UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WALLINGFORD GROUP, LLC, AND UNITED CONCRETE PRODUCTS, INC., plaintiffs,	:	
v.	:	Civil No. 3:18-CV-00946 (AVC)
ARCH INSURANCE COMPANY, defendant.	:	

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This is an action for damages and declaratory relief, in which the plaintiffs, Wallingford Group, LLC ("Wallingford Group") and United Concrete Products, Inc. ("United Concrete"), allege that the defendant, Arch Insurance Company ("Arch"), breached its duty to defend or indemnify Juliano Associates under a claims-made insurance policy. Arch filed a counterclaim for declaratory relief, in which it alleges that it does not have a duty to defend Juliano Associates, and that the insurance policy is void *ab initio*. It is brought pursuant to Connecticut General Statutes § 38a-321.[1] The court has jurisdiction pursuant to 28 U.S.C. § 1332.[2]

[1] Conn. Gen. Stat. § 38a-321 states, in relevant part, that "[e]ach insurance company which issues a policy to any person, firm or corporation, insuring against loss or damage on account of the bodily injury or death by accident of any person, or damage to the property of any person, for which loss or damage such person, firm or corporation is legally responsible, shall, whenever a loss occurs under such policy, become absolutely liable, and the payment of such loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, damage or death occasioned by such casualty."

[2] 28 U.S.C. § 1332 states in relevant part that the "district courts shall have original jurisdiction of all civil actions where the matter in

On August 16, 2019, the plaintiffs and Arch filed cross-motions for summary judgment on all counts, pursuant to rule 56 of the Federal Rules of Civil Procedure, arguing that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. For the reasons that follow, the plaintiffs' motion for summary judgment is DENIED, and Arch's motion for summary judgment is DENIED.

FACTS

Examination of the complaint, pleadings, local rule 56 statements, the exhibits accompanying the motion for summary judgment, and the responses thereto, disclose the following undisputed material facts:

The plaintiff, Wallingford Group, is a Connecticut LLC with its usual place of business at 173 Church Street, Yalesville, Connecticut 06492.

The plaintiff, United Concrete, is a Connecticut corporation with its principal place of business at 173 Church Street, Yalesville, Connecticut 06492.

The defendant, Arch Insurance Company, is a Missouri corporation with a principal place of business at 210 Hudson Street, Jersey City, New Jersey 07311.

---

controversy exceeds the sum or value of $75,000 . . . and is between (1) citizens of different states. . . ."

On July 30, 2013, the plaintiffs entered into an agreement with Juliano Associates, LLC ("Juliano Associates") whereby Juliano Associates agreed to perform necessary land record research, computations, calculations, and mapping for improvements to 59 and 65 North Plains Highway, Wallingford, Connecticut. The purpose of the services was to assist in the construction of a box culvert and other improvements to the real property located at 59 and 65 North Plain Highway. As part of the services, Juliano Associates purposefully designed the project to be less than 5,000 square feet, specifically to minimize the impacts to wetlands and to avoid the need for permits from the Army Corps of Engineers (hereinafter "ACOE") or the Connecticut Department of Energy and Environmental Protection (hereinafter "CT DEEP").

On April 2, 2014, the ACOE issued a Notice of Enforcement Investigation to Juliano Associates. The enforcement notice informed Juliano Associates that the ACOE did not have a record that the ACOE issued a permit for the project, and "[a] Corps permit is required in addition to any required local or State approvals."[3] The ACOE enforcement notice stated that "the Connecticut General Permit consists of very specific terms,

[3] Prior to April 2, 2014, the plaintiffs and Juliano Associates discussed the need for permits. Jonathan Gavin, the plaintiffs' owner and principal, and Christopher Juliano had an email exchange with the subject line "army corp" on April 3 and 4, 2014. Juliano stated that he would "get a set of the plans out to him asap."

conditions and eligibility requirements and ALL discharges of fill in Corps jurisdictions below 5,000 square feet are required to be reported to the Corps . . . ." The ACOE enforcement notice informed Juliano Associates that the ACOE is "currently investigating work within Corps jurisdiction at 59/65 North Plains Highway, Wallingford, Connecticut," and that the ACOE "recently learned that [Juliano Associates] provided surveying and/or engineering services for Jonathan Galvin of Wallingford Group, LLC in Wallingford, Connecticut." The US Army Corps of Engineers Jurisdiction Fact Sheet, attached to the ACOE enforcement notice, provides that "Violations of the [Clean Water Act] are punishable by civil and/or criminal fines of up to $25,000 per day of violation . . . ." The ACOE enforcement notice further provides: "We are currently investigating work within Corps jurisdiction at 59/65 North Plains Highway, Wallingford, Connecticut. It is possible that we may contact you at a future date to obtain survey information or other details about your involvement with this project." Other than the enforcement notice and a prior email from the ACOE, Christopher Juliano ("Juliano"), licensed professional engineer and land surveyor of Juliano Associates, received no further correspondence from the ACOE following the ACOE enforcement notice. Juliano testified that he did not believe the ACOE

enforcement notice was a "potential claim," but rather an "informative letter."

On January 31, 2016, Juliano signed an Architects & Engineers Professional Liability Application on behalf of Juliano Associates, which contained representations to Arch. Juliano did not disclose the ACOE enforcement notice in his application. Juliano signed his signature under a paragraph of the Juliano Application entitled "Notice to Applicant: Please Read Carefully" that states:

> Warranty: The undersigned warrants that the information contained herein is true as of the date this application is executed and understands that it shall be the basis of the policy of insurance and deemed incorporated herein if the insurers accept this application by issuance of a policy. It is understood and agreed this warranty constitutes a continuing obligation to report to the insurers, as soon as possible, any material change in the circumstances of the Applicant's business including but not limited to the size of the firm, the area of business engaged in by the firm and the information contained on each supplemental application submitted by the Applicant.

On February 11, 2016, Juliano signed a no claims declaration which states: "I/we hereby declare that the information contained in the Application Form dated 1-31-16 has not materially altered and that after inquiry I/we are not aware of any claim or loss on the above captioned policy." As of the date on which Juliano executed the no claims declaration, the plaintiffs had not threatened to bring a lawsuit against Juliano Associates.

On February 13, 2016, Arch issued a policy of insurance with a per claim limit of $1,000,000, to Juliano Associates bearing policy no. PAAEP0010600, effective from February 13, 2016 through February 13, 2017.[4]

[4] The policy incorporation endorsement of the Arch policy provides that "the application and any application for insurance of which this Policy is a renewal, and any supplemental materials submitted therewith, are deemed incorporated into and made a part of this Policy."

Section 1.A. provides: "The Insurer shall pay on behalf of the Insured all Damages and Claims Expenses by reason of a Claim first made against the Insured arising out of any negligent act, error or omission in rendering of failing to render Professional Services by the Insured or by any person whose negligent act, error or omission the Insured is legally responsible, except as exclude or limited by the terms, conditions and exclusions of this Policy and first takes place, on or after the applicable Retroactive Date stated in Item 7. of the Declarations."

Section 3.A. provides: "The Insurer shall have the right and duty to defend, subject to the Limit of Liability listed in Item 4. of the Declarations and Deductible, a Claim against the Insured for which coverage is provided under this Policy, even if any of the allegations of the Claim are groundless, false or fraudulent."

Section 3.E. permits Arch to "make any investigation they deem[ed] necessary including, without limitation, any investigation with respect to coverage, the [Arch policy] Application, statements made in the [Arch policy] Application any supplemental materials submitted therewith."

Section 4.D. defines related claims as "[t]wo or more Claims arising out of a single or related series of negligent acts, errors, or omissions or arising out of the same covered event shall be considered a single Claim, irrespective of the number of claimants and/or the number of negligent acts, errors, omissions or covered events."

Sections 8.B.1-2 defines a claim as a "demand received by any insured for money or services as a matter of right, including: 1. the service of suit . . . ; and 2. a threat or initiation of a suit seeking injunctive relief (meaning temporary restraining order or permanent injunction)."

Section 8.Z. defines professional services as "those services provided by the Insured . . . acting in the capacity of an architect, engineer, landscape architect, land surveyor, interior designer, construction manager, technical consultant, [or] environmental consultant . . . ."

Exclusion 7.A.2. provides: "This Policy shall not apply to Damages or Claims Expenses resulting from any Claim: arising out of any fact or circumstance known to the Insured prior to the commencement of this Policy if such fact or circumstance could reasonably have been foreseen to give rise to a claim against the Insured."

Exclusion 7.A.3. provides that that the Arch policy "shall not apply to Damages or Claims Expenses resulting from any claim arising out of fraudulent, criminal, malicious, dishonest, intentional, willful, or knowing acts, errors or omissions of any Insured; . . . ."

On April 11, 2016, the plaintiffs' counsel tendered a pre-litigation demand letter to Juliano Associates. The April 11 demand letter referenced the ACOE enforcement notice and alleged that the plaintiffs' additional incurred expenditures of $250,000, for additional wetlands work and $80,000, to resolve the ACOE's investigation, "flow directly from Juliano's failure to adhere to the standard of care, misunderstanding of ACOE and DEEP requirements, and/or improper and faulty designs." The letter states that the plaintiffs are "looking to Juliano Associates and Christopher S. Juliano, PE, to make them whole in this matter."

On April 13, 2016, Juliano Associates submitted the April 11 demand letter to Arch, as a claim under the Arch policy, seeking defense and indemnity against the plaintiffs.

On May 10, 2016, Arch declined coverage to Juliano Associates for the claim in a letter, citing to the ACOE enforcement notice as triggering the prior knowledge exclusion.

On August 9, 2016, the plaintiffs commenced a lawsuit against Juliano Associates in the superior court captioned Wallingford Group, LLC, et al. v. Juliano Associates, LLC et al., Docket No. NNH-CV16-6064356-S. The complaint in the underlying action alleges that "[a]s a professional engineering and surveying firm, Juliano Associates owed an obligation and duty to Wallingford Group and United Concrete to perform its

design and other professional responsibilities in accordance with the applicable standard of care."[5]

On August 22, 2016, Juliano Associates' counsel submitted to Arch a copy of the summons and complaint that the plaintiffs filed in the underlying action and demanded that Arch rescind its declination of coverage and assume the defense and indemnification of Juliano Associates in connection with the underlying action.

On September 15, 2016, Arch, through its counsel, replied to the letter dated August 22, 2016, and reiterated Arch's position that Arch does not have a duty to defend or indemnify

[5] Paragraph 8 of the underlying complaint further alleges that: "Juliano Associates breached that obligation and duty and negligently performed the Services in one or more of the following ways: a. In failing to recognize the need for an Army Corps of Engineers permit for the Project; b. In failing to recognize the need for Connecticut Department of Energy and Environmental Protection permits for the Project; c. In preparing maps and plans that failed to adhere to the applicable standard of care; d. In preparing maps and plans that were inadequate for their intended purpose; e. In producing a site plan and drainage plan that wasn't constructible; and f. In failing in properly account for watercourses and wetlands in its design."

The term "Services" is defined in the underlying complaint as "the engineering and surveying services that Juliano Associates agreed to provide to Plaintiffs, specifically Juliano Associates' providing necessary land record research, office computations and mapping to update an existing A-2 Property/Boundary survey of 59 North Plain Highway and prepare a survey of 65 North Plain Highway, Juliano Associates' preparing a site plan and other maps, drawings and calculations, and Juliano Associates' providing engineering design of grading, erosion controls and other plans and mapping."

Paragraph 9 of the underlying complaint further alleges that: "As a result of Juliano Associates' foregoing negligence, United Concrete and Wallingford Group have suffered damages, including but not limited to: a. Costs and expenses relating to an enforcement action; b. Mortgage payments, carrying costs and other delay damages; c. Additional construction expenses; d. Additional design expenses; e. Legal and professional fees; f. Lost rent; and g. Other damages."

Juliano Associates as the Arch policy does not afford coverage for the claims asserted in the underlying action.

On October 27, 2017, the plaintiffs and Juliano Associates entered into a stipulated agreement in the amount of $300,000, in exchange for full and final release of all claims asserted against Juliano and assignment of all tort and contract claims and rights Juliano had against Arch, to the plaintiffs. Juliano contributed $20,000 of the $300,000 owed under the stipulated agreement.

On June 6, 2018, Arch filed a notice of removal pursuant to 28 U.S.C. § 1446(b), removing the action to this court, on the theory of diversity jurisdiction.

On June 22, 2018, the plaintiffs filed their first amended complaint in this action. On July 17, 2018, Arch filed its answer, affirmative defenses, and counterclaim.

On August 16, 2019, the plaintiffs and Arch filed cross-motions for summary judgment on all counts of the plaintiffs' complaint and Arch's counterclaim.

STANDARD

"The court shall grant summary judgment if the movant shows 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). "A dispute regarding a material fact is genuine 'if evidence is such that a reasonable jury could return a

verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

The court must view all inferences and ambiguities "in a light most favorable to the nonmoving party." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991), cert. denied, 502 U.S. 849 (1991). "A dispute regarding a material fact is genuine 'if evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "'Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper.'" Id. at 523 (quoting Bryant, 923 F.2d at 982).

DISCUSSION

I. Duty to Defend

"[A]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, . . . does not depend on whether the injured party will successfully maintain a cause of action against the insured[,] but on whether he has, in his complaint, stated facts which bring the injury within the coverage [of the policy]." R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co., 287 F.3d 242, 245 (2d Cir. 2002) (quoting Springdale Donuts, Inc. v. Aetna Casualty and Surety Co., 247 Conn. 802,

807 (1999)). "[I]t is well established that a liability insurer has a duty to defend its insured in a pending lawsuit if the pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered." Hartford Casualty Ins. Co. v. Litchfield Mutual Fire Ins. Co., 247 Conn. 457, 464 (2005) (quoting QSP, Inc. v. Aetna Casualty & Surety Co., 256 Conn. 343, 352 (2001)).

However, "[i]f the allegations of a complaint necessarily fall within the terms of a policy exclusion, . . . an insurer does not have a duty to defend." Town of Monroe v. Discover Prop. & Cas. Ins. Co., 169 Conn. App. 644, 648 (2016), cert. denied, 324 Conn. 911, 2017 WL 521612 (2017). "An insurer is entitled to prevail under a policy exclusion only if the allegations of the complaint *clearly and ambiguously* establish the applicability of the exclusion to each and every claim for which there might otherwise be coverage under the policy." Id. (internal quotations omitted).

(a) Extrinsic Evidence

First, the plaintiffs argue that is improper for the court to consider extrinsic evidence "in order for Arch to prove that it does not have a duty to defend." Specifically, the plaintiffs argue that the "four corners" rule prohibits the introduction of the ACOE enforcement notice and the April 11

demand letter in determining the applicability of the prior knowledge exclusion to Arch's duty to defend Juliano Associates.

Arch argues in opposition that the evidence does not fall outside the "four corners" of the underlying complaint and the Arch policy. Specifically, Arch replies that "the ACOE Enforcement Notice is explicitly referenced in the April 11 Demand Letter, and the April 11 Demand Letter is a Claim under the Arch Policy. The April 11 Demand Letter and the Underlying Complaint are Related Claims under the Arch Policy."

"Connecticut law does occasionally allow an insurer to look outside the allegations made in an underlying complaint in order to establish a duty to defend. But such extrinsic evidence may be considered solely in determining whether the duty to defend exists under the circumstances of a particular case . . . ." Vermont Mut. Ins. Co. v. Ciccone, 900 F. Supp. 2d 249, 268 (D. Conn. 2012) (internal quotations omitted) (citing Fortin v. Hartford Underwriters Ins. Co., No. X04CV030103483S, 2005 WL 1083800, at *3 (Conn. Super. Ct. Apr. 6, 2005)). In a case where the complaint alleges coverage and a party offers extrinsic information to show that the insured's claims are not covered, the party should not be permitted to "bring facts outside the four corners of the Underlying Complaint . . . unless there is specific language present in the Policy between [parties] that serves to preclude coverage of the allegations

contained in the Underlying Complaint." Vermont Mut. Ins. Co., 900 F. Supp. 2d at 268-69. "The seriousness with which the courts take this duty to defend is exemplified by the fact that the duty to defend must be exercised regardless of . . . whether, after a full investigation, the insurer got information which categorically demonstrates that the alleged injury is in fact covered." Id. at 269. (internal citation omitted).

The court finds that the four corners rule does not prohibit the court from considering extrinsic evidence to determine whether Arch had a duty to defend Juliano Associates. In this case, Arch had knowledge of the claim **before** the commencement of the underlying action, and therefore did not learn about external evidence "**after** a full investigation" of the underlying complaint. Id. On May 10, 2016, Arch declined coverage to Juliano Associates for the claim, citing to the ACOE enforcement notice as triggering the prior knowledge exclusion. The plaintiffs' counsel explicitly referenced and quoted the ACOE enforcement notice at length in the April 11 demand letter, and because the Arch policy allowed Arch to make an investigation "with respect to coverage" and "any supplemental materials submitted therewith,"[6] Arch appropriately investigated

[6] Section 3.E. of the Arch policy permits Arch to "make any investigation they deem[ed] necessary including, without limitation, any investigation with respect to coverage, the [Arch policy] Application, statements made in the [Arch policy] Application any supplemental materials submitted therewith."

the ACOE enforcement notice in its determination to deny coverage to Juliano Associates.

The court further finds that it must consider the ACOE enforcement notice and the April 11 demand letter in this case. The April 11 demand letter and the underlying complaint are related claims under the Arch policy. On September 15, 2016, Arch declined to defend and indemnify Juliano Associates in the underlying action, after the plaintiffs filed the underlying complaint on August 9, 2016, on the basis of Arch previously declining coverage on May 10, 2016 for the April 11 demand letter. Arch argues that the underlying complaint was a related claim to the April 11 demand letter under the Arch policy, and it again cites to the ACOE enforcement notice as triggering the prior knowledge exclusion to its duty to defend Juliano Associates. Under the Arch policy, related claims are: "Two or more Claims arising out of a single or related series of negligent acts, errors, or omissions or arising out of the same covered event shall be considered a single Claim, irrespective of the number of claimants and/or the number of negligent acts, errors, omissions or covered events." Juliano Associates submitted the April 11 demand letter to Arch as a claim under the Arch policy. The plaintiffs' April 11 demand letter and the underlying complaint both allege damages arising from the ACOE enforcement notice/investigation and Juliano Associates'

improper services provided on the project. Because the April 11 demand letter and the underlying complaint are "arising out of a single or related series of negligent acts, errors, or omissions or arising out of the same covered event," they are related claims.

The court concludes that it is proper to consider the ACOE enforcement notice, the April 11 demand letter, and other extrinsic evidence in determining whether an exclusion applies to Arch's duty to defend Juliano Associates.[7] Extrinsic evidence may be considered "solely in determining whether the duty to defend exists under the circumstances of [this] particular case." Vermont Mut. Ins. Co., 900 F. Supp. 2d at 268. Therefore, the plaintiffs' motion for summary judgment with respect to count one of their claim and count one of Arch's counterclaim on this ground is DENIED.

[7] The plaintiffs also argue that the prior knowledge exclusion does not require the court to access extrinsic evidence. Arch replies that the prior knowledge exclusion requires the court to access extrinsic evidence. Under the two-part, subjective-objective test for prior exclusions to claims-made insurance policies, Connecticut courts have weighed extrinsic evidence in determining whether a prior knowledge exclusion applies to a particular case. See HSB Grp., Inc. v. SVB Underwriting, Ltd., 664 F. Supp. 2d 158, 193 (D. Conn. 2009) (citing two Connecticut cases that examined "what the insured knew as of the effective date of the policy" and "whether the insured . . . could have reasonably foreseen that his acts, errors and/or omissions might be expected to be the basis of a claim"). Therefore, the court necessarily must examine extrinsic evidence to analyze the prior knowledge exclusion to Arch's duty to defend Juliano Associates.

(b) Prior Knowledge Exclusion

The plaintiffs next argue that Arch breached its duty to defend Juliano Associates in the underlying action. Specifically, the plaintiffs argue that the prior knowledge exclusion does not apply to the defense of the underlying action.

Arch argues that it did not have a duty to defend Juliano Associates in the underlying action. Specifically, Arch argues that the prior knowledge exclusion applies to the defense of the underlying action.

Connecticut analyzes prior knowledge exclusions to claims-made insurance policies under "a two-part, subjective-objective test to determine whether the exclusion bars coverage for a particular claim, asking first, whether the insured had *actual knowledge* of a suit, act, error or omission, a subjective inquiry; and second, whether a reasonable professional in the insured's position might expect a claim or a suit to result, an objective inquiry." Metropolitan Dist. Comm'n v. QBE Americas, Inc., 416 F. Supp. 3d 66, 72 (D. Conn. 2019) (quoting HSB Grp., Inc., 664 F. Supp. 2d at 193).

The prior knowledge exclusion in the Arch policy states: "[t]his Policy shall not apply to Damages or Claims Expenses resulting from any Claim: arising out of any fact or circumstance known to the Insured prior to the commencement of

this Policy if such fact or circumstance could reasonably have been foreseen to give rise to a claim against the Insured."

First, the court finds the subjective prong of the subjective-objective test is satisfied. "When applying the subjective-objective test, the court must first ask the subjective question of whether the insured had knowledge of the relevant facts." Philadelphia Indem. Ins. Co. v. Atl. Risk Mgmt., Inc., No. CV064018752, 2009 WL 2783073, at *8 (Conn. Super. Ct. Jul. 30, 2009) (internal citation omitted). The ACOE enforcement notice constitutes a "relevant fact" that occurred prior to the commencement of the Arch policy. The ACOE issued the ACOE enforcement notice on April 2, 2014, and the Arch policy was effective from February 13, 2016 to February 13, 2017. Juliano admits that he had actual knowledge of the ACOE enforcement notice. Juliano further admitted that he prepared his design to avoid the need for an ACOE permit. The April 11 demand letter that Juliano Associates submitted to Arch as a claim under the Arch policy "arises out of . . . [the] circumstance known to [Juliano Associates] prior to the commencement of [the Arch] Policy." Thus, Juliano had actual notice of the facts in the plaintiffs' underlying claim. The first part of the prior knowledge exclusion test is satisfied.

Second, the court finds that the objective prong of the subjective-objective test is not satisfied. "The court must now

ask the objective question of whether such facts could reasonably have been expected to give rise to a claim." Philadelphia Indem. Ins., 2009 WL 2783073, at *9 (internal citation omitted). Arch has presented evidence supporting its argument that the objective prong is met, and the plaintiffs have presented evidence supporting their argument that the objective prong is not met. The court concludes that the parties' submissions have "demonstrated that genuine issues of material fact exist with regard to this issue." Id. Arch noted that Juliano specifically prepared plans and specifications for the plaintiffs so that they would not "trigger a[n] [ACOE] review." The ACOE began an investigation because of this lack of a permit. The ACOE enforcement notice states "Notice of Enforcement Investigation" in bold, capital letters. The ACOE enforcement notice advised of the potential for fines or remedial work based upon the failure to obtain a permit, which Juliano advised the plaintiffs that he did not need because of his design. The fact sheet enclosed to the ACOE enforcement notice further stated: "Performing any work which requires, but is not authorized by, a Corps permit, or failing to comply with the terms and conditions of a Corps permit, **may subject the developer, the landowner or other responsible party, including the contractor, to criminal and/or civil liability** . . . . "

However, the plaintiffs argue that the purpose of the ACOE enforcement notice was "to inform [Juliano Associates] of Corps permit requirements" and that Juliano Associates received no further communication from the ACOE. The ACOE enforcement notice stated that "[the ACOE] is currently investigating work within Corps jurisdiction at 59/65 North Plains Highway, Wallingford, Connecticut. It is possible that we may contact you at a future date to obtain survey information or other details about your involvement with this project." On the basis of this language, Juliano testified that he did not believe the ACOE enforcement notice was a "potential claim," but rather an "informative letter."

Although Juliano's testimony that he lacked subjective knowledge "may constitute 'disingenuous, after-the-fact justifications,'" Philadelphia Indem. Ins., 2009 WL 2783073, at *9 (internal citation omitted) (quoting Selko v. Home Ins. Co., 139 F.3d 146, 152 (3d Cir. 1998)), "credibility issues are not appropriately resolved on summary judgment and must be decided by a jury." Id. (citing State v. Beavers, 290 Conn. 386, 414 (2009)). "[B]ecause the jury has the opportunity to observe the conduct, demeanor and attitude of the witnesses and to gauge their credibility, it is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a

witness' testimony." Philadelphia Indem. Ins., 2009 WL 2783073, at *9 (citing State v. Morgan, 274 Conn. 790, 800 (2005)) (internal quotations omitted). On a motion for summary judgement, "[t]he courts hold the movant to a strict standard. To satisfy his burden[,] the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." Id. at *10 (quoting Zielinski v. Kotsoris, 279 Conn. 312, 318 (2006)).

Accordingly, viewing the evidence in the light most favorable to the non-moving parties on the summary judgment motions, the parties have "failed to meet [their] burden of demonstrating that there are no genuine issues of material fact as to whether the prior-knowledge exclusion applies" to Arch's duty to defend Juliano Associates. Philadelphia Indem. Ins. Co. v. Atl. Risk Mgmt., Inc., No. CV064018752, 2009 WL 2783073, at *10 (Conn. Super. Ct. July 30, 2009); see Coregis Ins. Co. v. Goldstein, 32 F. Supp. 2d 508, 512-13 (D. Conn. 2008) (denying summary judgment to the insurer on the basis of the prior knowledge exclusion because genuine issues of material fact remained as to whether a reasonable professional would conclude that a claim might arise from the underlying facts).[8]

[8] The plaintiffs argue that they "are entitled to a declaratory judgment that Arch has a duty to defend **or indemnify** Juliano Associates." Both parties do not make arguments with respect to Arch's duty to indemnify in their briefs.

Therefore, Arch's motion for summary judgment with respect to count one of its counterclaim on this ground is DENIED. The plaintiffs' motion for summary judgment with respect to count one of their claim and count one of Arch's counterclaim on this ground is DENIED.

II. The Arch Policy Void *Ab Initio*

Arch lastly argues that the Arch policy is void *ab initio*. Specifically, Arch argues that Juliano materially misrepresented the plaintiffs' potential claim in both the Juliano application and a no claims declaration submitted to Arch.

The plaintiffs respond that "Arch's allegations and theories are unsupported by the undisputed material facts."[9]

Under Connecticut law, an insurer may void an insurance policy if "the applicant made material representations, relied on by the company, which were untrue and known by the assured to be untrue when made." Pinette v. Assurance Co. of Am., 52 F.3d

---

Without the benefit of fully developed arguments on the issue, the court declines to address it. Ryan v. Cty. Of Nassau, No. 12-CV-543(JS)(SIL), 2018 WL 354684, at *10 n.10 (E.D.N.Y. Jan. 10, 2018); see Yong Zhuang Pan v. U.S. Citizenship & Immigration Servs., 273 F. App'x 116, 117 (2d Cir. 2008) (deeming an argument waived where plaintiff "fails to sufficiently argue before th[e] Court"). The court notes that "where there is no duty to defend, there is no duty to indemnify, given the fact that the duty to defend is broader than the duty to indemnify." QSP, Inc., 256 Conn. at 382. "Applying this logic, where there might be a duty to indemnify, there necessarily also might be a duty to defend." Id.

[9] The court notes that the nonmoving party cannot "'rely on conclusory allegations or unsubstantiated speculation' but 'must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact.'" Robinson v. Concentra Health Servs., 781 F.3d 42, 34 (2d Cir. 2015) (citation omitted).

407, 409 (2d Cir. 1995) (quoting State Bank & Trust Co. v. Connecticut Gen. Life Ins. Co., 109 Conn. 67, 72 (1929)) (internal quotations omitted). To prevail on a claim of material misrepresentation, the insurer "must prove three elements: (1) a misrepresentation (or untrue statement) by the plaintiff which was (2) knowingly made and (3) material to defendant's decision whether to insure." Pinette, 52 F.3d at 409.

"For a material misrepresentation to render a contract voidable under Connecticut law, the misrepresenting party must know that he is making a false statement. 'Innocent' misrepresentations—those made because of ignorance, mistake, or negligence—are not sufficient grounds for rescission." Id. (citing Middlesex Mut. Assurance Co. v. Walsh, 218 Conn. 681, 691-92 (1991)).

Because the court concluded that genuine issues of material fact remained as to Juliano's objective knowledge of the enforcement notice, it follows that there is also a question of material fact as to whether Juliano "knowingly made" a material misrepresentation on the no claims declaration. The court finds that there is an issue of material fact in regard to whether the policy is void *ab initio*. Therefore, Arch's and the plaintiffs' motions for summary judgment with respect to count two of Arch's counterclaim on this ground are DENIED.

CONCLUSION

Based upon the foregoing, the plaintiffs' motion for summary judgment (document no. 34) is DENIED. Arch's motion for summary judgment (document no. 37) is DENIED.

It is so ordered, this 11th day of May 2020, at Hartford, Connecticut.

/s/
Alfred V. Covello
United States District Judge