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18 ARUP NORTH AMERICA LTD.

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA

20 COUNTY OF SAN FRANCISCO

21 NATIONAL UNION FIRE INSURANCE
22 COMPANY OF PITTSBURGH, PA., a
23 Pennsylvania corporation,

24 Plaintiff,

25 v.

26 AMERICAN ZURICH INSURANCE
27 COMPANY, an Illinois corporation; ZURICH
28 AMERICAN INSURANCE COMPANY, a
New York corporation; ARUP NORTH
AMERICA LTD., a United Kingdom
corporation; and DOES 1-100, inclusive,

Defendants.

ARUP NORTH AMERICA LTD.,

Cross-Complainant,

v.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA., a
Pennsylvania corporation, and DOES 1-100,
inclusive,

Cross-Defendant.

FILED
San Francisco County Superior Court

JUL 17 2019

CLERK OF THE COURT

BY: [Signature]
Deputy Clerk

Case No. CGC-18-564066

**PROPOSED ORDER GRANTING
ARUP NORTH AMERICA LTD.'S
MOTION FOR SUMMARY
ADJUDICATION AGAINST
AMERICAN ZURICH INSURANCE
COMPANY AND ZURICH AMERICAN
INSURANCE COMPANY**

PER COURT ORDER OF 02/04/19

Date: July 15, 2019
Time: 9:30 a.m.
Dept: 302

Complaint Filed: February 2, 2018
Cross-Complaint Filed: April 19, 2018

Trial: December 9, 2019

1 Defendant and Cross-Complainant Arup North America Ltd.'s ("Arup") Motion for
2 Summary Adjudication Against American Zurich Insurance Company and Zurich American
3 Insurance Company came on regularly for hearing on July 15, 2019.

4 Arup's motion for summary adjudication on its second cause of action for declaratory
5 relief in its second amended cross-complaint against American Zurich Insurance Company and
6 Zurich American Insurance Company ("Zurich") is granted. Zurich owes a duty to defend Arup in
7 the underlying Millennium Tower property damage cases. Arup purchased general liability
8 insurance policies from Zurich from April 2008 through April 2014. (UMF 1.) Those policies
9 provide coverage when "'property damage' is caused by an 'occurrence' that takes place in the
10 'coverage territory.'" (UMF 3.) The policy also contains a professional services exclusion. (UMF
11 9.) Arup contends that it is entitled to coverage because the underlying actions allege that it
12 negligently performed professional and non-professional services. Zurich argues that no coverage
13 exists because extrinsic evidence shows that Arup is only being sued for damages based on its
14 professional services.

15 Arup demonstrates that it is entitled to coverage and Zurich owes a duty to defend as a
16 matter of law. "The determination whether the insurer owes a duty to defend usually is made in
17 the first instance by comparing the allegations of the complaint with the terms of the policy. Facts
18 extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the
19 claim may be covered by the policy." (*Montrose Chemical Corp. v. Superior Court* (1993) 6
20 Cal.4th 287, 295.) "Any doubt as to whether the facts establish the existence of the defense duty
21 must be resolved in the insured's favor." (*Montrose*, 6 Cal.4th at 299-300.) An insurer may rely
22 on extrinsic evidence to show no coverage exists, but its adduced undisputed facts must
23 "conclusively eliminate a potential for liability." (*Id.* at 299 (emphasis added).)

24 In this case, the underlying allegations base liability on far more than professional
25 services. The Millennium Tower Association alleges that: Arup breached its duty to exercise
26 ordinary care. On information and belief, the HOA alleges that Arup negligently, carelessly,
27 tortuously, and wrongfully failed to use reasonable care in the analysis, preparation, design,
28 manufacture, and/or construction of the soils evaluation, lateral support, and/or buttress pile wall,

1 thereby causing damage to the Millennium Tower. (Arup's Ex. M, 122 (emphasis added).
2 Treadwell & Rollo, Inc.'s cross-complaint for indemnity against Arup alleges that it "recklessly
3 and negligently performed design and/or construction activities at the Transit Center site,
4 including, but not limited to, dewatering, excavation, demolition, shoring, and other activities."
5 (Arup's Ex. N, 23.) Mission Street Development LLC and Millennium Partners Management LLC
6 similarly averred that Arup's construction activities caused damage. (Arup's Ex. P, 2, 141, 223,
7 259, and 262.)

8 Zurich argues that despite these allegations, extrinsic evidence shows that Arup really
9 only performed professional services. Zurich cites the "Architect-Subconsultant Agreement For
10 Geotechnical Services," the Pelli Clark Pelli Architects, Inc. contract, and several "admissions"
11 from Arup's general counsel (Joseph Dennis). This evidence does not conclusively eliminate the
12 potential for coverage. Even if the contracts originally contemplated that Arup would only
13 perform "professional services," it is possible that Arup subsequently performed other non-
14 professional services too. Mr. Dennis' correspondence of November 18, 2016 did not establish
15 that there was no potential for coverage. While he agreed that Zurich's recitation of the facts
16 regarding the Millennium Tower claim was "generally correct," he further noted that some of
17 Arup's work may not fall within the professional services exclusion. (Zurich's Index of Exhibits,
18 Ex. 13.) Zurich has not met its heavy burden of showing that there was no potential for coverage.
19 "To prevail, the insured must prove the existence of a potential for coverage, while the insurer
20 must establish the absence of any such potential. In other words, the insured need only show that
21 the underlying claim may fall within policy coverage; the insurer must prove it cannot. Facts
22 merely tending to show that the claim is not covered, or may not be covered, but are insufficient
23 to eliminate the possibility that resultant damages (or the nature of the action) will fall within the
24 scope of coverage, therefore add no weight to the scales." (*Montrose*, 6 Cal.4th at 300; see also
25 *North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902,
26 928 [allegations of negligent construction of dam were outside the scope of the professional
27 services exclusion]; *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1038-
28 1039 ["An insurer may rely on an exclusion to deny coverage only if it provides conclusive

1 evidence demonstrating that the exclusion applies." (emphasis in original)].) Because Zurich has
2 failed to provide conclusive evidence demonstrating that the exclusion applies, Arup's motion is
3 granted.

4 **IT IS SO ORDERED.**

5 DATED: July 17th, 2019
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7 
8 THE HONORABLE ETHAN P. SCHULMAN
9 JUDGE OF THE SUPERIOR COURT
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CGC-18-564066

NATIONAL UNION FIRE INSURANCE COMPANY OF VS.
AMERICAN ZURICH INSURANCE COMPANY AN ILLINOIS ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on July 18, 2019 I served the foregoing:

1. ORDER GRANTING ARUP NORTH AMERICA LTD.S MOTION FOR SUMMARY ADJUDICATION AGAINST ZURICH INSURANCE COMPANY AND ZURICH AMERICAN INSURANCE COMPANY
2. ORDER DENYING DEFENDANTS AMERICAN ZURICH INSURANCE COMPANY AND ZURICH AMERICAN INSURANCE COMPANY'S JOINT MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION AGAINST PLAINTIFF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, AND CROSS-COMPKAINNAT, ARUP NORTH AMERICAN , LTD.
3. ORDER GRANTING PLAINTIFF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S MOTION FOR SUMMARY ADJUDICATION AGAINST DEFENDANTS AMERICAN ZURICH INSURANCE COMPANY AND ZURICH AMERICAN INSURANCE COMPANY

on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: July 18, 2019


By: M. GOODMAN

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