STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

CFRM ENTERPRISES, INC. d/b/a
GXC IMAGING SPECIALIST,

Plaintiff,

- against

HANOVER INSURANCE COMPANY
and CARESTREAM HEALTH, INC.,

Defendants.

COMMERCIAL DIVISION
DECISION AND ORDER
INDEX NO. 2014-800286

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C.**
R. Scott Atwater, Esq.
Katherine M. Liebner, Esq.
Attorneys for Plaintiff

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Reetuparna Dutta, Esq.
Attorneys for Carestream Health Inc.

MURA & STORM PLLC
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Attorneys for Hanover Insurance Company

WALKER, J.

Defendant Carestream Health, Inc. (Carestream) moves to dismiss the Amended Complaint as asserted against it. For the reasons that follow, the motion is denied.

Background

The following is taken from the facts as alleged in the Amended Complaint.

In or about March 2010, CFRM Enterprises, Inc. d/b/a GXC Imaging Specialists (GXC), purchased a digital detector[1] from defendant Carestream and installed it at the Erie County Medical Center (ECMC) (the "Detector"). As part of that purchase, GXC also paid Carestream to train a GXC service engineer to service the Detector (the "Related Services"). As a result, GXC had access to Carestream's "tech support" for assistance in resolving any problems with the Detector.

On or about April 7, 2012, GXC received a complaint from ECMC that the Detector had image quality issues namely, "lines" which obscured the digital image of cervical spines. GXC also purchased a "Commercial Marine" policy from defendant Hanover Insurance Company, with coverage from December 20, 2011 to December 20 2012, which insured "DRX-1 detector units and DRX evolutions systems" (including the Detector) on a replacement cost basis, subject to a deductible. On April 10, 2012, GXC submitted a claim to Hanover for the purchase of a replacement detector.

On April 13, 2012, GXC contacted Carestream's tech support, and spoke with Paula Hughes, who recommended that GXC remove the Detector from the imaging system, and reinstall and re-calibrate it. GXC proceeded as advised, but thereafter received similar complaints regarding the Detector from ECMC. GXC again contacted Carestream's tech support, "who [sic] stated to GXC that because the [Detector] continued to malfunction, GXC should remove [it] and purchase a new Carestream detector to install at ECMC" (Amended

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[1] The detector enables doctors to view scans or x-rays.

Complaint ¶ 15). GXC alleges that, because Carestream could not immediately supply a replacement detector, GXC arranged to purchase one through an authorized Carestream retailer, Tiba Enterprises, at a cost of $61,500. After installation of the replacement Detector, GXC received no further complaints from ECMC.

Plaintiff further alleges that, while the above scenario played out, Carestream was competing with GXC for the services GXC provided to ECMC; and that Carestream was ultimately successful in replacing GXC at ECMC.

As part of its claims process, Hanover's first expert, upon examining the Detector, opined that "the diagnosis of a defective detector was correct and replacing it cleared the artifact ["lines"] from the images" (Amended Complaint ¶ 23). Seeking a second opinion (in June 2012), Hanover sent the Detector to Carestream, and advised GXC that Carestream would conduct "destructive testing". There is no indication that GXC objected to that process. Carestream ultimately reported (in September 2012) that "no image quality problem was found", and issued an invoice to **GXC** (not Hanover) for $3,000 for "dealer evaluation service charges." When the Detector was returned to GXC, it did not function. Hanover denied coverage for the Detector, and GXC paid the $3,000 invoice.

The Complaint was filed in January 2014. Carestream filed a motion to dismiss, which it withdrew after Plaintiff served an Amended Complaint (adding one cause of action). The Amended Complaint asserts causes of action in breach of contract, estoppel and vicarious liability against Hanover, and causes of action in fraud, negligent misrepresentation and negligence against Carestream.

Discussion

1. **Standard of Review**

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleadings are to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, [and] accord plaintiffs the benefit of every possible favorable inference" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [citations and quotation marks omitted]). However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence" will be deemed insufficient (*Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

2. **Fraud**

Carestream asserts that Plaintiff's fraud claim fails to comply with CPLR 3016(b)'s requirement that "the circumstances constituting the wrong shall be stated in detail", because Plaintiff failed to allege when the statements were made, who made them, their content, or sufficient facts to permit an inference of fraudulent intent (citing *High Tides, LLC v DeMichele*, 88 AD3d 954 [2nd Dept 2011]; *Chrysler Credit Corp v Dioguardi Jeep Eagle*, 192 AD2d 1066, 1067 [4th Dept 1993]).

A cause of action for fraud "requires proof of a representation of fact which is false and known to be false when made, which is offered to deceive another and with the intention to induce the other to act or refrain from acting, and proof of reliance upon the representation which causes injury" (*Chase Manhattan Bank v Perla*, 65 AD2d 207, 210 [4th Dept 1978], quoted in *Koagel v Ryan Homes, Inc.*, 167 AD2d 822 [4th Dept 1990]).

Here, Plaintiff has sufficiently detailed the elements of the alleged fraud namely, the dates upon which it spoke to a Carestream tech support person; the name of one of the two (2) tech support members with whom it spoke; and the subject matter of the instructions given. Contrary to Carestream's contention, Plaintiff need not provide "a reason to believe" that Carestream's tech support personnel had a "motive" to provide false information - since motive is alleged, i.e., that either directly or, by selling detectors on the retail market, Carestream would profit from the sale of a new detector.

Carestream also contends that the facts do not permit an inference of fraudulent intent, or that the statements alleged were non-actionable opinions.

> It is the general rule that representation of opinion or predictions of something which it is hoped or expected will occur in the future will not sustain an action for fraud .... " 'To constitute actionable fraud, the false representation relied upon must relate to a past or existing fact, or something equivalent thereto, as distinguished from a mere estimate or expression of opinion' "

(*Koagel v Ryan Homes, Inc.*, 167 AD2d 822 [4th Dept 1990] [citation omitted]).

A statement that Plaintiff should remove the Detector and purchase a new one cannot be classified as a "statement[] of prediction or expectation" (*Pacnet Network Ltd. v KDDI Corp.* (78 AD3d 478, 479 [1st Dept 2010]). The question is whether, in the context of a service contract, an opinion expressed by the technician is actionable (*see, e.g., FMC Corp v Fleet Bank*, 226 AD2d 225, 226; *American Food & Vending Corp v IMB*, 245 AD2d 1089, 1090 [4th Dept 1997]). A statement that equipment "needs to be replaced" is a statement of fact, no matter how careless or off-hand the statement, and Carestream has failed to establish that Plaintiff was not justified in relying on the advice of its technician - to replace the Detector. Thus, the motion to dismiss the fraud cause of action is denied.

3. **Negligent Misrepresentation**

It is well settled that 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" (*JAO Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Carestream asserts that a "special relationship" does not arise out of "an ordinary arm's length business transaction between two parties" (*Flaherty Funding Corp v Johnson*, 105 AD3d 1445, 1446 [4th Dept 2013). Rather, a plaintiff must allege that the defendant "possess[es] unique or specialized expertise, or [is] in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] In *Mandarin*, for example, the court determined that the defendant's "art expertise alone [could not] create a special relationship where otherwise the relationship between the parties [was] too attenuated." (*Mandarin Ltd.*, 16 NY3d at 181).

> "Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information ... There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals [or] good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care." (*International Prods. Co. v Erie R. R. Co.*, 244 NY 331, 338)

(*Mathis v Yondata Corp.*, 125 Misc2d 383, 387 [Sup Ct Monroe County 1984] [Boehm, J.]).

Here, Plaintiff has alleged that Carestream trained GXC's personnel in servicing the Detector, and that Plaintiff was provided access to Carestream's tech support for advice. Thus, Plaintiff has alleged that Carestream knew it asked tech support questions for a "serious

purpose," and there is no allegation that Plaintiff was required to obtain a second opinion before acting on Carestream's advice; rather, the assumption is that Plaintiff had a right to rely upon Carestream's advice regarding its own equipment and, conversely, that Carestream had a duty to impart correct advice. To this extent, Plaintiff has alleged a "special relationship".

While not addressed by the Parties, a simple breach of contract action will not give rise to a separate claim for negligent misrepresentation where there is no separate relationship distinct from, and independent of the contract. In other words, the acts alleged must be based upon a breach of legal duties extraneous to, and distinct from the contract (*see RKB Enters., Inc. v Ernst & Young*, 182 AD2d 971 [3rd Dept 1992]; *see also Alamo Contract Builders, Inc. v CTF Hotel Co.*, 242 AD2d 643 [2nd Dept 1997]). Here, the alleged relationship is based upon GXC hiring Carestream to train one of GXC's technicians to service the Detector, as a result of which, GXC was permitted to contact Carestream for technical support and advice. At this stage of the pleadings, the Court cannot determine whether a contract existed on these terms or a less formal relationship. Therefore, the motion to dismiss the negligent misrepresentation cause of action is denied, with leave to renew upon the completion of discovery.

4. **Negligence**

This cause of action is based upon different facts namely, that Carestream was negligent in conducting "destructive testing", and is therefore liable for the (inoperable) Detector. Carestream seeks dismissal of this cause of action because, it alleges, it owed no duty to GXC, and because any negligence on its part was not the proximate cause of Plaintiff's damages.

> The law is well settled that where an agent is guilty of active negligence or misfeasance, he is liable to the person injured, regardless of whether his conduct was committed within or outside the scope of his employment .... Where,

> however, the claimed negligence consists only of nonfeasance in failing to perform a duty owing to the principal, the person injured has a cause of action only against the principal and not against the agent ... Thus, an agent is liable for injury to third persons when he breaches some duty he owes to such third person .... The mere fact that the injured person has a contractual relationship with the agent's principal does not insulate the agent from liability for his wrongful act .....

(*Mathis v Yondata*, 125 Misc2d at 386).

Ignoring the undisputed fact that Carestream invoiced **GXC,** not Hanover, for the (destructive) testing, Carestream asserts that it owed no duty to GXC to conduct the testing (i.e., "dealer evaluation service") with care. Further, Carestream's assertion that it was "ordered" to conduct "destructive testing", and therefore cannot be the cause of damage to Plaintiff is obviously disputed: If Carestream was able to determine that the Detector was in working order, why did it not function when Carestream returned it to Plaintiff? The motion to dismiss this cause of action is denied, with leave to renew upon the completion of discovery.

Accordingly, it is hereby

ORDERED, that Carestream's motion to dismiss is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: July 30, 2014
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

JUL 31 2014

BY _____
JOHN H. GARBO, JR.
COURT CLERK