

## Supplemental case law (Research Summary)

---

### [Oceanside Pier View, L.P. v. Travelers Property Cas. Co. of America](#)

S.D.Cal. | May 06, 2008 | Not Reported in F.Supp.2d

INSURANCE - Property. Policy for construction project did not cover increased costs of materials and labor for previously un-constructed portions of project.



### [Zurich American Ins. Co. v. Keating Bldg. Corp.](#)

D.N.J. | March 22, 2007 | 513 F.Supp.2d 55

INSURANCE - Property. "Debris removal" costs did not include costs of demolition of the damaged property and related engineering expenses.

2008 WL 7822214

Only the Westlaw citation is currently available.  
United States District Court,  
S.D. California.

OCEANSIDE PIER VIEW, L.P., a California  
limited partnership, Plaintiff,  
v.  
TRAVELERS PROPERTY CASUALTY COMPANY  
OF AMERICA, a Connecticut corporation,  
Defendant.

No. 07CV1174 WQH (POR).

|  
May 6, 2008.

West KeySummary

- 1 **Insurance**  
🔑 Business Interruption; Lost Profits  
**Insurance**  
🔑 Repair or Replacement

A developer's insurance policy for a construction project did not cover increased costs of materials and labor for previously un-constructed portions of the project. The policy provided basic coverage for builder's risk, soft costs, business income, and rental value, and additional coverage for expediting costs and additional cost of construction materials and labor. The plain language of the builders' risk provisions protected only those buildings, structures, or portions of buildings and structures under construction at the project. In addition, the business income provision could not include coverage for the increased costs because there was a specific provision for increased costs in the "additional coverage" provision for the "expediting costs" section. Interpreting the coverage for business income as including coverage for the increased costs would render the "additional coverage" provision superfluous and ambiguous.

[Cases that cite this headnote](#)

#### Attorneys and Law Firms

[Jeffrey R. Patterson](#), Allen Matkins Leck Gamble and Mallory, San Diego, CA, for Plaintiff.

[John T. Brooks](#), [Marc Jeremy Feldman](#), Luce Forward Hamilton and Scripps, San Diego, CA, for Defendant.

#### ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

[HAYES](#), District Judge.

\*1 Pending before the Court is Defendant's motion for partial summary judgment. (Doc. # 10). The Court heard oral argument on the matter on Monday, February 4, 2008.

#### PROCEDURAL HISTORY

On May 30, 2007, Plaintiff Oceanside Pier View, L.P. (Oceanside Pier View) filed a Complaint against Defendant Travelers Property Casualty Company of America (Travelers) in California State Superior Court in San Diego, California. (Doc. # 1, Ex. A at 11). On June 27, 2007, Defendant filed an answer in the State Superior Court. (Doc. # 1, Ex. A at 63). On June 28, 2007, Defendant removed the case to the United States District Court for the Southern District of California. (Doc. # 1).

On December 12, 2007, Defendant filed the pending motion for partial summary judgment on Plaintiff's claim for the increased subcontractor costs as a result of the increased costs of construction materials and labor. (Doc. # 10). On January 17, 2008, Plaintiff filed an opposition. (Doc. # 17). On January 28, 2008, Defendant filed a reply. (Doc. # 19).

## FACTUAL BACKGROUND

Plaintiff Oceanside Pier View, L.P. is a limited partnership which owns and is developing real property located at 301 Mission Avenue, in Oceanside, California (the Property). *Declaration of Ron Douglas (Douglas Decl.)* (Doc. # 17–3), ¶ 2. Plaintiff is constructing a six-story mixed use building on the Property, which will include “retail, office, residential condominiums and parking garage uses ...” (the Project). *Douglas Decl.*, ¶ 2. Plaintiff intends to sell the retail space and office and residential condominiums after completion of the Project. *Douglas Decl.*, ¶ 3.

In late 2004, Plaintiff contacted insurance broker Barney & Barney in order to obtain insurance for the Project. *Douglas Decl.*, ¶ 3. Plaintiff informed Barney & Barney of the Project specifications and that Plaintiff had entered into a Guaranteed Maximum Price (GMP) contract with a general contractor, Leducor Construction (Leducor), to construct the Project. *Douglas Decl.*, ¶ 4. Thereafter, Barney & Barney proceeded to obtain insurance quotes for the Project from insurance carriers. *Douglas Decl.*, ¶ 4.

In or around February of 2005, Plaintiff began discussions with Defendant Travelers regarding insurance for the project. *Douglas Decl.*, ¶¶ 6–7. Plaintiff provided Defendant with the Project construction budget, as well as its view regarding which costs Plaintiff considered “hard costs,” and which costs Plaintiff considered “soft costs.” *Douglas Decl.*, ¶ 7. After review, Defendant informed Plaintiff that many of the costs Plaintiff considered “soft costs,” were, in Defendant’s view, “hard costs.” *Douglas Decl.*, ¶ 7; *Plaintiff’s Lodgment* (Doc. # 17–14), Ex. A. On April 12, 2005, Defendant issued revised insurance quotes. *Douglas Decl.*, ¶ 8.

After considering the April 12, 2005, revised quotes, Plaintiff agreed to purchase an insurance policy from Defendant. *Douglas Decl.*, ¶ 9. Defendant issued an insurance binder (the Insurance Binder), dated April 12, 2005, to reflect coverage for the period April 1, 2005, to June 1, 2005. *Douglas Decl.*, ¶ 9; *Plaintiff’s Lodgment*, Ex. D. The Insurance Binder stated that Plaintiff had coverage as follows: “Total Completed Value-\$28,201,753;” “Temporary Storage-\$1,000,000;” “In Transit Limit-\$1,000,000;” “Soft Costs-\$3,073,407;” and “Specific Testing Limit-\$5,000,000.” *Plaintiff’s Lodgment*, Ex. D. The Insurance Binder further stated that, “[t]his binder is cancelled when replaced by a policy.

If this binder is not replaced by a policy, the Company is entitled to charge a premium for the binder according to the Rules and Rates in use by the Company.” *Plaintiff’s Lodgment*, Ex. D at 3. Neither the April 12, 2005, revised quotes, nor the April 12, 2005, Insurance Binder contained a specific limitation with respect to “additional costs of labor and materials.” *Douglas Decl.*, ¶ 11.

\*2 On April 18, 2005, and in reliance upon the fact that it had insurance coverage, Plaintiff issued its general contractor, Leducor, “a Notice to Proceed with construction.” *Douglas Decl.*, ¶ 10. Plaintiff and Leducor also agreed upon a Substantial Completion date of “approximately October 18, 2006.” *Douglas Decl.*, ¶ 10. Plaintiff “began construction on the Project in April 2005, with the understanding that it had Builder’s Risk coverage for Total Completed Value at \$28,201,753 and for Soft Costs up to \$3,073,407.” *Douglas Decl.*, ¶ 12; *Plaintiff’s Lodgment*, Ex D at 1. At the time Plaintiff issued Leducor the Notice to Proceed, Plaintiff had not received an actual insurance policy. *Douglas Decl.*, ¶ 12.

On May 13, 2005, Defendant issued the insurance policy (the Policy) detailing coverage for the Project with an effective date of April 1, 2005. *Defendant’s Motion for Summary Judgment (Defendant’s MSJ)* (Doc. # 10), Ex. 1. The Policy provided basic coverage for “Builders’ Risk,” “Soft Costs,” “Business Income,” and “Rental Value,” and additional coverage for “Expediting Costs and Additional Cost of Construction Materials and Labor,” among other things. *Defendant’s MSJ*, Ex. 1 at 11–15. The Policy provided in pertinent part that,

### A. COVERAGE

We will pay for “loss” to Covered Property from any of the Covered Causes of Loss.

#### 1. Covered Property

Covered Property, as used in this Coverage Part, means “Builders’ Risk”.

#### 2. Covered Causes of Loss

Covered Causes of Loss means RISKS OF DIRECT PHYSICAL “LOSS” except those causes of “loss” listed in the Exclusions.

#### 3. Soft Costs and Special Time Element

##### a. “Soft Costs”

We will pay your “soft costs” during the “period of delay in completion”. Such “soft costs” must result from “loss to Covered Property from any of the Covered Causes of Loss which delays the completion of the “project” beyond the “planned completion date”.

b. “Business Income”

We will pay the amount by which your “business income” is actually reduced during the “period of delay in completion”. Such reduction in “business income” must result from “loss” to Covered Property from any of the Covered Causes of Loss which delays the completion of the “project” beyond the “planned completion date.”

...

**5. Additional Coverages**

...

**g. Expediting Costs and Additional Cost of Construction Materials and Labor**

(1) We will pay for the following costs made necessary by a Covered Cause of Loss to Covered Property at the “job site”:

(a) Your costs to expedite repair of Covered Property;

(b) Your increased cost of construction materials and labor; and

(c) Your costs to make changes in construction specifications.

...

(2) The most we will pay under this Additional Coverage is the least of:

(a) 5% of the applicable “Basic Limit of Insurance”; or

\*3 (b) \$100,000.

*Defendant’s MSJ*, Ex. 1 at 11, 15. The Policy defines “Builders’ Risk,” in pertinent part, as:

Property described in the Declarations under “Builders’ Risk” owned by you or for which you are legally liable consisting of:

a. Buildings or structures including temporary structures while being constructed, erected or

fabricated at the “job site”;

b. Property that will become a permanent part of the buildings or structures at the “job site”:

(1) While in transit to the “job site” or temporary storage locations;

(2) While at the “job site” or at a temporary storage location.

“Builders’ Risk” does not include:

a. Contraband, or property in the course of illegal transit or trade;

b. Buildings or structures that existed at the “job site” prior to the inception of this policy;

c. Land (including land on which the property is located) or water.

*Defendant’s MSJ*, Ex. 1 at 22. In the event of a loss, the Policy valued the “Builders’ Risk” coverage as the least of the following,

a. The Cost to replace Covered Property (without deduction for depreciation) with other property:

(1) Of comparable material and quality; and

(2) Used for the same purpose;

including your labor, reasonable profit and delivery charges;

b. The cost of reasonably restoring the property to its condition immediately before “loss”;

c. The cost of replacing that property with substantially identical property; or

d. Your legal liability for property of others.

*Defendant’s MSJ*, Ex. 1 at 20.

The Policy defines “Soft Costs,” as follows:

“Soft costs” means your actual and necessary business costs in excess of your budgeted amount for the “project” consisting only of type shown in the Declarations.

*Defendant's MSJ*, Ex. 1 at 25. The Policy's Declarations limits recovery for "Soft Costs" to: Interest on money borrowed to finance construction

Advertising expenses

Realty taxes and other assessments

Costs resulting from the renegotiation of your lease(s) or construction loans.

*Defendant's MSJ*, Ex. 1 at 8.

The Policy defines "Business Income" as follows:

4. "Business income" means the sum of:

a. The net profit or loss (before income taxes) from the operation or use of the "project"; and

b. The continuing normal operating expenses, including payroll, of the operation or use of the "project", less your "rental value".

*Defendant's MSJ*, Ex. 1 at 22.

On the evening of May 31, 2005, a shoring wall on the east side of the Property failed and caused damage to the Project. *Douglas Decl.*, ¶ 13. As a result of the shoring wall failure, "progress on the construction was interrupted, the critical path of construction was impacted, and the completion date for the Project was delayed." *Douglas Decl.*, ¶ 13. Plaintiff suffered losses as a result of the shoring wall failure, "including, without limitation, costs to redesign and repair the failed shoring wall, increases to the GMP pursuant to change order requests for Ledcor, increased costs to protect the Property from further damage, increased costs of financing, increased fees and general conditions for the general contractor and project manager, and other soft costs and loss of business income." *Douglas Decl.*, ¶ 14. Plaintiff determined that the shoring failure "caused a delay to the Substantial Completion date of 79 days." *Douglas Decl.*, ¶ 14.

\*4 Plaintiff promptly informed Defendant of its claim for losses relating to the shoring wall failure, and upon receipt of the claim, Defendant started an investigation. *Douglas Decl.*, ¶ 13. In September of 2005, Plaintiff received the Policy. *Douglas Decl.*, ¶ 12. On February 7, 2006, Plaintiff submitted a claim seeking approximately \$1.3 million. *Douglas Decl.*, ¶ 14.

Throughout 2006, Defendant and its representatives met and corresponded with Plaintiff and its representatives regarding the claim. *Douglas Decl.*, ¶ 15. From time-to-time during this period, Defendant requested

additional back-up information, and in each instance, Plaintiff provided the information. *Douglas Decl.*, ¶ 15. On June 5, 2006, Defendant sent a letter to Plaintiff which provided in part, "[p]lease be advised of our position that the cause of loss falls within the insuring agreement of the policy and coverage is afforded subject to all applicable terms, conditions and deductible(s)." *Plaintiff's Lodgment*, Ex. E; *Douglas Decl.*, ¶ 16.

On June 16, 2006, Defendant delivered Plaintiff an "initial advance of \$250,000" as partial payment on the insurance claim. *Douglas Decl.*, ¶ 17. On or about August 5, 2006, Plaintiff submitted to Defendant an updated loss summary detailing losses of approximately \$1.5 million. *Douglas Decl.*, ¶ 18. On November 16, 2006, Defendant delivered Plaintiff an additional advance of \$180,399.27 as partial payment on Plaintiff's insurance claim. *Douglas Decl.*, ¶ 19. On or about February 22, 2007, Plaintiff submitted to Defendant an addition updated loss summary detailing losses of \$1,666,974.16. *Douglas Decl.*, ¶ 21. On March 9, 2007, Defendant delivered Plaintiff an additional advance of \$131,081.74 as partial payment on Plaintiff's insurance claim. *Douglas Decl.*, ¶ 22.<sup>1</sup>

On March 22, 2007, Defendant notified Plaintiff by letter that portions of Plaintiff's insurance claim would not be covered. *Douglas Decl.*, ¶ 23. Among other things, Defendant informed Plaintiff that Plaintiff's losses from increased labor and materials costs were not entirely covered under the Policy, and were subject to a \$100,000.00 limitation. *Douglas Decl.*, ¶ 23; *Plaintiff's Lodgment*, Ex. G. In the letter of March 22, 2007, Defendant sought further information which related to the claim. *Plaintiff's Lodgment*, Ex. G.

On June 28, 2007, Plaintiff filed the Complaint in this matter, in part seeking declaratory relief providing that Plaintiff is entitled to coverage for "loss of income resulting from increased labor, materials, overhead, and general condition expenses due to delays caused by the Shoring Failure." *Complaint*, ¶ 33.

## STANDARD OF REVIEW

Summary judgment is appropriate under [Rule 56 of the Federal Rules of Civil Procedure](#) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *FED. R. CIV. P. 56(c)*; see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A

fact is material when, under the governing substantive law, it could effect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute over a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

\*5 In ruling on a motion for summary judgment, “[t]he district court may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir.2001). The court is not obligated to “scour the record in search of a genuine issue of triable fact.” *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.1996) (citing *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir.1995)). The court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). “Credibility determinations [and] the weighing of evidence ... are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment.” *Anderson*, 477 U.S. at 255.

## DISCUSSION

The only issue raised by Defendant’s motion for partial summary judgment is whether Plaintiff is entitled to recover more than \$100,000.00 from Defendant for losses sustained by Plaintiff as a result of the increased costs of construction materials and labor associated with previously unconstructed portions of the Project.

Defendant contends that it is entitled to summary judgment on Plaintiff’s claim for the increased costs of construction materials and labor for previously un-constructed portions of the Project because it has paid Plaintiff all that it owes under the Policy. Specifically, Defendant contends that the plain language of the Policy provides that Defendant is not obligated to pay more than \$100,000.00 for the increased costs to construction materials and labor pursuant to the “Expediting Costs and Additional Cost of Construction Materials and Labor” provisions of the Policy. Defendant’s MSJ, 5–6. Defendant contends that the “Builders’ Risk” and “Business Income” provisions do not provide coverage for the increased costs of construction materials and labor, particularly when those provisions are read in light of the

entire policy.

Plaintiff contends that the plain language of the Policy provides coverage for the increased costs to construction materials and labor up to approximately \$28 million. Specifically, Plaintiff contends that the “Builders’ Risk” and/or “Business Income” provisions provide coverage individually or together for the increased costs to construction materials and labor for previously unconstructed portions of the Project. Assuming that the Court concludes that neither the “Builders’ Risk” nor “Business Income” provisions provide coverage for the increased costs of construction materials and labor, Plaintiff contends in the alternative that the Policy is ambiguous, and that extrinsic evidence requires that the Court interpret the Policy in favor of Plaintiff and in such a manner as to include coverage for the increased costs of construction materials and labor.

## I. Principles of Policy Interpretation

\*6 Under California Law, “[t]he meaning to be ascribed to an insurance policy, as with any contract, is a question of law.” *Ray v. Farmers Ins. Exch.*, 200 Cal.App.3d 1411, 1415–16, 246 Cal.Rptr. 593 (Cal.Ct.App.1988). Courts must interpret an insurance policy “so as to give effect to the mutual intention of the parties at the time the policy was issued, and this intent should be inferred, to the extent possible, solely from the written provisions of the policy contract.” *PMI Mortg. Ins. Co. v. Am. Int’l Specialty Lines Ins. Co.*, 394 F.3d 761, 764 (9th Cir.2005) (citing *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 646, 3 Cal.Rptr.3d 228, 73 P.3d 1205 (Cal.2003)). “When an insurance policy contains clear and unequivocal provisions, the only reasonable expectation to be found is that afforded by the plain language of the terms in the contract.” *Travelers Casualty & Surety Co. v. Employers Ins. of Wausau*, 130 Cal.App.4th 99, 115, 29 Cal.Rptr.3d 609 (Cal.Ct.App.2005). Where the plain language of an insurance policy is “clear and unambiguous, the court must enforce it as written and cannot modify the contract or create ambiguity where none exists.” *Contractors Equip. Maint. Co. v. Bechtel Hanford, Inc.*, 514 F.3d 899, 903 (9th Cir.2008). Like all contracts, the whole of an insurance policy “is to be taken together, so as to give effect to every part.” CAL. CIV.CODE § 1641; see *Collin v. Am. Empire Ins. Co.*, 21 Cal.App.4th 787, 818, 26 Cal.Rptr.2d 391 (Cal.Ct.App.1994) (“[O]ne cannot read a term of an insurance policy in such a way that would render some of its words meaningless.”).

## II. Whether the Plain Language of the Policy Provides More Than \$100,000.00 of Coverage to Plaintiff For Losses Sustained as a Result of the Increased Costs of Construction Materials and Labor

On May 13, 2005, Defendant issued the Policy detailing coverage for the Project with an effective date of April 1, 2005. *Defendant's MSJ*, Ex. 1. The Policy provided basic coverage for "Builders' Risk," "Soft Costs," and "Business Income," and additional coverage for "Expediting Costs and Additional Cost of Construction Materials and Labor," among other things. *Defendant's MSJ*, Ex. 1 at 11–15.

### A. Builders' Risk

The "Builders' Risk" provisions of the Policy provide that Defendant "will pay for 'loss' to Covered Property from any of the Covered Causes of Loss." *Defendant's MSJ*, Ex. 1 at 11. The Policy defines "Covered Property" as "Builders' Risk," and "Builders' Risk" as,

Property described in the Declarations under "Builders' Risk" owned by you or for which you are legally liable consisting of:

- a. Buildings or structures including temporary structures while being constructed, erected or fabricated at the "job site";
- b. Property that will become a permanent part of the buildings or structures at the "job site":
  - (1) While in transit to the "job site" or temporary storage locations;
  - (2) While at the "job site" or at a temporary storage location.

\*7 *Defendant's MSJ*, Ex. 1 at 22. The Policy defines "Covered Causes of Loss" as, "RISKS OF DIRECT PHYSICAL 'LOSS' except those causes of 'loss' listed in the exclusions." *Defendant's MSJ*, Ex. 1 at 11.

Defendant contends that the "Builders' Risk" provisions exclude coverage for the increased costs of construction materials and labor for previously un-constructed portions of the Project because "Builders' Risk" only provides coverage for direct physical loss to covered property. Defendant contends that coverage for the increased costs of construction materials and labor related to work on

previously un-constructed portions of the Project is governed by the "Additional Coverages" provision for "Expediting Costs and Additional Cost of Construction Materials and Labor." *See Defendant's MSJ*, Ex. 1 at 15.

Plaintiff contends that the "Builders' Risk" provisions provide coverage for the increased costs of construction materials and labor because (a) the Policy is ambiguous, and (b) Plaintiff understood at the time that it purchased the Policy that the increased costs of materials and labor were considered hard costs, and were covered under the Policy. *See Opposition to MSJ*, 9–10.

Where the plain language of an insurance policy is "clear and unambiguous, the court must enforce it as written and cannot modify the contract or create ambiguity ...." *Bechtel Hanford, Inc.*, 514 F.3d at 903. Here, the Court finds that the "Builders' Risk" provisions plainly provide coverage for losses resulting from the direct physical loss of buildings or structures being erected on the Property, but do not include coverage for the increased costs of construction materials and labor to construct never-before constructed portions of the Project. Indeed, the plain language of the "Builders' Risk" provisions protect only those buildings, structures, or portions of buildings and structures under construction at the Project, and do not protect against the unforeseen costs to construct never-before constructed buildings or structures which may arise as a result of delays. Accordingly, while the "Builders' Risk" provisions covered and Defendant paid Plaintiff for the cost to replace the failed shoring wall in this case, including any increased costs to construction materials and labor which were necessary to reconstruct or replace the shoring wall to its original condition, the "Builders' Risk" provisions did not and do not cover the increased costs of construction materials and labor which Plaintiff alleges it incurred to complete portions of the Project which were not yet under construction at the time that the shoring wall failure caused the delay. This conclusion is buttressed by the Policy's description of how to value covered property at the time of loss, which provides that the covered property is valued as the least of (a) the cost to replace the covered property with other property, (b) the cost of reasonably restoring the property to its condition immediately before loss, or (c) the cost to replace the covered property with substantially identical property. *See Defendant's MSJ*, Ex. 1 at 20. As the valuation provisions confirm, the "Builders' Risk" provisions do not contemplate coverage for unforeseen costs which may be incurred to construct buildings or portions of buildings which have yet to be constructed in the first instance at the time of a delay.

\*8 Though Plaintiff contends that the Policy is ambiguous

and should therefore be interpreted in Plaintiff's favor, Plaintiff's opposition to the motion for summary judgment fails to identify a single portion of the Policy which is ambiguous. Indeed, at oral argument Plaintiff's counsel repeatedly conceded that the plain language of the Policy was not ambiguous on its face, but made ambiguous only after considering extrinsic evidence and principles of equity and fairness. See *Transcript of Oral Argument, February 8, 2008* at 9, 11, 17. "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable." *Mirpad, LLC v. Calif. Ins. Guarantee Assn.*, 132 Cal.App.4th 1058, 1069, 34 Cal.Rptr.3d 136 (2005). Here, Plaintiff has not provided, nor can the Court discern, a reasonable construction of the "Builders' Risk" provisions which would include coverage for the increased costs to construction materials and labor. Instead, the Court concludes that the plain language of the "Builders' Risk" provisions do not provide coverage for the increased costs to construction materials and labor. The Court concludes that the "Builders' Risk" provisions are not ambiguous on their face, and are not susceptible to more than one reasonable construction. See *Travelers Casualty & Surety Co.*, 130 Cal.App.4th at 115, 29 Cal.Rptr.3d 609 (holding that where the plain language is clear, "resort to extrinsic evidence to support a different meaning" is not permitted).

In addition to analyzing the plain language of the "Builders' Risk" provisions, the Court is required to read the provisions of an insurance policy "together, so as to give effect to every part." CAL. CIV.CODE § 1641; see *Collin*, 21 Cal.App.4th at 818, 26 Cal.Rptr.2d 391. Here, the Policy specifically includes a provision for the increased costs of construction materials and labor under "Additional Coverages":

## 5. Additional Coverages

...

### g. Expediting Costs and Additional Cost of Construction Materials and Labor

(1) We will pay for the following costs made necessary by a Covered Cause of Loss to Covered Property at the "job site":

(a) Your costs to expedite repair of Covered Property;

(b) Your increased cost of construction materials and labor; and

(c) Your costs to make changes in construction

specifications.

...

(2) The most we will pay under this Additional Coverage is the least of:

(a) 5% of the applicable "Basic Limit of Insurance"; or

(b) \$100,000.

*Defendant's MSJ*, Ex. 1 at 12, 15. Read in its entirety, the Court concludes that the plain language of the Policy provides limited coverage for increased costs to construction materials and labor for previously un-constructed portions of the Project under the additional coverage for "Expediting Costs and Additional Cost of Construction Materials and Labor," and not under the "Builders' Risk" provisions. Interpreting the "Builders' Risk" provisions as including coverage for the increased costs of construction materials and labor would render the "Additional Coverage" provision for "Expediting Costs and Additional Cost of Construction Materials and Labor" superfluous, ambiguous, and with respect to the latter provision's \$100,000.00 limitation, meaningless. See *Mirpad, LLC v. California Ins. Guarantee Assn.*, 132 Cal.App.4th 1058, 1073, 34 Cal.Rptr.3d 136 (2005) ("An interpretation of the policy that creates an ambiguity where none existed by rendering words redundant or superfluous violates all rules of construction.").

\*9 The Court concludes that the "Builders' Risk" provisions of the Policy do not provide coverage for the increased costs to construction materials and labor.

## B. Business Income

The Policy provides coverage for loss of "Business Income" as follows:

We will pay the amount by which your "business income" is actually reduced during the "period of delay in completion". Such reduction in "business income" must result from "loss" to Covered Property from any of the Covered Causes of Loss which delays the completion of the "project" beyond the "planned completion date."

*Defendant's MSJ*, Ex. 1 at 11. The Policy defines "Business Income" as the sum of,

- a. The net profit or loss (before income taxes) from the operation or use of the "project"; and
- b. The continuing normal operating expenses, including payroll, of the operation or use of the "project", less your "rental value".

*Defendant's MSJ*, Ex. 1 at 22.

Defendant contends that the "Business Income" provisions do not include coverage for the increased costs of construction materials and labor because coverage for "Business Income" is limited to losses of income from operation or use of the Project which incur during a delay in the operation or use of the Project. Defendant contends that Plaintiff never operated or used the Project during the alleged 79 day delay so as to incur recoverable loss of "Business Income." Defendant further contends that the Policy cannot provide coverage for the increased costs of construction materials and labor under the "Business Income" provisions because such losses are only recoverable under the "Additional Coverage" provision for "Expediting Costs and Additional Cost of Construction Materials and Labor."

Plaintiff contends that the increased costs for construction materials and labor are covered under the "Business Income" provision because, under the facts of this case, the increased costs of construction materials and labor associated with developing the Project after the delay will result in lost income for Plaintiff.

As noted previously, the Court must read the Policy as a whole, "so as to give effect to every part" of the Policy. [CAL. CIV.CODE § 1641](#); see [Collin](#), 21 Cal.App.4th at 818, 26 Cal.Rptr.2d 391 ("one cannot read a term of an insurance policy in such a way that would render some of its words meaningless."). Here, when read in its entirety, the Policy provision for "Business Income" cannot include coverage for the increased costs of materials and labor because there is a specific provision for the increased costs of construction materials and labor—the "Additional Coverage" provision for "Expediting Costs and Additional Cost of Construction Materials and Labor"—and interpreting the coverage for "Business Income" as including coverage for the increased costs of material and labor would render the "Additional Coverage" provision for "Expediting Costs and Additional Cost of Construction Materials and Labor" superfluous and ambiguous. See [Mirpad](#), 132 Cal.App.4th at 1073, 34 Cal.Rptr.3d 136 ("An interpretation of the policy that creates an ambiguity where none existed by

rendering words redundant or superfluous violates all rules of construction."). In addition, the Court concludes that Plaintiff's alleged losses due to the increased costs of construction materials and labor do not qualify as "Business Income" under the plain language of the "Business Income" provisions because Plaintiff has not established that losses were incurred during the period of delay in completion of the Project or that there was ever, or could ever have been, income from operation or use of the Project during the delay.

**\*10** After reviewing the plain language of the Policy, the Court concludes that the "Business Income" provisions do not provide coverage for the increased costs of construction materials and labor.

## II. Issuance of the Policy

During the claims adjustment period, as well as during the majority of this lawsuit, it was undisputed that the Policy was in effect on the day that the shoring wall failed. At oral argument on the motion for summary judgment, however, Plaintiff's counsel for the first time questioned whether the Policy was ever in effect. *Oral Argument Trans.* at 10.

"In the absence of evidence to the contrary, a policy will be presumed to take effect upon its date." [Anderson v. Mutual Life Ins. Co.](#), 164 Cal. 712, 716, 130 P. 726 (1913). Here, the evidence before the Court shows that Policy bears an issuance date of May 13, 2005, and an effective date of April 1, 2005. The Court finds that Plaintiff has not submitted any evidence which would rebut that the Policy issued and was effective on those dates. *Defendant's MSJ*, Ex. 8–26. Though Plaintiff submitted a declaration which states that Plaintiff did not receive "a copy of the full policy until September 2005," Plaintiff's opposition to the motion for summary judgment does not explain or describe how that fact contradicts the evidence of issuance on the Policy itself, and Plaintiff has not cited a single case which bears on the issue. In addition, neither Plaintiff nor Plaintiff's counsel has ever asserted either that the Policy never issued, or that the Policy was never in effect. Though Plaintiff's counsel questioned whether the Policy had been issued at oral argument, counsel ultimately stated that he could not "take a position" on "when the Policy was actually issued." *Oral Argument Trans.* at 10. Counsel's statement at oral argument, however, directly contradicted Plaintiff's opposition to the motion for summary judgment, the introduction to which concedes that, "Travelers issued Commercial Inland Marine Insurance

Policy No. QT-660-7633B638-TI-05 ('Policy') to OPV ... for the policy period from April 1, 2005 to April 1, 2006, covering the Property." (Doc. # 17 at 1, ll. 11-14); *see also Defendant's MSJ*, Ex. 1.

"Whether an insurance policy has or has not been delivered after its issuance so as to complete the contract and give it binding effect does not depend on its manual delivery to, or possession by, insured, but rather on the intention of the parties as manifested by their acts or words ...." *Ahern v. Dillenback*, 1 Cal.App.4th 36, 46, 1 Cal.Rptr.2d 339 (1991). Here, there is no evidence of the parties mutual intent which is inconsistent with the issuance date that appears on the Policy.

The Court concludes that there is no genuine issue of material fact with respect to whether the Policy issued. The undisputed evidence before the Court is that the Policy issued on May 13, 2005, and was effective on April 1, 2005.

## CONCLUSION

The Court concludes that the Policy provides coverage for

### Footnotes

- <sup>1</sup> Between May 31, 2005, and the beginning of this lawsuit, neither party disputed that the Policy had been issued and was in effect on the date of the shoring wall collapse.

the increased costs to construction materials and labor for previously un-constructed portions of the Project under the additional coverage for "Expedited Costs and Additional Cost of Construction Materials and Labor." *See Defendant's MSJ*, Ex. 1 at 15. The Court further concludes that the Policy provides up to \$100,000.00 of coverage for the increased costs of construction materials and labor under the "Expedited Costs and Additional Cost of Construction Materials and Labor" provisions, and that Defendant has paid to Plaintiff the \$100,000.00 maximum under those provisions. Accordingly, and because the Court concludes that Plaintiff is not entitled to recover for the increased costs of construction materials and labor for previously un-constructed portions of the Project under the "Builders' Risk" or "Business Income" provisions of the Policy, the Court hereby GRANTS Defendant's motion for partial summary judgment on Plaintiff's claim for losses due to the increased costs of construction materials and labor. (Doc. # 10).

**\*11 IT IS SO ORDERED.**

### All Citations

Not Reported in F.Supp.2d, 2008 WL 7822214

 KeyCite Yellow Flag - Negative Treatment  
Distinguished by [One Place Condominium, LLC v. Travelers Property  
Cas. Co. of America](#), N.D.Ill., April 22, 2015  
513 F.Supp.2d 55  
United States District Court, D. New Jersey.

ZURICH AMERICAN INSURANCE COMPANY,  
Plaintiff,  
v.  
KEATING BUILDING CORPORATION, et al.,  
Defendants.

Civil Action No. 04-1490.

March 22, 2007.

#### Synopsis

**Background:** Insurer under a builders' risk policy sued insureds, a construction site owner and a general contractor, seeking a declaratory judgment regarding a dispute over the payment of insurance proceeds for losses suffered by the owner after a serious construction accident. The insurer and the owner filed cross-motions for partial summary judgment.

**Holdings:** The District Court, [Simandle](#), J., held that:

[1] "debris removal" costs were limited to the costs of removing debris from the property and transporting it away from the project site;

[2] "debris removal" costs did not include "forensic" debris removal costs;

[3] the policy covered increased costs to complete construction of undamaged property; and

[4] consequential loss exclusion did not apply to increased costs to complete construction of undamaged property.

Ordered accordingly.

West Headnotes (12)

[1]

#### Insurance

🔑 [Risks or Losses Covered and Exclusions](#)

#### Insurance

🔑 [Amount of Insurance](#)

Under New Jersey law, for purposes of a builders' risk policy issued to the owner of a construction site on which a large portion of a garage collapsed, "debris removal" costs, which were subject to a sublimit, were limited to the costs of removing debris from the property and transporting it away from the project site, and did not include costs of demolition of the damaged property and related engineering expenses or costs associated with electricity, permits, scaffolding, elevator/manlift services and the general contractor's supervision and coordination of demolition subcontractors; the policy repeatedly referred to costs associated with "demolition" and with "debris removal" separately.

[4 Cases that cite this headnote](#)

[2]

#### Insurance

🔑 [Risks or Losses Covered and Exclusions](#)

Under New Jersey law, "debris removal" costs covered by a builders' risk policy issued to the owner of a construction site on which a large portion of a garage collapsed did not include "forensic" debris removal costs associated with an investigation into the cause of the collapse, in which four construction workers were killed, to the extent such costs were over and above the costs of standard debris removal; the plain meaning of the policy language did not indicate that the parties contemplated coverage in excess of more typical debris removal techniques, and such costs were incurred to address third-party liability issues, for which the policy did not provide coverage.

[4 Cases that cite this headnote](#)

[3]

#### Insurance

🔑 Real property

**Insurance**

🔑 Repair or Replacement

Under New Jersey law, a builders' risk policy issued to the owner of a construction site on which a large portion of a garage collapsed covered increased costs to complete construction of undamaged property; the policy's valuation clause stated that the policy covered costs to repair or replace the property lost or damaged at the time and place of loss, and from the perspective of an ordinary insured reading the policy, the phrase "property lost or damaged" as a result of the collapse referred to the entire structure, not simply to the location of the collapse.

2 Cases that cite this headnote

[4]

**Insurance**

🔑 Risks Covered and Exclusions

**Insurance**

🔑 Exclusions and limitations in general

Under New Jersey law, a court must construe insurance policy provisions that grant coverage broadly and those that limit coverage narrowly, so as to maximize the insurance available to cover a loss.

1 Cases that cite this headnote

[5]

**Insurance**

🔑 Risks or Losses Covered and Exclusions

Under New Jersey law, an "all risk" policy covers all fortuitous losses that an insured peril proximately causes, unless an exclusion applies.

1 Cases that cite this headnote

[6]

**Insurance**

🔑 Rules of Construction

**Insurance**

🔑 Ambiguity in general

Under New Jersey law, when evaluating the insurer's claim as to the meaning of language in a policy, the court is permitted to consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question.

1 Cases that cite this headnote

[7]

**Insurance**

🔑 Combined or concurrent causes

Under New Jersey law, a consequential loss exclusion in a builders' risk policy issued to the owner of a construction site on which a large portion of a garage collapsed did not apply to increased costs to complete construction of undamaged property; the efficient proximate cause of the loss was the collapse, a covered peril, and moreover, the types of losses listed in the exclusion were purely economic losses that were separate and apart from regular construction costs.

4 Cases that cite this headnote

[8]

**Insurance**

🔑 Exclusions and limitations in general

Under New Jersey law, when dealing with clauses of exclusion in an insurance policy, strict interpretation is required.

1 Cases that cite this headnote

[9]

**Insurance**

🔑 Burden of proof

Under New Jersey law, an insurer bears the burden of proving that a provision limiting coverage, either an exclusion or limitation,

applies to the particular loss at issue.

[Cases that cite this headnote](#)

additional costs associated with the delay in completion.

[1 Cases that cite this headnote](#)

[10] **Insurance**  
🔑 [Proximate Cause](#)

Under New Jersey law, when an insurance policy uses an exclusion which bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the efficient proximate cause of the loss.

[4 Cases that cite this headnote](#)

[11] **Insurance**  
🔑 [Proximate Cause](#)

Under New Jersey law, coverage under an insurance policy is available if the covered peril was the efficient proximate cause of a loss and an excluded peril merely occurred in the chain of events that followed.

[4 Cases that cite this headnote](#)

[12] **Insurance**  
🔑 [Risks or Losses Covered and Exclusions](#)  
**Insurance**  
🔑 [Combined or concurrent causes](#)  
**Insurance**  
🔑 [Repair or Replacement](#)

Under New Jersey law, a “delay in completion” exclusion in a builders’ risk policy issued to the owner of a construction site on which a large portion of a garage collapsed did not apply to increased costs to complete construction of undamaged property; the exclusion did not state that a delay in completion would be a consequential loss but that the penalties associated with a delay in completion would be a consequential loss, and the insured owner was not seeking coverage for a penalty, but for

**Attorneys and Law Firms**

**\*57** [Philip C. Silverberg](#), Esq., [William D. Wilson](#), Esq., [Mark S. Katz](#), Mound, Cotton, Wollan & Greengrass, Newark, NJ, for Plaintiffs Zurich American Insurance Company.

[David Goodwin](#), Esq., [Stephen Goldberg](#), Esq., [Monika Lee](#), Esq., Heller Ehrman, LLP, San Francisco, CA, [John T. Wolak](#), Esq., [Michael R. Griffinger](#), Esq., Gibbons, P.C., Newark, NJ, for Defendants Aztar Corporation and Adamar of New Jersey, Inc. d/b/a Tropicana Casino and Resort.

**OPINION**

[SIMANDLE](#), District Judge.

This matter is before the Court upon cross-motions for partial summary judgment by Plaintiff Zurich American Insurance Company (“Zurich”) and Defendants Aztar Corporation and Adamar of New Jersey, Inc. d/b/a Tropicana Casino and Resort (collectively, “Aztar”). This declaratory judgment action arises from a dispute over the payment of insurance proceeds for losses suffered by Aztar after a serious construction accident at the Tropicana Hotel and Casino (the “Tropicana”) in **\*58** Atlantic City, New Jersey in which a large portion of a garage collapsed. Zurich filed this action as a way to assist the parties in resolving certain disputes that developed during the course of the claims adjustment process.

The parties raise four issues in these cross-motions. First, the Court is asked to resolve whether the costs associated with removing the damaged remains of the collapsed portion of the garage constitutes “costs to remove debris”—such that it would be subject to the insurance

policy's debris removal sublimit—or “demolition,” which would not be subject to the insurance policy's debris removal sublimit (discussed in Section III.A, *infra*). Second, the Court is asked to resolve the proper method to calculate the debris removal sublimit. Third, the Court is asked to determine whether the policy covers additional costs Aztar paid related to the so-called “forensic debris removal” (discussed in Section III.B, *infra*). Finally, the parties seek clarification regarding whether the delay-driven increases in construction costs incurred by Aztar in completing the expansion project are covered under the insurance policy (discussed in Section III.C, *infra*).

For the reasons discussed below, the Court will grant in part and deny in part Zurich's motion for partial summary judgment and grant in part and deny in part Aztar's motion for partial summary judgment. Specifically, on the issue of the scope of the “Debris Removal” clause, the Court finds in favor of Aztar and holds that the only costs that are subject to the “Debris Removal” sublimit in the builders risk policy are the costs of removing debris from the property and transporting it away from the site. Because the Court grants Aztar's motion regarding the scope of the Debris Removal clause, this Court need not address the issue of the calculation of the Debris Removal sublimit. The Court will grant Zurich's motion for partial summary judgment on the issue of whether Zurich must pay the extra costs associated with the “forensic debris removal,” finding these costs are not covered. Finally, the Court grants Aztar's motion for partial summary judgment on the issue of whether Zurich must pay the extra costs that Aztar paid to complete the project and holds that Zurich cannot escape paying the extra costs that Aztar paid to complete the project solely on the ground that the costs involve work at the project away from the immediate area of the collapse.<sup>1</sup>

## I. BACKGROUND

### A. The Collapse of the Tropicana Expansion

Aztar contracted with Keating Building Corporation (“Keating”) for Keating to serve as the general contractor on a major expansion project at Aztar's Tropicana Hotel and Resort in Atlantic City, New Jersey (the “Project”). Specifically, Aztar contracted for Keating to build a twenty-seven-floor expansion which would include retail, dining and entertainment space on the first three floors, followed by a seven-level parking garage, followed by

seventeen floors of hotel rooms. Aztar and Keating expected to complete the project \*59 by the end of the first fiscal quarter of 2004.<sup>2</sup>

On October 30, 2003, as the Project was well underway, portions of six floors of the structure collapsed. The collapsed section came to rest on top of the three-level retail, dining and entertainment complex. The accident resulted in the death of four construction workers (and the injury of numerous others), significant property damage and delay losses. According to Aztar, the accident brought construction of the entire project to a halt and, for nearly three months, work on the Project was limited to emergency measures. Keating then devised a demolition plan that attempted to minimize further damage and maximize preservation of the usable portions of the building. To this end, Keating contracted with Bradenburg Industrial Services Company to assist in the engineering task of planning to demolish and dismantle the damaged floors and preserve, where appropriate, the undamaged portions of the structure. Next, Keating substantially revised the schedule for completion of the Project, meaning that all synchronized work needed to be rescheduled and re-ordered. Because of the accident, Aztar experienced a nearly eight-month delay, with construction of the building not being completed until the end of November 2004. Aztar claims that, due to the dismantlement, demolition, debris removal and reconstruction required after the accident and the delay caused by the accident, the cost of the Project ballooned from \$225 million to over \$300 million.

### B. The Insurance Policy

Before beginning construction on the Project, Zurich and Aztar entered into an insurance agreement in which Zurich issued a “builders' risk” insurance policy to Aztar covering Aztar, its operating entity Adamar of New Jersey, Keating and Keating's subcontractors for losses arising out of the accident.<sup>3</sup> (Ex. C to the Certification of Louis Chiafullo (the “Policy”)). The Policy provides “all risks” insurance in two parts.

#### 1. Property Coverage

First, the policy contains “property” coverage, insuring Aztar, Keating and Keating's subcontractors. The Policy states:

This policy, subject to the terms, exclusions, limitations and conditions contained herein or endorsed hereto, insures against all risk of direct physical loss or damages to Insured Project....

(Policy at AZINS 00539.) Under the Policy, the “Valuation” of the “direct physical loss or damages” to property under construction shall be:

Costs to repair or replace the property lost or damaged at the time and place of loss with material of like kind and quality less betterment including contractor’s reasonable profit and overhead....

(*Id.* at AZINS 000548). The Policy expressly excludes, however, any damage or expense “caused directly or indirectly and/or contributed to, in whole or in part” by “consequential loss, damage or expense of any kind or description including but not limited to ... penalties for non-completion, delay in completion, or non compliance with contract conditions....” (*Id.* at AZINS 000541).

The Property Coverage also contains a provision with respect to “Debris Removal.” Specifically, this provision states:

**\*60 Debris Removal:** ... in the event of direct physical loss or damage insured hereunder and occurring during the policy period, the Company will pay the following necessary and reasonable costs:

- (1) costs to remove debris being an insured part of the property from the project location of the insured; and/or
- (2) costs of cleanup, at the project location of the insured, made necessary as a result of such direct physical loss or damage.

(*Id.* at AZINS 00540.) Debris Removal costs, however, are subject to a Debris Removal sublimit. (*Id.* at AZINS 00537.) Specifically, the Debris Removal sublimit is “25% of the amount of insured physical loss or damage.” (*Id.*)

## **2. Delay in Completion Endorsement**

Second, the policy contains a “Delay in Completion” endorsement. (Policy at AZINS 000551.) This endorsement insured Aztar (but not Keating or its subcontractors) against the loss of gross earnings, rental income and “soft costs/additional expenses” associated with a delay in the building’s construction schedule. (*Id.*)

The Policy also has a “blanket” limit of liability of \$200 million per occurrence as well as various “sublimits” of liability that apply to specific losses (besides the “Debris Removal” sublimit). (*Id.* at AZINS 00537.) The Policy is Zurich’s standard proprietary form, which it sold to Aztar on a take-it-or-leave-it basis.

## **C. The Claims Adjustment Process**

Aztar notified Zurich about the accident immediately. Representatives and consultants from Zurich arrived at the Project site the day after the accident. At the request of and with the assistance of Zurich, Keating instituted a system of classification for the work performed on site and instructed its foremen and supervisors about the classification system. Specifically, Keating assigned “insurance” job numbers to costs that were not within the scope of the original construction contract but resulted directly from the collapse and submitted these expenses (referred to by the parties as “Requests for Compensation” or “RCs”) to Zurich for payment.

According to Zurich, the RCs included the costs incurred by Keating to remove the debris and repair the collapsed section of the garage, as well as increased construction costs incurred by Keating—apart from the debris removal and repair costs—because the entire Project took longer to complete. Aztar separately submitted a claim under the Delay in Completion endorsement for various economic losses it sustained because of the delay in completing the overall project (e.g., lost rent, lost hotel revenue and additional interest costs attributed to the delay in completing the project).

Zurich and its accountants reviewed the RCs. Those RCs that Zurich did not immediately agree to pay were designated RCs that were “held for discussion.” Aztar and Zurich resolved many of the RCs categorized as “held for discussion” but according to Aztar, as many as \$45 million of RCs “held for discussion” remain unpaid.

Overall, Aztar and Keating submitted an insurance claim for \$80 million in increased construction costs resulting from the accident. Zurich admitted coverage and paid (or agreed to pay) approximately \$40 million. Some of the money paid out was categorized by Zurich as “Debris Removal.”<sup>4</sup> Zurich announced that the RCs for \*61 Debris Removal exceeded the claimed sublimit and that Zurich would not pay above the sublimit. As a consequence of these actions, Zurich’s payments fell short of the amounts requested in the RCs and Aztar was forced to advance the funds that Keating needed to complete the Project.

#### D. Procedural History

Zurich filed this declaratory judgment action against both Keating and Aztar on March 30, 2004. Aztar filed a counterclaim (1) seeking a declaratory judgment that Zurich is obligated to pay all losses that Aztar and Keating submitted and (2) alleging breach of contract. Since the filing of the declaratory judgment, the parties have successfully worked out a number of the disputes that arose during the claims adjustment process. After an unsuccessful day of mediation on the remaining issues, the parties asked Magistrate Judge Donio to postpone a second scheduled day of mediation so that the parties could file these motions for summary judgment to resolve certain legal disputes concerning damages issues. Both Aztar and Zurich filed motions for partial summary judgment, to which both parties filed timely oppositions and reply briefs. [Docket Item Nos. 88, 95] The Court heard oral argument on the cross-motions on November 3, 2006.<sup>5</sup>

## II. SUMMARY JUDGMENT STANDARD OF REVIEW

Zurich and Aztar both moved for summary judgment pursuant to [Rule 56, Fed.R.Civ.P.](#) A court may grant summary judgment when the materials of record “show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” [Fed.R.Civ.P. 56\(c\)](#); see [Lang v. New York Life Ins. Co.](#), 721 F.2d 118, 119 (3d Cir.1983). A dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is “material” only if it might affect the outcome of the suit under the applicable rule of law. See *id.* Disputes over irrelevant or

unnecessary facts will not preclude a grant of summary judgment. *Id.*<sup>6</sup>

### \*62 III. DISCUSSION

Both Zurich and Aztar have filed motions for partial summary judgment seeking declaratory judgment on certain issues that have remained in dispute during the claims adjustment process. Aztar argues that Zurich has improperly refused to pay approximately \$40 million in Rcs. Specifically Zurich refused to pay more than \$8.5 million in costs on the grounds that those costs are subject to already-exhausted sublimit of liability in the Policy. Second, Aztar contends that Zurich has a broad obligation to pay for all direct physical loss to the entire project and disputes Zurich’s contention that it need only cover costs associated with the repair of the collapsed portion of the structure. Such a narrow reading of the Policy, Aztar argues, would leave Aztar “bare” for approximately \$30 million in costs.

#### A. Whether the Policy Requires Zurich to Pay the Costs It has Classified as “Debris Removal”

The parties do not dispute that the demolition and dismantlement of portions of the collapsed garage took many months and Keating submitted RCs to Zurich that included \$24,435,283 worth of invoices from demolition contractors associated with these tasks. According to Aztar, Zurich’s accountants improperly placed \$12.6 million of the demolition and other costs into the “Debris Removal” category. Aztar claims that Zurich is attempting to avoid paying millions of dollars of otherwise covered losses by calling costs for demolition work “Debris Removal” losses, which are subject to the already-exhausted “Debris Removal” sublimit in the Policy. Aztar claims that Zurich made the unilateral decision that Debris Removal includes not only the expense of removing debris from the Project site, but also the substantial costs to demolish the collapsed area. Aztar also claims that Zurich improperly included other expenses—such as engineering costs, planning, lighting and other costs—involved in the dismantlement process into the Debris Removal category to avoid paying these RCs.

In response to this argument (and in support of its own motion for partial summary judgment), Zurich argues that Aztar proffers an unreasonably narrow interpretation of

the term “Debris Removal” and maintains that New Jersey courts have defined “debris” in insurance contracts as “the remains of something broken or destroyed.” See *Vantage Dev. Corp. v. Am. Env’t Techs. Corp.*, 251 N.J.Super. 516, 532 n. 10, 598 A.2d 948 (Law Div.1991). According to Zurich, following the collapse, large portions of the collapsed and damaged steel and concrete garage slabs that were left hanging from the remaining structure had to be cleared and discarded before a concrete garage slab could be constructed. Such remains, according to Zurich, constituted debris as that term is \*63 defined by the New Jersey courts. Zurich further argues that Aztar’s effort to distinguish “demolition” from “debris removal” is artificial and unavailing.

As discussed above, the Property Coverage in the Policy contains a provision with respect to Debris Removal. Specifically, this provision states:

*Debris Removal:* Subject to the sublimit of Liability ... in the event of direct physical loss or damage ... the Company will pay the following necessary and reasonable costs:

- (1) costs to remove debris being an insured part of the property from the project location of the insured; and/or
- (2) costs of cleanup, at the project location of the insured, made necessary as a result of such direct physical loss or damage.

(Policy at AZINS 00540.) The “Debris Removal” clause is located in the portion of the Policy covering extensions of coverage. (*Id.* at AZINS 00539–40.)

### 1. “Debris Removal” vs. “Demolition”

[1] The Court finds that Aztar’s definition of “Debris Removal” is reasonable and that the costs subject to the “Debris Removal” sublimit are limited to the costs of removing debris from the property and transporting it away from the Project site. For a number of reasons, the Court finds that “Debris Removal” costs do not include, then, costs of demolition of the damaged property and related engineering expenses are not subject to the “Debris Removal” sublimit.

First, because the Policy does not define the term “Debris Removal,” this Court, in interpreting the language of an insurance policy under New Jersey law, must determine the ordinary meaning of the language of the policy.<sup>7</sup>

*Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 595, 775 A.2d 1262 (2001)(“the words of an insurance policy are to be given their plain, ordinary meaning”); *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175, 607 A.2d 1255 (1992). To assist in determining the ordinary and plain meaning of language in an insurance policy, New Jersey courts have resorted to the use of a dictionary. See *Daus v. Marble*, 270 N.J.Super. 241, 251, 636 A.2d 1091 (App.Div.1994)(use of dictionary to determine definition of term “forklift” in insurance policy); *Killeen Trucking, Inc. v. Surplus Lines Ins. Co.*, 211 N.J.Super. 712, 715, 512 A.2d 590 (App.Div.1986) (use of dictionary to determine definition of term “trailer” in insurance policy). The phrase “debris removal” and the term “demolition,” according to their plain meanings, are distinct. According to *The American Heritage Dictionary*, the term “remove” means “[t]o move from a position occupied; to convey from one place to another.” *The American Heritage Dictionary* 1101 (1976). Under this definition, the phrase “to remove debris ...” in the Policy refers to the act of moving the debris from one location to another. Such \*64 a definition does not include demolition, planning and engineering. The dictionary defines “demolition” as “the act or process of wrecking or destroying.” *Id.* As such, the term “debris removal” is distinct from “demolition” and costs associated with demolition (i.e., not having to do directly with removing debris from the property and transporting it away) should not be subject to the Debris Removal sublimit.

Second, in the context of this insurance contract, “debris removal” cannot include the term “demolition,” as suggested by Zurich. A finding that the term “debris removal” included “demolition” would render the term “demolition” superfluous, a result that is contrary to New Jersey law regarding interpretation of insurance policies. See *Gunther v. Metropolitan Casualty Ins. Co.*, 33 N.J.Super. 101, 113, 109 A.2d 485 (Law Div.1954)(“No part of any contract, particularly a policy prepared with the care with which this one was prepared, should be treated as useless unless it is indeed useless.”) Indeed, when interpreting an insurance policy, “[a] court must endeavor to give effect to all terms in a contract ‘and the construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable.’ ” *Linan-Faye Constr. Co. v. Housing Auth.*, 995 F.Supp. 520, 524 (D.N.J.1998)(quoting *Prather v. Am. Motorists Ins. Co.*, 2 N.J. 496, 502, 67 A.2d 135 (N.J.1949)). Here, the Policy repeatedly refers to costs associated with “demolition” and with “debris removal” separately. For example, in the General Purpose Endorsement “Ordinance or Law: Demolition and Increased Cost of Construction” of the Policy, the Policy states:

The following costs are not payable hereunder:

1. Cost of *demolition* or increased cost of repair or reconstruction, *debris removal*, or other consequential loss caused by the enforcement of any law or ordinance regulating asbestos material;
3. Cost of *demolition* or increased cost of repair or reconstruction, *debris removal*, or other consequential loss caused by the enforcement of any law or ordinance regulating Contaminants or Pollutants;

(Policy at AZINS 000556). Use of the terms in this manner confirms that the term “debris removal” means something separate and distinct from “demolition.” To hold otherwise would be to find the term “demolition” superfluous.

Finally, if this Court had not determined that the terms “debris removal” and “demolition” were distinct and it was unclear whether the phrase “costs to remove debris ... from the project site” referred to simply costs associated with removing debris from the Project location and carting it away or the costs associated with engineering and dismantling the damaged portion of the garage, the Court would have concluded that the phrase was ambiguous. Such an ambiguity would be resolved in favor of the insured.<sup>8</sup> *Id.* Indeed, in *Vantage \*65 Dev. Corp.*, the New Jersey Superior Court, Law Division held that if “the language of a policy will support two interpretations, one favorable to the insured and the other favorable to the insurer, a court is obligated to apply the interpretation that favors coverage.” 251 N.J.Super. 516, 522, 598 A.2d 948 (Law Div.1991)(citing *Butler v. Bonner and Barnewall, Inc.*, 56 N.J. 567, 576, 267 A.2d 527 (1970)). Here, an interpretation of this clause in favor of Aztar and against Zurich would be warranted even if the language were not as plain as it is.

## 2. Other Costs Zurich Characterized as Debris

Next, Aztar contends that Zurich also attempted to “toss[ ] a host of other costs into the ‘Debris Removal’ bucket,” such as costs associated with electricity, engineering reviews, permits, scaffolding, elevator/manlift services and the general contractor’s supervision and coordination of demolition subcontractors, and argued that the Debris Removal sublimit also applies to these costs. (Aztar Br. at 19.) Aztar maintains that these costs are not “costs to remove debris ... from the project location” and therefore should not be subject to the Debris Removal sublimit.

The Court agrees with Aztar. Again, interpreting the language of the Policy according to its plain meaning, the Court finds that a reasonable person would conclude that the costs of engineering plans, permits, scaffolding, and contractor’s supervision are costs associated with demolition rather than with debris removal. Such costs appear to be directed to the dismantling of damaged portions of the garage in preparation for debris to be removed from the Property location. Debris removal consists of removing debris from the Property and transporting it to another site. To the contrary, it is reasonable to find costs associated with the labor, specialty equipment used to load vehicles with large pieces of debris, dump trucks, and dumping and permit fees to be included as costs of Debris Removal. Thus, costs related to engineering expenses, scaffolding, permits, contractor’s supervision, skilled demolition labor or demolition consultants and with the coordination of demolition subcontractors are not costs that are subject to the “Debris Removal” sublimit.<sup>9</sup>

### **\*66 B. Whether “Forensic Debris Removal” Costs are Covered by the Policy**

<sup>[2]</sup> When the garage at the Tropicana collapsed, four construction workers were killed and twenty-one were injured. An extensive investigation into the cause of the collapse followed, and Aztar and Keating were compelled by various government authorities and the pendency of personal injury and wrongful death actions to preserve certain sections of the debris. (Keating’s Br. at Ex. 16, Rotolo Tr. at 200.) The need to preserve evidence of the collapse resulted in certain debris removal costs in excess of what otherwise would have been incurred if more typical (and destructive) debris removal techniques had been used (these additional costs are so-called “forensic debris removal” costs). Zurich maintains that it has identified \$2,573,088 in “forensic debris removal costs” over and above the \$12,622,195 otherwise incurred in the debris removal.

According to Zurich, the additional costs associated with the forensic debris removal were motivated by third-party liability issues and should not be borne by Zurich.<sup>10</sup> Because the Policy does not cover the costs associated with liability defense issues, Zurich argues it is not responsible for these additional costs. Aztar argues that the Policy provides that Zurich pay for “necessary and reasonable costs” to remove debris from the project and does not exclude debris removal for purposes of preserving evidence. According to Aztar, because Zurich

is attempting to deny or limit coverage, Zurich must prove that such forensic debris removal costs were not “necessary and reasonable.” See *Victory Peach Group, Inc. v. Greater N.Y. Mut. Ins. Co.*, 310 N.J.Super. 82, 90, 707 A.2d 1383 (App.Div.1998)(“the burden is on the insurer to bring the case within an exclusion or limitation.”) Aztar continues, arguing that even if Zurich made a prima facie showing sufficient to satisfy its burden on summary judgment, there would be a triable issue of fact on this point because the additional costs of the forensic debris removal were both necessary and reasonable for Zurich’s subrogation investigation.

The Court disagrees with Aztar and finds that Zurich is not responsible for the additional costs of “forensic” debris removal that are over and above the costs of standard debris removal. As previously explained, New Jersey law requires this Court to interpret the Policy according to the ordinary meaning of the language contained in it, see *Zacarias*, 168 N.J. at 595, 775 A.2d 1262, and the plain meaning of the language of the Policy is sufficient for Zurich to satisfy its burden. The “Debris Removal” provision in the Policy’s Extensions of Coverage provision is straightforward; in the event of a “direct physical loss or damage,” Zurich will pay “the following necessary and reasonable costs ... (1) costs to remove debris ... from the project location of the Insured.” (AZINS 00540). Reading this clause, the Court cannot conclude that the costs associated with “forensic debris removal” (i.e., non-destructive removal of certain sections of the collapsed structure, storage of select \*67 segments of the debris as evidence, etc.) fall within the grant of coverage afforded by the Policy. The plain meaning of this language does not indicate that the parties contemplated that this provision would cover (and Aztar would be insured for) in excess of what otherwise would have been incurred if more typical (and destructive) debris removal techniques had been used. Absent any language indicating coverage for such extraordinary costs associated with forensic removal, the Court finds that the Policy does not cover Aztar’s forensic debris removal expenses.<sup>11</sup>

In addition, the Policy issued by Zurich does not provide coverage for costs associated with liability defense issues. A conclusion by this Court that Zurich is responsible for forensic debris removal costs associated with Aztar and Keating’s investigation would run afoul of Third Circuit law holding that property insurance is first-party coverage that is intended to compensate the insured for damages to the insured’s own property, not third-party insurance coverage. See *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3d Cir.2002); See Ostrager & Newman, *Handbook on Insurance Coverage Disputes* §

21.01[a] (13th ed.2006). Specifically, in *Port Auth. of N.Y. & N.J.*, the Third Circuit stated:

The primary aim of third-party insurance is to defend and indemnify insureds against liability claims made against them as a result of their own conduct. First-party coverage, on the other hand, protects against loss caused by injury to the insured’s own property.

311 F.3d at 233. As such, the forensic debris costs—which were incurred in order for Aztar and Keating to address third-party liability issues—are not covered by the Policy.

***C. Whether the Builders’ Risk Policy Covers the Increased Cost to Complete the Insured Project Caused by the Collapse***

The parties do not dispute that, following the accident, Keating had to formulate an entirely new construction schedule that would accommodate dismantlement, demolition and reconstruction work in the damaged areas of the Project and the preservation of undamaged construction work surrounding the damaged areas. This new schedule called for Keating to reorder and re-sequence work on the project, which led to Keating and its subcontractors incurring substantial costs, having to either stay on the job site longer than previously scheduled or come back to the site sometimes months later to complete their work. In addition, the work of construction crews and subcontractors was put on hold and work crews had to be recalled at a later date.

These factors (and others) ultimately increased the cost of completing the Project. Zurich has refused to pay certain of these increased expenses. Specifically, Zurich has earmarked three categories of RCs \*68 that it has refused to pay: (1) “Extended General Conditions” (e.g., administrative costs, trailers, supplies and other costs that are not captured as direct charges); (2) “Contractor’s Delay” charges (e.g., costs and expenses such as idle labor and equipment, that was incurred before reconstruction could begin); and (3) “Storage, Price Increases, Etc.” (e.g., increases in labor wages and building material costs, as well as storage costs that would

not have been needed but for the collapse). The Extended General Conditions, Contractor's Delay and Storage/Price Increase costs shall be referred to collectively as the "Additional Costs."

Aztar argues that it incurred the Additional Costs simply to finish the Project—not to build anything different from, or in addition to, the original Project. According to Aztar, the extra costs fall within the Policy's grant of coverage and are not expenses excluded from coverage. Zurich's argument is centered on the premise that the construction delays caused by the accident are losses suffered by Keating (rather than Aztar) and that Keating's losses are not covered by the Policy. Zurich contends that even if these costs were covered within the granting language of the Policy, they would be excluded by the exclusion provision addressing consequential losses, damages and expenses.

### 1. Whether the Additional Costs are Within the Policy's Grant of Coverage

<sup>[3]</sup> For Zurich to be responsible for coverage of the Additional Costs, Aztar must first demonstrate that these losses are within the Policy's grant of coverage. According to Aztar, the Additional Costs fall within the Policy's grant of coverage because the Policy covers "all risks of direct physical loss or damage," which includes coverage of *all* fortuitous losses for which an insured peril is the proximate causes (unless expressly excluded from coverage). Zurich argues that the extra costs are unrelated to the repair of the damaged property and that they relate solely to the delay in completing undamaged portions of the Project that Zurich contends would not have been incurred "but for" the delay resulting in the collapse. (Zurich's Opp. Br. Ex. 18, Dep. Tr. of Williams at 216–20.) In other words, construction was disrupted by the collapse and the Project took longer to build. According to Zurich, these were Keating's delay claims and Keating's delay claims are not covered under the Policy because the scope of the Policy's indemnity ("Valuation Clause") is measured by the "[c]ost to repair or replace the property lost or damaged at the time and place of loss with materials of like kind and quality...." (Policy at AZINS 00548.) Thus, Zurich asserts, the scope of the indemnity only covers repair costs to the damaged portion of the Project, not increased costs to complete construction of undamaged property.

<sup>[4]</sup> <sup>[5]</sup> The Court finds that all three categories of Additional Costs are covered by the Policy. Under New Jersey law, this Court must construe insurance policy

provisions that grant coverage broadly and those that limit coverage narrowly, so as to maximize the insurance available to cover a loss. See *Vantage*, 251 N.J.Super. at 523, 598 A.2d 948. The Policy's grant of coverage states that the Policy covers "all risk of direct physical loss or damage to insured property while at the location of the Insured Project." (*Id.* at AZINS 00539.) According to New Jersey law, an "all risk" policy like the Policy at issue in this case covers all fortuitous losses that an insured peril proximately causes (unless an exclusion applies). See \*69 *Ariston Airline & Catering Supply Co., Inc. v. Forbes*, 211 N.J.Super. 472, 479, 511 A.2d 1278 (Law Div.1986). In *Ariston*, a New Jersey trial court cited approvingly to the American Law Reports section titled "Coverage Under 'All Risks' Insurance" and stated "a policy of insurance insuring against 'all risks' is to be considered as creating a special type of insurance extending to risks not usually contemplated, and recovery will usually be allowed, at least for all losses of a fortuitous nature," unless excluded. *Id.* (citing 88 A.L.R.2d 1122, 1125 (1983)).

In addition, as Aztar points out, the Policy does not restrict coverage only to the area of the Project where the accident occurred. To the contrary, the Policy insures physical damage to the insured property at the "Insured Project." The Policy defines the "Property Insured" to include all property used to construct the "Insured Project" and "Insured Project" as "the work which the Insured is contractually obligated to perform in accordance with the contract documents." The "work" referenced in this definition is defined as the "construction of a 27 Story—350' High Multi-[U]se Non-Combustible Building." (Aztar's Statement of Material Facts ¶¶ 10–12.)

Zurich's argument that the Policy's Valuation Clause limits coverage to only repair costs, and not increased costs to complete construction of undamaged property, are unpersuasive. The Policy's Valuation Clause states that the Policy covers only costs to "repair or replace the property lost or damaged at the time and place of loss with materials of like kind and quality less betterment...." However, the Court finds that from the perspective of an ordinary insured reading the Policy—the perspective from which this Court must view the language of the Policy, see *Daus v. Marble*, 270 N.J.Super. 241, 251, 636 A.2d 1091 (App.Div.1994)—the term "property lost or damaged" as a result of the collapse refers to the entire structure, not simply to the location of the collapse.

<sup>[6]</sup> In addition, if Zurich had intended to limit its obligations under the Policy to only obligations to repair costs for the damaged portion of Project, Zurich, who sold

the Policy on a “take-it-or-leave-it” basis, could have used language imposing this type of coverage restriction. Under New Jersey law, when evaluating the insurer’s claim as to the meaning of language in a policy, this Court is permitted to consider “whether alternative or more precise language, if used, would have put the matter beyond reasonable question.” *Mazzilli v. Accident Cas. Ins. Co.*, 35 N.J. 1, 7, 170 A.2d 800 (1961). In fact, another insurance form used by Zurich states that Zurich will pay for losses required to “rebuild, repair, or replace such part of the property herein described as has been damaged or destroyed.” *Doswell Ltd. Partnership v. Va. Elec. & Power, Co.*, 1998 WL 972244, at \*2 (Va. Cir.1998). Because Zurich knew how to (but did not) issue a policy with this limiting language, the Court cannot now limit the language in the Policy in such a way.

## 2. Whether the Extra Costs are Excluded from the Policy’s Exclusion of “Consequential Losses”

<sup>[7]</sup> Having found that the extra costs fall within the Policy’s grant of coverage, the Court must now analyze whether the policy contains a specific provision expressly excluding the loss from coverage. Zurich argues that the extra costs are expressly excluded from the Policy as “consequential losses.” The Policy states:

This policy shall not pay for any loss, damage or expense caused directly or indirectly and/or contributed to, in whole or in part, by any of the following excluded perils ...

**\*70 A. Consequential loss, damage or expense of any kind or description including but not limited to** loss of market or delay, liquidated damages, performance penalties, penalties for non-completion, **delay in completion**, or non-compliance with contract conditions, whether caused by a peril insured or otherwise, however the foregoing shall not exclude Delay in Completion Coverage when it is endorsed to the Policy.

(Policy at AZINS 000541)(emphasis added). According to Zurich, the extra costs—which were incurred largely as a result of construction delays due to the collapse—are the epitome of consequential losses as they are losses that “do[ ] not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act[s].” *Black’s Law Dictionary* (6th ed.1990).

<sup>[8]</sup> <sup>[9]</sup> “When dealing with clauses of exclusion, strict interpretation is required.” See *Vantage*, 251 N.J.Super. at 523, 598 A.2d 948. Moreover, the insurer bears the burden of proving that a provision limiting coverage (either an exclusion or limitation) applies to the particular loss at issue. *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95, 698 A.2d 9 (N.J.1997)(“In general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion”); *Victory Peach Group, Inc. v. Greater N.Y. Mut. Ins. Co.*, 310 N.J.Super. 82, 90, 707 A.2d 1383 (App.Div.1998). Here, Zurich has failed to satisfy its burden that the consequential loss exclusion applies to the Additional Costs for several reasons.

<sup>[10]</sup> <sup>[11]</sup> First, in New Jersey, when an insurance policy uses an exclusion which bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the “efficient proximate cause” of the loss. *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, 181 N.J. 245, 257, 854 A.2d 378 (2004)<sup>12</sup> (noting that the “Appleman Rule” applies in New Jersey); see also John Alan Appleman, *Insurance Law & Practice*, § 3038, at 309–11 (1970); *Great Am. Ins. Co. v. Lerman Motors, Inc.*, 200 N.J.Super. 319, 326, 491 A.2d 729 (App.Div.1984)(“A construction which excludes consequential losses from coverage under a general liability policy is not a reasonable interpretation of a policy which insures against all damages ... nor is it one which comports with the reasonable expectation of an average lay purchaser of insurance as to the coverage afforded by the policy.”) However, coverage is available if the covered peril was the efficient proximate cause of a loss and an excluded peril merely occurred in the chain of events that followed. *Auto Lenders Acceptance Corp.*, 181 N.J. at 257, 854 A.2d 378. Here, the parties do not dispute that the efficient proximate cause of Aztar’s loss was the collapse or that the collapse is a covered peril. Applying the Appleman Rule, even if an excluded peril (a “consequential loss”) was involved in the chain of events that led to the loss (the Additional Costs), coverage is still available because a covered peril (the collapse) was the efficient proximate cause and such **\*71** an exclusion cannot bar coverage as long as the efficient proximate cause is covered.

Second, interpreting the exclusionary language narrowly as it must, see *Vantage*, 251 N.J.Super. at 523, 598 A.2d 948, the Court finds that the consequential loss exclusion does not apply to the losses at issue. Here, the Policy lists the specific types of losses that are excluded as “consequential” losses. The types of losses listed in the exclusion—“loss of market or delay,” “liquidated damages,” “performance penalties,” and “penalties for

non-completion, delay in completion, or non-compliance with contract conditions”—are purely economic losses that are separate and apart from regular construction costs. Extending the exclusion of “consequential losses” beyond purely economic losses to include regular construction costs incurred to simply finish the Project is unwarranted and impermissible in light of New Jersey law directing courts to interpret exclusionary language narrowly.

<sup>[12]</sup> Finally, the Court addresses one argument raised by Zurich in support of its position that the Additional Costs are either not covered by the Policy’s grant language or excluded by the consequential loss exclusion. First, in arguing that the exclusion bars coverage, Zurich points to an exclusion for “delay in completion.” At first blush, Zurich’s argument appears persuasive, stating that the consequential loss exclusion covers delays in completion. However, the exclusion does not appear in the manner Zurich presents it. Rather, the exclusion excludes only losses caused by the “perils” of “consequential loss, damage or expense” and gives several examples of excluded losses, including “penalties for non-completion, delay in completion, or non-compliance with contract conditions.” Thus, the exclusion does not state that a delay in completion would be a consequential loss but that the penalties associated with a delay in completion would be a consequential loss. Here, Aztar is not seeking coverage for a penalty, but for Additional Costs associated with the delay in completion.

#### IV. CONCLUSION

For the reasons expressed in this Opinion the Court will (1) grant in part and deny in part Zurich’s motion for partial summary judgment and (2) grant in part and deny in part Aztar’s motion for partial summary judgment as follows:

- On the issue of the parties’ differing interpretations of the scope of the Policy’s “Debris Removal” clause, the Court will deny Zurich’s motion for partial summary

judgment and grant Aztar’s motion for partial summary judgment. Specifically, the Court holds that the only costs that are subject to the “Debris Removal” sublimit in the Policy are the costs of removing debris from the property and transporting it away from the site—not the costs of demolishing the damaged property or related engineering expenses;

- On the issue of the calculation of the “Debris Removal”, the Court having granted Aztar’s motion for partial summary judgment as to the scope of the “Debris Removal” clause and based on Aztar’s counsel’s representations to the Court at oral argument as discussed in footnote 9, *supra*, this Court need not decide this issue as “Aztar would be entitled to coverage for all of its reasonable and necessary costs of debris removal.” (Oral Argument Tr. at 28.);
- On the issue of whether Zurich must pay the extra costs associated with the “forensic debris removal,” the Court will grant Zurich’s motion for partial summary judgment and deny Aztar’s motion. The Court finds that Zurich need not pay the extra costs associated with the \*72 “forensic debris removal” and there is no triable issue of fact with respect to whether Zurich must pay these costs; and
- On the issue of whether Zurich must pay the Additional Costs that Aztar paid to complete the project, the Court will deny Zurich’s motion for partial summary judgment and grant Aztar’s motion. Specifically, the Court holds that Zurich must pay the extra costs that Aztar paid to complete the project, without regard to whether the costs involve work at the project away from the immediate area of the collapse.

The accompanying Order is entered.

#### All Citations

513 F.Supp.2d 55

#### Footnotes

<sup>1</sup> The Court notes that the parties have and continue to actively pursue settlement discussions to resolve these issues. In fact, after the filing of these cross-motions but prior to oral argument, the parties informed the Court that they resolved a fifth issue originally presented to the Court. (Letter from David Goodwin to the Court, dated October 17, 2006.) As the Court stated at the conclusion of oral argument, counsel and the parties should be commended on their efforts to settle these disputes prior to filing a declaratory judgment.

<sup>2</sup> Under the Design Build Construction Agreement between Keating and Aztar, Keating was obligated to complete the project for a

fixed price of \$173,254,000.

- 3 A builders' risk policy protects owners and contractors from losses that occur during construction. The builders' risk policy at issue here is Zurich Policy No. IM 3709810.
- 4 Zurich also paid out insurance funds for RCs related to a category titled "Expediting Expenses." The parties however, have resolved these differences and all of the materials related to the dispute over Expediting Expenses in the parties' summary judgment motion papers will be disregarded. (Letter from David Goodwin to the Court, dated October 17, 2006.)
- 5 On February 9, 2007, counsel for Zurich wrote to this Court in order to supplement Zurich's summary judgment motion by presenting newly acquired evidence based on the February 1, 2007 deposition of Michael Williams of Keating Building Corporation. (Letter from Mark S. Katz, 2/9/07.) Counsel for Aztar replied on February 14, 2007 objecting to Zurich's attempt to reopen and supplement the summary judgment record (Letter from David S. Goodwin, 2/14/07) to which Zurich replied on February 16, 2007. (Letter from Mark S. Katz, 2/16/07). The evidence presented by Zurich in its February 9 letter goes to the issue of whether Zurich or Aztar appropriately calculated the "Debris Removal" sublimit. As discussed in footnote 9 *infra*, because the Court ruled in favor of Aztar as to the scope of the "Debris Removal" clause in the Policy, the issue of the proper calculation of the sublimit is no longer before the Court. Thus, the Court need not and will not address whether to reopen the summary judgment record to allow Zurich's supplementation.
- 6 Moreover, a non-moving party must do more than rely only "upon bare assertions, conclusory allegations or suspicions." *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.1985), *cert. denied*, 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985) (citation omitted); see *Liberty Lobby*, 477 U.S. at 249–50, 106 S.Ct. 2505. Thus, if the non-moving party's evidence is a mere scintilla or is "not significantly probative," the court may not grant summary judgment. *Liberty Lobby*, 477 U.S. at 249–50, 106 S.Ct. 2505; *Country Floors*, 930 F.2d at 1061–62.
- Cross-motions for summary judgment:  
are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. *Transportes Ferreos de Venezuela II CA v. NKK Corp.*, 239 F.3d 555, 560 (3d Cir.2001) (citing *Rains v. Cascade Indus., Inc.*, 402 F.2d 241, 245 (3d Cir.1968)). If review of cross-motions for summary judgment reveals no genuine issue of material fact, then judgment may be entered in favor of the party deserving of judgment in light of the law and undisputed facts. See *Iberia Foods Corp. v. Romeo Jr.*, 150 F.3d 298, 302 (3d Cir.1998) (citing *Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 145–46 (3d Cir.1998)).
- 7 The Court notes that both parties have cited case law from other jurisdictions that the parties argue support their position that the terms "debris removal" and "demolition" are either (1) distinct (Aztar) or (2) synonymous (Zurich). Because none of these precedents are binding authority on this Court, the Court will not consider any of them. Rather, the Court will interpret the Policy according to the principles governing the interpretation of insurance policies under New Jersey law. See *Zacarias v. Allstate Ins. Co.*, 168 N.J. 590, 595, 775 A.2d 1262 (2001); *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 520 (3d Cir.1997); *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 331–32, 712 A.2d 1116 (1998); *Owens-Illinois, Inc. v. United Ins. Co.*, 264 N.J.Super. 460, 468, 625 A.2d 1 (App.Div.1993).
- 8 In their brief in opposition, Zurich argues that New Jersey's rule of insurance policy interpretation (which requires a Court to construe any ambiguity against the insurer when an insurance policy is sold on a "take-it-or-leave-it" basis) is not applicable in this case because Aztar is a sophisticated insured and a multi-billion dollar corporation that hired an experienced insurance agent to assist it in obtaining the builders risk policy. In support of its position, Zurich cites *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 179 N.J. 87, 843 A.2d 1094 (2004). *Benjamin Moore*, however, does not preclude this Court from construing any ambiguity against the insurer. See 179 N.J. at 102, 843 A.2d 1094. Indeed, *Benjamin Moore* holds that "only where it is clear that an insurance policy was *actually negotiated* or *jointly drafted*, and where the policyholder had bargaining power and sophistication, is the rule of strict construction of policy terms against the insurer not invoked." *Id.* (citations omitted)(emphasis added). The Third Circuit Court of Appeals has held similarly in *Pittston Co. Ultramar Am. v. Allianz Ins. Co.*, stating  
[T]he dispositive question is not merely whether the insured is a sophisticated corporate entity, but rather *whether the insurance contract is negotiated, jointly drafted or drafted by the insured*. In such instances, we conclude that the doctrine of *contra proferentem* should not be invoked to inure to the benefit of the insured.  
124 F.3d 508, 521 (3d Cir.1997)(emphasis added). Here, the Policy was a standard Zurich property insurance form that Zurich insisted on using without alteration. (Aztar's Statement of Material Facts ¶ 7; Cert. Ex. N. at 58). Indeed, Zurich has not identified any term in the Policy that Aztar or its insurance broker drafted or actually negotiated. As such, the rule of strict construction of

policy terms against the insurer applies in this case.

- 9 Having ruled in favor of Aztar with respect to the scope and application of the “Debris Removal” provision of the Policy, the Court need not address the issue of which parties’ calculation of the “Debris Removal” sublimit is correct. At oral argument, Aztar’s counsel stated that, should the Court rule this way, “Aztar would be entitled to coverage for all of its reasonable and necessary costs of debris removal” and that this issue no longer arises. (Transcript of Oral Argument, 11/3/2006, at 27–28.) The Court takes this representation to mean that should the Court rule in favor of Aztar on the issue of the scope of the Debris Removal clause (which the Court has) the issue of the calculation of the Debris Removal sublimit becomes moot as Aztar’s claims for Debris Removal would be lower than Zurich’s calculation of the Debris Removal sublimit. In other words, the Court should assume that, should the Court find in Aztar’s favor on the scope of the Debris Removal sublimit, Aztar either (1) concedes that Zurich’s calculation of the sublimit is correct or (2) withdraws its motion for partial summary judgment on the issue of the calculation of the debris removal sublimit.
- 10 Keating commenced a third-party action against its liability insurer to recover the forensic debris removal costs that Zurich refused to pay.
- 11 Moreover, Aztar’s argument that incurring such costs were “necessary” because Plaintiffs had to preserve evidence as part of Zurich’s subrogation investigation and not prejudice Zurich’s subrogation rights is unpersuasive. Aztar has failed to present any evidence that it expended additional debris removal expenses and sought to preserve such forensic evidence due to Zurich’s orders (i.e., that Zurich made such costs “necessary”). It is more reasonable to conclude that Aztar had its own agenda and need for preserving evidence (i.e., to defend against wrongful death and personal injury lawsuits). In addition, the Court having found that the Policy does not provide coverage for the forensic debris removal expenses, the Court need not address whether a triable issue of fact exists with respect to whether such costs were “necessary” under the Policy.
- 12 In *Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc.*, 181 N.J. 245, 257, 854 A.2d 378 (2004), the New Jersey Supreme Court held that “[w]here a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and the final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss ... [and] recovery may be allowed ... where the insured risk itself set into operation a chain of causation in which the last step may have been an excepted risk.”