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COMMITTEE ON OPINIONS

FOX PAPER, LTD., Plaintiff,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MIDDLESEX COUNTY
	:	DOCKET NO. MID-L-2818-16 CIVIL ACTION
HANOVER INSURANCE COMPANY and SANO BROKERAGE CO., Inc**.,** Defendants,	:	OPINION

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Honorable Arnold L. Natali, Jr., J.S.C.:

Presently before the Court in this broker malpractice and insurance coverage action filed by Plaintiff, Fox Paper Ltd. ("Fox"), is the motion by Defendant, Sano Brokerage Company, Inc., ("Sano") to dismiss the Complaint for failure to state a claim, pursuant to R. 4:6-2(e) or, in the alternative, for summary judgment in accordance with R. 4:46. Defendant Hanover Insurance Company ("Hanover") has neither joined nor opposed Sano's application. The Court heard oral argument on September 9, 2016, and in accordance with R. 1:6-2(f), issued an oral decision and

accompanying Order granting in part and denying in part Sano's application.[1] Specifically, the Court held:

- a conflict exists between the substantive law of New York and New Jersey as it relates to the duty of a broker to an insured;

- New York substantive law shall apply to the broker malpractice claims asserted by Fox against Sano. Applying the choice of law principles detailed in P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132 (2008) and the Restatement (Second) of Conflict of Laws (1971) (hereinafter the Restatement), New York has the more significant relationship to the issues in the case as compared to New Jersey. That conclusion is supported by an appropriate analysis pursuant to section 145 as well as the principles and considerations outlined in section 6 of the Restatement;

- Sano's R. 4:6-2(e) application is converted to a motion for summary judgment pursuant to R. 4:46 as Sano relies upon matters outside of the pleadings. Based on the genuine and material facts in the motion record, combined with the absence of necessary discovery, Sano's motion is denied without prejudice;

- Sano's claim that New Jersey is such an inconvenient forum that dismissal is warranted in favor of a New York forum is denied without prejudice; and

- the discovery track assignment shall be changed to Track 607, professional negligence because (1) the allegations in the Complaint clearly address professional negligence issues of an insurance broker and (2) both Sano and Fox consent to the re-designation and Hanover has filed no opposition on the issue.

Factual and Procedural Background

Fox is a New York corporation that distributes party and catering products and has a current principal place of business in Edison, New Jersey. On the date of the loss that is the basis for Fox's claims in this case, Fox maintained offices and a warehouse in Brooklyn, New York. Sano is a New York insurance broker, is incorporated in the State of New York and has a principal place of business in Garden City, New York. Hanover is a New Hampshire corporation with its principal

[1] As the Court advised the parties at oral argument, this Opinion is provided as further support for the Court's September 9, 2016 Order and oral decision.

place of business in Massachusetts. Hanover sells insurance products throughout the United States and has gained substantial premiums in the states of New York and New Jersey. Hanover delivered the insurance policy at issue, and to which the broker malpractice claims emanate, to Fox's then offices in Brooklyn, New York.

According to Fox, Sano acted as its broker in procuring insurance coverage from Hanover for certain personal and real property located in Brooklyn, New York related to Fox's business operations. On October 29, 2012, while the Hanover coverage was in effect, Hurricane Sandy hit the New York City metropolitan area. Fox alleges that due to Hurricane Sandy's high gusts of wind, its Brooklyn, New York warehouse was severely damaged by rain and other elements entering its insured premises. Approximately one week later, on November 7, 2012, Fox sustained additional damage, and it contends covered losses, when a Nor'easter storm struck the New York City area. In total, Fox alleges to have incurred $1,567,044.00 in related property damage to its warehouse and insured property.

The Contentions of the Parties

In its Complaint, Fox alleges that Sano failed to recommend or advise Fox to obtain flood insurance for its New York operations prior to Hurricane Sandy. In this regard, Plaintiff alleges that Sano had a professional duty to provide advice and recommendations for appropriate and necessary insurance coverage. Plaintiff also claims Sano breached these professional responsibilities when it failed to provide Fox with accurate information pertaining to the availability of flood insurance.

As noted, in lieu of an answer, Sano moved to dismiss Fox's Complaint. In its application, Sano maintains that a New Jersey Court applying its choice of law rules is required under the applicable significant relationship test to apply New York substantive law to the broker

malpractice and related claims against Sano in this case. Further, Sano maintains that an actual conflict exists between the laws of New York and New Jersey as they relate to the duty owed by a broker to an insured. Once New York law is applied, Sano contends that the Complaint fails to state a cognizable claim for relief. Alternatively, Sano urges the Court to dismiss the Complaint pursuant to the doctrine of forum non conveniens and also seeks a track re-designation from complex commercial to professional negligence.

Fox opposes the motions on three primary grounds. First, it contends that there is no practical difference or conflict between the laws of New York and New Jersey as they relate to a broker's duty to an insured and therefore no choice of law determination is required. Second, it argues that the allegations in Fox's Complaint, in which it avers that Sano failed to advise it of all necessary coverages including contents-based flood insurance, are sufficient to deny the instant application even if New York law applies, particularly at this early stage of the litigation. Finally, Fox opposes Sano's alternative request for a forum non conveniens dismissal because of the deference afforded to a resident plaintiff's choice of forum, the lack of an appropriate discovery record, its significant ties to New Jersey, the parties, witnesses and evidence.

Conclusions of Law

A. R. 4:6-2 and R. 4:46

In considering a motion to dismiss pursuant to R. 4:6-2(e), a court must search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). Every "reasonable inference of fact" must be accorded to the plaintiff. Id. (citations omitted). At such a preliminary stage of the litigation, "the Court is not concerned with the ability of plaintiffs

to prove the allegation contained in the complaint." Id. (citations omitted). A motion to dismiss for failure to state a claim will be granted only if even a generous reading of the allegation does not reveal a legal basis for recovery. Camden County Energy Recovery Assoc. v. NJDEP, 320 N.J. Super. 59, 65 (App. Div. 1999), aff'd, 170 N.J. 246 (2001). As a result, a movant faces a difficult task to meet its burden of persuasion prescribed by R. 4:6-2(e). Printing Mart-Morristown, supra, 116 N.J. at 746. Finally, in the rare circumstances that the court grants such a motion, it is typically dismissed without prejudice. Id. at 772.

When a R. 4:6-2(e) motion relies upon matters outside the pleading, the motion shall be treated as one for summary judgment. R. 4:6-2. Under such circumstances, the matter will be disposed of in accordance with R. 4:46, giving parties a "reasonable opportunity to present all material pertinent to such a motion." Id. Here, the Court concludes that Sano's motion should be treated as a motion for summary judgment, pursuant R. 4:46, as it relies on materials outside of the pleadings. Indeed, both Fox and Sano rely upon certifications and attached exhibits neither referenced in the Complaint nor judicially noticeable.

Summary judgment should be denied where "the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party." Brill v. Guardian Life Ins. Co. of Amer., 142 N.J. 520, 540 (1995). Further, as Brill instructs, pursuant to R. 4:46-2, "a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Id. at 529. Prior to granting a summary judgment, a trial court should also make the determination of whether the matter is ripe for consideration. Salomon v. Eli Lilly & Co., 98 N.J. 58, 61 (1984). The court should be sure to "afford every litigant who has a bona fide cause of action or defense

the opportunity for full exposure of his case." Osalacky v. Borough of River Edge, 319 N.J. Super. 79, 87 (App. Div. 1999) (quoting Velantzas v. Colgate-Palmolive Co. Inc., 109 N.J. 189, 193 (1988)).

B. Choice of Law

As the forum state, New Jersey applies its choice of law rules. See Rowe v. Hoffman-LaRoche, Inc. 189 N.J. 615, 621 (2007). New Jersey's choice of law principles were addressed by the New Jersey Supreme Court in P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 135-36 (2008). In Camp Jaycee, the Court applied the "most significant relationship test" detailed in the Restatement to resolve choice of law disputes in tort actions. As detailed by our Supreme Court, courts are directed to determine first whether a conflict exits between the substantive laws of the two respective states. Id. at 143. If a conflict exists, the court's analysis proceeds– as it relates to personal injury actions – by applying the presumption that the parties' rights and liabilities will be governed by the location of where the injury occurred. See section 146 of the Restatement (Second) of Conflict of Laws (1971). Id. at 144.

Next, "[o]nce the presumptively applicable law is identified, that choice is tested against the contacts detailed in section 145 and the general principles outlined in section 6 of the Second Restatement." Id. at 136. Unless overcome by another state having a more significant relationship to the parties, the section 146 presumption shall apply (again in the context of a dispute involving personal injuries). Id. As explained in greater detail, infra, applying the facts of this matter to the choice-of-law analysis detailed in Camp Jaycee and the Restatement, New York, has the most significant relationship to the claims Fox has asserted against Sano. Further, the Court concludes that the application of New York law is further supported by the factors and considerations detailed in sections 145 and 6 of the Restatement.

As noted, when determining whether a conflict exists between the laws of two states, the court shall examine "the substance of the potentially applicable laws to determine whether 'there is a distinction' between them." Camp Jaycee, supra, 197 N.J. at 143 (quoting Lebegern v. Forman, 471 F.3d 424, 430 (3d Cir. 2006)). If no conflict exists, "there is no choice-of-law issue to be resolved." Id. (citing Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 621 (2007)).

Comparing the laws of New York to those of New Jersey with respect to an insurance broker's duties to an insured, it is clear that a conflict of law exists between the states. By way of example only, under New Jersey law, "an insurance broker owes a duty to the insured to act with reasonable skill and diligence in performing the services of a broker." Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Group, Inc., 135 N.J. 182, 188-89 (1994). Further, due to the increasingly complex nature of the insurance industry, New Jersey courts have held that a broker must have "the specialized knowledge required to understand all of its intricacies." Aden v. Fortsh, 169 N.J. 64, 78 (2001) (citations omitted). New Jersey courts have further characterized brokers as a fiduciary and in that capacity, require insurance brokers to execute their business activities in conformity with its duty of good faith and reasonable skill. Id. at 78-79 (stating an insurance broker must "possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected").

The New Jersey Supreme court in President v. Jenkins stated that a broker is responsible "(1) to procure the insurance; (2) to secure a policy that is neither void nor materially deficient; and (3) to provide the coverage he or she undertook to supply." President v. Jenkins, 180 N.J. 550, 569 (2004) (citing Rider v. Lynch, 42 N.J. 465, 476 (N.J. 1964). Once a broker agrees to procure a specific insurance policy for a client, the broker may be liable for damages if the broker is negligent and fails to adhere to such standards. Aden, supra, 169 N.J. at 79; See also Carter

Lincoln-Mercury, Inc., 135 N.J. at 189 (specifying that the duty an insurance broker owes to the client encompasses the obligation to advise a client of the available insurance options) (citations omitted).

Further, in certain instances, under New Jersey law an insurance broker may assume duties in addition to, and beyond those set forth by the court in Rider, supra 42 N.J. at 476; Sobotor v. Prudential Property & Casualty Ins. Co., 200 N.J. Super. 333 (App. Div. 1984); Glezerman v. Columbian Mut. Life Ins. Co., 944 F.2d 146, 150-51 (3d Cir. 1991). For example, when an insurance broker and an insured have formed a "special relationship," the insurance broker can impliedly "'assume duties in addition to those normally associated with the agent-insured relationship' by conduct that invited plaintiff's detrimental reliance." Triarsi v. BSC Group Services, 422 N.J. Super. 104, 117 (App. Div. 2011) (quoting Glezerman, 944 F.2d. at 150 (3d Cir. 1991)).

In contrast, New York law does not impose the same professional duties upon an insurance broker as does New Jersey. Under New York law, insurance brokers have a "duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage." Murphy v. Kuhn, 90 N.Y.2d 266, 270 (App. Div. 1997). Generally, New York courts elect to impose liability for negligent misrepresentation "only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." Id. (citations omitted). Positions requiring specialized expertise are typically limited to lawyers, engineers, or other professionals who, "by virtue of their training and expertise, may have special relationships of confidence and trust with their clients." Id. (citations omitted).

As further explained in Murphy v. Kuhn, supra, because of "the uniqueness of customary and ordinary insurance relationships and transactions," New York law has reserved application of such additional duties, as they arise out of a "special relationship" between an insurance broker and the insured, only in "exceptional situations." Id. at 273. New York courts have identified three "exceptional situations" that may give rise to a "special relationship." Id. at 272. In particular, such "exceptional situations" may arise when

> (1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on.

Id. (citations omitted).

As noted, upon review of the relevant New Jersey and New York authority regarding an insurance broker's duty of care to its insured, it is clear that a conflict of law exists between the states. Pursuant to New Jersey law, insurance brokers are generally "expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected." Rider, 42 N.J. at 476. In contrast, New York courts have expressly declined to view insurance brokers as fiduciaries owing a higher, professional standard of care to the insured. Murphy, supra, 90 N.Y.2d. at 273 (reasoning that "[i]nsureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act"). Rather, New York has determined that the continuing duty to advise an insured to obtain additional coverage is a supplement to the broker's professional duties, but only when a special relationship is present. Id. In other words, unless a special relationship is established between the parties, New York does not impose the fiduciary-like obligations on insurance brokers.

Camp Jaycee and the Restatement instruct that once a conflict in the substantive law of two or more states has been established, additional analysis is required to determine which state's law will be applied to a particular issue or claim. Camp Jaycee, supra, 197 N.J. at 144. In tort actions not involving personal injury, Camp Jaycee and the Restatement direct courts to consider sections 145 and section 6 to resolve the dispute. Id.[2]

The first section 145 contact to be considered is the situs where the injury occurred. Restatement (Second) of Conflict of Laws (1971) § 145(2)(a). Here, the property damage occurred in New York. Second, the court must determine where the conduct that caused the injury occurred, which is also New York. Id. at § 145(2)(b). There is no dispute that both Plaintiff and Sano were New York corporations with principal places of business or significant operations in New York at the time the relationship between the two parties was formed. In fact, the Hanover policy at issue underlying the claim was sent to Fox's Brooklyn, New York offices and covered property located in New York. Similar to the circumstances involved in the instant matter,

> [w]hen both conduct and injury occur in a single jurisdiction, with only "rare exceptions, the local law of the state where conduct and injury occurred will be applied" to determine an actor's liability. That is so because "a state has an obvious interest in regulating the conduct of persons within its territory and in providing redress for injuries that occurred there." The place of injury becomes less important when it is simply fortuitous.

Fu v. Fu, 160 N.J. 108, 125-26 (1999) (quoting Restatement, supra, § 145 comment d) (internal citations omitted). Based on the motion record, the Court understands that the statements allegedly made by Sano to Fox regarding the scope of the insurance coverage occurred in New York. Again,

[2]In its moving papers, Sano relied on Section 146 of the Restatement in support of its request that the Court apply New York law. See Sano's Moving Brief at p. 11. However, Section 146, and the presumption that the law of the place of the injury should typically apply, relates to personal injury actions. After oral argument, the Court reviewed again the Complaint, the parties' submissions and all related pleadings and confirmed there is no allegation in the Complaint that asserts claims of personal injury. Accordingly, Section 146 is not applicable. Rather, the Court's analysis, consistent with the Restatement and Camp Jaycee proceeds pursuant to Section 145 and Section 6. See discussion at pp. 10-16, infra.

the insurance policy at issue was sent to Fox's New York facility and there is no indication that the relevant and contemporaneous discussions at the core of the allegations in Fox's Complaint against Sano took place in a state other than New York.

As the Restatement instructs, the place of injury will not play a significant role in the selection of applicable law when the place of injury can be said to be by happenstance or is fortuitous or if bears little causal relationship to the occurrence:

> This will be so when, such as in the case of fraud and misrepresentation… there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury, or when, such as in the case of multistate defamation… injury has occurred in two or more states.

See e.g., Camp Jaycee, supra, 197 N.J. at 146 (quoting Restatement, supra, § 145 comment e). Here, the place of the injury was not incidental or fortuitous. New York was the location where the parties (Fox and Sano) transacted business, where they were incorporated, where the insurance policy was delivered and where the relevant communications at issue occurred. Further, the insured property at issue is a warehouse located in Brooklyn, New York. Pursuant to section 145, the third factor that should be considered is "the domicile, residence, nationality, place of incorporation and place of business of the parties." Restatement, supra, § 145(2)(c). It is important that when analyzing this contact, that a court focus not only the state of incorporation, but also the corporation's principal place of business, as "the principal place of business is a more important contact that the place of incorporation…" Camp Jaycee, supra, 197 N.J. at 146 (quoting Restatement, supra, § 145 comment e). Here, Plaintiff asserts that its principal place of business in New Jersey. On this issue the Court also considered that at the time the relevant events occurred, the factual underpinning of the Complaint relate to Plaintiff's then New York operations and property. While Plaintiff notes that Sano is licensed in New Jersey as an insurance broker, Plaintiff does not dispute that Sano's principal place of business also is New York.

The final "section 145 [factor to be considered] is the place where the relationship between the parties is centered." Id. at 147. As relevant broker communications occurred in New York and the resulting insurance policy that covered Fox's Brooklyn, New York offices and warehouse were in New York, application of the legal authority of New York is appropriate in this action. While the motion record does refer to certain New Jersey contacts, they occurred after the policy was issued and the misrepresentations at the core of Fox's Complaint were made. In sum, it does not appear disputed that while some conduct involving the parties' relationship occurred in New Jersey, critical, contemporaneous and relevant discussions, communications and decisions regarding potential and actual insurance coverage for a New York warehouse involving two New York companies took place in New York. Thus, the strength of New Jersey's contacts, as they relate to the dispute between Sano and Fox, pale in comparison to New York's contacts.

After completing a Section 145 analysis, a court must assess the principles of section 6 and measure the significance of those contacts to determine whether such considerations increase or "diminish the values to be ascribed to the contacts relevant to the issue presented." Camp Jaycee, supra, 197 N.J. at 147. Section 6 of the Restatement provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability, and uniformity of result, and
> (g) ease in determination and application of the law to be applied.

"Reduced to their essence, the section 6 principles are: (1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." Camp Jaycee, supra, 197 N.J. at 147 (quoting Erny v. Estate of Merola, 171 N.J. 86, 101-02 (2002) (quoting Fu, supra, 160 N.J. at 122)).

With respect to the competing state interests, the "focus is not on the importance of the policy to the state but on the relationship between the policy and the contacts." Id. at 148. Here, we are faced with two conflicting policies. The policy behind the duty imposed upon insurance brokers under New Jersey law is rooted in "the increasing complexity of the insurance industry." Aden, supra, 169 N.J. at 78 (quoting Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 260 (App. Div.1987) (quotations omitted)). To ensure that New Jersey brokers are keeping up with the specialized complexities of the insurance industry, New Jersey requires its licensed insurance brokers to possess "the specialized knowledge required to understand all of its intricacies." Id.

New York courts have expressly rejected the policy adopted by New Jersey, taking the position that the relationship between an insurance broker and the client is generally not recognized as a professional relationship. Murphy, supra, 90 N.Y.2d. at 270-71. Thus, such an ordinary commercial relationship does not usually lead to requiring the broker to give ongoing guidance and advice. Id. at 273. Unless the insured asks for the insurance brokers to advise and act, New York believes that the insured is in the best position to protect itself and its property, having knowledge of the assets it has acquired. Id. Additionally, New York courts have reasoned that to hold insurance brokers to a higher degree of standard of care would "open flood gates to even more complicated and undesirable litigations." Id.

As noted above, the focus is on the relationship between the policy and the contacts. Here, both states have chosen a policy that seeks to regulate the duty of insurance brokers licensed in the state, but each applies a different means to achieve the same end. New Jersey has chosen to protect the consumer by identifying insurance brokers as professionals, and holding them to higher standard of care, at least in ordinary situations. Aden, supra, 169 N.J. at 86-87. Conversely, New York has determined that the relationship between an insured and insurance broker is not a professional relationship, as the insured is likely to have superior knowledge of the necessary insurance for its assets. Murphy, supra, 90 N.Y.2d. at 273. To hold otherwise would result in unnecessary and over complicated litigation. Id. Considering the contacts outlined above, New Jersey would not be advancing this policy by regulating the conduct of a New York insurance broker for allegedly failing to procure adequate insurance coverage to protect property in New York for a New York incorporated plaintiff.

The interest of interstate comity looks to "further harmonious relations between the states and facilitate commercial intercourse between them." Restatement, supra, § 6 comment d. When considering this principle, the court is instructed to consider whether application of the law of the other state will frustrate the policies of the interested state. Fu, supra, 160 N.J. at 122 (citing Restatement, supra, § 145 comment b). New Jersey has continuously deferred to the rights of other states to regulate conduct within its borders, especially when such conduct is directed to both residents of the state and non-residents. Camp Jaycee, supra, 197 N.J. at 153. Application of New Jersey law here will frustrate the policy interests of New York, while in no way subverting New Jersey's policy to protect an insured party, by way of holding insurance brokers in New Jersey to a heightened professional standard of care.

The interests of judicial administration require this Court to consider such factors that promote uniformity and predictability. Camp Jaycee, supra, 197 N.J. at 154. "[W]here, as here, the contacts and principles of the Restatement lead inexorably to the conclusion that a particular state's relationship to the parties and issues is predominant, judicial administration considerations necessarily yield." Camp Jaycee, 197 N.J. at 154-155 (citing Erny, supra, 171 N.J. at 102).

Accordingly, application of the choice-of-law principles detailed in Camp Jaycee to the facts in the motion record requires the Court to conclude that New York law applies. The section 145 contacts, in combination with the principles listed in section 6 of the Restatement, support the application of the law of New York.

Having resolved the choice of law issues, the Court must next determine if, under the forum state's procedural law, dismissal is appropriate. Camp Jaycee, 197 N.J. at 144. As detailed above, although New York law does not impose the same duty upon insurance brokers that New Jersey does, New York does acknowledge that additional duties may arise between a broker and an insured if a "special relationship" exists. Murphy, supra, 90 N.Y.2d. at 273. Here, Fox has raised a genuine issue of material fact as to whether a special relationship exists between Sano and Plaintiff. Plaintiff alleges that it formed a significant professional relationship with Sano over the course of many years. Plaintiff also contends that it expected Sano to give competent advice, as it performed services within its professional expertise.

Further, Plaintiff does more than allege that the special relationship was born out of a longstanding business relationship, which renders this matter distinguishable from the cases cited by Sano. Notably, Plaintiff asserts that prior to renewal, Fox communicated with Sano to ensure that the warehouse was adequately covered. Sano purportedly advised Fox that all the necessary coverage and more was procured. Further, Fox maintains that prior to Superstorm Sandy, Sano

contacted Plaintiff about procuring flood insurance for its New Jersey location and the Fox executives' New Jersey home, but failed to inquire or advise about the propriety of flood insurance for the Brooklyn, New York warehouse that was located within feet of the water. Fox further asserts that this conversation occurred after Plaintiff inquired into the terms of the policy to ensure that all necessary coverage had been obtained.

At a minimum, these factual circumstances raise a genuine issue of material fact, as to whether a special relationship existed. Murphy, supra, 90 N.Y.2d. at 271-72. As noted by the Murphy court, a determination of "whether the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact." Id. at 271.

Separately, Sano's motion must be denied as it is premature. Having plead appropriately a cause of action under New York law for broker negligence, and established genuine and material factual questions on the current motion record regarding a special relationship, it would be improper to grant summary judgment at this stage. The parties have not yet propounded or responded to a single written discovery request and not a single witness has been deposed. In such circumstances, summary judgement under R. 4:46 is improper.

C. Forum Non Conveniens

Defendant Sano also contends that Plaintiff's complaint should be dismissed under the doctrine of forum non conveniens claiming New Jersey is not the proper forum in which this case should be litigated. Typically, "…a motion for dismissal due to forum non conveniens should not be heard unless the movant has made a good faith effort to obtain discovery and can provide the court with a record verifying that discovery is unreasonably inadequate for litigating in the forum chosen by the plaintiff." Kurzke v. Nissan Motor Corp. in U.S.A., 164 N.J. 159, 168 (2000).

Consideration, however, should also be given to the heavy costs that may be incurred by a party if such a dismissal is denied but granted in a later stage in the litigation. Id. With respect to timeliness of a forum non conveniens application, the Court in Kurzke, stated:

> a defendant must assert a motion to dismiss for *forum non conveniens* within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant. While untimeliness will not effect a waiver, it should weigh heavily against the granting of the motion because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconvenience the doctrine is meant to relieve.

Id. (internal citations omitted).

Generally, the doctrine of forum non conveniens permits a court to "… decline jurisdiction whenever the ends of justice indicate a trial in the forum selected by the plaintiff would be inappropriate." Kurzke, supra 164 N.J. at 164 (citing D'Agostino v. Johnson & Johnson, Inc., 225 N.J. Super. 250, 259 (App. Div. 1988)). As the doctrine is equitable in nature, the determination of whether the doctrine of forum non conveniens is applicable to the pending matter is typically within the sound discretion of the trial court. Kurzke, supra, 164 N.J. at 165 (citing Civic Southern Factors Corp. v. Bonat, 65 N.J. 329, 332 (1974)).

The doctrine is generally invoked to protect the private interests of the litigants, such as availability of witnesses and the ease of access to other sources of proof." Mandell v. Bell Atl. Nynex Mobile, 315 N.J. Super. 273, 279 (1997) (citing Semanishin v. Metropolitan Life Ins. Co., 46 N.J. 531, 533 (1966)). When assessing the applicability of the doctrine to the instant matter, the Court considered various private and public interest factors. The Court considered the following private interest factors:

> (1) the relative ease of access to sources of proof;
> (2) the availability of compulsory process for attendance of unwilling witnesses;
> (3) the cost of obtaining the attendance of willing witnesses;

(4) the possibility of viewing the premises; and
(5) and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Mandell, supra 315 N.J. Super. at 279 (citing Derensis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003, 1007 (D.N.J.1996) (internal citations omitted)).

Further, the Court considered and weighed the following public interest factors:

(1) the administrative difficulties flowing from court congestion;
(2) the local interest from having localized controversies decided at home;
(3) the interest of having a trial of a diversity case in a forum that is at home with the law that must govern the action;
(4) the avoidance of unnecessary problems in conflict of laws or the application of foreign law; and
(5) the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. at 279-80.

As to the public interest factors, it is essential that the Court looks beyond

> the interests of the specific parties to any dispute and to determine on a broader societal level whether the action should be maintained here. In this regard, it is simply not enough that the plaintiff chooses this forum, it is essential that, looking at the public interest considerations, there be a connection with the forum, a reason why it should in fairness to the citizens of this state be permitted to remain here.

Mandell, supra, 315 N.J. Super. at 283.

In this case, when evaluating the private and public interest factors, the Court balanced the factors, by assessing the relevancy of each factor, in relation to the lawsuit at issue. See Derensis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003, 1007 (D.N.J. 1996) (citing Van Cauwenberghe v. Biard, 486 U.S. 517, 528 (1988)). Additionally, the Court considered that generally courts give deference to a plaintiff's choice of forum. Mandell, supra, 315 N.J. Super. at 281 (internal citations omitted). In this regard, a defendant will be unable to overcome the deference afforded to plaintiff's choice in forum "… unless there is a showing of hardship or an

equally compelling reason rising to the level of supporting a finding that plaintiff's choice is demonstrably inappropriate." Id. (citation omitted).

The Court denies Sano's forum non conveniens application without prejudice for two reasons. First, while giving consideration to the Kurzke's court's concerns regarding granting such an application at a later stage in the litigation, the Court concludes that Sano has not established that "discovery is unreasonably inadequate for litigating in the forum chosen by the plaintiff." See Kurzke, supra, 164 N.J. at 168.

Second, on the current motion record, the Court cannot conclude that a balancing of the private and public factors warrants dismissal. While certain of the public interest factors may support a New York forum (i.e., New York's interest in having localized controversies decided at home and the interest in having a New York court resolve a case involving New York law, at least as to one of the defendants), a balancing and deliberation of the remaining private and public interest factors supports the Court's decision to maintain this New Jersey forum.

For example, it has not been established that any "administrative difficulties flowing from court congestion" support dismissal nor does the Court anticipate any problems in the application of New York law here. New Jersey trial courts regularly apply the law of other states to the entirety of a litigated matter or on an issue by issue basis, as necessary. Finally, there is no unfairness in requiring New Jersey citizens to appear for jury duty in a case that involves a plaintiff with a current principal place of business in New Jersey.

Additionally, evidence relevant to the issues in the case is readily available in New Jersey as New York. Fox and its representatives are located in New Jersey as are relevant documents. It also appears that the geographic proximity between New York and New Jersey minimizes greatly any difficulties in accessing proofs. Further, it has been represented to the Court that Defendant

Santo Lombardozzi, the principal of Sano, is licensed as a New Jersey broker and regularly does business within the State. In addition, it does not appear that the cost of obtaining and attendance of willing witnesses will present any material difficulties if this matter proceeds in New Jersey and there do not appear any practical problems that would prevent any trial in this matter from proceeding in New Jersey expeditiously and inexpensively.

Conclusion

For the aforementioned reasons, the Court concludes that New York law shall apply to the broker malpractice claims asserted by Fox against Sano in this matter. However, Sano's motions for dismissal pursuant to R. 4:46, R. 4:6-2(e) and on forum non conveniens grounds are denied. Sano's motion for a track re-assignment is granted.

Date: October 6, 2016

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Honorable Arnold L. Natali Jr., J.S.C.