

**Rose v Arthur J. Gallagher & Co.**

2014 NY Slip Op 32831(U)

September 26, 2014

Supreme Court, Nassau County

Docket Number: 4322-09

Judge: Vito M. Destefano

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

TRIAL/IAS, PART 15  
NASSAU COUNTY

ALLAN V. ROSE, AVR-SAULET LLC, and  
AVR REALTY COMPANY, LLC,

Decision and Order

Plaintiffs,

-against-

MOTION SEQUENCE:06, 07  
INDEX NO.:4322-09

ARTHUR J. GALLAGHER & CO., ARTHUR J.  
GALLAGHER & CO. OF NEW YORK, INC., and  
ARTHUR J. GALLAGHER RISK MANAGEMENT  
SERVICES, INC.,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Memorandum of Law in Support	2
Memorandum of Law in Reply and in Opposition to Cross Motion	3
Notice of Cross Motion	4
Memorandum of Law in Opposition to Motion and in Support of Cross Motion	5
Memorandum of Law in Further Support of Cross Motion	6

In an action to recover damages for, *inter alia*, negligent misrepresentation and breach of contract, the Plaintiffs move for an order pursuant to CPLR 2221 to renew and reargue their prior motion which sought an order granting them summary judgment on the issue of Defendants' liability on the first and second causes of action and setting this matter down for a trial to determine the amount of damages to be awarded.

The Defendants cross-move for an order pursuant to CPLR 2221 to reargue their prior cross motion which sought an order pursuant to CPLR 3212 granting them summary judgment dismissing the first and second causes of action.

### **Background**

Plaintiff AVR Realty Company, LLC ("AVR Realty") is a national real estate company. Plaintiff AVR-Saulet LLC ("AVR Saulet") is a Louisiana limited liability company and the owner of the Saulet Apartments in New Orleans, Louisiana. Plaintiff Allan V. Rose is the sole managing member of AVR Realty.<sup>1</sup> Defendants (collectively referred to as "Gallagher") are insurance brokers with which AVR has maintained a relationship for approximately 10 or more years.

Throughout their relationship, the parties entered into several compensation agreements which contained the following relevant provision:

Gallagher will provide insurance brokerage Services to Client and will use its best efforts to secure the following insurance coverages on Client's behalf: Umbrella Liability. In the event an insurance company cancels or refuses to place the listed insurance, Gallagher will use its best efforts to obtain the coverage from another insurance company. Gallagher will also provide the Services set out on Exhibit A, attached hereto.

One such agreement, in particular, was dated May 28, 2008 but set forth that it was "entered into and effective this 28<sup>th</sup> day of May, 2007" (the "Agreement").

The services to be provided by Gallagher annexed as exhibit A to the Agreement included:

1. Gallagher will act as Broker for all contracts of property and casualty insurance (all insurance coverage other than employee benefits insurance) requested by Client.
2. Perform risk management services which Client may from time to time need or require. The services include, but are not limited to:
  - A. Marketing and selection of carriers for property and casualty insurance.

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<sup>1</sup> AVR Realty, AVR Saulet, and Allan Rose are collectively referred to as "AVR".

[\* 3]

B. Interpreting coverage and offering professional advice about the insurance program as requested.

C. Advising Client of changes in the insurance industry trends.

\* \* \*

E. Reviewing of Client's contracts solely to determine if additional risk exposures are present.

\* \* \*

J. Generally assist Client in the administration of its program.

The Agreement also provided that:

Gallagher shall NOT receive its usual and customary brokerage commission for the services provided hereunder. Gallagher will be charging fee of \$15,000. Payable 30 Days for the negotiation and procurement of insurance product(s). If additional services are required, other than those set out in Exhibit A, Client agrees to compensate Gallagher for those services at its usual and customary rates.

An indemnification provision set forth in Section IV of the Agreement stated that "Gallagher agrees to indemnify and hold [AVR] harmless from any loss, cost, damage, or expense (including reasonable attorney's fees) arising from the negligent acts or omissions of Gallagher".

In early May of 2008, AVR was considering the purchase of the Saulet Apartments, a large luxury apartment complex in Orleans Parish, Louisiana. At that time, AVR had a blanket property insurance policy which covered the majority of its properties.<sup>2</sup> The blanket policy had a

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<sup>2</sup> In February 2008, Lexington Insurance Company ("Lexington") bound coverage on AVR's renewal policy. Thereafter, Lexington issued the renewal policy. The renewal policy was a comprehensive blanket property insurance policy and provided coverage to AVR for the various properties in its portfolio with a limit of \$250,000,000. This \$250,000,000 limit was subject to, *inter alia*, a sublimit of \$30,000,000 per occurrence for those properties located in a Tier 1B location. The locations subject to various sublimits, including Tier 1B locations, were set forth in a schedule that was annexed to the renewal policy. Orleans Parish was not listed as Tier 1B location on the renewal policy. Importantly, however, Orleans Parish was listed as a Tier 1B location with a \$30,000,000 sublimit on the expired policy.

\$250,000,000 limit with a sublimit of \$30,000,000 for properties located in a Tier 1B location which had sustained damage caused by wind and hail. On or about May 9, 2008, AVR requested from Gallagher a quote for the annual premium for the Saulet Apartments to be added to AVR's blanket policy with full replacement coverage. The requested quote was to be used by AVR to ascertain the costs associated with owning the Saulet Apartments if it chose to purchase them.<sup>3</sup> On May 28, 2008, Gallagher quoted a premium of \$204,430 to add the Saulet Apartments to AVR's blanket policy. This annual premium, based on the composite rate, covered full replacement cost insurance of \$99,600,000. Shortly after providing the composite rate-based quote, Gallagher learned from its underwriter, Lexington Insurance Company, that the composite rate may not apply to the Saulet because of its location.<sup>4</sup> When Bonnie Hyatt, Gallagher's account executive who handled the AVR account, was asked in her deposition, "did you ever tell AVR that the quote that you had given them for coverage may not be accurate", she answered, "I don't believe I did". And when asked why nobody from Gallagher had conveyed that information to AVR, she answered, "Because I was stressed and I just had too much going on" (Ex. "D" to Prior Motion at pp 148-149).

On June 17, 2008, AVR entered into a contract for the purchase of the Saulet Apartments. The purchase price was \$97,500,000. On July 1, 2008, AVR entered into a loan commitment agreement with its lender, who required AVR to obtain full replacement coverage for the Saulet Apartments.

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<sup>3</sup> According to the Plaintiffs:

To perform its analysis, AVR first determines an acceptable capitalization rate. The capitalization rate is a rate of return on real estate on real estate investment property. AVR's determination is based on specific property details and market conditions, taking into consideration such things as risk and the rate of return available on other investments.

AVR then prepares a *pro forma* investment analysis which identifies the property's total anticipated annual income taking into consideration such factors as the rent roll, vacancy rates, and income generated from fees and other sources. AVR also evaluates each expense line item. The cost of insurance is a significant component in this analysis. Once the annual net operating income is ascertained it is then divided by the "cap rate". The resulting figure is the maximum price that AVR would be willing to pay for the property.

(Plaintiffs' Rule 19-A Statement of Facts at ¶¶ 28-29).

<sup>4</sup> The composite rate, which is agreed to by the broker and the insurance company at or after the time the policy is bound, is based on the amount of the total premium that is attributable to a particular type of risk covered under an insurance policy. The composite rate would not necessarily apply to new properties AVR sought to add to its blanket policy after it was bound.

On July 7, 2008, Gallagher emailed certificates of insurance to AVR which indicated \$250,000,000 of coverage for the Saulet without any sublimit for windstorm damage. On July 9, 2008, Gallagher learned from its underwriter that the Saulet, because it was located in New Orleans, was subject to a sublimit of \$30,000,000 per occurrence for windstorm damage. Once again, Gallagher did not inform AVR that the quote it gave was not applicable to full replacement coverage but subject to a \$30 million sublimit.

Later that month, Gallagher informed AVR that the quote it previously provided for the Saulet was not correct because the Saulet was located in New Orleans and was subject to a \$30 million sublimit for windstorm damage, which had not previously been disclosed to AVR.

Gallagher thereafter undertook to obtain additional insurance coverage from various other companies. Gallagher's quote for the cost of full replacement cost insurance for the Saulet exceeded \$700,000 - as compared to Gallagher's initial premium quoted at \$204,430. Rose stated in his affidavit that "Gallagher's error had a significant impact on AVR's investment analysis for this property. If Gallagher had given an accurate quote at the time that AVR was performing its cap rate analysis, we would never have offered to pay \$97,500,000 for the property. Instead, the maximum amount that AVR would have been willing to pay to purchase the Saulet Apartments would have been at least \$5,000,000 less than what AVR actually paid" (Rose Affidavit in Support of Prior Motion at ¶ 25).

#### *The Instant Action and Underlying Motions for Summary Judgment*

AVR thereafter commenced the instant action asserting, *inter alia*, causes of action against Gallagher for negligent misrepresentation and breach of contract. Specifically, AVR alleged that Gallagher provided an incorrect insurance quote to insure the Saulet; that Gallagher was negligent in preparing the quote; that AVR relied upon the quote in purchasing the Saulet; and that AVR would not have purchased the Saulet at the contract price had the true cost of insurance been known to them (Ex. "H" to Prior Motion at ¶¶ 51-66).

With respect to the breach of contract claim, AVR asserted that they and Gallagher had an agreement that Gallagher would "act as insurance brokers and consultants for [AVR] and in return they maintained a substantial business relationship and earned tens of millions of dollars from [AVR] in commissions;" AVR requested of Gallagher a quote for the annual premium to add the Saulet to its current policy with replacement coverage; that Gallagher provided a quote which did not reflect that the Saulet was fully insured with full replacement coverage but, rather, was subject to a \$30 million sublimit under the policy; that Gallagher breached the agreement by failing to properly calculate the quote and failing to recognize that AVR did not have full replacement coverage for the Saulet Apartments as a result of Gallagher's failure to identify that the Saulet was located in New Orleans, an area subject to a \$30 million dollar sublimit; and that

[\* 6]

as a direct result of this breach of the agreement, the "purchase price of The Saulet Apartments was far higher than it would have been had [Gallagher] provided [AVR] with a proper calculation of the cost of insuring The Saulet Apartments prior to entering into the Purchase Contract for The Saulet Apartments" (Ex. "H" to Prior Motion at ¶¶ 68-75).

Gallagher answered after which AVR moved for summary judgment on the first and second causes of action in the complaint<sup>5</sup> and Gallagher cross-moved for summary judgment dismissing the complaint.<sup>6</sup>

AVR's motion and Gallagher's cross motion were both denied by order of this court (DeStefano, J.) dated April 7, 2014 (the "prior order") given the issues of fact as to whether a contract existed between the parties during the relevant time period (Ex. "A" to Motion).

#### *The Instant Motions*

AVR moves for leave to renew and reargue their prior motion. The branch of AVR's motion seeking renewal is based upon Gallagher's admission, after the issuance of the court's prior order, of the authenticity of the Agreement. AVR also seeks reargument, given the admitted authenticity of the Agreement, of its prior motion which sought summary judgment on their causes of action for breach of contract and negligent misrepresentation.

With respect to Gallagher's cross motion to reargue, Gallagher states:

While the Court was correct in denying AVR's summary judgment motion as to liability, Gallagher respectfully submits that it should have granted Gallagher's motion for summary judgment as to the appropriate measure of damages. On its motion for summary judgment, Gallagher cited several cases standing for the proposition that the only damages AVR seeks - the difference between what it paid for the Saulet and what it allegedly would have paid had the property insurance quote

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<sup>5</sup> AVR moved for the following relief in its prior motion: summary judgment as to Defendants' liability on their first and second causes of action; finding that, as a matter of law, the contract to which Plaintiffs and Defendants were parties permit Plaintiffs to recover the difference between the price they paid for the Saulet Apartments and the price they would have paid had Defendants not breached the Agreement and committed negligent misrepresentation; and setting this matter down for a trial as to the amount of damages that should be awarded to Plaintiffs.

<sup>6</sup> In the prior cross motion, Gallagher moves for an order pursuant to CPLR 3212 on the basis that AVR's claims for breach of contract and negligent misrepresentation fails as a matter of law and, furthermore, that AVR's "theory of damages is entirely speculative and not permitted under either of those theories of liability" (Affirmation in Support of Prior Cross Motion at ¶ 38).

been correct - are entirely speculative. . . . [E]ven assuming AVR can ultimately show that the [indemnity] clause is valid and broader in scope than Gallagher contends, it has a more fundamental problem: in the face of Gallagher's summary judgment motion, AVR was obligated to put forth some evidence as to the basis for its contention that it would have been able to purchase the Saulet for exactly \$5,000,000 less but for the mistaken quote. It has done nothing of the sort, and it is too late for it to do so now (Memorandum of Law in Support of Cross Motion and in Opposition at pp 3-4).

For the reasons that follow, the motion is granted in part and denied in part and the cross motion is denied.

### The Court's Determination

The branch of AVR's motion to renew is premised upon Gallagher's response to AVR's Notice to Admit which was served upon Gallagher after this court's prior order. In their response, Gallagher admitted that the Agreement dated May 28, 2008 was prepared by them and signed by them.<sup>7</sup> As such, Gallagher's argument in the prior motion that the breach of contract cause of action must be denied inasmuch as the contract was not authenticated has been rendered academic in light of Gallagher's response to the Notice to Admit.<sup>8</sup>

The court also finds that notwithstanding the date in which the Agreement was executed (May 28, 2008), the effective date of the Agreement is May 28, 2007 and was in effect during all relevant times to this action (*see Manns v Norstar Bldg. Corp.*, 4 AD3d 799 [4<sup>th</sup> Dept 2004]).

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<sup>7</sup> The court notes that in the prior motion papers, Gallagher argued that the Agreement was not authenticated and thus cannot be the basis for a motion for summary judgment. Gallagher stated that, "there is not a shred of testimony or other evidence speaking to the identity of the individual at Gallagher (if anyone) who signed the purported contract. Plaintiffs cannot rely on an illegible signature, with nothing more, to authenticate that contract; thus, the contract is inadmissible and cannot serve as the basis for Plaintiffs' claim". Gallagher also argued, "to the extent Plaintiffs are attempting to introduce any statement in the purported contract for its truth, the document has not been shown to fall within any hearsay exception" (Affirmation in Support of Prior Cross Motion at ¶¶ 40-41).

<sup>8</sup> On the instant motion, Gallagher failed to raise a genuine issue of material fact that Exhibit A annexed to the Agreement is a stand alone document and not part of the Agreement, especially in view of the fact that it was Gallagher who provided the Agreement with the annexed Exhibit A in response to AVR's discovery demand. There is also no merit to Gallagher's bald and conclusory allegation that the "Alleged Contract is actually 'part of a larger proposal to [AVR]'; thus, it (and the obligations it imposes) must be interpreted in the context of that proposal" and, therefore, "at the very least, there remains a question of fact as to whether the Alleged Contract can be analyzed as a stand-alone document" (Memorandum of Law in Support of Cross Motion and in Opposition at pp 4-6).

In order to establish a *prima facie* case for breach of contract, a plaintiff must demonstrate the existence of a contract, the plaintiff's performance of the contract, the defendant's breach of contractual obligations, and damages resulting from the breach (*Dee v Rakower*, 112 AD3d 204 [2d Dept 2013]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]).

Here, the Agreement executed by the parties in May 2008 was in effect during the relevant time period. There is also an affidavit by Rose that AVR paid the \$15,000 for the additional services as set forth in the Agreement and, thus, performed its part of the Agreement.

With respect to whether Gallagher breached any of the provisions set forth in Exhibit A, which was annexed to the Agreement, the court concludes that Gallagher failed to "discharge the duties imposed" by the Agreement and, thus, breached the Agreement (*see Siekkeli v Mark Mariani, Inc.*, 119 AD3d 766 [2d Dept 2014]) ["An insurance agent or broker . . . may be held liable under theories of breach of contract or negligence for failing to procure insurance . . . . An insured must show that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction"].

Specifically, Gallagher's breaches of the Agreement included, but are not limited to the following: 1) Failing to recognize that New Orleans, which was listed as a Tier 1B location on AVR's expired policy (and thus subject to a \$30 million sublimit), was not listed as a Tier 1B location on AVR's renewal policy; 2) providing a quote to AVR as to the additional premium to be added to AVR's blanket policy if AVR added the Saulet Apartments to its property portfolio - such quote being based on a composite rate - prior to confirming with the underwriter that the composite rate risk analysis would actually apply to this property located in New Orleans; and 3) upon learning from their underwriter that the composite rate based premium would not apply to the Saulet Apartments - which was prior to the time AVR entered into a contract to purchase the Saulet Apartments, and failed to disclose this information to AVR.

In support of its claim that it has sustained damages, AVR argues that, as a result of Gallagher's breach:

Based on all of the foregoing, it is manifest that Gallagher breached its various obligations under the contract. AVR is thus entitled to summary judgment as to Gallagher's liability for breach of contract.

AVR is also entitled, as a matter of law, to a judgment for the difference between the amount it paid for the Saulet and the amount it would have paid had Gallagher not breached the Contract and provided AVR with an incorrect insurance quote. Indeed,

the Contract explicitly provides that Gallagher will "indemnify and hold [AVR] harmless from *any loss, cost, damage, or expense* (including reasonable attorney's fees) arising from the negligent acts or omissions of Gallagher". See Exhibit A (emphasis added). It is also a "fundamental principle of contract law that an award of damages should place a plaintiff in the same position as he or she would have been in if a contract had not been breached."

Here, AVR paid substantially more than it otherwise would have for the Saulet because Gallagher provided an insurance quote that was understated by over half of a million dollars. As a result, the value of the property was substantially overstated. Had Gallagher provided a correct insurance quote, AVR's cap rate analysis would have shown that the Saulet was worth at least five million dollars less than what AVR ultimately paid. In that case, AVR would have either negotiated a substantially lower purchase price or it would have "walked away" from the transaction. It is thus clear that AVR's overpayment for the Saulet is directly attributable to Gallagher's breach of its obligations under the Contract, and that AVR can only be made whole by an award of damages equal to the difference between what AVR actually paid and what it would have paid had Gallagher provided an accurate insurance quote. Accordingly, AVR is entitled to summary judgment as to its entitlement to this measure of damages and, upon issuing the judgment, the Court should schedule [a] hearing with respect to the amount of damages to be awarded (Memorandum of Law in Support of Prior Motion at pp 15-16 [citations omitted]).

AVR's damages analysis is, *inter alia*, predicated upon the Agreement's indemnity provision wherein Gallagher agreed to hold AVR harmless for any loss, cost, damage, or expense arising from the negligent acts or omissions of Gallagher. In this regard, AVR argues that the indemnification provision:

[C]learly provides that Defendants will indemnify Plaintiffs for any loss or damage to them resulting from Defendants' negligent acts or omissions. As Defendants were obligated under the Contract to interpret coverage under the Policy and to provide advice as requested, there is no question that the contract obligated them to indemnify Plaintiffs for their negligence in performing such tasks. As discussed above, Defendants were negligent in fulfilling these obligations when it came to the Saulet transaction. As such, as a matter of law, the indemnification provision obligates Defendants to indemnify Plaintiffs for any loss or damage resulting from their negligence, in this case, the difference between the amount Plaintiffs actually paid for the Saulet, which was determined on the basis of Defendants' inaccurate quote, and the price that they (and any other similarly situated commercial real estate

investor) would have paid had they been provided with an accurate insurance quote (Memorandum of Law in Support of Motion at p 14).

In support of this argument, AVR submitted the affidavit of Rose wherein Rose stated that "Gallagher's error had a significant impact on AVR's investment analysis for this property. If Gallagher had given an accurate quote at the time that AVR was performing its cap rate analysis, we would never have offered to pay \$97,500,000 for the property. Instead, the maximum amount that AVR would have been willing to pay to purchase the Saulet Apartments would have been at least \$5,000,000 less than what AVR actually paid".

In opposition to the prior motion, and in support of their prior cross motion, Gallagher argued that "Plaintiffs' damages calculation [which is based on AVR's cap rate analysis] is not viable under either of their theories of liability".

While Gallagher acknowledges that the "cap rate is a calculation which considers the net income that a property is expected to generate", Gallagher nevertheless argues that it would be improper to assume that AVR would have "successfully purchased the Saulet Apartments for the reduced price" (Affirmation in Support of Prior Cross Motion at ¶ 69). In addition, Gallagher argues that the damages here, if any, are speculative and, in effect, that they were not within the contemplation of the parties "as a probable result of breach at the time of or prior to contracting" (Affirmation in Support of Prior Cross Motion at ¶ 71). In this regard, Gallagher claims that it is "indisputable that Gallagher did not have so much as an inkling that Plaintiffs would be using its quotes to perform a complicated, forward-looking calculus as to the profits it hoped to earn on the Saulet Apartments, and thus, the price it was willing to spend on same" (Affirmation in Support of Prior Cross Motion at ¶ 71).

Contrary to Gallagher's contention that the damages were not within the contemplation of the parties at the time they entered into the Agreement, Bonnie Hyatt, the account executive for Gallagher who handled the AVR account, testified at her deposition testimony that she was aware AVR was looking for a premium quote on the Saulet because AVR was "in the midst of purchasing it or considering purchasing it" and that it was her "understanding" that AVR wanted an insurance quote because "they were setting budgets" (Ex. "D" to Prior Motion at pp 75-76). Hyatt similarly stated in a May 21, 2008 email to Joseph Probega, the underwriter for Lexington, "Can you let me know today if I can use the .18 [composite] rate on this property. I thought maybe because of the location you need to rate it. The insured is holding up their final negotiation and needs this today to finalize" (Ex. "O" to Affirmation in Support of Prior Motion).

With respect to the damages purportedly sustained herein as a result of Gallagher's breach of the Agreement, the following is relevant:

It is frequently difficult to apply the rules of damages, and to determine how far and when opinion evidence may be received to prove the amount of damages. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible, and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They are nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered, because they cannot be proved. *But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach.* It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Future profits, so far as they can be properly proved, may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy (*Farquehar v Wisconsin Condensed-Milk Co.*, 30 Misc 270 [NYSup 1900]).

In *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.* (25 AD2d 81, 86 [1<sup>st</sup> Dept 1966]), the First Department stated:

The rule is well-established that where it is speculative whether damages were sustained there may be no recovery. The fact of damage must be clearly established. On the other hand, once the fact of damage is established the aggrieved party may sustain his burden of proof on the amount of damage by proof on any reasonable basis. A wrongdoer will not lightly escape his responsibilities, it is often said, because of the victim's difficulties in establishing the amount of his damage.

And, as noted in *Williston on Contracts*:

Although any breach of contract entitles the injured party to at least nominal damages, that party cannot recover more without establishing a basis for an inference of fact that he or she has been actually damaged. Moreover, damages which are considered to be too remote and speculative are not recoverable. "[W]here actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed." *The amount of damages must be established with reasonable, not absolute, certainty.* The exact amount need not be

shown, since mathematical precision is not required. *It is sufficient if a reasonable basis for computation of damages is afforded, even though the result will only be approximate.*

An attempt is sometimes made to distinguish between certainty that some damage has been caused, and certainty as to the amount of damage—the courts invoking the well-worn phrase that although the fact of damage must be certain, the amount need only be reasonably certain—but no broad statement can be made that where it is uncertain that any damage has been caused by the breach no recovery is allowable. What can be said is that—"T]here is a clear distinction between the measure of proof necessary to establish the fact that [the plaintiff] sustained some damage and the measure of proof necessary to enable the jury to fix the amount." Thus, it is now well established that the uncertainty that prevents recovery is uncertainty as to the fact of damage and not as to its amount. *In other words, where substantial damage has been suffered, the impossibility of proving its precise amount provides no basis for denying the recovery of substantial damages altogether* (24 Williston on Contracts §§ 64.8, 64:9 [4th ed.] [emphasis added]).

In view of the foregoing, the court concludes that AVR has demonstrated that the damages they sustained as a result of Gallagher's breach of the Agreement are not speculative but, rather, capable of being established on a reasonable basis. In addition, there being no issues of fact as to the Defendants' breaches, the only issue to be tried concerns the amount of damages (CPLR 3212[c]).

#### *Negligent Misrepresentation*

In order to prevail on a cause of action sounding in negligent misrepresentation, a plaintiff is required to demonstrate: Privity of contract between the plaintiff and the defendant or a relationship "so close as to approach that of privity"; that the information was incorrect; and reasonable reliance on the information (*Sykes v RFD Third Ave. 1 Associates, LLC*, 15 NY3d 370 [2010]; *Ramsarup v Rutgers Casualty Insurance Co.*, 98 AD3d 494, 496 [2d Dept 2012]).

Here, the existence of the Agreement between AVR and Gallagher satisfies the necessary privity of contract. In addition, it is apparently undisputed that the quote given to insure the Saulet at full replacement cost was incorrect as the quote actually provided by Gallagher was based on a \$30 million sublimit. Last, AVR demonstrated that its reliance on the quote when preparing the cap rate was reasonable. In this regard, the court notes the following: AVR and Gallagher had a ten-year plus relationship whereby when AVR was considering a new acquisition, it would consult with Gallagher to obtain insurance quotes to use in analyzing the potential acquisition and determining the appropriate purchase price for the property, that AVR

often asked what potential coverage would be; and that Gallagher always knew that AVR was relying on the quotes it gave in making their investment decisions (Rose Affidavit in Support of Prior Motion at ¶¶ 9, 13).<sup>9</sup> The nature of this relationship was confirmed by Hyatt who testified that AVR sometimes purchased additional properties which they wanted to be covered under their blanket policy and they would call Gallagher stating they needed insurance; that Gallagher had a "standard operating procedure" when AVR called with respect to the purchase of an additional property, namely, that AVR would fill out a questionnaire that had been prepared for them, and that AVR did in fact provide to Gallagher all the information Gallagher requested of them with respect to the Saulet Apartments (Ex. "D" to Prior Motion at pp 47-49).

Accordingly, AVR has established, as a matter of law, that there are no triable issues of fact as to Gallagher's liability on AVR's cause of action for negligent misrepresentation.

**Conclusion**

Based on the foregoing, it is hereby ordered that the Plaintiffs' motion for leave to renew and reargue their prior motion is granted, and upon renewal and reargument, the court grants the motion to the following extent: the court finds that all liability issues have been resolved in favor of the Plaintiffs and that the only triable issues of fact remaining concern the amount of damages sustained by the Plaintiffs; therefore, it is further,

Ordered that a trial shall be held to determine the amount of damages sustained by the Plaintiffs (CPLR 3212[c]) and the attorneys for the parties shall participate in a telephone conference September 24, 2014 at 11:00 a.m. to discuss the scheduling of the trial; and it is further

Ordered that the Plaintiffs' motion is, in all other respects denied; and it is further

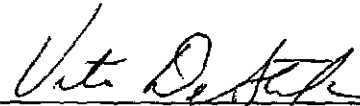
Ordered that the Defendants' motion is denied.

Date: September 23, 2014

**ENTERED**

SEP 26 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
Hon. Vito M. DeStefano, J.S.C.

<sup>9</sup> AVR "relied on the quote . . . in determining the anticipated annual net operating income for the property and the amount of money that AVR would offer to purchase the property" (Rose Affidavit in Support at ¶ 19).