SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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WDF INC.

Plaintiff,

- v -

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

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INDEX NO. 651068/2016

MOTION DATE 11/20/2019

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 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, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, the motions are decided as follows:

In this insurance coverage action, plaintiff WDF Inc. (WDF) seeks to recover amounts it allegedly incurred in connection with a $4 million settlement it entered into with the New York County District Attorney's Office (the DANY) concerning WDF's allegedly wrongful use of minority and women-owned business entities (MWBE) on construction projects undertaken for the City of New York (the City) and the Port Authority of New York and New Jersey (the PA). The DANY claimed that WDF made "false filings" in which it claimed monetary credit of at least $7.4 million for utilizing fraudulent MWBEs on 19 specified projects, and sought the return of those funds from WDF.

Zurich moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. WDF cross-moves, pursuant to CPLR 3212, for an order (a) denying Zurich's motion for summary judgment, and granting its cross-motion for partial summary judgment; (b) ruling that WDF is

entitled to coverage under its Policy with Zurich for 100% of the defense costs it incurred in connection with the DANY investigation, in amounts to be determined at trial; (c) ruling that WDF is entitled to coverage for an allocated share of the $4 million settlement payment it made in accordance with the policy's "allocation" clause; and (d) entering judgment in favor of WDF and against Zurich in the amount of $2,137,200, representing WDF's allocated coverage entitlement for the $4 million settlement payment, pursuant to the allocation clause.

As set forth below, Zurich's motion for summary judgment is granted, and WDF's cross motion is denied.

BACKGROUND

The Zurich Policy

Zurich issued to Greenstar Services Corp. (Greenstar) a Private Company Directors, Officers and Employees Liability insurance policy bearing policy number DOC6549197-01 for the original policy period of July 22, 2010 to July 22, 2011 (the Policy [NYSCEF Doc No. 6]). At the time the Policy was issued, WDF was a subsidiary of Greenstar, and was thus an insured under the Policy (*id*. at 8).

The Policy was issued for the original policy period of July 22, 2010 to July 22, 2011 (*id*. at 5). However, on July 1, 2011, Greenstar, along with its subsidiary WDF, was acquired by Tutor Perini Corporation. Greenstar cancelled the Policy as of July 1, 2011, and the Policy went into "run-off" by issuance of Endorsement 23 to the Policy, a "Run-Off" Endorsement.

The "Run-Off" Endorsement provides a six-year period, running through July 2017, for the insureds to report claims, but provides that Zurich "shall not be liable for Loss on account of any Claim based upon, arising out of, or attributable to any Wrongful Acts where all or any part

of such acts were committed, attempted or allegedly committed or attempted subsequent to 07/01/2011" (*id*. at 58).

WDF's Business

WDF is a mechanical contractor that had for many years worked on numerous construction projects for the PA and the New York City Department of Environmental Protection (the DEP). Pursuant to applicable New York City law and regulations, companies performing construction work for the City and the PA are "required provide a good faith effort to retain and pay minority and women-owned business enterprises who are certified by the various agencies" (deposition of Becky Tung, WDF's general counsel, at 36-36 [NYSCEF Doc No. 64]). Each contract with the City and PA would then contain specific goals for participation by MWBEs on each project (*id*.). In connection with such projects, WDF was required to make good-faith efforts to achieve certain MWBE participation goals (Tung affirmation, ¶ 22 [NYSCEF Doc No. 116]).

In this regard, until 2012, WDF often engaged Ascon Industries, Inc. (Ascon), Arbee Contracting Corp. (Arbee), Greeneman/Darman Corporation (Darman) and Janus Industries (Janus) (collectively, the Suspect Entities) as suppliers for its projects (*id*., ¶ 25; affirmation of Daniel J. Horwitz, Esq., WDF's attorney during the DANY investigation [NYSCEF Doc No. 117]; *see also* Tung dep at 47).

WDF was required to submit periodic (either monthly or quarterly) reports to the contracting agency that specified, among other things, the amount of money WDF had paid to "certified" MWBEs during that period for work or supply provided in connection with the subject project (the MWBE Reports) (Tung affirmation, ¶ 3). WDF reported the payments it made to the Suspect Entities (as well as other MWBEs) in its MWBE Reports (*id*.).

The District Attorney's Investigation of WDF

In May 2013, the DANY and the PA Inspector General informed WDF of an investigation (the DANY Investigation) that they were conducting along with the Department of Investigation of the City of New York, concerning WDF's use of certain MWBEs on various City and PA projects (Tung affirmation ¶ 6; *see* memorandum to the State University Construction Fund on WDF, Inc., at MS 000155 [NYSCEF Doc No. 62]). The DANY and the PA were investigating WDF's use of the Suspect Entities as "pass-through" entities that did not actually perform the services, and served no commercially useful purpose (*see id*.).

On September 17, 2013, Eli Cherkasky of the DANY sent an email to WDF (NYSCEF Doc No. 67), concerning WDF's use of the Suspect Entities, in which he: (1) identified 19 specific PA and DEP projects that the DANY was investigating; and (2) estimated that WDF had improperly received approximately $7,000,000 in MWBE credits on the projects as a result of its alleged "M/WBE related false filings" concerning use of the Suspect Entities (the DANY Claim). The DANY demanded that WDF pay it $7,400,000 as a result of the "false filing" (*see id*.; *see also* Horwitz affirmation, ¶ 7; Tung affirmation, ¶ 9). In the email, the DANY asserted that the Suspect Entities were not bona fide MWBEs, and that thus, all MWBE credits claimed for such entities were improper. The DANY also identified several WDF employees that it wanted to interview as part of its investigation.

The DANY requested numerous documents concerning the 19 projects identified in the September 17, 2013 email, which WDF provided in March 2014 (*see* letter 3/31/14 letter from WDF's counsel to the DANY [NYSCEF Doc No. 68]).

WDF's Settlement with the DANY

On November 14, 2014, the DANY and WDF entered into a Memorandum of Agreement (the DANY Agreement [NYSCEF Doc No. 71]) to resolve the DANY's potential claims against

WDF concerning WDF's contracts with the City and the PA (Tung affirmation, ¶ 13; Horwitz affirmation, ¶ 11). The DANY Agreement identified the same 19 projects that had been identified in the September 17, 2013 email from the DANY to WDF (the DANY Agreement, ¶ 3).

Pursuant to the DANY Agreement, WDF agreed to pay the DANY $4,000,000.00 (*id.*, ¶ 4). The DANY Agreement also provided that the funds paid by WDF would be distributed in accordance with New York law to the City and the PA (*id.*, ¶¶ 5, 6).

The DANY's Distribution of the WDF Settlement Funds

The DANY deposited the $4,000,000 paid by WDF into a State Asset Forfeiture Account (affidavit of Ling Lo, the director of the DANY's Fiscal Unit [the DANY aff], ¶ 2 [NYSCEF Doc No. 103]). The DANY distributed $820,000.00 of those funds to the PA, and another $820,000.00 to the City of New York (*id.*, ¶¶ 3-9; *see* exhibits A-D [NYSCEF Doc Nos. 104-107]). In addition to the distributions to the City and the PA, the DANY distributed $1,280,000.00 to the Chemical Dependence Services of the New York State Office of Alcoholism and Substance Abuse Services (OASAS) (*id.*, ¶¶ 10-12; *see* exhibits E and F [NYSCEF Doc Nos. 108-109]). The DANY retained $1,080,000 of the amount paid by WDF pursuant to the DANY Agreement (*id.*, ¶¶ 3, 13).

The Coverage Dispute

By letter dated May 6, 2014 (NYSCEF Doc No. 69), Greenstar notified Zurich of the DANY matter, and provided Zurich with a copy of the DANY's September 17, 2013 email. By letter dated July 22, 2014 (NYSCEF Doc No. 70), Zurich reserved its rights in connection with the DANY Claim. In that letter, Zurich advised WDF that no coverage existed under the Policy for Loss in connection with any Claim "based upon, arising out of, or attributable to any Wrongful Acts where all or any part of such acts were committed, attempted or allegedly committed or attempted subsequent to 07/01/2011. To the extent that any of the alleged Wrongful Acts were

committed in whole or part after 07/01/2011, Zurich advises you that no coverage would be afforded under the Policy" (*id*. at Z 000315). By letters dated March 9, 2015 and May 22, 2015 (NYSCEF Doc Nos. 72 and 73), Zurich repeated its prior request that WDF provide it with documents relating to the dates of the alleged Wrongful Acts.

In the July 22, 2014 letter, and in an email dated June 3, 2014 (NYSCEF Doc No. 99), Zurich also reserved its rights as to whether any amounts paid by WDF to DANY to settle the matter would be covered under the Policy, and advised WDF that such amounts would be WDF's responsibility. By letter dated May 22, 2015 (NYSCEF Doc No. 73, at Z 000104) and email dated November 4, 2014 (NYSCEF Doc No. 110), Zurich agreed not to raise lack of consent to a settlement between WDF and DANY as a coverage defense, but reserved all of its other rights and defenses.

In the May 22, 2015 letter, Zurich also advised WDF that, based on the limited information provided to Zurich, it appeared that the Wrongful Acts giving rise to the DANY matter may have been committed in whole or in part subsequent to July 1, 2011 (*see* 5/22/ letter at Z 000104). Zurich thus again requested that WDF provide Zurich with all documents concerning the 19 projects identified in the DANY's September 17, 2013 email and the DANY Agreement, which WDF had never provided to Zurich despite Zurich's prior requests (*id*. at Z 000104-05).

On June 3, 2015, WDF first provided to Zurich more than 77,000 pages of documents relating to the 19 projects specified by the DANY. WDF had provided these documents to the DANY in 2014 as part of the investigation. These documents included the MWBE filings that the DANY alleged were "false filings," and demonstrated the dates on which each such filing was made (*see* affirmation of Andrew L. Margulis, Esq. [NYSCEF Doc No. 59], exhibits P-II [NYSCEF Doc Nos. 75-94]). Not all of the documents requested by Zurich were provided, and

by letter dated July 9, 2015 (NYSCEF Doc No. 101), Zurich again requested the missing documents from WDF. By email dated August 11, 2015, WDF refused to provide the missing documents to Zurich (NYSCEF Doc No. 102).

WDF then commenced this action seeking coverage under the Policy for its $4,000,000 settlement payment to the DANY pursuant to the DANY Agreement, as well as amounts allegedly incurred as "defense costs" in connection with the DANY Claim. The first cause of action of the complaint is for breach of contract, and the second cause of action is for declaratory judgment. The portion of the first cause of action alleging breach of the implied covenant of good faith and fair dealing was previously dismissed by the Court by order dated November 2, 2016 and entered November 7, 2016 (NYSCEF Doc No. 29).

DISCUSSION

"'[T]he 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 demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear

that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

The interpretation of an insurance policy presents a question of law suitable for resolution by way of summary judgment (*see e.g. Burlington Ins. Co. v NYC Transit Auth.*, 29 NY3d 313, 321 [2017]; *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 354 [1978]). When analyzing a dispute over insurance coverage, courts should look first to the language of the policy (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 221 [2002]). As with the construction of all contracts, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal citation omitted]; *see also Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]; *Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009] [observing that "the court may properly grant summary judgment" where unambiguous policy terms "present[] a question of law to be determined by the court"]).

Under New York law, "[t]he predominant consideration in the Court's analysis of these issues is the language of the particular insurance policy" (*Keyspan Gas E. Corp. v Munich Reins. Am., Inc.*, 143 AD3d 86, 90 [1st Dept 2016]). "A court interpreting an insurance policy must give its words their plain and ordinary meaning" (*Executive Risk Indem. Inc. v Starwood Hotels & Resorts Worldwide, Inc.*, 98 AD3d 878, 880 [1st Dept 2012]). "[P]arties cannot create ambiguity from whole cloth where none exists, because provisions 'are not ambiguous merely because the parties interpret them differently'" (*Universal Am. Corp. v National Union Fire Ins. Co. of*

Pittsburgh, Pa., 25 NY3d 675, 680 [2015] [citation omitted]; *see also Conlon v Allstate Veh. & Prop. Ins. Co.*, 152 AD3d 488, 490 [2d Dept 2017]).

"'[A]n insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms'" (*National Contl. Ins. Co. v Countrywide Ins.*, 112 AD3d 416, 417 [1st Dept 2013] [citation omitted]). New York law is clear that a policy should not be interpreted so as to render any language in the policy without meaning (*see Westview Assoc. v Guaranty Nat. Ins. Company*, 95 NY2d 334, 339 [2000] ["defendant's interpretation would render the umbrella policy's specific exclusions mere surplusage, a result to be avoided"]; *Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 632-33 [1997] ["in interpreting insurance policies, should strive to give 'meaning . . . to every sentence, clause, and word of a contract of insurance'"] [citation omitted]).

In the context of an insurance coverage dispute, "[g]enerally it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage" (*Consolidated Edison Co. of N.Y., Inc.*, 98 NY2d at 218; *see York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861, 862-863 [2d Dept 2010]).

As more fully set forth below, application of the above principles to the underlying complaint and the language of the Policy makes clear that the DANY matter is not covered by the Policy, because the acts giving rise to that matter took place in whole or in part after July 1, 2011. Accordingly, Endorsement 23 bars coverage, and WDF's cross-motion must be denied and Zurich's motion granted.

Greenstar was acquired by Tutor-Perini on July 1, 2011 and, on that same date, the Policy was cancelled and placed into "run-off." The Run-Off Endorsement to the Policy, Endorsement 23, extended the time within which claims could be reported by six years, until 2017, but only for

claims based on acts that took place solely and entirely before date the Policy was placed into run-off. No coverage exists for any Claim based in any part on acts taking place after July 1, 2011, as clearly stated in Endorsement 23:

> "The Underwriter shall not be liable for Loss on account of any Claim based upon, arising out of, or attributable to any Wrongful Acts where all or any part of such acts were committed, attempted or allegedly committed or attempted subsequent to 07/01/2011"

(Policy at 58).

The Policy defines the term "Claim" in part as a "written demand for monetary damages or non-monetary relief . . . against the Company for a Wrongful Act" (*id*. at 18-19). The term "Wrongful Act" in turn is defined in part as "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted" by the insureds (*id*. at 9).

With its initial tender of coverage, WDF submitted to Zurich the September 17, 2013 email from Eli Cherkasky of the DANY to WDF. In that email, the DANY advised WDF of its conclusion that WDF had received $7,400,000 of credit for "M/WBE related false filings" in connection with 19 projects identified in that email. The "Claim" tendered by WDF to Zurich, and for which WDF seeks coverage, was thus the DANY's written demand for $7,400,000. The alleged "Wrongful Acts" that made up that Claim were the alleged "M/WBE related false filings" allegedly made by WDF in the 19 projects identified in the September 17, email, as the term "Wrongful Acts" is defined by the Policy to include any "act" allegedly committed by WDF.

By WDF's own admission, the "false filings" alleged by the DANY referred to utilization reports filed by WDF in which WDF identified the MWBEs for which it was claiming credit to reach its MWBE utilization goals for each project (*see* Tung Dep. at 73). WDF has acknowledged that the DANY Investigation focused on WDF's use of four specific purported MWBEs that the

DANY had determined were fraudulent entities, i.e., they were just fronts or "pass-throughs" that did not provide any commercially useful function and did not actually supply the goods or services utilized in the projects (*see* state construction memorandum at MS 000155; Tung dep at 46). As further acknowledged by WDF, since these entities – Arbee, Janus, Ascon and Darman – were not legitimate MWBEs, any filing on which WDF took MWBE utilization credit for using any of these entities would be considered a "false filing" (Tung dep at 73). WDF has also admitted that its use of these "pass-through" entities and WDF's inclusion of them on their utilization plans for meeting their MWBE goals was "wrongful" (memorandum to the state university construction fund at MS000155).

Pursuant to Endorsement 23 of the Policy, as long as any such alleged "false filings" (i.e. Wrongful Acts) occurred after July 1, 2011 on any of the projects that were the subject of the Claim, no coverage would exist. Here, the undisputed evidence demonstrates that there were such alleged "false filings" after July 1, 2011 on each one of the 19 projects identified by the DANY in its September 17, 2013 email, in the amount of at least 200 (*see generally* Margulis affirmation, ¶¶ 35-120 and exhibits P-HH; Margulis opposition affirmation, ¶¶ 13-31 [NYSCEF Doc No. 161]). These alleged "false filings" took the form of either quarterly or monthly reports on which WDF took credit towards each project's MWBE goal for utilizing one of the four fraudulent MWBEs identified by the DANY. These reports were submitted by WDF beginning shortly after July 1, 2011 and continued through into 2014 (*see id.*).

Indeed, the contracts for three of the projects identified in the DANY's September 17, 2013 email were signed after July 1, 2011, meaning every filing by WDF on those projects was necessarily made after July 1, 2011 (*see* Margulis affirmation, ¶¶ 35-50, 57-65, and 66-75 and exhibits P, S, and T). Since the Policy only requires that any part of the Wrongful Acts alleged in

a Claim took place after July 1, 2011 to negate coverage, this fact alone is sufficient to preclude coverage for the Claim in its entirety without even considering any filings on any of the other projects.

In any event, the alleged "false filings" after July 1, 2011 were not limited to these three projects. Again, WDF's own documents demonstrate that such alleged "false filings" were made after July 1, 2011 on each one of the 19 projects making up the DANY Claim stated in the September 17, 2013 email (*see* Margulis affirmation, ¶¶ 35-120 and exhibits P-II).

Moreover, not only do the project documents demonstrate that the alleged "false filings" took place after July 1, 2011, but WDF has admitted that it continued to use these four fraudulent MWBE entities and claim MWBE utilization credit for using these entities well after July 1, 2011. During the course of the DANY Investigation, WDF was required to appear for a "responsibility hearing" before the MTA New York City Transit to determine WDF's eligibility to continue working on MTA projects in light of the allegations of MWBE fraud against WDF (*see* transcripts of special responsibility hearings dated January 23, 2014 [NYCEF Doc No. 95] and February 3, 2014 [NYSCEF Doc No. 96]; *see also* Tung dep at 68). During that hearing, WDF acknowledged that the DANY Investigation concerned WDF's use of Ascon, Arbee, Darman and Janus, and that WDF continued to use Arbee until the "summer of 2012," and the other three entities until 2013 (*see* 2/3/14 transcript at MS 079542). WDF also acknowledged that the DANY Investigation focused on WDF's use of those entities until at least 2012 (*see id*. at MS 079542).

Accordingly, WDF admits that the DANY Investigation focused on WDF's alleged Wrongful Acts in connection with the MWBEs well beyond July 1, 2011. Moreover, WDF acknowledged in its submission to the State University Construction Fund that it continued to use and seek payment/credit for the four MWBEs that were the target of the DANY investigation until

2013. In that submission, WDF acknowledged that it continued to use and take MWBE credit for Arbee until at least July 2012 (state construction memorandum at MS 000160 and MS000273, MS 000279). WDF also acknowledged that it continued to use and take MWBE credit for Ascon, Janus and Darman for Ascon through at least June 2013, stating that in "June 2013, WDF voluntarily reported to the DEP that Janus, Ascon and [Darman] each refused to cooperate with WDF's due diligence process, and that WDF would not use these entities going forward" (*id*. at MS 00163and MS 000302). WDF confirmed, however, that it would count MWBE participation for those vendors up until that time, i.e. June 2013 (*id*. at MS 000279, 000302). Indeed, WDF's general counsel testified that WDF was still taking credit for the MWBEs at issue through early 2013 (Tung dep at 61).

Finally, as late as February 2014 in their filings with the PA on the projects at issue in this case, WDF also acknowledged that while it was no longer using Arbee as an MWBE supplier, it would count all purchases made from Arbee up until the time that WDF learned that Arbee's WBE status was under investigation by the PA (*see* project documents at WDF00072995 [NYSCEF Doc No. 79). And WDF has admitted in this case that this occurred on July 12, 2012 (Tung dep at 94; state construction memorandum at MS 000279).

WDF thus continued to take MWBE credit for these four fraudulent MBWEs by submitting filings taking such credit, and these filings are the alleged "false filings" referenced in the September 17, 2013 DANY email. Since, by WDF's own admission these "false filings" continued at least into 2013, under the language of the Policy, "all or any part of" the Wrongful Acts alleged in the DANY Claim took place after July 1, 2011. Thus, there is no dispute that the DANY Claim was based upon, arose out of, or was attributable to in whole or in part WDF's alleged "false filings", i.e. Wrongful Acts, after July 1, 2011.

Under New York law, the phrase "arising out of" in an insurance policy provision is deemed to be a broad and comprehensive phrase, and a "but for" test has been applied to determine the applicability of such exclusions. Indeed, it has been held that "the words 'arising out of' have broader significance . . . and are ordinarily understood to mean originating from, incident to, or having connection with" (*Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005] [quotation and citation omitted]). There need only "be some causal relationship" between the injury and excluded risk (*id*. at 472; *see also Country-Wide Ins. Co. v Excelsior Ins. Co.*, 147 AD3d 407, 409 [1st Dept 2017]). "[T]he phrases 'based on' and 'arising out of,' when used in insurance policy exclusion clauses, are unambiguous and legally indistinguishable" (*Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 351 [1996]; *see also United States Fire Ins. Co. v New York Mar. & Gen. Ins. Co.*, 268 AD2d 19, 23 [1st Dept 2000]).

For these reasons, pursuant to Endorsement 23 to the Policy, no coverage exists for any Loss arising from the DANY Claim. The DANY Claim clearly arises out of and is based upon the alleged false filings by WDF after July 1, 2011. Indeed, the DANY's September 17, 2013 email specifically refers to the "false filings" by WDF in connection with the 19 specified projects. In addition, the project documents demonstrate hundreds of such filings after July 1, 2011 (*see* Margulis affirmation, exhibits P-II). The Policy defines Loss to include damages, judgments, settlements and Defense Costs (Policy at 19). As such, and because the Claim at issue was based on, arose from, and/or was attributable to post-July 1, 2011 Wrongful Acts, no coverage exists for the $4,000,000 settlement paid by WDF to DANY or for any Defense Costs incurred by WDF in connection with the DANY Claim.

Accordingly, Zurich is entitled to summary judgment dismissing the amended complaint in its entirety.

Nevertheless, in support of its cross motion, WDF argues that, since some of the filings were made before July 1, 2011, coverage exists with respect to the amounts attributable to those filings. Specifically, WDF argues that the DANY Claim was a "mixed action" subject to the Policy's allocation provision (WDF opposition memorandum at 9-13 [NYSCEF Doc No. 158]). The allocation provision provides:

> "If the Insured incurs both Loss and other loss not covered by this policy either because a Claim against the Insured includes ***both covered and uncovered matters*** or because a Claim is made against both the Insured and others, then one hundred percent (100%) of the Defense Costs for such Claim will be considered Loss and all other loss not covered by this policy shall be allocated to the Insured and the Underwriter based upon the relative legal exposure of the parties to covered and uncovered matters.
>
> In any arbitration, suit or other proceeding among the Underwriter, the Insured Persons or the Company, no presumption shall exist concerning what is a fair and proper allocation between covered Loss and uncovered loss"

(Policy at 23-24 [emphasis added]).

The allocation provision thus requires that a Claim include both covered and uncovered matters. In such instance, the Policy permits allocation between covered Loss and uncovered amounts. However, the clear language of Endorsement 23 precludes that outcome as a matter of law, and negates the ability to have both covered and uncovered matters based on the date of the Wrongful Acts. Endorsement 23 clearly states that no coverage exists for any "Claim" where all or any part of the Wrongful Acts were committed, attempted or allegedly committed or attempted subsequent to July 1, 2011. Endorsement 23 thus eliminates any possibility that a Claim with Wrongful Acts both before and after July 1, 2011 can be a "mixed action." As soon as there are Wrongful Acts that cross that threshold date, the entire Claim becomes uncovered.

WDF also argues that each of the 19 projects must be looked at separately to determine whether all or any part of the acts in connection with each project were after July 1, 2011. This

argument also lacks merit. Under the plain language of the Policy, there is a single "Claim"—the September 17, 2013 email demanding $7,400,000 from WDF. That written demand, i.e. the "Claim," then lists 19 projects on which the DANY identified or alleged false filings by WDF. Based on the clear policy language, it is evident that each project cannot be considered to be a separate "Claim." "Claim" is defined in the Policy to include "a written demand for monetary damages." A project on which WDF performed work is not and cannot be a "Claim" as defined in the Policy.

Moreover, under the clear language of the Policy, a project cannot be considered to be a "Wrongful Act." Instead, it is the alleged "false filings" made by WDF that are the Wrongful Acts that make up the "Claim," which was the DANY's written demand for money in its September 17, 2013 email. Indeed, the DANY even stated in that email that they were not including the amount of fraud associated with each contract—instead, the DANY simply concluded that the total amount of credit received by WDF as a result of the false filings was $7,400,000. And, again, WDF has admitted that its use of these four entities and WDF's inclusion of the entities on their utilization plans for meeting their MWBE goals was "wrongful" (state construction memorandum at MS 000155).

Even if some of the projects had alleged false filings before July 1, 2011, that is not relevant. The only thing necessary, under the clear language of the Policy, is that the "Claim," i.e. the written demand for money, was based upon, arose out of or was attributable to Wrongful Acts and that all or any part of those acts took place after July 1, 2011. Since it is undisputed that the DANY's demand for $7,400,000 (i.e. the "Claim") is based upon alleged false filings (i.e. "Wrongful Acts") made after July 1, 2011, no coverage exists for the DANY Claim in its entirety.

Courts faced with identical run-off provisions have held that they bar coverage where some of the acts giving rise to the claim took place after the "run-off" date (*see e.g. Oceans Healthcare, L.L.C. v Illinois Union Ins. Co.*, 379 F Supp 3d 554, 568-569 [ED Texas 2019] [provision barring coverage for claims "arising out of" acts taking place "in whole or in part" after the runoff date must be given broad, general and comprehensive interpretation and precludes coverage where any of the acts took place after the run-off date]; *Health Corp. v Clarendon Natl. Ins. Co.*, 2009 WL 2215126 [Del Super. Ct July 15, 2009], * 14-16 [policy's run-off provision barred coverage for any claim where "all or part of such acts were committed after" September 12, 2000; since alleged acts took place between 1997 and 2004, coverage was precluded]; *see also Lifelock, Inc. v. Certain Underwriters at Lloyd's*, 146 AD3d 565 [1st Dept 2017] [policy provision excluding coverage for claims arising out of any related or continuing acts to acts that took place prior to retroactive date barred applied to preclude coverage where acts giving rise to claim occurred both before and after the retroactive date]; *County of Duchess v Argonaut Ins. Co.*, 150 AD3d 672 [2nd Dept 2017] [coverage excluded under policy provision barring coverage where wrongful acts took place "in part" prior to retroactive date because acts giving rise to claim took place both before and after retroactive date]).

WDF next argues that Endorsement No. 23 does not defeat coverage for the DANY Claim because "this one sentence" cannot "defeat[] [or] override[] the other terms of the 58-page Policy that dictate Zurich owes coverage for the" DANY Claim (WDF opposition memorandum at 13).

This argument fails. As an initial matter, Endorsement 23 clearly states: "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY**" (Policy at 58 [emphasis in original]).

Moreover, there are many instances in an insurance policy where a single sentence overrides the grant of coverage otherwise provided elsewhere in the policy, as is the case with virtually every exclusion in every insurance policy. Indeed, in the Zurich Policy, there are several exclusions, all of which completely defeat and override coverage. The Insuring Agreement of the Policy grants coverage for Claims for Wrongful Acts. The exclusions then override that grant of coverage by eliminating coverage for certain types of claims. For example, the Zurich Policy excludes coverage for the following types of Claims:

> • based upon, arising out of, attributable to, or in any way directly or indirectly related to any fact, circumstance or situation which has been the subject of any written notice given under any other policy of insurance which incepted prior to the inception of the Policy Period;
>
> • based upon, arising out of, attributable to, or in any way directly or indirectly related to any demand, suit or proceeding pending, or order, decree or judgment entered against the Company or any Insured Person on or prior to the respective Pending or Prior Date set forth in Item 8 of the Declarations, or the same or substantially the same fact, circumstance or situation underlying or alleged therein;
>
> • for bodily injury, mental anguish, emotional di stress, sickness, disease or death of any person or damage to or destruction of any tangible property including loss of use thereof; provided that as respects any Employment Practices Claim, this exclusion 5, shall not apply to mental anguish or emotional distress

(Policy at 9-10).

Each of these one-sentence exclusions negates coverage for the types of claims described, and overrides the general provisions in the Policy granting coverage for Claims. Indeed, that is the very purpose of an exclusion in an insurance policy—to negate coverage for a specific type of claim, and override the general grant of coverage.

New York law is clear that an insurance policy is permitted to contain exclusions, and these "exclusions by their nature modify the scope of coverage provided in an insurance policy" (*Lend Lease (U.S.) Constr. LMB Inc. v Zurich American Ins. Co.*, 136 AD3d 52, 60 [1st Dept 2015]).

"An insurance policy is not illusory if it provides coverage for some acts; it is not illusory simply because of a potentially wide exclusion" (*id.*, quoting *Associated Community Bancorp, Inc. v St. Paul Mercury Ins. Co.*, 118 AD3d 608, 608 [1st Dept 2014]; *see also Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 47 [1956] [if there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls]).

Endorsement 23 provides coverage for Claims made during the extended reporting period, but precludes coverage if all or any part of the acts giving rise to a Claim took place after July 1, 2011. This "single sentence" precludes coverage for this type of Claim just as the other "single sentence" exclusions in the Policy bar coverage for the types of Claim they address.

WDF further argues that, "[e]ven if the Court were to adopt Zurich's strained interpretation of the one-sentence provision contained in Paragraph 1 of Endorsement #23 – upon which Zurich exclusively relies – the Inconsistency Endorsement dictates that WDF is nevertheless entitled to coverage for the Investigation in accordance with the Allocation clause and other provisions of the Policy that dictate coverage exists for the DANY's mixed action" (WDF opposition memorandum at 18). The Inconsistency Endorsement provides that:

> "In consideration of the premium charged, it is hereby understood and agreed that in the event there is an inconsistency between any endorsements attached this policy and/or any terms or condition of this policy or any other endorsements(s), then
>
> It is understood and agreed that unless prohibited by laws, the Underwriter shall combine those terms, conditions or wording, in part, contained within either endorsements(s) or the policy and apply only those which are more favorable to the Insured"

(Policy at 27). WDF contends that if Zurich's interpretation of Endorsement 23 is adopted, the Inconsistency Endorsement would be triggered because that would mean there is an inconsistency between Endorsement 23 and the operative "terms and conditions" of the Policy and other endorsements to the Policy.

The court rejects this argument, as it is again based on its flawed premise that the DANY Claim is a "mixed action" to which the allocation provision applies. As discussed immediately above, it is not. Endorsement 23 is only "inconsistent" with other provisions of the Policy in the manner that every exclusion in an insurance policy is inconsistent with the grant of coverage, also as discussed above.

Accordingly, Zurich's motion for summary judgment is granted, and WDF's cross motion for summary judgment is denied.

The court has considered the remaining arguments, and finds them to be either moot, or without merit.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross motion is denied.

9/29/2020
DATE

LAURENCE L. LOVE, J.S.C.

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