UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MERRITT ENVIRONMENTAL CONSULTING CORPORATION,

Plaintiff,

-against-

GREAT DIVIDE INSURANCE COMPANY, and BERKLEY SPECIALTY UNDERWRITING MANAGERS,

Defendants.
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REPORT AND RECOMMENDATION
CV 17-7495 (SJF)(AYS)

SHIELDS, Magistrate Judge:

This is an action in which Plaintiff Merritt Environmental Consulting Corporation ("Plaintiff" or "Merritt Environmental") seeks a declaratory judgment that Defendant Great Divide Insurance Company ("Great Divide" or the "Insurer") is obligated to cover Plaintiff in connection with two actions commenced in the Southern District of New York.[1]

Presently before this Court, upon referral by the Honorable Sandra J. Feuerstein for Report and Recommendation, is Defendant's motion pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss Plaintiff's Complaint. See Docket Entry herein ("DE") 10 (Motion to Dismiss) and Electronic Order dated May 17, 2018 (referring motion). For the reasons set forth below, this Court respectfully recommends that the motion be granted.

1. Although Plaintiff commenced this action against both Great Divide and Berkley Specialty Underwriting Managers ("Berkley"), the motion papers presently before the Court make clear that Plaintiff has alleged no facts against Berkley, and agrees to discontinue as against this Defendant.

BACKGROUND

I. The Parties

Plaintiff Merritt is a New York corporation with its principal place of business in the County of Suffolk. DE 1 ¶ 1. Merritt is engaged in the business of providing environmental consulting services. See DE 1 ¶ 6. Defendant Great Divide is an insurance company organized under the laws of the State of North Dakota, authorized to do business in the State of New York with its principal place of business in the State of Iowa. DE1 ¶ 2. Great Divide issued Plaintiff a combined insurance policy that included coverage for professional liability claims. DE 1¶ ¶ 29-35. At issue here is whether that policy provides coverage for two lawsuits commenced against Merritt that are presently pending in the United States District Court for the Southern District of New York. The Court turns now to discuss those lawsuits, as well as the relevant policy provisions.

II. Background and the Underlying Lawsuits

A. Merritt's Business and its Agreement to Perform Services for Bank United

On or about July 17, 2013, Merritt entered into a Master Services Agreement (the "MSA") with Bank United, N.A. (the "Bank"). Id. The MSA contemplated that Merritt would provide environmental review and consulting services pursuant to specific work orders. Such consulting services were provided for properties as to which the Bank was contemplating the extension of financing.

On or about November 5, 2013, the Bank asked Merritt to provide services pursuant to the MSA with respect to a property located at 105 Mt. Kisco Avenue, Mt. Kisco, New York (the "Mt. Kisco Property" or the "Property"). In particular, the Bank asked Merritt to perform a "Phase I Environmental Site Assessment" (a "Phase I Review') for the Property. That review

was sought in connection with a mortgage refinance that the Bank was asked to extend to an entity known as 105 Mt. Kisco Associates (the "Borrower"). DE 1 ¶ 8. Merritt completed its Phase I Review, and issued its report on or about December 2, 2013. DE 1¶ 12; Exhibit B (the "Report"). Thereafter, on or about March 20, 2014, the Bank apparently agreed to the refinancing requested by the Borrower, and closed on a refinancing of the Mt. Kisco Property.

B. Lawsuits Arising out of Contamination at the Mt. Kisco Property

On July 9, 2015, Merritt, along with several others, was named as a defendant in a case commenced in the Southern District of New York, by, among others, the Borrower. That lawsuit bears docket number 15-cv-05346 (NSR)(JCM) (the "Mt. Kisco Lawsuit"). DE 1 at Exhibit C. The Mt. Kisco Lawsuit seeks recovery pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 ("CERCLA"). It details a long history of radiological contamination at the Mt. Kisco Property, initially stemming from its involvement in the Manhattan Project during World War II. DE 1; Exh. C at 77.[2] The contamination referred to in the Mt. Kisco Lawsuit includes allegations that the Property was contaminated by its use as a uranium and radium processing facility, and that materials recovered at the property include "radium, radium-D, polonium and actinium", all of which are referred to as "highly radioactive substances". Id. at 78. The presence of radioactive materials at the 105 Mt Kisco Property is also attributed to the post-war production of commercial radium and uranium, and the failure to properly dispose of radioactive waste. Id. at 78. Plaintiffs in the Mt. Kisco Lawsuit allege that hot spots of radium continued to exist at the Property in the 1970's, and that such conditions

2. For ease of reference, page references to documents appearing on the docket herein are those assigned to the document as electronically filed.

continued to persist through 1998. Id. at 79. Further, a 2013 review of the property by the Environmental Protection Agency is alleged to have revealed continued radium contamination. Id. at 82.

With respect to Merritt, the 105 Mt. Kisco Lawsuit refers to the refinancing of the Property by the Bank as described above, as well as Merritt's preparation of its Phase I Review and the Report. It is alleged that Merritt's review of the Property was intended to uncover the presence of hazardous materials, but that it failed to properly conduct that review. Plaintiffs' complaint in the Mt. Kisco Lawsuit concludes that "if Merritt has conducted a proper investigation, then it would have noted the significant radium and uranium contamination on the [Mt. Kisco Property] and history of governmental investigations." Id. at 83.

In an opinion dated March 30, 2017, the District Court in the Mt. Kisco Lawsuit granted Merritt's motion to dismiss. Plaintiffs in that lawsuit thereafter amended their complaint, again naming Merritt as a CERCLA defendant. DE 1; Exh. D at 124. While the amended complaint adds allegations of Merritt's knowledge regarding the Bank and the Borrowers reliance on the Phase I Report, it states in similar fashion to the original complaint, that Merritt was "grossly negligent and committed professional malpractice when it failed to identify any material regarding radiological contamination" when it conducted its review of the Property. DE 1; Exh. D at 132. The cause of action in the amended complaint against Merritt alleges negligent misrepresentation by, inter alia, its "gross omissions and understatements of radioactivity" at the Property. DE 1; Exh. C at 167. Merritt has once again moved to dismiss. That motion is pending.

On July 13, 2017, Merritt was named as a defendant in a second lawsuit arising out of its services with respect to the Mt. Kisco Property. That lawsuit was commenced by the Bank

("The Bank Lawsuit"). On November 26, 2017, the Bank filed an amended complaint naming Merritt, Great Divide and others in its lawsuit referencing Merritt's Phase I Review and Report with respect to the Property. DE 1; Exh. E at 171. The Bank's lawsuit refers to its extension of a loan in the amount of $3.225 million to the Borrower in connection with the refinancing of the Property. DE 1; Exh. E at 176. Like the Mt. Kisco Lawsuit, the Bank Lawsuit refers to the long history of nuclear and radiological contamination at the Property. It alleges that Merritt's Report "failed to contain any information whatsoever regarding past existence, present existence, or potential for the present existence of nuclear radiation or radiological contamination" at the property and also failed to "reveal the existence of a radium and uranium refinery that existed [there] from 1942 to 1966". Id. at 176. Like the plaintiffs in the Mt. Kisco Lawsuit, the Bank charges Merritt with failing to "discover, disclose or detect the radioactive contamination" at the Mt. Kisco Property. Id. at 182. It concludes that Merritt failed to conform to industry standards when conducting its review, and states that its "failure to conduct [its review] with the skill ordinarily exercised by professional environmental consultants at the time of the [review] resulted in an error-filled and materially misleading" report. Id. at 185.

Merritts' conduct is alleged to have led the Bank to extend a loan with respect to the Property based upon a value at or near $4.3 million, when in reality the Property was "virtually worthless". Id. The Bank states that it has been significantly damaged as a direct and proximate result of Merritt's failure to perform the Phase I Review of the Property in accord with proper professional standards. Recovery is sought from Merritt on theories of breach of contract, professional malpractice, and negligent misrepresentation. The Bank seeks a declaratory judgment that if Merritt is found liable to the Bank, then Great Divide must indemnify the Bank for the property damage caused by Merritt's negligently prepared report.

III. The Policy

Merritt's requests for coverage for both the Mt. Kisco Lawsuit and the Bank Lawsuit (collectively "The Lawsuits") seek defense and indemnity pursuant to the "Coverage E-Professional Liability" section of the Insurance Company's policy no. ECP0154742513 (the "Policy").[3] The Policy covers the time period from April 17, 2015 through April 17, 2016 and renewed Merritt's prior policy, bearing policy number ECPO1547421-12, which was first effective as of April 17, 2012. DE 10-14; Affidavit of Charles Merritt (hereinafter "Merritt Aff') ¶ 2. The Policy limits coverage for professional liability to $2 million per claim, with a per claim retention of $10,000. DE 1-4 at 227. The Policy is a "claims made" policy, applying to claims made against the insured and reported to Great Divide during the policy period or any "Extended Reporting Period" as defined in the Policy.

The professional liability section of the Policy, pursuant to which coverage is sought herein, provides coverage for damages (in excess of the retained amount) "that result from professional services to which [the Policy] applies." Covered damages are defined as those that "result from an actual or alleged act, error, or omission in the performance of professional services rendered by the insured." The Policy gives the Insurance Company "the right and duty to defend" the insured against any suit seeking those damages. However, there is no duty to defend "against any suit seeking damages as to which [the Policy] does not apply. DE 1-4 at 240.

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3. The Policy includes various sections providing coverage for matters outside of the professional liability realm, including, for example, coverage for bodily injury. While Great Divide has included discussion of these sections in its motion, Merritt makes clear that it seeks coverage only pursuant to the Coverage E-Professional Liability section of the Policy. The Court therefore confines its discussion to that section of the Policy.

As noted, the Policy, including its professional liability coverage is a claims made policy. Specifically, it applies only if "the claim is first made against the insured and reported to the Insurer, in writing, during the policy period," or what is defined as the "Extended Reporting Period". Additionally, the actual or alleged act for which coverage is sought "takes place on or after the Retroactive Date" if any, as set forth in the Policy, and before the end of the Policy period. In this case, the policy period ends on April 17, 2016. The retroactive date is April 17, 2009. Thus, with respect to date, claims covered by the Policy are those made to the Insurer for acts or alleged acts that took place between April 17, 2009 and April 17, 2016, and for which a claim was made against the insured and reported (in writing) to Great Divide by April 17, 2016.

The professional liability coverage section of the Policy contains particular exclusions, and also incorporates certain "Shared Exclusions". Shared Exclusions appear in Section II of the Policy, and exclude a variety of specified categories of claims from coverage. Relevant here is the following subsection of the Shared Exclusion section of the Policy which broadly excludes from coverage:

> Any liability of whatever nature arising out of, resulting from, caused by or contributed by:
>
> a. Ionizing radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel.
>
> b. The radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor, or other nuclear assembly or nuclear component thereof.
>
> c. Any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force of matter.
>
> d. Radioactive contamination however caused, whenever or wherever happening.

DE 1-4 at 246 (hereinafter the "Radioactive Exclusion").

IV. Merritt's Requests for Coverage and the Insurer's Denials

On August 13, 2015, Merritt tendered the Mt. Kisco Lawsuit to Great Divide, seeking coverage under the Policy. Merritt Aff. ¶ 10. Great Divide denied coverage for the Mt. Kisco Lawsuit on August 19, 2015. On September 11, 2015, Merritt sought reconsideration of that denial, and the Insurer reiterated its denial of coverage in a letter dated October 6, 2016. Id.

On April 17, 2017, Merritt advised Great Divide that on April 7, 2017, the Bank made clear its intent to pursue any remedies arising out of "alleged substandard work" performed by Merritt. DE 10-26. Merritt reiterated its request for coverage in the Mt. Kisco Lawsuit. The Insurer's denial of coverage for the Mt. Kisco Lawsuit was again made clear on May 15, 2017, as was its denial of coverage for the Bank Lawsuit. Merritt Aff. Exh. M.

In a letter dated May 15, 2017, Great Divide summarized the reasons for its prior denial of coverage for the Mt. Kisco Lawsuit, which it argued also applied (in addition to another reason) to the Bank Lawsuit. As a common ground for denial of coverage for The Lawsuits, the Insurer relied on the Radioactive Exclusion. Thus, Great Divide denied coverage on the ground that any liability on the part of Merritt would arise from or was caused by radioactive contamination at the Property, and therefore triggered the Radioactive Exclusion. Further, in particular denial of coverage for the Bank Lawsuit, the Insurer relied on the claims made aspect of the Policy. Thus, coverage was additionally denied for the Bank Lawsuit on the ground that the claim asserted against Merritt by the Bank was first made against Merritt on or about April 7, 2017 and, thereafter, in writing to the Insurer on April 17, 2017 – both dates being outside of the claims made period of the Policy, i.e., no later than April 17, 2016. See Exh. M to Merritt Aff.

V. The Present Lawsuit and the Motion to Dismiss

Having failed to reach agreement as to coverage, Merritt commenced the present action. As noted, Merritt alleges breach of its contract of insurance with Great Divide. It seeks a judgment declaring that Great Divide is obligated to defend and or indemnify Merritt in connection with both the Mt. Kisco Lawsuit and the Bank Lawsuit.

Great Divide moves to dismiss this lawsuit in its entirety. First, Great Divide argues that the Radioactive Exclusion excludes coverage of The Lawsuits. Additionally, the Insurer argues that no coverage exists for the Bank Lawsuit on the ground that it was commenced, and Great Divide received no notice thereof, until after the close of the claims made period.

Having outlined the relevant background and policy terms, the Court turns to discuss the merits of the motion.

DISCUSSION

I. Legal Principles: Standards on Motions to Dismiss

A. Rule 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (quoting, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also Arista Records, LLC v. Doe 3, 604 F.3d 110, 119–20 (2d Cir. 2010). Facial plausibility is established by pleading factual content sufficient to allow a court to reasonably infer the defendant's liability. Twombly, 550 U.S. at 556. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 555. Nor is a pleading that offers nothing more than "labels and conclusions" or "a formulaic

recitation of the elements of a cause of action," sufficient. Iqbal, 556 U.S. at 678 (2009) (quoting Twombly, 550 U.S. at 555).

B. Documents Considered

In deciding a Rule 12(b)(6) motion, the Court may consider only the facts alleged in the complaint (which are accepted as true), documents attached to the complaint as exhibits or incorporated by reference therein, matters as to which judicial notice may be taken, and documents upon which the complaint "relies heavily" and which are, thus, rendered "integral" to the complaint. Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002); Gesuldi v. Difazio, 2018 WL 1202640, *4 (E.D.N.Y. March 8, 2018); David Lerner Assocs., Inc. v. Philadelphia Indem. Ins. Co., 934 F. Supp.2d 533, 539 (E.D.N.Y. 2013). Among documents considered as integral to a complaint are policies of insurance at issue in a declaratory judgment action. Thus, in the context of motion to dismiss a coverage dispute, courts may consider the contents of an insurance policy, whether or not the plaintiff attaches the policy as an exhibit to its complaint. Classic Laundry & Linen Corp. v. Travelers Cas. Ins. Co. of America, 2017 WL 4350610 (S.D.N.Y. 2017); Svensson v. Securian Life Ins. Co., 706 F. Supp. 2d 521, 524 (S.D.N.Y. 2010); see Strom v. Goldman, Sachs & Co., 202 F.3d 138, 140 n.1 (2d Cir. 1999) (District Court properly considered insurance policy on motion to dismiss as integral to the complaint, even when not attached as an exhibit to complaint).

II. Disposition of the Motion

A. Burden of Insurer on a Motion to Dismiss

The duty to defend an insured is "exceedingly broad", and is broader than the duty to indemnify. Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.2d 131, 136, 818 N.Y.S.2d 176, 179 (2006); David Lerner, 934 F. Supp. 2d at 539. So long as the allegations of a complaint suggest a

"reasonable possibility of coverage" the insurer will be required to provide a defense. David Lerner, 934 F. Supp.2d at 539. However, where there is no duty to defend, there is no duty to indemnify. See ABC, Inc. v. Countrywide Ins. Co., 308 A.D.2d 309, 311. 764 N.Y.S.2d 244, 247 (1st Dep't. 2003).

Where, as here, an insurance company seeks to invoke a policy exclusion relieving it of the duty to defend, it bears "the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision." David Lerner, 934 F. Supp. 2d at 539-40; see Scottsdale Indem. Co. v. Beckerman, 120 A.D.3d 1215, 1218-19, 992 N.Y.S.2d 117, 120 (2d Dep't 2014). While ambiguous insurance policy exclusions are to be construed against the insurer, unambiguous provisions are to be afforded "their plain and ordinary meaning." Country-Wide Ins. Co. v. Excelsior Ins. Co., 147 A.D.3d 407, 408, 46 N.Y.S.3d 96, 98 (1st Dep't. 2017).

B. The Radioactive Exclusion Bars Coverage

Relevant and potentially dispositive of the coverage question as to The Lawsuits is the question of whether the Radiation Exclusion bars coverage as a matter of law. See Maroney v. New York Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 471, 805 N.Y.S.2d 533, 535 (2005) ("in policies of insurance ... if any one exclusion applies there can be no coverage") (citations omitted). As described above, the Radiation Exclusion excludes coverage for, inter alia, any liability "arising out" of "radioactive contamination, however caused and wherever happening." DE 1-4 at 246. New York law holds that the term "arising out of", when used in the context of a policy exclusion, is unambiguous. General Star Indem. Co. v. Driven Sports, Inc., 80 F. Supp.3d

442, 450 n.6 (E.D.N.Y. 2015). The term is broadly interpreted to mean "originating from, incident to, or having connection with". Country-Wide, 147 A.D.3d at 409, 46 N.Y.S.2d at 98 (quoting Maroney, 5 N.Y.3d at 472, 805 N.Y.S.2d at 533). It requires "only that there be some causal relationship between the injury and the risk for which coverage is provided". Regal Constr. Corp. v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa., 15 N.Y.2d 34, 38, 904 N.Y.S.2d 338 (2010) (quoting Maroney, 5 N.Y.3d at 472).

To determine the applicability of an "arising out of" exclusion, New York courts apply a "but for" causation test. See Mount Vernon Fire Ins. Co. v. Creative Hous., 88 N.Y.2d 347, 350, 645 N.Y.S.2d 433, 668 N.E.2d 404 (1996). As stated succinctly in Country-Wide: "if the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling within such an exclusion, and none of the causes of action that he or she asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action". 147 A.D.3d at 409, 46 N.Y.3d at 98 (emphasis added); accord Scottsdale, 120 A.D.3d at 1219, 992 N.Y.S.2d at 121.

Here, there is no question but that neither the claims in the Mt. Kisco Lawsuit nor the Bank Lawsuit could exist absent radioactive contamination at the Property. Both lawsuits cite extensively to contamination there, and both argue that financial harm has resulted from the parties' investments therein. It matters not that the particular claims made against Merritt are styled as claims of negligence and/or professional malpractice. New York law is clear that the claim asserted in a lawsuit for which coverage is sought is not dispositive of the issue of whether an exclusion applies.

For example in Mount Vernon, the Court of Appeals noted that the negligence theory asserted in the underlying claim for which coverage was sought "has little to do with whether the

injury sought to be compensated was based on" a claim arising out of activity excluded by the policy. Mt. Vernon, 88 N.Y.2d at 351, 645 N.Y.S.2d at 435. Instead, as noted in Mt. Vernon, "[w]hile the insured's negligence may have been a proximate cause of plaintiff's injuries, that only resolves its liability; it does not resolve the insured's right to coverage based on the language of the contract between him and the insurer. Merely because the insured might be found liable under some theory of negligence does not overcome the policy's exclusion . . . ." Accord TIG Ins. v. Martin, 2003 WL 25796732, *4 (E.D.N.Y. February 28, 2003) (refusing to hold that an underlying claim of negligent misrepresentation deprived the insurer from relying on an exclusion for claims arising under an "abuse or molestation" exclusion). Because no liability on the part of Merritt, whether by negligence, professional malpractice or any other theory could exist but for the presence of radioactive contamination, the Radioactive Exclusion bars coverage for The Lawsuits.

Merritt argues that the 1991 decision of the Second Circuit in Kimmins Indus. Servs. Corp. v. Reliance Ins. Co., 19 F.3d 78 (2d Cir. 1991) requires a different result. A close reading of that case, and subsequent New York state case law reveals that Merritt's reliance is misplaced. In Kimmins, the Second Circuit construed an insurance policy indemnifying the insured for injuries suffered "by reason of any act or omission, whether negligent or otherwise" during covered work. Workers who suffered injury during asbestos removal sued, and the insured sought indemnity. Id. at 79-80. The issue in that declaratory judgment action was whether the insurer could avoid indemnity based upon a policy exclusion, that excluded coverage for, inter alia, claims for personal injury "arising out of" the removal of asbestos. Id. at 80. There, the Second Circuit required the insurance company to indemnify, narrowly holding that the term

"arising out of" required a showing that the excluded coverage was a proximate cause (and not simply a "but for") cause of the injury alleged. Id. at 82.

In the several years since Kimmins was decided, New York courts have moved away from interpreting the phrase "arising out of" to require that the injuries for which coverage is sought be proximately caused by excluded conduct, and toward a much broader construction of that language. See e.g., Gluck v. Executive Risk Indem., Inc., 680 F. Supp. 2d 406, 420 (E.D.N.Y. 2010) (noting that "post-Kimmins, the New York Court of Appeals continued to state that "arising out of" "only requires some causal connection," rather than explicitly adopting Kimmins' view that proximate causation is necessary"), citing Maroney v. N.Y. Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 472, 805 N.Y.S.2d 533, 839 N.E. 2d 886 (2005).

Most recently, New York courts have, as described above, applied a causation standard that is certainly less than proximate cause, in favor of only a "but for" causation requirement to policy exclusions for conduct "arising out" of excluded events. See Country-Wide, 147 A.D.3d at 408, 46 N.Y.S.3d at 98. Indeed, in 2011, the Second Circuit itself, citing to, inter alia, Maroney and Mount Vernon, recognized that the New York Court of Appeals interprets the phrase "arising out of" to be "understood to mean originating from, incident to, or having connection with", and requiring on that there be only "some causal relationship" between the injury and the policy language. Fed. Ins. Co. v. Am. Home Assur. Co., 639 F.3d 557, 568 (2d Cir. 2011).

A recent decision by the New York Court of Appeals construing different policy language to require proximate cause is also instructive. In Burlington Ins. Co. v. NYC Tr. Auth., 29 N.Y.3d 313, 316, 57 N.Y.S.3d 85 (2017), the Court of Appeals held that a policy covering injuries "caused in whole or in part" by acts of the insured covered only injuries proximately

caused by the insured. There, the Court specifically rejected a "but for" causation interpretation of the policy language. Burlington, 29 N.Y.2d at 321-22. Notably, the Court differentiated the policy at issue in Burlington (language covering acts "caused in whole or in part") from language like the one at issue here which broadly excludes from coverage injuries "arising out of" certain activities. Id. at 323-24 ("arising out of" is not the functional equivalent of "proximately caused by"). Relevant to this case, the Court of Appeals in Burlington cited to Maroney and noted the reasoning that the phrase "arising out of" is "ordinarily understood to mean originating from, incident to, or having connection with". Id. at 324.

For the foregoing reasons, this Court holds that the Radioactive Exclusion, which excludes from coverage injuries arising out of radioactive contamination, bars coverage for The Lawsuits. Put simply, the injuries for which compensation is sought in both lawsuits could not exist without the radioactive contamination alleged to exist at the Property. Thus, there is a sufficient causal connection between the excluded conduct and the conduct for which coverage is sought. Accordingly, The Lawsuits arise out of excluded conduct, and there is no coverage.[4]

This is not to say that Merritt has, in fact, engaged in negligent conduct or committed professional malpractice with respect to the Property. Indeed, as evidenced by its prior dismissal of at least one of the lawsuits at the pleading stage, Merritt may have good defenses. However, the Insurer herein has no duty to defend or indemnify Merritt. Coverage is clearly excluded and the motion to dismiss must therefore be granted.

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4. Because the Radioactive Exclusion bars coverage in both lawsuits, this court need not reach the issue raised with respect to the Bank Lawsuit only, i.e., whether that lawsuit is also barred because it does not comply with the claims made provision of the Policy.

CONCLUSION

For the foregoing reasons, this Court respectfully recommends that Defendant's motion, appearing as Docket Entry No. 10 herein, be granted.

OBJECTIONS

A copy of this Report and Recommendation is being provided to all counsel via ECF. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of filing of this report. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the District Judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals. Thomas v. Arn, 474 U.S. 140, 145 (1985) ("[A] party shall file objections with the district court or else waive right to appeal."); Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision").

Dated: Central Islip, New York
October 10, 2018

/s/ Anne Y. Shields
Anne Y. Shields
United States Magistrate Judge