UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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AMERICAN EMPIRE SURPLUS LINES INSURANCE CO.,

Plaintiff,

-against-

CERTAIN UNDERWRITERS AT LLOYD'S LONDON,

Defendant.
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MEMORANDUM AND DECISION
16-CV-05664 (AMD) (JO)

Ann M. Donnelly, United States District Judge:

On October 11, 2016, the plaintiff, American Empire Surplus Lines Insurance Company ("American Empire"), commenced this insurance coverage action against the defendant, Certain Underwriters at Lloyd's London ("Underwriters"), seeking a declaration pursuant to U.S.C. §§ 1331, 2201, and 2202, that Underwriters has an obligation to defend and indemnify New York City Housing Authority ("NYCHA") in three construction-related personal injury actions brought against it in New York State Supreme Court. On December 15, 2017, American Empire moved for summary judgment on all claims, and on January 19, 2018, Underwriters cross-moved. (Pl.'s Mot. for Summ. J., ECF No. 24; Def.'s Cross-Mot. for Summ. J., ECF No. 27.) For the reasons set forth below, I grant Underwriters' motion for summary judgment, and deny American Empire's motion.

BACKGROUND

1. Facts[1]

[1] Unless otherwise noted, the following facts are undisputed and are based on my review of the record. As to each motion, I construe the facts in the light most favorable to the non-moving party. *See Capobianco v. City of New York*, 422 F.3d 47, 50 n.1 (2d Cir. 2005).

a. Construction Contract between NYCHA and AEC

On April 14, 2015, NYCHA and Adam's European Contracting, Inc. ("AEC") executed a contract ("Construction Contract"), in which AEC agreed to perform façade restoration and roofing replacement work at the Queensbridge Housing Complex. (Pl. 56.1, ¶ 26; Def. 56.1, ¶¶ 8, 20.)

Pursuant to the Construction Contract,[2] AEC had to, among other things, "furnish all necessary labor, materials, tools, equipment, and transportation necessary for performance of the work," "directly superintend the work or assign or have on the work site a competent superintendent," and "be responsible for all materials delivered and work performed until completion and acceptance of the entire work." (ECF No. 27-7, at 109.) AEC also promised to "indemnify and hold [NYCHA] and its members, officers, agents and employees harmless from any and all claims and judgments for damages and from costs and expenses," and to "defend . . . at its own cost and expense . . . any claim made or suit brought against the [NYCHA] or its members, officers, agents and employees by any person arising out of, or resulting from, or in connection with any of the above risks assumed by the Contractor." (ECF No. 27-7, at 109; ECF No. 27-9, at 3-4.)

The Construction Contract also required AEC to purchase and maintain Commercial General Liability (CGL) insurance and Owners and Contractors Protective Liability (OCP) insurance. Specifically, AEC had to purchase CGL insurance, naming NYCHA as an additional insured, on a "primary [and] non-contributory" basis, with an aggregate limit of $20,000,000, and $10,000,000 for each occurrence. (ECF No. 27-8, at 91, ECF No. 27-9, at 7, 28.) AEC also

[2] The relevant documents in the Construction Contract are the HUD Form 5370, Special Conditions to the Contract, Supplemental Provisions to HUD Form 5370, and the New York City Housing Authority Insurance Requirements Matrix. (ECF Nos. 27-7, 27-8, 27-9.)

had to buy OCP insurance, naming NYCHA as the sole named insured, for an aggregate limit of $5,000,000 and $5,000,000 per occurrence. (ECF No. 27-9, at 30.)

b. Relevant Insurance Policies[3]

i. American Empire's CGL Policy

On March 16, 2015, American Empire issued a CGL policy to AEC as the named insured, for the period of March 20, 2015 to March 20, 2016. (Pl. 56.1, ¶ 23.) The insurance policy had aggregate limits of $2,000,000 per project, $5,000,000 for the general policy, and a limit of $1,000,000 per occurrence. (Def. 56.1, ¶ 37; ECF No. 27-12, at 2.)

Pursuant to the Construction Contract, the CGL policy identified NYCHA as an additional insured. (*See* ECF No. 27-12, at 43 (providing coverage to "[a]ll entities required by written contract to be included for coverage as additional insured's in respect to operations performed by [AEC] or on their behalf).) An endorsement to the CGL policy, titled "Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization," indicated that American Empire would provide coverage to additional insureds such as NYCHA, with respect to:

> [L]iability for 'bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> 1. [AEC]'s acts or omissions; or
>
> 2. The acts or omissions of those acting on [AEC's] behalf;
>
> In the performance of [AEC's] ongoing operations for the additional insured(s) at the location(s) designated above.

[3] In addition to purchasing the below CGL and OCP insurance policies from American Empire and Underwriters, AEC also purchased excess liability insurance policies from American Empire and Axis Surplus Insurance Company. (ECF No. 27-13, at 3; ECF No. 27-14, at 2.) However, neither of these policies are relevant to my decision.

(*Id.*; Pl. 56.1, ¶ 24.)[4]

ii. Underwriters' OCP Policy

On April 15, 2015, Underwriters issued an OCP policy to AEC, naming NYCHA as the named insured, for the policy period of April 7, 2015 through April 7, 2016. (ECF No. 27-10, at 2-5.) The Common Policy Declarations, which summarize the types of insurance coverage in the policy, stated that the policy contained only a "Commercial General Liability Coverage Part." (*Id.*) This coverage part had an aggregate limit of $2,000,000 for the policy and a limit of $1,000,000 per occurrence. (*Id.*)

The insurance contract consists of the policy form, titled "Owners and Contractors Protective Liability Coverage Form-Coverage for Operations of Designated Contractor," as well as a number of endorsements. (ECF No. 27-10, at 4, 36-37.) The policy document—also labeled as "Commercial General Liability CG 00 09 12 07"—sets forth the insuring agreement, definitions, exclusions, and conditions. (*Id.*) Specifically, the Owners and Contractors Protective Liability Coverage Form provides the following:

> a. We [Underwriters] will pay those sums that the insured become legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply . . . .
>
> ***
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an

[4] A separate endorsement provided that "[t]he insurance afforded to any additional insured on this policy is primary insurance, but only with respect to 'bodily injury' or 'property damage' liability arising out of [AEC's] operations," and that the "insurance maintained by the additional insured shall be non-contributing." (ECF No. 27-12, at 49.) The endorsement further indicated that the "coverage extension applies only if: [AEC] is required by an "insured contract" to provide primary and non-contributory status; and [t]he "bodily injury" or "property damage" must occur subsequent to the execution of an "insured contract." *Id.*

> "occurrence" and arises out of:
>
> (a) Operations performed for you [NYCHA] by the "contractor" at the location specified in the Declarations; or
>
> (b) Your [NYCHA's] acts or omissions in connection with the general supervision of such operations;
>
> (2) The "bodily injury" or "property damage" occurs during the policy period; and
>
> (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II- Who is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

(ECF No. 27-10, at 36-37.) Underwriters defined the term "contractor" (with quotation marks) as the "contractor designated in the Declarations," and identified AEC as the "Designated Contractor" (without quotation marks) in the policy declarations. (*Id.* at 22, 43.)

The Owners and Contractors Protective Liability Coverage Form included language excluding coverage for contractual liability and employers' liability, but did not include language excluding coverage for injuries incurred by independent contractors' employees. (*Id.*) However, the insurance contract included an endorsement titled "CGL Blanket Endorsement" that purportedly amended existing exclusions and added new exclusions to the policy. Specifically, the blanket endorsement stated that it "modifie[d] [the] insurance under the . . . Commercial General Liability Coverage Part" and "added" the following exclusion to the policy: (ECF No. 27-10, at 8.)

> This insurance does not apply to:

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3. Employees of Independent Contractors.

"Bodily injury," "property damage," "personal and advertising injury," or any injury, loss or damage:

a. Sustained by any employee of an independent contractor contracted by you [NYCHA] or on your [NYCHA's] behalf; or

b. Arising out of operations performed for [NYCHA] by independent contractors or your [NCYHA's] acts or omissions in connection with your [NYCHA's] general supervision of such operations.

(ECF No. 27-10, at 2, 11-12, 36.)

The parties now dispute whether the blanket endorsement and the Employees of Independent Contractors (EIC) exclusion contained therein, applied to the Owners and Contractors Protective Liability Coverage Form and modified the scope of coverage for claims of bodily injuries to employees of independent contractors. While Underwriters maintains that the blanket endorsement clearly excluded such claims, American Empire argues that the endorsement applied only to the Commercial General Liability Coverage Part, and did not modify any terms in the OCP Coverage Form. (ECF No. 25, at 13.)[5]

c. Lawsuits Against NYCHA

Following the execution of the Construction Contract, three separate lawsuits were filed against NYCHA in New York Supreme Court: *Hernan Serrano and Lida Lopez v. NYCHA* (pending in Queens County Supreme Court), *Nerrissa Hairston v. NYCHA* (pending in Bronx

[5] The Owners and Contractors Protective Liability Coverage Form contains a similar "Other Insurance" provision as American Empire's CGL policy. The form provided that "[t]he insurance afforded by this Coverage Part is primary insurance and we will not seek contribution from any other insurance available to you unless the other insurance is provided by a contractor other than the designated "contractor" for the same operation and job location designated in the Declarations." (ECF No. 27-10, at 42.)

County Supreme Court), and *Eduardo Valencia Maldonado v. NYCHA* (pending in Queens County Supreme Court). (Def. 56.1, ¶¶ 5-7.) It is undisputed that all the plaintiffs were employees of AEC, and that they alleged that they sustained bodily injuries while performing work in connection with the Construction Contract. (Def. 56.1, ¶¶ 20, 54; ECF Nos. 27-4, 27-5, 27-6.)

Both American Empire and Underwriters were notified of the claims asserted against NYCHA. (Pl. 56.1, ¶¶ 28-30.) American Empire allegedly assumed the duty to defend NYCHA in the state personal injury actions. (Compl. ECF No. 1, ¶ 21.) Underwriters, however, denied any obligation to defend and indemnify NYCHA in these actions based on the EIC exclusion. (Def. 56.1, ¶¶ 53-58.)

2. Procedural History

American Empire commenced this declaratory action on October 11, 2016. On December 15, 2017, American Empire moved for summary judgment on all claims, seeking the following declarations that: (1) Underwriters is obligated to defend and indemnity NYCHA with respect to the underlying actions on a "primary" basis; (2) Underwriters is prohibited from seeking contribution from American Empire for Underwriters' defense and indemnification of NYCHA in the underlying state actions; (3) coverage under the American Empire policy is not implicated if at all until exhaustion of Underwriters' OCP policy, (4) American Empire is entitled to reimbursement from Underwriters of the amounts American Empire has expended, together with interest, in connection with the defense of the underlying actions; and (5) American Empire be awarded costs and disbursements of this action. (ECF No. 1, ¶¶ 29, 34, 38, Prayer for Relief; ECF No. 24.) Underwriters cross-moved for summary judgment, seeking a

declaration that it has no obligation to provide coverage to NYCHA for the state personal injury actions due to the Employees of Independent Contractors Exclusion. (ECF No. 27-22, at 14.)

LEGAL STANDARD

1. Summary Judgment Standard

Summary judgment is appropriate only if the parties' submissions, in the form of deposition transcripts, affidavits, or other documentation, show that there is "no genuine dispute as to any material fact," and the movant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The movant has the "burden of showing the absence of any genuine dispute as to a material fact." *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997); *Tsesarskaya v. City of New York*, 843 F. Supp. 2d 446, 453–54 (S.D.N.Y. 2012) ("While disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment, factual disputes that are irrelevant or unnecessary will not be counted.") (internal quotations and internal brackets omitted). "Once the moving party has met this burden, the party opposing summary judgment must identify specific facts and affirmative evidence that contradict those offered by the moving party to demonstrate that there is a genuine issue for trial." *Ethelberth v. Choice Sec. Co.*, 91 F. Supp. 3d 339, 349 (E.D.N.Y. 2015) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986)). "The non-moving party 'may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that [their] version of the events is not wholly fanciful.'" *Id.* (quoting *D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998)). In deciding whether summary judgment is appropriate, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party. *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010); *accord Peralta v. Chromium*

Plating & Polishing Corp., No. 99-cv-3996, 2000 WL 34633645, at *3 (E.D.N.Y. Sept. 15, 2000). Where, as here, the parties file cross-motions for summary judgment, "each party's motion must be examined on its own merits, and in each case[,] all reasonable inferences must be drawn against the party whose motion is under consideration." *Seneca Ins. Co. v. Illinois Nat. Ins. Co.*, No. 07 CIV. 11272 (RMB), 2009 WL 2001565, at *3 (S.D.N.Y. July 9, 2009) (quoting *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001)).

2. Contract Interpretation Principles[6]

In resolving a dispute over insurance coverage, courts must start with the language of the policy itself. *Am. Empire Surplus Lines Ins. Co. v. Colony Ins. Co.*, No. 16-CV-7946 (KBF), 2017 WL 4857595, at *3 (S.D.N.Y. Oct. 25, 2017). If there is an endorsement to the insurance policy, "the endorsement and the policy must be read together, and the words of the policy remain in full force and effect except as altered by the words of the endorsement." *CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 720 F.3d 71, 84 (2d Cir. 2013) (quoting *Cnty. of Columbia v. Cont'l Ins. Co.*, 83 N.Y.2d 618, 628 (1994)); *U.S. Underwriters Ins. Co. v. Kum Gang, Inc.*, 443 F. Supp. 2d 348, 357 (E.D.N.Y. 2006). In addition, when construing the terms of an insurance contract, "[c]ourts must [] avoid construing conflicting provisions and ambiguities within a policy in such a manner as to negate certain coverages, or in ways that render coverage provisions mere surplusage," and "an interpretation that gives a reasonable and effective meaning to all terms of a contract is preferable to one that leaves a portion of the writing useless or inexplicable." *U.S. Underwriters Ins. Co. v. Affordable Hous. Found., Inc.*, 256 F. Supp. 2d

[6] I find that New York law applies in this case. Both parties' briefs assume that New York law controls, and "such implied consent . . . is sufficient to establish choice of law." *Santalucia v. Sebright Transp., Inc.*, 232 F.3d 293, 296 (2d Cir. 2000) (quoting *Tehran–Berkeley Civil & Environmental Engineers v. Tippetts–Abbett–McCarthy–Stratton*, 888 F.2d 239, 242 (2d Cir.1989)); *accord Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130, 153 n.11 (2d Cir. 2017); *Seneca Ins. Co.*, 2009 WL 2001565, at *3 n.2.

176, 181 (S.D.N.Y. 2003), *aff'd*, 88 F. App'x 441 (2d Cir. 2004); *see Am. Empire Surplus Lines Ins. Co.*, 2017 WL 4857595, at *3 (citing *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221 (2002)) ("[c]ourts are to construe the words of the policy in a manner that gives meaning to all language, and leaves no provision without force and effect.").

"[S]ummary judgment may be granted only where the language of the contract is unambiguous and conveys a definite meaning." *John Hancock Mut. Life Ins. Co. v. Amerford Intern. Corp.*, 22 F.3d 458, 461 (2d Cir. 1994); *accord Seneca Ins. Co.*, 2009 WL 2001565, at *3. "The determination of whether an insurance policy is ambiguous is a matter of law for the court to decide." *Commercial Union Ins. Co. v. Flagship Marine Servs.*, 190 F.3d 26, 33 (2d Cir. 1999) (quoting *In re Prudential Lines, Inc.*, 158 F.3d 65, 77 (2d Cir. 1998)). "Contractual language is unambiguous when it has a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion." *John Hancock Mut. Life Ins. Co.*, 22 F.3d at 461 (internal quotations omitted). If the contract terms are unambiguous, courts must interpret the terms according to their "plain and ordinary meaning," and "enforce them as written." *Sunrise One, LLC v. Harleysville Ins. Co. of New York*, 293 F. Supp. 3d 317, 325–26 (E.D.N.Y. 2018); *see also Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006) ("[A]n insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract.") (quotations and citations omitted).

Ambiguity arises when the terms of an insurance contract suggest "'more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" *Parks Real Estate*

Purchasing Grp., 472 F.3d at 42 (quoting *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275 (2d Cir. 2000)); *see also U.S. Specialty Ins. Co. v. LeBeau, Inc.*, 847 F. Supp. 2d 500, 504 (W.D.N.Y. 2012) ("The test for ambiguity in an insurance agreement is whether 'an ordinary business man in applying for insurance and reading the language of these policies . . . would have thought himself covered against precisely the damage claims now asserted.'").[7]

New York law makes clear that in order to negate coverage, the exclusion must be "stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case and that its interpretation of the exclusion is the only construction that [could] fairly be placed thereon." *Parks Real Estate Purchasing Grp.*, 472 F.3d at 42; *Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York*, 241 A.D.2d 66, 71 (1st Dep't 1998). When interpreting exclusionary clauses in insurance policies, New York law "is highly favorable to insureds." *Pioneer Tower Owners Ass'n v. Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 306 (2009). *See also Parks Real Estate Purchasing Grp.*, 472 F.3d at 42 (under New York insurance law, "the burden, a heavy one, is on the insurer, and if the language of the policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer.") (brackets and citations omitted).

DISCUSSION

The primary question in this insurance coverage dispute is whether the EIC exclusion in Underwriters' OCP policy unambiguously excludes coverage for bodily injuries sustained by AEC's employees. American Empire argues that it does not, and posits two ambiguities in the

[7] If ambiguity exists, courts may "accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract.'" *Morgan Stanley Group Inc.*, 225 F.3d at 275–76. If extrinsic evidence does not yield a conclusive answer about the parties' intent, then "a court may apply other rules of contract construction, including the rule of contra proferentem, which generally provides that where an insurer drafts a policy 'any ambiguity in [the] . . . policy should be resolved in favor of the insured.'" *Id.*

OCP insurance contract. According to American Empire, the terms and conditions in the Owners and Contractors Protective Liability Coverage Form purportedly provides coverage for claims of bodily injuries by AEC's employees, and the blanket endorsement containing the EIC exclusion did not change those terms and conditions. It further argues that the term "independent contractor" in the EIC exclusion is ambiguous because it did not explicitly refer to AEC. Underwriters, on the other hand, contends that the exclusionary language is clear and unambiguous, and that the personal injury claims brought by AEC's employees fall squarely within the EIC exclusion. Alternatively, Underwriters argues that even if the EIC exclusion did not apply, American Empire has the obligation to provide primary coverage to NYCHA because its insured, AEC, contractually agreed to defend and indemnify NYCHA.

For the reasons stated below, I find that the EIC exclusion clearly and unmistakably applies to claims of bodily injuries by AEC's employees; as a result, Underwriters has no obligation to defend or indemnify NYCHA in the underlying state personal injury actions.[8] Accordingly, Underwriters' motion for summary judgment is granted, and American Empire's motion is denied.

A. Employees of the Independent Contractor Exclusion

The EIC exclusion states that Underwriters' insurance policy "does not apply" to claims of "'bodily injury' [] or any injury, loss or damage [] sustained by any employee of an independent contractor contracted by [NYCHA]." (ECF No. 27-10, at 36-37.) This exclusion is clear and unambiguous: if an employee of an independent contractor hired by NYCHA was injured, that injury would not be covered by Underwriters' policy. *See, e.g.*, *Century Sur. Co. v.*

[8] Since I grant summary judgment in favor of Underwriters on this ground, I do not address Underwriters' alternative argument that AEC's indemnification agreement abrogated the priority of insurance coverage.

Franchise Contractors, LLC, No. 14 CIV. 277 (NRB), 2016 WL 1030134, at *6 (S.D.N.Y. Mar. 10, 2016) (collecting cases in which similar independent contractor exclusions were found to be clear and unambiguous).

Despite this clear language, American Empire argues that there is ambiguity because the blanket endorsement containing the exclusion states that the endorsement applies to the Commercial General Liability Coverage Part, and not the Owners and Contractors Protective Liability Coverage Part. Thus, American Empires contends, the endorsement (and the EIC exclusion) do not change any of the terms and conditions in the Owners and Contractors Protective Liability Coverage Part form that purportedly insured claims of bodily injuries by AEC's employees. However, the mere fact that a party "can proffer a construction of [an insurance] contract that renders its provisions partially contradictory does not make such a construction 'reasonable.'" *See Axis Ins. Co. v. Stewart*, 198 F. Supp. 3d 4, 17 (N.D.N.Y. 2016). A commonsense reading of the entire insurance contract shows that the Owners and Contractors Protective Liability Coverage Part form is the *only* coverage part in the OCP policy to which the blanket endorsement applies; other than this coverage form, the rest of the OCP policy consists of endorsements. Thus, American Empire's reading—that the entire blanket endorsement should be rendered useless because it did not explicitly state that it applied to the Owners and Contractors Protective Liability Coverage Part[9]—is illogical and contrary to the rules of contract interpretation.

[9] American Empire also does not explain why an Owners and Contractors Protective Liability Coverage Part and a Commercial General Liability Coverage Part are mutually exclusive. Indeed, the evidence shows otherwise. The Common Policy Declarations in the OCP policy states that the insurance consists of only a Commercial General Liability Coverage Part. In addition, the relevant form at issue is titled both as an "Owners and Contractors Protective Liability Coverage Part" and a "Commercial General Liability" document. (See ECF No. 27-10, at 8.) Absent any evidence that a separate Commercial General Liability Coverage Part exists independent of the Owners and Contractors Protective Liability Coverage Part, I see no reason why the blanket endorsement and the EIC exclusion should not apply to the Owners and Contractors Protective Liability Coverage Part.

Moreover, while it is true that some of the amendments in the blanket endorsement do not readily apply to the terms and conditions in the Owners and Contractors Protective Liability Coverage Part, those inconsistencies do not invalidate the EIC exclusion at issue. The fact that "terms of a policy of insurance may be construed as ambiguous where applied to one set of facts does not make them ambiguous as to other facts which come directly within the purview of such terms." *Morgan Stanley Grp. Inc.*, 225 F.3d at 276. Here, the EIC exclusion—which the drafters added as an entirely new exclusion to Underwriters' insurance policy—can be read harmoniously with the rest of the provisions in the policy, and be given full force and effect.

The fact that Underwriters did not specifically define the term "independent contractor" in the EIC exclusion also does not render the provision ambiguous. "The mere fact that a contractual term is undefined does not render it ambiguous per se." *Century Sur. Co.*, 2016 WL 1030134, at *6; *see Cassoli v. Am. Med. & Life Ins. Co.*, No. 14-Cv-9379(SHS), 2015 WL 3490688, at *3 (S.D.N.Y. June 2, 2015) (same). "[E]ven where a contract does not define a particular—and potentially ambiguous—term, a body of state law or an established custom [may fill] in the gaps left by the drafters." *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617 (2d Cir. 2001); *Century Sur. Co.*, 2016 WL 1030134, at *6. Courts construing similar independent contractor exclusions have established the following legal meaning for the term "independent contractor:"

> one who contracts to do certain work according to his own methods, and without being subject to the control of his employer except as to the product or result of his work; he contracts to perform a piece of work at his own risk and cost, his workmen being his servants and he being liable for their misconduct.

Century Sur. Co., 2016 WL 1030134, at *6; *Mount Vernon Fire Ins. Co. v. William Monier Constr. Co.*, No. 95 CIV. 0645 (DC), 1996 WL 447747, at *3 (S.D.N.Y. Aug. 7, 1996), *aff'd*, 112 F.3d 504 (2d Cir. 1997) (collecting cases). American Empire does not contest this

definition, and thus, the meaning of the term "independent contractor" is not in dispute. (ECF No. 25, at 20.)

The fact that Underwriters defined AEC as a "contractor" or "designated contractor" but left the term "independent contractor" undefined in the policy, in no way proves that AEC was not an independent contractor. It is undisputed that AEC was a contractor hired by NYCHA to perform certain construction work for a fixed sum, and it is well-settled that the "terms 'contractor' and 'independent contractor' are broad terms that [] include 'subcontractors' and 'general contractors.'" *Century Sur. Co.*, 2016 WL 1030134, at *8; *see also U.S. Underwriters Ins. Co. v. Congregation Kollel Tisereth, TZVI*, No. CIV.A. 99-CV-7398DGT, 2004 WL 2191051, at *1 (E.D.N.Y. Sept. 30, 2004) (the fact that parties were subcontractors "does not preclude the application of the [employees of independent contractor] exclusion, as the term 'contractor' has been held to be a 'generic one, encompassing both general contractors and subcontractors.'"); *Mount Vernon Fire Ins. Co. v. Chios Const. Corp.*, No. 94 CIV. 6107 (SS), 1996 WL 15668, at *3 (S.D.N.Y. Jan. 17, 1996) (subcontractor qualified as an independent contractor even if the policy did not explicitly refer to them as independent contractors). Thus, the term "independent contractor" in the EIC exclusion plainly encompasses AEC.[10]

The record makes clear that the criteria for the EIC exclusion are satisfied. AEC was an independent contractor hired by NYCHA. The plaintiffs in the underlying state actions are

[10] There are only two possibilities with respect to AEC's status in the context of this case: an independent contractor or an employee. American Empire has not (and cannot) show that AEC was NYCHA's employee. (*See* ECF No. 27-2 (specifying AEC as a contractor and requiring it to assume all responsibility for work performed and purchase liability insurance). To the extent that American Empire argues that AEC is a contractor that is neither an independent contractor nor an employee to avoid the exclusions in Underwriters' OCP policy, that argument has "no basis in [the] law." *See Century Sur. Co.*, 2016 WL 1030134, at *8 (rejecting defendants' theory that a subcontractor can be neither an independent contractor nor an employee); *accord William Monier Constr. Co.*, 1996 WL 447747, at *4 ("[T]here are only two possibilities; [the injured worker] was either an independent contractor or employee.").

AEC's employees, and they allegedly sustained bodily injuries. The EIC exclusion in Underwriters' OCP policy therefore applies as a matter of law, and Underwriters has no obligation to defend and indemnify NYCHA in the underlying personal injury actions.

CONCLUSION

For the reasons set forth above, American Empire's motion for summary judgment [24] is denied. Underwriters' motion for summary judgment [27] is granted. The Clerk of the Court is directed to enter judgment in favor of the defendant, Underwriters, and close the case.

SO ORDERED.

s/Ann M. Donnelly

Ann M. Donnelly
United States District Judge

Dated: Brooklyn, New York
July 23, 2018