NOT APPROVED FOR PUBLICATION

FIRST SPECIALTY INSURANCE COMPANY, Plaintiffs, and AMERICAN PROPERTIES AT MADISON, LLC, a New Jersey Corporation, Plaintiff- Intervenor v. INTERSTATE FIRE AND CASUALTY COMPANY AND CRUM & FORSTER SPECIALTY INSURANCE COMPANY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY DOCKET NO: **L-996-16** CIVIL ACTION **OPINION OF THE COURT**

Decided: 9/04/2018

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Terrence J. Bolan, Esq., (Bolan Jahnsen Dacey) for plaintiffs First Specialty Insurance Company

Brian Plocker, Esq., (Hutt & Shimanowitz, P.C.) for plaintiffs American Properties at Madison

Michael A. Kotula, Esq., (Rivkin Radler LLP) for defendants Interstate Fire and Casualty Company

Tara McCormack, Esq. & Gary S. Kull, Esq., (Kennedy's CMK LLP) for defendants Crum and Forster Specialty Insurance Company

Marbrey, J.S.C.

STATEMENT OF FACTS

The matter at bar concerns a complex construction case. On October 29, 2013, the Plaintiff, in the underlying case, Madison at Ewing Condominium Association, Inc. filed a Complaint alleging various claims of damages due to deficiencies in the construction of 192 residential dwellings across six (6) buildings and common elements known as Madison at Ewing Condominium in Ewing, NJ. On May 20, 2016, the Association filed its most recent amended version of the complaint. According to the underlying complaint, American Properties was the sponsor and developer that "created, designed and constructed" the dwelling units and common elements at the Project. American Properties utilized subcontractors to construct and install the various buildings systems and components of the Madison at Ewing Condominium.

According to the underlying complaint, the American Properties failed to discover, disclose, maintain and/or correct "various defects and deficiencies in the design and construction" of the common elements at the Project. It further alleges that a preliminary investigation of the Project revealed improper design and construction of the buildings, particularly with respect to the exterior cladding and other exterior components including doors and foundations. The Association also alleges deficiencies regarding the installation of piping and plumbing systems, the installation of defective plumbing pipes and widespread pipe leaks. The Association claims that these designs and construction deficiencies have and will continue to cause direct and consequential damage to the common element and building interiors.

Insurance carrier First Specialty Insurance agreed to defend Defendant American Properties, however co-carriers Crum & Forster Specialty Insurance Co. and Interstate Fire and Casualty Company denied coverage under their respective policies. Crum & Forster Specialty Insurance Co. provided insurance coverage for American Properties for the 2005-2006, 2006-2007, and 2007-2008 policy periods. Subsequent to Crum & Forster, Interstate Fire and Casualty

Company provided insurance coverage for the succeeding policy periods, 2008-2009 and 2009-2010. On May 12, 2016, First Specialty Insurance filed a declaratory judgment action against Crum & Forster Specialty Insurance Co. and Interstate Fire and Casualty Company, alleging that they had issued policies of insurance to American Properties and wrongfully denied overage to the insured for the underlying action.

The following opinion summarizes the arguments made by the insurance carriers and provides the basis for the Court's decision as to the pertinent issues. Note - the following opinion will first address the arguments raised as between First Specialty Insurance and Crum and Forster Specialty Co. before exploring the separate contentions raised by Interstate Fire and Casualty Company. Any similarities as between the separate argument will be recognized and treated accordingly.

LEGAL ANALYSIS

Summary Judgment

The standard for summary judgment in New Jersey is well settled. "A motion for summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73 (1954). A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). Bare conclusions without factual support cannot defeat summary judgment; instead, evidence submitted in support of the motion must be admissible, competent, non-hearsay evidence. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999); Jeter v. Stevenson, 284

N.J. Super. 229, 233 (App. Div. 1995).

The moving party must sustain the burden of showing clearly that there is no genuine issue of material fact in the case, and that the moving party is entitled to judgment as a matter of law. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. at 73. In determining whether a dispute is genuine, the court is to make all legitimate inferences in favor of the non-moving party and deny the motion if there is the slightest doubt about the existence of a material issue of fact. Saldana v. DiMedio, 275 N.J. Super. 488 (App. Div. 1998).

The court must consider whether the competent evidential materials presented, when viewed in light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. at 523. On motion for summary judgment, the judge must engage in an analytical process essentially the same as that necessary to rule on motion for directed verdict--whether evidence presents sufficient disagreement to require submission to jury or whether it is so one-sided that party must prevail as matter of law; weighing process requires the court to be guided by same evidentiary standard of proof--by preponderance of evidence or clear and convincing evidence--that would apply at trial on merits when deciding whether there exists "genuine" issue of material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. at 533-34.

Additionally, the New Jersey Supreme Court has held that a non-moving party cannot defeat a motion for summary judgment "merely by pointing to any fact in dispute." Id. at 529. Rather, if the moving party makes the requisite *prima facie* showing, it is incumbent upon any opposing party to come forward with competent proofs indicating that the facts are not as the moving party asserts. Spiotta v. Wm. H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962),

certif. denied, 37 N.J. 229 (1962).

Procedurally, summary judgment is usually inappropriate prior to the completion of discovery. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003). However, a non-moving party does have an obligation to demonstrate, with some degree of particularity, the likelihood that further discovery will supply the missing elements of the cause of action. Id.

I. FIRST SPECIALTY INSURANCE V. CRUM AND FORSTER SPECIALTY INSURANCE

A. Crum and Forster Argument

1. Standard of Review

Crum and Forster (hereinafter "C&F") argues that New Jersey law regarding insurance policy interpretation requires that this Court interpret the unambiguous terms of their policy as written. C&F contends that, in the case of policy interpretation, when the terms of the policy are clear and unambiguous, the language used binds the parties and the Court must give it effect. Longobardi v. Chubb Ins. Co. of NJ, 121 N.J. 530, 537 (1990). Furthermore, "in the absence of ambiguity, courts must not engage in a strained construction to support the imposition of liability." J. Josephson, Inc. v. Crum & Forster, 293 N.J. Super 170, 216 (App. Div. 1996) (citing Longobardi, 121 N.J. at 537). Based on these cases, C&F contends that the Court is constrained to interpret their policies in accordance with their plain language.

2. EIFS Exclusion

C&F states that the Exterior Insulation and Finish System ("EIFS") exclusion clause contained within their policy precludes coverage for the underlying action under both the 2005-

2006 and 2006-2007 policies. C&F asserts that the EIFS Exclusion during the two periods of coverage precludes coverage for any "property damage" arising out of "any work or operation, with respect to any exterior component, fixture or feature of any structure if any "exterior insulation and finish system' is used on any part of that structure." In the present case, C&F argues that the record is clear. The facts presented clearly indicate that EIFs are present at each of the six residential buildings, as well as the clubhouse, located at the Madison at Ewing Condominium (the "Project"). C&F argues that the Plaintiff itself fails to dispute this and instead takes the inaccurate position that the FWH Transition Inspection Report does not use the terms "EIFS." However, C&F proffers that such position is disingenuous at best, as the record proves otherwise.

C&F states that the EIFS Exclusion contained within their policy has been conclusively determined to be "clear and ambiguous." In an unreported Law Division case, C&F sought a declaration that an identical EIFS exclusion precluded coverage for claims against a contractor arising from the construction of a 45-building condominium complex. In ruling in favor of C&F the Court in that case expressly stated that "the EIFS Exclusion contained within plaintiff's insurance policies bar coverage for any property damage arising directly or indirectly out of any work or operations concerning the exterior component, fixture or feature of any building at Lakeside where EIFS or DEFS has been used on any part thereof." On appeal, the Appellate Division affirmed the unpublished opinion decision of the trial court stating that "the legal conclusion that flowed from the trial court's findings was inescapable, i.e., the exclusion applied."

In a separate unreported Superior Court opinion, a case in which C&F moved for summary judgment on the preclusive effect of the EIF Exclusion clause, the Court again held that the clause was "valid and enforceable" and further noted that the "terms of the EIFS exclusion are clear and unambiguous and exclude coverage for damage resulting from work performed on any "exterior

component, fixture or feature' if a structure in that EIFS was installed on part of that building." In the present case, C&F insists that the fact that EIFS were/are installed throughout the project is clear and discernible based on the various documents produced during discovery. These proofs include the twenty separate work orders issued by American Properties to subcontractor Stucco Systems; the 2008 Kipcon Report, created by the Kipcon consulting company, the Falcon's Group Proposal, created by the Falcon's Group consulting company, and the FWH Transition Study, created by the FWH consulting group. Use of EIFS is also noted in the correspondences shared between counsel for American Properties and the Association. Based on these proofs and the foregoing arguments C&F takes the position that the EIF Exclusion clause effectively bars coverage for the two policy periods for any and all "property damage".

3. Continuous or Progressive Injury and Damage Exclusion

Consequently, as to the 2007-2008 coverage year, C&F asserts that the Continuous or Progressive Injury and Damage Exclusion precludes coverage under the 2007-2008 Crum & Forster Policy. C&F asserts that this particular clause precludes coverage for "property damage" "which first existed, or is alleged to have first existed" prior to the effective date of the Policy or "which is, or is alleged to be, in the process of taking place prior to the inception date of this policy, even if the actual or alleged injury or property damage continues during this policy period." Relying upon the Supreme Court of New Jersey's ruling in Princeton Ins. Co. v. Chungmuang, C&F argues that policy exclusions such as theirs are "presumptively valid and will be given effect if 'specific, plain, clear, prominent and not contrary to public policy." 151 N.J. 80, 95 (1997) (citing Doto v. Russo, 140 N.J. 544, 559 (1995).

Just as with the EIF Exclusion clause, the trial court relied on unreported case in which the trial court upheld the preclusive effect of the Continuous or Progressive Injury and Damage

Exclusion clause and stated, "that the terms of Crum & Forster's C&P exclusion are specific, plain, and unambiguous. According to the clear terms of the exclusion, property damage is not covered if it occurred before the policy was in effect, even if the damage continues after the policy was in effect." Similar to the cases presented to law division courts in other counties, C&F contends that the damage caused by water intrusion occurred prior to the 2007-2008 coverage period. To that end, C&F argues that the preclusive effect of its policy clause excludes it from coverage for that year.

4. Continuous Trigger Theory

Moreover, C&F additionally contends that pursuant to Air Master & Cooling, Inc. v. Selective Ins. Co. of America, the defects at issue manifested prior to the 2007-2008 coverage year serves to preclude coverage for that year. 452 N.J. Super. 35, 39-40 (App. Div. 2017). In Air Master, the insured performed HVAC work as a subcontractor in connection with the construction of a mostly-residential condominiums and was later named in a lawsuit commenced by the condominium association over property damage. The insured commercial general liability carriers disclaimed coverage in connection with the insured's work at the project arguing that the "property damage had already manifested before their respective policy period began." Id. at 40. The Court applied a continuous trigger theory of insurance coverage. The theory contends that, in instances involving progressive "property damage" in construction defect cases, the temporal endpoint of a covered occurrence occurs when the "essential nature and scope of the property damage first becomes known, or when one would have sufficient reason to know of it." Id. at 38. In the present case, C&F contends that the earliest manifestation of construction defects began in 2005 with the complaints of water leaks. Pursuant to Air Master this early indication of damage serves as

manifestation of the now existing property damage and therefore C&F is exempted from coverage responsibility for the 2007-2008 coverage year.

5. Self-Insured Retention

Lastly, C&F argues that there is no coverage under the 2006-2007 policy because American Properties did not satisfy the Self-Insured Retention ("SIR"). Pursuant to Moore v. Nayer, a SIR is treated as an arrangement in which the insurer has no obligation to pay on a claim until the insured plays the amount of the SIR. 321 N.J. Super. 419, 438-39 (App. Div. 1999). While New Jersey courts have yet to address whether third parties can make payments toward an insured's SIR, courts in other states have held that the costs paid by one can be used toward the other carrier's SIR, "unless the policy clearly requires the insured itself, not other insurers, to pay this amount." Forecast Homes, Inc. v. Steadfast Ins. Co., 181 Cal. App. 4th 1466, 1474 (App. Div. 2010). Presently, American Properties has yet to pay the SIR for the 2006-2007 policy which C&F argues precludes it from coverage for that year and no language exist within the pertinent policy provision allowing payment by third party insurers. To that end, C&F asserts that it has no duty to defend American Properties for the 2006-2007 policy year until they have satisfied the Self-Insured Retention clause.

For these reasons, C&F respectfully requests the Court grant its request for summary judgment.

B. First Specialty Insurance Opposition

1. Argument as to the Continuous Trigger Theory

In opposition, the Plaintiff, First Specialty Insurance Company ("FSIC"), rejects the arguments raised by C&F and contend that the allegations of damages in the underlying action

triggers coverage under each of C&F's policies. FSIC pretexts its argument by first asserting that principles of insurance policy interpretation dictate that the Court interpret the language of the policy "according to its plain and ordinary meaning." Voorhees v. Preferred Mut. Ins. Co., 128 N.J., 175, (1992). If the terms are not clear, but are instead ambiguous, they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations. Doto v. Russo, 140 N.J. 544, 556, (1995).

In the case of exclusionary clauses, such clauses are presumptively valid and are enforced if they are "specific, plain, clear, prominent, and not contrary to public policy." Princeton Ins. Co. V. Chunmuang, 151 N.J. 80, 95, (1997). "In general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41, (1998) (quoting Chunmuang, supra, 151 N.J. at 95, 698 A.2d 9). As a result, exclusions are ordinarily strictly construed against the insurer. Aetna Ins. Co. v. Weiss, 174 N.J. Super. 292, 296, (App.Div.), certif. denied, 85 N.J. 127, 425 (1980). If there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it. Cobra Prods., Inc. v. Fed. Ins. Co., 317 N.J. Super. 392, 401, (App.Div.1998), certif. denied, 160 N.J. 89, 733 A.2d 494 (1999).

An insurer's duty to defend an action brought against its insured depends upon a comparison between the allegations set forth in the complainant's pleading and the language of the insurance policy. Voorhees, supra, 128 N.J. at 173; Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 512, (1965); L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 490, (App.Div.2004). In making that comparison, it is the nature of the claim asserted, rather than the specific details of the incident or the litigation's possible outcome that governs the insurer's obligation. Flanagin, supra, 44 N.J. at 512, 210. Similarly, if a complaint includes multiple or alternative causes of action, the

duty will attach as long as any of them would be a covered claim and it continues until all of the covered claims have been resolved. Voorhees, supra, 128 N.J. at 174, (citing Mt. Hope Inn v. Travelers Indem. Co., 157 N.J. Super. 431, 440-41, (Law Div.1978)).

Consequently, FSIC rejects the applicability of the Continuous Trigger Theory introduced by C&F on the premise that the record does not completely support its application. To refute the movants continuous trigger theory, FSIC relies upon Air Master & Cooling, Inc., v. Selective Insurance Company of America, 452, N.J. Super 35, (App. Div. 2017), as relied upon by C&F in its argument. FSIC does not dispute the facts of Air Master as presented by C&F but focuses on the Court's ruling that the point at which coverage ends due to a continuous injury to property would be at the time of "the 'essential' manifestation of the injury." Id. The alleged manifestation in Air Master concerned certain indications of water intrusion within and upon certain windows, ceilings, and other portions of the individual units. The intrusion was noted by the developer of the property as well as the general contractor who, according to a newspaper report, began to attempt remedial measures.

Nevertheless, evidence of the intrusion in turn led to a consultant being brought in to perform a survey of the roof for water damage. Findings from the report detailed extensive water damage but found that it was impossible to determine at which point the moisture infiltration occurred. Id. at Air Master, 452. As a consequence, the Court held that evidence as to the manifestation was inconclusive and that questions of material fact remained as to whether the "damage to the roof and its replacement is harm that is 'indivisible' from the damage to the rest of the building, or whether, conversely, the deterioration of the roof comprises distinct property damage stemming from entirely distinct construction defects. Id. (emphasis added).

Here, FSIC argues that similar to Air Master the allegations of progressive damage do not share a conclusively common manifestation point. The underlying project was completed in July 2006. However, evidence of water infiltration and other damages began to manifest as of December 2005, prior to the completion of three of the six buildings in the project, and continually manifested until at minimum 2008. While the continued manifestation certainly makes the continuous trigger theory applicable, FSIC argues that the fact that the leaks began to occur prior to the construction of half of the projects buildings would arguably constitute distinct damage separate from the initial defects. Furthermore, FSIC proffers that C&F has failed to establish a link between the alleged damage to the individual units and the common areas.

Lastly, FSIC avers that though C&F may have provided some support as to the source of the water intrusion they did not provide any supporting evidence as to how that damage is linked to the other alleged sources of injury, mainly the concrete work, slabs and foundations, and plumbing pipes/systems. To that end, FSIC contends that C&F's position that the essential nature of all the allege damage manifested prior to the 2007-2008 policy is unsupported. Therefore, FSIC argues that the full extent of the nature of the problem affecting the Madison property were not known until much later.

Consequently, to the extent that C&F cannot show that its "Continuous or Progressive Injury and Damage Exclusion" (the "Exclusion") applies to each and every instance of damage alleged, FSIC contends that C&F had a duty to defend the insured under the 2007-2008 C&F policy. FSIC states that the evidence C&F uses to support its contention as to the total preclusive effect of the Exclusion is premised upon evidence of water intrusion into 10 of the 192 units at the Madison project. C&F then extrapolates these findings to aver that as there exists evidence that

some property damage existed before the 2007-2008 period, therein the Exclusion acts to preclude coverage for *all* property damage regardless of when that damage actually began.

FSIC argues that this contention is unsustainable given existing legal precedent. While New Jersey Courts have yet to publish an opinion on the interpretation of the Exclusion clause, Courts in other jurisdictions have. FSIC contends that it is well established in New Jersey law that time of the "occurrence" within the meaning of a liability policy is the time when the third party is actually damaged, and not the time of the wrongful act. Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co., 98 N.J. 18, (N.J. 1984). The language of the Exclusion operates to exclude coverage for "property damage' which has first occurred, or alleged to have first existed, or begun to occur prior to the effective date" of the 2007-2008 policy. Regardless of whether: (1) such prior occurring "property damage" continues to occur during the policy; or (2) whether repeated or continued exposure to conditions that caused such prior occurring "property damage" results in additional "Property damage" during the policy. To that end FSIC argues that pursuant to the above language the Exclusion only applies if the pertinent "property damage" can actually be shown to have preceded the policy period and where that same "property damage" continued into the policy period or resulted in more of the same damage.

However, FSIC avers that the allegations and evidence in the underlying action do not substantiate C&F's contention that all of the pertinent damages first occurred before the 2007-2008 policy periods, nor were they a continuation of the cause of the damage. Rather it is FSIC's position that the evidence proves that the alleged damages were part of an ongoing process whereby new damage takes place over time. Therefore, in order to prove its supposition as to the continuous nature of the alleged damage FSIC proffers that C&F must show that the property

damage or its cause took place prior to the policy period and is separate and apart from the other new property damage that manifested after the inception of the 2007-2008 policy.

As stated earlier, New Jersey Courts have yet to publish an opinion on the interpretation of the "Continuous or Progressive Injury and Damage Exclusion." Therefore, to support their contention FSIC brings to the Court's attention a number of out of state cases. The first case cited by FSIC is Ameron B.V. v. American Home Assurance Co., 625 Fed. Appx. 803 (9th Cir. 2015). In Ameron, the Federal Ninth Circuit was asked to determine the application of a "known loss" exclusion to corrosion damage at a natural gas production project caused by the use of defective paint. The "known loss" exclusion excluded coverage for property damage known to the insured prior to the inception of the policy. Id. at 804. The insured had two facilities one offshore and another onshore. It was determined that the insured knew about corrosion damage to the offshore facility. As a result, the insurer attempted to allege that the damage to the onshore facilities was a continuation of the initial damage to the offshore facility. However, the Court disagreed finding that "there [were] issues of fact as to whether the corrosion at the various locations shared a common cause." Id. at 805. While the two facilities did share damage relevant to the paint used, the effect the surrounding conditions and environment had separately on each facility remained an issue preventing a finding of complete exclusion.

Similarly, in an unreported case, before the District Court for the Southern District of California, the Court denied an insurer's attempt to deny the insured policy coverage despite the fact that the insurer was able to point to various points of evidence supporting its contention that property damage occurred prior to the given policy period. In making its decision the Court dismissed the evidence presented in support of the exclusion on the premise that such evidence did

not negate the possibility of damage resulting from the insured's work would first manifest at a later time.

Summarily, FSIC principally contends that in order for C&F to use its coverage exclusion to the extent that it warrants should be applied, C&F must demonstrate a close connection or sameness between the known or prior damage and the damage taking place during a given policy period. This sameness must exist for each type of damage and cannot be generalized. In the present case, FSIC contends that C&F has failed to show any connection between the damages caused by the alleged water intrusion and the damage caused to the concrete slabs and foundations. FSIC argues that without showing that a causal connection exists between the two, C&F's argument as to complete exclusion is unsubstantiated.

FSIC further argues that none of the cases relied upon by C&F as to the effect of the exclusion are applicable. FSIC proffers that the unreported case is inapposite to the present dispute as that matter only concerned one source of damage and only one building; unlike the current circumstances, that has multiple sources of damages across six buildings. Consequently, while there were other cases cited by C&F, FSIC's principal argument as to each of those cases is that they all either pertained to one source of damage or involved situations in which the damage was uncontrovertibly found to have occurred before the inception of the pertinent policy period.

FSIC argues that C&F has failed to proffer any evidence conclusively proving that the entirety of the scope and extent of all of the damage affecting the project existed, was alleged to exist, or were known to exist prior to the inception of the 2007-2008 policy. In fact, FSIC argues that none of the experts reports relied upon by C&F as to the existence of damages in its motion actually predate the 2007-2008 policy period. In addition, while C&F certainly presents arguments as to the effect of the leaks it makes no affirmations as to the damage caused by defective pipes,

plumbing, or concrete works. Given this failure and pursuant to the aforementioned arguments, FSIC contends that the C&F has not met its burden of demonstrating that the Continuous or Progressive Injury and Damage Exclusion precludes coverage for the claims presented in this matter. Therefore, FSIC avers that C&F had a duty to defend the insured under the 2007-2008 policy.

2. Argument as to the EIFS/DEFS

As to C&F's arguments pertaining to the exclusionary effect of the EIFS/DEFS clause in its policy, FSIC argues that the clause does not preclude C&F's duty to defend and indemnify American Properties under the 2005-2006 and 2006-2007 policies. FSIC argues that though the exclusionary clause may exclude damage caused by EIFS, the damages at issue are not constrained to just EIF damages and include allegations of structural damage, which are by definition internal and therefore separate and apart from EIFS. To that end, FSIC avers that C&F cannot avoid its duty to defend American Properties based solely on the EIFS/DEFS Exclusion clause contained within the 2005-2006 and 2006-2007 policies.

3. Deductibles

FSIC contends that both the 2005-2006 and 2006-2007 policies are subject to a $50,000, per claim, deductible, that is operative regardless of whether C&F defense obligation is triggered. FSIC states that the terms of the deductible make C&F responsible to pay damages or defend American Properties in excess of the deductible amount, with American Properties being responsible for reimbursing C&F at the time payments become due. Therefore, FSIC argues that C&F cannot refuse to defend American Properties for the aforementioned policy periods on the basis that the deductible has not been satisfied. Consequently, FSIC proffers that C&F must honor its duty to defend American properties.

Based on the foregoing, FSIC request that the Court deny C&F's motion for summary judgment.

C. C&F's Reply

1. No Coverage for Plumbing Pipes and Pipe Leaks

On reply, C&F first asserts that FSIC's arguments as to C&F's duty to provide coverage for allegations related to the "improper installation of plumbing pipes of system, installation of defective copper plumbing pipes, and widespread pipe leaks," at the project is completely without merit. C&F's contention as to why is simple, the coverage period extended from 2005-2008, however the Association did not assert its first allegation related to plumbing defects until May 2016, eight years after the last C&F policy period ended. Furthermore, discovery adduced from the Underlying Action includes a Tort Claims Notice filed by the Association with the Trenton Water Utilities on August 10, 2015, wherein the Association reported water leaks in the ceilings of individual units "stemming from leaking hot or cold water pipes," and indicated that the leaks giving rise to its claim "started" in May 2015. Therefore, given that the alleged pipe leaks did not begin until, at earliest, 2015, seven years after the last policy period terminated, the leaks did not start during the period of coverage and as such is not covered.

2. No Coverage for Foundation and Concrete Slabs

As to the alleged damages pertaining to the foundation and concrete slabs, C&F asserts that such damages do not meet the definition of "property damage" as defined within the context of its policy. C&F contends that New Jersey courts will find the existence of property damage if the insureds'; faulty workmanship causes physical injury to third party property (i.e., not simply the insured's own work). See. e.g., Weedo v. Stone-E-Brick, 81 N.J. 233, 241 ("injury to persons and damage to other property constitute the risks intended to be covered under the CGL"). In the

present case, the record reflects that the damage to the slabs and foundation was done as a result of improper construction and the use of substandard materials. However, C&F asserts that as established by Weedo, and absent an injury to a third party, such occurrence does not meet the definition of "property damage" for purposes of coverage and is, accordingly, not covered.

3. EIFS Excluded Under the 2005-2006 and 2006-2007 Policies

As to damages relating to the EIFS, C&F contends that FSIC itself seems to concede that C&F's policy does not cover EIFS. However, C&F argues that FSIC fails to fully appreciate the extent of this non-coverage. While seemingly admitting to the preclusive effect of the policy as it pertains to damages directly linked to EIFS, that is to say damages to building components that fall into the EIF category, C&F maintains that FSIC fails to appreciate that the policy also precludes coverage for building components or harms that are indirectly related to EIFS. Specifically, the EIFS Exclusion precludes coverage for any "Property Damage" that arises "directly or indirectly out of 'your EIFS/DEFS product' or 'your EIFS/DEFS work,'" and defines EIFS/DEFS work to include "any work or operations with respect to any exterior component, fixture or feature of any structure if any 'exterior insulation and finish system' or direct exterior finish system' is used on any part of that structure."

The EIFS Exclusion "excludes any injuries arising out of…any work [the insured] performed on any exterior component of a building if any EIFS was used on any part of that structure." Trinity Universal Ins. Co. V. Employers Mut. Cas. Co., 592 F.3d 687, 690, 692-93 (5th Cir. 2010.) Consequently, the underlying complaint alleges: "improper design and construction of the buildings at Madison at Ewing, particularly with respect to the exterior cladding…and other building components, including…a. Azek Trim Siding…, b. Stucco…C. Stone Veneer….d. Windows and Doors….e. Missing or Improper Flashing…f. Foundation Walls and Slabs….g.

Balconies….h. Roof and Roof Structures." As supported by the complaint, each of the alleged construction defects is an exterior component of the building. Given that all of the alleged damage is related to exterior components of structures containing EIFS, C&F asserts that the EIFS Exclusion applies to preclude coverage for all damages under both the 2005-2006 and 2006-2007 policies.

4. The Continuous or Progressive Exclusion Precludes Coverage Under the 2007-2008 C&F Policy

As to the Continuous or Progressive Exclusion clause (the "Exclusion") contained within the 2007-2008 policy, C&F avers that there can be no dispute that the plain language of this exclusion bars coverage for all property damage that existed or was alleged to exist prior to inception of the 2007-2008 C&F Policy. Again, the Exclusion acts to preclude coverage for "property damage" which first occurred, or [is] alleged to have first existed, or begun to occur prior to the effective date of the [C&F 2007-2008] policy" or "which continues to occur, for any reason on or after the effective date of the policy." C&F asserts that FSIC's contention that the Exclusion does not apply due to C&F's inability to prove its applicability to each and every instance of damage alleged by the Association is without merit. C&F states, that FSIC itself admitted that the "property damage" at issue began at the time of installation and has been continuous from the time of construction to the present. To that point, construction for the first three buildings was completed in July 2005, while construction for the latter three finalized as of June 2006. Therefore, commensurate with Plaintiff's own admission as to the time damages were first alleged, all "property damage" is admitted to have begun before the inception of the 2007-2008 C&F policy.

Consequently, C&F argues that FSIC's contention that certain areas of the Project have an increased likelihood of damage based on the building materials used is a red herring. Regardless of which materials were used the Exclusion plainly reads that it bars coverage for any "property damage" that first existed prior to the policy periods, regardless of whether or not said damages continues to occur prior to the 2007-2008 policy period. C&F proffers that FSIC attempts to strengthen its position by citing to multiple out-of-state decisions all of which speak to irrelative "knowledge qualifications" that do not exist within C&F's policy. For example, C&F argues that the Ameron case relied upon by FSIC unrelated to the issue at hand because the policy in that case contained a known damages provision. Ameron B.V. v. American Home Assurance Co., 625 Fed. Appx. 803, 805 (9th Cir. Sept. 9, 2015).

That provision precluded coverage for property damage that the insured "knew...had occurred in whole, or in part, prior to the policy period." Id. at 803. While C&F does not deny that it too has such a provision, its provision exists within the Insuring Agreement not within the Continuous or Progressive Exclusion. The Exclusion has no knowledge qualifications and expressly states that coverage is precluded if "property damage" "first occurred," was "alleged to have first existed" or had "begun to occur" prior to the policy's inception date.

Lastly, C&F argues that FSIC's argument that the Exclusion only applies to the same type of "property damage" that took place before the policy period and continued into the new coverage period and thereby does not apply to similar but new damage is without merit. C&F argues that such position contradicts Madison at Ewing's own admission as to the time the property damage began and is further unsupported by anything in the record. To that end, C&F asserts that as all "property damage" at the Project first existed or was alleged to first exist prior to the inception of the 2007-2008 policy, the Exclusion bars coverage for the claims presented. As such, C&F

contends that it has no duty to defend or indemnify its insured, Defendant American Properties for the 2007-2008 policy period.

5. No Coverage Under 2007-2008 Policy Due to Prior Manifestation

Alternatively to the above, C&F further argues that it is not responsible for coverage under the 2007-2008 policy based solely on the fact that the "property damage" manifested prior to the policy period. In making this argument, C&F reasserts its position as to the effect of the continuous trigger theory as purported by the aforementioned Air Master case. Principally, C&F re-avows that as the "property damages" began to manifest prior to the 2007-2008 policy year, its responsibility for covering such defects elapsed at the end of the policy period in which the damage first manifested. In the present case, the "property damage" first manifested in 2005 and continued to manifest well into the 2006-2007 policy year. To that end, and pursuant to Air Master, as the damage was continual and progressive C&F's responsibility terminated as of 2007. Accordingly, C&F is not responsible for coverage under the 2007-2008 policy period.

6. No Coverage Under 2006-2007 Policy Due to American Properties Failure to Satisfy the Self-Insured Retention

Finally, C&F does not oppose FSIC's argument as to the effect of the deductible's for the 2005-2006 and 2007-2008 policy periods but contends that the 2006-2007 policy contains a $50,000 per claim Self-Insured Retention, which is a condition precedent to coverage under the policy, and has yet to be satisfied. C&F avers that it is under no duty to provide coverage for American Properties until such time as the SIR is satisfied.

D. DECISION

1. Standard of Review

The standard for summary judgment in New Jersey is well settled. "A motion for summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73 (1954). A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). Bare conclusions without factual support cannot defeat summary judgment; instead, evidence submitted in support of the motion must be admissible, competent, non-hearsay evidence. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999); Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995).

The moving party must sustain the burden of showing clearly that there is no genuine issue of material fact in the case, and that the moving party is entitled to judgment as a matter of law. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. at 73. In determining whether a dispute is genuine, the court is to make all legitimate inferences in favor of the non-moving party and deny the motion if there is the slightest doubt about the existence of a material issue of fact. Saldana v. DiMedio, 275 N.J. Super. 488 (App. Div. 1998).

The court must consider whether the competent evidential materials presented, when viewed in light most favorable to the non-moving party in consideration of applicable evidentiary standards, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. at 523. On

motion for summary judgment, the judge must engage in an analytical process essentially the same as that necessary to rule on motion for directed verdict--whether evidence presents sufficient disagreement to require submission to jury or whether it is so one-sided that party must prevail as matter of law; weighing process requires the court to be guided by same evidentiary standard of proof--by preponderance of evidence or clear and convincing evidence--that would apply at trial on merits when deciding whether there exists "genuine" issue of material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. at 533-34.

Additionally, the New Jersey Supreme Court has held that a non-moving party cannot defeat a motion for summary judgment "merely by pointing to any fact in dispute." Id. at 529. Rather, if the moving party makes the requisite prima facie showing, it is incumbent upon any opposing party to come forward with competent proofs indicating that the facts are not as the moving party asserts. Spiotta v. Wm. H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962), certif. denied, 37 N.J. 229 (1962).

Procedurally, summary judgment is usually inappropriate prior to the completion of discovery. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003). However, a non-moving party does have an obligation to demonstrate, with some degree of particularity, the likelihood that further discovery will supply the missing elements of the cause of action. Id.

The Court Grants Crum and Forster's Motion for Summary Judgment in part. In interpreting an insurance policy, a court may not write a better policy of insurance for the insured if the policy language in the insuring agreements, exclusions and conditions are clear and unambiguous. President v. Jenkins, 180 N.J. 550, 562 (2004). A court may not ignore the clear and

unambiguous terms of the policy; where the terms of a policy are clear and unambiguous, the court must give it effect. Longobardi v. Chubb Ins. Co. of N.J., 121 N.J. 530, 537 (1990).

Courts are not free, "even under the guise of good faith and peculiar circumstances, to alter the terms of an otherwise unambiguous contract." Longobardi, 121 N.J. at 537. "[I]t is the function of a court to enforce [the insurance policy] as written and not to make a better contract for either of the parties." State v. Signo Trading Int'l, Inc., 130 N.J. 52, 63 (1993) (quoting Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)).

In interpreting "the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." Chubb Custom Ins. Co. v. Prudential Ins. Co., 195 N.J. 231, 238 (2008). "[I]f the language is clear, that is the end of the inquiry." Id.

2. Effect of the EIFS Exclusion

In making its decision the Court finds it prudent to reemphasize the controlling nature of the insurance policy as written and referenced by the perspective parties. In pertinent part, the C&F's EIFS Exclusion states that it "does not apply to… "Property Damage" …arising directly or indirectly out of…"your EIFS/DEFS work." "Property Damage" is, in the context of the policy, defined as "physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or [as the] loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it. "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Exterior Insulation and Finish System ["EIFS"] [is] defined as an exterior cladding or finish system used on any part of any structure…"

"Your EIFS/DEFS work" is defined as any "work or operations performed by you or by any person or entity working directly or indirectly for you or on your behalf," to include: the design, manufacture, construction, fabrication, preparation, installation, application, maintenance, repair, including remodeling, service, correction or replacement of an [EIF], or a "direct exterior finish system" ["DEF"] or any part of either system," or any substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings…"

In the present case, FSIC does not seem to contest the fact that certain EIFS were used in the construction of American Properties. Instead, FSIC's principal argument as to the inapplicability of the EIFS Exclusion is that the allegations of property damage extend beyond that of EIFS and include certain internal damage most notably due to pipe leaks which, FSIC declares, have no relation to an exterior component, fixture or feature of the project building. However, as evidenced within the body of C&F's reply the first instance of pipe leakage did not arise until May 2015, almost seven years after the termination of the last policy year. To the extent that, FSIC has not put forth any argument suggesting that the leaks began during the course of either of the three coverage periods, or any other future damages clause, the Court, pursuant to Chubb Custom Ins. Co. v. Prudential Ins. Co., must take the language of the pertinent policy as written.

Said language is clear and unambiguous; C&F is precluded from covering American Properties for any damages caused from or relating to EIF installation, maintenance, or repair. Given that FSIC itself has not and, presumably, cannot contest the use of EIFS in the construction of the Project, C&F is precluded from coverage for the two policy periods during which such materials were used. As those periods spanned both the 2005-2006 and 2006-2007 coverage years, C&F is precluded from coverage for those periods.

3. 2007-2008 Coverage Year

Before proceeding to its analysis as to the issue of C&F's coverage liability under its 2007-2008 policy, the Court notes that C&F does not contest liability for the preceding policy periods, 2005-2006 and 2006-2007.

Conversely, relative to the issue of coverage for the 2007-2008 coverage year, the Court notes that C&F has put forth two alternate arguments for exemption. The first of these two arguments mirrors its previous contention relative to the EIFS clause. Separate from the EIFS Exclusion, the 2007-2008 C&F policy contains a Continuous Progressive Injury and Damage Exclusion Endorsement which precludes damages for "property damage which has first occurred, or alleged to have first existed or begun to occur prior to the effective date of [the] policy." The language of the exclusion further indicates that the clause is effective regardless of whether the "property damage continues to occur, for any reason on or after the effective date of the policy;" and/or [occurs as a result of] repeated or continued exposure to conditions, which caused such… property damage, occurs on or after the effective date of this policy, and causes additional, progressive or further…"property damage."

In response to C&F's contention as to the exculpatory effect of this Exclusion clause, FSIC argues that the record shows that the damages arising out of the Project are ongoing with new damages arising continually. The Constructive Building Solutions, LLC (hereinafter "CBS") and FWH report referenced by FSIC does state that there was more prevalent damage in areas clad with masonry stone veneer or stucco and, further, that damage was severe in certain areas to include the base of walls, below balconies, and at inside/outside corners of walls. However, the language of the Exclusion clearly reads that the clause is effective regardless of whether the "property damage continues to occur, for any reason on or after the effective date of the policy.

Therefore, the fact that masonry stone veneer or stucco was used is a non-issue, unless they were new damages that occurred during the 2007-2008 policy year. To that end, the pertinent question is when did those damages begin to occur?

The record supports the fact that water intrusion began as early as 2005. The first incident report was made by way of a service order for Unit 235, which complained of a "water stain on the ceiling in the Living Room."[1] Following the service order, another service report was issued for Unit 444, which indicated that there were "bubbles [in the dry wall] by the baseboard."[2] Lastly, a copy of a December 20, 2006 email correspondence indicated that a leak in Unit 344 had been fixed "2-3 times" and that the leak began anew "every time it rains."[3] These excerpts are among the many **undisputed** instances of water intrusion that began prior to 2007.

Consequently, the undisputed facts provided in the record state that C&F's 2007-2008 insurance policy contain an exclusionary clause that precludes C&F from coverage liability for "property damage which has first occurred, or alleged to have first existed or begun to occur prior to the effective date of [the] policy." The above referenced instances of water leakage are clear evidence that water intrusion existed prior to the 2007-2008 coverage year. Pursuant to Longobardi v. Chubb Ins. Co., "[i]nsurance policies should be construed liberally in the insured's favor to the end that coverage is afforded to the full extent that any fair interpretation will allow. Notwithstanding that premise, the words of an insurance policy **should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability. Although courts should construe**

[1] C&F SOMF ¶24
[2] C&F SOMF ¶25
[3] C&F SOMF ¶33

insurance policies in favor of the insured, they should not write for the insured a better policy of insurance than the one purchased." 121 N.J. 530, 533 (1990). (Emphasis added.)

Given the evidenced manifestation of water intrusion established by the cited instances of water leakage and the express language of the 2007-2008 C&F insurance policy coupled with the New Jersey Supreme Court's holding in Longobardi this Court finds that C&F is excluded from coverage liability as to the issue of water intrusion for the 2007-2008 coverage year. While First Specialty may argue that the cited indications of water intrusion should not act as a complete bar to a finding of exclusion, this Court finds such contention unavailing. It is clear from the many incidents of water infiltration cited to in the record that damage caused by water intrusion was exceedingly epidemic throughout the Project. Further, given that the first noted incident of intrusion began in 2005, it is evident that this defective condition existed from the Project's inception. To that end, this Court finds First Specialty's arguments to the contrary to be without merit and affirms it grant of summary as to exclusion for water intrusion under the 2007-2008 coverage year.

Conversely, with respect to defects in the masonry, this Court relies upon the various reports by Kipcon Inc. In its motion, C&F relies upon a 2008 report by Kipcon, Inc. in which John T. Stevens, Vice-President of the company, provided a summary of his company's investigation of the Madison Property. (See. C&F, Exhibit F). In his report Stevens identifies various cracks in the stone slab ranging from minor hairline cracks to one particular crack leading from the front porch of the clubhouse, which he indicated to be of "concern." (C&F, Exhibit F, pg. 7). Notably, the site review provided by Stevens is devoid of any analysis as to when those cracks first manifested. Nor does C&F make any substantive assertion as to when such cracks first began.

Moreover, in its extensive review of this case the Court has researched numerous exhibits provided by the many parties attached to the motion papers. In its review of these documents, this Court has examined a 2004 Kipcon report that was prepared for the Plaintiff. In preparation of the report, Kipcon presumably conducted a site review of the six buildings that at that point had been undergoing construction. In their 2004 report, Kipcon identified certain preliminary cracks in the foundations of Buildings B, C, D, and E and even noted the presence of some damage to certain parts of the foundation wall. Given this report, and commensurate with the aforementioned Exclusionary clause, this Court would normally grant summary judgment on the basis of the language of the policy. However, this Court finds that such holding would be improper given the timing of the 2004 report. While this Court concedes that the 2004 Kipcon report supports C&F's argument as to pre-existing damages in the masonry, this Court also notes that construction had yet to be completed at that time.

Construction for the six buildings that constitute a majority of the Madison Project were not completed until 2006, with Buildings 4-6 (D-F) not being fully commenced until 2005. To that end, there exists a gap in information relative to the existence and propagation of cracks between the completion of Buildings four-six in 2005 and the ones tangentially referred to in the 2008 Kipcon Report. Without more information as to the time the alleged masonry damage began the Court cannot simply award C&F the benefit of the doubt as to the timing of their accrual. To that end, the Court declines to grant summary judgment as to C&F's coverage during the 2007-2008 as there exist a possibility that the manifestation of cracks may overlap with that policy period. The fact that Buildings four-six were not completed until 2006 adds further support to this Court's holding. To the extent that a Pre-Existing exclusionary clause cannot apply to buildings that had

yet to formally exist, this Court finds that a question of fact remains as to the manifestation of cracks in the masonry.

In addition, unlike the water infiltration issue, the record is devoid of a precipitating cause as to the defects in the foundation. Without proof of the precipitating event this Court concludes that a determination as to C&F's coverage liability under the 2007-2008 policy with respect to the masonry cracks is best left to a jury. Pursuant to Saldana v. DiMedio, in determining whether a dispute is genuine, the court is to make all legitimate inferences in favor of the non-moving party and deny the motion if there is the slightest doubt about the existence of a material issue of fact. 275 N.J. Super. 488 (App. Div. 1998). Therefore, given the absence of fact as to a manifestation point with respect to cracks in the masonry, especially with regard to Buildings four through six, summary judgment is, as to the defective masonry condition, is denied.

Consequently, C&F's reliance upon the Continuous Trigger Theory referenced in Air Master seemingly mirrors C&F's position as to the Continuous Progressive Injury and Damage Exclusion. The main thrust of C&F's position as to the Continuous Trigger Theory is that it acts to absolve C&F from liability as the essential nature and scope of the "property damage" first began with the water leaks which manifested prior to the 2007-2008 policy period. This argument essentially mirrors C&F's position as to the effect of the Exclusionary clause and will therefore be treated in like manner. To that end, while the Court agrees that the theory is applicable to damages caused by the evidenced water intrusion, it holds that the theory is inapplicable to the cracks in the masonry, as no substantive evidence has been presented relative to the cracks manifestation.

The New Jersey Appellate Court's holding in Air Master states that in instances involving progressive "property damage" in construction defect cases, the temporal endpoint of a covered occurrence occurs when the "essential nature and scope of the property damage first becomes

known, or when one would have sufficient reason to know of it." Air Master & Cooling, Inc. v. Selective Ins. Co. of America 452 N.J. Super. 40 (App. Div. 2017). As to water intrusion, the record reflects that the first indication of such defect were first noticed on December 20, 2005. (See C&F Fact P.5-6 at #24). Therefore, pursuant to Air Master, the Continuous Trigger Theory acts to preempt C&F's coverage liability for such damage. However, as stated under the Exclusion, there is no such evidence as to the initial manifestation point of the masonry cracks. As such, the Continuous Trigger Theory, for purposes of summary judgment, is holistically inapplicable to the defective masonry condition, as no evidence exists as to the conditions temporal point of origin. Moreover, even if C&F were to aver that the Plaintiff had sufficient reason to know of said condition, a query as to reasonableness would be an issue of material fact also subject to determination by a jury.

To that end, mirroring its holding under the Exclusion, this Court grants C&F's motion for summary judgment under the applicability of the Continuous Trigger Theory solely as to water intrusion, and likewise denies such finding relative to the defective masonry condition.

4. Deductibles and Self-Insurance Retention

As to the final issue, the Court notes that the parties are not in dispute as to the effective deductibles for the first two policy periods. As to the SIR payment the Court rules in accordance with the arguments raised in C&F's reply and holds that American Properties must first satisfy the SIR before C&F is obligated to provide coverage for the 2007-2008 policy periods. However, the policy does not specifically bar any payments by third parties to be attributed to the insured SIR. Note however, that satisfaction of the SIR does not constitute automatic coverage responsibility as the Court's ruling as to the effect of the two exclusionary provisions still stands.

II. FIRST SPECIALTY INSURANCE V. INTERSTATE FIRE AND CASUALTY COMPANY

A. Interstate Argument

1. Standard of Review

Interstate Fire and Casualty Company ("Interstate") contends that New Jersey law regarding insurance policy interpretation requires that this Court interpret the unambiguous terms of their policy as written. Interstate contends that, in the case of policy interpretation, when the terms of the policy are clear and unambiguous, the language used binds the parties and the Court *must* give it effect. Longobardi v. Chubb Ins. Co. of NJ.,121 N.J. 530, 537 (1990). Furthermore, "in the absence of ambiguity, courts must not engage in a strained construction to support the imposition of liability." J. Josephson, Inc. v. Crum & Forster, 293 N.J. Super 170, 216 (App. Div. 1996) (citing Longobardi, 121 N.J. at 537). Based on these cases, Interstate contends that the Court is constrained to interpret their policies in accordance with their plain language.

2. Pre-Existing Damages Exclusion

Interstate begins its argument by first asserting that the Pre-Existing Damages Exclusion contained within its insurance policy constitutes a complete bar to coverage as the record clearly reflects that the "property damage" at issue first began to occur in 2005, three years prior to the inception of its first policy period. Interstate contends that each of its policies contain a Pre-Existing Damage Exclusion, which bars coverage for "[a]ny damages arising out of or related to . . . 'property damage,' whether such . . . 'property damage' is known or unknown, . . . which are, or are alleged to be, in the process of occurring as of the inception date of the polic[ies]." Relying upon the Supreme Court of New Jersey's ruling in Princeton Ins. Co. v. Chungmuang, Interstate argues that policy exclusions such as theirs are "presumptively valid and will be given effect if

'specific, plain, clear, prominent and not contrary to public policy." 151 N.J. 80, 95 (1997) (citing Doto v. Russo, 140 N.J. 544, 559 (1995).

Interstate contends that the undisputed record evidence establishes beyond a doubt that "property damage" was "in the process of occurring" at the buildings comprising Madison at Ewing in 2005 and 2006. This was before the inception of the first of the two Interstate Policies, on May 1, 2008.

Interstate asserts that its Pre-Existing Damage Exclusion applies to bar coverage regardless of whether property damage is known or unknown.[4] In fact, the Pre-Existing Damage Exclusion applies to bar coverage if "property damage" is "in the process of occurring" or if "property damage" is "alleged to be" "in the process of occurring" before the inception of the Interstate Policies. In the present case, Interstate "property damage" was both alleged to be in the process of occurring, and was actually in the process of occurring, before May 1, 2008.

Furthermore, Interstate argues that the Complaints in the Underlying Action, together with the Complaints and Admissions by the Plaintiffs (First Specialty Insurance Company ["FSIC"] and American Properties) allege that the "property damage" that they contend is of a continuous nature, first commenced during Crum & Forster's coverage period in 2005. Interstate contends that its position is further supported by expert reports. For example, the Cladding Investigation Litigation Report concluded that, as a result of numerous defects in the design and construction of the buildings, "water intrusion and damage to the building began to occur immediately following the original construction."[5] Likewise, Drew Brown, a principal at Construction Building Solutions, LLC ("CBS"), testified at deposition that the defects at the Project and "the causations are from areas that allow water infiltration to go in between building components . . . and there's not

[4] Interstate SOMF ¶ 72
[5] Interstate SOMF ¶ 39

provisions provided within the cladding system to drain that water back out."[6] Mr. Brown also testified in support of the Plaintiff's claims against American Properties that damage began immediately after the first rain event following completion of construction.[7]

Given these reports in combination with the incontrovertible fact that all six of the buildings were completed as of 2006, two years before the inception of Interstate's first policy period, Interstate argues that the clear language of its Pre-Existing Damage Exclusion precludes coverage for defense or indemnity costs under the Interstate Policies.

3. EIFS Exclusion

Interstate argues that numerous documents and reports establish that the design and construction of the buildings at the Project included use of EIFS.[8] Nevertheless, Interstate adopts the arguments made by Crum & Forster in its Brief in support of its Motion for Summary Judgment on its similarly worded EIFS exclusion to the one contained in both of the Interstate Policies, as to why that exclusion precludes coverage here.

4. Continuous Trigger Theory

Interstate's argument as to the effect of the Continuous Trigger Theory presented in Air Master & Cooling, Inc. v. Selective Ins. Co. of America,452 N.J. Super. 35, 39-40 (App. Div. 2017) also closely follows C&F's argument as to the same, albeit with a starting policy period of 2008-2009, and therefore will not be reiterated.

5. Subsidence Exclusion

Alternatively, Interstate states that the Interstate Policies each contain a "Subsidence Exclusion," which precludes coverage for "property damage," "whether direct or indirect, arising

[6] Interstate SOMF ¶ 41
[7] Interstate SOMF ¶ 42
[8] Interstate SOMF ¶ 17-32

out of, caused by, resulting from, contributed to, or aggravated by the subsidence, settling, . . . sinking, . . . or any other movement of land or earth."[9] Here, Interstate contends that the record undisputedly states that concrete foundation slab cracks were observed before the inception of the Interstate Policies.[10] While Interstate still maintains that the Pre-Existing Damage and EIFS Exclusions bar coverage for the reasons set forth above, to the extent that it is alleged that foundation slab cracks could trigger coverage under the Interstate Policies, Interstate further argues that as slab cracks can only have happened, directly or indirectly, arising out of, caused by, resulting from, contributed to, or aggravated by the subsidence, settling, sinking or any other movement of land or earth of the kind excluded by the Subsidence Exclusion.

Interstate contends that New Jersey courts have enforced subsidence exclusions to bar coverage, both for claims of "property damage" and "bodily injury." Interstate also relied upon two unreported cases. One case held that coverage for property damage for building collapse was precluded by a subsidence exclusion. The other concluded that coverage for bodily injury resulting from a cave in of a foundation wall was precluded by a subsidence exclusion.

For the reasons stated above, Interstate request that the Court grant its motion for summary judgment.

B. First Specialty Insurance Opposition

1. Principles of Insurance Policy Interpretation

In opposition, the Plaintiff, First Specialty Insurance Company ("FSIC"), rejects the arguments raised by C&F and contend that the allegations of damages in the underlying action triggers coverage under each of C&F's policies. FSIC pretexts its argument by first asserting that principles of insurance policy interpretation dictate that the Court interpret the language of the

[9] Interstate SOMF ¶ 73
[10] Interstate SOMF ¶ 47

policy "according to its plain and ordinary meaning." Voorhees v. Preferred Mut. Ins. Co., 128 N.J., 175, 607, A.2d 1255 (1992). If the terms are not clear, but are instead ambiguous, they are construed against the insurer and in favor of the insured, in order to give effect to the insured's reasonable expectations. Doto v. Russo, 140 N.J. 544, 556, (1995).

In the case of exclusionary clauses, such clauses are presumptively valid and are enforced if they are "specific, plain, clear, prominent, and not contrary to public policy." Princeton Ins. Co. V. Chunmuang, 151 N.J. 80, 95, (1997). "In general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41, (1998) (quoting Chunmuang, supra, 151 N.J. at 95, 698 A.2d 9). As a result, exclusions are ordinarily strictly construed against the insurer. Aetna Ins. Co. v. Weiss, 174 N.J. Super. 292, 296, (App.Div.), certif. denied, 85 N.J. 127, (1980). If there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it. Cobra Prods., Inc. v. Fed. Ins. Co., 317 N.J. Super. 392, 401, (App.Div.1998), certif. denied, 160 N.J. 89, (1999).

An insurer's duty to defend an action brought against its insured depends upon a comparison between the allegations set forth in the complainant's pleading and the language of the insurance policy. Voorhees, supra, 128 N.J. at 173; Ohio Cas. Ins. Co. v. Flanagin, 44 N.J. 504, 512, (1965); L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 490, (App.Div.2004). In making that comparison, it is the nature of the claim asserted, rather than the specific details of the incident or the litigation's possible outcome that governs the insurer's obligation. Flanagin, supra, 44 N.J. at 512. Similarly, if a complaint includes multiple or alternative causes of action, the duty will attach as long as any of them would be a covered claim and it continues until all of the covered

claims have been resolved. Voorhees, supra, 128 N.J. at 174, (citing Mt. Hope Inn v. Travelers Indem. Co., 157 N.J. Super. 431, 440-41, (Law Div.1978)).

2. Continuous Trigger Theory

Consequently, FSIC rejects the applicability of the Continuous Trigger Theory introduced by Interstate on the premise that the record does not completely support its application. So to support this contention FSIC relies upon Air Master & Cooling, Inc., v. Selective Insurance Company of America, 452, N.J. Super 35, (App. Div. 2017), as relied upon by both Interstate and C&F in their arguments. FSIC does not dispute the facts of Air Master as presented by the Defendants but focuses upon the Court's ruling that the point at which coverage ends due to a continuous injury matter would be at the time of "the 'essential' manifestation of the injury." Id. at 53. The alleged manifestation in Air Master concerned certain indications of water intrusion within and upon certain windows, ceilings, and other portions of the individual units. The developer of the property as well as the general contractor who, according to a newspaper report, began to attempt remedial measures noted the intrusion.

Nevertheless, evidence of the intrusion in turn led to a consultant being brought in to perform a survey of the roof for water damage. Findings from the report detailed extensive water damage but found that it was impossible to determine at which point the moisture infiltration occurred. As a consequence, the Court held that evidence as to the manifestation was inconclusive and that questions of material fact remained as to whether the "damage to the roof and its replacement is harm that is 'indivisible' from the damage to the rest of the building, or whether, conversely, *the deterioration of the roof comprises distinct property damage stemming from entirely distinct construction defects.* Id. at 10. (Emphasis added).

As to the present case, FSIC argues that similar to Air Master the allegations of progressive damage do not share a conclusively common manifestation point. FSIC does not deny that the underlying project was completed in July 2006. However, evidence of water infiltration and other damages began to manifest as of December 2005, prior to the completion of three of the six buildings in the project, and continually manifested until at minimum 2008. While the continued manifestation certainly makes the continuous trigger theory applicable, FSIC argues that there is no conclusive proof that complaints as to water linkage did not continue into the Interstate policy periods. Essentially, FSIC argues that as Interstate has not proven, conclusively, when the manifestations ceased, the Continuous Trigger Theory works to make Interstate responsible for the defects that occurred during its periods of coverage.

Consequently, as to Interstate's citation of defects discovered during construction and punch list inspections, FSIC argues that such citation fails to establish that distinct damage to concrete work, slabs and foundations did first not take place during the Interstate Policy periods. In this regard, FSIC maintains that the Kipcon reports cited by Interstate were based on visual observations of the existing ongoing construction work and that there is no indication in the reports that Kipcon made any effort to determine the causes of the construction issues identified. Rather, the stated purpose of the reports was to identify construction issues so that American Properties could remedy those issues.[11]Because the Kipcon reports were not concerned with the cause of the noted defects, FSIC asserts that there is no evidence to suggest that the essential nature of the observed damage manifested prior to the inception of the Interstate Policies thereby cutting off coverage for the damage that allegedly continued into the Interstate policy periods. For these

[11] Interstate SOMF ¶ 47 and FSIC Response

reasons, FSIC contends that both Interstate Policies are triggered by the allegations of damage in the Underlying Action.

Consequently, to the extent that Interstate cannot show that its "Pre-Existing Damage Exclusion (the "Exclusion") applies to each and every instance of damage alleged, FSIC contends that Interstate had a duty to defend the insured under the 2008-2009 and 2009-2010 policy periods. FSIC states that Interstate's position conflates the presence of **some** damage to some areas of the project that was observed to have taken place prior to the first Interstate policy with **all** of the alleged damage that is alleged to have taken place over the years and affecting the entire project.

FSIC argues that this contention is unsustainable given existing legal precedent. While New Jersey Courts have yet to publish an opinion on the interpretation of the Exclusion, Courts other jurisdictions have. Consequently, FSIC contends that it is well established in New Jersey law that time of the "occurrence" within the meaning of a liability policy is the time when the third party is actually damaged, and not the time of the wrongful act. Hartford Accident & Indem. Co. v. Aetna Life & Casualty Ins. Co., 98 N.J. 18, (N.J. 1984). The language of the Exclusion operates to exclude coverage for "property damage' which has first occurred, or is (or is alleged to be) in the process of occurring as of the inception date of the policy even if the "occurrence" continues during the policy period.[12]

FSIC states that the first prong of the exclusion applies only to "damages arising out of or related to" "property damage" that has already taken place as of the date of policy inception. The second prong applies to "damage arising out of or related" to "property damage" that began prior to policy inception and which continues to take place during the policy period. However, FSIC argues that the endorsement language is ambiguous in meaning as to the scope of the exclusion.

[12] Interstate SOMF ¶ 72

FSIC believes that Interstate has taken a very broad position while the language is susceptible to a much narrower meaning. Consequently, FSIC contends that if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it. Cobra Prods., Inc., supra 317 N.J. Super. at 401.

FSIC further contends that the allegations and evidence in the underlying action do not substantiate Interstate's contention that all of the pertinent damages first occurred before the inception of their policy nor were they a continuation of the cause of the damage. Rather it is FSIC's position that the evidence proves that the alleged damages were part of an ongoing process whereby new damage takes place over time. Therefore, in order to prove its supposition as to the continuous nature of the alleged damage FSIC proffers that Interstate must show that the property damage or its cause took place prior to the policy period and is separate and apart from the other new property damage that manifested after the inception of their policy.

As stated earlier, New Jersey Courts have yet to publish an opinion on the interpretation of the "Continuous or Progressive Injury and Damage Exclusion." Therefore, so to support their contention FSIC cites to a number of out of state cases. The first case cited by FSIC is Ameron B.V. v. American Home Assurance Co., 625 Fed. Appx. 803 (9th Cir. 2015). In Ameron, the Federal Ninth Circuit was asked to determine the application of a "known loss" exclusion to corrosion damage at a natural gas production project caused by the use of defective paint. The "known loss" exclusion excluded coverage for property damage known to the insured prior to the inception of the policy. Id. at 805. The insured had two facilities one offshore and another onshore. It was determined that the insured knew about corrosion damage to the offshore facility. As a result, the insurer attempted to allege that the damage to the onshore facilities was a continuation of the initial damage to the offshore facility. However, the Court disagreed finding that "there

[were] issues of fact as to whether the corrosion at the various locations shared a common cause." Id. While the two facilities did share damage relevant to the paint used, the effect the surrounding conditions and environment had on the property remained an issue preventing a finding of complete exclusion.

Similarly, in unpublished out of state opinion the Court denied an insurer's attempt to deny the insured policy coverage despite the fact that the insurer was able to point to various points of evidence supporting its contention that property damage occurred prior to the given policy period. The Court dismissed the evidence presented on the premise that such evidence did not negate the possibility of damage resulting from the insured's work would first manifest at a later time.

Summarily, in citing to these cases, FSIC principally contends that in order for Interstate to use its coverage exclusion to the extent that it warrants should be applied, Interstate must demonstrate a close connection or sameness between the known or prior damage and the damage taking place during a given policy period. This sameness must exist for each type of damage and cannot be generalized. In the present case, FSIC contends that Interstate has failed to show any connection between the damages caused by the alleged water intrusion and the damage caused to the concrete slabs and foundations. FSIC argues that without showing that a causal connection exists between the two, Interstate's argument as to complete exclusion is unsubstantiated.

FSIC further asserts that none of the cases relied upon by Interstate as to the effect of the exclusion are applicable. While there were other cases cited by Interstate, FSIC's principal argument as to each of those cases was that they all either pertained to one source of damage or involved situations in which the damage was uncontrovertibly found to have occurred before the inception of the pertinent policy period.

However, FSIC argues that Interstate has failed to proffer any evidence conclusively proving that the entirety of the scope and extent of all of the damage affecting the project existed, was alleged to exist, or were known to exist prior to the inception of their policy. In fact FSIC argues that the CBS report and report by its principal, expert Drew Brown, for purposes of establishing that all of the alleged water intrusion damage took place before the Interstate policies expired, also states that the severity and prevalence of water intrusion damage at the project was dependent on the type of building materials used at the damaged area as well as the location on the buildings. In addition, FSIC argues that while Mr. Brown's statements are constrained to untreated wood products, the alleged damages extend to claims of water damage beyond the subject of untreated wood products. Finally, FSIC contends that Interstate failed to make any affirmations as to the damage caused by defective pipes, plumbing, or concrete works. Given this failure and pursuant to the aforementioned arguments, FSIC contends that Interstate has not met its burden of demonstrating that the Pre-Existing Damage Exclusion precludes coverage for the claims presented in this matter. Therefore, FSIC avers that Interstate had a duty to defend the insured for the two policy periods.

3. Argument as to the EIFS/DEFS

As to Interstate's arguments pertaining to the exclusionary effect of the EIFS/DEFS clause in its policy, FSIC argues that the clause does not preclude Interstate's duty to defend and indemnify American Properties under the 2008-2009 and 2009-2010 policies. FSIC argues that though the exclusionary clause may exclude damage caused by EIFS, the damages at issue are not constrained to just EIF damages and include allegations of structural damage that are by definition internal and therefore separate and apart from EIFS. To that end, FSIC avers that Interstate cannot

avoid its duty to defend American Properties based solely on the EIFS/DEFS Exclusion clause contained within the 2008-2009 and 2000-2010 policies.

4. Subsidence

As to Interstate's Subsidence argument FSIC states that it is unaware of any authority that has determined that all concrete foundation slab cracks are related to earth movement. FSIC is also unaware of any evidence produced in the Underlying Action that has concluded that earth movement was a factor in the claimed damage. As Interstate provides no evidence or authority supporting its argument, FSIC contends that the argument should be dismissed.

For these reasons, FSIC respectfully requests that the Court deny Interstate's Motion for Summary Judgment.

C. Interstate's Reply

1. Response to FSIC's Duty to Defend Argument

Interstate argues that FSIC fundamentally misapprehend the duty to defend law in New Jersey. "The duty to defend is triggered by a complaint alleging a covered claim." Polarome Int'l, Inc. v. Greenwich Ins. Co., 404 N.J. Super. 241, 273 (App. Div. 2008) (citing Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 173 (1992)), certif. denied, 199 N.J. 133 (2009). "However, that obligation does not extend to 'claims which would be beyond the covenant to pay if the claimant prevailed.'" Id. (quoting Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 389 (1970)). "Neither the duty to defend nor the duty to indemnify 'exists except with respect to occurrences for which the policy provides coverage.'" Id. at 274.

"If an insurer believes that the evidence indicates that the claim is not covered, the insurer is not always required to provide a defense." Polarome, 404 N.J. Super. at 274 (citing George J. Kenny and Frank A. Lattal, New Jersey Insurance Law § 4-5:1, at 117 (2000)). "Thus, if there is

a factual dispute that, once resolved, may indicate that an occurrence is not covered, and it is unlikely to be resolved at trial [in the underlying action], an insurer may deny coverage and await judicial resolution." Id. at 275 (citing Heldor Indus., Inc. v. Atlantic Mut. Ins. Co., 229 N.J. Super. 390, 399, (App. Div. 1988)); accord The Muralo Co., Inc. v. Employers Ins. of Wausau, 334 N.J. Super. 282, (App. Div. 2000).

In the present case Interstate argues that, as in Polarome, the underlying complaint was ambiguous as to the occurrence triggering coverage. The Association did not declare the dates when the alleged property damage began to occur or was in the process of occurring. Consequently, Interstate could not determine from the four corners of the complaint whether its duty to indemnify, and thus its duty to defend, was triggered. Polarome, 404 N.J. Super. at 276-77. Thus, Interstate contends that it could examine extrinsic evidence to determine whether "property damage" had begun to occur or was alleged to be in the process of occurring before the inception of the Interstate Policies, and it had no duty to indemnify, and thus, no duty to defend.

An examination of that extrinsic evidence reveals that the Association alleges that "water intrusion and damage to the building began to occur immediately following the original construction,"[13]; and original construction was completed approximately two years or more before the inception date of the Interstate Policies. Thus, Interstate declares that the Pre-Existing Damage Exclusion bars coverage for any duty to indemnify, and thus, any duty to defend. Interstate maintains that the same is also true concerning Interstate's defenses based on the EIFS Exclusion, Trigger of Coverage and the Subsidence Exclusion. Because they too preclude a duty to indemnify, there is no duty to defend.

[13] Interstate SOMF ¶ 39

2. No Coverage Under the Pre-Existing Damage Exclusion

On reply, Interstate restates its position as to the preclusive effect of the Pre-Existing Damage Exclusion. Referencing back to the language of the Exclusion as well as the supporting expert reports and admissions and facts listed in the Underlying Complaint, Interstate states that the undisputed evidence establishes beyond a doubt that "property damage" was "in the process of occurring" at the buildings comprising Madison at Ewing in 2005 and 2006; at least two years prior to their policies first inception period.

Interstate reasserts that the language of its Exclusion applies to bar coverage if "property damage" is in fact "in the process of occurring" ***or*** if "property damage" is only "alleged to be" "in the process of occurring" before the inception of the Interstate Policies. Here, Interstate contends "property damage" was both alleged to be in the process of occurring, and was actually in the process of occurring, before May 1, 2008. The buildings at Madison at Ewing completed construction from July 2005 to July 2006.[14] Expert witness consultants retained by the Association found that water intrusion at the buildings caused damage "immediately" upon completion of construction of the buildings.[15]

Plaintiffs have cited no contrary witnesses or evidence to dispute that damage began to occur "immediately" upon completion of construction. In addition, there was a long history of water intrusion at Madison at Ewing, predating the inception date of the first of the two Interstate Policies on May 1, 2008.[16] Referencing the reports by CBS and Drew Brown, Interstate asserts that this fact is strongly supported. The Pre-Existing Damage Exclusion provides that Interstate "shall have no duty to defend any insured against any loss, claim, 'suit', or other proceeding

[14] Interstate SOMF ¶ 16
[15] Interstate SOMF ¶¶ 35-42
[16] Interstate SOMF ¶¶ 48-58.

alleging damages arising out of or related to . . . 'property damage' to which this endorsement applies."[17] Accordingly, Interstate declares that the Pre-Existing Damage Exclusion precludes coverage for defense and indemnity costs under the Interstate Policies.

To the extent that the facts of the unpublished Law Division decision closely reflect the facts currently in dispute, Interstate contends that the case is analogous. Furthermore, Interstate argues that FSIC cannot avoid the Pre-Existing Damage Exclusion by claiming that all of the property damage had to have occurred before the inception date of the Interstate policies to be barred by the Exclusion. That Exclusion explicitly provides that it bars coverage for damages arising out of or relating to property damage, whether such property damage is known or unknown, "which are, or alleged to be, in the process of occurring as of the inception date of the policy . . . even if the "occurrence" continues during this policy period." [18]

3. FSIC's Pipe and Slab Argument

As to FSIC's argument pertaining to the cracks in the slab and pipe leaks Interstate states that the record clearly reflects that these claims were not asserted until after 2014, four years after the expiration of its last policy period. As to the pipes, Interstate argues that FSIC's assertion that Interstates policy should be enacted relative to the pipes because they may have been corroding during its policy period is a total misapprehension of the terms of Interstates policy. Interstate submits that its policies only afford coverage, subject to their other terms, for defects that result in property damage during the policy period, not defects that have not yet resulted in consequential damage to other property.

Relative to cracks in the slabs, Interstate contends that to the extent that FSIC points to slab cracks and alleged resulting property damage, the record evidence is undisputed that concrete

[17] Interstate SOMF ¶72
[18] Interstate SOMF ¶72.

foundation slab cracks were observed at the Project well before the inception of the Interstate Policies, before construction was completed.[19] Moreover, the Association alleged that the slab cracks caused the same kind and type of damage that the other construction defects caused immediately following completion of construction. Interstate avers that such damage clearly began before the inception of the first Interstate Policy and was allegedly in the process of occurring some two or more years before then.

Finally, Interstate states that FSIC fails to account for the fact that while attempting to argue that certain damages occurred during Interstates coverage period it is also stating the same against Crum & Forster. Interstate notes that FSIC points to the same defects and argue they resulted in property damage during Crum & Forster's earlier policy periods. Plaintiffs cannot have it both ways – alleging property damage happened during prior insurers' time on the risk, but at the same time alleging that property damage is not alleged to be in the process of occurring before the inception of the Interstate policies. For these reasons, Interstate reaffirms its request for summary judgment.

D. DECISION

1. Standard of Review

The Court Grant's Interstate's Motion for Summary Judgment. In interpreting an insurance policy, a court may not write a better policy of insurance for the insured if the policy language in the insuring agreements, exclusions and conditions are clear and unambiguous. President v. Jenkins, 180 N.J. 550, 562 (2004). A court may not ignore the clear and unambiguous terms of the policy; where the terms of a policy are clear and unambiguous, the court must give it effect. Longobardi v. Chubb Ins. Co. of N.J.,121 N.J. 530, 537 (1990).

[19] Interstate's SOMF ¶ 47.

Courts are not free, "even under the guise of good faith and peculiar circumstances, to alter the terms of an otherwise unambiguous contract." Longobardi, 121 N.J. at 537. "[I]t is the function of a court to enforce [the insurance policy] as written and not to make a better contract for either of the parties." State v. Signo Trading Int'l, Inc.,130 N.J. 52, 63 (1993) (quoting Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)).

In interpreting "the meaning of a provision in an insurance contract, the plain language is ordinarily the most direct route." Chubb Custom Ins. Co. v. Prudential Ins. Co., 195 N.J. 231, 238 (2008). "[I]f the language is clear, that is the end of the inquiry." Id.

2. Effect of the EIFS Exclusion

[The Court relies on its holding as to the issue of EIFS Exclusion it wrote in the C&F Motion]

3. Subsidence

The Court denies summary judgment as to the subsidence issue as there are is a factual dispute relative to the cause of the cracks in the foundation. Pursuant to Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73 (1954) the standard for summary judgment in New Jersey is well settled. "A motion for summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. A genuine issue of material fact must be a disputed issue of fact that is of a substantial nature, having substance and real existence. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). Bare conclusions without factual support cannot defeat summary judgment; instead, evidence submitted in support of the motion must be admissible, competent, non-hearsay evidence. Brae

Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999); Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995).

Here, as the Court finds that an issue material fact exists as to the issue of subsidence, it finds an award of summary judgment improper. Accordingly, the Court denies Interstate's request for summary judgment as to the issue of subsidence.

4. Effect of the Pre-Existing Damages Exclusion

In discussing its decision as to the effect of the Pre-Existing Damages Exclusion clause found in Interstate's Insurance Policies, the Court notes that the arguments raised by Interstate are substantially similar to those raised by Crum & Forster. The Court reiterates by reference to the arguments and summations it made in the C&F motion. However, the Court finds it prudent to point out that it finds FSIC's argument as to coverage far more persuasive within the context of Interstate's policies versus that of Crum & Forster's. As noted by Interstate, during the course of the submissions, FSIC takes the simultaneous position that both Crum & Forster and Interstate are liable for coverage for both water infiltration and masonry defects.

As to the issue of water infiltration, the Court refers to its analysis relative to C&F where it found that the Exclusion clause in the 2007-2008 policy was applicable. The Court reached this decision based on the numerous reports of water infiltration and the report of Drew Brown who concluded that the water intrusion was a result of defects with the installation of the cladding. The logical implication of the Court's holding as to C&F exclusion naturally precludes Interstate from being held liable. If C&F is not responsible for coverage under their 2007-2008 policy then of course Interstate cannot be found liable under their policy for the two subsequent years. To that end, this Court grants Interstate's motion for summary judgment as to the issue of water intrusion.

As to the issue of masonry cracks, this Court previously denied C&F's motion for summary judgment as to exclusion under the 2007-2008 policy premised on an absence of substantive fact as to the start date of the cracks in the masonry. Citing to the 2004 and 2008 Kipcon reports this Court held that without a certifiable start date as to the manifestation of the masonry cracks this Court cannot find the exclusion completely applicable. Upon review of the same Kipcon reports this Court holds that summary judgment as to Interstate for exclusion under their 2008-2009 and 2009 and 2010 policies is also inappropriate.

As to C&F's 2007-2008 policy this Court found that the differences in the cracks identified in the 2004 Kipcon Report and those highlighted in the 2008 Kipcon Report created an issue of material fact as to its coverage for the 2007-2008 policy period. The Court's decision as to that effect hinged on an absence of fact as to an exact manifestation period, especially in regards to Buildings four through six. Because of this absence of fact, the Court found that a possibility for overlap existed relative to the 2007-2008 policy. However, the Court does not find such risk of overlap with respect to Interstate. The 2008 Kipcon report was prepared on February 11, 2008 and again on March 4, 2008. [20] Interstate's first coverage period began on May 1, 2008 and lasted to May 1, 2009.[21]

While a clear point of manifestation remains undetermined a review of the 2008 Kipcon report indicates that the defective masonry condition existed prior to Interstate's first policy period. To that end, given the risk of overlap with respect to the manifestation of cracks in the masonry between the years of 2004 and 2007 this Court withheld grant of summary judgment as to C&F. This decision was bolstered by the fact that Buildings four through six had not come online until 2006 and therefore, there exist some likelihood that cracks manifested during 2007 policy period.

[20] See, Interstate Exhibits M and N
[21] Interstate SOMF ¶66

However, as no such risk exists as to Interstates 2008-2009 policy and by consequence, is even less plausible as the 2009-2010 policy period, this Court holds that Interstate's Exclusion policy is applicable.

Lastly, as to the issue of defects in the pipes, it is clear from the record that the alleged condition was not observed until at least 2015. [22]As this defect occurred four years after the termination of Interstate's last policy period, Interstate is not liable for the defective condition. Accordingly, the Court grants Interstate motion for summary judgment as to the defective condition of the pipes.

[22] Interstate SOMF ¶¶59-65