

**Gateway II LLC v Hartford Fire Ins. Co.**

2014 NY Slip Op 32483(U)

September 22, 2014

Supreme Court, New York County

Docket Number: 652294/2012

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

GATEWAY II LLC, GAETANO DEVELOPMENT CORP.,

Plaintiffs,

INDEX NO. 652294/12

-against-

MOTION SEQ. NO. 001

THE HARTFORD FIRE INSURANCE COMPANY,  
CATLIN INSURANCE COMPANY INC., THE  
INTERNATIONAL INSURANCE COMPANY OF  
HANOVER LTD., PHILADELPHIA INDEMNITY  
INSURANCE COMPANY, PUTNAM INSURANCE  
AGENCY, LLC, MCMILLAN PLUMBING &  
HEATING INC., CONTAGIOUS PLUMBING &  
HEATING INC., J.E. LEVINE BUILDER INC.,

Defendants.

The following papers were read on this motion and cross-motion by some defendants to dismiss and sever.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Reply Affidavits — Exhibits (Memo) \_\_\_\_\_

Cross-Motion:  Yes  No

Motion sequence numbers 001 and 002 are hereby consolidated for purposes of disposition.

In this property damage action, defendant Putnam Insurance Agency, LLC (Putnam) moves for an order: (1) pursuant to CPLR 3211, dismissing the sixth and seventh causes of action, the damages sought against Putnam, and the cross-claim of J.E. Levine Builders Inc. (Levine) as against it, with prejudice, for failure to state a cause of action; and (2) pursuant to CPLR 603, severing the insurance coverage and insurance broker malpractice causes of action from the property damage causes of action (motion sequence number 001).

Defendant Catlin Insurance Company, Inc. (Catlin) cross-moves for an order: (1) pursuant to CPLR 3211(a)(7), dismissing Levine's cross-claim as against it; and (2) pursuant to CPLR 603, severing the insurance coverage causes of action from the property damage causes of action.

Defendant Hartford Fire Insurance Company (Hartford) moves for an order: (1) pursuant to CPLR 3211(a)(1) and (7), dismissing the first cause of action; or, in the alternative (2) severing the first cause of action from the complaint (motion sequence number 002).

### BACKGROUND

The following facts are taken from the complaint. According to the complaint, plaintiff Gateway II LLC (Gateway II) was the owner of the premises located at 2096-2098 Eighth Avenue, New York, New York (hereinafter, the premises) at all relevant times (complaint, ¶ 15). Gateway II hired plaintiff Gaetano Development Corp. (Gaetano) to perform construction and construction management on the premises (*id.*, ¶ 16).

In May 2008, Gaetano allegedly hired defendant McMillan Plumbing & Heating Inc. (McMillan) to install pipes, sprinkler system pipes, and plumbing, and to perform plumbing and construction work on the premises (*id.*, ¶ 19). Plaintiffs claim that McMillan commenced work at the premises in October 2008 (*id.*, ¶ 20). Plaintiffs allege that McMillan subsequently hired defendant Contagious Plumbing & Heating Inc. (Contagious) to supervise the plumbing work, sprinkler system installation, and construction work (*id.*, ¶ 21). Plaintiffs allege that McMillan and Contagious, *inter alia*, "negligently, carelessly and improperly installed, repaired, welded pipes and plumbing and fire suppression equipment in such a way as to cause damage to the Premises" (*id.*, ¶¶ 26, 30, 92). Plaintiffs claim that the "pipes and piping system and sprinkler system [] had to be repaired, replaced and restored" (*id.*, ¶ 29). According to plaintiffs, "there was loss and damage to property owned and occupied by tenants . . . which plaintiffs were obligated to repair, restore, and replace" (*id.*, ¶ 31).

On June 15, 2010, Gateway II entered into a building loan agreement with nonparty G4 Gateway LLC, pursuant to which Levine, as the construction consultant, was to inspect the construction work and monitor the progress of the work (*id.*, ¶ 38). From March 2010 through September 2011, Levine provided additional services for Gateway II, including monitoring of the project, review of plans and change orders, and inspection of the property and construction work in order to ensure that the contractors performed their work in a timely and sufficient manner (*id.*, ¶ 41). Plaintiffs allege that Levine negligently supervised the work, which caused damage to the premises (*id.*, ¶ 42). According to plaintiffs, Levine breached its contract by failing to supervise its employees and agents and those of the contractors and subcontractors, and by permitting faulty and improper workmanship (*id.*, ¶ 43).

Plaintiffs claim that they suffered consequential damages, including labor and materials to repair the premises in an amount of at least \$500,000, refinancing costs due to delays in construction, including soft costs, in an amount of \$300,000, lost sales/sales delays in an amount of \$500,000, and delay costs and additional interest charged to plaintiffs in the sum of \$650,000, continuing to the present, totaling approximately \$2,000,000 (*id.*, ¶ 53).

Prior to May 2008, plaintiffs allegedly hired Putnam to act as their insurance broker and/or agent to procure sufficient insurance in appropriate amounts during and after construction of the premises (*id.*, ¶ 58). Plaintiffs claim that they specifically requested that Putnam obtain builder's risk insurance and coverage to insure plaintiffs against any loss as a result of the failure, negligence, or breach of contract of any contractors, subcontractors, tradesman, and plumbers, and to provide sufficient insurance against any foreseeable loss and damage (*id.*, ¶ 59). In or around February 2011, Putnam allegedly cancelled plaintiffs' builder's risk insurance policy and unilaterally decided that they no longer needed builder's risk coverage and placed in effect inadequate coverage under a commercial property insurance policy (*id.*, ¶ 65). Plaintiffs further allege that they relied on Putnam's representations and assurances as to

the property and premises being insured against the risks of loss that had been outlined between plaintiffs and Putnam (*id.*, ¶ 66).

Plaintiffs allege that Hartford issued a builder's risk insurance policy under policy number 31 MS-ABO-512 to plaintiffs, with a policy period from September 3, 2009 through September 1, 2010, wherein it insured against all risks of property damage and for builder's risk at the premises (*id.*, ¶ 17). According to plaintiffs, the policy provided builder's risk coverage in the sum of \$14,600,000, with a \$5,000 deductible; coverage for soft costs in the sum of \$1,000,000 with a deductible of five days; and coverage for water damage/flood with a deductible of \$25,000 (*id.*, ¶ 18). Plaintiffs claim that Hartford breached the contract of insurance by failing to provide coverage to plaintiffs (*id.*, ¶¶ 69-70).

In addition, defendant International Insurance Company of Hanover Ltd. (Hanover) issued to plaintiffs an all risk insurance policy bearing policy number 10025A000031, with a policy period from April 19, 2010 through April 18, 2011, insuring plaintiffs for building coverage to the premises at a replacement cost in the sum of \$8,530,000 (with an increase of total insured value of an additional \$4,000,000) and business interruption coverage in the sum of \$320,000 (*id.*, ¶ 55). Plaintiffs assert that Hanover breached its insurance contract by denying coverage and refusing to pay any part of plaintiffs' claims (*id.*, ¶ 78).

Plaintiffs further allege that defendant Catlin Insurance Company Inc. (Catlin) issued a builder's risk insurance policy under policy number IMI 197406-0911, with a policy period from September 1, 2010 through September 1, 2011 (*id.*, ¶ 54). The policy provided builder's risk coverage and water damage coverage in the sum of \$5,000,000, with a deductible of \$25,000, and soft costs in the sum of \$1,000,000, with a deductible of 14 days, and a \$10,000 deductible for all other losses (*id.*). Plaintiffs claim that Catlin denied coverage, and has thereby breached its contract of insurance (*id.*, ¶ 74).

According to plaintiffs, defendant Philadelphia Indemnity Insurance Company

(Philadelphia) issued to plaintiffs an all risk commercial lines policy bearing number PHPK 707501, with a policy period from April 18, 2011 through April 18, 2012, insuring plaintiffs for building coverage to the premises in the sum of \$21,500,000 and business interruption coverage in the sum of \$300,000 (*id.*, ¶ 56). Philadelphia allegedly breached its insurance contract by denying coverage for any part of plaintiffs' claims (*id.*, ¶ 83). The complaint asserts 16 causes of action.

### DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]; *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 173-174 [1st Dept 2013]). However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review “is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533, 533 [1st Dept 2012], quoting *Leon*, 84 NY2d at 88). “Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus” (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013] [internal quotation marks and citation omitted]).

Dismissal is warranted, pursuant to CPLR 3211(a)(1), where the documentary evidence “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation

marks and citation omitted]; see *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002] [A CPLR 3211(a)(1) motion “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law”]; *Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003])

#### **A. Putnam’s Motion to Dismiss and Sever**

Plaintiffs assert three causes of action against Putnam. The fifth cause of action alleges that “[s]hould it be determined that the plaintiffs did not possess sufficient and/or proper insurance coverage for the losses, the lack of proper insurance coverage and any failure to obtain insurance coverage therefor was due wholly to the negligence and carelessness of the defendant Putnam” (complaint, ¶ 85). The fifth cause of action further alleges that “[t]he direct loss to plaintiffs as a result of that negligence of defendant Putnam is in a sum of at least \$2,000,000, plus any additional consequential damages, costs and attorneys’ fees” (*id.*, ¶ 86).

The sixth cause of action alleges that “[t]he lack of proper insurance coverage and any failure to obtain proper insurance coverage was due wholly to the breach of agreement and contract by defendant Putnam with the plaintiffs” (*id.*, ¶ 87). The sixth cause of action states that “the direct loss to plaintiffs as a result of said loss is in a sum of at least \$2,000,000, plus any additional consequential damages, costs and attorneys’ fees” (*id.*, ¶ 88).

In the seventh cause of action, plaintiffs allege that “[t]he lack of proper insurance coverage was due to defendant Putnam’s failure to timely and properly notify the co-defendants, insurance companies, of the type of risks the plaintiffs needed insurance coverage for, of the losses sustained, and of the damages that occurred” (*id.*, ¶ 89). The seventh cause of action claims that “the direct loss to plaintiffs as a result of said failure by Putnam is in a sum of at least \$2,000,000, plus any additional consequential damages, costs and attorneys’ fees” (*id.*, ¶ 90).

In its answer, Levine asserts a cross-claim for indemnification and/or contribution against Putnam (Levine's answer, ¶ 40).

1. *Breach of Contract (Sixth Cause of Action)*

Putnam argues that the sixth cause of action for breach of contract is duplicative of the fifth cause of action for negligence. Putnam maintains that plaintiffs do not allege that there was a specific contract.

"It is a well-established principle 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" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). "[A]n agent or broker may be held liable for neglect in failing to procure insurance, with liability limited to that which would have been borne by the insurer had the policy been in force" (*Milgrim v Royal & SunAlliance Ins. Co.*, 75 AD3d 587, 589 [2d Dept 2010], quoting *Andriaccio v Borg & Borg*, 198 AD2d 253, 253 [2d Dept 1993]; see also *American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 346 [1st Dept 1984]). "A broker who negligently fails to procure a policy, therefore, stands in the shoes of the insurer, and is liable to provide for the plaintiff's defense in the underlying action and to indemnify him for any judgment which would have been covered by the policy" (*Island Cycle Sales v Khlopin*, 126 AD2d 516, 518 [2d Dept 1987]). "The liability . . . may either be based upon breach of contract or tort" (*American Motorists Ins. Co.*, 102 AD2d at 346).

Contrary to Putnam's contention, plaintiffs' breach of contract claim would not be subject to dismissal as duplicative of the negligence claim; rather, plaintiffs' negligence claim would be subject to dismissal based upon this rule. As indicated above, plaintiffs may pursue both breach of contract and negligence theories against Putnam (*see id.*). Moreover, plaintiffs do allege that there was a contract between plaintiffs and Putnam. Plaintiffs allege that "plaintiffs engaged defendant Putnam to act as their insurance broker and/or agent to procure proper and sufficient coverage by appropriate insurers in appropriate amounts and coverage during the

construction of the premises and after the Premises was contracted,” and that “plaintiffs made specific request to defendant Putnam to obtain Builders Risk Insurance and coverage to insure plaintiffs against any loss as a result of the failure, negligence, breach of contract of any contractors, subcontractors, tradesman, plumbers, not performing their work properly and/or on time, and to provide insurance sufficient to compensate plaintiffs for any such foreseeable loss and damage” (complaint, ¶¶ 58, 59). Accordingly, dismissal of the sixth cause of action is unwarranted.

2. *Negligence (Seventh Cause of Action)*

Putnam next contends that the seventh cause of action for negligence must be dismissed as duplicative of their fifth cause of action for negligence, since it is based on the same facts and circumstances.

While the seventh cause of action makes similar allegations to the fifth cause of action, this is not a basis for dismissal of the seventh cause of action (*compare Brooks v Key Trust Co. Natl. Assn.*, 26 AD3d 628, 630 [3d Dept 2006], *lv dismissed* 6 NY3d 891 [2006] [investor’s breach of fiduciary duty claim against his investment advisors was based same facts and theories as his breach of contract claim and was thus duplicative]). As noted above, on a motion to dismiss, the court’s function is to “determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon*, 84 NY3d at 87-88). Putnam does not argue that plaintiffs’ fifth cause of action for negligence against Putnam fails to state a cause of action. Therefore, the branch of Putnam’s motion seeking to dismiss the seventh cause of action is denied.

3. *Consequential Damages*

Putnam argues that plaintiffs are not entitled to recover consequential damages in connection with their causes of action against it. Putnam contends that such damages were not contemplated at the time any contract was executed, nor were such alleged damages the

natural and proximate consequences of any alleged wrongful act by Putnam.

“In order to recover consequential damages [on a breach of contract claim], the plaintiffs were required to plead that those damages were the natural and probable consequences of the breach, and were contemplated at the time the contract was executed” (*Atkins Nutritionals v Ernst & Young*, 301 AD2d 547, 549 [2d Dept 2003]). The rule that “damages are recoverable where the loss or injury is the natural and proximate consequences, and not the remote consequences, of a wrongful act,” is applicable to breach of contract causes of action as well as tort causes of action (*Rose Lee Mfg. v Chemical Bank*, 186 AD2d 548, 551 [2d Dept 1992]). In determining whether consequential damages were reasonably contemplated, “courts must look to the nature, purpose and particular circumstances of the contract known by the parties . . . as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff to suppose that it assumed, when the contract was made” (*Bi-Economy Mkt., Inc. v Harleystown Ins. Co. of N.Y.*, 10 NY3d 187, 193 [2008] [internal quotation marks and citation omitted]). As discussed previously, “[a]n agent or broker may be held liable for neglect in failing to procure insurance, with liability limited to that which would have been borne by the insurer had the policy been in force” (*Milgrim*, 75 AD3d at 589 [internal quotation marks and citation omitted]).

In the complaint, plaintiffs allege that Putnam cancelled plaintiffs’ builder’s risk insurance policy and unilaterally decided that they no longer needed builder’s risk coverage, and obtained inadequate coverage for plaintiffs under a commercial property insurance policy (complaint, ¶ 65). Plaintiffs seek damages in the amount of \$2,000,000, consisting of labor and materials to repair the premises, refinancing costs due to delays in construction, lost sales/sales delays, and delay costs and additional interest (*id.*, ¶ 53). Plaintiffs allege that they made Putnam aware of penalties involved in plaintiffs’ financing and deadlines for construction, the sale of housing units, and occupancy (*id.*, ¶¶ 60-63). At this early stage of the action, plaintiffs have sufficiently

pleaded that the consequential damages that they seek against Putnam were reasonably contemplated by the parties at the time of contracting. "The purpose of builder's risk insurance is to compensate for loss due to physical damage or destruction caused to the construction project itself" (*Fireman's Fund v Structural Sys. Tech., Inc.*, 426 F Supp 1009, 1025 [D Neb 2006]). However, plaintiffs' damages sought against Putnam must be limited to that which would have been borne by the insurer had the relevant policies at issue been in force (see *Milgrim*, 75 AD3d at 589).

#### 4. *Levine's Cross-Claim for Indemnification and Contribution*

Putnam also moves to dismiss Levine's cross-claim for indemnification and/or contribution. Putnam argues that Levine's cross-claim fails to state a cause of action for indemnification against it, since Levine's liability is premised on its own acts and omissions.

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (*Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003] [internal quotation marks and citation omitted]). "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247 [1st Dept 2013], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

Here, Levine was sued for its own acts or omissions on the construction project. The complaint alleges that, on June 15, 2010, Levine was hired as the construction consultant, and that Levine was negligent and breached its contract (complaint, ¶¶ 38-48). The complaint alleges that, prior to May 2008, plaintiffs hired Putnam as their insurance broker and/or agent,

and that, in or around February 2011, Putnam cancelled plaintiffs' builder's risk insurance policy, and unilaterally decided that plaintiffs no longer needed builder's risk coverage, and placed in effect inadequate coverage for plaintiffs under a commercial property insurance policy (*id.*, ¶¶ 58, 65). Since Levine was sued for its own negligence and breach of contract, and not for any vicarious liability, Levine's cross-claim for common-law indemnification against Putnam fails to state a cause of action (*see Beck v Studio Kenji, Ltd.*, 90 AD3d 462, 463 [1st Dept 2011] ["The common-law indemnification claim fails, as [the architect] does not allege mere vicarious liability"]; *Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [1st Dept 2009] [construction manager did not have a viable third-party claim for common-law indemnification against architect since plaintiff's claims and owner's cross claims did not allege vicarious liability attributed solely to the fault of the architect]).

Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them . . ." Contribution is generally available as a remedy "when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe[ ] to the injured person" (*Garrett v Holiday Inns*, 58 NY2d 253, 258 [1983] [internal quotation marks and citation omitted]). "The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal quotation marks and citation omitted]).

In this case, Levine also does not have a valid claim for contribution against Putnam. Putnam and Levine are not joint tortfeasors. Putnam, an insurance broker or agent, could not have "had a part in causing or augmenting" any property damage caused by Levine (*id.*).

In opposition, Levine argues that Putnam has failed to provide an affidavit or other admissible evidence and that it needs discovery to sufficiently defend its cross-claim. Levine's

contentions are unpersuasive. CPLR 3211(a)(7) states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . *the pleading fails to state a cause of action*” (emphasis added). Moreover, “if the [claim] fails to state a cause of action as a matter of law and no amount of discovery can salvage the claim, it must be dismissed and no discovery is warranted” (*Herzog v Town of Thompson*, 216 AD2d 801, 803-804 [3d Dept 1995]). Accordingly, Putnam is entitled to dismissal of Levine’s cross-claim for indemnification and/or contribution against it.

5. *Severance of the Insurance Causes of Action from the Property Damage Causes of Action*

Putnam also requests that the causes of action against the insurance carriers (Hartford, Catlin, Hanover, and Philadelphia) and insurance broker/agent (Putnam) be severed from the underlying property damage action against McMillan, Contagious, and Levine. Plaintiffs argue that their claims against Putnam are intertwined with the claims against the insurers, and that they will be prejudiced by having to conduct discovery in two separate actions. For its part, Philadelphia contends that the insurance coverage and insurance broker malpractice causes of action should be severed before trial, but should not be severed until after discovery to further judicial economy.

CPLR 603 states that “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.” The granting of severance rests within the sound discretion of the trial court (*Rosenbaum v Dane & Murphy*, 189 AD2d 760, 761 [2d Dept 1993]).

“[I]t is generally recognized that, even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims” (*Burlington Ins. Co. v Guma Constr. Corp.*, 66 AD3d 622, 625 [2d

Dept 2009], quoting *Christensen v Weeks*, 15 AD3d 330, 331 [2d Dept 2005]; see also *Kelly v Yannotti*, 4 NY2d 603, 607 [1958]; *Chunn v New York City Hous. Auth.*, 55 AD3d 437, 438 [1st Dept 2008]). “The severing of negligence actions from insurance coverage actions applies to brokers and agents as well as to insurance companies” (*Hoffman v Kew Gardens Hills Assoc.*, 187 AD2d 379, 379 [1st Dept 1992]).

In *Johnson v Berger* (171 AD2d 728, 729 [2d Dept 1991]), the Court held that the lower court erred in directing a joint trial of a legal malpractice action and an action by one of the defendants against his professional liability insurance agent. In so holding, the Second Department found that the action did not involve common questions of law or fact and that a joint trial of the actions could result in substantial prejudice to the insurance agent (*id.*).

Similarly, in *Hoffman, supra*, the First Department determined that:

“[s]everance of the third-party action against third-party defendants, an insurance broker and his agency, for negligence and malpractice resulting from the insolvency of the first of two excess carriers was proper as a joint trial would result in substantial prejudice. The severing of negligence actions from insurance coverage actions applies to brokers and agents as well as to insurance companies. Although the motion was brought pursuant to CPLR 1010, the court did not err in basing its finding not only upon substantial prejudice, but also on the lack of a common question of law or fact under CPLR article 6 which is also pertinent to the propriety of a single trial for a main and third-party action” (*Hoffman*, 187 AD2d at 379 [citations omitted]).

Here, it would be prejudicial for Putnam to have the issue of insurance coverage, as well as Putnam’s conduct in procuring the policies, be tried before the same jury that considers the property damage claims. Moreover, plaintiffs’ negligence and breach of contract claims against McMillan, Contagious, and Levine do not share any common questions of law or fact with the insurance coverage claims against the insurers or the breach of contract and negligence claims against Putnam. Accordingly, the branch of Putnam’s motion to sever the insurance claims and property damage claims is granted.

## B. Catlin's Motion to Dismiss and Sever

### 1. Levine's Cross-Claim for Indemnification and Contribution

In its answer, Levine asserts a cross claim for indemnification and/or contribution against Catlin (Levine's answer, ¶ 40).

Catlin moves to dismiss Levine's cross-claim for indemnification and/or contribution because it could not have contributed or caused the property damage for which plaintiffs seek to hold Levine liable.

As noted above, "the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee" (*Aiello*, 110 AD3d at 247 [internal quotation marks and citation omitted]). Contribution requires that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Raquet*, 90 NY2d at 183 [internal quotation marks and citation omitted]).

Plaintiffs allege in the complaint that Levine was hired as the construction consultant, and that Levine was negligent and breached its contract (complaint, ¶¶ 38-48). The complaint alleges that Catlin issued a builder's risk insurance policy for the period September 1, 2010 through September 1, 2011 (*id.*, ¶ 54). Plaintiffs allege that Catlin breached its insurance contract by denying coverage to plaintiffs (*id.*, ¶ 74). It is clear that Levine was sued for its own acts or omissions, and not for any vicarious liability. Therefore, Levine's cross-claim fails to state a cause of action for common-law indemnification against Catlin (*see Aiello*, 110 AD3d at 247). Moreover, Catlin, an insurer, could not have had a part in causing or augmenting the property damage caused by Levine, a construction consultant (*see Marist Coll. v Chazen Env'tl. Servs., Inc.*, 84 AD3d 1181, 1183 [2d Dept 2011], *lv dismissed* 17 NY3d 893 [2011] [environmental service did not state a cause of action for contribution against prior owner and alleged polluter of property; "(prior owner) is allegedly a polluter, but its status as such has no bearing on (environmental service's) alleged failure to conduct a proper environmental

assessment of the property and to comply with the terms of its contract with (plaintiffs’)]. As a result, Levine does not state a valid claim for contribution against Catlin. Although Levine argues that discovery is warranted, Levine has failed to show that “facts essential to justify opposition may exist but cannot [] be stated” (CPLR 3211[d]). In light of the above, Levine’s cross-claim for indemnification and/or contribution as against Catlin is dismissed.

2. *Severance of the Insurance Coverage Cause of Action from the Property Damage Causes of Action*

Catlin also moves to sever the property damage and insurance coverage causes of action because it would be prejudicial to try the insurance coverage issues before the same jury that determines liability for property damage.

Given that it would be prejudicial for the insurers to have the issue of insurance coverage tried before the same jury that determines liability for the property damage, severance is warranted (*see Burlington*, 66 AD3d at 625). In making this determination, the Court finds that plaintiffs’ negligence and breach of contract claims against McMillan, Contagious, and Levine do not share any common factual or legal issues with the insurance coverage claim against Catlin or the other insurers. Whether Catlin breached its contract has no bearing on whether McMillan, Contagious, and Levine negligently damaged the premises and breached their contracts with plaintiffs. Therefore, the branch of Catlin’s motion seeking severance of the insurance coverage and property damage claims is granted.

**C. Hartford’s Motion to Dismiss and Sever**

1. *Breach of Contract (First Cause of Action)*

The first cause of action alleges that plaintiffs timely notified Hartford of the losses; that Hartford failed to pay any of plaintiffs’ claims and denied coverage for any part of plaintiffs’ claims by letter dated February 16, 2012; and that Hartford has thereby breached its contract of insurance with plaintiffs (complaint, ¶¶ 67-70).

To state a cause of action for breach of contract, the plaintiff must allege the existence of a contract, the plaintiff's performance, the defendant's breach, and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The essential terms of the parties' purported contract, including the specific provisions upon which liability is predicated, must be alleged (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; see also *ACE Fire Underwriters Ins. Co. v ITT Indus., Inc.*, 84 AD3d 688, 689 [1st Dept 2011]). CPLR 3013 states that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Hartford argues that plaintiffs' breach of contract claim against it fails to state a cause of action, since plaintiffs fail to allege the specific date of the occurrence and have failed to plead with specificity the allegedly breached provision. In reply, Hartford argues that plaintiffs fail to plead the nature of the alleged fortuitous event.

Although Hartford argues that plaintiffs fail to allege the specific date of the occurrence, accepting plaintiffs' allegations as true and giving plaintiffs the benefit of every favorable inference (see *Leon*, 84 NY2d at 87), plaintiffs sufficiently allege a cause of action for breach of the insurance contract (see *Harris*, 79 AD3d at 426). Indeed, plaintiffs allege that they had an insurance policy with Hartford which provided property damage coverage and builder's risk coverage with a policy period from September 3, 2009 through September 1, 2010, that they performed under the contract (i.e., timely notified Hartford of an occurrence), that Hartford breached the contract, and that it was damaged as a result (complaint, ¶¶ 17, 67-71). Plaintiffs claim that McMillan, Contagious, and Levine performed construction and supervisory work from October 2008 through the present on the premises, and caused damage to the premises (*id.*,

¶¶ 24, 25, 35, 50-53). Thus, plaintiffs have given adequate notice of the transactions or occurrences intended to be proved, and the material elements of their breach of contract claim (see CPLR 3013). Moreover, contrary to Hartford's assertion, the complaint sufficiently alleges the provisions upon which liability is predicated, given that plaintiffs allege that the policy provided property damage coverage and builder's risk coverage, and that Hartford has denied coverage to plaintiffs (complaint, ¶¶ 17, 18, 69). Therefore, the branch of Hartford's motions seeking dismissal of the first cause of action is denied.

2. *Severance of the Insurance Coverage Claims from the Liability Claims*

Hartford also moves to sever the insurance coverage claims from the liability claims to avoid undue prejudice. As discussed above, Hartford would be prejudiced if the same jury determined insurance coverage under its policy and the underlying liability (see *Kelly*, 4 NY2d at 607). In addition, whether Hartford breached its insurance contract has no bearing on whether McMillan, Contagious, and Levine were negligent in causing damage to the premises and breached their contracts with plaintiffs. Therefore, the branch of Hartford's motion seeking severance of the first cause of action is granted.

### CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of defendant Putnam Insurance Agency, LLC is granted to the extent of limiting plaintiffs' damages on the fifth, sixth, and seventh causes of action to that which would have been borne by the insurers had the relevant policies been in force, dismissing defendant J.E. Levine Builders Inc.'s cross-claim for indemnification and contribution against it, and severing the first, second, third, fourth, fifth, sixth, and seventh causes of action from the complaint, which shall be tried separately from the remaining causes of action, and is otherwise denied; and it is further,

ORDERED that the cross-motion of defendant Catlin Insurance Company Inc. is

granted, and defendant J.E. Levine Builders Inc.'s cross-claim for indemnification and contribution as against it is dismissed, and the first, second, third, and fourth cause of action are severed from the complaint and shall be tried separately from the remaining causes of action; and it is further,

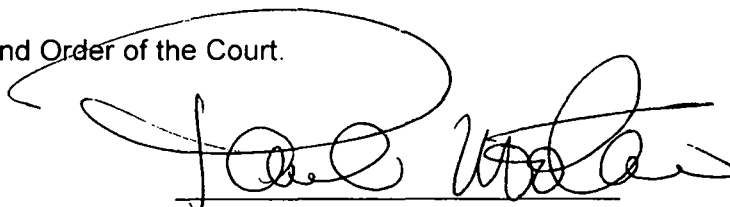
ORDERED that the motion (sequence number 002) of Hartford Fire Insurance Company is granted to the extent of severing the first cause of action from the complaint which shall be tried separately from the remaining causes of action, and is otherwise denied; and it is further,

ORDERED that all parties are directed to appear for the previously scheduled status conference on November 5, 2014 at 11:00 a.m.; and it is further,

ORDERED that counsel for Putnam is directed to serve a copy of this order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 9-22-14

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE