2019 WL 529276 (N.Y.Sup.), 2019 N.Y. Slip Op. 30305(U) (Trial Order)
Supreme Court of New York.
Commercial Division
New York County

**1 GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, Plaintiff,
v.
L. KNIFE & SON, INC., U.B. Distributors, Defendants.

No. 157164/2013.
February 11, 2019.

Decision and Order

Hon. Saliann Scarpulla.

MOTION DATE 10/01/2018, 10/01/2018, 10/01/2018, *N/A*

MOTION SEQ. NO. 009 010 011 *012*

**1 The following e-filed documents, listed by NYSCEF document number (Motion 009) 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 441, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 584, 595

were read on this motion to/for *JUDGMENT-SUMMARY*.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 442, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 558, 559, 560, 561, 562, 563, 564, 585, 586, 587, 588, 589, 590, 591, 592, 596

were read on this motion to/for *SUMMARY JUDGMENT (AFTER JOINDER*.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 582, 593, 597

were read on this motion to/for *DISMISS*.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 583, 594, 598, 599, 600, 601

were read on this motion to/for *DISMISS*.

**2 In this five year-old insurance coverage action, four final motions for judgment are before me. In motion sequence no. 9, second third-party defendant Swett & Crawford of Georgia ("Swett & Crawford") moves for summary judgment dismissing the causes of action asserted against it by second third-party plaintiff TGA Cross Insurance, Inc. ("TGA Cross"). In motion sequence

no. 10, TGA Cross moves for summary judgment dismissing the third-party complaint of defendant/third-party plaintiff L. Knife & Son, Inc. ("L. Knife").

In motion sequence no. 11, Swett & Crawford moves to dismiss the cross claims asserted against it by L. Knife. In motion sequence no. 12, plaintiff Great American Insurance Company of New York ("Great American") moves to dismiss defendants' counterclaims for attorney's fees and other extra-contractual damages. Motion sequence nos. 9, 10, 11, and 12 are consolidated for disposition.

BACKGROUND

L. Knife is a beer distributor with a warehouse located in Brooklyn, New York. In 2007, L. Knife contacted retail insurance broker TGA Cross to purchase flood insurance for the warehouse. TGA Cross, in turn, contacted wholesale insurance broker Swett & Crawford to market the risk to the insurance marketplace. Mary Coates ("Coates") of TGA Cross contacted of Keith Morell ("Morell") of Swett & Crawford. Morell then solicited flood coverage from Great American.

When applying for flood coverage, Coates exchanged information and documents with Morell. The initial application that Coates submitted to Morell requested ****3** $4,000,000 in coverage for the building and $2,500,000 in coverage for the contents of the premises. On this application, the line titled "contents value" was left blank.

***2** As part of its underwriting, Great American requested information concerning the total insurable value ("TIV") of the insured property from Morrell, as well as information regarding L. Knife's flood prevention measures. Coates provided certain information in an email to Morell. On December 6, 2007, Morell then relayed the information to Great American in a separate email, adding that the value of the contents of the premises was $3,000,000: the "insured has confirmed the following: . . . Total contents value is $3M". At his deposition, Morell stated that the TIV of $3 million came from Coates. Coates denied in her deposition that she provided that information to Morell.

The parties also dispute from where the $3 million value originated -- L. Knife attributes it to Swett & Crawford, and/or Great American, while Great American attributes it to TGA Cross and/or L. Knife.

Coates received an insurance quote in 2007 from Great American, through Morell. The 2007 quote provides that the "Premium is based on $7,000,000 [total insurable value] ($4,500,000 and $3,000,000 Contents)." Coates responded to Morell, asking him to "Kindly bind per GA [2007] Quote." Subsequently, Great American issued L. Knife an excess flood insurance policy for the 12/31/2007-12/31/2008 period. Great American also conducted an inspection of the premises shortly after issuing the policy. After the inspection, Great American did not make any changes to the policy.

The policy was renewed four additional times. Prior to the last renewal period (12/31/2011-12/31/2012), by mail dated December 7, 2011, Morell sent Coates an ****4** insurance renewal quote from Great American which stated: "Based on total exposed values of $7,000,000 -- please confirm that this is still accurate." Coates responded, "Please bind per the attached quote and advise if you need anything further." Swett & Crawford, in turn, instructed Great American to "please renew as quoted."

On October 29, 2012, L. Knife's warehouse sustained flood damage from Super Storm Sandy. L. Knife submitted a claim totaling $5,000,000 in damage the following day. Great American denied coverage for the claim on the alleged basis that L. Knife had made a material misrepresentation on its 2007 application for insurance.

In August 2013 Great American commenced this action against L. Knife, seeking a declaration that the insurance policy was void ab initio, based on the alleged "material misrepresentation" on the hand-written application that TGA Cross had provided to Swett & Crawford. On September 26, 2013, L. Knife served its answer and counterclaim against Great American for breach of contract.

In September 2014, L. Knife filed a third-party complaint against TGA Cross, its retail broker, asserting claims of negligence and breach of contract against it. The gravamen of L. Knife's third-party complaint is that if TGA Cross, as L. Knife's broker, failed to provide information or provided incomplete or incorrect information to Great American which caused Great American to disclaim, then TGA Cross is negligent and breached its contract with L. Knife.

In 2015, Great American moved for summary judgment, a declaration that the insurance policy was void ab initio because of a material misrepresentation, and for dismissal of L. Knife's counterclaims for a declaratory judgment and breach of contract. ****5** By decision and order dated April 17, 2015 (2015 NY Slip Op 30606[U] [Sup Ct, NY County 2015]) I denied the motion, stating that, among other things, "[t]he issue of whether defendants materially misrepresented any facts such as would void the policy remains a question of fact" (*id*. at *3). Great American appealed, and the First Department affirmed (*Great American Ins. Co. of New York v L. Knife & Son, Inc.*, 138 AD3d 531 [1st Dept 2016]).

***3** In April 2016, TGA Cross filed a second third-party complaint against Swett & Crawford, asserting two causes of action. First, TGA asserted that Swett & Crawford breached its contract with TGA Cross. Second, TGA Cross alleged that Swett & Crawford undertook a duty to TGA in procuring insurance coverage for TGA Cross. TGA Cross alleged that, to the extent that TGA Cross is liable to L. Knife, Swett & Crawford is responsible for that liability due to its own negligence.

After the completion of discovery, L. Knife and Great American cross-moved for summary judgment. By decision and order dated October 10, 2017 (*Great American Ins. Co. of New York v L. Knife & Son, Inc.*, 2017 NY Slip Op 32132[U] [Sup Ct, NY County 2017]), I denied both motions, holding that there were still issues of fact after discovery as to whether Swett & Crawford was Great American's agent for the purpose of placing and renewing the policy for the successive five years; and whether L. Knife misrepresented any facts and, if so, whether the misrepresentation was material to Great American's decision to issue the policy and its renewals.

Further, I held that "questions of fact remain as to whether L. Knife misrepresented any facts. Specifically, whether Coates, at any point prior to Morell's ****6** December 2007 Email, verbally communicated and represented to Morell the value of the contents" and that "[t]his issue of fact equally relates to the materiality of the misrepresentations, because Morell's December 2007 Email may be read as showing that he, without any prompting from [Great American], let alone L. Knife, represented the value of the contents as $3,000,000" (*id*. at *7-8).

The First Department affirmed my October 10, 2017 decision, stating that:
"Discovery has not resolved the questions of fact outlined by this Court in a prior decision in this insurance coverage dispute (138 AD3d 531, 29 NYS3d 353 [1st Dept 2016]). Rather, the record presents triable issues with respect to whether defendants or their broker made any misrepresentation about the total insurable value of the property and the value of the contents of the property, whether plaintiff's decision to issue the policy and the premium charged relied on that alleged misrepresentation, and whether the wholesale broker was acting on behalf of plaintiff or defendants (*see id*.)"

(*Great American Ins. Co. of New York v L. Knife & Son, Inc.*, 166 AD3d 444, 444 [1st Dept 2018]).

On November 8, 2017, L. Knife served an amended answer and cross-claims against Swett & Crawford. The parties have now filed a final round motions for judgment before trial.

DISCUSSION

Swett & Crawford's Motion for Summary Judgment (Mot. Seq. No. 009)

Swett & Crawford moves for summary judgment dismissing the breach of contract cause of action asserted by second third-party plaintiff TGA Cross on the ground that there is no contract between the two companies. With respect to TGA Cross's

negligence cause of action, Swett & Crawford argues that TGA Cross can recover only if Swett & **7 Crawford failed either to obtain specifically requested coverage, or to inform TGA Cross that it was unable to do so. Swett & Cross argues that TGA Cross has adduced no evidence that Swett & Crawford failed in these obligations in any way. Rather, the evidence is undisputed that Swett & Crawford did all that it was asked to do and thus, met the applicable standard of care.

In its first cause of action for breach of contract, TGA Cross alleges that "[d]uring all relevant times, a contract existed between TGA Cross and Swett & Crawford whereby TGA Cross engaged Swett & Crawford to obtain excess flood insurance for L. Knife" (second third-party complaint, ¶ 49). After discovery, however, neither TGA Cross nor Swett & Crawford has produced any document that would evidence the existence of such a contract, and no witness has testified that such an agreement, written or oral, exists. Indeed, Thomas Gregory, TGA Cross's representative, testified that he is not aware of any contract between the two entities during the relevant time-frame (*see* Gregory dep at 141-142 [aff of Daniel W. Cohen, exhibit 10]).

*4 It is axiomatic that, to sustain a cause of action for breach of contract, the plaintiff must successfully prove the existence of the contract, as well as the provision at issue (*see Kraus v Visa Intl. Serv. Assn.*, 304 AD2d 408, 408 [1st Dept 2003]). Here, because TGA Cross has failed to prove the existence of a contract with Swett & Crawford, Swett & Crawford is entitled to summary judgment dismissing TGA Cross's breach of contract cause of action.

With respect to the negligence cause of action, TGA Cross alleges that Swett & Crawford "undertook to assist TGA Cross in obtaining excess flood insurance coverage" **8 for L. Knife, "owed a duty to TGA Cross and L. Knife," and "held itself out to TGA Cross as an expert" (second third-party complaint, ¶ 31 -32). TGA Cross further alleges that any alleged misrepresentations that might void L. Knife's coverage "arose due to Swett & Crawford's failure to exercise reasonable care" (*id.*, ¶ 44), and, to the extent that TGA Cross is found liable for any damages arising from L. Knife's loss of coverage, "such liability will have been brought about by Swett & Crawford's failure to exercise reasonable care," as are TGA Cross's defense expenses (*id.*, ¶¶ 46-47). For relief, TGA Cross requests "a judgment indemnifying TGA Cross for any recovery that may be awarded to L. Knife" (*id*. at 10).

Swett & Crawford argues that this negligence cause of action must be dismissed because there is no evidence showing that Swett & Crawford has breached its duty of care to TGA Cross. "[A]n insurance agent or broker owes no common-law duty to its customer other than to obtain the policy requested within a reasonable period of time, or to inform the customer that it could not do so" (*People v Liberty Mut. Ins. Co.*, 52 AD3d 378, 380 [1st Dept 2008]). Here, Swett & Crawford's "customer" is retail broker TGA Cross.

Swett & Crawford contends that it is entitled to summary judgment because the evidence so clearly indicates that "the TIV of $3M . . . came from TGA [Cross]," that trial is unnecessary. Thus, Swett & Crawford argues, it has met its obligations to TGA Cross to provide the policy requested because no evidence suggests that its representative did anything other than accurately pass on information he received to TGA Cross.

**9 The crux of both the main action and third-party complaints, however, is the TIV information and how a TIV of $3 million came to be. [1] Swett & Crawford's argument that the TIV of $3 million came from Coates at TGA Cross as a matter of law ignores my prior decisions, affirmed by the First Department, that there are sharply disputed issues of fact as to: (1) what information regarding TIV was provided to Great American; (2) whether any such information constituted a misrepresentation such that Great American can void the insurance policy ab initio; (3) who provided such information, and (4) to whom it was provided.

*5 Thus, although Swett & Crawford argues that "Morell has testified that he is *certain* that this information -- the TIV of $3M -- came from TGA" (Swett & Crawford memorandum at 9), in fact, Morell repeatedly testified that he did not recall and could not remember conversations or emails. Regarding the $3 million figure on the application and quote, he could only suggest: "[t]hat would have been information that someone at **10 [TGA Cross] would've provided me" and "I believe it was provided to me [by TGA Cross]" (Morell dep at 46).

In addition, Morell did not remember with whom he spoke at TGA Cross regarding contents, or whether he had received the $3 million figure from Coates or someone else at TGA Cross (*id*. at 45-46 "I believe it was Mary Coates, but I can't say specifically"]). In addition, he did not recall writing the email that contained the $3 million TIV figure (*id*. at 45).

Morell's testimony is far from conclusive evidence that L. Knife or TGA Cross provided the TIV information. This issue of fact requires denial of Swett & Crawford's motion to dismiss TGA Cross's negligence cause of action.

TGA Cross' Motion for Summary Judgment (Mot. Seq. No. 010)

TGA Cross moves for dismissal of L. Knife's third-party complaint on three grounds: (1) the law of the case doctrine; (2) the absence of the requisite "claim over" liability under third-party practice; and (3) the economic loss doctrine.

First, TGA Cross argues that the prior decision of the First Department, in which it affirmed my 2015 decision denying summary judgment to Great American, "demonstrates that the law of the case doctrine should be applied to bar continued litigation against TGA" (TGA Cross memorandum at 4).

TGA Cross argues that "it is indisputable that at the center of both the main action and L. Knife's third-party complaint is TIV information for the Premises" (TGA Cross memorandum at 4), and that the First Department, in affirming this court's denial of summary judgment to Great American, noted that Great American's "decision to issue ****11** the policy and the premium charged were not tethered to the TIV" (*Great American Insurance Co. of New York*, 138 AD3d at 531). TGA Cross then argues that this "holding . . . as adhered to and echoed by this Court" is the "death knell to LK's third-party action since the First Department has already held (and LK seemingly recognized) that the TIV was not determinative of GA's decisions to issue or price the Policy" (TGA Cross memorandum at 4-5).

TGA Cross mischaracterizes the First Department decision. The First Department affirmed the denial of Great American's motion for summary judgment seeking to declare the policy void. Specifically, the First Department held that Great American "failed to establish as a matter of law that defendant [L. Knife] made any misrepresentation" and that Great American failed to show that any such misrepresentation was material (*Great American Insurance Co. of New York*, 138 AD3d at 531). The First Department also stated, in dicta, that "[a]fter plaintiff issued the policy, its own investigation of the property, which could have uncovered the TIV of the property and its contents, resulted in no underwriting activity, and other internal insurance company documents suggest that the decision to issue the policy and the premium charged were not tethered to the TIV" (*id*.).

Under the law of the case doctrine, dicta in a court opinion does not constitute a holding (*Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332, 333 [2d Dept 2005] [finding that "the law of the case doctrine did not preclude dismissal of the action" where trial court's statement as to how to remedy the dismissal of the complaint "was mere dicta and not the law of the case"]).

***6 **12** Indeed, the doctrine only applies when a prior ruling directly addressed "a question of law that is essential to the determination of the matter" (*Karol v Polsinello*, 127 AD3d 1401, 1402 [3d Dept 2015]; *Brown v State of New York*, 250 AD2d 314, 320 [3d Dept 1998] [the application of the doctrine is limited "exclusively to questions of law"]). Here, the statement by the First Department regarding TIV was dicta relate to facts and does not relate to questions of law as required by the law of the case doctrine.

TGA Cross next argues that L. Knife's negligence claims against it are barred because there is no "claim over liability," as L. Knife's claims against TGA Cross are not " 'sufficiently related to the main action to raise the question of whether the third-party defendant may be liable to the third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to the main plaintiffs' " (TGA Cross memorandum at 6, quoting *Amorizzo v Conte*, 21 Misc 3d 1111[A], 2008 Slip Op 4571280[U], *3 [Sup Ct, Nassau County 2008]).

In making this argument, TGA Cross contends that "the fulcrum of LK's third-party complaint against TGA" concerns the "TIV" figures (TGA Cross memorandum at **13 7). TGA Cross misstates the scope of L. Knife's third-party claims against TGA Cross. Rather, as the allegations set forth in the third-party complaint demonstrate, L. Knife has asserted claims for both breach of contract and negligence by TGA Cross arising from its conduct as L. Knife's insurance broker, whose responsibility it was to procure and make sure that excess flood insurance for L. Knife was in place to protect L. Knife's property. If it is found at trial that the insurance policy that L. Knife purchased from Great American through its broker, TGA Cross, is void ab initio, then TGA Cross may have breached its contract with L. Knife, and TGA Cross's negligence may have caused Great American's disclaimer. Thus, L. Knife's claims are clearly not limited to TGA Cross's failure to provide accurate TIV information but are based on any misrepresentation or omission by TGA Cross on which Great American bases its disclaimer.

TGA Cross also argues that there can be no "claim over" liability because the TIV figures were "provided by LK to TGA on an annual basis," and because the "prior holdings of this Court demonstrate that the TIV was not the province of TGA but rather LK and/or GA" (TGA Cross memorandum at 7). As stated in detail above, both I and the First Department have already found that there are highly contested issues of fact as to these issues. Accordingly, TGA Cross' claim-over liability argument fails.

Finally, relying on the economic loss doctrine, TGA Cross argues that L. Knife is not entitled to assert claims for both breach of contract and negligence. The economic loss rule "denies the purchaser of a defective product a tort action against sellers, manufacturers, installers and servicers for purely economic losses sustained as a result of the defective product." **14 *Assured Guar. (UK) Ltd. v. JP Morgan Inn. Man. Inc.*, 80 AD3d 293, 306 [1st Dept 2012] *affd* 18 NY3d 341 (2011). As this is not a products liability action, the economic loss doctrine is inapplicable.

Moreover, the First Department has held that in those instances where the economic loss doctrine is applied beyond products liability actions, "the better course is to recognize that the rule allows ... recovery [for economic loss] in the limited class of cases involving liability for the violation of a professional duty' " *Assured Guar. (UK) Ltd.*, 80 Ad3d at 306, *quoting Hydro Invs. v. Trafalgar Power*, 227 F.3d 8, 18 [2d Cir.2000]. Here, L. Knife alleges that TGA Cross breached its professional duty. Accordingly, the economic loss doctrine is not a bar to LK Knife's negligence claims against TGA Cross.

*7 For the foregoing reasons, TGA Cross' motion for summary judgment dismissing L. Knife's third-party complaint is denied in its entirety.

Swett & Crawford's Motion to Dismiss Defendants' Cross Claims (Mo. Seq. No. 011)

Swett & Crawford moves for dismissal of L. Knife's cross claims because they are barred on the ground of statute of limitations. Great American commenced this action for a declaratory judgment seeking rescission of the policy in August 2013. On September 26, 2013, L. Knife filed its answer, along with a counterclaim against Great American. L. Knife did not refer to or mention Swett & Crawford in its original answer.

On April 29, 2014, L. Knife filed an amended and supplemental answer and counterclaim, which added TGA Cross as a counterclaim defendant. In its amended answer, L. Knife's only reference to Swett & Crawford was its denial that L. Knife ever had any contact with Swett & Crawford (*see* amended answer, ¶ 77 ["L. Knife never had **15 any communication with Great American or Great American's broker, Swett & Crawford, regarding the binding of the flood Policy or any renewal of the Policy thereafter"]).

Swett & Crawford was added to this action via a second third-party complaint filed by TGA Cross on April 14, 2016. On November 8, 2017, following Great American's filing of an amended complaint, L. Knife filed an amended answer, which included, for the first time, cross claims against Swett & Crawford.

In its cross claims, L. Knife asserts claims for negligence and breach of fiduciary duty. With respect to its negligence cross claim, L. Knife asserts that:

"In the event that Swett is found not be Great American's agent, which L. Knife strenuously disputes and denies, and if Swett provided TIV information, or any other inaccurate information to Great American, Swett will, as a result, have breached its legal duties to L. Knife, including its duty to act with reasonable care to all actions taken in providing information to Great American in connection with the Policy or any renewals thereof"

(cross claims, ¶ 91).

With respect to its breach of fiduciary duty cross claim, L. Knife alleges that:
"In the event that Swett is determined to be L. Knife's agent, which L. Knife strenuously disputes and denies, Swett engaged in self-dealing, by accepting commissions and other benefits from Great American while purportedly acting on L. Knife's behalf, in violation of its fiduciary duty and duty of reasonable care"

(*id.*, ¶ 92).
"In the event that Swett is determined to be L. Knife's agent, which L. Knife strenuously disputes and denies, Swett would have been acting contrary to the interests of L. Knife is purporting to act on behalf of L. Knife, and failing to disclose a clear conflict of interest between Swett's interest and L. Knife's interest"

****16** (*id.*, ¶ 93).

In both cross claims L. Knife asserts that Swett & Crawford had a duty toward L. Knife, which it breached at the time that the policy was negotiated.

L. Knife's first cross claim for negligence is subject to a three-year statute of limitations (*see* CPLR 214 [4]; *Chase Scientific Research v NIA Grp.*, 96 NY2d 20, 30 [2001] ["we conclude that the actions against defendant agents and brokers are governed . . . by the limitations period applicable to negligence actions (CPLR 214 [4])"]). Further, a negligence claim against an insurance broker accrues when "the injury occurred, and the plaintiffs were damaged when coverage was denied" (*Lewiarz*, 92 AD3d 1464, 1466 (3d Dep't 2011).

***8** As pled in its negligence cross claim, L. Knife's claim accrued when Great American denied its request for coverage under the Policy -- an event which L. Knife alleges occurred no later than August 2013 (*see* cross claims, ¶ 56). L. Knife did not plead its negligence cross claim until November 2017, long after the expiration of the limitations period. Thus, the cause of action for negligence is untimely.

The limitations period for a breach of fiduciary duty cause of action depends on whether the remedy sought is monetary or equitable (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Here, L. Knife seeks exclusively monetary relief in its breach of fiduciary cross claim against Swett & Crawford. The breach of fiduciary claims is therefore construed as alleging "injury to property" within the meaning of CPLR 214 (4) and carries a three-year limitations period. Like its ****17** negligence cross claim, L. Knife's breach of fiduciary cross claim accrued no later than August 2013, and the cross claim, which was filed more than four years later, is untimely.

L. Knife does not dispute that its cross-claims against Swett & Crawford are subject to a three-year statute of limitations. Nevertheless, L. Knife argues that the cross-claims are timely because: they "relate back" to the date the initial complaint was filed; the cross claims did not accrue until after I issued my October 10, 2017 decision and order; and Swett & Crawford has been "on notice" of "potential litigation" for several years.

CPLR 203 (f) states that "a claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of

transactions or occurrences, to be proved pursuant to the amended pleading."[2] Examination of L. Knife's pleadings in this case shows that it did not give Swett & Crawford notice of its negligence and breach of fiduciary duty claims in its earlier pleadings.

L. Knife's original answer, filed on September 26, 2013, does not even mention Swett & Crawford, and Swett & Crawford had not yet been named in this action. L. ****18** Knife's original answer therefore could not have given notice to Swett & Crawford of its potential liability to L. Knife.

The subsequent pleadings filed by L. Knife that mentioned Swett & Crawford did so only to emphasize Swett & Crawford's lack of involvement with L. Knife. Nowhere in any of those pleadings was Swett & Crawford placed on notice that some transaction or occurrence might lead to L. Knife asserting breach of fiduciary duty and negligence claims against it. In fact, to the extent that any pleadings prior to L. Knife's 2017 amended answer may have placed Swett & Crawford on notice, it was notice that L. Knife believed it had no possible cause of action against Swett & Crawford.

***9** Contrary to L. Knife's argument, the insurance policy and L. Knife's dispute with Great American over payment is not the "transaction" or "occurrence" of which Swett & Crawford had to be put on notice in the pleadings. Instead, L. Knife must have placed Swett & Crawford on notice of some conduct in which Swett & Crawford engaged affecting L. Knife.[3]

L. Knife also appears to argue that its claim against Swett & Crawford did not accrue until the October 10, 2017 decision and order, in which I found an issue of fact with respect to the relationship between Swett & Crawford and Great American (*see* opposition memorandum at 14-15). However, no new facts were presented to me or cited by me in the October 2017 decision and order. My analysis of fact issues concerning Swett & Crawford does not toll any limitations period. In addition, the October 2017 ****19** decision had nothing to do with the relationship between Swett & Crawford and L. Knife. As such, it could not serve as the basis for a "legal right to relief" by L. Knife against Sweet & Crawford.

Finally, L. Knife also argues that because Swett & Crawford was "intimately involved in these proceedings as a non-party," it must have had "notice" of some potential conduct by it, which is the "linchpin of the relation-back doctrine" (opposition memorandum at 12). This argument is meritless. "[T]he fact that the defendants had actual notice . . . [is] insufficient to invoke the relation-back doctrine, since notice must be provided in the original pleading itself" (*Cooper v Sleepy's LLC*, 126 AD3d 664, 666 [2d Dept 2015]).

For the foregoing reasons, L. Knife's cross claims against Swett & Crawford are untimely, and I grant Swett & Crawford's motion to dismiss them.

Great American's Motion to Dismiss L. Knife's Counterclaims for Attorneys' Fees and Other Extra-Contractual Damages (Motion Sequence No. 012)

Great American moves to dismiss defendants' counterclaims for attorney's fees and other extra-contractual damages. In paragraph 65 of the first counterclaim, and in paragraph 78 of the second counterclaim, L. Knife seeks to recover attorneys' fees and costs from Great American. However, neither counterclaim cites any statutory or contractual provision permitting the recovery of attorneys' fees and costs.

New York law is clear that "in the absence of any pertinent contractual or statutory provision with respect to the recovery of amounts expended in the successful prosecution or defense of an action, each party is responsible for its own legal fees" (****20** *Chapel v Mitchell*, 84 NY2d 345, 349 [1994]). Similarly, "an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 324 [1995]; *O'Keefe v Allstate Ins. Co.*, 90 Ad3d 725, 726 [2d Dept 2011] [holding that an insured may not recover its expenses against its insurer in a suit to settle its right under the policy]).[4] Accordingly, L.Knife's demand for attorneys' fees is dismissed.

***10** L. Knife also seeks "consequential and/or punitive damages . . . as a result of Great American's bad faith refusal to pay . . . and further based [on its] wrongful breach of contract and breach of the covenant of good faith and fair dealing." In general, New York law "does not recognize a separate cause of action for breach of the covenant of good faith and fair dealing when a breach of contract claim, based upon the same facts, is also pled" (*Harris v Provident Life & Acc. Ins. Co.*, 310 F 3d 73, 81 [2d Cir 2002]; *New York Univ.*, 87 NY2d at 320.

Here, L. Knife's counterclaim for breach of the duty of good faith and fair dealing is redundant of its breach of contract claim, and simply recasts Great American's alleged conduct as "wrongful" or in bad faith. *See Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 308 A.D.2d 349, 350 (1st Dept.2003) ("Allegations that an insurer had no good faith basis for denying coverage are redundant to a cause of action for breach of contract based ****21** on the denial of coverage, and do not give rise to an independent tort cause of action, regardless of the insertion of tort language into the pleading"). More importantly, L. Knife does not identify any specific acts performed by Great American that would constitute bad faith. Rather, L. Knife alleges that Great American acted in bad faith by denying the claim and by asserting that material facts were misrepresented in the application (*see* answer, ¶ 42; amended answer, ¶ 57). Without more, these allegations are insufficient to support a claim of bad faith denial of insurance coverage.

Finally, L. Knife does not allege in its counterclaims that it has suffered any specific damage because of Great American's alleged bad faith refusal to pay its claim, other than damages associated with the breach of contract claim. For this reason alone, the demand for consequential damages should be dismissed (*see Ebrahimian v Nationwide Mut. Fire Ins. Co.*, 960 F Supp2d 405, 416-417 [ED NY 2013] [dismissing plaintiff's bad faith claims as redundant of its claims for breach of contract because plaintiff did not allege damages suffered because of the denial aside from damages associated with the alleged breach of contract]). [5]

****22** I also dismiss L. Knife's demand for punitive damages. "Punitive damages are not ordinarily available for a breach of contract claim, as their purpose is not to remedy private wrongs but to vindicate public rights." (*Rocanova v Equitable Life Assurance Socy. of United States*, 83 NY2d 603, 619 [1994]). Here, L. demands punitive damages in its prayer for relief, but fails to allege any facts to show that that Great American has committed a pattern of egregious conduct towards the public at large.

Accordingly, Great American's motion to dismiss L. Knife's demands in its counterclaims for attorneys' fees and other extracontractual damages is granted. [6]

***11** In accordance with the foregoing, it is

ORDERED that the motion of second third-party defendant Swett & Crawford of Georgia for summary judgment on the causes of action asserted by second third-party plaintiff TGA Cross Insurance, Inc. against it (motion sequence no. 9) is granted to the extent that the first cause of action for breach of contract is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of third-party defendant TGA Cross Insurance, Inc. for summary judgment dismissing the third-party complaint of third-party plaintiffs L. Knife & Son, Inc. and U.B. Distributors, LLC (motion sequence no. 10) is denied; and it is further

****23** ORDERED that the motion of defendant Swett & Crawford of Georgia for an order dismissing with prejudice the cross claims asserted against it by L. Knife & Son, Inc. and U.B. Distributors, LLC (motion sequence no. 11) is granted, and the cross-claims are dismissed as against it; and it is further

ORDERED that the motion of plaintiff Great American Insurance Company for an order dismissing the demands of defendants L. Knife & Son, Inc. and U.B. Distributors, LLC for attorney's fees and costs, consequential damages and punitive damages (motion sequence no. 12) is granted, and these counterclaims are dismissed; and it is further

ORDERED that the remainder of the action is severed and shall continue.

The parties are directed to appear for a pretrial conference on March 20, 2019 at 2:15 p.m.

This constitutes the decision and order of the court.

2/112019

DATE

<<signature>>

SALIANN SCARPULLA, J.S.C.

Footnotes

1 In the main action, Great American contends that the L. Knife insurance policy is void ab initio because of the alleged misrepresentations regarding the TIV. Similarly, L. Knife's third-party complaint is premised on the following allegation: "Any failure to provide requested information [concerning TIV] as alleged by Great American, is due to a failure or omission committed or made by TGA Cross, who was, at all times, acting as L. Knife's broker and agent" (third-party complaint, ¶ 53). In addition, TGA Cross's second third-party complaint alleges: "If Great American is permitted to rescind, deny or disclaim coverage in connection with the Loss on the basis of material misrepresentation or misrepresentations made regarding the total insurance value of the Property and its contents, such alleged misrepresentation(s) arose due to Swett & Crawford's failure to exercise reasonable care in the course of obtaining such insurance coverage" (TGA Cross's second third-party complaint, ¶ 44).

2 Similarly, CPLR 203 (d) allows relation back for the late assertion of defenses and counterclaims: "A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed."

3 *See, e.g., D&D Knits v Grand Morgan Realty Corp.* (213 AD2d 372, 373 [2d Dept 1995]); *Spade v. Neiss*, 2011 Slip Op 30958[U] at *14 [Sup. Ct. Nassau Co. 2011].

4 There is one limited exception to the general rule that an insured may not recover attorneys' fees to settle rights under an insurance policy. An insured may recover attorneys' fees incurred in defending against the insurer's action where the insurer has a duty to defend the insured, *i.e.*, suits involving liability insurance (*Insurance Co. of Greater N.Y. v Clermont Armory, LLC*, 84 AD3d 1168, 1171 [2d Dept 2011]). That limited exception is inapplicable here.

5 L. Knife conlusorily alleges that it "was damaged in an amount of $2 million representing consequential damages," but has not identified the specific damages that make up this amount, or any damages that did not flow directly from the breach of contract. These allegations are insufficient to support a claim for consequential damages (*see Jane St. Holding, LLC v Aspen Am. Ins. Co.*, 2014 WL 28600, *10, 2013 US Dist LEXIS 182110, *28 [SD NY 2014] [" '(m)ere difference of opinion between an insurer and an insured over the availability of coverage does not constitute bad faith; to show bad faith the insured must demonstrate that 'no reasonable carrier would, under the given facts' deny coverage"] [citation omitted]).

6 Although I may have not specifically discussed in detail each of the parties' voluminous arguments, I have considered them all, and have found that any not specifically discussed do not change my analysis and conclusions on these four motions.