STATE OF NEW YORK
SUPREME COURT CHAMBERS
RENSSELAER COUNTY COURTHOUSE
TROY, NEW YORK 12180
(518) 285-6140

PATRICK J. McGRATH
JUSTICE

December 5, 2018

JENNIFER C. SHATZ
LAW CLERK

Philip C. Silverberg, Esq.
Mound Cotton Wollan & Greengrass
One New York Plaza, 45th Floor
New York, New York 10004

Re: Black River Partners, et. al. v. Adirondack Mechanical Services, et. al.
Index No. 252627

Dear Mr. Silverberg:

Enclosed please find original Decision and Order in the above matter. Please file and serve accordingly. The original supporting papers have been forwarded to the Rensselaer County Clerk's Office for filing. Please be advised that I have scheduled a conference in the above matter for **January 8, 2019 at 10:00 a.m.**

Very truly yours,

Patrick J. McGrath
Supreme Court Justice

PJM:mr

Enc.

cc: Murray S. Bower, Esq. ***(w/enclosure)***
Joshua A. Sabo, Esq. ***(w/enclosure)***

At an IAS Term of the Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 9th day of October 2018

PRESENT: HON. PATRICK J. McGRATH
Justice of the Supreme Court

SUPREME COURT STATE OF NEW YORK
COUNTY OF RENSSELAER

BLACK RIVER PARTNERS, LLC A/A/O CHAMPLAIN SPINNERS POWER COMPANY, INC., ALICE FALLS HYDRO, LLC and STILLWATER HYDRO ASSOCIATES, LLC,

Plaintiffs,

-against-

DECISION AND ORDER
INDEX NO. 252627/2016

ADIRONDACK MECHANICAL SERVICES, LLC AND LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

APPEARANCES: JOSHUA A. SABO, ESQ.
Attorneys for the Plaintiff

MURRAY S. BROWER, ESQ.
Attorneys for Defendant Adirondack Mechanical Services, LLC

PHILIP C. SILVERBERG, ESQ.
Attorneys for Defendant Liberty Mutual Insurance Company

McGRATH, PATRICK J., J.S.C.

Defendant Adirondack Mechanical Services, LLC (hereinafter, "Adirondack") moves for summary judgment dismissing the complaint, as well as the cross-claims of defendant Liberty Mutual Insurance Company (hereinafter, "Liberty"). The plaintiff and Liberty oppose the motion.

Liberty moves for partial summary judgment as well as an order declaring the coverage for all loss and damage, including business interruption loss, is subject to a $50,000 water damage sub-

limit and dismissing plaintiff's claim for water damage in excess of the $50,000 sub-limit. CPLR 3001 and CPLR 3212. The plaintiff opposes the motion.

It is well settled that "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." McDay v. State, 130 AD3d 1359 (3d Dept. 2016). In deciding whether summary judgment is warranted, the Court's main function is issue identification, not issue determination. Barr v. County of Albany, 50 NY2d 247 (1980). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law. Winegard v. New York Univ. Med. Ctr., 64 NY2d 851 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. Davis v. Klein, 88 NY2d 1008 (1996). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980). Failure to make such showing requires denial of the motion regardless of the sufficiency of the opposing papers. Voss v. Netherlands Ins. Co., 22 NY3d 728 (2014).

Plaintiff Alice Falls Hydro LLC is the owner and operator of the Alice Falls hydroelectric generating facility located on the AuSable River in Clinton and Essex Counties, New York. The Alice Falls Powerhouse ("Powerhouse") has two power generating units designated as Unit 1 and Unit 2. Unit 2 is used for generating electrical power. Unit 2 is a generator that connects to a runner which connects to turbine blades.

The plaintiff sustained damage to the Powerhouse on three occasions. The plaintiff hired Adirondack to make the necessary repairs. The Powerhouse was damaged in 2011 as a result of Hurricane Irene which required the replacement of the generators. In 2013, an ice dam formed downstream of the Alice Falls Project blocking the flow of the AuSable River, causing the water levels to rise and flood the Powerhouse. The plaintiff removed the generator and runner of Unit 2. The machinery was repaired by another contractor and Adirondack reinstalled the equipment after it was repaired. In 2014, the plaintiff discovered a leak in the Powerhouse from Unit 2. The plaintiff hired Adirondack who recommended the runner be sent to a metal shop to be rebuilt. The plaintiff claims that starting in July of 2014, Adirondack disassembled, inspected and supervised the repairs to Unit 2. Unit 2 has a pressure plate that acts to seal the wet part of the hydro plant where the turbine blades are in the water and the shaft connects to the generator in the Powerhouse. The shaft is turned by the turbine blades from the lower part of the turbine through the pressure plate that connects to the generator. The pressure plate acts as a shield from the water and is held together with eight bolts. Adirondack reinstalled the unit and returned it to operation. On March 26, 2015, two weeks after the defendant reinstalled Unit 2, the Powerhouse flooded causing significant damage to all of the hydroelectric equipment. Once the Powerhouse was de-watered, the plaintiff discovered the pressure plate had shifted and eight bolts had come loose. Seven bolts were recovered. The plaintiff submitted a claim for the damages to its insurance company, Liberty. On November 11, 2015, Liberty denied coverage.

The Complaint

Plaintiff commenced this action against Adirondack, maintaining that defendant was negligent when it repaired Unit 2 as it did not use new bolts, did not inspect the threads in the flanges, did not clean the bolt holes, did not lubricate the holes before the bolts were inserted, did not use washers, did not use Loctite, did not clean the flange faces and did not use silicon to seal the flanges when the pressure plate was put back together. Plaintiff also seeks a declaratory judgment finding the policy of insurance issued by Liberty provides for coverage for the property damage sustained and business interruption losses. The Plaintiff also seeks damages for Liberty's breach of contract in the amount of $1,325,000.

Adirondack's Motion for Summary Judgment

Adirondack moves to dismiss the complaint against it, claiming it performed in a workmanlike manner. Specifically, Adirondack alleges when the pressure plate was disassembled in July of 2014, its employee cleaned the bolt holes with Braklen and used a torque wrench to tighten the bolts and washers on the pressure plate. The defendant alleges the plaintiff provided the bolts. The defendant alleges it cleaned and lubricated the bolt holes with Loctite and the bolts were properly torqued to 90 pounds. The defendant alleges that plaintiff has failed to offer any proof that the work performed was the cause of the flooding. Adirondack notes that Liberty hired Failure Analysis Prevention, Inc., (hereinafter "FAP") to investigate the incident. Liberty has also included one of the authors of the report, Lisa N. Eastep, a Senior Engineer at FAP, in its expert witness disclosure. The FAP report found that the bolts were not defective and were properly torqued. Defense counsel claims that the FAP report "acknowledged" vibrations caused the bolts to come out of the holes in the pressure plate, but then "ignore[d] the issue when it arrived at a conclusion." Counsel does not direct the Court to any specific portion of the FAP report wherein it acknowledges that vibrations caused the bolts to loosen, and Adirondack does not provide its own expert opinion on this motion. However, counsel points to the deposition of Brad Knapp, Plant Operator. Mr. Knapp acknowledged that at the time of the flooding, there were no devices on the turbine and generator that monitored for vibrations, but he believes that the bolts backed out of their holes because of "excessive vibration." Specifically, he testified that Unit 2 had been repaired prior to 2015. The operators were doing "commissioning" and there were vibrations coming from the turbine in Unit 2. It was then shut down and inspected and the lower turbine bearings had been worn. They were replaced and the vibrations ended. He testified that after the 2015 flood, the turbine was removed and it was sent to have the runner repaired. The runner was in need of repair because "[t]he bearings were worn and prop blades had been reduced in size; they rubbed against the casing, the housing." Mr. Knapp said this condition could have caused vibrations to be sent up the shaft. When asked whether those vibrations could have caused the bolts to back out, even if properly installed at 90 pounds per square inch of torque, Mr. Knapp said, "I'm not an engineer, but I believe it's possible." After another flood that occurred after 2015, Mr. Knapp again saw that the bearings and blades were worn in a similar pattern, even with new bolts. This is the basis for his belief that the bolts had failed because of vibration. He believed the bolts failing was a "symptom", not the cause of the flood. When asked "what would cause excessive vibration", Mr. Knapp said, "that's the million dollar

question. I don't know."

Adirondack also alleges it was retained on a time and material basis and never performed any engineering services. The defendant claims it was not hired to perform engineering services and it had no duty as an installer to evaluate the condition of the bolt hole threads or to perform or make recommendations for any needed repairs.

Finally, Adirondack contends the parties entered into a Release on July 22, 2014 and the plaintiff released the defendant from all past and future claims.

In opposition to the motion, the plaintiff maintains that questions of fact exist as to what caused the bolts to back out of their holes. Plaintiff states that if the FAP report is correct, then Adirondack's failure to properly install the bolts caused the damage. However, if the bolts were properly installed, then an unknown occurrence at the Powerhouse caused Unit 2 to malfunction, specifically, sudden vibrations.

Liberty also opposes Adirondack's summary judgment motion. Liberty notes that the FAP report found small areas of surface corrosion at the thread root on four bolts and thread damage on all of the bolts which varied from bolt to bolt. The FAP report concluded that a sufficient pre-load did not develop in the bolts during installation due to one or more of the following: the required torque level was not achieved; the threads were not lubricated sufficiently; or the corroded condition of the bolt holes impeded the development of pre-load in the bolts. In addition, the report did not find any evidence that Locktite (which can increase the resistance of bolt movement) was used in the installation of the bolts. While arguing that Adirondack has not offered any evidence that the operation of the Powerhouse or vibrations in Unit 2 caused the March 26, 2015 failure, Liberty also maintains that questions of fact exist as to the cause of the loss.

After a review of the record, the Court is unable to ascertain the cause of the malfunction of Unit 2. The defendant has not offered significant proof that it did not install the bolts in the pressure plate in a unworkmanlike manner, and even if it had, plaintiff and Liberty have raised questions of fact regarding causation via the FAP report. However, plaintiff is not entitled to summary judgment either, as the FAP report is far from conclusive and defendant has raised questions of fact with respect to the possibility that vibrations, which were noted before and after the 2015 flood, were the cause of the loss. Accordingly, the defendant's motion to dismiss the complaint on these grounds is denied. Nor can summary judgment be awarded to plaintiff after a search of the record. *See* CPLR 3212(b).

With respect to the July 22, 2014 Release executed by the plaintiff and Adirondack, that Release states,

> "[Plaintiff] expressly remises, releases and forever discharges [Adirondack]... from all causes of action and actions, suits, debts, sums of money, damages, judgments and claims and demands whatsoever in law or in equity which against the said [Adirondack] that [plaintiff

ever had, or ever has now and which [plaintff's] successor and assigns and heirs and representatives hereafter can, shall or may have for any reason or cause or things whatsoever from the beginning of the world to the day or date of these presents. Without limiting the generality of the foregoing, the foregoing shall include but not be limited to any work [Adirondack] performed relative to the unit prior to the date of this Agreement...."

Liberty notes that "unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts. Put another way, it must appear plainly and precisely that the limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility... By and large, if such is the intention of the parties, the fairest course is to provide explicitly that claims based on negligence are included." Gross v. Sweet, 49 NY2d 102, 106-08 (1979). The Court finds that the release does not express any intention to exempt Adirondack from liability for damages which may result from its own failure to use due care, as alleged here. Therefore, Adirondack's motion is denied on these grounds.

Finally, Adirondack argues that it was hired to work as a repairer, and was not obligated to inspect for other defects it was not hired to repair. *See* Rutherford v. Signode Corp., 11 AD3d 922, 923 (4th Dept. 2004) ("Absent a routine maintenance contract, a repairer may not be held liable for its failure to inspect a machine for defects unrelated to the problem that it was summoned to correct.") Adirondack acknowledges that "[e]ven without a general maintenance contract, a repairer may be liable for injuries caused by the unsafe operation of a device if, in response to a complaint concerning the very same operation which later caused the injury, the repairer undertook to make repairs and negligently failed to inspect to find the actual defect." Vermette v. Kenworth Truck Co., 111 AD2d 448, 450 (3d Dept. 1985). However, Adirondack argues that this was not the case here, as it was engaged to take the turbine apart and then re-assemble it, not to diagnose a problem. However, the complaint does not allege that Adirondack was negligent for failing to inspect for defects unrelated to the problem that it was summoned to complete. The complaint alleges that Adirondack was negligent in performing the very work is was contracted to do. Further, Daniel McCarty, a licensed engineer and Adirondack's project manager, testified when the leak was discovered in 2014, Adirondack contracted with LC Precision to inspect the runner. Further, that the scope of Adirondack's work in 2014 was to "disassemble, remove, inspect the unit, oversee repairs that were undertaken by LC Precision, then re-assemble and reinstall the unit." He went to inspect the work of LC Precision "twice during the process and at the end."

Adirondack's motion is therefore denied in its entirety.

Liberty's Motion for Summary Judgment/Declaratory Judgment

Liberty claims plaintiff's policy of insurance provides coverage for water damages, including all business losses, up to a $50,000 sub-limit. Liberty claims the March 2015 incident was the result of a sudden and accidental breakdown of Unit 2, and that almost 75% of the alleged property damage here is attributable to costs associated with repairs to water damaged electrical, hydraulics and

generators.
Liberty alleges that the $50,000 sub-limit also applies to plaintiff's business interruption claim as all loses that stem from a flood are subject to the flood sub-limit. Liberty maintains the insurance policy is unambiguous as it is clear the water damage cap is $50,000 per accident.

In opposition, plaintiff argues that questions of fact exist as to the cause of flooding, and therefore, the appropriate insurance coverage cannot be determined. Next, that the insurance policy is ambiguous. The plaintiff contends it would never have agreed to a flood coverage limit of $50,000 which included all water damage, all flood coverage and all business interruption coverage. The plaintiff claims Liberty's attempt to use sub-limits of coverage should have been outlined in clear and unambiguous language. The Plaintiff contends the parties have a difference of opinion and interpretation of the terms of the policy which cannot be resolved by summary judgment. Even if Liberty's interpretation is correct, plaintiff argues that the actual amount of damages liberty should pay is $325,000 in property damages, regardless of whether or not water entered that plant, plus the $50,000 in water damages, plus 75% of the business interruption claim.

"Where the provisions of an insurance policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement". U. S. Fidelity. & Guar. Co. v. Annunziata, 67 NY2d 229 (1986). It is well settled that an ambiguity in an insurance policy will be construed in favor of the insured (Matter of Mostow v. State Farm Ins. Cos., 88 NY2d 321 (1996)), particularly where the ambiguity is in an exclusionary clause (Matter of Metropolitan Prop. & Cas. Ins. Co. v. Mancuso, 93 NY2d 487 (1999)). The test for ambiguity is whether the language in the insurance contract is "susceptible of two reasonable interpretations." Concordia General Contracting, Inc. v. Preferred Mutual Insurance Company, 146 AD3d 932 (2d Dept. 2017). Whether or not a provision in an insurance policy is ambiguous is a question of law for the court to determine. NIACC, LLC v. Greenwich Ins. Co., 51 AD3d 883 (2d Dept. 2008).

On the second page of the insurance policy booklet, the concept of a liability sub-limit is introduced under the title, "Sub-Limits of Liability." Above the list of sub-limits, there is a notation which states that "[t]he sub-limits of liability shown below and in any attached endorsement are part of and not in addition to the Policy Limit of Liability. These sub-limits are per Occurrence unless otherwise noted." Towards to the bottom of the list is "Water Damage"; the sub-limit is stated as $50,000.

The policy booklet then provides for a table of contents; "limits of liability" is on page 3. On Page 3, there is a heading which reads "LIMITS OF LIABILITY" in font size that is capitalized and bigger than that on the rest of the page. Under this heading, the policy again informs the reader that the "Policy Limit of Liability shall be the amount stated in the Declarations, for loss, damage, or expense arising from any one occurrence. The sub-limits of liability as stated in the Declarations and in any attached endorsements are part of and not in addition to the Policy Limit of liability." Under "Water Damage Coverage" , the policy insures for "loss, including salvage expenses, on property damaged by water, resulting from any One Accident." An "accident" is defined in the policy as a "sudden and accidental breakdown of an Object or a part thereof which manifests itself at the time

of its occurrence by physical damage that necessitates repair or replacement of the Object or part thereof." An "object" includes "any mechanical or electrical machine or apparatus used for the generation, transmission or utilization of mechanical or electrical power." An "occurrence" is a "loss, incident or series of incidents immediately arising out of a single event or originating cause and includes all resultant or concomitant Named Insured losses..."

In this case, plaintiff's own allegations in its complaint place this incident squarely within the Water Damage Sub-Limit as it is described in the policy. The complaint states that the bolts securing Unit 2 "suddenly failed." The complaint further alleges that this failure allowed water to flow directly into the powerhouse, which flooded the generators, the hydraulic units, electrical switch gear, batteries, controls, etc. Silt from the river and an oil film from the hydraulic units coated the powerhouse and equipment. There is no evidence that the runner or the turbine blade were damaged. All claimed property damage was due to the water that flooded the powerhouse.

The existence of a $50,000 water damage limit per occurrence is not hidden within the policy. This sub-limit is mentioned upfront in the Declarations section of the policy, and in further detail where an insured would go to find specifics about their coverage after sustaining a loss. The language is bolded and capitalized to make it conspicuous.

Nor is the policy language ambiguous. The coverage limitation for water damage is plain and clear, and is communicated in clear and understandable language. The policy states that the sub-limit is the most the company will pay "per occurrence", which is defined. The policy is thus clear that the blanket limit for property damage is not applicable to all causes of loss. The only "ambiguity" referenced by the plaintiff is that the Policy sets a $1,000,000 sub-limit "in annual aggregate for the peril of Flood combined for Champlain Spinners and Stillwater Hydro." However, the very next line down states that the annual aggregate for the peril of Flood at Alice Falls was "not covered." Moreover, the policy defines "flooding" as "rising water, surface water, waves, tidal water, tide wave or tsunami; rising, overflowing or any breach of streams, rivers, lakes, reservoirs, other other bodies of water; or spray from any of the foregoing, all whether driven by wind or not." As pointed out by Liberty, the damage here was caused by water entering the powerhouse as a result of the bolts coming loose from their holes, not the rising or overflow of the river on which the powerhouse was situated. Again, "flooding" is not even covered at Alice Falls.

The Court therefore finds that Liberty is entitled to an Order declaring that coverage for all loss and damage, including business interruption loss, resulting from water is subject to a $50,000 water damage sub-limit, and dismissing Plaintiff's claims against Liberty in excess of the $50,000 sub-limit.

Liberty also seeks the dismissal of the cross-claims of the defendant Adirondack for contribution and indemnification, noting that the water damage policy does not cover faulty or defective material, faulty workmanship or corrosion. However, as the Court has already found that questions of fact exist as to the cause of flooding, and therefore, Liberty's motion is denied.

This constitutes the Decision and Order of the Court. This Decision and Order is being returned to the attorneys for Liberty Mutual Insurance Company. The Court will forward all original supporting documentation to the County Clerk's Office for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Liberty Mutual Insurance Company is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

DATED: Troy, New York
December 5, 2018

PATRICK J. McGRATH
Justice of the Supreme Court

Papers Considered:

1. Notice of Motion (Adirondack Mechanical Services, LLC), dated August 15, 2018; Affidavit, Murray S. Bower, Esq., dated August 15, 2018 with annexed Exhibits A-I.
2. Notice of Motion (Liberty Mutual Insurance Company) dated August 20, 2018; Affirmation, Philip C. Silverberg, Esq. dated August 20, 2016 with annexed Exhibits 1-16; Memorandum of Law dated August 20, 2018.
3. Affidavit, Dwight Bowler dated September 20, 2018 with annexed Exhibit A; Memorandum of Law dated September 21, 2018.
4. Affirmation in Opposition, Philip C. Silverberg, Esq. dated September 20, 2018 with annexed Exhibits 1-8; Memorandum of Law dated September 20, 2018;
5. Reply Memorandum of Law dated October 4, 2018.