SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

----------X

NOUVEAU ELEVATOR INDUSTRIES, INC., NATIONAL CASUALTY COMPANY, SCOTTSDALE INDEMNITY COMPANY,

Plaintiff,

- v -

NEW YORK MARINE AND GENERAL INSURANCE COMPANY, MARKEL AMERICAN INSURANCE COMPANY,

Defendant.

----------X

INDEX NO. 157891/2016

MOTION DATE 06/06/2019

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 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, 107, 108, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 136, 137

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 104, 106

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 134, 135, 138

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

Motions sequence numbers 004, 005 and 006 are consolidated for disposition. This action involves a coverage dispute between plaintiff Nouveau Elevator Industries, Inc. (Nouveau), as insured, and defendant New York Marine and General Insurance Company (Marine), its primary insurer under a series of comprehensive general liability (CGL) policies.

In motion sequence number 004 (NYSCEF Doc No. 71), Nouveau moves this court for an order, pursuant to CPLR 3212, granting it summary judgment, declaring that it has not exhausted coverage under its primary CGL policies issued by Marine and that Marine must

continue to defend and indemnify Nouveau with respect to several personal injury actions brought against Nouveau.

In motion sequence number 006 (NYSCEF Doc No. 109), plaintiffs National Casualty Company (National) and Scottsdale Indemnity Company (collectively, Scottsdale), Nouveau's excess insurers, seek summary judgment, declaring that coverage under Nouveau's primary CGL policies, and the umbrella policy of defendant Markel American Insurance Company (Markel), have not yet been exhausted and that Scottsdale's obligations to defend and indemnify Nouveau will not be triggered until Marine and Markel have exhausted their coverage by payment of settlements and judgments up to their respective policy limits.

Marine opposes these two motions and cross-moves for summary judgment, pursuant to CPLR 3212, seeking a declaration that Nouveau has exhausted its primary coverage with respect to the losses at issue, inasmuch as they all fall within the so-called "products-completed operations hazard aggregate limits" set forth in its primary CGL policies.

In motion sequence number 005 (NYSCEF Doc. No. 104), Nouveau moves by order to show cause for an order sealing certain documents filed as exhibits to its summary judgment motion, which consisted of copies of the service contracts that Nouveau has with its customers, which are alleged to contain proprietary and pricing information.

Background

In its amended complaint, filed November 1, 2016, Nouveau alleges that it purchased from Marine six CGL policies (Marine Policies) for consecutive one-year periods, commencing on June 1, 2009 and ending on June 1, 2015 (complaint [NYSCEF Doc No. 6] ¶¶ 3 and 13). Each of the Marine Policies provides a liability limit of $1 million, with an aggregate limit of $2 million, per accident or occurrence (*id.* ¶ 4). Nouveau further alleges that the policy premium

reflects a "per project aggregate," identified in Endorsement # 26 of each Marine Policy, which states that the $2 million limit "applies separately to each of Nouveau's projects" (*id.* ¶ 5).

The Marine Policies provided several different types of coverage, subject to different liability limits (*see* Limits of Liability set forth in Declaration V of exemplar policy annexed as exhibit A to the complaint [NYSCEF Doc No. 7]). Under Declaration V.A, coverage is limited to $1,000,000 for each occurrence (*id.*). Under the Products-Completed Operations Aggregate Limit set forth in Declaration V.B, coverage is limited to $2,000,000 (*id.*). Under Declaration V.F, the General Aggregate Limit is capped at $2,000,000 (*id.* Declarations at 2),

Section I of the Marine Policies' CGL Coverage Form, which follows the Declarations, describes the different coverages afforded thereunder. The relevant provision, Coverage A, provides for bodily injury and property damage liability coverage (*id.*, CGL Policy Form, Coverages at 1-7).

Section III of the CGL Coverage Form, captioned "Limits of Insurance," states that "the General Aggregate Limit is the most [Marine] will pay for the sum of . . . Damages under Coverage A, except damages for 'bodily injury' or 'property damage' included in the 'products-completed operations hazard'" (*id.*, Limits of Insurance, subsection 2 [b]). Section III goes on to provide that '[t]he Products – Completed Operations Aggregate Limit is the most [Marine] will pay under Coverage A for damages because of 'bodily injury' and 'property damage' included in the 'products – completed operations hazard'" (*id.*, Limits of Insurance, subsection 3).

Section V of the CGL Policy Form sets forth the Marine Policies' "Definitions." Therein,

> "'Products-completed operations hazard'
>
> (a) Includes all 'bodily injury' and 'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work' except:

(1) Products that are still in your physical possession; or

(2) Work that has yet to be completed or abandoned. However, 'your work' will be deemed completed at the earliest of the following times:

a. When all of the work called for in your control has been completed.

b. When all the work to be done at the job site has been completed if your contract calls for work at more than one job site.

c. When that part of the work done at the job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

(*id.*, Definitions, subsection 16). Section V defines "your work" to include "work or operations performed by you or on your behalf "(*id.*, Definitions, subsection 22 [a][1]).

Endorsement # 26 to the Marine Policies, captioned "Per Project Aggregate," provides that "[i]n consideration of the premium charged, it is hereby agreed that the General Aggregate Limit set forth in Declaration V.F. shall apply separately to each of your projects away from premises owned by or rented to you" (*id.*, Endorsements, Endorsement # 26). The Marine Policies do not define the term "project."

During the relevant policy periods and thereafter, twelve personal injury actions were commenced against Nouveau (Underlying Actions),[1] in which plaintiffs claimed that Nouveau

[1] The Underlying Actions, identified in paragraph 8 of the complaint, are: (1) *James v Nouveau Elevator Indus.* (Sup Ct, Kings County, Index No. 27360/2010); (2) *Maxwell-Cooke v Safon, IIC* (Sup Ct, NY County, Index No. 153275/2012); (3) *Ashe-Collis v New York Congregation Ctr.* (Sup Ct, Kings County, Index No. 2465/2011); (4) *Carter v Nouveau Elevator Indus.* (Sup Ct, Kings County, Index No. 503340/2012); (5) *Bard v Beth Israel Med. Ctr.* (Sup Ct, Kings County, Index No. 2172/2013); (6) *McFadden v Moinian Dev. Group* (Sup Ct, Kings County, Index No. 30783/2010); (7) *Ruiz v Long Island College Hosp.* (Sup Ct, Kings County, Index No. 29050/2009); (8) *Griffiths v The Durst Org.* (Sup Ct, Bronx County, Index No. 301728/2011); (9) *Seabrook v 24 W 57 APF LLC* (Sup Ct, Kings County, Index No. 18242/ 2010); (10) *Perloff v Huntington Hosp.* (Sup Ct Suffolk County, Index No. 37644/2010); (11) *Maxwell v Nouveau Elevator Indus.* (Sup Ct, Kings County, Index No. 29036/2010); and (12) *Kebede v Nouveau Elevator Indus.* (Sup Ct, Kings County, Index No. 10112/2012).

had negligently serviced maintained, and repaired the elevators that caused their physical injuries during periods of coverage under the Marine Policies (*id.* ¶¶ 7-8). Nouveau contends that only two of the twelve Underlying Actions involved injuries that allegedly occurred at the same premises (*id.* ¶ 8). Nouveau further asserts that, at the time of each accident, none of its operations had been completed at any of the subject projects (*id.* ¶ 10).

On March 9, 2017, Marine sent a letter to Nouveau for each of the Underlying Actions, asserting that each Marine Policy "applies with a $2 million limit collectively to all suits and that Nouveau is not afforded a separate $2 million per-location limit," and so each Marine Policy's limit "had, or would soon, be reached, and Marine would no longer provide coverage" to Nouveau (*id.* ¶ 11).

Scottsdale, in the supplemental complaint (Scottsdale complaint [NYSCEF Doc No. 90]), allege that the excess policies it issued to Nouveau "provide coverage when the applicable limits of the underlying primary policies issued to Nouveau by [Marine], and the umbrella policy issued by [Markel], have been exhausted" (Scottsdale complaint ¶ 2). Scottsdale further alleges that, in connection with the "numerous lawsuits" filed against Nouveau, Marine has "taken a position regarding [an] erosion of its aggregate limits that is not in accordance with the provisions of the primary policies, and that adversely affects the rights and obligations of Scottsdale under the excess polices" (*id.* ¶¶ 3-4). Scottsdale seek a "judicial determination as to the proper application of the aggregate limits of the [Marine Policies], which determination will also apply to the [Markel] umbrella policy by virtue of a General Aggregate Follow Form Endorsement" (*id.*). Scottsdale assert that it sought to file the "Complaint in Intervention seeking

---

Only the *Maxwell* and *Kebede* actions involve claims for physical injuries allegedly suffered at the same premises (complaint ¶ 9).

declaratory relief," as the issues in controversy "arise out of the same transactions and occurrences that gave rise to the main action" filed by Nouveau against Marine (*id.* ¶ 10).

Justice Lebovitz of this court granted Scottsdale's motion to intervene by order dated February 16, 2018 (NYSCEF Doc No. 51). Scottsdale then moved to add Markel, Nouveau's umbrella insurer, as a defendant in this action, which motion was granted by this court on August 14, 2018 (NYSCEF Doc No. 63). Scottsdale filed the supplemental summons and amended complaint against Marine and Markel on August 29, 2018 (NYSCEF Doc Nos. 66 and 67) and, in response, Marine filed its answer on September 4, 2018 (NYSCEF Doc No. 69) and Markel filed its answer on November 28, 2018 (NYSCEF Doc No. 70).

Discussion

Motion Sequence Numbers 004 and 006

Nouveau and Scottsdale, in their motions, and Marine in its cross motion, seek summary judgment with respect to coverage. In a summary judgment motion, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails this showing, the motion must be denied (*id.*). If this showing is made, however, "the burden [then] shifts to the party opposing the motion . . . to produce sufficient evidentiary proof . . . to establish the existence of a material issue of fact which require a trial of the action" (*id.*).

In weighing a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion" (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). The motion should be denied if there is any doubt about the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). However, bare allegations or

conclusory assertions are insufficient to create genuine issues of fact to defeat the motion (*Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]).

In its summary judgment motion, Nouveau argues that by virtue of Declaration V.F, which provides for a General Aggregate Limit of $2 million, and Endorsement # 26, which provides that the General Aggregate Limit "shall apply separately to each of [the insured's] projects away from premises owned by or rented to [the insured]" (complaint exhibit A Marine Policy [NYSCEF Doc. No. 7] [Declarations and Endorsement # 26]), Marine is bound to honor the higher aggregate claims cap of $2 million per project location. Nouveau also contends that Marine's disclaimer letter improperly applied the lower coverage limit from the "products – completed operation hazard" limit in Declaration V.B to deny it coverage (*id.*).

Among its other arguments, Nouveau asserts that its work relating to the Underlying Actions consisted of repair, service and maintenance of its customers' elevators and so its continuing performance under its service contracts constitute the type of ongoing operation that do not fall within the ambit of the Marine Policies' completed operations limits (citing, *inter alia, Town of Fort Ann v Liberty Mut. Ins. Co.*, 69 AD3d 1261, 1262 [3d Dept 2010]). Nouveau concludes that Marine is required to defend and indemnify Nouveau up to the limitation cap of $2 million per project location afforded under Endorsement # 26, and that the court should declare that Nouveau's elevator service agreements constitute ongoing operations until the agreements' terms expire.

In their motion, Scottsdale joins Nouveau in arguing that Marine improperly classified Nouveau's elevator service work as a "products – completed operations hazard" under Declaration V.B, which limits coverage to $2 million for the policy period, and instead should have provided coverage under Declaration V.F and Endorsement # 26, providing Nouveau a

liability limit of $2 million "per project," and that Scottsdale has no payment obligation until Marine and Markel have exhausted their "per project" limits (affirmation of Brian W. Colistra, Esq,, executed April 4, 2019 [NYSCEF Doc 109] ¶¶ 4-5). Scottsdale also contends that Marine is improperly using the "products – completed operations aggregate" as an exclusion and that operations that are recurring activities, such as those conducted by Nouveau under its elevator service contracts, are "ongoing operations," not subject to the products-completed operations classification (*id.* ¶ 24).

As to Markel, Scottsdale assert that because Markel provides Nouveau's first layer excess coverage, which sits below Scottsdale's excess policies, Markel must pay its limits on a per project basis in the same manner as Marine before Scottsdale's obligations are triggered (*id.* ¶¶ 25-26).

Scottsdale seek summary judgment declaring that the claims in the Underlying Actions against Nouveau are not subject to the "products-completed operations aggregate limit," but rather the "per project general aggregate limit," which provides $2 million coverage from Marine for each location where Nouveau performs services. Scottsdale also seek a declaration that the general aggregate limit of the policy Markel issued to Nouveau applies to the claims in the Underlying Actions and provides up to $2 million coverage for each location where Nouveau performs services, and that Scottsdale's excess policies apply only after the claims in the Underlying Actions exhaust Markel's limits of payment of up to $2 million for each location where Nouveau performs services.

Markel, in its submission (affidavit of Deborah Mason, sworn to May 6, 2019 [NYSCEF Doc No. 138]), states that it takes no position with respect to the arguments made by Nouveau, Scottsdale and Marine. Markel also notes that the policy it issued to Nouveau was only in effect

from June 1, 2013 to October 11, 2013, and so it only covers claims or damages in excess of the limits of the applicable Marine Policy for bodily injury that occurred during that policy period.

In its opposition and cross motion, Marine contends that the language of the Marine Policies clearly demonstrates that the claims at issue are subject to the $2 million aggregate limit under the "products-completed operation hazard" provision in Declaration V.B. Marine further asserts that the $2 million general aggregate limit in Declaration V.F is defined to exclude claims like these, which are subject to the products-completed operations hazard.

Marine notes that Nouveau and its affiliate, nonparty NuStar Elevator Construction Company (Nustar), are involved in elevator construction and installation projects, and that NuStar is also an insured under the Marine Policies. Marine argues that the language of Endorsement # 26 was intended to provide separate limits for each of Nustar's construction projects, and so this court should reject Nouveau's attempt to misinterpret the per project aggregate provision to apply to Nouveau's elevator service contracts.

Marine also argues that Nouveau's contention – that ongoing elevator service work is different from elevator installation work and that its service contracts cannot be deemed completed until the contract has expired – cannot be reconciled with the wording of the Marine Polices, which state, in relevant part, that "work will be deemed to be completed … when that part of the work done at a job site has been put to its intended use" and "work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed" (Marine Policies, Definitions, subsection 15 [a][2]). Marine asserts that, because the elevators in the Underlying Actions had been put back to their intended use by being returned to regular service after Nouveau conducted maintenance or repair services, each of the accidents fall within the products – completed operations hazard provision, citing *Zurich Ins. Co.*

v Principal Mut. Ins. Co. (761 A2d 344, 349 [Md Spec App 2000] and *Avrio Group Surveillance Solutions, Inc. v Essex Ins. Co.* (790 F Supp 2d 89, 100-101 [WD NY 2011] [construing Maryland law]). Additionally, Marine contends that the per project aggregate in Endorsement # 26 does not apply here because the term "project," as used therein, refers to "construction projects," not service contracts, and that limitations of liability are not considered exclusions and so are not to be construed against the insurer.

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [citations omitted]). "It is well settled that a contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*id.* [internal quotation marks, alteration and citations omitted]; *see also United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986] [clear and unambiguous policy provisions "must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" [internal quotation marks and citation omitted]).

If an ambiguity exists, that is, where "the language is reasonably susceptible of more than one interpretation" (*Demetrio v Stewart Tit. Ins. Co.*, 124 AD3d 824, 826 [2d Dept], *lv denied*, 25 NY3d 906 [2015]), the insurer bears the burden of establishing that the construction it advances is not only reasonable but also that it is "subject to no other reasonable interpretation" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). "[W]hen the insurer fails to submit extrinsic evidence that resolves the ambiguity, the proper interpretation is an issue of law for the court and the ambiguity must be resolved against the drafter of the contract, the insurer"

(*Kenavan v Empire Blue Cross and Blue Shield*, 248 AD2d 42, 47 [1st Dept 1998], citing *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; see also *Westview Assoc. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 [2000] ["If the language of the policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer"] [citation omitted]). "[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (*Seaboard Sur. Co.*, 64 NY2d at 311 [internal quotation marks and citation omitted]). "Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*id.* [citations omitted]).

New York law applies, as there is no dispute among the parties as to the applicability of New York law, Nouveau is a foreign corporation duly authorized to do business in the state of New York (complaint [NYSCEF Doc No. 6] ¶ 1), and Marine is a foreign corporation authorized to do business in New York (answer [NYSCEF Doc No. 9] ¶ 2) (*see Lumbermens Mut. Ins, Co. v Town of Pound Ridge*, County of Westchester, 362 F 2d 430, 432 [2d Cir 1966] [citing New York cases]).

Marine's reliance on the *Zurich Ins. Co.* and *Avrio Group* decisions is misplaced, as neither of those cases address New York law and the Maryland rule they follow is not followed here. Under New York law, completed operations policy language does not apply where, as in this case, an insured's ongoing services require it to continue engaging in operations at the locations where the underlying physical injuries allegedly occurred, even though its personnel were not at those locations at the times of their occurrence (*Lumbermens Mut. Ins. Co.*, 362 F2d at 432-44 [town snow and ice removal services], citing *Vito v General Mut. Ins. Co.*, 15 AD2d

289 [3d Dept], *lv denied*, 11 NY2d 645 [1962] [propane gas service contract]; *see also United States Underwriters Ins. Co. v Image By J & K, LLC*, 335 F Supp 3d 321, 337 [ED NY 2018] [defendant insured floor cleaning contractor prevails at summary judgment, and plaintiff insurer ordered to defend and indemnify, where policy clause excluding coverage for completed work found "inapplicable because one reasonable interpretation is that work was ongoing while contracts were in effect"]).

Also, the term "project" does not necessarily mean "construction project," as Marine asserts (*see id.*, 335 F Supp 3d at 337 [noting term "project" in policy's All Works clause "could be interpreted as connoting a subdivision of a contract [or] reasonably interpreted as encompassing the entirety of any agreement for which the named insured [floor cleaning contractor] sought coverage"]). In any event, if Marine intended to restrict the definition of "project" to construction projects in its coverage limitations, it was required to do so in clear and unambiguous language (*Zohar Creations, Ltd. v Those Certain Underwriters at Lloyd's*, 176 AD 2d 611, 612 [1st Dept 1991], citing *Seaboard Sur. Co.*, 64 NY2d 304 [where insurer failed to express coverage limits in clear, unambiguous terms, lower limitation of liability held inapplicable]). Finally, the court need not determine that the insurance provision at issue is an exclusion to construe an ambiguity therein against the insurer (see *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353 [1978] ["Well recognized is the general rule that ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause"] [citation omitted]).

Motion Sequence Number 005

In motion sequence number 005, Nouveau seeks an order of this court to seal documents that were filed with the affidavit of Donald J. Speranza, sworn to February 7, 2019 (NYSCEF

Doc No. 73) as Exhibit B (NYSCEF Doc Nos. 75-81), in support of its summary judgment motion. These documents consist of customer service contracts that purportedly contain proprietary information, including the names and addresses of customers and pricing figures (affirmation of William J. Mitchell, Esq., executed March 11, 2019 [NYSCEF Doc No. 102], ¶¶ 4-7). Because the motion is unopposed, the relief sought therein is granted to the extent of sealing the proprietary information in Exhibit B from non-litigants, as requested by Nouveau (*Mancheski v Gabellli Group Capital Partners*, 39 AD3d 499, 502 [2d Dept 2007] [relief for sealing granted where documents contained non-public proprietary financial information]).

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff Nouveau in motion sequence number 004 is granted; and it is further

ADJUDGED AND DECLARED that Nouveau is entitled to coverage from defendant Marine under Declaration V.F. and Endorsement # 26 of the Marine Policies and that Marine must continue to defend and indemnify Nouveau until the limits of liability under Endorsement # 26's Per Project Aggregate are exhausted with respect to each of the Underlying Actions; and it is further

ORDERED that the motion for summary judgment by plaintiff-intervenors Scottsdale in motion sequence number 006 is granted; and it is further

ADJUDGED AND DECLARED that the coverage obligations of Scottsdale shall not be triggered until Marine and Markel have exhausted the limits of their respective primary and umbrella policies by payment of settlements and judgments in connection with the Underlying Actions; and it is further

ORDERED that the cross motion for summary judgment with respect to motion sequence numbers 004 and 006 by defendant Marine is denied, in all respects; and it is further

ORDERED that the motion by Nouveau, under motion sequence number 005, which seeks an order sealing certain proprietary documents that were filed as exhibits to its summary judgment motion, bearing NYSCEF document numbers 75 through 81 in this action is hereby granted, and the Clerk of the Court is hereby directed to restrict access to these documents to court personnel the parties to this action; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this court.

12/23/2020
DATE

W. FRANC PERRY, J.S.C.

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