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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. RICHARD F. BRAUN** J.S.C. *Justice*

PART 23

Selective Insurance Co.

- v -

Chu + Gassman Consulting

INDEX NO. 112116/10

MOTION DATE 6/2/11

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion ~~to~~/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Notices of Cross Motion Answering Affidavits — Exhibits [illegible]	2, 3
Replying Affidavits	4, 5, 6, 7, 8

FILED

APR 23 2012

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted to the extent of awarding defendant Continental Casualty Company [illegible] summary judgment ~~that~~ plaintiff pay the first $50,000 of defendant Chu & Gassman Consulting Engineers, P.C.'s (Chu) defense costs in the two underlying actions, and thereafter share defense costs on a 50/50 basis with Continental; the cross motion of defendant Chu is granted to the extent of awarding Chu summary judgment declaring that plaintiff is obligated to defend Chu [illegible] on a primary basis [illegible] the underlying actions, as aforesaid, and the cross motion by plaintiff is denied.

This constitutes the decision and order of this Court. See separate Opinion. Settle judgment.

Dated: New York, New York, April 16, 2012 ENTER: [signature] J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☑ SETTLE JUDGMENT

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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SELECTIVE INSURANCE COMPANY OF AMERICA,

Plaintiff,

-against-

CHU & GASSMAN CONSULTING ENGINEERS, P.C., CONTINENTAL CASUALTY COMPANY, INC., DONNA MONTELLO, AS ADMINISTRATRIX OF THE ESTATE OF GENNARO MONTELLO and DONNA MONTELLO, INDIVIDUALLY, and DAVID MOSTYN AND LISA MOSTYN,

Defendants.

----------X

Index No. 112116/10

OPINION

RICHARD F. BRAUN, J.:

This is a declaratory judgment action brought to determine the defense and indemnification obligations of two liability insurers with respect to a personal injury action and a wrongful death action arising from the collapse of an industrial conveyor belt. The parties have moved for relief as follows:

(a) Defendant Continental Casualty Company, Inc. ("Continental") moves for summary judgment (CPLR 3212) declaring that plaintiff Selective Insurance Company of America ("Selective") must defend defendant insured Chu & Gassman Consulting Engineers, P.C. ("Chu") on a primary basis and reimburse Continental for certain defense costs.

(b) Chu cross-moves for the same declaration, dismissal of plaintiff's amended complaint, and attorney's fees in connection with the instant action.

(c) Selective cross-moves for summary judgment declaring that Selective is relieved from any policy obligations under the insurance policy exclusions for "professional services" and "errors and omissions."

Intl. S. Ins. Co., 71 AD3d 561, 562 [1st Dept 2010].) Moreover, "[t]o be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision (citation omitted)." (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997].) If any claims asserted "arguably arise from covered events," the insurer must defend the entire action. (*id.*)

Where a professional services exclusion is invoked, the trier of fact must look "to the nature of the conduct under scrutiny rather than to the title or position of those involved, as well as to the underlying complaint, the contract under which [the insured] was to perform...." (*Reliance Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 262 AD2d 64, 65 [1st Dept 1999] [citation and internal quotation marks omitted].) The exclusion does not apply where the insured merely enforces the terms of its contract or safety rules without drawing upon engineering or other professional knowledge. (*id.*)

The direct and third-party claims against Chu assert claims for ordinary negligence, and contract, common law and statutory violations in connection with construction and demolition that could conceivably fall outside the exclusion for professional, supervisory, inspection, or engineering services (*cf. Westpoint Intl., Inc. v American Intl. S. Ins. Co.*, 71 AD3d 561, 562 ["Although the underlying complaint contains some causes of action that are arguably subject to the insurance policy's 'contract liability' exclusion, it alleges, in addition to a single cause of action for breach of contract, several causes of action sounding in tort and alleging statutory

violations."]). The plaintiffs and other parties do not assert that all of Chu's conduct involved supervision and inspection.

In urging summary judgment under the exclusion, Selective has submitted a subcontract and purchase orders claimed to be between Chu and an entity apparently alleged to be affiliated with third-party defendants in the underlying actions. Selective argues that the documents show that Chu was responsible for resident engineering, and electrical and mechanical inspection support, and notes that the word "engineer" appears in Chu's corporate name and that Chu is described as an architect in the declarations page of the policy. The court may not even consider this "evidence" in determining the duty to defend. It is well-established that "a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though the facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered (citation omitted)." (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]; *accord Savik, Murray & Aurora Constr. Mgt. Co., LLC v ITT Hartford Ins. Group*, 86 AD3d 490, 494 [1st Dept. 2011].)

With respect to Selective's invocation of the errors and omissions exclusion, there is no need to examine the legal applicability of the clause. In neither of the two partial disclaimer letters by Selective did it invoke that exclusion. Rather, Selective relied exclusively upon the professional services exclusion, and did not raise the errors and omissions exclusion until Selective made its instant cross-motion. Accordingly, any defense under the exclusion has been waived *(Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 35 [1st Dept 2009]). In any event, the same analysis applicable to the professional services exclusion would apply. The pleadings allege negligence and statutory claims which might conceivably fall outside of the

"(1) consulting; (2) evaluating; (3) advising; (4) instructing; (5) testing; (6) reporting; or otherwise providing or failing to provide services" provision of the errors and omissions exclusion.

Chu and Continental are entitled to a declaration that the Selective policy, like Continental's, provides primary coverage. Because both policies contain "other insurance" provisions, the clauses cancel each other out, and the insurers are required to provide primary coverage on a pro rata basis (*Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 687 [1999]; *Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 19 [1st Dept 2009]). Furthermore, because Continental's policy provides for a $50,000 self-insured retention, Selective is responsible for the first part of defense costs up to that amount before the two insurers are required to share the costs (*see New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1568 [4th Dept 2010]).

Finally, Chu is entitled to attorney's fees incurred in connection with this insurance declaratory judgement action. An insured is entitled to such fees when it "has been cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations ... (citations omitted)." (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 21 [1979]; *accord Reliance Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 262 AD2d at 66.) Selective placed Chu in that position by commencing this action.

Thus, by this court's separate decision and order, dated April 17, 2011, the motion by Continental and the cross motion by Chu were granted in their entirety. Selective's cross motion was denied. The branch of Chu's cross motion seeking dismissal of the amended complaint cannot be granted, as it is not appropriate to dismiss a declaratory judgment cause of action on the merits but, if the claim is meritless, a declaration should be made in the opposite direction

(*see 200 Genesee St. Corp. v City of Utica*, 6 NY3d 761, 762 [2006]; *Sirius Am. Ins. Co. v Burlington Ins. Co.*, 81 AD3d 562, 563 [1st Dept 2011).

Dated: New York, New York
April 19, 2012

RICHARD F. BRAUN, J.S.C.