IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

FARM FAMILY CASUALTY COMPANY, As Subrogee of M. Virginia Richardson and As Assignee of KNICELEY'S INC., Plaintiff, v. CUMBERLAND INSURANCE COMPANY, INC., a foreign corporation, DOWNES INSURANCE ASSOCIATES, INC., a Delaware corporation, HARRINGTON INSURANCE AGENCY, INC., Individually and as successor-in-interest to Downs Insurance Associates, Inc., and Marvel AGENCY, INC., a Delaware corporation, Defendants.	C.A. No. K11C-07-006 JTV

Submitted: June 6, 2013
Decided: October 2, 2013

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Farm Family, et al., v. Cumberland Insurance, et al.
C.A. No. K11C-07-006 JTV
October 2, 2013

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Upon Consideration of Defendant
Harrington's Motion For Summary Judgment
Against Farm Family
GRANTED

Upon Consideration of Defendant
Harrington's Motion To Amend Answer
GRANTED

Upon Consideration of Defendant
Harrington's Motion For Summary Judgment
Against Downes
GRANTED

VAUGHN, President Judge

OPINION

Plaintiff Farm Family Casualty Insurance Co. ("Farm Family")[1] has asserted various claims against insurance brokers Downes Insurance Associates, Inc. ("Downes") and Harrington Insurance Agency, Inc. ("Harrington") (collectively, the "Broker Defendants"), for their failure to secure appropriate insurance coverage for

[1] Farm Family brings its complaint as subrogee of M. Virginia Richardson and as assignee of Kniceley's, Inc.

Kniceley's, Inc.'s ("Kniceley") lead paint abatement business.[2] Additionally, Harrington has moved to amend its answer to assert cross-claims against co-defendant Downes that are related to an indemnification agreement. Now before the Court are Harrington's motion for summary judgment against Farm Family, Harrington's motion to amend its answer and Harrington's motion for summary judgment against cross-claim defendant Downes.

FACTS

The Underlying Action

The precursor to this action was an underlying lawsuit where a child, Jose LaTorre ("LaTorre"), suffered serious personal injuries and impairment caused by lead poisoning.[3] The child's injuries resulted from exposure to lead paint located within a rental property owned by M. Virginia Richardson ("Richardson").

In November of 2004, it was discovered that LaTorre had an elevated blood-lead level. On December 13, 2004, after an inspection of the home indicated the presence of lead-based paint, the Delaware Division of Public Health ordered Richardson to reduce the levels of lead paint present on the property in order to bring them into compliance with state standards. Richardson hired Kniceley, a licensed lead abatement company, to handle the situation. Kniceley performed the abatement work in February and March of 2005. On March 11, 2005, subcontractor Batta Associates, Inc. ("Batta") informed Richardson that the work had been completed and

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[2] Farm Family sued another broker, Marvel Agency, Inc. ("Marvel") as well. Marvel has been dismissed from this action.

[3] *LaTorre ex rel. Diaz v. Richardson*, C.A. No. 06C-05-020 (Del. Super.).

that the premises had been cleared for lead dust. On August 30, 2005, LaTorre again tested positive for high blood-lead levels.[4] The State's subsequent inspection confirmed that lead dust and paint were still present in the house.

A representative of LaTorre filed a lawsuit against Richardson on May 11, 2006. Richardson filed a third-party complaint against Kniceley and Batta on May 20, 2008 that sought contribution for their negligent failure to properly remove the lead-based paint from her home, resulting in injuries to LaTorre.

On July 8, 2008, Cumberland Insurance Company, Inc. ("Cumberland") informed Kniceley that it was denying coverage for the negligence claim brought by Richardson pursuant to a Total Pollution Exclusion Endorsement (the "total pollution exclusion") contained in the Policy. In its letter to Kniceley, Cumberland explained that "there [was] no coverage for [the] claim as presented" because the law suit was "based on [the] allegation of the release of 'pollutants' as a result of the work performed."[5]

On March 30, 2011, Richardson obtained a $350,000 (plus costs and interest) consent judgment against Kniceley after the parties agreed to a settlement.

The Procurement of the Policy and the Brokers

In the Fall of 2002, Donald Kniceley ("Mr. Kniceley") contacted Downes, an insurance broker, to help him obtain a commercial general liability policy (the "Policy") for his painting and paint removal business. After completing the

[4] In fact, Richardson alleged that LaTorre's blood-lead levels actually increased after the abatement.

[5] Pl.'s Resp. to Cumberland's Mot. Summ. J., Ex. C, at 3.

preliminary application and risk investigation processes, Downes submitted an insurance application to Cumberland on November 11, 2002. Cumberland reviewed the application and issued the Policy to Kniceley. With Downes' assistance, Kniceley renewed the Policy annually through November 2005. The Policy was in effect from November 11, 2004 to November 11, 2005, during which the aforementioned lead-paint abatement of Richardson's home occurred. It is undisputed that each iteration of the Policy contained the total pollution exclusion.

On March 13, 2006, Downes and Harrington executed an "Agreement for the Purchase of Assets" (the "Purchase Agreement") wherein Downes sold its property and casualty insurance businesses to Harrington. Relevant provisions of the Purchase Agreement will be discussed later in this opinion.

Downes remained the broker of record for Kniceley until September 18, 2006, when the broker was formally changed to Harrington. Farm Family asserts that Harrington performed brokerage services for Kniceley after acquiring the assets of Downes, including: "(1) collecting and mailing policy premium checks from Kniceley to its insurer(s); (2) communicating with Kniceley (3) providing Certificates of Insurance to third parties on behalf of Kniceley; (4) resolving notice of cancellation issues for nonpayment or late payment of premiums; and (5) confirming Kniceley's policy reinstatements with its insurer upon receiving notices of cancellation."[6] Kniceley decided to end its relationship with Harrington before the annual renewal of the Policy's coverage was slated to occur on November 11, 2006. It appears that Harrington was made aware of the change in broker by November 9, 2006 at the

[6] Pl.'s Resp. to Mot. Summ. J., at 5.

latest. Kniceley appointed Marvel Agency, Inc. ("Marvel") to replace Harrington as its insurance broker.

Procedural Facts

On July 7, 2011, Farm Family filed the complaint in this action against Cumberland and the Broker Defendants. Farm Family alleged that the Policy actually covered the claim filed by Richardson, and contended, alternatively, that if it did not, Cumberland, along with the Broker Defendants, made erroneous representations that the Policy would provide coverage for Kniceley's lead-based paint activities. Farm Family asserted three counts against Cumberland: (1) breach of contract, (2) breach of the duty of fair dealing, and (3) consumer fraud. The plaintiff asserted five counts against the Broker Defendants: (4) negligence, (5) breach of contract, (6) consumer fraud, (7) negligent misrepresentation and (8) equitable fraud. Harrington has moved to amend its answer and assert two cross-claims against Downes relating to an indemnification provision found in the Purchase Agreement: (1) for breach of contract and (2) for a declaratory judgment.

No scheduling order has been entered in this case, as the parties believe that summary judgment will resolve most, if not all, of the issues. Every defendant moved for summary judgment. Oral argument on the motions was heard on October 12, 2012. At the October 12 hearing, the Court granted Marvel's motion for summary judgment and permitted the remaining parties to submit additional briefing and/or to request additional argument time. The parties all made supplemental submissions and another hearing occurred before the Court on June 6, 2013.

STANDARD OF REVIEW

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[7] "[T]he moving party bears the burden of establishing the non-existence of material issues of fact."[8] If a motion is properly supported, the burden shifts to the non-moving party to establish the existence of material issues of fact.[9] In considering the motion, the facts must be viewed in the light most favorable to the non-moving party.[10] Thus, the court must accept all undisputed factual assertions and accept the non-movant's version of any disputed facts.[11] Summary judgment is inappropriate "when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[12]

Harrington's Motion for Summary Judgment Against Farm Family

PARTIES' CONTENTIONS

Harrington contends that settled Delaware law establishes that Farm Family failed to bring any of its claims within the applicable Statute of Limitations; that

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[7] Super. Ct. Civ. R. 56(c).

[8] *Gray v. Allstate Ins. Co.*, 2007 WL 1334563, at *1 (Del. Super. May 2, 2007).

[9] *Id.*

[10] *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[11] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[12] *Mumford & Miller Concrete, Inc. v. New Castle Cnty.*, 2007 WL 404771, at *1 (Del. Super. Jan. 31, 2007).

Harrington is not the successor-in-interest to Downes, but merely a transferee that is not liable for the conduct of its predecessor; that Harrington had no relationship with Richardson or Kniceley at the time of the alleged negligence; that the plaintiff cannot sustain its negligent procurement claim because Harrington never procured or renewed an insurance policy for Kniceley; that the breach of contract and fraud based claims must be dismissed because there was never a contract or relationship between Harrington and Kniceley; that the consumer fraud claim is inapplicable to this case; and that the Superior Court lacks subject matter jurisdiction to hear the negligent misrepresentation and equitable fraud claims.

Farm Family contends that all of its claims fall within the applicable Statutes of Limitation pursuant to the "time of discovery" exception; that there is a genuine question of material fact regarding whether Harrington is the successor-in-interest to Downes; that Harrington, as Kniceley's insurance broker, owed the company a duty to maintain and procure adequate insurance; that Harrington owed a contractual obligation to Kniceley by virtue of the Purchase Agreement and its performance of brokerage services for Kniceley; and that the Superior Court has jurisdiction over its negligent misrepresentation and equitable fraud claims because they are pled within the context of the Consumer Fraud Act.

DISCUSSION

Negligent Misrepresentation (Count VII) and Equitable Fraud (Count VIII)

"Whenever a question of subject matter jurisdiction is brought to the attention of the trial court, the issue must be decided before any further action is taken, and the

issue of jurisdiction must be disposed of regardless of the form of motion."[13] In adherence to this doctrine, I first address Harrington's contention that this Court lacks subject matter jurisdiction over Farm Family's allegations of negligent misrepresentation and equitable fraud.

Although Farm Family pled them as separate counts in its complaint, equitable fraud and negligent misrepresentation are essentially the same cause of action.[14] It is well-established that the Court of Chancery retains exclusive jurisdiction over claims for negligent misrepresentation[15] and equitable fraud.[16] An exception to this jurisdictional doctrine applies when such claims are "raised in the context of the Consumer Fraud Act."[17]

Farm Family alleged its statutory fraud claim separately from its claims for negligent misrepresentation and equitable fraud.[18] Additionally, the equitable claims are devoid of any citation to a statutory provision of the Consumer Fraud Act. These

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[13] *Texcel v. Commercial Fiberglass*, 1987 WL 19717, at *2 (Del. Super. Nov. 3, 1987).

[14] *See Radius Servs., LLC v. Jack Corrozi Constr., Inc.*, 2009 WL 3273509, at *2 (Del. Super. Sept. 30, 2009) ("Equitable fraud is also known as negligent or innocent misrepresentation.").

[15] *Van Lake v. Sorin CRM USA, Inc.*, 2013 WL 1087583, at *11 (Del. Super. Feb. 15, 2013).

[16] *Pepsi-Cola Bot. Co. of Salisbury, Md. v. Handy*, 2000 WL 364199, at *6 (Del. Ch. Mar. 15, 2000).

[17] *Iacono v. Barici*, 2006 WL 3844208, at *5 (Del. Super. Dec. 29, 2006).

[18] Compl. ¶¶ 39, 43, 48. Consumer fraud is asserted as Count VI. Negligent misrepresentation and equitable fraud are asserted as Counts VII and VIII.

were conscious decisions made by the plaintiff from which only one conclusion can be drawn. It is clear from reading the Complaint that Farm Family's claims for negligent misrepresentation and equitable fraud were pled outside the confines of the Consumer Fraud Act. Consequently, this Court lacks jurisdiction over those claims. Therefore, Counts VII and VIII of the Complaint are ***dismissed without prejudice*** to Farm Family's right to transfer the action to the Court of Chancery within 60 days.[19]

The Statute of Limitations and the Time of Discovery Exception

Three claims against Harrington remain in the case: negligent procurement (Count IV), breach of contract (Count V) and consumer fraud (Count VI). These claims are all governed by the three year statute of limitations set forth in 10 *Del. C.* § 8106.[20] Thus, the critical issue for the Court to determine is when exactly the causes of action accrued and triggered the commencement of the three year statutory period.

Harrington contends that the statute began to run when the Policy was first delivered to Kniceley, on November 11, 2002. If the three year period began on that day, then it expired well before Farm Family filed the instant lawsuit on July 7, 2011. Farm Family maintains that, pursuant to the "time of discovery" exception, the statutory period did not commence until July 8, 2008, when Cumberland informed Kniceley that it was denying coverage for Richardson's lawsuit. If that is correct, then the plaintiff asserted its claims within the three year statute of limitations.

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[19] 10 *Del. C.* § 1902.

[20] 10 *Del. C.* § 8106 ("[N]o action to recover damages caused by an injury unaccompanied with force ... shall be brought after the expiration of 3 years from the accruing of the cause of action . . . .").

In each claim that Farm Family asserts against Harrington, it advances two separate theories of liability: (1) that Harrington is liable individually for its own actions and (2) that Harrington has acquired Downes' liabilities because Harrington is the successor-in-interest to Downes.[21] Presumably, the claims brought against Harrington, individually, are directed towards actions that occurred during its relationship with Kniceley, *i.e.*, after the March 13, 2006 Purchase Agreement but before Kniceley engaged Marvel to be its broker in November of 2006. For those claims premised on successor liability from Downes, the relevant period is any time prior to the March 13, 2006 Purchase Agreement. In either case, if the time of discovery exception does not apply, the three year statute of limitations bars the claims.

"The general rule in [Delaware] is that the statute of limitations . . . begins to run at the time of the wrongful act, and, ignorance of a cause of action, absent concealment or fraud, does not stop it."[22] However, Delaware courts have recognized a "time of discovery" exception to the traditional rule that may sometimes act to toll the statute of limitations.[23] In, *Kaufman v. C.L. McCabe & Sons, Inc.*, the Delaware Supreme Court held that the time of discovery exception "is narrowly confined in

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[21] Compl. ¶¶ 29, 34, 39. 43, 48.

[22] *Isaacson, Stolper& Co. v. Artisans's Sav. Bank*, 330 A.2d 130, 132 (Del. 1974).

[23] *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 835 (Del. 1992).

Delaware to injuries which are both: (a) 'inherently unknowable'; and (b) sustained by a 'blamelessly ignorant' plaintiff.[24]

The *Kaufman* decision is directly applicable here. In *Kaufman*, the plaintiffs brought a claim of negligent procurement against their insurance broker when their insurer denied their claim for loss of use coverage following a fire that damaged a property that they co-owned.[25] Apparently, unbeknownst to the plaintiffs, they had been excluded from the loss of use coverage when they were changed from named insureds to additional insureds under their policy.[26] The *Kaufman* plaintiffs presented the court with the same argument that is now raised by Farm Family in this case, "that the exclusion of the loss of use coverage in the insurance policy procured for them . . . was inherently unknowable to them as laymen and that they were blamelessly ignorant because they relied upon the expertise of a professional."[27] The *Kaufman* court noted that the plaintiff's "argument assume[d] too much and ha[d] been previously rejected as unsound."[28] The court found that:

> The absence of loss of use coverage for the Kaufmans in their insurance policy was not inherently unknowable; rather, it was available to be ascertained by anyone who cared to read the policy. That is the reason for placing the

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[24] *Id.*

[25] *Id.* at 833.

[26] *Id.*

[27] *Id.* at 835.

[28] *Id.*

> terms of coverage in writing and delivering the policy representing the contractual undertaking of the issuer to the insured. The Kaufmans cannot reasonably claim to be blamelessly ignorant of the terms of a policy of which they had notice and constructively accepted.[29]

Ultimately, the court in *Kaufman* held that the time of discovery rule did not apply and that "the cause of action accrued on the date on which the Kaufmans entered into an insurance contract whose coverage was not that which they desired for the period in question."[30]

Farm Family contends that this case is distinguishable from *Kaufman* because, in *Kaufman,* the exclusion of coverage was "apparent on the face of the policy,"[31] whereas here, in a case involving lead paint, there is disagreement in the legal community as to whether the total pollution exclusion should apply. The plaintiff contends that, under these circumstances, the exclusion of coverage was not ascertainable by a layperson. Farm Family is correct that courts are split as to whether total pollution exclusions preclude coverage for injuries caused by lead paint.[32] However, in a separate opinion granting a motion for summary judgment filed by Cumberland, I have concluded that the total pollution exclusion in Kniceley's

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[29] *Id.*

[30] *Id.*

[30] *Id.* at 834.

[32] *See Farm Family Cas. Ins. Co. v. Cumberland Ins. Co., Inc.*, C.A. No. K11C-07-006, at *12 nn.25-26 (Del. Super. Oct. 2, 2013) (listing courts on either side of the argument).

Policy is unambiguous and that Cumberland correctly denied coverage.[33] I do not find the plaintiff's argument persuasive. The rule established by the court in *Kaufman* is purposely broad. I conclude that Farm Family's negligent procurement claim falls within the scope of *Kaufman* because the injury in this case–the procurement of the "wrong" coverage–was not "inherently unknowable."

I will first address Farm Family's claims asserted under the theory of successor liability. Upon the delivery of the initial Policy containing the total pollution exclusion on November 11, 2002, Kniceley was apprised of the existence "of facts sufficient to put a person of ordinary intelligence on inquiry which, if pursued, would lead to discovery."[34] As in *Kaufman*, those facts could be discovered by reading the Policy. When Kniceley received the initial Policy, it had reason to know that its desired coverage may not have been obtained. Therefore, I conclude that the negligent procurement cause of action accrued on November 11, 2002.

Further, I conclude that Farm Family's breach of contract claim is also barred by the three year statute of limitations. If Downes did breach its contract with Kniceley, the breach occurred, and thus the cause of action accrued,[35] at the same time that the negligent procurement claim accrued: when Kniceley received its initial

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[33] *Id.*

[34] *Abdi v. NVR, Inc.*, 2007 WL 2363675, at *3 (Del. Super. Aug. 17, 2007), *aff'd*, 945 A.2d 1167 (Del. 2008) (TABLE).

[35] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 2005 WL 1089027, at *13 (Del. Ch. May 4, 2005) ("An action for breach of contract accrues at the time of the alleged breach of the contract.").

Policy from Cumberland on November 11, 2002.[36] The time of discovery rule does not apply to the plaintiff's breach of contract claim.[37]

The negligent procurement and breach of contract claims asserted against Harrington individually are similarly barred. The wrongful acts necessarily had to have occurred prior to November of 2006, when Kniceley changed its broker from Harrington to Marvel. For the reasons stated above, the latest date that the causes of action could have accrued was when the Policy was renewed in November of 2006. Therefore, the three year statute of limitations expired well before Farm Family filed its complaint in July 7, 2011.

Accordingly, the bar of the statute of limitations applies as a matter of law and Harrington's motion for summary judgment on the plaintiff's claims for negligent procurement (Count IV) and breach of contract (Count V) is ***granted***.

Although it seems likely that the statute has also run on the plaintiff's consumer fraud claim, the parties offer little in the way of evidence or argument regarding when the alleged wrongful acts or injuries occurred. Because the timing cannot be ascertained on the present record, that claim is best addressed in the context of the other contentions raised by the parties.

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[36] *See Jadczak v. Assurant, Inc.*, 2009 WL 1277965, at *4 (Del. Super. Apr. 30, 2009) ("The time of discovery rule does not apply to breach of contract claims.").

[37] *Id.*

Consumer Fraud (Count VI)

Harrington contends that the Delaware Consumer Fraud Act[38] does not apply here because it never advertised, marketed, or sold its services to Kniceley; that the plaintiff has not stated a *prima facie* case of consumer fraud under the statute; and that Farm Family has waived its right to oppose Harrington's arguments because it failed to respond to them in its summary judgment briefs. It appears that Farm Family is content to rely upon the consumer fraud allegations asserted in its complaint as it does not directly address the claim in its briefing.

The plaintiff's complaint avers that "[Harrington] engaged in deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression or omission of materials facts with its insured, with the intent that its insured rely on such conduct in connection with the sale or advertisement of its insurance products," resulting in injuries to the plaintiff.[39] This assertion tracks the statutory language of 6 *Del. C.* § 2513 very closely.[40] However, Farm Family offers no evidence to substantiate or develop the allegations in its complaint.

At this stage in the litigation, the plaintiff has had ample opportunity to acquire such evidence. When Harrington, in its motion for summary judgment, challenged Farm Family to support its consumer fraud claim, the plaintiff still made no effort to craft a response aimed at establishing the claim's validity. Farm Family's failure to

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[38] 6 *Del. C.* § 2511 *et seq*.

[39] Complaint ¶¶ 41-42.

[40] *See* 6 *Del. C*. § 2513(a).

provide the Court with any evidence regarding the essential elements of its statutory fraud claim[41] is fatal.[42] I find that Farm Family has failed to state a *prima facie* Consumer Fraud action under 6 *Del. C.* § 2513. Therefore, Harrington's motion for summary judgment is ***granted*** with regards to Count VI, consumer fraud.

Harrington's Motion to Amend Its Answer to Add a Cross-Claim

A motion for leave to amend is within the sound discretion of the court,[43] and leave "shall be freely given when justice so requires."[44] "In the absence of substantial prejudice or legal insufficiency, the court must exercise its discretion in favor of granting leave to amend."[45]

Harrington moves to assert two cross-claims against Downes: (1) breach of contract for Downes' failure to defend and indemnify and (2) for a declaratory judgment that Downes owes it a duty to defend or reimburse defense costs. Because

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[41] *See Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (reciting the elements of a common law or equitable fraud action and discussing the major differences between those actions and the requirements of an action brought pursuant to the Consumer Fraud Act).

[42] *See Wilmington Trust Co. v. Jestice*, 2012 WL 1414282, at *2 (Del. Super. Jan. 11, 2012) (quoting *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.")).

[43] *E.I du Pont de Nemours & Co. V. Allstate Ins. Co.*, 2008 WL 555919, at *1 (Del. Super. Feb. 29, 2008).

[44] Super. Ct. Civ. R. 15(a).

[45] *E.I du Pont*, 2008 WL 555919, at *1.

Harrington's proposed cross-claims are legally sufficient[46] and Downes has fully argued against the merits of the cross-claims in its response to Harrington's motion for summary judgment, Harrington's motion to amend is ***granted***.

Harrington's Motion for Summary Judgment Against Downes

DISCUSSION

The indemnification dispute between Harrington and Downes is narrow. Generally, Harrington contends that the plain and unambiguous language of the Purchase Agreement requires Downes to defend and, if necessary, indemnify Harrington from this lawsuit. Downes contends that Harrington's cross-claims for indemnification are time-barred by the express terms of the Purchase Agreement.

The arguments pertaining to this motion require the Court to examine and interpret select provisions in the Purchase Agreement. Harrington primarily relies on Section 7 of the Purchase Agreement ("Section 7" or the "indemnification provision") which provides:

> 7. Indemnification by Seller. The Sellers, jointly and severally, do hereby indemnify and hold harmless Buyers against and in respect to any loss, cost, expense (including without limitation reasonable attorney's fees) or damage suffered by Buyers resulting from, arising out of, or incurred with respect to (i) any and all liabilities, accrued or unaccrued, absolute or contingent, existing as of the date of final settlement; (ii) any claims, debts, demands or causes of action made against the assets being sold hereunder, accrued or unaccrued, absolute or contingent, existing prior to the date of or on the date of actual

[46] As will be discussed shortly.

> settlement, including the cost of defending same; (iii) any and all damages resulting from any misrepresentation, breach of warranty, failure to perform any covenant or agreement contained in this agreement, or breach of any warranty or representation made hereunder; and (iv) any and all actions, suits, proceedings, claims, demands, judgments, costs and expenses incident to any of the foregoing.[47]

Downes relies on Section 3 of the Purchase Agreement entitled "Warranties and Representations of Seller" ("Section 3"). Section 3 provides:

> 3. Warranties and Representations of Seller. The Purchaser is purchasing in reliance upon the following warranties and representations of the Seller and Seller does hereby make these representations and warranties in order to induce Purchaser to purchase. *Seller does expressly agree that these warranties and representations shall survive settlement for a period of three (3) years.* Specifically, the Sellers do hereby jointly and severally represent and warrant to the Purchaser as follows:
>
> > a. Seller is the owner of and has good and marketable title to the business and assets referred to in paragraph 1, free and clear of all debts and encumbrances.
> >
> > b. Seller has entered into no contract related to the business and property referred to in paragraph 1, which will survive settlement, except as shown on Exhibit C - by the signing hereof Buyer agrees to assume those contracts and/or debts listed on Exhibit C.

[47] Harrington Op. Br. Supp. Mot. Summ. J., Ex. F, at 3 (hereafter "Purchase Agreement").

> c. There are no judgments, liens, actions or proceedings pending against the assets.
>
> d. There are no violations of any kind pending or threatened\ against the business and assets referred to in paragraph 1.
>
> e. Seller has, to its knowledge, complied with all of the laws, rules and regulations regarding the business and the assets referred to in paragraph 1.
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> f. All outstanding creditors of the Seller shall be paid in full by the date of actual settlement.
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> g. If there be a lease being transferred hereunder, said lease is in good standing and with no violations by Lessee or Lessor.
>
> h. No untrue nor misleading statement is contained in any representation in this agreement as of the date of the signing of this agreement and same shall be true as of the date of actual settlement.
>
> i. Seller agrees to purchase tail coverage under his existing E&O policy and to provide Buyer proof of same.[48]

As mentioned, Downes contends that Section 3's three year time limitation or "survival clause" applies to Section 7's indemnification provision, thus barring

[48] Purchase Agreement, at 1 (emphasis added).

Harrington's cross-claims. Downes further contends that even if the restriction does not apply to Section 7, case law has held that the indemnification provision should not survive closing in the absence of an applicable survival clause. Downes cites the Court of Chancery opinion, *GRT, Inc. v. Marathon GTF Technology, Ltd.,*[49] as an authority that supports both of its contentions.

Downes' reliance on *GRT* under these circumstances is misplaced. No legal principle set forth in *GRT* refutes or conflicts with Harrington's contentions regarding the indemnification provision. Harrington does not contend that the survival clause is unambiguous or invalid under Delaware law. It merely contends that there is no reason to apply Section 3's survival clause to Section 7's indemnification provision. Harrington's argument is consistent with Delaware contract construction principles.

Put simply, the contract at issue in *GRT* was very different from the Purchase Agreement. The express terms of the *GRT* survival clause provided that it applied to certain remedial indemnification provisions found elsewhere in that contract.[50] The opposite is true of the survival clause in the Purchase Agreement. Section 3 makes no reference to Section 7 and no mention of indemnification. Moreover, unlike the remedial paragraphs at issue in *GRT*, which were triggered only upon the breach of specified representations and warranties located in other sections of the contract,[51] Section 7 creates obligations between Downes and Harrington that are subject to

[49] 2011 WL 2682898 (Del. Ch. July 11, 2011).

[50] *Id.* at *7.

[51] *Id.* at, *9-10.

breach in the first instance. Its application is not dependent upon any other provision in the Purchase Agreement as it is not merely a remedial provision. The "Securities Purchase Agreement" in *GRT* and the Purchase Agreement here both contained survival clauses and indemnity provisions. However, the similarities end there. A review of the two contracts reveals that the respective parties used different language, with the intent to form different obligations and achieve different results.

I find that a reasonable person in the position of the parties would conclude that the only tenable reading of the Purchase Agreement is that the three year time limitation contained within Section 3 applies to the itemized list of warranties and representations that immediately follows it, but not to any other provision in the agreement.[52] Section 7 is an independent provision that is entirely separate from Section 3. There is no language in Section 7 or Section 3 that evinces an intent to link one to the other in the manner advanced by Downes. This interpretation of Section 3 does not render the survival clause meaningless; its application is merely limited to the warranties and representations delineated (a)-(i) within the same section.

Downes' final contention is that *GRT* stands for the proposition that the indemnification provision of Section 7 does not survive closing of the Purchase Agreement without language in the agreement to the contrary. That is certainly not a rule or holding articulated by *GRT*. I cannot accept Downes' contention as it is

[52] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("Contract terms themselves will be controlling when . . . a reasonable person in the position of either party would have no expectations inconsistent with the contract language.").

contrary to established contract construction principles.[53] Downes' contention is unpersuasive.

I agree with Harrington's interpretation of Section 7. The indemnification provision unambiguously provides that Downes has a duty to indemnify and hold Harrington harmless for those liabilities that it has incurred and will incur from this lawsuit. That includes the costs and reasonable attorneys' fees associated with defending itself from Farm Family's claims and from Harrington's own efforts to enforce the indemnification agreement through its own cross-claims.[54] On March 13, 2006, when the Purchase Agreement was executed, LaTorre's claim against Richardson and Richardson's third party claim against Kniceley were accrued, but not yet filed. Also, Kniceley's alleged negligence had occurred and the Policy had been purchased with Downes' assistance. The claims brought by Farm Family clearly arise out Downes' insurance contract and relationship with Kniceley, which existed at the time of the March 13, 2006 settlement.

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[53] *See GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) ("[A] Court must construe the agreement as a whole, giving effect to all provisions therein." (quoting *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985))); *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) ("[W]e will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

[54] The plain language of Section 7 is supported by precedent. *See Delle Donne & Assocs., LLP v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1256 (Del. 2004) ("Our case law recognizes that where, as here, a party . . . is contractually entitled to be held harmless, that party is entitled to its costs and attorneys' fees incurred to enforce the contractual indemnity provision.").

CONCLUSION

Therefore, Harrington's Motion for Summary Judgment as to its breach of contract and declaratory judgment cross-claims is ***granted***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File