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

PRESENT: Hon. Shlomo S. Hagler *Justice* **PART:** 17

BLACK BULL CONTRACTING, LLC,

Plaintiff/Petitioner,

- against -

INDIAN HARBOR INSURANCE COMPANY,

Defendant/Respondent(s).

INDEX NO.: 150120 / 2013

MOTION SEQ. NO.: 001

DECISION and ORDER

Motion by defendant Indian Harbor Insurance Company for summary judgment pursuant to CPLR § 3212 dismissing the complaint. Cross-Motion by plaintiff Black Bull Contracting, LLC, for summary judgment and declaratory judgment.

	Papers Numbered
Defendant's Notice of Motion to Dismiss Complaint Pursuant to CPLR § 3211(a)(1) & (7)	1
Affirmation of Defendant's Counsel Michael L. Zigelman, Esq., in Support of Defendant's Motion, with Exhibits "A" through "D"	2
Affidavit of Michael Rosemark, Senior Claim Analyst for XL Insurance, in Support of Defendant's Motion with Exhibits "1" through "3"	3
Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss	4
Plaintiff's Notice of Cross-Motion for Summary Judgment and Declaratory Judgment	5
Affirmation of Plaintiff's Counsel James M. Haddad, Esq., in Support of Plaintiff's Cross-Motion and in Opposition to Defendant's Motion to Dismiss, with Exhibit "A"	6
Affidavit of Michael Villano, Broker for the Insurance Policy Between Plaintiff and Defendant, with Exhibits "A" through "M"	7
Plaintiff's Memorandum of Law in Opposition to Defendant's Motion and in Support of Plaintiff's Cross-Motion	8
Affirmation of Defendant's Counsel Michael L. Zigelman, Esq., in Further Support of Defendant's Motion and in Opposition to Plaintiff's Cross-Motion	9
Affidavit of Michael Rosemark in Further Support of Defendant's Motion and in Opposition to Plaintiff's Cross-Motion, with Exhibits "A" through "C"	10
Affidavit of Brenda Bouyer-Windley in Further Support of Defendant's Motion and in Opposition to Plaintiff's Cross-Motion, with Exhibits "A" through "F"	11
Defendant's Memorandum of Law in Further Support of Defendant's Motion and in Opposition to Plaintiff's Cross-Motion	12
Reply Affirmation of Plaintiff's Counsel James M. Haddad, Esq., in Further Support of Plaintiff's Cross-Motion with Exhibits "1" through "3"	13
Transcript of Oral Argument of July 1, 2013	14

Cross-Motion: ☐ No ☑ Yes **Number of Cross-Motions:** 1

Upon the foregoing papers, it is hereby ordered that Defendant Indian Harbor Insurance Company's Motion for summary judgment to dismiss the complaint is granted and Plaintiff Black Bull Contracting, LLC's Cross-Motion for summary judgments and declaratory judgment is denied as set forth in the attached separate written Decision and Order.

Dated: December 31, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:	☑ **Final Disposition**		☐ **Non-Final Disposition**	
Motion is:	☑ Granted	☐ Denied	☐ Granted in Part	☐ Other
Cross -Motion is:	☐ Granted	☑ Denied	☐ Granted in Part	☐ Other
Check if Appropriate:	☐ SETTLE ORDER		☐ SUBMIT ORDER	

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

----------X

BLACK BULL CONTRACTING, LLC,

Plaintiff,

-against-

INDIAN HARBOR INSURANCE COMPANY,

Defendant.

----------X

Index No.: 150120/13

Motion Sequence No.: 001

DECISION & ORDER

Shlomo S. Hagler, J.:

In this insurance coverage dispute, defendant Indian Harbor Insurance Company ("defendant" or "Indian Harbor") moves, pursuant to CPLR § 3211(a)(1) and (7), to dismiss the complaint. Plaintiff Black Bull Contracting, LLC ("plaintiff" or "Black Bull") cross-moves for summary judgment on the complaint, for a declaration, in part, that Indian Harbor is obligated to provide a defense and to indemnify Black Bull, which is a third-party defendant in an underlying personal injury action in Supreme Court, Kings County, by a Black Bull employee, Luis Mora ("Mora") against non-parties United Air Conditioning Corp. II ("United Air") and United Sheet Metal Corp. ("United Sheet Metal"). (*Mora v United Airconditioning Corp. II*, Index No. 25564/11 ["*Mora* action"], attached as Exhibit "C" to the Defendant's Notice of Motion.) United Air and United Sheet Metal Corp. impleaded Black Bull into the *Mora* action. (*Mora* Third-Party Complaint, attached as Exhibit "B" to Affirmation of Defendant's Counsel Michael L. Zigelman, Esq., in Support of Defendant's Motion ["Zigelman Aff."].)

BACKGROUND

The pleadings in the *Mora* action indicate that Black Bull was hired by United Air to perform work at the premises 27-02 Skillman Avenue, Long Island City, New York ("the premises").

United Air is the owner of the premises, and United Sheet Metal is the managing agent. On August 26, 2011, Mora was demolishing a chimney on the premises with a jackhammer, when a piece of concrete from the chimney broke off and fell, striking him, and allegedly causing him to sustain injuries. Mora commenced his action against United Air and United Sheet Metal on November 11, 2011 and they commenced the third-party action against Black Bull on June 13, 2012.

United Air and United Sheet Metal are claimed to be additional insureds on a commercial general liability insurance policy ("the Policy") Indian Harbor issued to Black Bull as the primary insured for the period in question. (Exhibit "1" to the Affidavit of Mark Rosenmark in Support of Defendant's Motion ["Rosenmark Aff.].) On May 29, 2012, Black Bull claims to have received tender from United Air and United Sheet Metal, to be defended and indemnified under the Policy for the *Mora* action. Black Bull sent Indian Harbor a notice of claim on June 5, 2012. Indian Harbor disclaimed coverage for United Air and United Sheet Metal on July 30, 2012, on the ground of untimely notice and disclaimed against Black Bull on August 23, 2012 ("August 23rd Disclaimer"). (Exhibit "D" to Rosenmark Aff.)

In the August 23rd Disclaimer, Indian Harbor explained that coverage would not be afforded to Black Bull because the Policy contained a Classification Limitation Endorsement ("Endorsement #003"), which indicated that the Policy applied "only to operations that are classified or shown on the Declarations or specifically added by endorsement to this Policy." This disclaimer letter did not further explain how Endorsement #003 served to bar coverage to Black Bull.[1]

---

1. Disclaimer was also made under another endorsement, Endorsement #011, which is not discussed in this motion.

In a further disclaimer letter to Black Bull, dated August 29, 2012 ("August 29th Disclaimer"), Indian Harbor again invoked Endorsement #003, adding that the Policy only covered the following limiting classifications: (1)"Carpentry-Interior"; (2) "Dry Wall or Wallboard Installation"; (3) "Contractors-subcontracted work - in connection with construction, reconstruction, repair or erection of buildings - Not otherwise Classified"; and (4) "Contractors-subcontracted work - in connection with construction, reconstruction, repair or erection of buildings - Not otherwise Classified - uninsured/underinsured." (Exhibit E to Affirmation of Plaintiff's Counsel James M. Haddad, Esq., in Support of Plaintiff's Cross-Motion and in Opposition to Defendant's Motion to Dismiss ["Haddad Aff."].) The August 29th Disclaimer also stated that the type of work Mora was doing, which it characterized as 'demolition,' "is not classified and accordingly no coverage would be afforded . . . ." (*Id.* at 3.)

On these motions, Indian Harbor claims that it properly and timely denied coverage to Black Bull based on the fact that the accident did not fall within the coverage of the Policy, as it was not incurred while Black Bull was engaged in any of the four classifications covering the Policy's Endorsements. Black Bull retorts that Indian Harbor's disclaimer was untimely, and therefore, it has waived its disclaimer based on Endorsement #003. The issues on these motions are whether the Black Bull disclaimers were untimely, whether disclaimer under Endorsement #003 can or cannot be waived, and, if the disclaimers were not waived, whether Mora was engaged in any covered activity when he was injured, so as to fall within the parameters of the Policy.

DISCUSSION

Regarding the timeliness of an insurer's disclaimer, Insurance Law § 3420(d)(2) states, in pertinent part:

> "[i]f under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant."

If an insurer fails to give timely notice of disclaimer to its insured, it waives its reliance on exclusions forming the basis of the disclaimer. (*Pav-Lak Industries, Inc. v Arch Insurance Company*, 56 AD3d 287 [1st Dept 2008].) The insurer must also justify any delay in giving notice of disclaimer (*First Financial Insurance Co. v Jetco Contracting Corp.*, 1 NY3d 64 [2003]), and will be afforded the benefit of a reasonable period of time in which to investigate the claim before disclaiming, unless the nature of the disclaimer is "readily apparent" from the face of the notice of claim. (*Id.* at 69; *Pav-Lak Industries,* 56 AD3d at 287-288.)

Black Bull maintains that Indian Harbor must have known the basis for its denial – failure to fall within a listed classification – from a mere reading of the face of the notice of claim, since it now brings this motion based only on that notice of claim and the Policy. However, Black Bull's argument in this regard is inopposite. While Black Bull, on this motion, claims that Indian Harbor's "protestations" that it could not tell whether Mora's work fell within the classification without investigation "simply do not hold up to the simplest scrutiny" (Haddad Aff. at 3), Black Bull also claims that it is so unclear as to be a factual issue as to whether demolition of a chimney with a jackhammer might fall under the definition of carpentry. If that is so, the nature of the disclaimer

was not readily apparent from the face of the notice of claim, and Indian Harbor was within its rights to delay disclaimer until it had time to investigate.

Regardless, even if Indian Harbor was entitled to some reasonable time to investigate what type of work Mora was engaged in at the time of his accident, the 55 day delay was still too long a time before issuing the disclaimer. Indian Harbor could have ascertained the work Mora was engaged in and compared it with the policy language well before 55 days. Therefore, Indian Harbor's delay was unreasonable and the disclaimer is untimely as a matter of law.

The issue then becomes whether the ground for disclaimer, that the work Mora was engaged in did not fit within any classification listed in the policy, can be waived. Under the seminal case of *Zappone v Home Insurance Company* (55 NY2d 131 [1982]) ("*Zappone*"), the New York State Court of Appeals distinguished between a disclaimer based language in an insurance policy excluding certain things from coverage, which can be waived, and language indicating that the policy did not include coverage in the first instance, which defense could not be waived, and, therefore, required no disclaimer at all. The Court of Appeals in *Zappone* reasoned that an insurer should not have to provide coverage for something "which had never been contracted for and for which no premium had ever been paid" (*id.* at 137), and that doing so would be to "rewrite the policy to expose [the insurer] to a risk . . . never contemplated by the parties and for which [the insurer] had never been compensated . . ." (*Id.* at 138.)

Black Bull argues that the language in the Policy is meant to be an exclusion, since it changes the overall coverage which allegedly starts out in the Policy as complete coverage for all defined losses, in all areas the insured contractor may be involved. Black Bull relies on various treatises and outside sources, such as the "scholarly paper" (Affidavit of Michael Villano in Support of Plaintiff's

Cross-Motion and in Opposition to Defendant's Motion ["Villano Aff."], at 5) written by the International Risk Management Institute, Inc. ("IRMA"). Black Bull posits that this scholarly paper provides for the proposition that an "unendorsed policy, without special terms like the Classification Limitation Endorsement attached, is supposed to cover 'any bodily injury . . . that is not excluded' " (Villano Aff., at 6), so that "the Classification Limitation Endorsement adds to the policy a significant restriction that otherwise would not exist," i.e., an exclusion. (*Id.*)

Black Bull also mounts a technical argument that the use of the word "to" in an insurance policy's provisions always means, whether in the insurance industry, or in an insurance policy, that there is an exclusion, but that the use of the word "if" indicates that there is a limitation to coverage which is not an exclusion. (Reply Affirmation of James M. Hadad, Esq., in Further Support of Plaintiff's Cross-Motion ["Hadad Reply Aff."], at 10-14.) According to Black Bull, since the Endorsement #003 says "[t]his insurance applies only **to** operations that are classified . . . [emphasis added]," the endorsement is meant to be an exclusion. Black Bull admits that this distinction between words is "subtle." (Reply Aff. of James M. Hadad, at 13.) Black Bull further compares the Policy with other types of liability policies for the proposition that a classification limitation is always an exclusion.

There is no clear answer in New York State case law as to whether a classification limitation endorsement in a general liability policy covering a construction project indicates a lack of inclusion in coverage, or an exclusion, and certainly no case law addressing this question in the *Zappone* context, concerning whether such a defense raised in a denial of claim can be waived for the purposes of a notice of disclaimer. However, the matter has been addressed most closely by the United States District Court for the Eastern District of New York in the case of *Max Specialty*

Insurance Company v WSG Investors, LLC (2012 WL 3150577, 2012 US Dist LEXIS 108564 [EDNY 2012]) ("*Max Specialty*"). In *Max Specialty*, the court addressed the *Zappone* issue in the context of a suit arising out of an injury to an employee of defendant WSG Investors, LLC ("WSG") while the employee was involved in exterior construction work. WSG was denied coverage on the basis of a classification limitation endorsement in the policy issued by Max Specialty. In the Max Specialty policy, there was a "Limitation to Designated Class Endorsement" which stated that the policy would "appl[y] only to" various losses "arising only out of only those operations designated, listed and described in the declarations page." (*Max Specialty*, 2012 WL 3150577, at *3, 2012 US Dist LEXIS 108564, at *8.) The declarations page listed two classes of coverage, "Carpentry-Interior," and "Dry Wall or Wallboard Installation." The Max Specialty policy contained other endorsements and exclusions.

The matter of the characterization of the Limitation to Designated Class Endorsement was turned over to a magistrate to hear and recommend to the court. The magistrate found that the Limitation to Designated Class Endorsement "merely describes the scope of the policy's coverage, and did not create an exclusion." (*Max Specialty*, 2012 WL 3150577 at *3, 2012 US Dist LEXIS 108564, *7.) As such, the magistrate found that "because Max Specialty denied coverage 'by reason [of] lack of inclusion,' not based on an exclusion, it was not required to disclaim coverage under [New York Insurance Law] § 3420(d)(2)." (*Id.*)

The court confirmed the magistrate's recommendation. WSG's employee was not involved in either "Carpentry-Interior" or "Drywall or Wallboard Installation" and the *Max Specialty* court found "no ambiguity" in the policy language. (*Id.*) The judge held that "[t]he policy does not generally cover WSG's business operations; it is written to cover only those business operations in

the areas of interior carpentry and drywall and wallboard installation." (*Id.*, 2012 WL 3150577, at *3, 2012 US Dist LEXIS 108564, *8.) As a result, the court found that Max Specialty was entitled to a declaration that it did not have to defend or indemnify WSG and that the reliance of the insurer on the Limitation to Designated Class Endorsement was not waived by lateness.

In support of this holding, the court in *Max Specialty* referred to the case of *NGM Insurance Company v Blakely Pumping, Inc.* (593 F3d 150 [2d Cir 2010]) ("*NGM*"). In *NGM*, the Second Circuit dealt with an insurance policy and endorsement "that covered liability arising out of the use of a 'Hired Auto' or 'Non-Owned Auto'" (*id.* at 151), "terms defined so as not to include an auto owned by an . . . employee" of the defendant/insured. (*Id.*) In *NGM*, the accident involved an employee's vehicle and, as in *Max Specialty*, the issue was "whether these definitions constitute 'exclusions' of coverage" (*id.*) requiring the plaintiff insurance company to timely notify the defendant of disclaimer under Insurance Law § 3420(d)(2).

The *NGM* Court noted that "[d]etermining whether there is coverage by reason of exclusion as opposed to lack of inclusion can be 'problematic' [citation omitted]." (*Id.* at 153.) Regardless, the *NGM* Court found that the definitions of "Hired Auto" and "Non-Owned Auto" were not exclusions requiring notice of disclaimer.

The *NGM* Court reasoned that:

> "[t]he Endorsement did not generally cover auto accidents; it covered only accidents arising from the use of a 'Hired Auto' or 'Non-Owned Auto.' Those terms were defined in such a way that an employee's or officer's vehicle . . . could *never* be covered. This is not a case then where 'the happening of a subsequent event" implicated a definitional term that 'uncovered' a formerly covered car. Rather, it is a case in which 'the policy as written could not have covered the liability in question under any circumstances' (*Zappone*, 55 NY2d at 134)."

(*Id.* at 154.) The NGM Court referred to the policy language as "definitional." (*Id.*)

These cases are persuasive because they hold that an insurer can write a liability policy as to limit the type of work it will cover, using "definitional" classifications in an endorsement. This is especially applicable in the present case where, in the Declarations, it is indicated that the total premium charged will be based solely on the four classifications of work, each being deemed "included" in the premium. No other classifications of work are included. This seems to indicate that Black Bull only paid premiums based on the four classifications of work. As in *Zappone*, including a classification of work outside the four enumerated ones would impose on Indian Harbor "an added source of indemnification which had not been contracted for and for which no premium had ever been paid." (*Zappone*, NY2d at 137.)

The cases cited by Black Bull are not as persuasive as the *Max Specialty* and *NGM* cases. It is certainly true that it is not necessary for an insurance policy to use the word "exclusion" to create an exclusion. (*See Planet Insurance Co. v Bright Bay Classic Vehicles*, 75 NY2d 394 [1990].) In *Planet Insurance*, an endorsement to not cover rental cars leased for more than 12 months was deemed an exclusion when applied to give coverage to a vehicle leased for 24 months, where it was a fact that the owner of the car "paid an amount to cover liability insurance premiums," and the vehicle was "duly registered by the State of New York," which included a certificate filed with the Motor Vehicles Department indicating that the vehicle had proper insurance. (*Id.* at 398.) In *Planet Insurance*, the finding that the endorsement limiting coverage to vehicles leased for less than 12 months, as a definition of rental vehicles, was actually an exclusion, was based on the public policy that the driver of the rental vehicle should have "no reason to suspect that [he or she] were putting either the public or [him or herself] at risk by causing an uninsured automobile to be operated on the highway." (*Id.* at 401.) No such considerations apply here.

Black Bull refers to *Burlington Insurance Co. v Guma Construction Corp.* (66 AD3d 622 [2d Dept 2009]), claiming that case "invalidates the Classification Limitation Endorsement on the grounds of late disclaimer, and directed the insurer to defend and indemnify its insured accordingly" (Plaintiff Black Bull's Memorandum of Law, at 4), because the endorsement was allegedly considered by the Court to be an exclusion. However, *Burlington* does not stand for that proposition as it merely required the insurer to provide a defense to the insured, based on the possibility that the claim fell inside a classification limitation, where the insurer claimed that the insured had misrepresented the type of work in which it would be involved at a jobsite. This case is not dispositive of the present matter.

Likewise, *Wickramasekra v Associated International Insurance Company* (890 So2d 569 [La App 4 Cir 2003]) offers nothing to the present analysis, because the parties refer to a "Classification Limitation Exclusion" without any discussion of why the classification limitation is an exclusion. (*Id.* at 573.)

Finally, this court notes the language in *Essex Insurance Company v Foley* (2011 WL 1706214, 2011 US Dist LEXIS 133367 [SD Ala 2011]), which describes a classification limitation endorsement as a "narrowing clause," and must, therefore, be read as an exclusion, for purposes of deciding who has the burden of proving the applicability of the provision. (*Id.*, 2011 WL 1706214, at *4.) However, the reasoning in *Max Specialty* and *NGM* are more persuasive and relevant to the issues in this case. The remainder of Black Bull's cases are not persuasive, and need not be discussed.

This court also rejects Black Bull's creative argument concerning the import of the use of the words "to" or "if." Endorsement #003 could have easily have said "this insurance only applies 'if'

the operations are as classified," and still indicate a lack of inclusion. In sum, Endorsement #003 created a lack of inclusion for any loss occasioned from work not listed in the declarations page. Thus, Mora's accident is not covered if it falls outside the four classifications.

Although Black Bull tries to create a question of fact that, perhaps, the job in which Mora was engaged could be considered "carpentry," there is no basis for such a supposition since knocking down a concrete chimney with a jackhammer is clearly not carpentry, which usually refers to working with wood.

Black Bull also suggests that Mora's work might fall under the classification "Contractors-subcontracted work - in connection with construction, reconstruction, repair or erection of buildings - Not otherwise Classified." Black Bull maintains that the classification is meant to apply to any work for which Black Bull was a subcontractor, rather than any work it might sub-contract out to other contractors; otherwise, Black Bull argues that the classification is at least ambiguous. This is an incorrect interpretation of the Policy. Black Bull's interpretation of the provision is specious, as it would essentially eviscerate the classification limitations in the Policy. Under such an interpretation, Black Bull apparently would always be in the position of being a subcontractor. In other words, this classification would apply to each and every job in which Black Bull was engaged, whatever the nature of the work, effectively vitiating the classification limitation language. In a footnote to its argument, Black Bull writes that "[i]t is Black Bull's position that this work was performed by it for United Air as a favor and that it was not intended to be bound by the terms of a formal contract. Still, the informal agreement was termed a 'subcontract.' " (Villano Aff., at 11.) This argument is sophistry. The classification "Contractors-subcontracted work - in connection with construction, reconstruction, repair or erection of buildings - Not otherwise Classified" does not apply to all the

work Black Bull performed on the site. As a result, Indian Harbor was within its rights to disclaim coverage to Black Bull in the *Mora* action.

As a result of the foregoing, the complaint must be dismissed. There is no request for this Court to make a declaration of rights, as Black Bull's motion for summary judgment was made prior to the service of an answer, and is not properly made under CPLR § 3212.

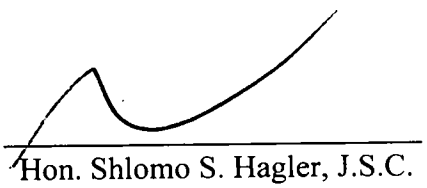
CONCLUSION

Accordingly, it is

ORDERED that the motion by defendant Indian Harbor Insurance Company to dismiss the complaint is granted; and it is further

ORDERED that the cross-motion by plaintiff Black Bull Contracting, LLC for summary judgment is denied.

ENTER:



Dated: December 31, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.