SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 652964/2013
EL-AD 250 WEST LLC
vs.
ZURICH AMERICAN INSURANCE
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/4/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 47-52
Answering Affidavits — Exhibits _____ | No(s). 53-62
Replying Affidavits _____ | No(s). 64-65

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/30/16

_____, J.S.C.
SHIRLEY WERNER KORNREICH J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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EL-AD 250 WEST LLC,

Index No.: 652964/2013

Plaintiff,

DECISION & ORDER

-against-

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

----------X

SHIRLEY WERNER KORNREICH, J.:

Defendant Zurich American Insurance Company (Zurich) moves, pursuant to CPLR 3212, for partial summary judgment against plaintiff El-Ad 250 West LLC (plaintiff or El-Ad 250). Plaintiff opposes the motion. Zurich's motion is denied for the reasons that follow.

I. Factual Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.[1]

On August 22, 2013, plaintiff commenced this action to recover property damage and delay in completion losses allegedly caused by Superstorm Sandy (the Storm) to a building then under construction located at 250 West Street in Manhattan. Zurich, the defendant insurer in this action, issued an "all-risk" Builders Risk Insurance Policy (the Policy) to plaintiff, the developer. The Policy was in effect during the Storm, which occurred on October 29, 2012.

The initial, threshold dispute in this action was whether the Policy's flood sublimit and deductible applied to all of plaintiff's claims. On November 7, 2013, Zurich moved for partial summary judgment on this issue, and, on December 5, 2013, plaintiff cross-moved for summary

[1] *See* Dkt. 46 (Joint Statement of Undisputed Facts). References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

judgment. By order dated June 27, 2014, this court held, as a matter of first impression under New York law, that the language in the subject Policy clearly required application of the flood sublimit and deductible. *See* Dkt. 30 (*El-Ad 250 W. LLC v Zurich Am. Ins. Co.*, 44 Misc3d 633 (Sup Ct, NY County 2014) (the 2014 Decision)). On July 7, 2015, the Appellate Division affirmed the 2014 Decision. *See* Dkt. 44 (*El-Ad 250 W. LLC v Zurich Am. Ins. Co.*, 130 AD3d 459 (1st Dept 2015)). Discovery has been completed, and plaintiff filed a Note of Issue on June 5, 2015. *See* Dkt. 40.

The parties do not dispute the existence of material questions of fact that require a trial to resolve. However, on August 12, 2015, Zurich filed the instant motion for partial summary judgment on three issues which it believes can be decided as a matter of law. The court reserved on the motion after oral argument. *See* Dkt. 68 (2/18/16 Tr.).

The first two issues relate to delay in completion damages allegedly suffered by affiliates of plaintiff working on the project, when they (1) paid additional interest on construction loans; and (2) lost earnings due to delay in selling units in the Building, including purchase prices lower than originally offered before the Storm. Zurich contends that coverage for damages suffered by plaintiff's affiliates, not named in the policy, are not recoverable under the Policy. Zurich also complains that plaintiff's decreased purchase price claims should be precluded for other reasons, such as alleged late notice. In opposition, plaintiff does not deny that the Policy appears to only permit coverage for delay in completion losses incurred by plaintiff, and not its affiliates, but nonetheless avers that New York law requires Zurich to cover these losses. As discussed below, Zurich is not entitled to summary judgment on these issues. The third issue raised by Zurich is

whether the 10% retainage plaintiff held back from its contractors should be used to calculate the deductible. Summary judgment on this issue also is denied.

II. Legal Standard

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

III. Discussion

A. Losses' Incurred By Plaintiff's Affiliates

Plaintiff, El-Ad 250, was the developer of the subject construction project. It is the only Named Insured in the Policy. *See* Dkt. 49 at 15. The Policy also contemplates and defines as Additional Named Insureds other endorsed owners, contractors, and subcontractors (*see id.*), but "[t]here are no endorsements to the Policy adding Additional Named Insureds." *See* Dkt. 46 at 2. The Policy's Delay in Completion Schedule lists plaintiff as the only Named Insured [*see* Dkt. 49 at 37] and states:

> For the purpose of Delay in Completion Coverage only, the *Named Insured* shall be as shown below [i.e., El-Ad 250]. There shall be no Additional Named Insureds, unless otherwise endorsed.

See id. (italics in original). It is clear, therefore, that the Policy states that only the Named Insured – plaintiff El-Ad 250 – may recover delay in completion losses. Nonetheless, plaintiff contends that it may recover delay in completion losses incurred by related "El-Ad" affiliates who worked on the covered project.[2] The court considers such alleged losses in turn.

[2] There is no dispute that Zurich became aware of the other "El-Ad" entities through the process of underwriting the Policy. In fact, the Business Address for plaintiff listed in the Delay in Completion schedule is a Las Vegas address, not directly for plaintiff, but "c/o El Ad IDB Las Vegas, LLC." *See* Dkt. 49 at 37. That said, while the court is holding that plaintiff's affiliates might be entitled to delay in completion coverage, the court does not agree with the argument of plaintiff's counsel that plaintiff and its affiliates are not and should not be treated as distinct legal entities. *See* Dkt. 62 at 8. Counsel should be wary of the consequences of making such a representation, which suggests that veil-piercing factors may be present. That said, this decision does not turn on that issue, but rather on the issue of when affiliated entities can seek coverage under the case law cited herein.

1. Interest on the Construction Loans

Five construction loans were used to finance the project, which are referred to by the parties as the (1) Term Loan; (2) Building Loan; (3) Project Loan; (4) Mezzanine Loan; and (5) Related Loan (collectively, the Loans). *See* Dkt. 46 at 3. Plaintiff was the borrower on the first three Loans (collectively, the El-Ad 250 Loans), and the affiliates were the borrowers on the Mezzanine and Related Loans (collectively, the Affiliated Loans). Zurich concedes that plaintiff "has a right to recover for additional interest incurred on [the El-Ad 250 Loans], subject to all of the terms and conditions of the Policy." *See* Dkt. 48 at 9. Indeed, Zurich paid $928,383 to plaintiff with respect to additional interred incurred by plaintiff on the El-Ad 250 Loans. *See* Dkt. 46 at 3.

Zurich, however, contends that the additional interest paid on the Affiliated Loans cannot be recovered by plaintiff because plaintiff is not the borrower on them. Non-party El-Ad 250 West Mezz LLC is the borrower on the Mezzanine Loan, and non-party El-AD 250 West Holding LLC is the borrower on the Related Loan. Plaintiff admits that it has no liability on the Mezzanine Loan and the Related Loan, including the additional interest expenses claimed in this action under the Policy.

Plaintiff argues that it may recover the additional interest paid on the Affiliated Loans because, notwithstanding the Policy only designating plaintiff as the Named Insured, the parties always intended that such interest expenses on the project be recoverable. That said, plaintiff concedes this is a disputed question of fact that it can only prevail on at trial, not summary judgment. Zurich disagrees, arguing that any intent plaintiff may be able to prove with parol evidence is of no moment because the Policy unambiguously states that plaintiff is the only

Named Insured, and delay in completion losses can only be recovered by the Named Insured. Zurich, thus, contends this issue is purely a question of law that can be decided in its favor on this summary judgment motion.

Plaintiff's argument that delay in completion coverage is available to its affiliates[3] is based on a line of cases originating with *Lipschitz v Hotel Charles*, 226 AD 839 (3d Dept), *aff'd* 252 NY 518 (1929).[4] *Lipschitz* was a short decision and, given its importance to this case, warrants reproduction:

> Upon the stipulation made in open court by counsel representing all parties that the court might amend the award to show by whom the Hotel Charles was operated, the court finds that Abraham Lipschitz, Louis Cohen, and Kopel London, as copartners, were doing business as the Hotel Charles, and finding of fact numbered 1 is amended by inserting, in the place of 'Hotel Charles,' the names of Abraham Lipschitz, Louis Cohen, and Kopel London, as copartners doing business as the Hotel Charles; and the same insertion to be made in the award before the word 'employer'; and as so amended the award is affirmed, with costs to the State Industrial Board against the insurance carrier, on the ground that the carrier has waived its right to declare the policy void by demanding and receiving a premium after the loss occurred. [*Pack v Washington Life Ins. Co.*, 91 AppDiv 597, 600 (2d Dept 1904), *aff'd* 181 NY 585 (1905); *Munn v Masonic Life Ass'n*, 115 AppDiv 855 (4th Dept 1906), *aff'd* 189 NY 486 (1907); *Whipple v Prudential Ins. Co. of Am.*, 222 NY 39 (1917); *Phoenix Mut. Life Ins. Co. v Raddin*, 120 US 183 (1887); *Knickerbocker Life Ins. Co. v Norton*, 96 US 234 (1877)]. **The name of the insured in the policy is not always important if the intent to cover the risk is clear.** [*Clinton v Hope Ins. Co.*, 45 NY 454 (1871); *Weed v Hamburg-Bremen Fire Ins. Co.*, 133 NY 394 (1892)].

Lipschitz, 226 AD at 839-40 (emphasis added).

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[3] The parties do not address the question of whether the affiliates' delay in completion losses can be recovered by plaintiff or if the affiliates themselves need to be named as additional plaintiffs. This shall be addressed at the pre-trial conference.

[4] *Lipschitz* was affirmed by the Court of Appeals in a per curiam order that merely states "Order affirmed, with costs." *See Lipschitz*, 252 NY at 518.

Lipschitz and its progeny are understood to stand for the proposition that if an insurance policy inaccurately recites the party for whom it was intended that coverage for the subject risk would be available, then that intended insured could receive coverage, despite not being named in the policy. *See H.L. & F.H. Realty Corp. v Gulf Ins. Co.*, 19 AD3d 646, 648 (2d Dept 2005); *Anand v GA Ins. Co. of N.Y.*, 228 AD2d 397, 399 (2d Dept 1996). An example of this principle is set forth in *Laura Accessories, Inc. v Travelers Ins. Co.*, 67 AD2d 638 (1st Dept 1979), where the court explained:

> There is present in the lawsuit an issue relating to defendant's intention to insure. There is evidence which supports the conclusion that the parties to the insurance contract intended to have that policy afford coverage to Marino Express, Inc., the plaintiff's judgment debtor; that Mr. Marino freely interchanged the names Marino Express and Marino Express, Inc., when referring to his business and that there was only one entity, operating under a legal corporate name with an everyday trade name of Marino's Express. Defendant offered no proof that there were separately conducted businesses. **The name of the insured as stated in the policy is not the sole factor to be considered in determining who was the intended insured.**

Id. at 639 (emphasis added). Likewise, in a similar construction context, a more recent court held:

> It is undisputed that the subject policy was procured in order to insure against risks attendant to a commercial construction project on a specified parcel of property. **Obviously, it was the character of the property and the project that was proposed to be undertaken thereon (both of which were properly identified) that defined the risk; the identity of the owner was comparatively unimportant.** Recognizing that [t]he name of the insured in the policy is not always important if the intent to cover the risk is clear, it is our view that Shaker Pine was entitled to equitable reformation of the policy to correct the obvious inadvertent misidentification of the named insured.

N.Y. Cas. Ins. Co. v Shaker Pine Inc., 262 AD2d 735, 736-37 (3d Dept 1999) (emphasis added; internal citations and quotation marks omitted); *see also Crivella v Transit Cas. Co.*, 116 AD2d 1007, 1008 (4th Dept 1986) ("When, through innocent mistake, the nature of the ownership of

the property to be insured is misdescribed, that constitutes mutual error for purposes of reformation, even though the insurer is not aware of the error. The name of the insured in the policy is not always important if the intent to cover the risk is clear.") (internal citations and quotation marks omitted).

Zurich correctly observes that the legal principles of mistake and reformation are themes underlying many of these cases. *See, e.g., 137 Broadway Assocs., LLC v 602 W. 137th Deli Corp.*, 40 Misc3d 1218(A), at *2 (Sup Ct, NY County 2013) ("When the intent to cover a risk is clear and one party innocently, mistakenly, and unilaterally lists a nonentity as the additional insured, New York courts have held that it is appropriate to regard that mistake as a mutual mistake and to honor the intent of the contract rather than uphold the erroneous drafting").[5] However, not all of the above-cited cases (e.g., *Laura Accessories*) expressly base their holding on the doctrine of mistake, nor do any of these cases expressly hold that mistake is an essential element of a claim that the intended insured was not correctly identified in the Policy. On the contrary, there are a number of cases where the decision to afford coverage to a party not named in the policy turned exclusively on intent without any consideration of whether a mistake was made. *See Schlueter v Manhattan Fire & Marine Ins. Co.*, 18 AD2d 167, 169 (1st Dept 1963) ("The predominant purpose and intent of the parties to the insurance policy was to provide for indemnity against loss of the property specifically scheduled."); *Engler v Regent Bindery, Inc.*,

[5] The court in *137 Broadway Assocs.* went on to hold that "[w]hether Broadway may obtain coverage from Leading ultimately depends on whether the parties intended to cover the risk, and whether Nadal's mistake in identifying Cromwell was an innocent mistake. The Policy expressly covers the risk to the manager and lessor arising from their ownership, maintenance or use of the property. The sole owner, manager, and lessor of the property is Broadway." *Id.* at *3 (internal citations omitted).

272 AD 843 (2d Dept 1947) ("During the policy period the partnership changed its entity and ownership to corporate form as 'Regent Bindery, Inc.' and claimant suffered compensable injury while in latter's employ. The risk covered by the policy was not otherwise altered."); *Heffler v Tariff*, 269 AD 913 (3d Dept 1945) ("The policy of insurance expressly covered the place of injury. The claimant worked for a copartnership. The policy of insurance was written in the name of one of the copartners. 'The name of the insured in the policy is not always important if the intent to cover the risk is clear.'"), quoting *Lipschitz*, 226 AD at 839. In fact, the First Department has held that denying coverage based on an absence of "evidence of mutual mistake or unilateral mistake coupled with fraud ... [is] not justified." *In re Liquidation of Galaxy Ins. Co.*, 257 AD2d 351, 352 (1st Dept 1999). Rather, coverage must be provided to "the owners of and the only parties with an insurable interest in the insured property, as named insureds" because "[t]he name of the insured need not appear on the face of the policy; it is enough that it describes the person for whose benefit the insurance is obtained." *Id.*, quoting *Schlueter*, 18 AD2d 167.

Indeed, *Lipschitz* and its progeny recognize that coverage determinations must turn on the question of whether the parties' intended to cover the underlying risk, not which corporate entity was the intended insured. *Lipschitz*, 226 AD at 840 ("The name of the insured in the policy is not always important if the intent to cover the risk is clear"); *Laura Accessories,* 67 AD2d at 639 (same); *N.Y. Cas.*, 262 AD2d at 736 ("Obviously, it was the character of the property and the project that was proposed to be undertaken thereon (both of which were properly identified) that defined the risk; the identity of the owner was comparatively unimportant.").

That being said, even if mistake is an essential element, plaintiff has raised a genuine question of fact about whether the parties indeed mistakenly failed to list all of plaintiff's affiliates as Named Insureds in the Delay in Completion Schedule.[6] Zurich's contention that the affiliates were actually accounted for, but considered to be possible Additional Insureds – which undisputedly are not entitled to delay in completion coverage – is not clearly correct. The intended scope of possible Additional Insureds is disputed. This was a construction project. Therefore, Additional Insureds included subcontractors, which were very differently situated than plaintiff's affiliates. It makes sense why subcontractors were not given the benefit of delay in completion damages, as such coverage would expose the carrier to unknown, virtually limitless risk given the number of contractors that may have worked on the project. Coverage for plaintiff's affiliates posed a much more foreseeable, circumscribed risk. Hence, as plaintiff correctly observes, some of the cases cited by Zurich, where a contractor on a construction project not named in the policy was not entitled to coverage, are inapposite. *See York Restoration Corp. v Solty's Const., Inc.*, 79 AD3d 861 (2d Dept 2010); *Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386 (1st Dept 2006).

Moreover, as noted, Zurich's underwriting process appears to have accounted for the affiliates, suggesting it understood coverage might extend to them. While Zurich disputes this, the reasons behind Zurich's underwriting are questions of fact that cannot be resolved on its summary judgment motion, where the evidence must be viewed in the light most favorable to

[6] The deposition testimony cited by the parties is not dispositive. Simply put, the cited testimony does not contain clear admissions regarding the parties' intent, and much of the testimony appears to have been elicited for the purpose of inducing the parties' principals, who are not attorneys, to opine on legal conclusions.

plaintiff, the party opposing summary judgment. *Martin*, 235 AD2d at 196; *see Vega v Restani Const. Corp.*, 18 NY3d 499, 503 (2012)

Of course, it is far from clear on this record that the parties intended that the affiliates' delay in completion losses were to be covered by the Policy. Zurich correctly observes that the affiliates are legally distinct entities, but plaintiff also correctly avers that the affiliates are economically united in interest with plaintiff since the net profit on the Loans (and, as discussed below, the net profit on the project) is inexorably linked with the time needed to complete the project. The Policy, after all, recognized that the risk being insured was the "INSURED PROJECT". *See* Dkt. 49 at 15-17.

Summary judgment on the claim for extra interest paid on the Affiliated Loans, therefore, is denied because plaintiff has raised questions of fact as to whether such interest paid by the affiliates is encompassed in the risk the parties intended to insure. Zurich's summary judgment argument – that it is evident from the Policy that plaintiff is the only insured – is not tenable in light of *Lipschitz* and its progeny. Where, as here, there is a genuine question as to the parties' intent to cover plaintiff's affiliates, who also bore the risk of delay in completion damages, Zurich cannot be granted summary judgment on the sole ground that only plaintiff is a Named Insured.

2. Lost Earnings Claim

Plaintiff also asserts a lost earnings claim based on the lower, post-Storm sale prices of the units. The parties agree that the net profit on the project is the unit sale proceeds left over after the Loans are fully paid. *See* Dkt. 46 at 3. There also is no dispute that plaintiff's lost earnings claim presents myriad triable questions of fact, such as those set forth in Zurch's reply

brief. *See* Dkt. 65 at 16-17. That said, Zurich contends it is entitled to summary judgment on the lost earnings claim for two reasons: (1) any such losses were suffered by plaintiff's parent company, non-party El-AD U.S. Holding, Inc. (Holding), because any profits earned by plaintiff would be remitted to Holding and, thus, are not recoverable since Holding is not a Named Insured; and (2) plaintiff cannot assert a lost earnings claim because such claim was supposedly disclosed for the first time in plaintiff's opposition brief. Neither argument warrants summary judgment.

For the reasons discussed above, Holding, like plaintiff's affiliates on the extra interest claim, cannot be barred from recovering delay in completion damages merely by virtue of not being listed as a Named Insured in the Policy. The question of whether the claimed lost profits were intended by the parties to be recoverable as delay in completion damages cannot be resolved on this summary judgment motion.[7]

Nor can summary judgment be granted to Zurich based on plaintiff's supposed late disclosure of its lost earnings claim because the record on this motion does not definitely show this to be true. Zurich raised this argument for the first time in its reply brief in response to detail provided in plaintiff's opposition brief. *See* Dkt. 62 at 21 (table comparing unit contract and offering prices). The record on this motion does not clearly establish that plaintiff is attempting to engage in the sharp practice of trial by ambush. It also is not evident on this record whether the parties conduced sufficient expert discovery on the issue and whether Zurich was provided

[7] The parties additionally dispute whether the profits are attributable to plaintiff at all, but that issue is only relevant if Holding's lost profit claim is not covered and, consequently, is best left to be resolved by the finder of fact.

with all of the evidence plaintiff intends to rely on to support its lost earnings claim.[8] This issue is more properly raised on a motion in limine,[9] at which point the court will be in a better position to assess the evidence supporting the claim and Zurich's expression of surprise.

B. Retainage & the Deductible

The insurance policy provides for a deductible equal to 5% "of THE TOTAL PROJECT VALUE IN PLACE* at the time of loss or damages." *See* Dkt. 49 at 49. It is undisputed that plaintiff was entitled to withhold 10% from its contractors' invoices as "Retainage." Further, it is undisputed that this is a common practice in the construction industry and that 10% is within the customary percentage withheld. The purpose of Retainage, simply put, is to incentivize the contractor to complete the project since the contractor is not entitled to full payment until the project is done.

The Retainage withheld by plaintiff, purportedly, is related to the Policy's applicable deducible. Zurich argues that the contractors' invoices reflect the project value, and that the Retainage withheld as inducement for completion has no bearing on such value. Plaintiff, however, correctly observes that neither the original invoiced amounts nor the 10% Retainage amount is necessarily dispositive of the project value. Indeed, the record does not clearly indicate the final amount paid to the contractors or how much of the Retainage (i.e., all 10%, none of it, or some amount in between) was ultimately kept (or is permitted to be kept) by

[8] At oral argument, plaintiff's counsel represented that Zurich did not ask plaintiff for its exact damages calculation and that plaintiff produced all documents it intends to rely on. *See* Dkt. 68 (2/18/16 Tr. at 19-20). The court cannot determine from this record if this is true.

[9] Such motion will be considered at the pre-trial hearing along with other in limine and evidentiary issues.

plaintiff. Since the 10% Retainage is a fixed contractual amount not inherently reflective of the project value, the 10% amount is not necessarily dispositive of the actual project value. Some portion (or possibly all) of the Retainage may reflect the value and need to used be to compute the deductible, but the parties make no effort to make that determination on this motion. Zurich presents the deductible's inclusion of the full 10% Retainage as an all-or-nothing question, but that is far from certain. The record on this motion does not establish the "THE TOTAL PROJECT VALUE IN PLACE* at the time of loss or damages." Hence, summary judgment on the proper deductible amount is denied.[10] Accordingly, it is

ORDERED that defendant Zurich American Insurance Company's motion for partial summary judgment is denied; and it is further

ORDERED that the parties shall jointly contact the court within 20 days of the entry of this order on the NYSCEF system to discuss the scheduling of a pre-trial conference.

Dated: March 30, 2016

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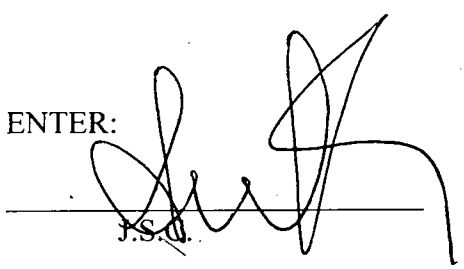

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[10] It should be noted that neither party cites any case law on if and how Retainage is ordinarily used compute the project value or the deductible.