GRATEFUL PED, INC. d/b/a LEVY & RAPPEL Plaintiff, V. OLD DOMINION FREIGHT LINE, INC., CAILOR FLEMING & ASSOCIATES, UNITED NATIONAL INSURANCE COMPANY, MARC ABDALLAH, CIA CUSTARD INSURANCE ADJUSTERS, INC., WESTERN HERITAGE INSURANCE COMPANY, an affiliated company of NATIONWIDE MUTUAL INSURANCE COMPANY, and NATIONWIDE MUTUAL INSURANCE COMPANY Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-3266-19 CIVIL ACTION **MEMORANDUM OF DECISION**

DATE OF DECISION: December 21, 2020

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DED: 02/23/2021
ARB: None
TRIAL: None

PRELIMINARY STATEMENT

This matter comes before the court as a motion filed by Defendants Western Heritage Insurance Company, an affiliated company of Nationwide Mutual Insurance Company ("Western Heritage"), and Nationwide Mutual Insurance Company ("Nationwide") to dismiss Count Seven of the Amended Complaint filed by plaintiff Grateful PED, Inc., d/b/a Levy & Rappel ("Plaintiff"). This is a property damage action arising from a truck accident that occurred on Plaintiff's commercial property in 2016. According to the Amended Complaint, on June 17, 2016, a delivery truck operated by defendant Old Dominion Freight Line, Inc. ("Old Dominion") hit Plaintiff's building causing "significant latent structural damage." In Count Seven of its Amended Complaint, Plaintiff asserts a claim for negligent misrepresentation against Nationwide for its purported failure to warn Plaintiff that making repairs to its property, which Plaintiff had already commenced, could impair its coverage under a different insurance policy issued by defendant United National Insurance Company ("United"). Plaintiff alleges that Nationwide failed to warn Plaintiff that continuing with repairs could impair Plaintiff's insurance claim with United.

Western Heritage and Nationwide argue that Plaintiff's claim against Nationwide is defective as the economic loss rule precludes the assertion of tort claims where the rights and duties between two parties are set forth in a contract. Here, Plaintiff's relationship with Nationwide was governed by an insurance policy and the New Jersey Unfair Claims Settlement Act, neither of which imposed a duty on Nationwide that would support a claim for negligent misrepresentation. Further, Plaintiff's claim should be dismissed as it fails to allege that: (i) Nationwide was in possession of the information that Plaintiff claims should have been disclosed; (ii) Plaintiff reasonably relied upon any statement or failure to disclose by Nationwide; and (iii) that any statement or failure to disclose by Nationwide proximately caused its damages.

In opposition, Plaintiff argues that the economic loss doctrine is inapplicable here. The claim as framed addresses the guidance established by Supreme Court decisions as there does exist an independent duty that was breached. First is the Unfair Claims Settlement Practices Act states that duties are imposed on insurers and their agents. Our courts routinely cast a focused eye on the insurer, its contracts and conduct. The duty imposed in binding precedent is that the insurer and its agents are to act with professional care when supplying information, and a breach can give rise to claims even from remote third parties. Moreover, this is not a construction case nor products liability contest, situations where most economic loss doctrine litigation has occurred. The very foundation of the doctrine articulated in those matters, i.e. parties have or should have contracted for contingencies, is not present when considering an insured-insurer circumstance because those agreements are contracts of adhesion. In such a case, particularly were information is being imparted by persons knowledgeable of the claim process and litigation in general – adjusters and claims persons – the economic loss doctrine does not apply, especially on a pre answer motion to dismiss.

STANDARD OF REVIEW

1. MOTION TO DISMISS STANDARD

Rule 4:6-2(e) permits dismissal of a complaint for failure to state a claim. The New Jersey Supreme Court has said that "the test for determining the adequacy of a pleading is whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). The reviewing court does not consider whether the plaintiff can prove the allegation in the complaint; it simply "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being

given to amend if necessary." Id. (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244 (App. Div. 1957)). The plaintiff is afforded "every reasonable inference of fact." Id. (citations omitted).

But if "matters outside the pleading are presented to and not excluded by the court" in support of a motion under R. 4:6-2(e), "the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46." R. 4:6-2(e); see also Lederman v. Prudential Life Ins. Co. of America, 385 N.J. Super. 324, 337 (App. Div.), *certif. den.*, 188 N.J. 353 (2006). However, a motion to dismiss the pleadings is not converted into a summary judgment motion by filing documents with the court which are referred to in the pleading. Myska v. New Jersey Mfrs. Ins., 440 N.J. Super. 458, 482 (App. Div.), app. dismissed 224 N.J. 523 (2015) ("In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue."' (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183) (further citations omitted)). When allegations in a complaint are contradicted by the records to which it refers, the records control. Id. (citing Rapaport v. Robin S. Weingast & Assocs., 859 F. Supp. 2d 706, 714 (D.N.J. 2012)).

The standard for summary judgment is set forth in R. 4:46-2, and has been clarified by the New Jersey Supreme Court in Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). An order for summary judgment "shall be rendered if the pleadings…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." R. 4:46-2(c). In Brill, the New Jersey Supreme Court held:

> Whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential

> materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.
> [Brill, 142 N.J. at 540.]

On a motion for summary judgment, the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Id.

2. ECONOMIC LOSS DOCTRINE

The economic loss doctrine precludes the tort liability of parties to a contract when the relationship between them is based on a contract, "unless the breaching party owes an independent duty imposed by law." Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 788 A.2d 268 (2002), 170 N.J. at 316-17 (citing New Mea Constr. Corp. v. Harper, 203 N.J. Super. 486, 493, 497 A.2d 534 (App. Div. 1985)). New Jersey courts have consistently applied the economic loss rule to preclude tort claims where the rights and duties between two parties are expressly set forth in a contract. See Dean v. Barrett Homes, 204 N.J. 286, 295 (2010). Essentially, the economic loss rule establishes a "boundary line" between contract and tort remedies; when the relationship between the parties is contractual in nature, the remedy should be contractual as well. See Horizon Grp. of New England, Inc. v. New Jersey Sch. Const. Corp., No. A-5934-09T1 (App. Div. Aug. 24, 2011) (slip op. at 12). Under New Jersey law, there are two exceptions to the economic loss rule which would allow a party to state a tort claim even in the context of a contractual relationship: (1) where the injured party would not otherwise have a remedy; and (2) if an independent duty is imposed by law.

3. NEGLIGENT MISREPRESENTATION

Negligent misrepresentation is "'[a]n incorrect statement, negligently made and justifiably relied on,' which results in economic loss." See McLellan v. Felt, 376 N.J.Super. 305, 313 (2005) (quoting Kaufman v. i-Stat Corp., 165 N.J. 94, 109 (2000)). Significantly, the statement at issue

must be the proximate cause of the plaintiff's damages. Karu v. Feldman, 119 N.J. 135, 147 (1990). Additionally, reliance upon the statement is a critical element of negligent misrepresentation, and its absence will doom a claim. Kuhnel v. CNA Ins. Companies, 322 N.J.Super. 568, 581 (App. Div. 1999) (affirming dismissal of claim because plaintiffs made no showing that they received the misstatement and relied upon it to their detriment).

ANALYSIS

Here, the Court finds that, liberally construed, Plaintiff's complaint does not allege facts that could constitute a claim for negligent misrepresentation. The Court agrees with United that the economic loss doctrine precludes Plaintiff's claim. Moreover, the Court agrees that the Plaintiff does not support its attack of the economic loss doctrine with any New Jersey law, but cites only to decision in other jurisdictions that have not applied the economic loss doctrine in situations involving an insurance policy.

Neither exception to the economic loss doctrine is applicable in the current case. Under New Jersey law, there are two exceptions to the economic loss rule which would allow a party to state a tort claim even in the context of a contractual relationship: (1) where the injured party would not otherwise have a remedy; and (2) if an independent duty is imposed by law. First, as an insured under a Nationwide policy, Plaintiff would have a remedy against Nationwide other than tort, as Plaintiff would be entitled to assert a breach of contract claim against Nationwide. Second, Nationwide cannot be said to have assumed an independent duty to Plaintiff but was rather acting within the scope of its duties under the insurance policy. Specifically, in its Amended Complaint, Plaintiff admits that Nationwide issued an insurance policy and that it was investigating the loss after Plaintiff made a claim under the Policy. Complaint ¶¶ 11, 12. It then asserts that "[t]he transaction among Nationwide, Cailor and Plaintiff was one that required perfect good faith and

full disclosure." Id. ¶ 53. As such, the Court finds that Nationwide was acting within its already established duties under the insurance policy and no other duty

Furthermore, Plaintiffs relied on facts outside of the pleadings in its opposition to Nationwide's motion. In its Amended Complaint, Plaintiff states that: "The severity of the damage was such that when Nationwide inspected the premises by its representative, Saaleha Hewitt, who informed repairs needed to take place immediately to protect the structure and Plaintiff complied as same had already commenced." In its opposition papers, Plaintiff then states: "[Hewitt] and the claim representative, Michael Seckinger, each told plaintiff to continue any and all repair work without reservation; that is they did not advise only do necessary and essential work." United states that this statement completely contradicts the only factual allegation supporting Plaintiff's negligent misrepresentation claim – that Ms. Hewitt informed Plaintiff that "repairs needed to take place immediately to protect the structure." As such, the Court will treat this motion as one for summary judgment under R. 4:46.

When applying the standard from Brill to the current matter, the Court finds that granting summary judgment for Nationwide is appropriate. Plaintiff's claim is based on the alleged fact that it was instructed to carry out repairs by Nationwide. However, when Nationwide came to inspect the damage, it was shown that these repairs were already undertaken voluntarily by Plaintiff. Negligent misrepresentation requires that a statement is made and justifiably relied on. However, if the repairs were already being undertaken by Plaintiff, then there is no basis for finding that it relied on any statements made by Nationwide while the insurance company inspected the damage. As such, summary judgment is granted in favor of Nationwide.

CONCLUSION

For the foregoing reasons, Nationwide's Motion to Dismiss Complaint with prejudice is granted.

SO ORDERED.

HON. KIMBERLY ESPINALES-MALONEY, J.S.C.

R. 1:6-2(a): The within matter was__X___opposed ____unopposed.