SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

RAMPART BROKERAGE CORP.,	:	
Plaintiff,	:	Index No. 652385/2013
-against-	:	DECISION AND ORDER
RIBS NY LLC, RIBS NYC LLC, RIBS ONE LLC, RIEMER INSURANCE GROUP, INC., RIEMER INSURANCE AGENCY a d/b/a of Riemer Insurance Group, Inc., REGENCY INSURANCE BROKERAGE SERVICES, INC., STEPHEN L. RIEMER, GREGORY SCARPA, and JONATHAN HARTWELL,	:	Motion Sequence No. 009
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

In this action, Rampart Brokerage Corp. (Rampart) asserts seven causes of action against Jonathan Hartwell (Mr. Hartwell). Rampart alleges negligence and gross negligence, negligent misrepresentation, breach of fiduciary duty, fraud, violation of General Business Law (GBL) § 349, and seeks declaratory judgment and contribution with respect to the insurance coverage of Rampart's clients. Mr. Hartwell moves, pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, to dismiss the claims of negligence and gross negligence, negligent misrepresentation, breach of fiduciary duty, violation of GBL § 349, declaratory judgment, and contribution. He also moves, pursuant to CPLR 3211 (a) (7) and 3016 (b), to dismiss the fraud claim for failure to state a cause of action and failure to state a cause of action with the requisite particularity. Mr. Hartwell moves to dismiss the claims for attorneys' fees and punitive damages.

Background

The following facts are taken from the amended complaint and the Affidavit of Yvonne M. Mojica. Rampart is an insurance brokerage firm that was incorporated in 1965, and is doing business in New York. RIBS NY LLC (RIBS NY) is a Florida company authorized to do business in New York. Stephen L. Riemer (Mr. Riemer) owes and/or controls RIBS NY, RIBS NYC LLC, Riemer Insurance Group, Inc., and Regency Insurance Brokerage Services, Inc. (the Riemer entities). Mr. Hartwell ran the New York office of RIBS NY, and reported directly to Mr. Riemer and Gregory Scarpa (Mr. Scarpa).

In December 2010, Mr. Riemer approached Robert Glenn Morris, Rampart's president, and expressed an interest in doing business with Rampart. On August 1, 2011, Rampart entered into a Producer Agreement (Agreement) with RIBS NY as an intermediary-wholesaler to access insurance carriers that Rampart did not have a direct relationship with. Mr. Riemer assigned Mr. Hartwell to be Rampart's account representative, to represent all the Riemer entities.

Defendants allegedly misled Rampart and its clients as to which insurance policies had been issued, the nature of the policies, the premiums charged, and other terms. Specifically with regards to Mr. Hartwell, Rampart began to experience delays in June 2012 in the furnishing of various documentation such as quotes, binders, policies, and invoices on accounts placed through the Riemer entities. Rampart made multiple requests to Mr. Hartwell to provide the documents. In the absence of a timely binder, Mr. Hartwell would provide Rampart with written confirmation of coverage from the Riemer entities, and a policy number from the applicable insurance carrier.

At the end of August 2012, one of Rampart's clients informed Rampart that he had received a non-payment cancellation from its insurance carrier, Capitol Specialty. After failing

to reach Mr. Hartwell by phone, Rampart called Capitol Specialty's direct bill unit, which advised that the cancellation was an underwriting cancellation, not a non-payment cancellation. Yvonne Mojica (Ms. Mojica), President of Commercial Insurance at Rampart, called Mr. Hartwell about the issue. Before she could relay what Capitol Specialty told her, Mr. Hartwell said that he had spoken with the direct bill unit and learned that the notice was issued because the mailing address was incorrect, so the client had not been receiving bills. Mr. Hartwell claimed he had already rectified the problem, and the client could disregard the cancellation notice. Ms. Mojica told Mr. Hartwell that Capitol Specialty advised that the notice was for underwriting, not non-payment. Mr. Hartwell said he would call her back. Later that day, he left two voice messages advising that the underwriting notice was issued in error, the coverage was in full force, and he had confirmation that the notice had been rescinded. It was an internal error and had been rectified.

On September 14, 2012, Mr. Hartwell came to Rampart's office. Ms. Mojica had asked a staff member to double check with Capitol Specialty with respect to the reinstatement status of the client's account. During their meeting, Ms. Mojica asked Mr. Hartwell if that policy was still in force. Mr. Hartwell responded that he had an alternate quote, because Capitol Specialty no longer wanted to insure the property. Mr. Hartwell said that the coverage would expire on September 20, 2012, and Seneca would be the replacement insurer. Ms. Mojica told him that the policy would actually expire on September 17, 2012. Mr. Hartwell said it would be extended, and left the room to confirm that the extension was approved. When he returned, he told Ms. Mojica that the extension was approved, and he would email a copy of the Capitol Specialty extension confirmation to her from his New York office by that afternoon.

Early that afternoon, Ms. Mojica and a colleague called Mr. Riemer about Rampart's concerns. After Mr. Riemer learned of the specifies, he conferenced with Mr. Scarpa, and told Mr. Scarpa to shut Mr. Hartwell down.

Rampart determined that 19 of its clients were impacted by RIBS NY activities, ranging from a situation of no coverage to canceled accounts for underwriting reasons or non-payment of premiums, to policies with coverage deficiencies. Also, it alleges that documents that Mr. Hartwell provided to Rampart were altered.

Discussion

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

I. Tort Claims

Mr. Hartwell argues that Rampart cannot state a viable claim against him because an individual agent of a disclosed principal is not personally liable for acts committed on behalf of the principal, unless the plaintiff can meet an enhanced pleading standard by alleging that the corporate officer or employee acted outside of the scope of employment or capacity, or sought a personal benefit. *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 (1st Dept 2002); *Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 (1978).

Here, the facts show that all of Mr. Hartwell's actions were performed solely in his capacity as an employee of RIBS NY, and as an agent acting on behalf of a disclosed principal, RIBS NY. Rampart has alleged no facts which support the argument that Mr. Hartwell was acting in pursuit of personal gain outside his employment. According to Mr. Hartwell, Rampart fails to meet the enhanced pleading standard.

Rampart argues that Mr. Hartwell can be held liable for his tortious actions, because "a corporate officer who participates in the commission of a tort may be held individually liable, *regardless of whether the officer acted on behalf of the corporation in the course of official duties* . . . The 'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e. an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e. a failure to act." *Peguero v 601 Realty Corp.*, 58 AD3d 556, 558-59 (1st Dept 2009). *See also Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 (1st Dept 2012) (citing *Peguero*, 58 AD3d at 558), and *Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 116 (2d Dept 2009).

Mr. Hartwell argues that the court in *Fletcher* refused to dismiss a tort suit against individual directors on a co-op board because the tort alleged was discrimination, not because the court agreed that individuals acting in a corporate capacity could be held personally liable for their torts. However, the *Fletcher* court did in fact ground its finding on the theory of personal liability, stating that "it has long been held by this Court that 'a corporate officer who participates in the commission of a tort may be held individually liable.'" 99 AD3d at 49.

Next, Mr. Hartwell claims that Rampart has taken the Second Department's statement about a corporate officer's personal liability out of context in *Hamlet*. The *Hamlet* court clearly

affirmed that "[a] corporate officer may be held liable for torts committed by or for the benefit of the corporation if the officer participated in their commission." 64 AD3d 85 at 116.

The court holds that based on the theory of a corporate officer's personal liability, Rampart can state claims against Mr. Hartwell for torts of misfeasance or malfeasance.

II. Common-Law Duty of Insurance Agents

Mr. Hartwell argues that Rampart has failed to state a cause of action in negligence and gross negligence because Mr. Hartwell does not owe Rampart a duty independent of the Agreement. He points to the seminal case, *Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382 (1987), which held that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract." *Id.* at 389 (internal citations omitted).

In response, Rampart highlights *Clark-Fitzpatrick's* holding that a plaintiff seeking recovery for breach of contract can also sue in tort where the legal duty breached is separate from the contract, even though that duty "may be connected with and dependent upon the contract." *Id.* According to Rampart, Mr. Hartwell does owe a duty independent of any contract toward Rampart, since "the law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so." *Murphy v Kuhn*, 90 NY2d 266, 270 (1997). *See also Chase Scientific Research, Inc. v NIA Group, Inc.*, 96 NY2d 20, 30 (2001).

Mr. Hartwell denies that Rampart has established his duty independent of the alleged contracts, as all of Mr. Hartwell's dealings with Rampart were in the scope of his duties as an

account representative for his employer. Mr. Hartwell claims that a relationship between two insurance broker entities does not give rise to an independent duty under the common law, let alone between a broker entity and the employee of another broker. *Murphy*, 90 NY2d 266, *Levi v Utica First Ins. Co.*, 12 AD3d 256 (1st Dept 2004), and *Manes Org. v Meadowbrook-Richman, Inc.*, 2 AD3d 292 (1st Dept 2003).

None of these cases held that insurance agents owe no common-law duty to their clients. Rather, these cases dealt with the specific duty of insurance agents beyond their common-law duty to *advise* their clients respecting the terms of policies, which requires a special relationship between the agents and clients.

This court agrees that Mr. Hartwell owes Rampart an independent common-law duty of an insurance agent to obtain coverage requested by Rampart within a reasonable time, or inform Rampart if he failed to do so.

III. Negligence

"To establish a prima facie case of negligence under New York law, a plaintiff must demonstrate that the defendant owed him or her a duty of reasonable care, a breach of that duty, and a resulting injury proximately caused by the breach." *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 (1st Dept 2013).

Rampart has adequately alleged each element of a negligence claim. As an insurance agent, Mr. Hartwell owes a common-law duty to his client, Rampart, to obtain insurance policies as instructed or inform Rampart of his inability to do so. Rampart has also adequately alleged that Mr. Hartwell breached his common-law duty to Rampart by repeatedly providing false information about the cancellation of a client's coverage, failing to reinstate that coverage as promised, and providing apparently altered documents that misled Rampart as to what policies

were actually obtained for its clients. Rampart has also adequately alleged that it has been proximately injured by Mr. Hartwell's breach of duty. Rampart claims that Mr. Hartwell's breach damaged Rampart's industry reputation and caused Rampart to lose clients and accounts. These are natural and expected consequences of the alleged behavior of Mr. Hartwell.

Rampart cites *Levine v American Fed. Group*, 180 AD2d 575 (1st Dept 1992) with respect to the negligence claim. In *Levine*, the court ruled that an insurance broker can be held liable for the torts of gross negligence, breach of representations and warranties, and fraud against another insurance broker. *Id.* at 576-77.

IV. Gross Negligence

To properly plead gross negligence, a plaintiff must allege a "type of conduct that smacks of intentional wrongdoing and evinces a reckless indifference to the rights of others." *Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 684 (2012).

Rampart alleges the elements of gross negligence. Rampart alleges that Mr. Hartwell lied and repeatedly gave false information about a client's policy cancellation, and altered documents he provided to Rampart. Mr. Hartwell's mishandling allegedly affected the policies of 19 of Rampart's clients, ranging from a situation of no coverage, to canceled accounts for underwriting reasons or non-payment of premiums, to policies with coverage deficiencies. These acts, if proven, show intentional wrongdoings that evince a reckless indifference to the rights of others. Rampart has adequately plead a claim of gross negligence against Mr. Hartwell.

V. Economic Loss Doctrine

The Economic Loss Doctrine states that if there is no contractual relationship between parties, and there is no personal injury or property damage, a plaintiff may not recover for purely economic damages. 33 NY Prac, New York Construction Law Manual § 15:20 (2d ed).

Mr. Hartwell argues that all of Rampart's alleged damages, including the damage to its business and reputation, are economic damages. Therefore, Rampart should be barred by the Economic Loss Doctrine from recovering in tort. Rampart counters that a plaintiff can still recover for purely economic loss if "the underlying relationship between the parties [is] one of contract or the bond between them so close as to be the functional equivalent of contractual privity." *Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 (1989). *See also Bri-Den Constr. Co. v Kapell & Kostow Architects, P.C.*, 56 AD3d 355, 355 (1st Dept 2008).

The relationship between Mr. Hartwell and Rampart is a functional equivalent of contractual privity. RIBS NY entered into a contract with Rampart to secure insurance coverage for Rampart's clients. Mr. Hartwell was assigned to Rampart as an exclusive account representative to carry out RIBS NY's contractual obligations to Rampart. Rampart alleges that Mr. Hartwell committed acts of intentional malfeasance for which a corporate employee can be held liable in tort. It would make no sense if the Economic Loss Doctrine could be used as a shield to protect Mr. Hartwell from liability in the circumstances.

VI. Negligent Misrepresentation

To adequately plead negligent misrepresentation, a plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007). In addition to professionals with a duty to speak with care, a "special relationship may give rise to an exceptional duty regarding commercial speech." *Kimmel v Schaefer*, 89 NY2d 257, 264 (1996). To determine whether the plaintiff is justified in relying on the defendant, factors that

should be considered are "whether the person making the representation held or appeared to hold unique or special expertise; whether a special relationship of trust or confidence existed between the parties; and whether the speaker was aware of the use to which the information would be put and supplied it for that purpose." *Id.*

Rampart argues that Mr. Hartwell did occupy a special position of confidence and trust, since Rampart was relying on Mr. Hartwell to obtain contracts at the proposed prices and interface with the contracting insurance companies.

Mr. Hartwell counters that *Silvers v State,* 68 AD3d 668 (1st Dept 2009) precludes a finding of negligent misrepresentation against an agent like Mr. Hartwell under similar circumstances. In *Silver*, the court specifically stated that "an arm's length relationship" between the field representative and insurance broker was "not generally considered to be of the sort of a confidential or fiduciary nature that would support a cause of action for negligent misrepresentation." *Id.* Mr. Hartwell's role as Rampart's account representative and Rampart's need to rely on Mr. Hartwell are insufficient to elevate their relationship to a confidential or fiduciary level. The cause of action in negligent misrepresentation against Mr. Hartwell is dismissed.

VII. Breach of Fiduciary Duty

A fiduciary duty arises between parties when one party is "under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005). "Put differently, '[a] fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other.'" *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011). It "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business

transactions." *EBC I*, 5 NY3d at 19. Courts will not ordinarily impose a fiduciary duty unless the parties have created their own relationship of higher trust. *Id.* at 20.

Mr. Hartwell contends that Rampart has failed to allege the essential elements of a fiduciary relationship. He cites *Silver*, where the court opined that an arm's length relationship between an insurance brokerage firm and a field representative of another broker was not generally considered fiduciary in nature. 68 AD3d at 669. He also asserts other courts have refused to find that a relationship between a broker and customer rose to a fiduciary relationship absent extraordinary circumstances. *Hersch v Dewitt Stern Group, Inc.*, 43 AD3d 644, 645 (1st Dept 2007); *Busker on the Roof Ltd. P'ship v Warrington*, 283 AD2d 376, 377 (1st Dept 2001).

Rampart argues that Mr. Hartwell, together with other defendants, does owe a fiduciary duty to Rampart because the defendants exercised a high degree of control over Rampart's operations due to the terms in the Producer Agreement. In Rampart's interpretation, it "was entirely reliant and subservient to the defendants."

Rampart has not cited a case to support its claim that the terms in the Producer Agreement indicate that Mr. Hartwell had assumed a degree of control over Rampart's operations that created a fiduciary relationship. A fiduciary relationship does not arise merely because a defendant has significant control over the plaintiff's business. To establish fiduciary duty, the plaintiff needs to show (1) the defendant had a duty to act or give advice for the benefit of the plaintiff, *EBC I*, 5 NY3d at 19, or (2) the defendant has superiority and influence over the plaintiff, *Roni*, 18 NY3d at 848.

Rampart has not alleged that Rampart looked to Mr. Hartwell for advice or was influenced by Mr. Hartwell in choosing whether and what policies to secure. The facts only indicate that Rampart expected Mr. Hartwell to obtain the proposed policies for its clients,

provide relevant documents in a timely manner, communicate accurate information, and follow up with problems related to the policies. The facts do not indicate that Rampart was relying on Mr. Hartwell to give advice for its benefit.

Rampart attempts to establish a fiduciary relationship by arguing that Mr. Hartwell became the agent of Rampart by acting on behalf of Rampart to purchase insurance for its clients. Since "[i]t is beyond dispute that an agent is a fiduciary of its principal . . . failing to protect the interests of the principal amount to a breach of that fiduciary obligation."

Mr. Hartwell counters that insurance agents are not legally regarded as fiduciaries of their clients. While "an insurance broker is, to an extent an agent of its client, a broker is also sometimes the insurer's agent as well, and has, therefore, a 'dual agency status.'" *Rampart Brokerage Corp. v RIBS NY, LLC*, 2014 WL 1392219 at *13 (NY Sup, April 8, 2014) (internal citations omitted) (citing *People v Wells Fargo Ins. Servs.*, 16 NY3d 166, 171 (2011)). As the *Wells Fargo* court noted, "the word 'broker' suggests an intermediary – not someone with undivided loyalty to one or the other side of the transaction.'" 16 NY3d at 171. As a dual agent, Mr. Hartwell was not Rampart's fiduciary.

Rampart has alleged no facts demonstrating that Mr. Hartwell was a fiduciary of Rampart. Nor has Rampart provided any basis for its claim that insurance agents are fiduciaries of their clients by virtue of their identity as insurance agents, especially given their dual agency status. As Rampart has failed to allege a fiduciary relationship, the cause of action for breach of fiduciary duty is dismissed.

VIII. Fraud

> To establish a prima facie case for fraud, a plaintiff must show that
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> (1) defendant made a representation as to a material fact; (2) such representation was false; (3) defendant[] intended to deceive plaintiff; (4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance plaintiff sustained pecuniary loss.

Ross v Louise Wise Servs., Inc., 8 NY3d 478, 488 (2007).

Mr. Hartwell argues that Rampart's cause of action in fraud must be dismissed because its breach of contract allegations "serve as the exact same basis for Rampart's cause of action sounding in fraud." But a reading of the complaint reveals that Rampart has set out no facts which would support a contractual relationship between Rampart and Mr. Hartwell. In fact, Rampart states in its brief that it has no contract claim against Mr. Hartwell.

Mr. Hartwell argues that Rampart has failed to meet the specificity requirement under CPLR 3016 (b). Citing *Wall Street Transcript Corp. v Ziff Communications Co.*, 225 AD2d 322 (1st Dept 1996), Mr. Hartwell claims the statute requires the complaint to set forth, with specificity, all elements of fraud, including the making of material misrepresentations by the defendant to the plaintiff and reliance. *See id.* at 322. Mr. Hartwell argues that Rampart does not do so.

Contrary to Mr. Hartwell's evaluation, the court finds that Rampart has alleged sufficient facts "to permit a reasonable inference" that Mr. Hartwell committed fraud in his dealings with Rampart. *See Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 (2008). After the cancellation of a contractual coverage surfaced, Mr. Hartwell lied and repeatedly gave false information to Rampart about the cancellation. Also, Mr. Hartwell provided a number of allegedly altered documents to Rampart, presumably to cover up the deficient or non-existent

coverage. In light of these facts, it is reasonable to infer that Mr. Hartwell knew that his representations about the policies were false, and he intended to defraud Rampart. Furthermore, Hartwell does not challenge that Rampart reasonably relied on these actions. Since Rampart has adequately alleged each element for fraud, defendants' motion to dismiss is denied.

IX. General Business Law § 349

General Business Law (GBL) § 349 (a) provides that "deceptive acts or practices in the conduct of any business, trade, commerce or in the furnishing of any service in this state are hereby declared unlawful."

Mr. Hartwell maintains that Rampart has not properly pleaded a GBL § 349 claim because it is not a consumer, nor were his alleged actions consumer-oriented.

Rampart relies on the language of GBL § 349 (h), which grants a right of action to "any person who has been injured by reason of any violation of this section."

The Court of Appeals has held repeatedly that in order to plead a cause of action under GBL § 349, the conduct charged must be consumer-oriented, have a broad impact on consumers at large, and cannot involve a private contract dispute that is unique to the parties involved. *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 (1995); *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 (1995). The acts and practices targeted by section 349 are deceptive acts or practices that are consumer-oriented. *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 (1999).

Rampart is not a consumer. It is a business, and therefore the cause of action does not meet the threshold requirement of being consumer-oriented. *See also Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 (1st Dept 2000) ("section 349, is intended to protect consumers, that is,

those who purchase goods and services for personal, family or household use"). This cause of action is dismissed.

X. Declaratory Judgment

Rampart seeks a declaratory judgment that with respect to any claims or potential claims against it based on Mr. Hartwell's failure to obtain proper coverage, Rampart is entitled to be indemnified by him. Mr. Hartwell counters asserting Rampart has an adequate remedy at law, and because it would be premature.

Rampart argues that it does not have an adequate remedy at law because it is seeking a ruling that Mr. Hartwell must litigate (or else pay a judgment following litigation) any claims brought by Rampart's clients and pay any money due to its clients.

"[A] request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur." *New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 (1977).

Here, Rampart has not stated that there is an ongoing case for which it seeks relief. Rather, it seeks a determination in advance that if such a case comes to court, Mr. Hartwell will be responsible to litigate and pay for its costs. That is precisely the type of advisory opinion which the courts decline to entertain. It is beyond the control of the parties whether any case will be instituted, and, therefore, the question is not ripe for review. *Id.* at 531.

An action seeking indemnification is premature when the claim for indemnification has not accrued, and the cause of action accrues only when payment has been made by the party seeking indemnity. *Bay Ridge Air Rights v State of New York*, 44 NY2d 49, 54 (1978); *Alside, Inc. v Spancrete Northeast*, 84 AD2d 616, 617 (3d Dept 1981). Rampart has not alleged that any action has been commenced, much less that it has made any payment. If it had done so, a

declaratory judgment would not be the appropriate vehicle in any event. Rather, Rampart would have an adequate remedy at law which it would be obligated to pursue rather than seeking a declaratory judgment. *Automated Ticket Sys. v Quinn*, 90 AD2d 738, 739 (1st Dept 1982), *affd* 58 NY2d 949 (1983); *Boyle v Kelley*, 42 NY2d 88, 91 (1977).

It also bears noting that the declaration that Rampart seeks is far too broad to allow for any declaratory relief. This cause of action is also dismissed.

XI. Contribution

Rampart seeks contribution from Mr. Hartwell. Not only is such a claim premature because Rampart has not alleged that it paid claims for which contribution is sought (*Schmutz v Fleet Bank*, 278 AD2d 19, 20 [1st Dept 2000]), Rampart has not alleged that it is a joint tortfeasor with Mr. Hartwell. Consequently, contribution does not lie. *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 (1st Dept 2003).

XII. Punitive Damages

Rampart seeks punitive damages for its gross negligence and fraud causes of action. In order to recover punitive damages, a party "must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 (1994). Rampart maintains that Mr. Hartwell's conduct was directed at the public because its clients included members of the public, and Mr. Hartwell knew that his actions would injure consumers. Rampart does not allege any facts to support a conclusion that Mr. Hartwell's actions were part of a pattern of similar conduct directed at the public generally. It references only Mr. Hartwell's conduct with regard to its clients. Punitive damages are not available.

XIII. Attorneys' Fees

Rampart seeks attorneys' fees, claiming that it is entitled to attorneys' fees if it wins the GBL § 349 claim, and that the court has discretion to award attorneys' fees for its other claims. Rampart has not pointed to any contract provision or statute that would enable it to recover attorneys' fees should it prevail against Mr. Hartwell. Under the "American Rule," a prevailing litigant is not entitled to collect attorneys' fees from its opponents. *Hunt v Sharp*, 85 NY2d 883, 885 (1995); *Chase Manhattan Bank v Each Individual*

Underwriter Bound to Lloyd's Policy No. 790/004A89005, 258 AD2d 1, 4 (1st Dept 1999). Rampart may not recover attorneys' fees.

XIV. Stay of Discovery

Mr. Hartwell's request to have discovery stayed pending the determination of the instant motion is moot.

Conclusion

Accordingly, it is hereby

ORDERED that defendant Mr. Hartwell's motion to dismiss the complaint is partially granted to the extent that the causes of action for negligent misrepresentation, breach of fiduciary duty, violation of GBL § 349, and requests for declaratory relief, contribution, punitive damages and attorneys' fees are dismissed; and the motion is otherwise denied.

Dated: August 4, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER