NOT FOR PUBLICATION WITHOUT THE
WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

QUALITY PRO PAINTERS, LLC Plaintiff, vs. GLOBAL UNDERWRITERS AGENCY, INC. d/b/a GLOBAL ASSOCIATES, MICHAEL SCIARRA, GLOBAL INDEMNITY INSURANCE AGENCY, GEORGE ZERLANKO, ANA SILVA, COSTA DO SOL AGENCY, INC., CLAUDIA RUIZ, MARIA ISABEL COSTA, ENVIRONMENTAL UNDERWRITER SOLUTIONS and BETH LINTON, Defendants.	: SUPERIOR COURT OF NEW JERSEY : HUDSON COUNTY: LAW DIVISION : DOCKET NO. HUD-L-5862-12 **Civil Action** **OPINION**

FILED
MAR 11 2015
Barry P. Sarkisian, J.S.C.

Date of Hearings: February 6 and February 20, 2015

Date of Decision: March 11, 2015

SARKISIAN, J.S.C.

ARTURI, D'ARGENIO, GUAGLARDI & MELITI, LLP
Attorney for Plaintiff Quality Pro Painters, LLC
(Jason S. Nunnermacker, Esq. appearing)

FARKAS & DONOHUE, LLC
Attorney for Defendant Global Underwriters Agency, Inc.
d/b/a Global Associates
(Charles E. Murray, III, Esq. appearing)

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendants Global Indemnity Insurance Agency and
George Zerlanko
(Brian Gates, Esq. appearing)

WADE CLARK MULCAHY
Attorney for Defendants Costa Do Sol Agency, Inc., Claudia Ruiz and Maria Isabel Costa
(Denise Rica, Esq. appearing)

KAUFMAN, DOLOWICH & VOLUCK, LLP
Attorney for Defendants Beth Linton and Environmental Underwriter Solutions
(Charles Kellett, Esq. appearing)

Presently before the Court are four (4) motions for summary judgment pursuant to R. 4:46-2 filed by (1) Plaintiff Quality Pro Painters, LLC ("plaintiff") against all defendants, (2) defendants Insurance Office of America, d/b/a Environmental Underwriter Solutions ("Environmental Underwriter Solutions") and Beth Linton, (3) defendants Costa Do Sol Agency, Inc ("Costa Do Sol"), Claudia Ruiz, and Maria Isabel Costa, and (4) defendants Global Indemnity Insurance Agency and George Zerlanko.

This matter arises out of a 10 count amended complaint filed by plaintiff, a lead hazard abatement contractor, alleging a variety of causes of action against defendants for their alleged failure to procure an "A" rated insurance policy which plaintiff is required to procure under New Jersey regulations governing the certification of lead hazard abatement contractors (N.J.A.C. 5:17-2.3(b)(9)). The counts in plaintiff's complaint are as follows:

I. **Professional Negligence**: Global Underwriting d/b/a Global Associates ("Global Associates) and Michael Sciarra
II. **Breach of Fiduciary Duty:** Global Associates and Michael Sciarra
III. **Breach of Contract**: Global Associates and Michael Sciarra
IV. **Professional Negligence**: Global Indemnity Insurance Agency, George Zerlanko, and Ana Silva
V. **Breach of Fiduciary Duty**: Global Indemnity Insurance Agency, George Zerlanko, and Ana Silva
VI. **Professional Negligence**: Environmental Underwriting Solutions and Beth Linton
VII. **Breach of Fiduciary Duty**: Environmental Underwriting Solutions and Beth Linton
VIII. **Professional Negligence**: Costa Do Sol, Maria Isabel Costa, and Claudia Ruiz
IX. **Breach of Fiduciary Duty**: Costa Do Sol, Maria Isabel Costa, and Claudia Ruiz
X. **Breach of Contract**: Costa Do Sol, Maria Isabel Costa, and Claudia Ruiz

Since all defendants, except Global Associates, have filed motions for summary judgment along with the plaintiff, the Court presents the operative facts which establishes a weaved time line as to each parties' conduct, or lack thereof, during the operative period.

In 2009, plaintiff became a certified lead abatement contractor. Plaintiff provided lead abatement services to various New Jersey State Agencies and commercial management projects. N.J.A.C. 5:17-2.3(b)(9) requires certified lead abatement contractors to have proof of commercial general liability insurance with an "A" or better rating from A.M. Best. N.J.A.C. 5:17-2.3(b)(9) states:

> (b) Every application for certification shall include the following:
>
> 9. Proof of insurance as follows: a minimum of $ 1 million in commercial general liability coverage written on an occurrence basis without a sunset clause or provision by an entity admitted or otherwise approved to write policies in New Jersey by the New Jersey Department of Insurance and with an "A" or better rating from A.M. Best. Insurance coverage meeting this requirement shall be in effect during the entire time that a contractor remains certified and cannot be allowed to lapse.

N.J.A.C. 5:17-2.3(b)(9).

For the time period between March 17, 2009 and March 17, 2010, defendants Costa Do Sol, Claudia Ruiz, and Maria Isabel Costa procured an insurance policy from ACE Westchester Specialty Group ("ACE Westchester") for plaintiff through Mortsan General Agency, a wholesale insurance broker. Costa Do Sol was aware that plaintiff held a license for lead abatement from the Department of Community Affairs ("DCA"), and was aware of the insurance requirements plaintiff had to fulfill. The ACE Westchester policy had an "A" rating from A.M. Best.

After securing the ACE Westchester policy for plaintiff, Maria Isabel Costa notified Jim Zach, a field supervisor with the DCA, on March 25, 2009 that plaintiff had secured a general contractor insurance policy with an "A" rating from A.M. Best as required under N.J.A.C. 5:17-2.3(b)(9). The DCA, thereafter, approved Plaintiff's lead abatement contractor certification, starting May 1, 2009 and expiring on April 30, 2011.

On November 24, 2009, Ace Westchester sent plaintiff a non-renewal notice for its insurance policy, stating plaintiff's insurance policy would expire on March 17, 2010. Thereafter, Costa Do Sol, Claudia Ruiz, and Maria Isabel Costa procured an insurance policy from Century Surety Insurance ("Century Surety") for plaintiff through defendant George Zerlanko of Global Indemnity Insurance Agency for the time period between March 17, 2010 and March 17, 201. Global Indemnity Insurance Agency was being used as a substitute wholesale insurance broker for Mortsan General Agency. The Century

Surety policy, however, had an A.M. Best Rating of an "A-" in violation of N.J.A.C. 5:17-2.3(b)(9).

George Zerlanko and Global Indemnity Insurance Agency provided Costa Do Sol, Claudia Ruiz, and Maria Isabel Costa with the policy after contacting and receiving assistance from defendant Beth Linton of defendant Environmental Underwriting Solutions, an environmental consulting firm, to locate the particular policy Plaintiff would want.

George Zerlanko and Global Indemnity Insurance Agency knew Plaintiff performed lead abatement services and knew of the N.J.A.C. 5:17-2.3(b)(9) requirements for lead abatement contractors. George Zerlanko and Global Indemnity Insurance Agency also knew that the Century Surety policy only had an A.M. Best rating of an "A-." George Zerlanko testified, however, that no one from Costa Do Sol had advised him or anyone else from Global Indemnity Insurance Agency that Plaintiff needed an insurance policy from an A.M. Best "A" rated insurance company. Zerlanko also testified that no one from Costa Do Sol objected to the Century Surety policy.

Claudia Ruiz, plaintiff's account manager at Costa Do Sol and a licensed insurance agent by the New Jersey Division of Banking and Insurance, did not know what the Century Surety policy's A.M. Best rating was. Claudia Ruiz was not aware of the Department of Consumer Affair requirements for lead abatement contractors under N.J.A.C. 5:17-2.3(b)(9) until after Costa Do Sol procured the policy for plaintiff.

Maria Isabel Costa, a principal of Costa Do Sol, testified she was familiar with the lead abatement contractor insurance requirements under N.J.A.C. 5:17-2.3(b)(9), but she did not inquire or raise any concerns as to Century Surety's A.M. Best rating.

On March 1, 2011, plaintiff re-applied with the DCA for lead abatement certification.

On March 8, 2011, plaintiff replaced Costa Do Sol with defendant Michael Sciarra of defendant Global Associates as its insurance broker. Michael Sciarra, Global Associates, George Zerlanko, and Global Indemnity Insurance Agency, thereafter, acquired an insurance policy for plaintiff from Century Surety for the time period of March 17, 2011 to March 17, 2012 with help from Beth Linton and Environmental Underwriting Solutions, which, again, had an "A-" Rating from A.M. Best.

On March 15, 2011, plaintiff provided Global Associates with the DCA insurance requirements for lead abatement contractors under N.J.A.C. 5:17-2.3(b)(9). Specifically, the letter advised Global Associates that it needed an insurance policy with an A.M. Best Rating of "A" or higher and that Global Associates would have to forward a letter to the DCA representing that it complied with the insurance requirements.

On March 15, 2011, the same day that plaintiff provided Global Associates with its requirements under N.J.A.C. 5:17-2.3(b)(9), Michael Sciarra and Global Associates sent the DCA a letter saying plaintiff has complied with of N.J.A.C. 5:17-2.3(b)(9).

On April 14, 2011, James Zack, the DCA representative, notified plaintiff that its application for certification had deficiencies, including that plaintiff had not complied with N.J.A.C. 5:17-2.3(b)(9) by acquiring insurance with an A.M. Best rating of "A" or better. As a result of plaintiff not complying with N.J.A.C. 5:17-2.3(b)(9), plaintiff's license was "no longer valid." James Zack testified in his deposition, however, that plaintiff became non-compliant with N.J.A.C. 5:17-2.3(b)(9) as early as March 17, 2010 when Costa Do Sol was plaintiff's insurance broker and procured an "A-" policy from Century Surety.

After plaintiff received the deficiency letter from the DCA, Michael Sciarra and Global Associates contacted George Zerlanko and Global Indemnity Insurance Agency about plaintiff's insurance problem.

On April 18, 2011, George Zerlanko and Global Indemnity Insurance Agency contacted Beth Linton and Environmental Underwriting Solutions and notified it of the deficiencies in plaintiff's insurance coverage. The next day, on April 19, 2011, George Zerlanko forwarded to Environmental Underwriting Solutions the DCA insurance requirements for lead abatement contractors under N.J.A.C. 5:17-2.3(b)(9). Beth Linton testified this was the first time she had been advised that plaintiff required an "A" rated carrier or that plaintiff's insurance coverage needed to comply with certain regulations.

During George Zerlanko's and Beth Linton's conversation, Beth Linton mentioned to George Zerlanko that a "cut-through" endorsement from Century Surety's reinsurer, Odyssey Reinsurance, was available and could satisfy the regulation. Beth Linton, said in an e-mail dated April 21, 2011 that was addressed to George Zerlanko, "Century will work it out one way or another. They have a cut through available...thanks!" George Zerlanko responded,

> Thanks. Let's go ahead and get the cut through and Century can argue the point with the State of NJ later on. Can the insured have the cut through by Monday?

George Zerlanko also printed out Beth Linton's e-mail and wrote a hand-written notation stating, "Odyssey Reinsurance Corp. as per Beth on 4/21/11."

On the same day, April 21, 2011, Josh Bowen, Vice President for Century Insurance Group, told Beth Linton via e-mail that the only short term solution available was to cancel plaintiff's policy and allow him to secure coverage from an "A" rated insurer. Josh Bowen also stated that any other arrangement may take weeks to implement. Beth Linton, however, only hours after receiving Josh Bowen's email, told George Zerlanko via a telephone call that Odyssey Reinsurance could be a potential "cut-through" endorser.

George Zerlanko and Global Indemnity Insurance Agency, thereafter, conveyed the name of Odyssey Reinsurance to Michael Sciarra and Global Associates as a potential "cut-through" endorser, and Michael Sciarra and Global Associates prepared a Certificate of Insurance that identified Odyssey Reinsurance as the insurer for plaintiff's insurance policy. Plaintiff sent the Certificate of Insurance to the DCA and attached a letter from Michael Sciarra and Global Associates stating the insurance policy met the requirements set forth in N.J.A.C. 5:17-2.3(b)(9).

On April 25, 2011, four days after George Zerlanko and Global Indemnity Insurance Agency advised Michael Sciarra and Global Associates that Odyssey Reinsurance could serve as a "cut-through" endorser, George Zerlanko emailed Beth Linton of Environmental Underwriting Solutions and asked that written confirmation be sent to the DCA that the Odyssey Reinsurance policy had been placed and would satisfy the regulation.

On April 27, 2011, six (6) days after Beth Linton found out from Josh Bowen that a "cut-through" endorsement was not a viable option for plaintiff, Beth Linton and Environmental Underwriting Solutions responded to George Zerlanko's e-mail and said Odyssey Reinsurance could not serve as a "cut-through" endorser.

Upon receiving the Certificate of Insurance and attached letter from Michael Sciarra of Global Associates, James Zack of the DCA contacted Odyssey Reinsurance to see if the insurance policy was in effect. Thomas Bredhal of Odyssey Reinsurance, however, told James Zack via e-mail on May 4, 2015 that Odyssey Reinsurance does not insure plaintiff. As a result, on May 6, 2011, the DCA determined plaintiff had made a willful misstatement of material fact on its certification application and denied its application. James Zack testified that but-for the material misrepresentation, DCA would have approved Plaintiff's application for certification renewal.

There is a material dispute in fact, inter alia, on whether (1) Global Indemnity Insurance Agency and George Zerlanko, (2) Global Associates and Michael Sciarra, or (3) Beth Linton and Environmental Underwriting Solutions proximately caused plaintiff to send an erroneous Certificate of Insurance and letter to the DCA. The following sample of various defendants' conflicting positions underscores the need for jury resolution of proximate causation.

George Zerlanko testified he did not tell anyone at Global Associates that a "cut-through" endorsement had been secured or to prepare a Certificate of Insurance listing Odyssey Reinsurance as an insurance carrier. George Zerlanko claimed he only told Michael Sciarra that Odyssey Reinsurance was a potential "cut-through" endorser. George Zerlanko also testified he "would have instructed Beth Linton of Environmental

Underwriting Solutions to locate a different "A" rated insurance carrier if he knew Odyssey Reinsurance could not serve as a "cut-through" endorser on April 21, 2011."

Michael Sciarra of Global Associates testified the only evidence he relied on to determine that Beth Linton obtained a "cut-through" endorsement was his conversation with George Zerlanko.

Beth Linton certified and testified that she only emailed George Zerlanko that Odyssey Reinsurance has "a cut through available," and she never advised anyone to prepare a Certificate of Insurance reflecting that the potential cut-through endorsement was secured.

Alan Geiseinheimer, plaintiff's professional liability expert, made a variety of findings as to each of the defendants' roles in causing the DCA's refusal to renew Plaintiff's lead abatement certification. Global Associates' expert report received after oral argument on February 12, 2015, identifies Costa Do Sol, as the "root of the problem" while admitting that Global Associates, erred, but their expert opines that the damages incurred, by the plaintiff, if any, were caused by the other defendants' professional negligence.

There is also a dispute in fact on whether plaintiff suffered any damages. Plaintiff was later able to procure an insurance policy from Endurance Insurance, which had an A.M. Best "A rating, before plaintiff's certification with the DCA expired on April 30, 2011. Thereafter, on May 24, 2011, the DCA temporarily renewed plaintiff's certification after plaintiff appealed the DCA' denial of its certification application.

Jeff Malfetti, General Partner of Quality Pro Painters, LLC, testified that plaintiff did not lose any business in 2010 or 2011 as a result of plaintiff's insurance issue. James Zack also testified that the DCA waived any violations for work that plaintiff did while it had an A.M. Best "A-" rated insurance policy.

Plaintiff's damages expert, Stephan Cahit, however, said in his expert report that plaintiff suffered $1,747,345 in damages.

Now, (1) plaintiff (2) defendants' Environmental Underwriter Solutions and Beth Linton, (3) defendants Costa Do Sol Agency, Claudia Ruiz, and Maria Isabel Costa, and (4) defendants Global Indemnity Insurance Agency and George Zerlanko move for summary judgment pursuant to R. 4:46-2.

The Court, for the reasons set forth in this opinion, **denies all motions for summary judgment**, presently before the Court.

Applicable Law

1. Summary Judgment Standard

Summary Judgment is appropriate when "the pleadings depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment as a matter of law." R. 4:46-2; see also Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 528-29 (1995). "All inferences of doubt are drawn against the movant in favor of the opponent of the motion." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 76 (1955).

Judicial review of a summary judgment motion requires a discriminating search of the record to determine whether there exists a genuine dispute of material fact. Millison v. El. Du Pont Nemours & Co., 101 N.J. 161, 167 (1985). A genuine dispute of fact exists when the evidential materials considered "in the light most favorable to the non-moving party ... are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 523. "Mere assertions in the pleadings are not sufficient to defeat a motion for summary judgment." Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J.Super. 369, 383 (App. Div. 1960).

2. Professional Negligence Standard

"Actions involving a breach of professional duty are not everyday negligence claims- they involve obligations arising from special relationships." Aden v. Fortsh, 169 N.J. 64, 76 2001). New Jersey law provides that insurance brokers owe their clients a professional duty of care. See Rider v. Lynch, 42 N.J. 465, 476 (1964); see also Sobotor v. Prudential Property & Casualty Ins. Co., 200 N.J. Super. 333 (App. Div. 1984). "[I]nsurance policies are not ordinary contracts, but contracts of adhesion between parties not equally situated." Sobotor v. Prudential Property & Casualty Ins. Co., 200 N.J. Super. 333, 342 (App. Div. 1984) (internal citations omitted). Courts have found that this "inequality of position requires that the agent deal with laypeople as laypeople and not as experts in subtleties of the law." Sobotor, 200 N.J. Super. at 343 (internal citations omitted).

The Supreme Court stated:

> One who holds himself out to the public as an insurance broker is required to have a degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of

> good faith and reasonable skill, care and diligence in the execution of the commission. He is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principle seeks to be protected. If he neglects to procure the insurance, or if the policy is void or materially deficient, or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill of diligence, he becomes liable to his principal for the loss sustained thereby

Rider, 42 N.J. at 476.

Accordingly, an insurance broker is liable for professional negligence if the broker "(1) neglects to procure the insurance, (2) if the policy is void, (3) if the policy is materially deficient, or (4) the policy does not provide the coverage he undertook to supply." Avery v. Arthur E. Armitage Agency, 242 N.J. Super. 293, 296 (App. Div. 1990) (internal quotation omitted). A broker is also liable for professional negligence when he or she fails to "warn the client at once that coverage could not be obtained." Dimarino v. Wishkin, 195 N.J. Super. 340, 394 (App. Div. 1984). However, a court may only grant judgment to Plaintiff as a matter of law "where the evidence permits no conclusion other than that the broker was ignorant of available coverage, failed to obtain requested coverage, or failed to advise the customer of the unavailability of requested coverage." Avery, 242 N.J. Super. at 303.

Additionally, "[t]o succeed in an action against an insurance broker, the plaintiff must prove that in addition to being negligent, the broker's negligence was a proximate cause of the loss." Harbor Commuter Service, Inc. v. Frenkel & Co., Inc., 401 N.J. Super. 354, 368 (App. Div. 2008). Proximate cause is defined as a "cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about . . . and further as a cause which naturally and probably led to and might have been expected to produce the accident complained of." Scafidi v. Seiler, 119 N.J. 93, 101 (1990) (internal quotations omitted). "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." Davidson v. Slater, 189 N.J. 166, 185 (2007) (internal quotation omitted). "A mere possibility of such causation is not enough." Davidson, 189 N.J. at 185 (internal quotation omitted).

According to the Supreme Court,

> Ordinarily, the issue of proximate cause should be determined by the factfinder. Proximate cause has been described as a standard for limiting liability for the consequences of an act based upon mixed considerations of logic, common sense, justice, policy and precedent. Proximate cause as an issue, however, may be removed from the factfinder in the highly extraordinary case in which reasonable minds could not differ on whether that issue has been established.

Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999) (internal quotations and citations omitted).

An example of an event that breaks the chain of proximate causation is a superseding or intervening cause. See Komlodi v. Picciano, 217 N.J. 387, 418 (2014) (internal citation omitted). The Supreme Court stated:

> [a] superseding or intervening act is one that is the immediate and sole cause of the injury or harm. Significantly, intervening causes that are "foreseeable" or the normal incidents of the risk created will not break the chain of causation and relieve a defendant of liability

Komlodi, 217 N.J. at 418 (internal quotations and citations omitted).

However,

> professionals may not diminish their liability under the Comparative Negligence Act when the alleged negligence of the client relates to the task for which the professional was hired. That rule is premised on the heightened responsibilities of professionals in this State. Otherwise, the fiduciary relationship between the professional and the client may be under-mined and professionals may be allowed to escape liability for their malpractice

Aden, 169 N.J. at 78.

3. **Breach of Fiduciary Duty Standard**

A breach of fiduciary duty, like professional negligence, is a theory in tort. See In re Estate of Lash, 169 N.J. 20, 27 (2001). A "fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship." McKelvey v. Pierce, 173 N.J. 26, 57 (2002). "The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." McKelvey, 173 N.J. at 57. According to the Supreme Court,

> The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship.

McKelvey, 173 N.J. at 57.

The Supreme Court has found that insurance agents and intermediaries owe their clients a fiduciary duty"[b]ecause of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies.' Aden, 169 N.J. at 78. Accordingly, the relationship between insurance agents and intermediaries with their clients "gives rise to a duty owed by the broker to the client to exercise good faith and reasonable skill in advising insureds." Aden, 169 N.J. at 78.

Additionally, like with professional negligence, a plaintiff seeking damages for a breach of fiduciary must show that the breach of fiduciary duty proximately caused the plaintiff's loss. See Credit Suisse First Boston Mortgage Capital, LLC v. Philip Lehman Company, Ltd., 2010 N.J. Super. Unpub. LEXIS 494 at 20-21 (App. Div. Mar. 3, 2012) (determining "the charge on proximate cause -- regardless of whether Lehman was found negligent or found to have breached its fiduciary duty or both -- would have been the same."). Proximate cause is defined as a "cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about . . . and further as a cause which naturally and probably led to and might have been expected to produce the accident complained of." Scafidi v. Seiler, 119 N.J. 93, 101 (1990) (internal quotations omitted). "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." Davidson v. Slater, 189 N.J. 166, 185 (2007) (internal quotation omitted). "A mere possibility of such causation is not enough." Davidson, 189 N.J. at 185 (internal quotation omitted).

According to the Supreme Court,

> Ordinarily, the issue of proximate cause should be determined by the factfinder. Proximate cause has been described as a standard for limiting liability for the consequences of an act based upon mixed considerations of logic, common sense, justice, policy and precedent. Proximate cause as an issue, however, may be removed from the factfinder in the highly extraordinary case in which reasonable minds could not differ on whether that issue has been established.

Fleuhr v. City of Cape May, 159 N.J. 532, 543 (1999) (internal quotations and citations omitted).

An example of an event that breaks the chain of proximate causation is a superseding or intervening cause. See Komlodi v. Picciano, 217 N.J. 387, 418 (2014) (internal citation omitted). The Supreme Court stated:

> A superseding or intervening act is one that is the immediate and sole cause of the injury or harm. Significantly, intervening causes that are "foreseeable" or the normal incidents of the risk created will not break the chain of causation and relieve a defendant of liability.

Komlodi, 217 N.J. at 418 (internal quotations and citations omitted).

4. **Breach of Contract Standard**

A contract arises from offer and acceptance, and must be sufficiently definite that the performance to be rendered by each party can be ascertained with reasonable certainty. Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (internal quotation omitted). According to the Supreme Court,

> if parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract. Where the parties do not agree to one or more essential terms, however, courts generally hold that the agreement is unenforceable.

Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (internal citations omitted)

"To establish a breach of contract claim, a plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result." Murphy v. Implicito, 392 N.J. Super. 245, 265 (App. Div. 2007). A plaintiff who secures final judgment for a breach of contract is "entitled to compensatory damages for such losses as may fairly be considered to have arisen naturally from the defendant's breach of contract." Wade v. Kessler Institute, 343 N.J. Super. 338, 352 (App. Div. 2001). However, the Supreme Court has held that Courts should not grant summary judgment to a defendant on a breach of contract count, even if the plaintiff allegedly did not suffer any damage that arose from the defendant's breach, because the defendant's breach can still support a claim for nominal damages and potentially punitive damages. See Harris v. Schenkel, 26 N.J. 166, 167 (1958).

Moreover, in a professional negligence case, such as this, the contract, albeit an oral one that plaintiff had with defendants Global Associates, Michael Sciarra, Costa Do Sol, Maria Isabel Costa, and Claudia Ruizand, and any breach thereof is dependent upon whether liability is found on the professional negligence claims. Accordingly, the question of whether the contract claim goes to the jury is better left to the trial judge who hears the evidence.

Discussion

The moving defendants argue they are entitled to summary judgment pursuant to R. 4:46-2 because they did not proximately cause the harm plaintiff seeks redress for. Specifically, the moving defendants claim the DCA solely denied plaintiff's certification application because plaintiff made a material misrepresentation on its application so Global Associates' and Michael Sciarra's decision to create an inaccurate Certificate of Insurance and letter saying plaintiff had complied with in N.J.A.C. 5:17-2.3(b)(9) was a superseding cause and broke the chain of causation as to their liability.

In response, plaintiff argues it is entitled to partial summary judgment on liability pursuant to R. 4:46-2 because the moving and non-moving defendants were a "substantial factor" in causing the DCA to deny plaintiff's certification application.

The Court finds there is a genuine issue of material fact on whether one or none of the defendants: (1) Costa Do Sol, Claudia Ruiz, and Marie Isabel Costa, (2) Global Indemnity Insurance Agency and George Zerlanko, (3) Global Associates and Michael

Sciarra, and (4) Environmental Underwriting Solutions and Beth Linton proximately caused plaintiff to send an incorrect Certificate of Insurance and letter saying plaintiff complied with N.J.A.C. 5:17-2.3(b)(9) to the DCA which eventually led to the DCA denying plaintiff's application for renewal of its lead abatement certification. The Court, therefore, **DENIES** plaintiff's and the moving defendants' motions for summary judgment.

Generally, "the issue of proximate cause should be determined by the factfinder." Fleuhr, supra, 159 N.J. at 543. Proximate cause may only be removed from the fact finder "in the highly extraordinary case in which reasonable minds could not differ on whether that issue has been established." Fleuhr, supra, 159 N.J. 532, 543 (1999) (internal quotations and citations omitted).

When there are concurrent causes of liability, as there are presently between ((1) Costa Do Sol, Claudia Ruiz, and Marie Isabel Costa, (2) Global Indemnity Insurance Agency and George Zerlanko, (3) Global Associates and Michael Sciarra, and (4) Environmental Underwriting Solutions and Beth Linton, New Jersey courts apply the "substantial factor" test to determine if an individual defendant was the proximate cause for liability purposes. See, e.g., Konklin v. Hannoch Weisman, 145 N.J. 395, 419-20 (1996). Under the substantial factor test, negligent acts "need not, of themselves, be capable of producing the injury; . . . they [only have to be a] 'substantial factor' in bringing it about." Hannoch Weisman, 145 N.J. at 419-20. The Supreme Court in Hannoch Weisman reasoned "there can be any number of intervening causes between the initial wrongful act and the final injurious consequence" and proximate cause "does not require an unsevered connecting link between the negligent conduct and the ultimate harm." Hannoch Weisman, 145 N.J. at 419-20.

Here, the Court finds reasonable minds could differ on whether the conduct of (1) Costa Do Sol, Claudia Ruiz, and Marie Isabel Costa, (2) Global Indemnity Insurance Agency and George Zerlanko, (3) Global Associates and Michael Sciarra, and (4) Environmental Underwriting Solutions and Beth Linton was a substantial factor in causing plaintiff to send an incorrect Certificate of Insurance and letter saying plaintiff complied with N.J.A.C. 5:17-2.3(b)(9) to the DCA which eventually led to the DCA denying plaintiff's application for renewal of its lead abatement certification.

First, there is a general issue of material fact as to whether Costa Do Sol's, Claudia Ruiz's, and Maria Isabel Costa's procurement of the 2010 Century Surety Policy proximately caused the Department of Consumer Affairs denying plaintiff's application for lead abatement certification.

It is undisputed that Costa Do Sol, Claudia Ruiz, and Maria Isabel Costa originally procured the deficient, "A-" rated 2010 policy from Century Surety, despite Costa De Sol

being aware that plaintiff held a license for lead abatement and needed to comply with the insurance requirements articulated in N.J.A.C. 5:17-2.3(b)(9).

However, plaintiff replaced Costa Do Sol with Michael Sciarra and Global Associates on March 8, 2011 as its insurance broker, which was prior to plaintiff acquiring the deficient 2011 Century Surety Policy that eventually led to the DCA denying plaintiff's certification application.

Accordingly, the Court finds a reasonable mind could conclude that (1) the behavior of Costa Do Sol, Claudia Ruiz, and Maria Isabel Costa had a "snowball" effect and proximately caused the DCA to deny plaintiff's application for lead abatement certification, or that (2) Global Associates' and Michael Sciarra's decision to create an inaccurate Certificate of Insurance and letter saying plaintiff had complied with in N.J.A.C. 5:17-2.3(b)(9) was a superseding cause and broke the chain of causation as to Costo Do Sol, Claudia Ruiz, and Maria Isabel Costa.

Second, there is a general issue of material fact as to whether George Zerlanko's and Global Indemnity Insurance Agency's procurement of the deficient 2010 and 2011 Century Surety Policies and George Zerlanko's decision to mention to Michael Sciarra that Odyssey Reinsurance was potential "cut-through" endorser proximately caused the DCA denying plaintiff's application for lead abatement certification.

It is undisputed that George Zerlanko and Global Indemnity Insurance Agency, in 2010 and 2011, helped procure the deficient, "A-" rated policies from Century Surety, for plaintiff's insurance brokers, Costa Do Sol in 2010 and Global Associates in 2011. George Zerlanko and Global Indemnity Insurance Agency also conveyed the name, Odyssey Reinsurance, to Michael Sciarra and Global Associates before Michael Sciarra prepared an incorrect Certificate of Insurance and letter stating plaintiff had complied with the requirements in N.J.A.C. 5:17-2.3(b)(9). Michael Sciarra testified at his deposition that he interpreted his and George Zerlanko's conversation to mean a "cut-through" endorsement was available and definite.

However, George Zerlanko testified that he did not tell anyone at Global Associates that a "cut-through" endorsement had been secured or to prepare a Certificate of Insurance listing Odyssey Reinsurance as an insurance carrier. George Zerlanko testified he only told Global Associates that Odyssey Reinsurance was a potential "cut-through" endorser. Furthermore, James Zack testified that but-for the material misrepresentation on plaintiff's application for lead abatement certification, the DCA would have approved plaintiff's application.

Accordingly, the Court finds a reasonable mind could conclude that (1) George Zerlanko's and Global Indemnity Insurance Agency's procurement of the deficient 2010 Century and 2011 Century Surety Policies and George Zerlanko's decision to mention to

Michael Sciarra that Odyssey Reinsurance was potential "cut-through" endorser proximately caused the DCA to deny plaintiff's application for lead abatement certification or that (2) Global Associates' and Michael Sciarra's decision to create an inaccurate Certificate of Insurance and letter saying plaintiff had complied with in N.J.A.C. 5:17-2.3(b)(9) was a superseding cause and broke the chain of causation as to George Zerlanko and Global Indemnity Insurance Agency

Third, there is a genuine issue of material fact as to whether Global Associates' and Michael Sciarra's procurement of the deficient 2011 Century Surety Policy and Global Associates' and Michael Sciarra's decision to create an incorrect certificate of insurance for Odyssey Reinsurance and letter saying plaintiff had complied the requirements outlined in N.J.A.C. 5:17-2.3(b)(9) proximately caused the Department of Consumer Affairs denying plaintiff's application for lead abatement certification.

It is undisputed that Global Associates and Michael Sciarra created the incorrect Certificate of Insurance and wrote the letter saying plaintiff had complied with the requirements outlined in N.J.A.C. 5:17-2.3(b)(9). Furthermore, James Zack testified that but-for plaintiff's material misrepresentation in its application for lead abatement certification, the DCA would have approved plaintiff's application.

However, George Zerlanko and Global Indemnity Insurance Agency conveyed the name, Odyssey Reinsurance, to Michael Sciarra and Global Associates before Michael Sciarra prepared the Certificate of Insurance and letter stating the insurance policy met the requirements set forth in N.J.A.C. 5:17-2.3(b)(9). Michael Sciarra also testified at his deposition that he interpreted the conversation he had with George Zerlanko to mean a "cut-through" endorsement was available and definite.

Accordingly, the Court concludes a reasonable mind could conclude that (1) Global Associates' and Michael Sciarra's procurement of the deficient 2011 Century Surety Policy and Global Associates' and Michael Sciarra's decision to create a certificate of insurance for Odyssey Reinsurance and letter saying plaintiff had complied the requirements outlined in N.J.A.C. 5:17-2.3(b)(9) proximately caused the DCA denying plaintiff's application for lead abatement certification or that (2) George Zerlanko's and Global Indemnity Insurance Agency's decision to mention Odyssey Reinsurance as a potential "cut-through" endorser to Global Associates and Michael Sciarra proximately caused Global Associates and Michael Sciarra to create the incorrect certificate of insurance and letter which eventually led to the DCA denying plaintiff's application for lead abatement certification.

Fourth, there is a genuine issue of material fact as to whether Environmental Underwriter Solutions' and Beth Linton's failure to notify George Zerlanko on April 21, 2011 that a "cut-through" endorsement from Odyssey Reinsurance was not a viable

option for plaintiff to re-gain its lead abatement certification proximately caused the DCA denying plaintiff's application for lead abatement certification.

It is undisputed Beth Linton of Environmental Underwriting Solutions helped Costa Do Sol and Global Indemnity Insurance Agency in 2010 and Global Associates and Global Indemnity Insurance Agency in 2011 acquire the deficient Century Surety policyies for plaintiff. Furthermore, it is undisputed that on April 27, 2011, six days after Beth Linton found out from Josh Bowen that a "cut-through" endorsement was not a viable option for plaintiff and after George Zerlanko conveyed the name of Odyssey Reinsurance to Michael Sciarra and Global Associates as a potential "cut-through" endorser, Beth Linton and Environmental Underwriting Solutions advised George Zerlanko via email that Odyssey Reinsurance could not serve as a "cut-through" endorser. George Zerlanko testified that he would have instructed Beth Linton to locate a different "A" rated insurance carrier if he knew Odyssey Reinsurance could not serve as a "cut-through" endorser on April 21, 2011 when Beth Linton found out from Josh Bowen.

However, Beth Linton certified and testified that she only emailed George Zerlanko that Odyssey Reinsurance was "a cut through available," and she never advised anyone to prepare a Certificate of Insurance reflecting that the potential cut-through endorsement was secured. Furthermore, James Zack testified that but-for plaintiff's material misrepresentation on its application for lead abatement certification, the DCA would have approved plaintiff's application for certification renewal.

Accordingly, a reasonable mind could conclude that (1) Underwriter Solutions' and Beth Linton's failure to notify George Zerlanko on April 21, 2011 that a "cut-through" endorsement from Odyssey Reinsurance was not a viable option for plaintiff to re-gain its lead abatement certification proximately caused the DCA to deny plaintiff's application for lead abatement certification or that (2) Global Associates' and Michael Sciarra's decision to create an inaccurate Certificate of Insurance was a superseding cause and broke the chain of causation as to Environmental Underwriter Solutions and Beth Linton.

Finally, the Court cannot determine, as a matter of law, that Global Associates' and Michael Sciarra's decision to create an incorrect Certificate of Insurance and letter saying plaintiff complied with N.J.A.C. 5:17-2.3(b)(9) was a superseding cause to the liability of (1) Costa Do Sol, Claudia Ruiz, and Marie Isabel Costa, (2) Global Indemnity Insurance Agency and George Zerlanko, and (3) Environmental Underwriting Solutions and Beth Linton. The Supreme Court has stated:

> [a] superseding or intervening act is one that is the immediate and sole cause of the injury or harm. Significantly, intervening causes that are "foreseeable" or the normal incidents of the risk created will not break the chain of causation and relieve a defendant of liability

Komlodi, 217 N.J. at 418 (internal quotations and citations omitted).

Because "foreseeability" is a fact sensitive question, the Court finds it is for the jury to determine whether Global Associates' and Michael Sciarra's decision to create an Odyssey Reinsurance Certificate of Insurance and letter saying plaintiff complied with N.J.A.C. 5:17-2.3(b)(9) was "foreseeable" to break the chain of causation for (1) Costa Do Sol, Claudia Ruiz, and Marie Isabel Costa, (2) Global Indemnity Insurance Agency and George Zerlanko, and (3) Environmental Underwriting Solutions and Beth Linton.

Conclusion

Based on the foregoing, the motions for summary judgment filed by (1) plaintiff, (2) defendants Environmental Underwriter Solutions and Beth Linton, (3) defendants Costa Do Sol, Claudia Ruiz, and Maria Isabel Costa, and (4) defendants Global Indemnity Insurance Agency and George Zerlanko are **DENIED.**

SO ORDERED,

Hon. Barry R. Sarkisian, J.S.C.