At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31th day of July, 2020

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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GRENADIER REALTY CORP. AND
HOWLAND HOOK HOUSING CO. INC.,

Plaintiff,

-against-

Index No.: 502159/2018
Decision and Order

RLI INSURANCE COMPANY AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA,

Defendants,

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The following e-filed papers read herein	NYSCEF Doc. Nos.[1]
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	19-35; 41-63
Opposing Affidavits (Affirmations)	42-63

After having heard Oral Argument on May 18, 2020 and upon review of the foregoing e-filed papers read herein, plaintiffs Grenadier Realty Corp. (Grenadier) and Howland Hook Housing Co., Inc. (Howland Hook) (collectively, plaintiffs) move, in motion sequence (mot. seq.) one, pursuant to CPLR 3212 (a), for an order granting them summary judgment against defendant RLI Insurance Company (RLI) for breach of

[1] 1 New York State Courts Electronic Filing Document Numbers

contract and a declaratory judgment that RLI has the duty to indemnify them in connection with the underlying personal injury action entitled *Gargiso v Howland Hook Housing Co., Inc. et al.* (Sup Ct, Kings County, index No. 11044/14) (the underlying action). RLI cross-moves, in mot. seq. two, pursuant to CPLR 3212 and 3001, for a judgment declaring that it has no duty to indemnify plaintiffs in connection with the underlying action, and for an order dismissing plaintiffs' action against it with "full prejudice."

FACTS

This action relates to liability insurance coverage for an accident that allegedly occurred at 85 Holland Avenue, in Staten Island, New York (the property), owned by plaintiff Howland Hook and managed by plaintiff Grenadier. The property is part of a larger property formerly known as "Arlington Terrace" (now known as "North Shore Plaza"), which is a complex of four apartment buildings.

In September 2008, Grenadier hired Orland Construction Co. Inc. (Orland) to be general contractor for a construction project at the property that included repairing and renovation work as well as installation of additional and/or replacement outdoor lighting. In or around 2008-2009, Orland hired Catalyst Construction, LLC (Catalyst) as a subcontractor to perform demolition and excavation work for the project. The subcontracted work included demolition of the property's existing parking lot; construction of new parking lots including curbs, sidewalks, ramps, and islands; construction of new retaining walls; excavation of existing lighting systems; construction of a new lighting system; and installation of outdoor electrical equipment. Catalyst

performed excavation work at the property including digging trenches along an undeveloped area of the property to run an electrical conduit for installing light poles.[2]

Sometime in June or July 2010, after Catalyst had excavated the trenches, a payment dispute arose between Catalyst and Orland, and Catalyst ceased its work at the property. Catalyst left its excavation work unfinished including the open trenches. There were no construction activities at the property after July 2010 until at least December 2014, after Howland Hook had sold the Property.

Subsequently, Grenadier purchased a general liability insurance policy from RLI with policy effective dates of March 1, 2012 to March 1, 2013 (the policy). Grenadier and Howland Hook are named insureds under the policy and, subject to its terms and conditions, the policy includes bodily injury liability coverage with a $1 million per-occurrence limit. The policy is also subject to the "EXCLUSION - DESIGNATED OPERATIONS" endorsement, which provides that:

"This endorsement modifies insurance provided under the following:

EXCESS GENERAL LIABILITY INSURANCE POLICY

SCHEDULE

Description of Operations

Excludes all Construction and Development Activities, whether by you or others.
Excludes exterior work above ground floor, whether by you or others.
Routine Maintenance or interior renovation is not excluded, but all other projects are excluded.

Location:

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[2] 2 RLI states that Catalyst excavated large trenches in the *parking lots* to install the lighting system.

All locations

This insurance does not apply to **bodily injury, property damage, or personal injury and advertising injury** resulting from any operation described herein at any location stated herein."

All premiums owed for the policy have been paid, and the property is listed in the policy's schedule of covered locations.

Grenadier also purchased a commercial umbrella liability policy from National Union Fire Insurance Company of Pittsburgh, PA (National Union), Policy No. 045896608 (the National Union Policy) for the policy period March 1, 2012 to March 1, 2013. The policy provides $25,000,000 of coverage for each occurrence and in the aggregate. Grenadier and Howland Hook are named insureds under the National Union Policy. The National Union Policy provides coverage upon exhausting the "Retained Limit," i.e. the total applicable limits of "Scheduled Underlying Insurance" and any other applicable insurance providing coverage to the insured. The National Union Policy identifies the RLI policy as "Scheduled Underlying Insurance."

On July 11, 2012 on-duty firefighter Michael Gargiso fell in a trench/depression on the property allegedly built by nonparty contractor Catalyst in 2010.

Plaintiffs assert that sometime afterward, Grenadier, on behalf of itself and Howland Hook, provided timely written notice to RLI of the accident. On February 6, 2013, Grenadier sent RLI a written notice of claim, together with a letter of representation from Gargiso's attorney. Plaintiffs further assert that RLI received notice of the claim and assigned it claim number 00285587.

By letter dated March 22, 2013, RLI denied coverage for the Gargiso claim based on the policy's construction exclusion. Specifically, RLI advised that the parking lot where Gargiso fell was under construction on the date of the loss and therefore the construction exclusion applied.

In 2014, Gargiso commenced the underlying action against Grenadier, Howland Hook, Catalyst, Orland, and others. Gargiso alleged that he was on the property on July 11, 2012 when he stepped into a trench or depression which was excavated by Catalyst in 2010. Nevertheless, after receiving a copy of the Gargiso complaint, RLI reiterated its denial of coverage by letter to Grenadier dated August 22, 2014.

By letter dated September 5, 2014, Grenadier disputed RLI's denial of coverage in connection with the Gargiso action. In response, by letter dated September 10, 2014, RLI maintained its denial of coverage but agreed to defend plaintiffs in the underlying action on the condition that it was "reserv[ing] its right to disclaim indemnity should it be determined that the alleged injury falls within the scope of the Exclusion - Designated Operations [i.e. the construction exclusion]."

Subsequently, Catalyst moved in the underlying action for summary judgment dismissing Gargiso's complaint and all cross claims against it and argued that it did not owe plaintiff a duty of care as a matter of law. This court, under an *Espinal* analysis, concurred, finding, among other rulings, that Catalyst's excavation work at the property ended in 2010 (*see* NYSCEF Doc. No. 33, Decision and Order dated September 25, 2017 at 6, annexed as exhibit C to plaintiffs' mot. seq. one papers) which states that "Defendant, Catalyst had quit working at the premises two [2] years before the alleged

incident occurred"). Accordingly, the court granted Catalyst's motion and dismissed Gargiso's complaint against it.

In light of the court's finding that Catalyst's work at the property had concluded in 2010, in November 2017, Grenadier emailed RLI asking it to re-examine its coverage position. In this regard, Grenadier stated that the construction exclusion did not apply because there had been no "Construction or Development Activities" at the property from July 2010 through the date of Gargiso's alleged accident. RLI did not provide a written response to Grenadier's position regarding the significance of the court's order affecting coverage of the Gargiso claim.

By letter dated November 13, 2017, National Union initially denied coverage for Gargiso's claim by adopting RLI's position that coverage was being denied because construction activities were taking place on the property at the time Gargiso was allegedly injured. National Union also stated that it was denying coverage because the umbrella coverage was not triggered until the RLI policy's coverage has been exhausted. However, by letter dated October 29, 2018, National Union withdrew its denial of coverage stating that "in light of additional information that has been provided to us, National Union recognizes the potential for coverage under the Policy with respect to this matter" (*see* NYSCEF Doc. No. 29, at 1, annexed as exhibit I to plaintiffs' mot. seq. one papers).

Plaintiffs commenced the instant insurance coverage action on or about February 1, 2018 alleging claims for breach of contract and declaratory judgment against RLI and National Union for insurance coverage relating to the underlying action. Document discovery is complete, and the parties do not require further discovery.

On May 1, 2019, the parties in the underlying action (Gargiso, Grenadier, Howland Hook) entered into a $1.75 million settlement on the record before Justice Peter Sweeney in the underlying action, and National Union paid $750,000 of the settlement amount. The remaining $1 million is contingent upon this court's judicial determination that RLI is required to provide indemnity coverage for the claims in the underlying action. The parties and RLI agreed to have that issue determined by this motion for summary judgment (*see* NYSCEF Doc. No. 35, May 1, 2019 transcript in the underlying action, 1-13, especially 4-5, annexed as exhibit E to plaintiff's mot. seq. one papers). On December 11, 2019, Grenadier and Howland Hook discontinued the instant breach of contract/declaratory judgment action as against National Union pursuant to the settlement agreement (*see* NYSCEF Doc. No. 37, Stipulation of Discontinuance herein, dated December 11, 2019).

Plaintiffs thereafter moved for summary judgment on their causes of action against RLI, and it subsequently cross-moved for summary judgment declaring it has no indemnification duty to plaintiffs and for an order dismissing plaintiffs' action with prejudice. These motions are presently before the court for disposition.

ANALYSIS

In support of their motion, plaintiffs allege that RLI breached the commercial general liability (CGL) policy by disclaiming its duty to indemnify them in the underlying action. In this regard, plaintiffs maintain that the construction exclusion is inapplicable to the present facts because the court has already ruled in the underlying action that no construction was taking place when Gargiso's accident occurred. In any event, plaintiffs assert that the term "Construction and Development Activities" is ambiguous because it

is not defined in the policy. Accordingly, plaintiffs argue that they are entitled to indemnification from RLI.

In opposition to plaintiffs' motion and in support of its own cross motion, RLI contends that it has no duty to indemnify plaintiffs in the underlying action based upon the policy's construction exclusion. In this regard, to demonstrate that construction was ongoing when Gargiso's accident occurred, RLI first notes that the New York City Department of Buildings (the DOB) issued violations against Howland Hook between 2011 and 2013 for failure to maintain the building. These violations noted that the parking lot was defective; that the asphalt had not been removed; that there was a large pile of gravel on the property; and that the parking lot was in severe disrepair, containing a 2-3-foot trench 80 feet long.

RLI also points out that the Gargiso complaint alleges that Grenadier and Howland Hook performed construction work at the property. In addition, RLI notes that in the underlying action Gargiso testified at his deposition that construction had taken place at the property before his accident and that the property looked like a construction zone. RLI further notes that Grenadier's property manager, Mr. Joseph Maresca, testified at his deposition in the underlying action that the area where Gargiso fell was a parking lot "currently under construction," and that because the parking lot was still under construction, a staircase which would have normally provided access to the premises for pedestrians was not in place (*see* NYSCEF Doc. No. 49, Maresca deposition transcript at 17, lines 1-5 and at 20, lines 4-20).

Based on the foregoing, RLI argues that it correctly disclaimed any duty to indemnify Grenadier in connection with the Gargiso action because "*the claims against*

Grenadier result from construction activities excluded under the RLI policy" (*see* NYSCEF Doc. No. 42, affidavit of Kim Duro, RLI Claims Examiner at 4, ¶ 20 [emphasis added]). RLI asserts in the "Introduction" of its memorandum of law opposing plaintiffs' motion and in support of its own cross motion that "a New York City firefighter tripped in a trench *dug in the course of a construction project* to renovate the complex's parking lot," and that "[*t*]*he exclusion applies to the accident at issue because there is no dispute Mr. Gargiso fell in a trench created in the course of Grenadier's construction project*" (*see* NYSCEF Doc. No. 64, RLI's memorandum of law at 2, submitted as part of RLI's papers in mot. seqs. one and two [emphasis added]). In this regard, RLI argues that plaintiffs' contention that the accident did not arise out of construction because the project was interrupted, is misplaced because "*the trench was indisputably created in the course of the project*[,]" and "Grenadier's neglect and the mere passage of time do nothing to change the fact that the accident arose out of construction activities" (*id.* [emphasis added]). RLI also contends that "[i]n disputing RLI's disclaimer, Grenadier is impermissibly attempting to erase the exclusion from the policy, and convert the policy into one that covers construction liability" (*id.* at 2-3).

RLI further argues that "[e]xclusions in a liability policy applicable to certain designated operations (including construction) will be applied as written"; that given its plain and ordinary meaning, the construction exclusion *"at issue applies to all construction activities*[,]" namely, "[t]he exclusion is plainly stated in simple, black-and-white terms;" and that its application is "simple" as well, i.e. it is undisputed - based upon the Gargiso complaint, the deposition testimony noted above, the DOB violations, and the court's September 25, 2017 decision holding that Gargiso fell and was injured in

a trench created by construction work - that the subject trench "was created *in the course of construction activities*" and that "*the accident arose out of construction activities*" (*id.* at 9 [emphasis added]).

Next, RLI reiterates that "the condition from which the accident arose *was created in the course of construction*"; that the trench remained at the property at the time of the accident because the project had not been completed, and that "[*t*]*he premises remained a construction site, and the trench was a hazard created solely as a result of this unfinished construction work*" (*id.* at 10 [emphasis added]).[3]

RLI also contends that the exclusion is not ambiguous because the word "Construction" is self-explanatory and obvious; the policy was issued to a housing complex owner and covered Grenadier's risks in operating a housing complex, not the risks in operating a construction project; that the clarity of the exclusion is further reflected by the additional language which excludes routine maintenance from the exclusion; and the fact that the phrase "Construction and Development Activities" is not defined in the policy does not render it ambiguous.

"As with any contract, 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'" (*Baron v New York Mut. Underwriters*, 181 AD3d 638, 640 [2d Dept 2020], quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citation omitted]). Accordingly, "[i]n construing policy provisions defining the scope of

[3] RLI claims that the court's finding in its September 25, 2017 order that construction had stopped prior to Gargiso's accident is immaterial. In this regard, RLI states that "[w]hat is material is that the exclusion applies regardless because the trench that caused the accident was created in the course of construction and remained in that state due to Grenadier's own failure to finish the project such that its property remained a construction site" (*id.* at 12).

coverage pursuant to a policy of insurance, courts first look to the language of the policy, reading it in light of common speech and the reasonable expectations of a businessperson and in a manner that leaves no provision without force and effect" (*ABM Mgmt. Corp. v Harleysville Worcester Ins. Co.,* 112 AD3d 763, 764 [2d Dept 2013] [internal citations and quotation marks omitted]). Language in a contract is unambiguous if it has "a definite and precise meaning, unattended by danger of misconception in the purport of the policy itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]), and "a court is not free to 'make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation'" (*2619 Realty v Fidelity & Guar. Ins. Co.*, 303 AD2d 299, 300 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003], quoting *Breed,* 46 NY2d at 355). Further, "[t]he mere assertion by one that contract language means something different to him or her, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact" (*Cohen & Slamowitz, LLP v Zurich Am. Ins. Co.*, 168 AD3d 905, 906 [2d Dept 2019]). In addition, "'[a]n insurance contract should not be read so that some provisions are rendered meaningless'" (*S.P. v Dongbu Ins. Co.*, 174 AD3d 911, 913 [2d Dept 2019], quoting *County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994]).

However, "[a]n exclusion from coverage 'must be specific and clear in order to be enforced'" (*Northfield Ins. Co. v Fancy Gen. Constr., Inc.*, 167 AD3d 916, 918 [2d Dept 2018], quoting *Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). Further, "[a]ny ambiguity in the terms of an insurance policy must be construed in favor of the

insured and against the insurer" (*id.*; *see also Cohen & Slamowitz, LLP,* 168 AD3d at 905-906). Accordingly, "[w]here an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (*Minchala v 829 Jefferson, LLC*, 177 AD3d 866, 867 [2d Dept 2019] [internal citations and quotation marks omitted]). "[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" (*Baron,* 181 AD3d at 640 [internal citations and quotation marks omitted]). Specifically, a provision in an insurance contract is ambiguous where it is "reasonably susceptible of more than one interpretation" (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Finally, "exclusions are to be narrowly construed so that the scope of coverage remains as broad as possible" (*Snyder v National Union Fire Insurance Company*, 688 F Supp 932, 938 [SD NY 1988]; *see also 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 105 [1st Dept 2006] [internal citations and quotation marks omitted] ["This rule of construction (ambiguous terms construed in favor of insured and against insurer) is especially true where, as here, the language at issue appears in an exclusion limiting the insurer's exposure. Policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer"]; *Lee & Palmer, Inc. v Employers Commercial Union Insurance Company*, 360 F Supp 654, 656 [SD NY 1973] ["The rule would seem to have special vigor when applied to a policy such as the one involved here which is by its own terms denominated a 'comprehensive general liability policy'"]).

On the other hand, "parties cannot create ambiguity from whole cloth where none exists, because provisions 'are not ambiguous merely because the parties interpret

them differently'" (*Baron,* 181 AD3d at 640, quoting *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]). Further, "'the plain meaning of a policy's language may not be disregarded to find an ambiguity where none exists'" (*Minchala,* 177 AD3d at 867, quoting *Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.*, 75 AD3d 533, 534 [2010]; *see also Northfield Ins. Co.,* 167 AD3d at 918). Lastly, in an insurance context, "[t]he phrase 'arising out of' has been interpreted . . . to mean originating from, incident to, or having connection with and requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008] [internal citations and quotations marks omitted]).

Here, as indicated, the construction exclusion excludes from coverage bodily injury relating to "Construction and Development Activities" at the property. However, despite its six-page "Definitions" section defining approximately 40 terms, the policy does not define the phrase "Construction and Development Activities."

Further, it is true that the phrase suggests that construction must take place when the bodily injury occurs in order to trigger the exclusion. Moreover, the parties appear to agree upon this interpretation and, in its memorandum of law in opposition to plaintiffs' motion and in support of its own cross motion, RLI states that it does not dispute that the work at the property had stopped prior to the accident. However, absent a definition of the subject phrase, it cannot be concluded that this interpretation is the correct one.[4]

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[4] 4 As plaintiffs' assert in their reply memorandum of law, inasmuch as RLI concedes that there were no construction activities at the property at the time of the Gargiso accident, plaintiffs' argument that RLI is collaterally estopped from arguing the contrary based upon the

In any event, even assuming that the phrase requires construction to take place at the time the bodily injury occurred (*see e.g. Will Realty Corporation. v Transportation Insurance Company*, 22 Mass App Ct 918, 919, 492 NE2d 372, 373 [1986] [with respect to an exception to an exclusion, the term "construction" "looks to some substantial continuing activities"]), and taking into account that the parties agree that there were no construction activities taking place at the time of the accident, without a definition, it is unclear whether "Construction Activities" includes the digging of a trench in a parking lot. "[T]he burden is upon the insurer to prove that the exclusion from liability coverage applies" (*Kurtin v National Railroad Passenger Corporation (Amtrak),* 887 F Supp 676, 680 [SD NY 1995]). As noted, the policy does not define the phrase "Construction and Development Activities" and also "fails to refer to any such definition" (*id.*). Had RLI intended to exclude coverage for accidents occurring in a trench at a dormant or abandoned construction site, "it could have done so by specifically" saying so, or by simply excluding accidents occurring where construction work was performed or was being performed (*id.*). Accordingly, inasmuch as the phrase is ambiguous, it must be "'construed most strongly against the insurer'" (*Northfield Ins. Co.,* 167 AD3d at 918, quoting *Seaboard Sur. Co.,* 64 NY2d at 311; *see also Cohen & Slamowitz, LLP,* 168 AD3d at 905-906).

Addressing RLI's arguments set forth above, in brief, RLI contends that the construction exclusion applies to all construction activities; that the claims against Grenadier resulted from "construction activities;" and that the exclusion applies because

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court's September 25, 2017 order in the underlying action, and RLI's opposition to this argument is moot (*see* NYSCEF Doc. No. 65, plaintiffs' reply brief at 4, n 1, accompanying plaintiffs' papers in mot. seqs. one and two).

the trench was created in the course of Grenadier's construction project and because the property remained a construction site because of the unfinished construction work. However, the former two arguments merely state a conclusion. In addition, the latter argument presumes that construction must take place when the bodily injury occurred (rejected above due to ambiguity), and that abandoned construction sites constitute "Construction . . . Activities" or, stated otherwise, that the phrase excludes coverage because the trench was dug by a contractor two years before the accident. However, RLI provides no authority for this claim. Moreover, RLI has failed to satisfy its burden that this interpretation constitutes the "plain and ordinary meaning" of "Construction and Development Activities" (*see Baron,* 181 AD3d 638).

Addressing the arguments of RLI as to whether the phrase is ambiguous, RLI merely states in conclusory fashion that the phrase is not ambiguous because it is self-explanatory and obvious. Moreover, RLI contends that the phrase is not ambiguous merely because it is not defined in the policy but fails to provide further analysis applicable to the instant facts. In addition, that the policy only covered Grenadier's risks in operating a housing complex (which is unclear given that the subject phrase is undefined), and that the exclusion is somewhat defined by additional language, fail to demonstrate that the exclusion is "'specific and clear'" such that it may be enforced (*Northfield Ins. Co.,* 167 AD3d at 918, quoting *Seaboard Sur. Co.,* 64 NY2d at 311; *see also Kurtin,* 887 F Supp at 681[SD NY 1995] [plaintiff's employer's "acquisition of the RPL policy is insufficient, standing alone, to demonstrate that the definition of 'construction' in the exclusion clause of the CGL policy encompassed painting']).

In view of the foregoing, that branch of plaintiffs' motion, mot. seq. one, for a judgment declaring that RLI, must indemnify them with respect to the underlying action is granted, and the cross motion of RLI, mot. seq. two, is denied. The court has considered the remaining arguments of the parties and has found them to be without merit.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
July 31, 2020

HON. RICHARD VELASQUEZ

So Ordered
Hon. Richard Velasquez

JUL 31 2020

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