SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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LEXINGTON INSURANCE COMPANY,

Plaintiff,

- v -

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, SYNDICATE 623/2623, HISCOX SYNDICATES LIMITED ON BEHALF OF HISCOX SYNDICATE 33, ACE GLOBAL MARKETS, PEMBROKE, AXIS SURPLUS INSURANCE COMPANY, INTERSTATE FIRE & CASUALTY COMPANY, CNA FINANCIAL CORPORATION, COLUMBIA CASUALTY INSURANCE, and NAUTILUS INSURANCE COMPANY,

Defendants.

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INDEX NO. 654089/2022

MOTION DATE 03/13/2023, 03/23/2023

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 116, 117
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 54, 60, 61, 62, 63, 64, 65, 66, 67
were read on this motion to/for ORDER OF PROTECTION.

Plaintiff Lexington Insurance Company (Lexington) brings this action against Defendants Certain Underwriters at Lloyd's London, Syndicate 623/2623 (Beazley), Hiscox Syndicates Limited on behalf of Hiscox Syndicate 33 (Hiscox), ACE Global Markets (ACE), Pembroke, AXIS Surplus Insurance Company (AXIS), Interstate Fire & Casualty Company (Interstate), Columbia Casualty Company (Columbia), and Nautilus Insurance Company (Nautilus, and collectively with Beazley, Hiscox, ACE, AXIS, Interstate, and Columbia, Defendants)[1] in connection with the parties' coverage dispute arising under certain professional liability insurance policies issued to the parties' mutual insureds (NYSCEF # 1 – Compl.). Presently before the court is Lexington's motion pursuant to CPLR 3213 for summary judgment granting its claim (NYSCEF # 37). Lexington also moves to stay discovery under CPLR 3103 pending resolution of its motion for summary judgment

[1] On November 28, 2022, Lexington discontinued the above-captioned action, without prejudice, as to all claims asserted against Defendant CNA Financial Corporation (NYSCEF # 14).

(NYSCEF # 44). Defendants oppose both motions. For the following reasons, Lexington's motions are denied.

Background

Factual Background

The following facts are taken from the parties' Rule 19-a statements, affidavits, and exhibits. They are not in dispute unless otherwise noted.

In May 2004, Milberg Weiss LLP (Milberg Weiss) split into two separate firms—Milberg, LLP (Milberg) and Coughlin Stoia Geller Rudman & Robbins LLP (Coughlin Stoia) (NYSCEF # 38 – Pl. Statement ¶ 1). Prior to its split, Milberg Weiss maintained a tower of professional liability insurance consisting of primary and excess insurance (*id.* ¶ 2). After the split, Milberg and Coughlin Stoia purchased separate insurance towers that included coverage for claims made against them after their separation, as well as claims arising from professional services rendered prior to Milberg Weiss' split (Pre-Split Claims) (*id.* ¶ 3; NYSCEF # 69 – Defs. Counterstatement ¶¶ 18-19; NYSCEF # 81 – Marsh Aff. ¶ 7; NYSCEF # 95 – Randle Aff. ¶ 7; NYSCEF # 105 – Rowell Aff. ¶ 6).

The Milberg Primary and Excess Policies

On April 27, 2009, Milberg purchased a professional liability insurance policy (the Milberg Primary Policy) providing coverage up to a $25 million limit of liability for each claim (as defined in the policy) against Milberg between May 2, 2009, and May 2, 2010, subject to a $2 million deductible (Pl. Statement ¶¶ 7, 15; NYSCEF # 25[2] – Milberg Primary Policy at Decl. 2-4). The parties underwrote or subsequently subscribed to the Milberg Primary Policy (Pl. Statement ¶ 8; Counterstatement at Resps. 8, 19). Under the Milberg Primary Policy, the primary insurers agreed to pay damages and claims expenses (as those terms are defined in the policy) that arose "out of any act, error or omission of [Milberg] in rendering or failing to render professional services . . ." up until "the applicable limit of [] liability has been exhausted" (Milberg Primary Policy §§ I.A, I.B, V).

In addition to the Milberg Primary Policy, Milberg also purchased a layer of excess insurance for the same period to provide coverage up to a $25 million limit of liability in excess of the Milberg Primary Policy's limit of liability (the Milberg Excess Policy) (Pl. Statement ¶¶ 14, 15; NYSCEF #3 – Milberg Lexington MOI at 1). Lexington, AXIS, Interstate, Nautilus, and non-party Ironshore Specialty Insurance Company (Ironshore) participate in the Milberg Excess Policy (Pl.

[2] Lexington submits its Complaint and accompanying exhibits as a single exhibit to its motion for summary judgment (*see* NYSCEF # 41). It does the same thing for Defendants' Answer, Affirmative Defenses, and Counterclaims and accompanying exhibits (*see* NYSCEF # 42). For ease of reference, the court will cite to these pleadings and their exhibits as they appear on the docket, rather than citing to the compiled exhibits submitted in connection with the motion for summary judgment.

Statement ¶¶ 16, 20). For its part, Lexington has a $10 million level of participation in the Milberg Excess Policy, as reflected in its February 12, 2010, Memorandum of Insurance (the Milberg MOI) (*see* Milberg Lexington MOI at 1). The Milberg MOI notably incorporated, subject to certain exclusions, "all terms . . . set forth in" the Milberg Primary Policy "on the identical subject matter and risk" (*id.* at 3). The Milberg MOI also provided that "[i]n the event of the reduction . . . of the sums insured under the [Milberg Primary Policy] by reason of claims paid there under," Lexington would "pay the excess of the reduced underlying sums insured" (*id.*).

The Coughlin Stoia Primary and Excess Policies

On June 9, 2009, Coughlin Stoia purchased a professional liability insurance policy (the CS Primary Policy) providing coverage up to a $20 million limit of liability for claims (as defined in the policy) against Coughlin Stoia from January 31, 2009, to January 31, 2010, subject to a $2 million deductible (Pl. Statement ¶ 21; NYSCEF # 5 – CS Primary Policy at Decl. 2-4). Lexington, Hiscox, Nautilus, Columbia, AXIS, and Interstate underwrote or subsequently subscribed to the CS Primary Policy (Pl. Statement ¶¶ 22, 34). Like the Milberg primary insurers, the Coughlin Stoia primary insurers agreed to pay damages and claims expenses on behalf of the insured up until "the applicable limit of [] liability has been exhausted" (Pl. Statement ¶¶ 23-27; CS Primary Policy §§ I.A, I.B, V).

Coughlin Stoia also purchased excess insurance to cover the same period as the CS Primary Policy up to a $30 million limit of liability in excess of the CS Primary Policy's limit of liability (the CS Excess Policy, and together with the Milberg Primary Policy, the Milberg Excess Policy, and the CS Primary Policy, the Policies) (Pl. Statement ¶¶ 28-29; NYSCEF # 6 – CS Lexington MOI at 1, 3). Lexington, AXIS, and Interstate participate in the CS Excess Policy (Pl. Statement ¶¶ 30, 34; Defs. Counterstatement at Resps. 30, 34). For its part, Lexington has a $20 million level of participation in the CS Excess Policy (CS Lexington MOI at 1). As with the Milberg MOI, Lexington's Coughlin Stoia memorandum of insurance also incorporated the terms of the CS Primary Policy and agreed to pay the excess of any "reduced underlying sums insured" (*id.* at 3).

The Interlocking Clause

At the center of the parties' dispute is an "Interlocking Clause" included as part of the Policies (the Interlocking Clause). In essence, Milberg, CS, and their respective primary and excess insurers agreed to include the Interlocking Clause to extend coverage under the Policies to Pre-Split Claims (Pl. Statement ¶ 35; Defs. Counterstatement ¶¶ 1, 18-19). The Interlocking Clause was negotiated and first placed in policies issued to Milberg and Coughlin Stoia for the 2004-2005 policy period, and variations of the clause have been included in subsequent policy periods for the Policies (Defs. Counterstatement ¶¶ 1, 10-19, 21-23).

As is relevant here, the Interlocking Clause provides that

> "[i]n the event that a Claim is made under either the MILBERG Policy or the COUGHLIN STOIA Policy, or is made under both such Policies, where such Claim arises out of the same, continuing or related professional services first rendered prior to May 1, 2004, then as a result of the pre-agreed liability split between MILBERG and COUGHLIN STOIA (which has been consented to by the Underwriters of the MILBERG Policy and the Underwriters of the COUGHLIN STOIA Policy) the amount of any payment for such Claim shall be allocated on a 50/50 basis between the MILBERG Policy and the COUGHLIN STOIA Policy, provided always that the Underwriters' maximum combined Limit of Liability under all such Policies, including Claims Expenses, shall not exceed USD50,000,00 for such Claim."[3] (Milberg Primary Policy at Interlocking Clause ¶ 3; CS Primary Policy at Interlocking Clause ¶ 5[4]).

The Interlocking Clause further provides that if either the "MILBERG Policy Limit of Liability" or the "COUGHLIN STOIA Policy Limit of Liability" is exhausted or eroded "to such an extent that [the impacted policy] cannot meet any or all of its fifty (50) percent obligation to defend or settle a Claim," then the other non-exhausted or non-eroded policy would "pay the shortfall" (*see* Milberg Primary Policy at Interlocking Clause ¶ 3; CS Primary Policy at Interlocking Clause ¶ 5). Milberg and Coughlin Stoia, as part of the Interlocking Clause, agreed to "each pay 50% of their applicable deductible" (Milberg Primary Policy at Interlocking Clause ¶ 4; CS Primary Policy at Interlocking Clause ¶ 6).

The *Bobbitt* Litigation and Parties' Resulting Coverage Dispute

In 2001, Milberg Weiss filed an action captioned *Drnek v Variable Annuity Life Insurance Company*, No. 01-242 (D. Ariz.) on behalf of a putative class seeking recovery for alleged federal securities laws violations (Pl. Statement ¶ 38). During the *Drnek* litigation, Milberg Weiss missed several deadlines, which resulted in the court decertifying the *Drnek* class and granting summary judgment in favor of the *Drnek* defendant (*id.* ¶ 39). Because Milberg Weiss allegedly failed to notify the purported class of those developments, the class members' claims became time barred (*id.*). Accordingly, on November 2, 2009, the class sued for legal malpractice in an action captioned *Bobbitt v Milberg, LLP*, No. 09-629 (D. Ariz.) (the *Bobbitt*

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[3] Put differently, while the total limits of liability for the Policies is $100 million, the maximum limit is only $50 million for Pre-Split Claims (*see* Defs. Counterstatement ¶ 23).

[4] The CS Primary Policy includes nearly identical language as part of its Interlocking Clause. The Interlocking Clause's defined terms of "the MILBERG Policy" and "the COUGHLIN STOIA Policy" (or, as defined in the CS Primary Policy, "the MWB&S Policy" and "the LCSGR&R Policy") included both the Milberg Primary and Excess Policies, as well as the CS Primary and Excess Policies, respectively (*see* Milberg Primary Policy at Interlocking Clause ¶¶ 1-2; CS Primary Policy at Interlocking Clause ¶¶ 1-4).

Action) (*id.* ¶ 40). Milberg and Coughlin Stoia reported the *Bobbitt* Action to their respective policies, and the insurers accepted it as a covered "Claim" under the Policies (the *Bobbitt* Claim) (*id.* ¶ 41; Defs. Counterstatement ¶ 20). On April 5, 2022, the parties in the *Bobbitt* Action filed a notice of settlement, which is still being finalized (Compl. ¶ 66)

Although coverage for the *Bobbitt* claim is undisputed, the parties vigorously challenge the proper allocation of exposure among the primary and excess insurers (*see* Compl. ¶¶ 66-72; Answer ¶¶ 63-72; Counterclaim ¶¶ 44-62; NYSCEF # 10 at 2-3, NYSCEF #11 at 2-3). Lexington submits (and Defendants dispute) that, under the Interlocking Clause, each of the Milberg and Coughlin Stoia primary insurers are liable to the extent of their full participation in the Milberg Primary Policy and the CS Primary Policy, and therefore the primary limits of liability must be exhausted before any excess liability is triggered (Pl. Statement ¶¶ 42-43, 45-46). In support, Lexington points to a December 2, 2011 letter from Mendes & Mount, LLP (Mendes)—then counsel to three Milberg primary insurers—which indicated that, in the event of a hypothetical $50 million loss on the *Bobbitt* Claim, "exposure would be limited to $25 million, or the primary limits [under the Milberg Primary Policy], and up to $5 million of the $30 million in excess of $20 million layer [under the CS Primary Policy]" (NYSCEF # 7 – Dec. 2011 Mendes Letter at 9). Lexington also points to a May 1, 2012, email from a representative of Beazley indicating his view that, under a hypothetical $50 million loss, the "exposure to Beazley, Ace and Pembroke is the same" under a scenario where "both the Milberg and Coughlin Stoia policies cover the claim," as well as where "only the Milberg policy covers the claim" (NYSCEF # 9 – May 2012 Beazley Email at 1-2).

Defendants, on the other hand, state (and Lexington disputes) that for a Pre-Split Claim, the insurers are only exposed to half the Policies' otherwise stated limits of liability because of the Interlocking Clause (Defs. Counterstatement ¶¶ 18-19, 24). In support, Defendants point to an "in principal agreement" communicated to the Milberg and Coughlin Stoia insurance towers (*id.* ¶¶ 2-7; Randle Aff. ¶¶ 10-11; Rowell Aff. ¶¶ 9-12).[5] According to the affirmations of two Beazley employees who helped negotiate "in principal agreement," the Interlocking Clause (as described in the "in principal agreement") was meant to "restrict each layer's aggregate limit to the combined shared limit between the Milberg and Coughlin Stoia policies at those layers" (Rowell Aff. ¶ 12; Randle Aff. ¶ 11; *see also* Defs. Counterstatement ¶¶ 5-6). In further support of this position, Defendants also point to the original structure of the pertinent terms of the Interlocking Clause in 2004, as well as its development between the 2004-2009 years of account (*see* Defs. Counterstatement ¶¶ 8-19, 24; Marsh Aff. ¶¶ 8-10, 26; NYSCEF #'s 82-94).

[5] Pursuant to the "in principle agreement," the insurers would cover Pre-Split Claims on the condition that "[e]ach policy will contain an interlocking clause for wrongful acts committed pre-split showing that there is only one single limit and a single S.I.R. for all claims under both policies combined" (*see* NYSCEF # 106 at 1).

Procedural Background

Lexington commenced this action on October 28, 2022, asserting a single claim for a declaration that (i) Defendants are required to contribute to the *Bobbitt* Claim up to their share of the Milberg Primary Policy's and CS Primary Policy's full limits of liability, and (ii) neither the Milberg Excess Policy nor the CS Excess Policy are required to make any payment unless and until the primary policies' full limits of liability are exhausted (Compl. ¶¶ 74-80). On January 10, 2023, Defendants filed their Answer, Affirmative Defenses, and Counterclaim (NYSCEF # 24). In their counterclaim, Defendants seek a declaration that the Interlocking Clause requires that any payments towards the *Bobbitt* Claim be allocated on a 50/50 basis among all policies within the Milberg and Coughlin Stoia insurance towers and that the Policies' limits of liability are each reduced by half (*see* NYSCEF # 24 – Counterclaim ¶¶ 63-69).

On February 24, 2023, Defendants served their first request for production, their first set of interrogatories, and a notice of examination before trial (NYSCEF # 70. ¶¶ 25-31; *see also* NYSCEF # 61 ¶¶ 14-18). On March 13, 2023, Lexington filed its motion for summary judgment under CPLR 3212, as well as a motion under CPLR 3103 for a protective order staying discovery pending resolution of the motion for summary judgment (NYSCEF # 37; NYSCEF # 44). To date, the parties have not exchanged any discovery in this action (NYSCEF # 70 ¶¶ 32-34). Defendants aver that they believe Lexington is likely to possess various categories of documents that will help discern Lexington's interpretation of the Interlocking Clause (*see* Marsh Aff. ¶¶ 27-29).

Discussion

In moving for summary judgment, Lexington argues that the Interlocking Clause contained in the Policies is unambiguous and provides that a Pre-Split Claim submitted under these policies must be allocated equally between the Milberg and Coughlin Stoia insurance towers (NYSCEF # 39 at 15-17). Lexington further avers that, even for Pre-Split Claim payments, the Milberg primary insurers would be responsible for up to $25 million (i.e., the Milberg Primary Policy liability limit) before any excess liability applied, and the Coughlin Stoia insurers would be responsible for up to $20 million (i.e., the CS Primary Policy liability limit) before any excess liability applied (*id.* at 17-19).

Defendants first counter that Lexington's motion is premature because Defendants have not had any opportunity to conduct discovery (NYSCEF # 68 at 10-11). As Defendants explain, they served discovery seeking information bearing on how the parties intended the Interlocking Clause to apply, which Defendants submit is necessary to oppose Lexington's motion fully and fairly (*id.* at 11). On the merits, Defendants contend that Lexington's interpretation of the Interlocking Clause ignores key aspects of Polices' language and structure (*id.* at 11-13). Under a

proper interpretation of the Interlocking Clause, Defendants submit, each Policies' limit of liability should be reduced in half for purposes of Pre-Split Claims, and therefore full exhaustion of the primary policies' overall limited of liability is not required for the Milberg and Coughlin Stoia excess policies to trigger (*id.* at 12-17).

As explained below, the court concludes that Lexington's motion for summary judgment should be denied as premature.

I. Lexington's Motion for Summary Judgment (MS001)

A. Summary Judgment Standard

Under CPLR 3213, "[a]ny party may move for summary judgment in any action, after issue has been joined" (CPLR 3213 [a]). "The proponent of a motion for summary judgment must establish that there are no material issues of fact in dispute and that it is entitled to summary judgment as a matter of law" (*Mazurke v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). Once a movant makes its prima facie showing, the burden shifts to the opposing party to produce evidentiary proof sufficient to raise an issue of fact (*CitiFinancial Co (DE) v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]).

When resolving a motion for summary judgment, the court must view facts in a light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). Furthermore, if "facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit . . . disclosure to be had" (CPLR 3212 [f]).

B. The Interlocking Clause is Ambiguous and Summary Judgment is Premature

"An insurance contract is subject to principles of contract interpretation" (*Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]). Under these well-settled principles, the unambiguous provisions of an insurance policy, as with any written contract, must be accorded their plain and ordinary meaning (*2619 Realty, LLC v Fidelity and Guaranty Ins. Co.*, 303 AD2d 299, 300 [1st Dept 2003]). The agreement should be read as a whole to determine its purpose and intent, and it should be construed to give effect and meaning to all provisions (*W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Whether a writing is ambiguous is a "question of law to be resolved by the courts" (*id.* at 162). A "contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]

[internal quotations omitted], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "Conversely, '[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Triax Cap. Advisors, LLC v Rutter*, 83 AD3d 490, 492 [1st Dep 2011], quoting *Feldman v Nat'l Westminster Bank*, 303 AD2d 271 [1st Dept 2003]; *accord Lend Lease (U.S.) Cons. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56 [1st Dept 2015] ["The test for ambiguity is whether the language of the insurance contract is "susceptible of two reasonable interpretations"]). Although any ambiguity in insurance contracts is typically resolved in favor of the insured (*see CT Inv. Mgmt. Co., LLC v Chartis Specialty Ins. Co.*, 130 AD3d 1, 6 [1st Dept 2015]), this rule of construction is "not applicable in a contest between two insurance companies" (*Standard Marine Ins. Co., Ltd. v Federal Ins. Co.*, 30 AD2d 444, 446 [1st Dept 1972]; *see also Cummins, Inc. v Atlantic Mut. Ins. Co.*, 56 AD3d 288, [1st Dept 2008] [explaining that canon of construction requiring that ambiguities in policy must be construed against the insurer, i.e., *contra proferentem*, did not apply where plaintiff "is sophisticated" and "acted like an insurance company"]; *Loblaw, Inc. v Employers' Liability Assur. Corp.*, 85 AD2d 880, 881 [4th Dept 1981 [acknowledging that rule that ambiguity be construed against the insurer and in favor of the insured not applicable in contest between two insurance companies]).

Here, as explained above, the Interlocking Clause provides that "the amount of any payment for such Claim shall be allocated on a 50/50 basis between the MILBERG Policy and the COUGHLIN STOIA Policy" for Pre-Split Claims (*see* Milberg Primary Policy at Interlocking Clause ¶ 3). As drafted, it is unclear from either the Interlocking Clause's plain terms or its surrounding context whether, by referencing an allocation of costs on a "50/50 basis," the parties intended to spread payments out across the Policies up until each of the Policies' full liability limits, or if they intended to reduce the Policies' total limits of liability in the context of Pre-Split Claims. And the Interlocking Clause is otherwise silent as to what exactly an allocation of costs on a "50/50 basis" should entail.

In advancing its own interpretation, Lexington emphasizes the terms "amount of any payment" to establish that the Interlocking Clause only provided for a 50/50 allocation of payments without adjusting the Milberg and Coughlin Stoia limits of liability (NYSCEF # 116 at 2-3). Yet, as Defendants note in response, the Interlocking Clause also provides for a fifty percent reduction of the Policies' maximum combined limit of liability, and it also reduces each of the insured's deductible obligations by fifty percent (*see* Milberg Primary Policy at Interlocking Clause ¶¶ 3, 4). Although a provision in an insurance contract is normally not ambiguous merely because the parties interpret it differently (*see Atlantic Mut. Ins. Co. v Terk Techs. Corp.*, 309 AD2d 22, 28 [1st Dept 2003]), here, the parties' competing interpretations of the Interlocking Clause plainly underscore the inherent ambiguity of this clause's language.

The Interlocking Clause's ambiguity is further buttressed by the fact that the Interlocking Clause refers to—and sets forth procedures resulting from—circumstances when the Policies are unable "meet any or all of [their] fifty (50) percent obligation to defend or settle a claim" (Milberg Primary Policy at Interlocking Clause ¶ 3). This reference to a "fifty (50) percent obligation," when coupled with the Interlocking Clause's reference to "allocat[ing]" payments on a "50/50 basis," could plainly support either of the parties' respective interpretations of how the Policies treat the funding of Pre-Split Claims. And because no other portion of the Policies clarify whether the Interlocking Clause's "50/50 basis" allocation applies to payments, as averred by Lexington, or also to the Policies' liability limits, as averred by Defendants, the court cannot conclude, as a matter of law, that the Interlocking Clause is unambiguous as written.

Although the existence of ambiguity does not necessarily preclude summary judgment, where, as here, there has been no discovery and the facts and circumstances surrounding the meaning of the Interlocking Clause have yet to be thoroughly explored, the court concludes that this summary judgment motion is premature (*see Rodriguez v Architron Environmental Servs., Inc.*, 166 AD3d 505, 506 [1st Dept 2018] [concluding that summary judgment was premature "where [n]o discovery had been conducted before [defendant] moved for summary judgment" and plaintiff did not have opportunity to gather information from parties with "knowledge concerning the relevant issues"]; *Vance Assocs., LLC v One Flatbush Ave. Property, LLC*, 2017 WL 4551072, at *4 [Sup Ct, Kings County, Oct. 12, 2017] [concluding that summary judgment was premature where contract was ambiguous and little to no discovery had taken place]; *see also* Reply at 10 [noting that "[s]hould the Court nonetheless find ambiguity, this motion can be denied and the parties directed to discovery"]). Indeed, even assuming, without deciding, that Lexington's interpretation of the Interlocking Clause is reasonable, Defendants have come forward with a sufficient basis to believe that facts essential to justify opposition may exist and be discerned through discovery (*see* Defs. Counter-statement ¶¶ 2-19; Marsh Aff. ¶¶ 27-29). The need for discovery is particularly salient here given that the court may look to extrinsic evidence to help resolve the Interlocking Clause's ambiguity (*see Schulte Roth & Zabel LLP v Metropolitan 919 3rd Ave. LLC*, 202 AD3d 641, 641-642 [1st Dept 2022]).

Accordingly, Lexington's motion is denied without prejudice to renew after discovery has been completed.

II. Lexington's Motion for a Protective Order (MS002)

In addition to moving for summary judgment, Lexington also moves to stay disclosure pending resolution of its summary judgment motion (NYSCEF # 45). Given the court's conclusion that Lexington's motion for summary judgment is premature, and that discovery should proceed, Lexington's motion to stay discovery is denied as moot.

Conclusion

In light of the foregoing, it is

ORDERED that Lexington's motion for summary judgment (MS001) is denied, without prejudice to renew after discovery is complete; and it is further

ORDERED that Lexington's motion for a protective order under CPLR 3103 staying disclosure pending resolution of its summary judgment motion (MS002) is denied as moot; and it is further

ORDERED that a preliminary conference shall be held via Microsoft Teams on September 27, 2023, at 11:30 a.m. or at such other time that the parties shall set with the court's law clerk.

This constitutes the Decision and Order of the court.

08/16/2023
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE