Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

Copy

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.:21430/06
MOTION DATE: 2/6/14
MOTION NO.: 002 MD; 003 X MOTD;
004 X MOTD

NETHERLANDS INSURANCE COMPANY,

Plaintiff,

-against-

PINDAR VINEYARDS, LLC, HERODOTUS DAMIANOS, M.D., BRIARCLIFF SOD, INC., BRIARCLIFF LANDSCAPE INC., IRENE C. VITTI, BRENDA CICHANOWICZ, individually and as Executrix of the Estate of Frank J. Cichanowicz, III, THE ESTATE OF FRANK J. CICHANOWICZ, III, DONALD J. WILCENSKI, NATALIE WILCENSKI, NEAL J. CICHANOWICZ and CINDY CICHANOWICZ,

Defendants.

BRIARCLIFF SOD, INC.,

Third-Party Plaintiff,

- against -

THE NEEFUS-STYPE AGENCY, INC., and JEFFREY F. KAYTIS,

Third-Party Defendants.

GOLDBERG & SEGALLA LLP
Attorney for Plaintiff
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Garden City, New York 11530

JASPAN SCHLESINGER LLP
Attorney for Defendant Pindar Vineyard
300 Garden City Plaza
Garden City, New York 11530

FUREY, FUREY, LEVERAGE, MANZIONE, WILLIAMS & DARLINGTON, P.C.
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KEIDEL, WELDON & CUNNINGHAM, LLP
Attorney for Third-Party Defendants
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Upon the following papers numbered 1 to 54 read on this motion and cross-motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-28 ; Notice of Cross Motion and supporting papers 29-34; 35-36 ; Answering Affidavits and supporting papers 40 ; Replying Affidavits and supporting papers 41-42; 43-44 ; Other 37-39; 45-46; 47-52; 53-54 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 002) of plaintiff Netherlands Insurance Company for an order granting summary judgment against defendants in its action for an order declaring that it is not obligated to defend or indemnify the defendant/third-party plaintiff Briarcliff Sod, Inc. and defendant Briarcliff Landscape, Inc. or in a certain underlying action is denied; and it is further

ORDERED that the cross-motion (motion sequence no. 003) of defendant/third-party plaintiff Briarcliff Sod, Inc. for an order granting summary judgment and declaring that

plaintiff is obligated to defend and indemnify it in said underlying action is granted to the extent that the first and second causes of action in the complaint are dismissed, and is otherwise denied; and it is further

ORDERED that the cross-motion (motion sequence no. 004) of defendants Pindar Vineyards LLC and Herodotus Damianos, M.D. for an order granting summary judgment and declaring that a certain insurance policy issued to defendant/third-party plaintiff Briarcliff Sod, Inc. and defendant Briarcliff Landscape, Inc. by plaintiff provides coverage for the liability imposed on Briarcliff Sod, Inc. in said underlying action is granted to the extent that the first and second causes of action in the complaint are dismissed, and is otherwise denied; and it is further

ORDERED that upon a search of the record pursuant to CPLR R. 3212(b), summary judgment is granted in favor of defendants Irene C. Vitti, Briarcliff Landscape, Inc., Brenda Cichanowicz, Individually and as Executrix of the Estate of Frank J. Cichanowicz III, the Estate of Frank J. Cichanowicz III, Donald J. Wilcenski, Natalie Wilcenski, Neal J. Cichanowicz and Cindy Cichanowicz dismissing the complaint against them.

Plaintiff brings this declaratory judgment action seeking a declaration that it is not obligated to defend or indemnify defendant/third-party plaintiff Briarcliff Sod, Inc. ("Briarcliff") regarding an underlying action, *Pindar Vineyards, LLC & Herodotus Damianos, M.D. v Irene C. Vitti, et al.* commenced in Supreme Court, Suffolk County, under Index No. 08-14370. In that action Pindar Vineyards LLC ("Pindar") sought to recover damages based on the negligent spraying of herbicides, which allegedly caused the destruction of approximately 30 rows of grapevines in Pindar's vineyard. Pindar's complaint in the underlying action includes allegations that Briarcliff operated a sod farm on property leased to it by Irene C. Vitti, also a defendant in this action, and that Briarcliff improperly sprayed (oversprayed) a herbicide on that property which drifted into Pindar's vineyard causing the destruction of its grapevines.

The instant action was commenced by plaintiff against Briarcliff, defendants Pindar and Herodotus Damianos, M.D., and the remaining defendants who, at the time of the commencement of this action, might have had an interest in whether Briarcliff had insurance coverage regarding this incident or an interest in the outcome of this litigation. By order dated September 24, 2012, the Court (WHELAN, J.) dismissed Pindar's complaint in the underlying action as to defendants Irene C. Vitti, Briarcliff Landscape, Inc., Brenda Cichanowicz, Individually and as Executrix of the Estate of Frank J. Cichanowicz III, the Estate of Frank J. Cichanowicz III, Donald J. Wilcenski, Natalie Wilcenski, Neal J. Cichanowicz and Cindy Cichanowicz. Although said defendants have appeared in this action, the record reveals that they have not substantially participated in discovery in this action, without apparent objection from the remaining parties.

In its complaint, plaintiff alleges, among other things, that it issued a commercial general liability policy to Briarcliff, that the policy excluded coverage for "pollution," and that the complaint in the underlying action alleges causes of action, sounding in negligence, trespass, and nuisance. Plaintiff's complaint sets forth four causes of action all bearing on its singular request for declaratory judgment. In the first cause of action, plaintiff alleges that it does not owe any obligation to defend or indemnify Briarcliff on the ground that the property damage did not occur during the policy period. In the second, third and fourth causes of action, plaintiff alleges that it does not owe any obligation to Briarcliff on the grounds, respectively, that Briarcliff knew that the

property damage had occurred at the inception of the policy, that Briarcliff expected or intended the property damage, and that the policy excludes coverage regarding "pollutants." After issue was joined as to all of the named defendants, Briarcliff commenced a third-party action against third-party defendants The Neefus-Stype Agency, Inc. ("Neefus") and Jeffrey F. Kaytis ("Kaytis") alleging, among other things, that said defendants negligently failed to obtain adequate insurance coverage for Briarcliff after they were asked to do so.

It is undisputed that plaintiff issued Briarcliff a commercial general liability policy, number CBP 9880330, effective August 28, 2004 to August 28, 2005 (the "policy"), that Briarcliff operated a portion of its sod business on a farm adjacent to Pindar's vineyard during the policy period, and that Briarcliff used a chemical herbicide (2,4-D) to prevent the growth of weeds in the sod grown on its farm. It is also undisputed that Briarcliff sprayed 2,4-D on its farm on April 15, 2005, that Pindar noticed damage to its grapevines on or about June 5, 2005, and that Pindar's vineyard manager, Pindar Damianos ("Damianos") called in experts to determine the cause of the damage to the vineyard. In their submissions, the parties acknowledge that a trial in the underlying action found Briarcliff liable for the damage to the grapevines and resulted in a verdict against Briarcliff in the amount of $279,500. Under the circumstances, the Court deems it unnecessary to address any evidence submitted by the parties regarding the issue of Briarcliff's liability unless it bears directly on the issues presented herein.

Plaintiff now moves for summary judgment and a declaration that it is not obligated to defend or indemnify Briarcliff in the underlying action on the ground that "the unambiguous pollution exclusion precludes coverage for the alleged property damage and trespass/nuisance claims resulting from Briarcliff's application of a chemical herbicide (2,4-D) which migrated onto the adjacent Pindar Vineyard damaging the grape vines." In support of its motion, plaintiff submits, among other things, the pleadings, the policy, a number of expert "reports" issued to Pindar, its letters disclaiming coverage dated September 15, 2005 and June 26, 2008, and the transcripts of the depositions of the parties and two nonparty expert witnesses.[1]

On its behalf, plaintiff submits the deposition transcripts of three employees of Peerless Insurance Company, a marketing company affiliated with plaintiff. At her deposition, Anngelene Serafini ("Serafini") testified that she has been employed by the plaintiff in the underwriting department since 2007, that her duties include evaluating insurance risks, and that Laurie Robbins is one of her supervisors. She stated that underwriters review an applicant's claims history through a "loss run" reflecting the frequency and severity of prior claims against the applicant, and that the applicant's claims history is a factor in increasing the premium charged for insurance and in determining in which "tier" the applicant is placed. She described the plaintiff's four tiers as deviations from the plaintiff's "standard pricing," that the information regarding tiers is set forth in a "job aid reference guide" ("job guide"), and that the job guide does not have any information about dealing with environmental risks. Serafini further testified that plaintiff's underwriting file includes a loss run from Briarcliff's prior insurance company, Blue Ridge, showing a prior claim against Briarcliff for "overpay" (*sic*) in 2003/2004, and that the loss was not included in Briarcliff's [loss] experience rating because it was considered outside the rating period. She indicated that the underwriting file reflects that Briarcliff was given a hazard grade code of seven, with one being low risk and ten being high risk. She stated that, at the time of her

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[1] Counsel for plaintiff is cautioned against using transcripts of depositions with four pages on one sheet and writing on both sides. If this is necessary, the depositions should be attached in a manner so that the deposition can be read without requiring the Court to "flip" the motion papers to enable it to read the exhibit. Pursuant to 22 NYCRR §202.5, papers with writing on both sides of a page should be bound on the side.

deposition, the plaintiff offered "contractors limited liability pollution coverage" for herbicides and pesticides, and that she did not know if that coverage was available in 2004 or 2006.

Laurie Robbins ("Robbins") was deposed on June 29, 2012 and testified that she has been employed by the plaintiff for 12 years as a commercial property casualty underwriter. She stated that she would decline to write a farming policy in her capacity as an underwriter, that she did not know when the plaintiff made herbicide/pesticide coverage available to customers, and that an insured's loss experience figures into the decision on which tier is appropriate. She indicated that loss runs are important because "[p]rior losses usually occur in the future," that Briarcliff's loss run shows a claim paid in 2001/2002 in which Briarcliff "states herbicides used on property damaged grape crop," and that said loss was considered in Briarcliff's experience rating. Robbins further testified that a claim dated April 29, 2003 for Briarcliff's overspray of herbicides which damaged a vineyard was "too new" to be included in Briarcliff's experience rating, and that she did not know if herbicide overspraying would be excluded under a pollution exclusion clause in the plaintiff's standard policy in 2004. She stated that Briarcliff was "given the most favorable tier based on this underwriting review," and that the "modifying factor" based on Briarcliff's loss experience and reflected in the file results in a premium "slightly more than the standard premium."

At her deposition, Samantha Punch ("Punch") testified that she has been employed by the plaintiff since 2004 as a specialty claims consultant handling specialty claims including, among other things, environmental toxic torts. She stated that her duties include investigating, negotiating and settling claims, and that her investigations include coverage issues, as well as liability and damage issues. She indicated that she did not recall receiving any specific training regarding whether or not certain insurance policies would or would not cover pollutants, that she had not heard of 2,4-D before investigating this incident, and that she did not know if the plaintiff made "limited pollution coverage" available to customers in 2005. Punch further testified that a colleague, Anthony Mele, issued the initial disclaimer letter in this matter, and that the disclaimer includes language that there would be no insurance coverage "for property damage arising out of the pollution exclusion, which is ... the dispersal, seepage, migration escape or release of pollutants as they are defined by the policy." She stated that the policy defines pollutants to include chemicals, that she was not sure of the definition of the word "chemical," and that the word "herbicide" was not included in the policy's definition of pollutant.

Pindar's vineyard manager Damianos was deposed on June 18, 2013. He testified that he consulted with four experts regarding the damage at the vineyard, namely Dr. Hans L. Helmpecht, Dr. Andrew Senesac ("Dr. Senesac"), Ms. Alice Wise ("Wise"), and Dr. Barry H. Gump ("Dr. Gump"). He stated that he received correspondence from these experts after their visits to the vineyard, and that Dr. Helmpecht, Pindar's soil science consultant, orally recommended that he add charcoal and root fertilizer to the soil in an effort to curb the damage to the grapevines. He indicated that Wise also recommended charcoal, root fertilizer and irrigation to help the damaged vines, and that Dr. Gump agreed with those recommendations.

At his deposition, Dr. Senesac testified that he has a PhD. in plant science specialty and weed science, that he and Alice Wise prepared a letter dated June 24, 2005 after visiting the Pindar vineyard, and that he observed the damage to the grapevines. He indicated that 2,4-D is a "growth regulating herbicide," that it does not have a benign purpose when "applied in commercial applications" as it is applied to kill weeds, and that he would not classify it as an

"irritant." Dr. Senesac further testified that grapevines are 40 to 100 times more sensitive to 2,4-D than most plants, that 2,4-D is widely used for many crops, and that it can also be used to increase the pigment in red potatoes. He acknowledged that 2,4-D can be called a plant poison. He stated that he was aware of three incidents that occurred prior to June 2005 involving Briarcliff and 2,4-D drift onto other vineyards, at least one of which was "quite a long time ago."

At her deposition, Alice Wise ("Wise") testified that she has a Masters degree in pomology and viticulture from Cornell University, that she and Dr. Senesac visited the Pindar vineyard, and that she observed the damage to the grapevines. Her testimony essentially tracked that of Dr. Senesac.

Kaytis, a partner at Neefus, was deposed on July 31, 2013. He testified that he is a licensed insurance agent, that Neefus prepared Briarcliff's application for insurance, and that Neefus asked for all of Briarcliff's existing policies in connection with the application for insurance. He stated that his goal was to provide Briarcliff with the same coverage that it previously had at a competitive price, that he was not familiar with the term "herbicide endorsement" in 2004, and that he was not aware in 2004 of any insurance coverage available from the plaintiff specifically for the use of herbicides or pesticides. He acknowledged that Neefus was in possession of certain information regarding prior claims against Briarcliff but he did not recall if that information came from loss runs or from Briarcliff, and that Neefus filed an application with plaintiff on Briarcliff's behalf for supplemental pollution liability coverage after Pindar filed its claim.

At his deposition, defendant Donald J. Wilcenski ("Wilcenski") testified that he is the president and a co-owner of Briarcliff, that Roy Reeve Insurance Company ("Reeve") was Briarcliff's insurance agent before Neefus, and that he provided Neefus with copies of "all of the policies that we currently had with [Reeve]" in the process of transferring its insurance. He indicated that he asked Neefus to get Briarcliff the same coverage at competitive prices. He acknowledged that, prior to the transfer, Briarcliff had two policies for the period 2003 to 2004, one a general liability policy and the other for "custom farming." He stated that he did not know why Briarcliff had two such policies at the time. Wilcenski further testified that he provided information about prior overspray claims to Neefus and in its application to the plaintiff for insurance, that Briarcliff had submitted those claims to its previous insurer, and that he did not recall the type of coverage that Briarcliff had at those times. He stated that he received the plaintiff's initial disclaimer letter dated September 15, 2005, and that he did not understand the basis of the denial of coverage for the Pindar claim. He indicated that he "always thought we had coverage" because he didn't think that the chemicals he was using were a pollutant, and that it was never explained to him otherwise. Wilcenski further testified that it is his position that 2,4-D is not a pollutant because it is licensed for use by the Environmental Protection Agency and registered for use in New York State, and that a pollutant is something that causes bodily harm. He acknowledged that 2,4-D is an irritant, and he stated that he assumes that is the case as all chemicals have safety labels on them which would better explain the details.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the

party opposing the motion to produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interests must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

It is well settled that the party claiming the existence of insurance coverage has the burden of proving its entitlement to such coverage (*York Restoration Corp. v Solty's Const., Inc.*, 79 AD3d 861, 914 NYS2d 178 [2d Dept 2010]; *Stillwater Cent. School Dist. v Great Am. E & S Ins. Co.*, 66 AD3d 1260, 887 NYS2d 719 [3d Dept 2009]; *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 824 NYS2d 230 [1st Dept 2006]). The insurer then bears the burden of proving that an exclusion in the policy is applicable to defeat coverage. (*Consolidated Edison Co. of New York v Allstate Ins. Co.*, 98 NY2d 208 [2002]). Here, plaintiff does not dispute that the loss occurred during the policy period, and it has not raised any issue or submitted any evidence that Briarcliff knew that the property damage had occurred at the inception of the policy or that it expected or intended the property damage. Thus, to defeat coverage plaintiff must establish that the pollution exclusion applies in this particular case (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 763 NYS2d 790 [2003]; *Incorporated Vil. of Cedarhurst v Hanover Ins. Co.*, 89 NY2d 293, 653 NYS2d 68 [1996]; *Lee v State Farm Fire & Cas. Co.*, 32 AD3d 902, 822 NYS2d 559 [2d Dept 2006]; *Mazzuoccolo v Cinelli*, 245 AD2d 245, 666 NYS2d 621 [1st Dept 1997]).

When an insurance company intends to exclude certain coverage from its obligation under a policy, the insurance company must use clear and unmistakable language (*Belt Painting Corp. v TIG Ins. Co.*, *supra*; *Incorporated Vil. of Cedarhurst v Hanover Ins. Co.*, *supra*; *242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 815 NYS2d 507 [1st Dept 2006]). In addition, "[s]uch exclusions or exceptions from policy coverage must be specific and clear in order to be enforceable, and they are ... to be accorded a strict and narrow construction (*Lee v State Farm Fire & Casualty Co.*, *supra*; *see also Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302, 880 NYS2d 885 [2009]; *MDW Enters. v CNA Ins. Co.*, 4 AD3d 338, 772 NYS2d 79 [2d Dept 2004]).

It is also well settled that a court addressing an insurance coverage dispute must initially look to the language of the subject policy (*Raymond Corp. v National Union Fire Ins. Co.*, 5 NY3d 157, 162, 800 NYS2d 89 [2005]; *State of New York v Home Indem. Co.*, 66 NY2d 669, 671, 495 NYS2d 969 [1985]). The policy is construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*Raymond Corp. v National Union Fire Ins. Co.*, *supra* at 162, quoting *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221-222, 746 NYS2d 622 [2002]). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (*Lavanant v General Acc. Ins. Co.*, 79 NY2d 623, 629, 584 NYS2d 744 [1992]) and ambiguous provisions are construed "against the insurer who drafted the contract" (*State Farm Mut. Auto Ins. Co. v Glinbizzi*, 9 AD3d 756, 757, 780 NYS2d 434 [2004]). In construing an insurance contract, the tests to be applied are "common speech" and "the reasonable expectation and purpose of the ordinary businessman" (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398, 469

NYS2d 655 [1983]; *see also Pepsico, Inc. v Winterthur Intl. Am. Ins. Co.*, 13 AD3d 599, 788 NYS2d 142 [2d Dept 2004]; *MDW Enters. v CNA Ins. Co.*, *supra*).

The policy, Form CG 00 01 10 01, provides, in pertinent part:

> SECTION I - COVERAGES
> Coverage A Bodily Injury And Property Damage Liability
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies ...
>
> * * *
>
> 2. Exclusions
>
> This insurance does not apply to:
>
> * * *
>
> f. Pollution
>
> 1. "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
>
> a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured ...
>
> * * *
>
> SECTION V — DEFINITIONS
>
> * * *
>
> 15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Pollution exclusion clauses and the word "pollutant" have been the subjects of a great deal of litigation before courts throughout the United States. The reported cases reflect two views as to pollution exclusions generally. The first view limits application of pollution exclusion clauses to traditional environmental pollution claims (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 593 NYS2d 966 [1993]; *Town of Harrison v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 219 AD2d 640, 631 NYS2d 420 [2d Dept 1995] *mod* 89 NY2d 308, 653 NYS2d

75 [1996]; *Niagara County v Utica Mut. Ins. Co.*, 80 AD2d 415, 439 NYS2d 538 [2d Dept 1981]). The second view denies coverage under pollution exclusion clauses for claims involving pollutants whether or not the claim is for environmental pollution (*see Scottsdale Ins. Co. v. Universal Crop Protection Alliance, LLC*, 620 F3d 926 [8th Cir 2010]; *Assicurazioni Generali, S.p.A. v Neil*, 160 F3d 997 [4th Cir 1998]; *Deni Assoc. of Fla., Inc. v State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 [Fla. 1998]).

It is undisputed that an herbicide such as 2,4-D can also be considered a pesticide as its purpose is to kill weeds. While it has been held that 2,4-D can be considered a pollutant (*Scottsdale Ins. Co. v Universal Crop Protection Alliance, LLC*, *supra*), there is contrary authority holding that pesticides approved for use by the Environmental Protection Agency and used in the usual manner are not pollutants (*Westchester Fire Ins. Co. v City of Pittsburg, Kan.*, 791 F Supp 836 [D Kan 1992]; *Great Lakes Chem. Corp. v. International Surplus Lines Ins. Co.*, 638 N.E.2d 847 [Ind. Ct. App. 1994]; *Hastings Mut. Ins. Co. v Safety King, Inc.*, 286 Mich.App. 287, 778 N.W.2d 275 [2009]).

Here, there are issues of fact precluding a grant of summary judgment in favor of plaintiff. New York courts have held that the primary purpose of pollution exclusions is to exclude coverage for environmental pollution (*Pepsico, Inc. v Winterthur Intern. America Ins. Co.*, *supra*; *Roofers' Joint Training, Apprentice and Educ. Comm. of W. N.Y. v General Acc. Ins. Co. of Am.*, 275 AD2d 90, 713 NYS2d 615 [4th Dept 2000]). There is an issue of fact whether Briarcliff's overspray contaminated the soil in the vineyard, and plaintiff has failed to submit any evidence that Briarcliff's overspray of 2,4-D in any manner created an environmental pollution event on Pindar's property. There is testimony that Pindar's experts recommended that the vineyard add charcoal to the soil in an attempt to ameliorate the potential damage to the subject vines. However, there is no evidence that the recommendation was made to "draw out" any 2,4-D from the soil. In addition, there is testimony by Robbins, a supervisor and underwriter employed by the plaintiff, that she did not know if herbicide overspraying would be excluded under a pollution exclusion clause in plaintiff's standard policy in 2004.

There are additional issues of fact whether 2,4-D is a pollutant as defined in the policy and whether Briarcliff had a reasonable expectation that the policy covered its operations, including, among other things, whether Wilcenski's belief that 2,4-D is not a pollutant was reasonable. The deposition testimony does not indicate that 2,4-D is anything more than an irritant. In light of the fact that the New York courts have not yet spoken to whether 2,4-D is a pollutant and that there is conflicting authority regarding the question from other jurisdictions, and in light of plaintiff's obligation to exclude coverage by clear and unmistakable language, it is determined that plaintiff has failed to establish that 2,4-D is a pollutant as a matter of law.

Moreover, as noted above, New York courts construe an insurance contract in accordance with the reasonable expectation and purpose of the ordinary businessman (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, *supra*; *Pepsico, Inc. v Winterthur Intl. Am. Ins. Co.*, *supra*; *MDW Enters. v CNA Ins. Co.*, *supra*). Here, Wilcenski's unrebutted testimony that Briarcliff previously had insurance coverage for the very damage at issue herein raises an issue of fact as to whether said defendant had a reasonable expectation that it had the same coverage under the subject insurance policy, and whether he considered 2,4-D a pollutant under the subject pollutant exclusion.

Failure to make a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). Accordingly, plaintiff's motion for summary judgment declaring that it has no obligation to afford coverage, defend or indemnify the defendant Briarcliff Sod, Inc. in the underlying action is denied.[2]

Briarcliff now cross-moves for an order granting it summary judgment declaring that the plaintiff is obligated to defend and indemnify it in the underlying action, and awarding it attorney's fees in defending this action. Briarcliff has failed to include a set of the pleadings in support of its summary judgment motion, as required by CPLR R. 3212(b). Generally, this Court is constrained to deny the motion without prejudice to renewal upon proper papers (*Sendor v Chervin*, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]; *see also Liberty Doorworks, Inc. v Baranello*, 83 AD3d 1011, 921 NYS2d 561 [2d Dept 2011]). However, the denial of the cross motion with leave to renew would be a futile act as the submission by the plaintiff reveals that there are issues of fact precluding summary judgment in favor of Briarcliff, and Briarcliff's submission does not resolve those factual issues.

As noted above, there is an issue of fact whether Briarcliff's overspray of 2,4-D contaminated the soil in the vineyard, as many of Pindar's experts recommended adding activated charcoal to the soil to ameliorate the effects of the herbicide. In addition, there are issues of fact whether Briarcliff had a reasonable expectation that the policy covered its operations in light of Wilcenski's testimony that Briarcliff had two policies for the period 2003 to 2004, including a policy for "custom farming," and that he did not recall the type of coverage that Briarcliff had at the times that certain prior claims were made against it based on its overspraying of 2,4-D.

The Court notes that Briarcliff further contends that it is entitled to recover attorney's fees regarding its defense in this declaratory judgment action. In general, an insured who is "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 416 NYS2d [1979]). Considering that Briarcliff has not yet prevailed on the merits, the Court deems the request to be premature.

However, turning to those branches of Briarcliff's motion for summary judgment dismissing the first and second causes of action only, the record reveals, and plaintiff's submission itself establishes, that Briarcliff is entitled to summary judgment. Regarding plaintiff's first cause of action, it is undisputed that the occurrence which is the basis of the subject claim took place during the policy period. Regarding plaintiff's second cause of action, it is undisputed that Briarcliff did not know that the property damage had occurred at the inception of the policy. Accordingly, Briarcliff's motion for summary judgment is granted to the extent of dismissing the first and second causes of action in the complaint, and is otherwise denied.

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[2] The record reflects that the plaintiff provided Briarcliff with a defense in the underlying action while reserving its rights and defenses under the policy. The Court makes no determination regarding the extent to which the plaintiff's request for a declaration that it has no duty to defend Briarcliff may be academic.

Pindar cross-moves for summary judgment and a declaration that the policy issued to Briarcliff provides coverage for the liability imposed on Briarcliff in the underlying action. Initially, it is determined that this cross-motion suffers from the same disabilities as Briarcliff's cross motion in that Pindar has failed to include a set of the pleadings in support of its summary judgment motion, and its submission does not negate the factual issues raised by the plaintiff's submission. In support of its cross-motion Pindar submits a memorandum of law with an unauthenticated transcript of Dr. Senesac's trial testimony in the underlying action.[3] As set forth above, nothing in Pindar's submission negates the issues of fact raised by the plaintiff's submission. Furthermore, the record reveals, and plaintiff's submission itself establishes, that it is undisputed that the occurrence which is the basis of the subject claim took place during the policy period and that Briarcliff did not know that the property damage had occurred at the inception of the policy. Accordingly, Pindar's motion for summary judgment is granted to the extent of dismissing the first and second causes of action in the complaint, and is otherwise denied.

However, the Court finds that its inquiry should not end there. A court may search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of the motions before the court (CPLR 3212 [b]; *Dunham v Hilco Construction Co., Inc.*, 89 NY2d 425, 654 NYS2d 335 [1996]; *Yusin v Saddle Lake Home Owners Association, Inc.*, 73 AD3d 1168, 902 NYS2d 139 [2d Dept 2010]). Upon reviewing the entirety of the records submitted, the Court determines as a matter of law that defendants Irene C. Vitti, Briarcliff Landscape, Inc., Brenda Cichanowicz, Individually and as Executrix of the Estate of Frank J. Cichanowicz III, the Estate of Frank J. Cichanowicz III, Donald J. Wilcenski, Natalie Wilcenski, Neal J. Cichanowicz and Cindy Cichanowicz are not liable to Pindar and they have no interest in the outcome of this declaratory judgment action. Accordingly, said defendants are entitled to summary judgment dismissing the plaintiff's complaint.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR R. 3212[e][1]).

Dated: August 6, 2014

HON. PAUL J. BAISLEY, JR.
J.S.C.

[3] Briarcliff also submitted an unauthenticated transcript of Dr. Senesac's trial testimony in the underlying action in support of its cross motion, and the plaintiff has submitted additional unauthenticated transcripts of trial testimony in its sur-reply. The parties have not challenged the accuracy of said transcripts, and upon review, the testimony does not alter the Court's findings herein.