

**PCVST-DIL LLC v Lexington Ins. Co.**

2016 NY Slip Op 31007(U)

April 21, 2016

Supreme Court, New York County

Docket Number: 650587/2015

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH  
*Justice*

PART 54

Index Number : 650587/2015  
PCVST-DIL LLC  
vs.  
LEXINGTON INSURANCE COMPANY  
SEQUENCE NUMBER : 005  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 3/10/16  
MOTION SEQ. NO. \_\_\_\_\_

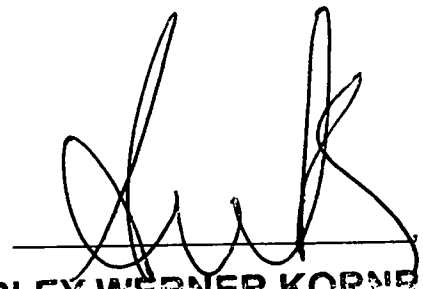
The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 141-172  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 174-198, 203  
Replying Affidavits \_\_\_\_\_ No(s) 199-202

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER**

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

Dated: 4/21/16

  
\_\_\_\_\_  
SHIRLEY WERNER KORNREICH, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE
- Cross-Motion

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X

PCVST-DIL LLC and ST-DIL LLC,

Index No.: 650587/2015

Plaintiffs,

**DECISION & ORDER**

-against-

LEXINGTON INSURANCE COMPANY,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

This is an insurance action seeking property damage coverage arising from Superstorm Sandy (the Storm).<sup>1</sup> Plaintiffs PCVST-DIL LLC and ST-DIL LLC (plaintiffs or PCV/ST) move, pursuant to CPLR 3212, for partial summary judgment against defendant Lexington Insurance Company (Lexington). Lexington opposes and cross-moves for partial summary judgment against plaintiffs. For the reasons that follow, both plaintiffs’ motion and Lexington’s cross-motion are denied.

*I. Factual Background & Procedural History*

The following facts are undisputed:

PCV/ST operates a complex of apartment buildings and associated property in the borough of Manhattan from First Avenue to Avenue C and between 14th and 23rd Streets [the Complex].<sup>2</sup> Certain portions of the [Complex] were damaged during [the Storm] in October 2012. Lexington issued to [plaintiffs] a Commercial Property Policy number 025031762 for the period October 1, 2012 through October 1, 2013 [the Policy]. Prior to [the Storm], there was asbestos-containing

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<sup>1</sup> The court will not recount the extensive procedural history of this action or the complex disputed issues not pertinent to this motion. Simply put, plaintiffs commenced this action on February 26, 2015, seeking coverage under the Policy for alleged extensive damage caused by the Storm, some of which is currently before the Hon. Helen E. Freedman (Ret.), who was appointed by the court as Umpire for the parties’ appraisal. *See* Dkt. 115. Plaintiffs filed the instant motion on August 26, 2015, Lexington cross-moved on September 25, 2015, and the court reserved on the motion and cross-motion after oral argument. *See* Dkt. 204 (2/25/16 Tr.).

<sup>2</sup> The Complex is called Peter Cooper Village/Stuyvesant Town (hence the acronym PCVST), and is better known as “Stuy Town”.

material in the basements of certain buildings at the [Complex]. **During [the Storm], the level of the East River rose and water overflowed its banks, and water from the East River entered the basements of certain buildings at the [Complex]. The asbestos-containing material was damaged by the water that entered the basements of buildings in the [Complex] during [the Storm].** The [Policy] has a “Pollution, Contamination, Debris Removal Exclusion Endorsement” (the “Pollution Exclusion”) with a Pollution and Contamination Exclusion clause and an Asbestos, Dioxin or Polychlorinated Biphenols Exclusions clause.

*See* Dkt. 150 (joint statement of undisputed facts) (paragraph breaks and numbering omitted; bold added); *see also* Dkt. 151 (the Policy).<sup>3</sup>

The parties dispute whether the Policy covers damage to the asbestos-containing material in the basements of the Complex. Specifically, the parties dispute whether plaintiffs’ costs of removing the damaged asbestos and their related time element losses (e.g., business interruption) are covered under the Policy. It is undisputed, however, that such losses were caused by Flood (defined below), which the parties agree includes storm surge. It is further undisputed that the perils covered by the Policy include “ALL RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE INCLUDING FLOOD.” *See* Dkt. 145 at 2;<sup>4</sup> *see also id.* at 38-41 (listing Perils Excluded and Property Excluded).

Paragraph 13 of the Policy, titled “EARTH MOVEMENT, FLOOD AND NAMED WINDSTORM”, provides that “[t]he term Occurrence shall include all loss or damage arising out of the same event.” *See id.* at 43. Paragraph 13(A) further provides that “[e]ach loss by earth movement or flood shall constitute a single occurrence hereunder if:

...

(2) any flood occurs within a period of the continued rising or overflow of any

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<sup>3</sup> References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

<sup>4</sup> All quoted capitalization in this decision is contained in the Policy.

river(s) or stream(s) and the subsidence of same within the banks of such river(s) or stream(s); or

(3) any flood results from any tidal wave or series of tidal waves caused by any one disturbance.

...

Flood, as defined in this policy, that would not have occurred but for an Earth Movement as described herein, shall be deemed to be proximately caused solely by Earth Movement regardless of any other cause or event that contributes concurrently or in any sequence to such Flood, and consequently shall be considered Earth Movement.

**Named Windstorm means a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone, Tropical Storm, or Tropical Depression.**

**The term Flood shall mean a temporary condition of partial or complete inundation of normally dry land from:**

- 1. The overflow of inland or tidal waters outside the normal watercourse or natural boundaries;**
- 2. The overflow, release, rising, back-up, runoff or surge of surface water; or**
- 3. The unusual or rapid accumulation or runoff of surface water from any source.**

A Tsunami shall not be considered a Flood as defined above.

*See id.* at 44 (bold added).

Named Storm is separately defined in the Limits of Liability section of the Policy (paragraph 3) to mean “a storm that has been declared by the National Weather Service to be a Hurricane, Typhoon, Tropical Cyclone, Tropical Storm or Tropical Depression” (the same definition as Named Windstorm). *See id.* at 22. Named Storm has a \$250 million sub-limit, except:

in Tier 1 Counties, regardless of the number of Coverages, Locations or Perils Involved (including but not limited to, all Flood, (however caused) wind, wind

gusts, storm surges, tornados, cyclones, hail or rain). **In the event covered Loss or Damage by Flood arises out of a Named Storm, the maximum amount the Company will pay per Occurrence for all such Loss or Damage by Flood shall be the Sublimits of Liability for Flood.** However, if Flood is not covered, the maximum amount the Company will pay per Occurrence for all such Loss or Damage by Named Storm shall exclude Loss or Damage by Flood.

*See id.* (bold added). Hence, the Policy contemplates one type of peril (Flood) being caused by another peril (Named Storm), and expressly accounts for this possibility by setting forth sub-limit applicability implications.<sup>5</sup>

On this motion, the parties dispute whether damage caused by Flood falls within the “windstorm” exception to the POLLUTION, CONTAMINATION, DEBRIS REMOVAL EXCLUSION ENDORSEMENT. *See* Dkt. 145 at 6 (the Pollution Endorsement). The parties do not dispute that the Storm was both a Named Storm and a Named Windstorm (both of which have the same definition in the Policy), but dispute whether the Storm was a “windstorm”, which is not defined.

Paragraph 2 of the Pollution Endorsement states:

This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.

Nevertheless, if fire is not excluded from this policy and a fire arises directly or indirectly from seepage or contamination or pollution, any loss or damage insured under this policy arising directly from that fire is insured, subject to the provisions of this policy.

CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration,

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<sup>5</sup> Another example can be found in paragraph 13(A) of the Policy, which provides that Flood caused by Earth Movement shall be considered Earth Movement. *See* Dkt. 151 at 44.

loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.

**This exclusion shall not apply when loss or damage is directly caused by fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, windstorm, hail, vandalism, malicious mischief.** This exclusion shall also not apply when loss or damage is directly caused by leakage or accidental discharge from automatic fire protective systems.

*See* Dkt. 145 at 6 (bold added) (the Pollution Exclusion).

Paragraph 3 of the Pollution Endorsement provides:

This policy does not cover –

- a) Asbestos, dioxin or polychlorinated biphenols (hereinafter all referred to as “Materials”) removal from any good, product or structure **unless the asbestos is itself damaged by** fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, **windstorm** or hail, vandalism, malicious mischief, leakage or accidental discharge from automatic fire protective system.
- b) Demolition or increased cost of reconstruction, repair, debris removal or loss of use necessitated by the enforcement of any law or ordinance regulating such Materials;
- c) Any governmental direction or request declaring that such Materials present in or part of or utilized on any undamaged portion of the insured’s property can no longer be used for the purpose for which it was intended or installed and must be removed or modified.

The exception to exclusion 3(a), above, does not apply to payment for the investigation or defense of any loss, damage or any undamaged portion of the insured’s property can no longer be used for the purpose for which it was intended.

*See id.* (bold added) (the Asbestos Exclusion; collectively, with the Pollution Exclusion, the Exclusions).

Paragraph 4 of the Pollution Endorsement then provides:

The Company will pay the expense within the sum insured to remove debris of insured property damaged or destroyed by an insured peril during the policy term. The Company will not pay the expense to:

- a) Extract contaminants or pollutants from the debris; or
- b) Extract contaminants or pollutants from land or water; or
- c) Remove, restore or replace contaminated or polluted land or water; or
- d) Remove or transport any property or debris to a site for storage or decontamination required because the property or debris is affected by pollutants or contaminants, whether or not such removal, transport, or decontamination is required by law or regulation.

It is a condition precedent to recovery under this extension that the Company shall have paid or agreed to pay for direct physical loss or damage to the property insured hereunder and that the Insured shall give written notice to the Company of intent to claim for cost of removal of debris or cost to clean up not later than 180 days after the date of such physical loss or damage.

*See id.* at 6-7.

## II. *Legal Standard*

### A. *Summary Judgment*

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in

support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

### *B. Burden of Proof*

“An insurance agreement is subject to principles of contract interpretation. ‘As with the construction of contracts generally, ‘unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.’” *Universal Am. Corp. v Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015), quoting *Vigilant Ins. Co. v Bear Stearns Cos.*, 10 NY3d 170, 177 (2008), quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 (2007); see *Oppenheimer AMT-Free Municipals v ACA Fin. Guar. Corp.*, 110 AD3d 280, 284 (1st Dept 2013) (“policies of insurance [] should be analyzed in accordance with general principles of contract interpretation and insurance law”). “Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties’ intent or where its terms are subject to more than one reasonable interpretation.” *Universal*, 25 NY3d at 680 (internal citations omitted; collecting cases). “[T]he test to determine whether an insurance contract is ambiguous focuses on the **reasonable expectations of the average insured upon reading the policy and employing**

**common speech.**” *Id.* (emphasis added), quoting *Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-27 (1996), and citing *Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 (2011).

“Exclusions from policy obligations must be in clear and unmistakable language if the terms of a policy are ambiguous, [and] **any ambiguity must be construed in favor of the insured and against the insurer.**” *Oppenheimer* 110 AD3d at 284 (emphasis added), citing *Pioneer Tower Owners Ass’n v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 (2009); *White*, 9 NY3d at 267. Indeed, the Court of Appeals has long held that “[t]he law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds” and that:

Whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation.

We have enforced policy exclusions only where we found them to have a definite and precise meaning, unattended by danger of misconception ... and concerning which there is no reasonable basis for a difference of opinion.

*Pioneer Tower*, 12 NY3d at 306-07 (internal citations and quotation marks omitted).

That said, “although the insurer has the burden of proving the applicability of an exclusion, it is the insured’s burden to establish the existence of coverage.” *Platek v Town of Hamburg*, 24 NY3d 688, 694 (2015) (internal citations omitted). “Thus, **[where] the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied.**” *Id.* (emphasis added), quoting *Borg-Warner Corp. v Ins. Co. of N. Am.*, 174 AD2d 24, 31 (3d Dept 1992), accord

*Northville Indus. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 634 (1997) (once “an insurer has satisfied its burden of establishing ... [the] application of [an exclusion], the burden shifts to the insured to demonstrate [the applicability of an] exception to exclusion ... Shifting the burden to establish the exception conforms with an insured’s general duty to establish coverage where it would otherwise not exist.”); see also *State v U.W. Marx Inc.*, 209 AD2d 784, 785 (3d Dept 1994) (“It is well settled that where, as here, the existence of coverage depends entirely on the applicability of an exception to an exclusion, the insured has the duty of demonstrating that the exception governs.”).

### III. Discussion

The issue raised by this motion – whether the windstorm exception to the Exclusions applies to the subject Flood damage in the basements of the Complex – requires an answer to two predicate questions. First, was the Storm a “windstorm” under the exceptions to the Exclusions? As previously noted, it is undisputed that the Storm was a Named Windstorm and, therefore, a Named Storm, but the Pollution Exclusion specifically excepts “windstorm”, an undefined term. Is “windstorm” the same as Named Storm? If so, the subject loss may be covered. If not, the loss is not covered.

Plaintiffs argue that the Storm was a windstorm. Their principal argument is that “windstorm” cannot be interpreted to have the same meaning as the word “wind” because if the Policy only meant to except wind-caused-damage from the Exclusions, it would have explicitly said so, just as damage caused by fire, lightning, and hail are expressly excepted. Lexington disagrees.

The only way to answer these questions is to ascertain what the parties intended the word “windstorm” to mean. One cannot overlook the fact that Named Windstorm and Named Storm have the same definition, and hence it is not implausible to think that the parties understood the words “storm” and “windstorm” to mean the same thing. But, unlike “windstorm”, those terms are capitalized and defined.<sup>6</sup> Indeed, the ordinary meaning of the word “windstorm” is not synonymous with “storm”. A storm is defined (similarly by Google, dictionary.com, and Merriam-Webster.com)<sup>7</sup> as “a disturbance of the normal condition of the atmosphere, manifesting itself by winds of unusual force or direction, often accompanied by rain, snow, hail, thunder, and lightning, or flying sand or dust.” Windstorm, in contrast, is defined as “a storm that has very strong winds and **usually very little rain** or snow.” *Id.* (emphasis added). If a windstorm is ordinarily understood to be a storm with significant wind, but not much precipitation, that would militate against the notion that the parties understood windstorm to be a foreseeable cause of Flood. After all, a Flood – both as a matter of common sense and as defined by the Policy – requires an accumulation of water. A storm with little precipitation, it would seem, cannot cause a flood. On the other hand, a storm surge, a type of Flood as defined by the Policy, can be caused by wind. Here, the Storm indisputably caused the Flood that caused the subject damage.

With these considerations in mind, the court finds that the Policy’s silence on the meaning of the word windstorm creates an ambiguity. The ordinary meaning of the word

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<sup>6</sup> The Policy, moreover, also uses the term “Tier 1 Windstorm”, and it is also unclear whether the word “Windstorm” in that expression means the same thing as “windstorm”.

<sup>7</sup> Google will provide a definition if one searches for a word followed by the word “definition”. A virtually identical definition can be found by searching for the words on dictionary.com or Merriam-Webster.com.

suggests that windstorms do not directly cause floods. However, the Policy's equivalent definitions of the words Storm and Named Windstorm include storms, such as Superstorm Sandy, that *do* cause Flood, including storm surge. It is not unreasonable to think that when the word windstorm was used in the Exclusions, the parties might have intended it to have the same meaning as the other iterations of the word Windstorm in the Policy. The court cannot, as a matter of law, resolve the question of whether a Flood caused by a Named Windstorm is synonymous with a Flood caused by a windstorm.

However, even if the Storm was a windstorm, a second question must be answered. Is damage caused by Flood that results from a windstorm an excepted peril, or are the excepted perils only those directly caused by a windstorm, i.e., the windstorm blowing a roof off of a building or rain from the storm destroying property? In other words, is damage caused by Flood that would not have occurred but for the Storm tantamount to loss caused directly by the Storm?

This second issue arises from language in the Exclusions. Before the excepted causes of loss are listed in the Pollution Exclusion, they are prefaced by the statement: "This exclusion shall not apply when loss or damage is **directly caused by.**" See Dkt. 151 at 6 (emphasis added). Likewise, in the Asbestos Exclusion, the excepted causes are prefaced by the language "unless the asbestos **is itself damaged by.**" See *id.* (emphasis added). The "directly caused by" and "is itself damaged by" qualifying language is telling, particularly in light of how other sections of the Policy address possible concurrent and sequential causes. For example, in an earlier portion of the Pollution Exclusion, the Policy states:

This policy does not cover **loss or damage caused by, resulting from, contributed to or made worse by** actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all **whether direct or indirect, proximate or remote** or [i]n whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.

See Dkt. 151 at 6 (emphasis added).

The above-quoted provision, like the previously discussed sublimit applicable to a Flood caused by a Named Storm, demonstrates that the parties understood how to account for losses caused by sequential perils (e.g., a storm causes a flood, and the flood then causes property damage). In the case of the above-quoted provision, the parties agreed that losses caused indirectly, *inter alia*, by the release of POLLUTANTS, are not covered. Consequently, if a covered peril was itself caused by the release of POLLUTANTS, the loss is not covered. In contrast, the description of the subject exceptions to the Exclusions contains no such anti-sequential language. They do, though, contain language indicating that the exceptions to the Exclusions, such as windstorm, must be “directly caused by” the excepted peril.

There are two reasonable ways to address the lack of anti-sequential language in the paragraphs setting forth the exceptions to the Exclusions. One is to aver that the lack of anti-sequential language prefacing the windstorm exception means that all sequential losses caused by windstorm are excepted from the Exclusions. Alternatively, a seemingly more compelling inference may be drawn that the “directly caused by” and “is itself damaged by” language means that sequential losses flowing from windstorm, as opposed to direct results of a windstorm (e.g., the wind), such as Flood, are not covered by the windstorm exception. Ambiguity as to this issue exists.

There has been no meaningful discovery in this action, and none at all on the meaning of the word windstorm. Discovery on the parties’ intent is necessary. *See State v Home Indem. Co.*, 66 NY2d 669, 671 (1985) (“Generally, the courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the

policies. If, however, the language in the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact. On the other hand, if the tendered extrinsic evidence is itself conclusory and will not resolve the equivocality of the language of the contract, the issue remains a question of law for the court. Under those circumstances, the ambiguity must be resolved against the insurer which drafted the contract.”) (internal citations omitted).

That said, if evidence of the parties’ intent does not exist, liability may turn on the applicability of the contra proferentem doctrine. As noted, ambiguities in a policy are generally construed in favor of the insured. *See Oppenheimer*, 110 AD3d at 284. However, as Lexington correctly contends, there are exceptions to this rule, such as where, as Lexington avers is the case here, plaintiffs are highly sophisticated insureds and the Policy was meaningfully negotiated and not a standard form, i.e., a contract of adhesion. *See Cummins, Inc. v Atl. Mut. Ins. Co.*, 56 AD3d 288, 290 (1st Dept 2008) (“The doctrine of contra proferentem does not apply as the evidence submitted on the motions shows that while defendant prepared the drafts of the agreement, the basic concept and terms originated with plaintiff, that plaintiff is sophisticated and was instrumental in crafting various parts of the agreement, and that plaintiff, while not an insurance company, had equal bargaining power and acted like an insurance company by maintaining a self-insured retention.”); *see also Westchester Fire Ins. Co. v MCI Commc’ns Corp.*, 74 AD3d 551 (1st Dept 2010) (“Nor is there a need to resort to contra proferentem, which, in any event, would be inapplicable to this sophisticated policyholder”). Plaintiffs dispute this, and maintain that contra proferentem applies. As with the meaning of the word windstorm

and whether the damage must be directly caused, questions of fact exist as to the sophistication of the parties and their negotiations.

Finally, plaintiffs also seek summary judgment on their entitlement to time element losses – coverage for Business Interruption, Extra Expense, and Expense to Reduce Loss (all of which, indisputably, are covered under the Policy [*see* Dkt. 151 at 26-28, 31]) – due to damage to the subject asbestos-containing material. The parties’ briefs afford this issue terse treatment.

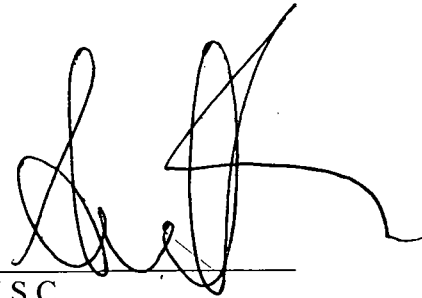
Plaintiffs aver that the Asbestos Exclusion does not apply because the asbestos itself was not damaged and did not require removal, only the material containing asbestos did. *See* Dkt. 171 at 23. Yet, earlier in their brief, plaintiffs stated that “the asbestos at issue was damaged” and that “the costs to remove the asbestos” was at issue. *See id.* at 5. Lexington’s opposition does not address this argument but rather contends that the time element losses were caused by Flood and, thus, are not recoverable. In support, Lexington cites to cases which stand for the proposition that, *unlike the Policy here*, a policy that excludes coverage for Flood losses excludes time element losses caused by Flood. *See* Dkt. 177 at 29, citing, e.g., *Five Towns Nissan, LLC v Universal Underwriters Ins. Co.*, 125 AD3d 580, 581 (1st Dept 2015). Further, plaintiffs fail to explain what time element losses they seek coverage for. In their moving brief, plaintiffs refer to this issue as an “as-yet unstated portion” of their claim. *See* Dkt. 171 at 5. Summary judgment regarding time element loss coverage, therefore, is denied. Accordingly, it is

ORDERED that the motion by plaintiffs PCVST-DIL LLC and ST-DIL LLC and the cross-motion by defendant Lexington Insurance Company for partial summary judgment are denied; and it is further

ORDERED that the parties shall appear in Part 54, Supreme Court, New York County,  
60 Centre Street, Room 228, New York, NY, for a preliminary conference on May 17, 2016 at  
11:00 in the forenoon.

Dated: April 21, 2016

ENTER:



J.S.C.

**SHIRLEY WERNER KORNREICH**  
J.S.C.