SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2366-15T1

BERKLEY RISK SOLUTIONS, LLC, and ADMIRAL INSURANCE COMPANY,

Plaintiffs-Respondents,

v.

INDUSTRIAL RE-INTERNATIONAL, INC., a/k/a INDUSTRIAL RE, and RENE GUTIERREZ,

Defendants-Appellants.

Argued March 16, 2017 – Decided September 20, 2017

Before Judges Espinosa and Suter.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0163-15.

Jon Rory Skolnick argued the cause for appellants (Law Offices of Jon Rory Skolnick, attorneys; Mr. Skolnick and Jenntyng Chern, of counsel and on the briefs).

Kevin T. Coughlin argued the cause for respondents (Coughlin Duffy, LLP, attorneys; Mr. Coughlin and Steven D. Cantarutti, of counsel and on the brief).

PER CURIAM

Plaintiffs, Berkley Risk Solutions, LLC (Berkley or BRS), and Admiral Insurance Company (Admiral) are, respectively, a provider of insurance and reinsurance management services, and an excess and surplus lines insurer in the United States and Puerto Rico. Defendants contended plaintiffs were obligated to pay or reimburse them for commissions plaintiffs paid to American Foreign Underwriters Corp. (AFU), a licensed general agency in Puerto Rico, to place plaintiffs' insurance in seventy-eight municipalities in Puerto Rico for policy years 2008-09 and 2009-10. Defendants now appeal from an order in this declaratory judgment action that granted summary judgment to plaintiffs. We affirm.

I.

In 2005, Marsh Saldana Inc. (Marsh), the retail broker appointed by Puerto Rico, was working with AFU to obtain property and casualty insurance for the municipalities. AFU served as Marsh's general agency, a position that required AFU to be licensed as a general agent in Puerto Rico.

Defendant Industrial Re-International Inc. a/k/a Industrial Re is a reinsurance intermediary incorporated in New York and New Jersey. Defendant Rene Gutierrez is Industrial Re's founder and president. In February 2005, AFU hired Industrial Re for the

purpose of managing public liability insurance proposals for the municipalities. Because Industrial Re was not a licensed general agency, Industrial Re could not place insurance policies in the municipalities without a licensed general agency like AFU.

After receiving relevant information from Industrial Re, Berkley submitted a proposal on behalf of Admiral to provide surplus lines insurance to the municipalities for the 2005-06 policy year. Marsh accepted the proposal and, as a result of renewals, Admiral provided surplus lines insurance to the municipalities for the 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10 policy years. Berkley was Admiral's authorized signatory on each policy.

2005-06 POLICY COMMISSION

AFU and Industrial Re agreed to split the commission for the 2005-06 policy through a "Handshake Agreement," which was typical of their business relationship. Plaintiffs were not parties to the Handshake Agreement. Gutierrez informed Jeffrey Vosburgh, president of Berkley, of the Handshake Agreement, and assured him that if Berkley "were to pay him the [commission] money . . . [it] would be appropriately shared with [AFU]." Berkley paid the entire commission of $727,777.75 to Industrial Re "with the intent that [it] would be shared" with AFU. Pursuant to the Handshake Agreement, Industrial Re paid AFU its share of $145,555 and kept

the rest.

2006-07 POLICY COMMISSION

A dispute arose between Industrial Re and AFU regarding the commission split for the 2006-07 renewal policy because AFU wanted a larger percentage of the commission. When attempts to resolve the dispute amicably failed, AFU filed an action against plaintiffs and Industrial Re in Puerto Rico alleging, in part, that Industrial Re agreed to split the 2006-07 policy commission equally with AFU but refused to sign a written agreement.

Plaintiffs deposited 50% of the commission owed on the 2006-07 policy with the court in Puerto Rico and paid the other 50% to Industrial Re. Plaintiffs were then dismissed with prejudice from the Puerto Rico lawsuit on October 5, 2006.

In May 2007, Industrial Re and AFU resolved their dispute and executed a settlement agreement, in which they agreed the 2006-07 policy commission and any future policies with the municipalities would be split sixty percent (60%) to Industrial Re and forty percent (40%) to AFU (Settlement Agreement). The parties also agreed that upon renewal of the policy, the "(60%) commission or 'fee' corresponding to [Industrial Re] shall be paid directly by [Berkley]." Plaintiffs were not parties to the Settlement Agreement. Yet, the Settlement Agreement released plaintiffs "from any civil, administrative, or any other liability as a result

of the facts, allegations and claims included or not in" the Puerto Rico action.

2007-08 POLICY COMMISSION

On August 23, 2007, Vosburgh emailed Gutierrez and AFU stating that, in light of the Settlement Agreement, plaintiffs were "prepared to separately distribute" the commission as long as they would "legally stipulate" to the percentage of the commission each was entitled to receive. Both Gutierrez and AFU responded by email stipulating that the commission distribution was sixty percent to Industrial Re and forty percent to AFU. Industrial Re received its sixty percent share of the 2007-08 policy commission directly from Berkley.

2008-09 AND 2009-10 POLICY COMMISSIONS

On March 5, 2008, in anticipation of the 2008-09 policy renewal, Vosburgh emailed Gutierrez and AFU, expressing plaintiffs' "interest[] in quoting renewal terms and premium" for 2008-09. The email also attempted to "recap the positions of the parties" and "provide . . . the opportunity to correct any misimpressions," stating,

> [Plaintiffs] interpret the [Settlement Agreement] between [AFU] and Industrial Re to operate in such a way as to legally identify Industrial Re as an agent of [AFU] solely with respect to the original and renewal placements of the municipalities Policy-Contract business . . . .

> [Plaintiffs] also interpret the [Settlement Agreement] between [AFU] and Industrial Re to operate in such a way that in the event of one or more renewals of the municipalities account by [plaintiffs] then Industrial Re will be paid its proportionate share of the renewal commission allowed by [plaintiffs] whether or not [AFU] has chosen to actively involve Industrial Re in the placement of the renewals with [plaintiffs]. As before, in the event of renewal(s) [plaintiffs] will distribute the requisite proportionate share to each of [AFU] and Industrial Re. . . .
>
> [F]or the sake of good order, it is once again pointed out that [plaintiff] is not a party to the [Settlement Agreement] between [AFU] and Industrial Re and cannot be bound by any of its terms. Further, as per usual market norms [plaintiffs] exclusively reserve[] the right to set out the terms, conditions and any and all other relevant items comprising the framework under which [plaintiffs] will operate with respect to any and all business which is, or may be, offered to [plaintiffs] by either or both [AFU] and Industrial Re.
>
> [(Emphasis added).]

However, on April 28, 2008, Vosburgh sent an email to AFU that Gutierrez was not copied on, which stated, in part:

> Given that [the litigation] was concluded at terms that to me would characterize Industrial Re as [AFU's] 'agent' (i.e.; acting under [AFU's] direction and control) and, given the traditional [excess and surplus] market protocol that the [excess and surplus] insurer must honor the source providing the "first complete submission" it would seem that under the circumstances . . . if renewed, [plaintiffs] would pay [AFU] the entire amount of brokerage decided on; and . . . then [AFU]

> would naturally be expected to honor [its] obligation to Industrial Re. In any event [plaintiffs] do[] not expect to, and will not, interfere in any way with the business relationship between [AFU] and Industrial Re as its contractual agent.
>
> [(Emphasis added).]

In August 2008, Vosburgh emailed Gutierrez and AFU regarding the distribution of the 2008-09 policy commission, asking them to "legally stipulate" to (1) separate distributions as was done in 2007-08; and (2) the percentage of the commission each is entitled to under the Settlement Agreement. Gutierrez stipulated to the separate distributions and the 60/40 split. AFU objected to separate distributions and the 60/40 split, noting Vosburgh's April 28 email in which he stated the entire commission would be paid to AFU. After AFU made Industrial Re aware of its objection, Gutierrez asked Vosburgh to "handle this matter . . . with the view of remitting to [Industrial Re] its share of the comm[ission]." In a later email, however, Gutierrez confirmed "that [Berkley] alone, can make the decision as to who and how the comm[ission] for [Industrial Re] and [AFU] should be disbursed."

On September 19, 2008, Vosburgh emailed Gutierrez, stating, in relevant part,

> As you are aware, [AFU] was the broker that first submitted to [Berkley] a complete submission to quote for the 2008-09 year on this account. As a result [Berkley] quoted

> and bound coverage with respect to the account entirely through the licensed Puerto Rican [excess and surplus lines] broker that was formally appointed by [Marsh]. All renewal terms, conditions and brokerage were negotiated and agreed with [AFU]. In light of foregoing, and based upon advice of counsel, [Berkley]/Admiral will remit the 100% of the commission due on this account directly to [AFU].

After noting plaintiffs were neither parties to nor involved in making the Handshake Agreement or the Settlement Agreement between Industrial Re and AFU, Vosburgh advised Industrial Re to make its requests for commission to AFU directly. The 2008-09 and 2009-10 policy commissions were paid in full to AFU.

Industrial Re filed an action against AFU in Puerto Rico seeking its portion of the 2008-09 and 2009-10 policy commissions. Plaintiffs were not parties to this action.

Industrial Re obtained a judgment from the Court of First Instance, Superior Court of San Juan, against AFU for the payment of its portion of the commission AFU received on the 2008-09 and 2009-10 policies plus interest and costs. The judgment was affirmed by the Court of Appeals of Puerto Rico in June 2012. However, Industrial Re's attempts to collect against AFU were unsuccessful because its principals passed away and the company became insolvent.

In April 2014, defendants' counsel sent a letter to plaintiffs

claiming Berkley owed Industrial Re sixty percent of the commission it paid to AFU on the 2008-09 and 2009-10 policies, plus interest, legal fees, and costs. In response, plaintiffs filed the instant declaratory judgment action, asking for a declaration they are not obligated to defendants for the 2008-09 and 2009-10 policy commissions. In their answer, defendants asserted promissory estoppel, unjust enrichment, and tortious interference counterclaims.

Plaintiffs filed a motion for summary judgment and defendants cross-moved for summary judgment. After hearing oral argument, the trial judge entered two orders: (1) an order granting summary judgment in favor of plaintiffs, declaring that plaintiffs did not owe defendants any commission on the 2008-09 and 2009-10 policies, and dismissing defendants' counterclaims; and (2) an order denying defendants' cross-motion for summary judgment. The trial judge set forth her reasons in an oral decision.

The trial judge first determined New Jersey law applied to this dispute because "the performance at issue here is [plaintiff's] payment of the commission to the defendants" and "the principal place of business for both defendants and one plaintiff is New Jersey." Applying the New Jersey six-year statute of limitations, the judge concluded defendants' claims were time-barred. However, the judge determined that, even if the 2009-10

policy commission claim was timely, plaintiffs still had no obligation to pay defendants a portion of the commission they already paid AFU because plaintiffs were not a party to the Settlement Agreement. The judge noted further, there was no contract, either express or implied, whereby plaintiffs agreed to pay defendants the 2009-10 policy commission.

With respect to defendants' promissory estoppel counterclaim, the trial judge found plaintiffs made no promise to defendants to pay the commission in accordance with the Settlement Agreement and, in fact, expressly told them they were not bound by its terms in a March 2008 email. The judge also determined defendants' unjust enrichment counterclaim failed because plaintiffs paid the commission in full to AFU.[1] Finally, the judge determined defendants' tortious interference counterclaim failed because they provided no evidence that plaintiffs interfered with AFU's performance of the Settlement Agreement.

In their appeal, defendants argue the trial judge erred in: concluding New Jersey's statute of limitations applied to their claims (Point I), dismissing their claim based on promissory estoppel (Point II), determining their claim for the 2009-10 commission accrued on September 19, 2008 (Point III), and

[1] Defendants do not challenge the court's decision on its unjust enrichment counterclaim on appeal.

dismissing their counterclaim for tortious interference (Point IV).

We are unpersuaded by any of these arguments and affirm.

II.

The arguments raised in Points II and IV merit only the following limited discussion.

A.

"Promissory estoppel is made up of four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008) (citation omitted).

Defendants argue a prima facie showing of the elements of promissory estoppel exist because plaintiffs made a clear and definite promise to distribute the 2008-09 policy commission directly to defendants on two occasions: (1) the March 5, 2008 email from Vosburgh stating, "As before, in the event of renewal(s) [plaintiffs] will distribute the requisite proportionate share to each of [AFU] and [defendants]," and (2) the August 12, 2008 email from Vosburgh acknowledging the Settlement Agreement. Neither document provides proof of "a clear and definite promise" by plaintiffs to pay a commission to defendants.

The very first sentence of the March 5, 2008 email clearly states the purpose of the email was to "recap the positions of the parties as [plaintiffs] understand them to be" and "provide [defendants and AFU] the opportunity to correct any misimpressions." Thus, the statements in the email — including that plaintiffs "will distribute the requisite proportionate share to" defendants — did not constitute a promise, but an articulation of plaintiffs' understanding as to how the commission would be distributed pursuant to the Settlement Agreement. More important, the same email states:

> [I]t is once again pointed out that BRS/Admiral Insurance Company is not a party to the executed agreement between [AFU] and Industrial Re and cannot be bound by any of its terms.

Defendants do not dispute that plaintiffs were not parties to the Settlement Agreement and have produced no evidence that plaintiffs agreed to be bound by the Settlement Agreement at any time.

Although plaintiffs acknowledged in an August 2008 email they "were previously advised" to distribute the commission in accordance with the Settlement Agreement, their willingness to do so for the 2008-09 policy was explicitly dependent upon receiving a written stipulation from both defendants and AFU to that effect. Thus, plaintiffs were neither bound by the Settlement Agreement

nor any independent promise made to defendants.

When viewed in the light most favorable to defendants, the record contains insufficient evidence to permit a rational factfinder to determine that plaintiffs made a "clear and definite promise" to distribute defendants' portion of the 2008-09 commission directly to them. Summary judgment was therefore properly granted, dismissing this claim.

B.

The elements of tortious interference with a contract are: (1) the existence of a contract; (2) interference that was intentional and done with malice; (3) the loss of the contract as a result of the interference; and (4) damages. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52 (1989). It is undisputed that the Settlement Agreement between defendants and AFU satisfied the first of these elements. The primary contention on appeal concerns whether plaintiffs intentionally and maliciously interfered with the defendant's rights under the Settlement Agreement.

Defendants argue the trial court failed to accord them all favorable inferences from the evidence and contend a genuine issue of fact regarding plaintiffs' interference with the Settlement Agreement was presented by the following: Plaintiffs were aware the Settlement Agreement provided that defendants would receive

60% of the commissions for the 2008-09 and 2009-10 policies and "promised" to distribute the commission pursuant to the terms of the Settlement Agreement.[2] Plaintiffs "intentionally and dishonestly interfered with" the Settlement Agreement by sending the April 28, 2008, email in which Vosburgh described his impression of the consequences of the Settlement Agreement. Vosburgh stated, based upon his understanding of the Settlement Agreement: Industrial Re is the agent of AFU; if the policy is renewed, "it would not be necessary to show Industrial Re on the declarations page"; and "if renewed, Admiral Insurance would pay [AFU] the entire amount of brokerage decided on." Defendants contend this email constituted the requisite interference because it was "AFU's basis for withholding its consent for [plaintiffs] to pay [defendants] their commission directly."

To prove their claim, defendants were required to show they lost the benefits of the Settlement Agreement "as a [direct] result of defendants' malicious interference." Baldasarre v. Butler, 132 N.J. 278, 293 (1993). Malicious interference requires proof "that the harm was inflicted intentionally and without justification or excuse." Printing Mart, supra, 116 N.J. at 751. To qualify as malice, "conduct must be both 'injurious and transgressive of

[2] As we have noted, the record fails to support defendants' contention that plaintiffs made such a promise.

generally accepted standards of common morality or of law.'" Lamorte Burns & Co. v. Walters, 167 N.J. 285, 306-07 (2001) (quoting Harper-Lawrence, Inc. v. United Merchants and Mfrs., Inc., 261 N.J. Super. 554, 568 (App. Div.), certif. denied, 134 N.J. 478 (1993)); see also Nostrame v. Santiago, 213 N.J. 109, 121-22 (2013)("[L]iability rests upon whether the interfering act is intentional and improper.").

Most clearly, "conduct that is fraudulent, dishonest, or illegal" amounts to tortious interference. Lamorte Burns, supra, 167 N.J. at 307. On the other hand, "a party may not be held liable for . . . merely providing truthful information to one of the contracting parties." E. Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 180 (App. Div. 1996), certif. denied, 148 N.J. 458 (1997).

In the email relied upon by defendants, Vosburgh explained the procedure plaintiffs would follow based upon his understanding of the Settlement Agreement and pursuant to "the traditional [excess and surplus] market protocol that the [excess and surplus] insurer must honor the source providing the 'first complete submission.'" Rather than undermine the contract between AFU and defendants, Vosburgh explicitly recognized AFU's obligation under the Settlement Agreement to pay defendants their portion of the commission.

Vosburgh echoed this justification for plaintiffs' actions in his September 19, 2008 email in which he advised Gutierrez the full commission would be paid to AFU and stated:

> At no time was Berkley Risk Solutions/Admiral Insurance Company involved in any aspect of the development, negotiation or drafting of the "commission sharing" agreement between Industrial Re and [AFU]. Further Berkley Risk Solutions/Admiral Insurance Company is not a party to the agreement between Industrial Re and [AFU]. Accordingly, we believe it is appropriate for you to address future requests for a portion of the commission to [AFU] directly.

Defendants have presented no evidence that Vosburgh's stated reasons for remitting the entire commission to AFU were untrue or dishonest. There is no evidence in the record that plaintiffs had an improper motive in making commission payments directly to AFU or that their interests were in any way advanced by distributing the full commission to AFU. Notably, the amount of commission they paid was the same regardless of how it was distributed.

When viewed in the light most favorable to defendants, the record contains insufficient evidence to permit a rational factfinder to determine that plaintiffs intentionally and maliciously interfered with the Settlement Agreement. As a result, the court correctly dismissed defendants' tortious interference claim on this ground.

III.

This court reviews "summary judgment orders de novo, utilizing the same standards applied by the trial courts." Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 242 (App. Div. 2013).

Under Rule 4:46-2(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The standard is "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Nonetheless, if "the evidence is 'so one-sided that one party must prevail as a matter of law' . . . the trial court should not hesitate to grant summary judgment." Id. at 536, 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

IV.

Defendants first challenge the trial judge's decision that New Jersey law, and its six-year statute of limitations for

contract actions, N.J.S.A. 2A:14-1, applied to this action as opposed to Puerto Rico law, which provides for a fifteen-year statute of limitations for equivalent action, 31 L.P.R.A. § 5294. As defendants acknowledge, New Jersey's choice of law principles apply to this determination. See Rowe v. Hoffman-La Roche, Inc., 189 N.J. 615, 621 (2007).

Defendants contend that under the "most significant relationship" test of the Restatement (Second) of Conflicts of Laws (1971), Puerto Rico had "the paramount interest in applying its law to the dispute." This test comports with the test applied in New Jersey at the time this matter was argued in the trial court, "a flexible 'governmental-interest' standard, which requires application of the law of the state with the greatest interest in resolving the particular issue that is raised in the underlying litigation." Gantes v. Kason Corp., 145 N.J. 478, 484 (1996). We agree with the trial court's determination that, under this test, New Jersey's statute of limitations applies. However, that test is no longer applicable.

In McCarrell v. Hoffmann-La Roche, Inc., 227 N.J. 569, 574 (2017), the Supreme Court held "that section 142 of the Second Restatement is now the operative choice-of-law rule for resolving statute-of-limitations conflicts." The Court observed, "[t]he adoption of section 142 is also a natural progression in our

conversion from the governmental-interest test to the Second Restatement begun in P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132 (2008), which adopted sections 146, 145, and 6 for resolving conflicts of substantive tort law." Id. at 574-75. As we stated in Fairfax Financial Holdings Ltd. v. S.A.C. Capital Management, L.L.C., 450 N.J. Super. 1, 17 (App. Div. 2017), "any past uncertainty about" the test applicable to a statute of limitations conflict between two jurisdictions "evaporated with the illumination provided" in McCarrell, and accordingly, we apply that test here.

"[U]nless exceptional circumstances make such a result unreasonable," Restatement (Second), supra, § 142 provides that "[t]he forum will apply its own statute of limitations barring the claim."[3] Stated succinctly, the Restatement (Second) § 142 standard is as follows:

> New Jersey, as the forum state, presumptively applies its own statute of limitations unless (1) New Jersey has no significant interest in

[3] Under Restatement (Second), supra, § 142, the forum will also apply its own statute of limitation to permit the claim unless:

> (a) maintenance of the claim would serve no substantial interest of the forum; and
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

> the maintenance of the claim and [the other state], has "a more significant relationship to the parties and the occurrence"; or (2) given "the exceptional circumstances of the case," following the Second Restatement rule would lead to an unreasonable result. In light of section 142, if New Jersey has a substantial interest in the litigation, the inquiry ends, and New Jersey applies its statute of limitations, provided there are no "exceptional circumstances" making that "result unreasonable."
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> [McCarrell, supra, 227 N.J. at 597 (citations omitted).]

Here, Industrial Re and Admiral both have their principal places of business in New Jersey, and Gutierrez, president of Industrial Re, is domiciled in New Jersey. Although the underlying dispute — defendants' entitlement to commissions paid on an insurance policy placed in Puerto Rico pursuant to an agreement with a Puerto Rican insurance agent — concerns Puerto Rico, this present dispute concerns only the business dealings between, on one side, a New Jersey-based reinsurance intermediary and its New Jersey-domiciled president, and, on the other side, a New Jersey-based insurance carrier and its Connecticut-based intermediary. Because New Jersey has a substantial interest in resolving disputes arising out of business dealings between two of its own corporations, it is unnecessary to consider whether Puerto Rico has a more significant relationship to the parties and the contractual dispute. Furthermore, there is no indication that any

"exceptional circumstances" are present that would justify the application of Puerto Rico law in New Jersey.

V.

Defendants filed their breach of contract claim pertaining to the commissions for the 2009-10 policy on March 23, 2015. The trial judge determined the accrual date for this breach of contract claim was September 19, 2008, which would result in that claim being time-barred.

September 19, 2008 was the date Vosburgh informed defendants, "Berkley/Admiral will remit the 100% of the commission due on [the 2008-09 policy] directly to [AFU]." The court reasoned that, on that date, "defendants were on notice what the position of the plaintiffs was with regard to payment of the commission" because "[t]hey didn't pay one and it was very clear that they weren't going to be dividing up the next one either without some" authorization from AFU to do so.

Defendants argue the trial judge erred in treating their claim as one that would arise under an installment contract. They contend the 2009-10 policy period did not renew until June 30, 2009 with the commission payable thirty days thereafter. As a result, they assert their cause of action did not accrue until July 31, 2009, when they claim they first had an enforceable right to the commission. Plaintiffs counter the trial judge correctly

determined the September 19, 2008 email constituted a repudiation, triggering the accrual of the cause of action.

"For purposes of determining when a cause of action accrues so that the applicable period of limitation commences to run, the relevant question is when did the party seeking to bring the action have an enforceable right." Metromedia Co. v. Hartz Mt. Assocs., 139 N.J. 532, 535 (1995) (quoting Andreaqqi v. Relis, 171 N.J. Super. 203, 235-36 (Ch. Div. 1979)). In other words, a cause of action accrues on "the date upon which the right to institute and maintain a suit first arises." Holmin v. TRW, Inc., 330 N.J. Super. 30, 35 (App. Div. 2000) (quoting Hartford Accident & Indem. Co. v. Baker, 208 N.J. Super. 131, 135-36 (Law Div. 1985)), aff'd, 166 N.J. 205 (2001). A breach of contract claim "accrues at the moment when the breach occurs." Hoppaugh v. McGrath, 53 N.J.L. 81, 85 (1890); see also Sodora v. Sodora, 338 N.J. Super. 308, 313 (Ch. Div. 2000).

The trial judge's rationale comports with the doctrine of anticipated breach, which "entitles a nonrepudiating party to claim damages for total breach when the other party, through an unambiguous affirmative act or statement, repudiates its contractual duties prior to the agreed-upon time for performance." Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 178 (App. Div.), cert. denied, 196 N.J. 85 (2008).

The cause of action could not have accrued until the 2009-10 policy commission became due, and AFU failed to pay defendants the sixty-percent they claim was due to them. The policy's stated contract period was "6/20/2009 to 6/30/2010." In a March 5, 2008 email plaintiffs "reserve[d] the right to decline the business prior to the renewal date for [their] own reasons." AFU therefore had no duty to pay defendants any commission on the 2009-10 policy until the 2009-10 policy was renewed on June 30, 2009. The record is unclear as to when a commission, if owed, was due.[4]

However, the trial judge also cited an independent basis for the dismissal of this claim. The judge determined that, even if the 2009-10 policy commission claim were timely, plaintiffs still had no obligation to pay defendants the portion of that policy's commission because there was no contract, either express or implied, whereby plaintiffs agreed to pay defendants the 2009-10 policy commission. Defendants do not challenge this particular determination on appeal. As we have discussed, defendant's promissory estoppel and tortious interference claims were properly dismissed pursuant to Rule 4:46-2(c). In the absence of any contractual obligation, this claim fails as well. Therefore, we

[4] Defendants assert, without citation to the record, that it became payable on July 31, 2009, thirty days after the June 30, 2009 renewal date.

discern no reason to disturb the order granting summary judgment.

Affirmed.