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SHORT FORM ORDER

INDEX No. 08-23798

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 8-31-10 (#010)
MOTION DATE 12-30-10 (#012)
MOTION DATE 5-17-11 (#013)
MOTION DATE 6-7-11 (#014, #015, #016)
MOTION DATE 6-28-11 (#017, #018)
MOTION DATE 8-15-11 (#019)
ADJ. DATE 10-11-11
Mot. Seq. # 010 - MD # 014 - Mot D # 017 - MG
012 - Mot D # 015 - MG # 018 - MD
013 - Mot D # 016 - Mot D # 019 - MG

MIGUEL PINON and PATRICIA PINON,

Plaintiffs,

- against -

99 LYNN AVE LLC, 105 LYNN AVE LLC, B & L MANAGEMENT CO. LLC, ALFRED CAIOLA, BEN AILOA III and ROSE CAIOLA, as Tenants in Common, ALFRED CAIOLA, PAUL MICHAEL CONTRACTING CORP., GEORGE E. VICKERS JR. ENTERPRISES, INC., NICHOLAS A . VERO, ARCHITECT, P.C., CARDO SITE DEVELOPMENT INC. and LAND USE ECOLOGICAL SERVICES, INC.,

Defendants.

BOYD LAW OFFICE, P.C.
Attorney for Plaintiffs
626 Rexcorp Plaza
West Tower, 6th Floor
Uniondale, New York 11556

WEG & MYERS, P.C.
Attorney for Defendants/Second Third-Party Plaintiffs 99 Lynn, 105 Lynn, B & L Management and Caiola
52 Duane Street
New York, New York 10007

CASCONE & KLUEPFEL, LLP
Attorney for Defendant Paul Michael Contracting
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

GEORGE E. VICKERS JR. ENTERPRISES, INC.

Third-Party Plaintiff,

- against -

MERCHANTS MUTUAL INSURANCE COMPANY,

Third-Party Defendant.

LITCHFIELD & CAVO
Attorney for Defendant/Third-Party Plaintiff George E. Vickers Jr. Ent.
420 Lexington Avenue, Suite 2104
New York, New York 10170

KELLY & HULME, P.C.
Attorney for Defendant Vero
323 Mill Road
Westhampton Beach, New York 11978

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99 LYNN AVE LLC and 105 LYNN AVE LLC,

Second Third-Party Plaintiffs,

- against -

MERCHANTS MUTUAL INSURANCE COMPANY and LEXINGTON INSURANCE COMPANY,

Second Third-Party Defendants.

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Upon the following papers numbered 1 to 249 read on these motions for summary judgment and to sever action ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19, 32 - 50, 79 - 106, 115 - 130, 131 - 142, 158 - 176, 190 - 204, 212 - 228, 233 - 245 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 21 - 27, 30 - 31, 53 - 74, 107 - 108, 143 - 153, 154 - 155, 177 - 182, 183 - 188, 205 - 206, 207 - 209, 229 - 230, 246 - 247 ; Replying Affidavits and supporting papers 109 - 114, 156 - 157, 189, 210 - 211, 248 - 249 ; Other memoranda of law 20, 28 - 29, 51 - 52, 75 - 76, 77 - 78, 177, 214, 231 - 232 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 010) by the second third-party defendant Lexington Insurance Company (Lexington) for an order pursuant to CPLR 3212 granting summary judgment and a declaration that it is not obligated to defend or indemnify the second third-party plaintiffs 99 Lynn Avenue LLC and 105 Lynn Avenue LLC in the plaintiffs' underlying action for personal injuries herein, is denied; and it is further

ORDERED that the motion (# 012) by the defendants/second third-party plaintiffs 99 Lynn Avenue LLC (99 Lynn) and 105 Lynn Avenue LLC (105 Lynn) for an order pursuant to CPLR 3212 granting summary judgment and a declaration that Lexington is obligated to defend them in the plaintiffs' underlying action for personal injuries, to indemnify them for any judgment entered against them in the underlying action, and to reimburse them for all attorney's fees incurred to date in defending the underlying action, is granted to the extent that 99 Lynn and 105 Lynn are entitled to summary judgment and a declaration that Lexington is obligated to defend them, and scheduling a hearing, as set forth below, to determine the amount of any reimbursement owed to them, and is otherwise denied; and it is further

ORDERED that the motion (# 013) by Lexington for an order pursuant to CPLR 3212 granting summary judgment and a declaration that the second third-party defendant Merchants Mutual Insurance Company (Merchants), is obligated to defend and indemnify 99 Lynn and 105 Lynn in the plaintiffs' underlying action for personal injuries on a primary basis, is granted to the extent that it is entitled to summary judgment and a declaration that Merchant is obligated to defend 99 Lynn and 105 Lynn in the underlying action, and scheduling a hearing, as set forth below, to determine the amount of any reimbursement owed to them, and is otherwise denied; and it is further

ORDERED that the motion (# 014) by the defendant/third-party plaintiff George E. Vickers Jr. Enterprises, Inc. (Vickers) for an order pursuant to CPLR 3212 granting summary judgment and a declaration that Merchants is obligated to defend it in the plaintiffs' underlying action for personal injuries, and to indemnify it for any judgment entered against it in the underlying action, is granted to the extent that it is entitled to summary judgment and a declaration that Merchant is obligated to defend it in the underlying action, and scheduling a hearing, as set forth below, to determine the amount of any reimbursement owed to it, and is otherwise denied; and it is further

ORDERED that the motion (# 015) by the defendant/third-party plaintiff Vickers for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (# 016) by the second third-party defendant Merchants for an order pursuant to CPLR 3212 granting summary judgment and a declaration that Merchants is not obligated to defend or indemnify 99 Lynn or 105 Lynn in the underlying action as they do not qualify as additional insureds under the Merchants insurance policy with its named insured, that Merchants is not obligated to defend or indemnify Vickers in the underlying action as it does not qualify as an additional insured under the Merchants insurance policy with its named insured, and that Merchants is not obligated to reimburse 99 Lynn, 105 Lynn or Vickers for the costs incurred to date in defending the underlying action, is granted to the extent that Merchants is entitled to summary judgment and a declaration that it is not obligated to indemnify 99 Lynn, 105 Lynn or Vickers in the underlying action, and is otherwise denied; and it is further

ORDERED that the motion (# 017) by the defendant Paul Michael Contracting Corp. (PMC) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (# 018) by the second third-party defendant Lexington for an order pursuant to CPLR 603 severing the second third-party action from the main action is denied with leave to make a further application seeking a separate trial with a separate jury, prior to the trial of the other actions, to determine Lexington's obligations to defend and indemnify its insureds upon the completion of discovery and filing of the note of issue herein; and it is further

ORDERED that the motion (# 019) by the defendant Cardo Site Development Inc. (Cardo) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted.

This is an action for personal injuries allegedly sustained on June 26, 2005, when the plaintiff Miguel Pinon (Pinon) dove into Shinnecock Bay from a bulkhead located in the rear of premises located at 99 Lynn Avenue or 105 Lynn Avenue, Hampton Bays, New York. The properties are owned by their respective namesakes, the defendants 99 Lynn and 105 Lynn, which had entered into separate contracts with the defendant/third-party plaintiff Vickers, acting as general contractor, for the construction of new homes on their properties.[1] Vickers had entered into subcontractor agreements with PMC, Pinon's

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[1] The defendants Alfred Caiola, Ben Caiola III, and Rose Caiola, as Tenants in Common, and Alfred Caiola are either prior owners of the subject properties, members of the LLCs which own the properties, or both. The

employer, to perform masonry work on the projects. The subcontractor agreements required PMC to obtain insurance policies covering its work on the projects, and to name the owners of the properties and Vickers as additional insureds in said policies. The defendant Cardo was responsible for site work on the projects. It appears that the defendant Nicholas A. Vero, Architect, P.C., performed architectural services for the projects, and that the defendant Land Use Ecological Services, Inc. (Land Use) was retained in connection with the development and construction of the subject bulkhead.[2]

It is undisputed that, after working as a mason's helper on the morning of his accident, Pinon ate his lunch and then decided to "cool off" by taking a swim in the bay located approximately 100 feet behind the area in which he was working. Pinon dove into the bay, struck his head on the sandy bottom, and suffered serious injuries. The plaintiffs commenced this action against the defendants alleging, among other things, that the premises were dangerous and defective in that the waters in the bay behind the premises appeared deeper than they were, that they failed to provide warnings and signs that indicated the water depth or the danger in diving into the bay, that they failed to supervise Pinon, that the area adjoining the bulkhead was not properly graded or maintained, and that they failed to provide barriers to prevent access to the bay, or to properly fence the perimeter of the construction site. Vickers then commenced a third-party action against Merchants, PMC's insurer, seeking a declaration that Merchant is obligated to defend and indemnify it in Pinon's action. 99 Lynn and 105 Lynn (collectively Lynn) commenced a second third-party action against Merchant and Lexington, their insurer, seeking a declaration that Merchant and Lexington are obligated to defend and indemnify them in Pinon's action.[3]

Lexington now moves (# 010) for an order granting summary judgment declaring that it has no duty to defend or indemnify Lynn in the Pinon action. 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 which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest 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]).

In support of its motion, Lexington submits, among other things, the second third-party pleadings,

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defendant B&L Management Co. LLC, is a related management company, which it appears may be owned by some or all of the individual defendants. The motions herein are not directed against these defendants, nor do these defendants address any issues that might relate to their potential liability in this action.

[2] The Court notes that discovery has not been completed in these actions, and that details regarding the involvement of some parties in this incident is not yet clear.

[3] Essex Insurance Company (Essex), Vicker's insurer, commenced a separate action under Index No. 08-40390 seeking a declaration that it was not obligated to defend or indemnify Vickers or Lynn in the Pinon action. By order dated April 26, 2011, this Court determined that Essex was obligated to defend Vickers and Lynn, and that a determination of Essex's duty to indemnify those entities must await a finding as to Pinon's status as an employee of PMC, as well as the resolution of other issues of fact.

copies of the policies that it issued to 99 Lynn and 105 Lynn, copies of Pinon's Hearing Before the Workers' Compensation Board, State of New York held on November 2, 2005, and the Memorandum of Board and Decision of the Legal Appeals Unit of the New York Workers' Compensation Board ("the Board") filed April 27, 2006, which found that Pinon was injured while on a lunch break, was not acting in the course of his duties as a laborer at the time he was injured, and denied his claim for workers' compensation benefits.

On or about September 27, 2004, Lexington issued a homeowners policy to 99 Lynn, bearing policy number LE 0578069 02, effective September 8, 2004 to September 8, 2005 (99 Lynn policy). On or about October 6, 2004, Lexington issued a homeowners policy to 105 Lynn, bearing policy number LE 0581427 02, effective October 8, 2004 to October 8, 2005 (105 Lynn policy). The subject homeowner policies are identical except for their effective dates (collectively Lexington policies).

The Lexington policies provide, in an added endorsement Form LEX 00 08 01 01:

> BUILDER'S RISK LIABILITY COVERAGE
> (Residence Premises Only)
>
> SECTION II - LIABILITY COVERAGES
>
> This insurance applies only to "bodily injury" or "property damage" arising out of the ownership, maintenance or use of the "residence premises" shown in the Declarations of this policy.
>
> The following is added:
>
> Coverage E - Personal Liability does not apply to:
>
> (a) "bodily injury" or "property damage" arising out of the "operations" performed for the "insured" by independent contractors or acts or omissions of the "insured' in connection with his general supervision of such operations, and,
>
> (b) "bodily injury" to any independent contractor or to any employee of such contractor or to any obligation of any "insured" to indemnify or contribute with another because of damages arising out of the bodily injury.

Lexington contends that the Lexington policies exclude coverage for bodily injury to Pinon because he was an employee of PMC, and that the 105 Lynn policy does not apply in any case, as the plaintiffs allege that Pinon was injured at 99 Lynn Avenue, Hampton Bays, New York. Lexington asserts that the policy language clearly amends the Lexington policies to exclude coverage under these circumstances despite the decision of the Board that Pinon was not acting in the course of his duties as an employee of PMC at the time of his accident. It argues that Pinon was an employee of PMC pursuant to section (b) above, regardless of his actions or the fact that he was on his lunch break at the time of this accident.

Here, Lynn argues that the language excluding coverage in this situation is ambiguous because a jury could reasonably find that Pinon was injured while acting outside the scope of his employment and, thus, was not an employee of PMC at the time of his accident. While it is true that the courts have upheld Workers' Compensation Board findings that lunchtime injuries may be deemed to occur outside the scope of employment except under limited circumstances *(see* ***Huggins v Masterclass Masonry***, 83 AD3d 1345, 921 NYS2d 722 [3d Dept 2011]; ***Smith v City of Rochester,*** 255 AD2d 863,681 NYS2d 371 [3d Dept 19981; ***Bennerson v Checker Garage Serv. Corp.***, 54 AD2d 1042, 388 NYS2d 374 [3d Dept 1976]), such determinations are not binding in a liability suit upon those who were not parties to the compensation proceedings (***Liss v Trans Auto Sys., Inc.***, 68 NY2d 15, 505 NYS2d 83 1 [1986]; ***Malmon v East 84th Apt. Corp.***, 67 AD3d 566, 889 NYS2d 563 [1st Dept 2009]; ***Lutheran Med. Ctr. v Hereford Ins. Co.***, 43 AD3d 1064, 842 NYS2d 498 [2d Dept 2007]). In this case, it is clear that the findings of the Board will not necessarily be binding upon the defendants in the Pinon action who did not participate in the Board hearing, or their insurers. However, given the determinations of the Board, this Court can reasonably conclude that there is an ambiguity as to the language in the insurance contract which is the subject of the within action. There is no definition of the word "employee" within the Lexington policies and there exists another possible interpretation of the clause which excludes the "employees" of the subcontractor, *i.e.* that a worker acting outside the scope of his employment is not an "employee" within the meaning of the exclusion. Therefore, Lexington has failed to demonstrate that it has no duty to defend and indemnify its insureds as a matter of law.

Accordingly, Lexington's motion for an order granting summary judgment declaring that it has no duty to defend or indemnify Lynn in the Pinon action is denied.

Lynn now moves (# 012) for an order granting summary judgment declaring that Lexington is obligated to defend and indemnify them in the Pinon action, and to reimburse them for the attorney's fees incurred to date in defending the underlying action. In support of their motion, Lynn submits, among other things, copies of the Lexington policies, the plaintiffs' complaint, and the transcript of Pinon's deposition testimony. Lynn argues that the determination of the Workers' Compensation Board establishes that Pinon was not an employee of PMC at the time of his accident, that the subject endorsement does not exclude coverage herein, and that Lexington is obligated to defend and indemnify them in the Pinon action under the terms of the homeowner policies issued to them by Lexington. For the reasons cited above, Lynn's contention that the Board's determination is binding on Lexington is without merit (*see* ***Liss v Trans Auto Sys., Inc.***, *supra*; ***Malmon v East 84th Apt. Corp.***, *supra*; ***Lutheran Med. Ctr. v Hereford Ins. Co.***, *supra*). However, a review of the record reveals that Pinon, in his complaint, does not allege that he was an employee of PMC at the time of his accident, and his deposition testimony comports with his testimony before the Workers' Compensation Board.

It is well settled that an insurer's duty to defend is broader than its duty to indemnify, such that an insurer may be obligated to defend its insured even if, at the conclusion of an underlying action, it is found to have no obligation to indemnify its insured (*see* ***Automobile Ins. Co. of Hartford v Cook***, 7 NY3d 131, 818 NYS2d 176 [2006]; ***Global Constr. Co. v Essex Ins. Co.***, 52 AD3d 655, 860 NYS2d 614 [2d Dept 2008]; ***City of New York v Evanston Ins. Co.***, 39 AD3d 153, 830 NYS2d 299 [2d Dept 2007]). An insurer's duty to defend arises whenever, as is the case here, "the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (***Worth Constr. Co. v Admiral Ins. Co.***, 10 NY3d 411, 415, 859 NYS2d 101 [2008], quoting ***Frontier Insulation Contrs. v Merchants Mut. Ins. Co.***, 91 NY2d 169, 667 NYS2d 982 [1997]). Further, "an insured should not be denied an initial recourse to a

carrier merely because another carrier may also be responsible" (***Continental Cas. Co. v Rapid-American Corp.***, 80 NY2d 640, 655, 593 NYS2d 966 [1993]).

Here, the four corners of the complaint in the Pinon action potentially give rise to a covered claim against Lynn. A jury could reasonably find that Pinon was not an employee of PMC at the time of his accident, and that his injuries were due to a failure by 99 Lynn or 105 Lynn to keep their premises in a reasonably safe condition, or due to negligence in the ownership, control, or maintenance of their property, or that Lynn was negligent in some other manner not excluded by the Lexington policies. Although Lexington contends that it owes no duty to 105 Lynn because the plaintiffs allege that the accident occurred at 99 Lynn, a review of the entire record reveals that Pinon has not clearly identified the place of his accident, that the plaintiffs' bills of particular note 99-105 Lynn Avenue, Hampton Bays, New York as the site of his accident, and that discovery has not yet been completed in this action. Accordingly, that branch of the motion which seeks a declaration that Lexington is obligated to defend 99 Lynn and 105 Lynn is granted.

The second branch of Lynn's motion seeks a declaration that Lexington is obligated to indemnify them for any settlement or judgment in the Pinon action. Here, Lynn has failed to establish their entitlement to summary judgment. In effect, Lynn seeks to ignore the ambiguity in the subject endorsement within the Lexington policies. There is a question of fact whether Pinon's injuries occurred within the scope of his employment so as to clearly identify him as an employee of PMC. Thus, regarding Lynn's request for a declaration that Lexington must indemnify them and under these circumstances, it cannot be determined whether they are entitled to indemnification until a determination as to Pinon's status is made herein because the subject endorsement in the policy specifically provides that coverage is not available "to any independent contractor or to any employee of such contractor." Accordingly, the second branch of Lynn's motion for summary judgment is denied.

The third branch of Lynn's motion seeks a declaration that Lexington is obligated to reimburse them for all attorney's fees incurred to date in defending the Pinon action. In light of the Court's decision that 99 Lynn and 105 Lynn are and were entitled to be defended by Lexington, they are entitled to reimbursement of the amounts expended by them in defending the Pinon action.

Accordingly, Lynn's motion for summary judgment is granted to the extent that 99 Lynn and 105 Lynn are entitled to summary judgment and a declaration that Lexington is obligated to defend them, and scheduling a hearing, as set forth below, to determine the amount of any reimbursement owed to them.

The Court will next address the three motions for summary judgment (# 015, # 017, and # 019) which seek to dismiss the plaintiffs' complaint, as this will help determine many of the issues in the remaining motions. Vickers moves (# 015) for an order granting summary judgment dismissing the complaint on the grounds that Pinon's injuries did not arise from his employment, that it did not owe a duty to Pinon, and that his dive into shallow water was the sole proximate cause of his injuries. In support of its motion, Vickers submits the deposition transcript of Pinon's testimony taken on October 15, 2010.

At his deposition, Pinon testified that he was employed by PMC as a laborer, and that he worked at the Lynn Avenue site for approximately two years before his accident. He indicated that, during that time period, he was free to do whatever he wished during his lunch breaks, and that he and his coworkers had engaged in activities such as playing soccer on the site. On the day of his accident, he and two of his

coworkers, Luis and Juan, ate their lunch quickly, and he decided to take a swim in the bay to cool off. He had never seen anyone swimming in the bay. However, Juan had told him that he had gone swimming in the bay the previous summer. Pinon stated that he did not think it would be "trouble" if he went swimming because of the activities the workers had engaged in on their lunch breaks before that day. He walked to the edge of the level ground of the property, through an open area in a line which included a low lying fence and hay bales, and proceeded down a hill to the beach area by the bay. He reached a "wall" or bulkhead, and dove head first into the waters of the bay, with his hands at his side. Pinon further testified that he did not attempt to learn the depth of the water, that he assumed the water was deep because he could not see the sandy bottom, and that he had never seen anyone dive into the bay before. He stated that there were no signs posted in the area, that the water was six feet below the top of the bulkhead that day, and that he was familiar with the concept of ocean tides. He acknowledged that he had testified truthfully and accurately at a workers' compensation hearing, and that the Board had determined that he was not injured in the course of his employment.

Here, Vickers has established that Pinon was the sole proximate cause of his injuries. It has been held that summary judgment is appropriate, "notwithstanding that a defendant's negligence might have been a causative factor in the accident where the reckless conduct of the plaintiff constituted an unforeseeable superseding event, sufficient to break the causal chain and thus [absolving] the defendant of liability" (***Kriz v Schum***, 75 NY2d 25, 550 NYS2d 584 [1989]; *see also* ***Boltax v Joy Day Camp***, 67 NY2d 617, 499 NYS2d 660 [1986]; ***Derdiarian v Felix Contr. Corp.***, 51 NY2d, 434 NYS2d 166 [1980]). A headfirst dive into water without first determining its depth is clearly reckless conduct in circumstances, such as those present here, where the claimant was aware that natural water levels fluctuate (*see* ***Olsen v Town of Richfield***, 81 NY2d 1024, 599 NYS2d 912 [1993]; ***Lionarons v. General Elec. Co.***, 215 AD2d 851, 626 NYS2d 321 [3d Dept 1995] *affd* 86 NY2d 832, 634 NYS2d 436 [1995]; ***Butler v Marshall***, 243 AD2d 971, 663 NYS2d 381 [3d Dept 1997]; ***Mortis v Dittl***, 275 AD2d 940, 715 NYS2d 182 [4th Dept 2000]; *cf.* ***Walter v Niagara Mohawk Power Corp.***, 193 AD2d 1065, 598 NYS2d 416 [4th Dept 1993]). Pinon's testimony at his examination before trial in which he states he did not know the depth of the water in the bay, that he did not attempt to learn of its depth, and that he dove headfirst with his hands at his side indicates sufficient support for the granting of Vicker's motion.

The plaintiffs have failed to raise a question of fact in opposition to Vicker's motion, or to negate the contention that Pinon was the sole proximate cause of his injuries. In opposition to the motion, the plaintiff's adopt Pinon's testimony, and they submit the affirmation of their attorney and the affidavit of an expert witness.[4] In his affirmation, counsel for the plaintiffs contends that the multiple motions for summary judgment made herein are premature as discovery has not been completed. He asserts that the plaintiffs' expert has established the need to proceed with discovery to learn of the actions taken by the defendants to make the work site safe, which defendant would have had the responsibility to post signs or warnings at the beach, and which defendant was responsible for the reconstruction of the beach and bulkhead. Although the plaintiffs' expert does raise some of these issues, a review of the expert's affidavit reveals that he does not address the defendants' contentions that Pinon was the sole proximate cause of his injuries. In addition, an expert "may not reach a conclusion by assuming material facts not supported by

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[4] The Court notes that the plaintiffs have submitted one set of opposition papers to this motion which they indicate is intended to serve as opposition to the three motions for summary judgment which seek to dismiss their complaint. As such, the Court has considered said opposition in regard to each of the subject motions.

the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York*** *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]). The plaintiffs' expert cites codes which are not relevant to this matter, and he cites his opinion on construction practices in a conclusory manner. Such construction practices, even if having some relevance, do not address the issue of Pinon's actions in diving into the bay. The plaintiffs' expert also opines that signs should have been posted in the area warning against swimming or diving. However, the expert failed to cite any regulation or standard in support of this contention. Thus, the affidavit lacks probative value and is insufficient to raise an issue of fact (*see* ***David v County of Suffolk***, 1 NY3d 525, 775 NYS2d 229 [2003]; ***Ioffe v Hampshire House Apt. Corp.***, 21 AD3d 930, 800 NYS2d 757 [2d Dept 2005]; ***Rochford v City of Yonkers***, 12 AD3d 433, 786 NYS2d 535 [2d Dept 2004]).

Accordingly, Vicker's motion for summary judgment is granted and the complaint and all cross claims against it are dismissed.

PMC moves (# 017) for an order granting summary judgment dismissing the complaint on the grounds that Pinon's injuries did not arise from his employment, that it did not owe a duty to Pinon, and that his dive into shallow water was the sole proximate cause of his injuries. The arguments and contentions made by PMC mirror or expand upon those set forth in the Vicker's motion. In addition, as set forth above, the plaintiffs' opposition is contained in one submission which they indicate is addressed to the three subject motions. Therefore, the issues herein, as well as the plaintiff's opposition papers, are identical to those involved in determining the Vickers motion. For the reasons set forth above, the Court finds that Pinon was the sole proximate cause of his injuries.

Accordingly, PMC's motion for summary judgment is granted and the complaint and all cross claims against it are dismissed.

Cardo moves (# 019) for an order granting summary judgment dismissing the complaint on the grounds that Pinon's injuries did not arise from his employment, that it did not owe a duty to Pinon, and that his dive into shallow water was the sole proximate cause of his injuries. For the reasons set forth above, the Court finds that Pinon was the sole proximate cause of his injuries.

Accordingly, Cardo's motion for summary judgment is granted and the complaint and all cross claims against it are dismissed.

Lexington moves (# 013) for an order pursuant to CPLR 3212 granting summary judgment and a declaration that the third-party defendant/second third-party defendant Merchants is obligated to defend and indemnify 99 Lynn and 105 Lynn on a primary basis in the plaintiffs' underlying action for personal injuries. It is undisputed that Merchants issued a commercial general liability policy to PMC, Pinon's employer, bearing policy number GLP9107330, effective July 14, 2004 to July 14, 2005 (Merchants policy).

Lexington, in support of its motion submits the Merchants policy which provides, in an added endorsement Form MU-7647 (06/01):

MERCHANTS GENERAL LIABILITY COMPLETE ENDORSEMENT

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE FORM

8. ADDITIONAL INSUREDS - BY CONTRACT, AGREEMENT OR PERMIT

SECTION II - WHO IS AN INSURED is amended to included as an insured:

5. a. Any person or organization you are required by a written contract, agreement or permit to name as an insured is an insured but only with respect to liability arising out of:

1. "Your work" performed for that insured at the location designated in the contract, agreement or permit; or

* * *

b. This insurance does not apply unless the contract, agreement or permit is made prior to the "bodily injury" or "property damage".

* * *

d. This insurance is primary if that is required by the contract, agreement or permit.

In addition, Lexington submits the contracts between Lynn and Vickers which required Vickers to obtain such insurance as would protect Lynn and Vickers from claims which might arise out of Vicker's operations under the contracts, whether by itself or a subcontractor, and the contract between Vickers and PMC for the period January 1, 2005 to December 31, 2005. The latter contract required PMC to obtain insurance "naming [the Owner, and Vickers] as an Additional Insured on a primary basis." Lexington also submits Accord Form Certificates of Liability Insurance issued on behalf of PMC by its insurance broker dated March 22, 2005. The certificates indicate that PMC held a commercial general liability coverage policy issued by Merchants naming 99 Lynn and Vickers as additional insureds. Merchants' contention that Lexington has failed to establish that the alleged contract between Vickers and PMC were actually signed by PMC or that the contract relates to the subject work projects is without merit. A review of the entire record reveals that Pinon testified that his boss at PMC was Paul Schneider, that the contract was signed by Paul M. Schnieder, and that Mr. Schneider's middle name was Michael, as in Paul Michael Contracting Corp. In addition, the proposal made by PMC to Vickers for the masonry work at the two subject properties contains the signature of Paul M. Schneider. The Court finds that Lynn are additional insureds under the Merchants policy, as they are organizations which PMC was required to name as an additional insured under the subject endorsement.

Lexington contends that it is also clear that Lynn are additional insureds under the Merchants policy because Pinon's injuries arose out of, or in connection with, PMC's work at the construction site. Here, the subject additional insured endorsement states that Lynn and Vickers are additional insureds "only with

respect to liability arising out of [PMC's] work for that insured." The phrase "arising out of" has been interpreted to "mean originating from, incident to, or having connection with" (***Maroney v New York Cent. Mut. Fire Ins. Co.***, 5 NY3d 467, 472, 805 NYS2d 533 [2005], quoting ***Aetna Cas. & Sur. Co. v Liberty Mut. Ins. Co.***, 91 AD2d 317, 320-321, 459 NYS2d 158 [1983]), and requires "only that there be some causal relationship between the injury and the risk for which coverage is provided" (***Maroney***, *supra* at 472). Lexington argues that Pinon's accident arose incident to, and in connection with, his work for PMC because, among other things, Pinon was driven to the work site by his employer and unable to leave during the work day, and that Pinon became "overheated" as a result of his job duties. Merchants argues that the accident did not arise out of PMC's operations in that Pinon was on his lunch break and he was not injured while acting within the scope of his employment. The Court is unpersuaded that Pinon's accident did not "arise out of" PMC's operations (***Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA***, 15 NY3d 34, 904 NYS2d 338 [2010]; *cf.*, ***Worth Const. Co. v Admiral Ins. Co.***, 10 NY3d 411, 859 NYS2d 101 [2008]). This is especially true where the Court has held that Pinon's actions constituted a superseding cause of his injuries, and a determination as to potential other causative factors has not been made.

As noted above, an insurer's duty to defend arises whenever the "four corners" of the underlying complaint potentially give rise to a covered claim (***Worth Constr. Co. v Admiral Ins. Co.***, *supra*). Here, the complaint in the Pinon action potentially gave rise to a covered claim against Lynn. Based on Pinon's complaint, a jury could reasonably find that Pinon was not an employee of PMC at the time of his accident, but that his injuries arose out of his employment. In addition, it has been held that an order dismissing an underlying action against a party does not render academic its claim against an insurer for litigation expenses incurred in defending the underlying action (***Judlau Contr., Inc. v Westchester Fire Ins. Co.***, 46 AD3d 482, 851 NYS2d 391 [1st Dept 2007]; *see also* ***Xingjian Const., Inc. v Atlantic Cas. Ins. Co.***, 31 Misc 3d 1210[A], 929 NYS2d 203 [Sup Ct, New York County 2011]). Here, the Court's determination dismissing the complaint against Vickers, Merchants' insured, does not foreclose Lynn's right to reimbursement for litigation expenses paid by them in defending the Pinon action. Accordingly, that branch of the motion which seeks a declaration that Merchant is obligated to defend 99 Lynn and 105 Lynn is granted.

However, the question remains whether said duty to defend is on a primary basis. As a general rule, "unless it would distort the plain meaning of the policies, where there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel each other out and each insurer contributes in proportion to its limit amount of insurance" (***State Farm Fire & Cas. Co. v LiMauro***, 65 NY2d 369, 374, 492 NYS2d 534 [1985]; ***Lumbermens Mut. Cas. Co. v Allstate Ins. Co.***, 51 NY2d 651, 435 NYS2d 953 [1980]; ***American Tr. Ins. Co. v Continental Cas. Ins. Co.***, 215 AD2d 342, 625 NYS2d 653 [2d Dept 1995]). However, "other insurance" clauses apply only when two or more policies provide coverage during the same period and serve to prevent multiple recoveries from such policies (***Consolidated Edison Co. of N.Y. v Allstate Ins. Co.***, 98 NY2d 208, 746 NYS2d 622 [2002]). Here, the Merchant policy and the Lexington policies do not cover the same risk. The Merchants policy is intended to provide coverage to Lynn for claims arising out of PMC's work. The Lexington policies are intended to provide coverage to Lynn for claims arising from their negligence or fault as owners of the properties. Under the circumstances, Lexington has failed to establish its entitlement to summary judgment and a declaration that Merchants has a duty to defend Lynn on a primary basis.

In light of the Court's determination that Merchants has a duty to defend them, Lynn are entitled to

reimbursement of the amounts expended by them in defending the Pinon action. Although there is no application for such reimbursement within Lexington's motion, the Court finds that complete relief cannot be granted in these actions without including Merchants' obligations to Lynn, and a hearing to determine the amount of said reimbursement is warranted. Moreover, since the relief granted is an essential component of the relief demanded, Merchants may not be said to have been prejudiced by Lexington's failure to demand the relief specifically (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:5).

The second branch of Lexington's motion seeks a declaration that Merchant is obligated to indemnify Lynn for any settlement or judgment in the Pinon action. For the reasons set forth above, the dismissal of the plaintiffs' complaint against Vickers and PMC means that Merchant can have no obligation to indemnify its insured or any additional insured under the Merchant policy.

Accordingly, Lexington's motion for summary judgment is granted to the extent that it is entitled to a declaration that Merchant is obligated to defend 99 Lynn and 105 Lynn in the Pinon action, and scheduling a hearing, as set forth below, to determine the amount of any reimbursement owed to Lynn.

Vickers moves (# 014) for an order pursuant to CPLR 3212 granting summary judgment and a declaration that the third-party defendant Merchants is obligated to defend it on a primary basis in the Pinon action, and that Merchants is obligated to reimburse it for all attorney's fees incurred to date in defending the Pinon action. As noted above, Merchants issued a commercial general liability policy to PMC, Pinon's employer, which was effective at the time of Pinon's accident (Merchants policy).

In support of its motion, Vickers submits its contracts with PMC which required PMC to obtain insurance "naming [the Owner, and Vickers] as an Additional Insured on a primary basis." Merchants' contention that Vickers has failed to establish that the alleged contract between the parties was actually signed by PMC or that the contract relates to the subject work projects is without merit. As discussed above, a review of the entire record reveals that Pinon testified that his boss at PMC was Paul Schneider. that the contract was signed by Paul M. Schnieder, and that Mr. Schneider's middle name was Michael, as in Paul Michael Contracting Corp. In addition, the proposal made by PMC to Vickers for the masonry work at the two subject properties contains the signature of Paul M. Schneider. Thus, Vickers is an organization which PMC was required to name as an additional insured under the additional insured endorsement discussed above.

In addition, Vickers contends that Merchant must provide it with coverage because Pinon's injuries arose out of, or in connection with, PMC's work at the construction site. Here, the subject additional insured endorsement states that Lynn and Vickers are additional insureds "only with respect to liability arising out of [PMC's] work for that insured." For the reason set forth above, the Court is unpersuaded that Pinon's accident did not "arise out of" PMC's operations (***Regal Const. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA***, *supra*; *cf.*, ***Worth Const. Co. v Admiral Ins. Co.***, *supra*).

Vickers has established its entitlement to summary judgment and a declaration that it is an additional insured under the Merchants policy, and Merchants has failed to raise on issue of fact requiring a trial of the issue. As Merchants' duty to defend is broader than its duty to indemnify, it is obligated to defend Vickers even if, at the conclusion of the Pinon action, it is found to have no obligation to indemnify Vickers (*see* ***Automobile Ins. Co. of Hartford v Cook***, *supra*). However, for the reasons set forth above,

Vickers has failed to establish its entitlement to summary judgment and a declaration that Merchants has a duty to defend it on a primary basis.

To the extent that Vickers' motion seeks a declaration that Merchant is obligated to indemnify it for any settlement or judgment in the Pinon action, the motion is denied as academic. The dismissal of the plaintiffs' complaint against Vickers and PMC means that no settlement by, or judgment against, Vickers will result. In any event, Vickers failed to establish whether Pinon's injuries arose out of PMC's work so as trigger indemnity coverage under the Merchants' policy.

Accordingly, Vickers' motion for summary judgment is granted to the extent that it is entitled to a declaration that Merchant is obligated to defend it in the Pinon action and scheduling a hearing, as set forth below, to determine the amount of any reimbursement owed to it.

Merchants moves (# 016) for summary judgment and a declaration that it is not obligated to defend or indemnify 99 Lynn or 105 Lynn in the underlying action, that it is not obligated to defend or indemnify Vickers in the underlying action, and that it is not obligated to reimburse 99 Lynn, 105 Lynn or Vickers for the costs incurred to date in defending the underlying action. In so moving, Merchants makes many of the same arguments set forth in its opposition to Lexington's motion (# 013), decided above. To the extent that the instant motion asserts that 99 Lynn, 105 Lynn and Vickers are not additional insureds under the Merchants policy because PMC did not agree to so name them in a written contract, and because the policy provides coverage only with respect to "liability arising out of 'your work' performed for that insured," the Court's determination above resolves the matter. In addition, for the reasons set forth above, Merchants' contention that it is not obligated to reimburse Lynn or Vickers is without merit.

Merchants makes two additional arguments in support of its contention that it is not obligated to defend or indemnify Vickers. The first is that Vickers failed to establish that it notified Merchants of Pinon's injuries in 2005, the second that Vickers failed to include a copy of its insurance policy with Essex in its motion papers. Initially, the Court notes that an additional insured has an independent duty to notify an insurer of a covered occurrence (***City of New York v St. Paul Fire and Mar. Ins. Co.***, 21 AD3d 978, 801 NYS2d 362 [2d Dept 2005]). However, the record reveals that Merchants was notified of the occurrence, and Vickers involvement, at some point well before August 10, 2005, when it issued a disclaimer letter to a number of the defendants herein, including Vickers. Merchants cannot establish its entitlement to summary judgment on this issue by pointing to gaps in its adversary's proof (***GJF Constr. Corp. v Cosmopolitan Decorating Co.***, 35 AD3d 535, 828 NYS2d 409 [2006]; ***Adler v Suffolk County Water Auth.***, 306 AD2d 229, 760 NYS2d 523 [2003]). In addition, the Court notes, as set forth in footnote 3 herein above, that it has ruled on the relevance of Vickers' insurance policy with Essex in this matter, and that the failure of Vickers to include said policy does not have an impact on the Court's decision herein. Accordingly, that branch of Merchants' motion which seeks a declaration that it is not obligated to defend and reimburse 99 Lynn, 105 Lynn, and Vickers is denied.

That branch of Merchants' motion which seeks a declaration that it is not obligated to indemnify 99 Lynn, 105, Lynn or Vickers is granted. For the reasons set forth above, the dismissal of the plaintiffs' complaint against Vickers and PMC means that Merchant can have no obligation to indemnify its insured or any additional insured under the Merchant policy.

Lexington moves (# 018) for an order severing the second third-party action from the main action.

It argues correctly that it is well settled that an insurance coverage action, such as the second third-party action herein, should not be tried together with a personal injury action against its insureds. However, considering the Court's determinations of the motions herein, and under these circumstances, judicial economy and the convenience of the parties would be served by allowing the actions to proceed without a severance. In addition, at this time there is no prejudice to Lexington in allowing joint discovery, or future motion practice, to proceed in this action as it is presently constituted.

Accordingly, Lexington's motion to sever the second third-party action is denied with leave to renew, prior to the trial of the other actions, upon the completion of discovery and filing of the note of issue herein.

The claims against defendants George E. Vickers Jr. Enterprises, Inc., Paul Michael Contracting Corp., and Cardo Site Development Inc. dismissed herein are severed and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

The parties are directed to appear for a hearing at the Supreme Court Building, One Court Street, Part 9, Riverhead, New York at 9:30 a.m. on * , 2012, and to produce appropriate documentation to support the amount of costs and attorney's fees sought by the respective claimants as reimbursement from Lexington Insurance Company, and Merchants Mutual Insurance Company.

The parties are directed to settle judgment in accordance with this order. However, the Court directs that settlement of said judgment be held in abeyance pending the outcome of the hearing to determine the amount of reimbursement due from the insurers.

Dated: April 2, 2012

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

* Counsel shall contact the Court for the hearing date upon receipt of this decision

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