The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Penta Corporation

v.

Town of Newport

v.

AECOM Technical Services, Inc.

No. 212-2015-CV-00011

ORDER

Plaintiff, Penta Corporation ("Penta"), filed an action against the Defendant, the Town of Newport ("Town"), for breach of contract arising from the Town's refusal to pay Penta, the general contractor for building an allegedly defective wastewater treatment plant. The Town brought a counterclaim against Penta and a third-party complaint against AECOM Technical Services, Inc. ("AECOM"), the engineer that designed the plant, alleging in substance that the plant was negligently designed and built. Penta has filed a cross-claim against AECOM, and AECOM brought a counterclaim against the Town and a cross-claim against Penta. The Town has filed Motion for Partial Summary Judgment as to Count IV of the Third Party Complaint against AECOM, which alleges that the Town is entitled to indemnity and to a defense if a claim is made against it as a result of the contract it had with AECOM. The Town has tendered defense of the lawsuit brought against it by Penta to AECOM, and AECOM has refused the tender. For the following reasons, the Town's Motion is GRANTED. AECOM is obligated to defend the Town from the lawsuit brought by Penta.

I

In ruling on a motion for summary judgment, the Court "consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." Pike v. Deutsche Bank Nat. Tr. Co., 168 N.H. 40, 41 (2015). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.; RSA 491:8-a, III. The following facts appear to be undisputed.

The Town operates a Wastewater Treatment Facility ("WWTF"), which discharged treated wastewater into the Sugar River. (Town's Third-Party Compl. ¶ 6 [hereinafter Compl.].) In April 2007, the EPA issued a National Pollutant Discharge Elimination System (NPDES) permit authorizing the Town to discharge treated wastewater from the WWTF with certain effluent limitations. (Compl. ¶¶ 7–9.) On March 6, 2009, the EPA issued an Administrative Order ("AO"), which found that the Town had violated the terms of the NPDES permit exceeding certain effluent limits. (Compl. ¶ 10.) As a result, the AO mandated that the Town submit a report by December 31, 2009, identifying all upgrades and modifications to the WWTF necessary to comply with the effluent limitations in the NPDES permit by October 31, 2012. (Compl. ¶¶ 11–12.)

The Town selected AECOM as an engineer to complete the preliminary evaluation and design services necessary to upgrade the WWTF to satisfy the AO requirements. (Cull Aff. in Supp. of the Town's Partial Mot. Summ. J. as to Count IV of the Third Party Complaint [hereinafter Cull Aff.] Exs. 1–4.) As part of this relationship, the Town and AECOM entered four different contracts: (1) an Engineering Report Phase Contract for Professional Services (the "Study Contract"); (2) a Preliminary Engineering

Design Phase Contract ("Preliminary Design Contract"); (3) a Final Engineering Design Phase Contract ("Final Design Contract"); and (4) an Engineering Construction Phase Contract for Professional Services (the "Engineering Construction Contract").

On or around, August 21, 2009, the Town and AECOM entered into the Study Contract. The purpose was to "examine the need, alternatives and cost of constructing Treatment Works including an evaluation of the alternatives and a recommendation for the upgrade of the WWTF necessary for the purpose of complying with the phosphorous limits contained in [the Town's] NPDES permit." (Cull Aff. Ex. 1, at 1.) The Study Contract included an indemnity provision, which provided:

> The Engineer hereby agrees to protect, defend and indemnify and hold the Town of Newport and its employees agents, officers and servants free and harmless from losses, claims, liens, demands and causes of action to the extent arising out of negligent acts of the Engineer of every kind and character including but not limited to, the amounts of judgments, penalties, interests, court costs, legal fees and all other expenses incurred by the Town arising in favor of any party including claims, liens, debts, personal injuries sustained by employees of the Town, death or damage to property (including property of the Town).

(Cull Aff. Ex. 1, at Ex. C § 1.2.) Pursuant to the Study Contract, AECOM issued its January 2010 report recommending the coagulation followed by direct filtration method, which utilized a disc filter system. The Town followed AECOM's recommendation and selected the disc filter system as part of the phosphorous upgrade (the "Project"). (Compl. ¶¶ 19–20.)

On or around May 9, 2011, the Town and AECOM entered into the Preliminary Design Contract, under which AECOM was to perform "all preliminary engineering, surveying, drafting, calculations, borings, and other work as required and necessary to develop and produce preliminary plans, specifications, and associated contract

documents involved in the construction of [the WWTF]." (Cull Aff. Ex. 2, at 2.) The Preliminary Design Contract contained an indemnity provision stating:

> To the fullest extent permitted by law, the Engineer shall indemnify, exonerate, protect, defend (with counsel acceptable to the Town of Newport), hold harmless and reimburse the Town of Newport and its employees, officers and representatives from and against any and all damages (including without limitation, bodily injury, illness or death or property damage), losses, liabilities, obligations, penalties, claims (including without limitation, claims predicated upon theories of negligence, fault, breach of warranty, products liability or strict liability), litigation, demands, defenses, judgments, suits, proceedings, costs disbursements, or expenses of any kind or nature whatsoever, including without limitation, attorneys' and experts' fees, investigative and discovery costs and court costs, which may at any time be imposed upon, incurred by, asserted against, or awarded against the Town of Newport which are in any way related to the Engineer's performance under this Agreement but only to the extent arising from (i) any negligent act, omission or strict liability of Engineer, Engineer's licenses, agents, servants or employees of any third party, (ii) any default by the Engineer under any of the terms or covenants of this Agreement, or (iii) any warranty given by or required to be given by Engineer relating to the performance of Engineer under this Agreement.

(Cull Aff. Ex. 2, at Ex. D § 6.) As required by the Preliminary Design Contract, AECOM prepared a preliminary design of the Project. (Compl. ¶¶ 25–27.)

On or around September 9, 2011, the Town and AECOM entered into the Final Design Contract, in which AECOM agreed to prepare final drawings and specifications with all criteria necessary to meeting the Town's NPDES permit effluent limits. (Cull Aff. Ex. 3, at Ex. D § 6.) The Final Design Contract included an indemnity provision identical to that in the Preliminary Design Contract. (Cull Aff. Ex. 3, at Ex. D § 6.) As required by the Final Design Contract, AECOM issued specifications for bid entitled "Information for Bidders Forms for Bid, Agreement and Bonds, Specifications for Phosphorous Removal Upgrade Newport Wastewater Treatment Facility Newport, New Hampshire" (the "Specifications"). (Compl. ¶ 31.) The Town awarded the construction contract to

Penta in March 2012. The Specifications formed the basis for the Town's contract with Penta (the "Construction Contract"). (Compl. ¶ 44.)

On or around March 2, 2012, the Town and AECOM entered into the Engineering Construction Contract, which provided for construction administration and related services. (Cull Aff. Ex. 4, at 2.) The Engineering Construction Contract contained an indemnity provision identical to those in the Preliminary and Final Design Contracts. (Cull Aff. Ex. 4, at Ex. D § 6.)

The Engineering Construction Contract required AECOM to verify and approve Penta's "estimates for periodic and final payments" and to prepare "certificate[s] of substantial completion and contract completion." (Cull Aff. Ex. 4, at ¶ I(1).) To comply with the AO, the Project's final completion date was set for December 31, 2012. However, the upgrade never reached substantial completion due to a number of deficiencies, which ultimately forced the WWTF to shut down. (Compl. ¶ 53.) Consequently, AECOM has neither certified substantial nor final completion, and it therefore refused to verify and approve Penta's requests for payments from the Town. (Cull Aff. Ex. 11.)

On January 26, 2015, Penta filed this action to recover payments it alleges the Town owes under the Construction Contract. Penta makes claims of breach of contract, unjust enrichment, quantum meruit, and negligent misrepresentation. (Cull Aff. Ex. 6.) Penta's complaint alleges AECOM designed the upgrade, which included preparing the Specifications that form the basis of Penta's contract with the Town. Penta states that it completed construction according to AECOM's plans and specifications, which called for the use of WesTech disc filters. (Cull Aff. Ex. 6, at ¶¶ 4, 8.) However, Penta alleges the WWTF failed to meet the required effluent limits due to the WesTech disc filters'

inability to handle the required flow of wastewater, which was a condition outside of Penta's control. (Cull Aff. Ex. 6, at ¶¶ 9–12.) Accordingly, Penta maintains it has achieved full contract performance and is entitled to payment of the balance of its contract price, which the Town refused to pay. (Cull Aff. Ex. 6, at ¶ 15.)

On February 26, 2015, the Town sent a letter to AECOM demanding that AECOM defend and indemnify the Town against Penta's claims. (Cull Aff. Ex. 7.) On March 11, 2015, AECOM responded and refused to defend or indemnify. It maintained that "Penta's Complaint does not contain any factual allegation of negligence, breach of contract, or breach of warranty directed at AECOM." (Cull Aff. Ex. 8.)

II

The Town argues that it is entitled to summary judgment under the indemnity agreement between the parties, because AECOM has an obligation to defend it, and the facts alleged in Penta's Complaint are sufficient to give rise to AECOM's duty to defend. The Town reasons that Penta's complaint alleges damages arising from AECOM's negligence or breach of contract because, if true, the inaccuracies in AECOM's specifications caused the Project's failure, which precluded the approval of any final payment to Penta.

AECOM objects on the ground that its duty to defend cannot be triggered until its negligence or breach has actually been proven. AECOM argues that its contractual duty to defend is not triggered by allegations in the Complaint that would, if true, give rise to its duty to defend and indemnify. Strictly construing the language of the duty to defend provision, AECOM emphasizes the word "reimburse" and maintains the clause affords a

scope of defense that is proportionally limited to the defense related to AECOM's actually determined fault.[1]

A

The Town cites a number of cases interpreting insurance policies for the proposition that the duty to defend is broader than the duty to indemnify; the latter extends only to claims actually covered by the policy, while the former also extends to claims that are potentially covered. Great Am. Dining, Inc. v. Philadelphia Indem. Ins. Co., 164 N.H. 612, 627 (2013). "An insurer's obligation to defend its insured is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring it within the express terms of the policy." Id. at 626. When interpreting insurance policies, the Court "consider[s] the reasonable expectations of the insured as to its rights under the policy." Id. Importantly, "[i]n cases of doubt as to whether the writ against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." Id.

It is true that some jurisdictions explicitly apply insurance principles in non-insurance contexts. See, e.g., Seven Signatures Gen. P'ship v. Irongate Azrep BW LLC, 871 F. Supp. 2d 1040, 1050–51 (D. Haw. 2012) ("Under Hawaii law, a contractual duty to defend in a non-insurance context is interpreted according to the same principles as

[1] AECOM also contends summary judgment on this issue is ineffective because Count IV of the Town's Third-Party Complaint does not request injunctive relief, but requests only compensatory damages, interest, and attorney's fees. (Compl. ¶ 89.) Therefore, at most, AECOM reasons that summary judgment would only be an entry of judgment with an award of yet to be determined damages. The Court summarily rejects this argument. As the Town points out, Count IV seeks judgment on its legal claim that AECOM breached its contracts with the Town, and a claim seeking payment of money for a breach of contract does not amount to seeking injunctive relief. As damages caused by any breach of the duty to defend cannot be determined until the Town's defense is concluded, AECOM is correct that any award of summary judgment as to Count IV would be an award of judgment as to liability without a determination of damages. However, RSA 491:8-a, III explicitly affords the Court authority to award "summary judgment, interlocutory in character . . . on the issue of liability alone, although there is a genuine issue as to the amount of damages."

insurance contracts."). However, at least three factors suggest that New Hampshire Supreme Court cases interpreting insurance policies are not applicable here.

First, insurance policies are entered into to afford coverage and therefore any ambiguity in the policy is construed against the insurance carrier and in favor of the insured. Trombley v. Blue Cross/Blue Shield, 120 N.H. 764, 771 (1980). The objectively reasonable expectations of the insured will be honored, even though painstaking study of the policy provisions would have negated those expectations. Coakley v. Maine Bonding, 136 N. H. 402, 415 (1992). Insurance policies are interpreted from the standpoint of the average layman in light of what a more than casual reading of the policy would reveal to the ordinary intelligent insured. Bergeron v. State Farm Fire and Casualty Company, 145 N.H. 391, 393 (2000). Public policy seeks to protect the rights of the insured where insurance contracts involve unequal bargaining power. See N.A.P.P. Realty Tr. V. CC Enters., 147 N.H. 137, 140 (2001) ("The standard applied to interpreting an insurance contract arises in part from the inequality in bargaining power."); Matarese v. N.H. Mun. Ass'n Prop. Liab. Tr., Inc., 147 N.H. 396, 401 (2002) (quoting Hoepp v. State Farm Ins. Co., 142 N.H. 189, 190 (1997) ("The doctrine that ambiguities in an insurance policy must be construed against the insurer is rooted in the fact that insurers have superior understanding of the terms they employ."). Additionally, public policy favors the insured because the object of the insurance contract is to protect the insured. Trombly v. Blue Cross/Blue Shield of N.H.-Vt., 120 N.H. at 771.

On the other hand, indemnity agreements are strictly construed, "particularly when they purport to shift responsibility for an individual's own negligence to another." One Beacon Insurance v. M & M pizza, Inc. 160 N.H. 638, 641 (2010); Merrimack Sch. Dist. v. Nat'l Sch Bus Serv., Inc., 140 N.H. 9, 12–13 (1995); Hamilton v. Volkswagen of

America, 125 N.H. 561, 564 (1984). New Hampshire courts apply the general rules of contract interpretation to express indemnity agreements. Kessler v. Gleich, 161 N.H. 104, 108 (2010). Courts must "look to the parties' intent at the time the agreement was made, considering the written agreement, all its provisions, its subject matter, the situation of the parties at the time the agreement was entered into, and the object intended." Id. Courts "assign the words and phrases used by the parties the common meaning that would be given to them by a reasonable person." Id.

Moreover, the rules regarding interpretation of insurance policies are *sui generis*; as a general rule, public policy disfavors unwarranted limits on freedom of contract. Therefore principles of contract interpretation focus on the objective mutual intent of the parties, rather than considering one party's reasonable expectations as to its rights under the contract or construing ambiguities against the drafter. See Centronics Data Comput. Corp. v. Salzman, 129 N.H. 692, 696 (1987) (quoting Thiem v. Thomas, 119 N.H. 598, 602 (1979)) ("The general rule applied to non-insurance contracts is that 'no presumptions are to be indulged in either for or against a party who draws an agreement.'"). Non-insurance contracts are not inherently intended to protect one party. Moreover, there is no presumption of unequal bargaining power in all non-insurance contracts.

Second, in New Hampshire many cases seeking coverage or a defense are brought as declaratory judgments, and the declaratory judgment statute, RSA 491:22-a provides that the insurance carrier bears the burden of showing that no coverage exists, regardless of whether the insured or the insurer brought the claim. Cogswell Farm Condo. Ass'n v. Tower Grp., Inc., 167 N.H. 245, 248 (2015). Shifting the burden of proof to the insurer is consistent with the previously discussed public policy goals of insurance

principles. But when determining whether a duty to defend arises from a non-insurance contract, the burden of proof would nonetheless remain with a moving indemnitee. See Sabinson v. Trs. of Dartmouth Coll., 160 N.H. 452, 460 (2010) (stating that the party moving for summary judgment has the burden of proving it is entitled to judgment as a matter of law).

Finally, virtually all insurance policies contain standard language which has long been interpreted to provide that the duty to defend is independent of the duty to indemnify and exists, even if there is ultimately no duty to indemnify. Insurance underwriters use standard provisions containing language that courts have already interpreted, which allow actuaries to more easily predict outcomes and set rates.[2] Under the rules interpreting insurance policies, the New Hampshire Supreme Court has held that whether a duty to defend exists based on the sufficiency of the pleadings. Broom v. Continental Casualty Co., 152 N.H. 749, 754 (2005) (" We have said that an insurer's obligation is not merely to defend in cases of perfect declarations, but also in cases where by any reasonable intendment of the pleadings liability of the insured can be inferred, and neither ambiguity or inconsistency... in the underlying plaintiff's complaint... an justify escape of the insurer from its obligation to defend"); see also Green Mountain Ins. Co. v. Forman, 138 N.H. 440, 443 (1994). ("The Court must consider the reasonable expectations of the insured as to its rights under this provision"). United States Fidelity & Guar. Co., Inc. v. Johnson Shoes, Inc., 123 N.H. 152

[2] For example, the Insurance Service Organization (ISO) drafts standard policies that many carriers use. The standard ISO automobile and homeowner's liability policy provides that the insurer will "defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent." See, e.g. ISO Personal Insurance Policy part A, Liability Coverage paragraph 2; ISO Homeowner's Policy, Section II, Liability Coverage, P. 17. Similar language is used in Comprehensive General Liability (CGL) policies. See, e.g. United States Fidelity & Guaranty Co., Inc. v. Johnson Shoes, Inc., 123 N.H. 148, 152 (1983).

(1983). Most of the cases cited by the Town involve cases in which the Court interpreted insurance policies, which renders them inapposite[3].

The New Hampshire rules relating to interpretation of insurance policies are consistent with the law in virtually all of the United States, and the majority of courts in other jurisdictions have found that insurance law principles do not apply to the interpretation of non-insurance contract duty to defend terms, but that such provisions are properly interpreted under the general rules of contract interpretation. See Dresser-Rand Co. v. Ingersoll Rand Co., No. 14 Civ. 7222 (KPF), 2015 WL 4254033, at *6–*7 (S.D.N.Y. 2015) (quoting Bank of N.Y. Tr. Co. v. Franklin Advisers, Inc., 726 F.3d 269, 283–84 (2d Cir. 2013) ("Outside the context of insurance policies, contractual defense obligations are generally treated like any other contractual provision. That is to say, such provisions 'must be strictly construed to avoid inferring duties that the parties did not intend to create.'"); Contreras v. Am. Family Mut. Ins. Co., No. 2:12-cv-00249-RFB-VCF, 2015 WL 5708456, at *15 (D. Nev. Sept. 29, 2015) (stating that in the non-insurance context, Nevada law requires strict construction of a term imposing a duty to

[3] The Town first points to three citations to Commercial Union Assurance Co. v. Brown Co., 120 N.H. 620, 623 (1980), in Merrimack Sch. Dist. v. Nat. Sch. Bus Serv., 140 N.H. 9, 12 (1995). The latter case involved a non-insurance contract to provide bus services and determined whether the claims against the plaintiff arose from the defendant's performance under the contract. Id. at 12–14. This is unlike the issue in this case, which concerns when the duty to defend arises. Moreover, Merrimack's oblique citations to Commercial Union, do not inject insurance indemnity principles into non-insurance contract interpretation for two reasons. First, Commercial Union is not actually an insurance case, even though an insurance company was a third-party claimant. Rather, it applied general contract principles to interpret an indemnity agreement in a construction contract, and it did not address a duty to defend at all. 120 N.H. at 623–24. Second, the discussion of the duty to defend in Merrimack cites Commercial Union only for the proposition that "clearly evident" does not necessarily mean "explicit." 140 N.H. at 14.

The Town also points to Seale v. Riordan, No. 98-481-JD, 2000 WL 1466135, at *5–*6 (D.N.H. Jan. 19, 2000), which cited Happy House Amusement, Inc. v. N.H. Ins. Co., 135 N.H. 719, 721 (1992), for its assertion that the "duty to indemnify is separate and distinct from the duty to defend." Again, the Court is not persuaded that this fleeting reference is sufficient to inject insurance indemnity principles into non-insurance contract interpretation.

defend, consistent with the general rules of contract construction); Grand Trunk W. R.R., Inc. v. Auto Warehousing Co., 686 N.W.2d 756, (Mich. App. 2010) ("The general rules for contractual indemnity apply to claims of indemnity in commercial transactions, rather than the specific rules governing an insurer's duty to defend."); Tateosian v. State of Vermont, 2007 VT 136, ¶¶ 13–15, 183 Vt. 57, 945 A.2d 833 (concluding that insurance law principles do not apply wholesale to non-insurance contractual indemnity relationships because, unlike indemnity terms construed to give effect to the parties' intent under the general rules of contract interpretation, the rules governing construction of insurance policies favor the insured, who has inferior bargaining power); Crawford v. Weather Shield Mfg. Inc., 187 P.3d 424, 430–31 (Cal. 2008) (finding that even though "indemnity agreements resemble liability insurance policies," their rules of construction differ significantly due to differing public policy concerns).

B

Accordingly, the Court must look to the plain language of the duty to defend language of the agreement between the parties to determine *when* the duty to defend arises and apply the rules of interpretation applicable to contracts generally to it. Though the duties to defend and indemnify are related, an express duty to defend generally implies an obligation distinct from the duty to indemnify. However, specific contract terms may impact the scope and operation of those obligations.[4] Generally, to

[4] Among courts applying strict construction, there is some disagreement as to whether an explicit duty to defend is presumed, absent language expressing a contrary intent, to be broader than and independent of the duty to indemnify. Compare Contreras v. Am. Family Mut. Ins. Co., No. 2:12-cv-00249-RFB-VCF, 2015 WL 5708456, at *15 (D. Nev. Sept. 29, 2015) (quotation omitted) ("The duty to defend . . . is broader than the duty to indemnify because it covers not just claims under which the indemnitor is liable but also claims under which the indemnitor could be found liable."), and Ferreira v. Beacon Skanska Constr. Co., 296 F. Supp. 2d 28, 33 (D. Mass. 2003) (stating that the duty to defend is independent of the duty to

"defend" means "[t]o do something to protect someone or something from attack," "[t]o deny, contest, or oppose," or "[t]o represent (someone) as an attorney; to act as legal counsel for someone who has been sued or prosecuted." Black's Law Dictionary 508 (10th ed. 2014). Based on this definition, it has been observed that a contractual duty to defend "connotes an obligation of active responsibility, from the outset, for the promisee's defense against such claims. The duty promised is to render, or fund, the service of providing a defense on the promisee's behalf." Crawford v. Weather Shield Mfg. Inc., 187 P.3d 424, 431–32 (Cal. 2008). The general meaning of a duty to defend is therefore "different from a duty expressed simply as an obligation to pay another, after the fact, for defense costs." Id. at 432. On the other hand, to "indemnify" means "to reimburse (another) for a loss suffered because of a third party's or one's own act or default." Black's Law Dictionary 886. This definition indicates that a duty to indemnify arises after a loss, which may reasonably include a duty to reimburse defense costs after the fact. Crawford, 187 P.3d at 432; see also MT Builders, L.L.C. v. Fisher Roofing Inc., 197 P.3d 758, 768 (Ariz. Ct. App. 2008) (finding that a contract term not expressly

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indemnify and concluding that the duty to defend would apply if the complaint stated a claim that some action or inaction by the indemnitor was connected to the injury alleged), with In re Bridge Constr. Servs. of Fla., Inc., No. 12 Civ. 3536(JGK), 2015 WL 6437562, at *7 (S.D.N.Y. Oct. 24, 2015) (looking only toward the language of the indemnity term to determine whether the duty to indemnify turned on the indemnitor's actual negligence), and Grand Trunk W. R.R., Inc. v. Auto Warehousing Co., 686 N.W.2d 756, 763 (Mich. App. 2010) ("Unlike in the insurance context, defendant's duty to defend is not separate and distinct from the duty to indemnify."). The Court, however, does not reach this issue because, under either iteration, the parties are free to contract around any presumed scope of the duty to defend, and the Court ultimately finds that the duty to defend provision in this case expresses a clear intent as to the scope of the duty to defend. See Crawford v. Weather Shield Mfg. Inc., 187 P.3d 424, 432 (Cal. 2008) ("[U]nless the parties' agreement expressly provides otherwise, a contractual indemnitor has the obligation, upon proper tender by the indemnitee, to accept and assume the indemnitee's active defense against claims encompassed by the indemnity provision."); MetroPCS Wireless Inc. v. Telcom. Sys. Inc., No. WDQ-09-0601 2009 WL 3418581, at *4–*5 (D. Md. Oct. 20, 2009) ("The principle that the duty to defend is no broader than the duty to indemnify 'has no significance' when the 'clear and unambiguous' terms of the relevant contract establish that the duty to defend is not contingent upon the determination of the duty to indemnify.").

requiring the indemnitor to "defend" nonetheless required a duty to reimburse the indemnitee's defense costs upon determining the indemnitor's fault).

Absent a specific independent duty to defend, the mere existence of an express duty to defend does not *necessarily* support the conclusion that the duty to defend is broader than the duty to indemnify such that it arises upon a complaint. Rather, contracting parties are free to delineate the scope of the duty to defend by terms that must be strictly construed. See Dresser-Rand Co. v. Ingersoll Rand Co., No. 14 Civ. 7222 (KPF), 2015 WL 4254033, at *6–*7 (S.D.N.Y. 2015) ("[T]he breadth of a non-insurer's contractual defense obligations is defined solely by the terms of the contract, strictly construed. . . . [However,] [i]f a contractual defense obligation is, by its own terms, exceedingly broad, a court will not artificially circumscribe it simply because the indemnitor is not an insurer."); Grand Trunk W. R.R., Inc. v. Auto Warehousing Co., 686 N.W.2d 756, 763 (Mich. App. 2010) ("Where parties have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined from the language of the contract.")

For example, a duty to defend provision may "specify that the indemnitor's sole defense obligation will be to reimburse the indemnitee for costs incurred by the latter in defending a particular claim," thereby limiting the scope of the duty to defend to the scope of the duty to indemnify. Crawford, 187 P.3d at 436. Under that iteration, the duty to defend only arises at the time the indemnitor's duty to indemnify has actually been triggered by a factual finding that the indemnitor was negligent or breached the contract. Alternatively, the parties may explicitly indicate that the duty to defend is broader than and therefore independent of the duty to indemnify. Under those circumstances, the duty to defend is triggered at the time a complaint against the

indemnitee alleges facts that, if true, would trigger the indemnitor's duty to indemnify. See Id. at 439; Luna v. Am. Airlines, 769 F. Supp. 2d 231, 240–41 (S.D.N.Y. 2011) (finding the indemnity term's language was sufficiently broad to indicate the duty to defend was triggered upon a claim, regardless of the claim's ultimate merit).

C

Applying these principles, it appears that the language of the indemnity provision in the Preliminary Design Contract, the Final Design Contract, and the Engineering Construction Contract unambiguously establishes a duty to defend that is broader in scope than the duty to indemnify. The relevant language of the indemnity term provides that AECOM:

> shall *indemnify*, exonerate, protect, ***defend (with counsel acceptable to the Town of Newport)***, hold harmless and reimburse the Town of . . . from and against any and all damages (including without limitation, bodily injury, illness or death or property damage), losses, liabilities, obligations, penalties, ***claims (including without limitation, claims predicated upon theories of negligence, fault, breach of warranty, products liability or strict liability), litigation***, demands, defenses, judgments, **suits**, proceedings, costs disbursements, or expenses of any kind or nature whatsoever, including without limitation, attorneys' and experts' fees, investigative and discovery costs and court costs, **which may at any time be** imposed upon, incurred by, ***asserted against***, or awarded against the Town of Newport *which are in any way related to the Engineer's performance under this Agreement but only to the extent arising from (i) any negligent act, omission or strict liability of Engineer*, Engineer's licenses, agents, servants or employees of any third party, (ii) any default by the Engineer under any of the terms or covenants of this Agreement, or (iii) any warranty given by or required to be given by Engineer relating to the performance of Engineer under this Agreement.

(Cull Aff. Ex. 2, at Ex. D § 6 (emphasis added).)

The duty to defend applies to "claims," "litigation," and "suits" that are "asserted against" the Town and relate to AECOM's contract performance in that they arise from AECOM's negligence or breach. This language anticipates unproven allegations, meaning the duty to defend would necessarily arise prior to any factual finding as to

AECOM's negligence or breach. See Stephan & Sons, Inc. v. Municipality of Anchorage, 629 P.2d 71, 75–76 (Ala. 1981) ("'Claim' clearly connotes assertion of a legal right, rather than the legal recognition or enforcement of that right."); Black's Law Dictionary 300 (10th ed. 2014) (defining "claim" as "[a] statement that something yet to be proved is true" or an "assertion of an existing right . . . even if contingent or provisional"). The phrase "incurred by, asserted against, or awarded against" highlights that the term anticipated that claims could be merely asserted, rather than actually proven or "awarded." This conclusion is underscored by the parenthetical information requiring AECOM to defend "with counsel acceptable to the Town." If AECOM's duty to defend only required it to reimburse the Town for the cost of a defense following adjudication of AECOM's negligence or breach, then the Town would necessarily have to choose its own counsel, thus rendering this language meaningless. See BAE Sys. Info. & Elecs. Sys. Integration, Inc. v. SpaceKey Components, Inc., 849 F. Supp. 2d 193, 198 (D.N.H. 2012) (quoting Summit Packaging Sys. v. Kenyon & Kenyon, 273 F.3d 9, 12 (1st Cir. 2001)) ("[I]t is a basic principle of contract law that constructions that render contract terms meaningless should be avoided.").

Moreover, contrary to AECOM's interpretation, the "but only to the extent arising from" limiting language does not operate to modify the duty to defend, thereby limiting its scope to only proven claims of negligence or breach. Rather, the limiting language is most reasonably interpreted as modifying the phrase "related to Engineer's performance," thereby limiting how a claim may be related to AECOM's performance. The phrase "arising out of" has been construed as a "very broad, general and comprehensive term" meaning "originating from or growing out of or flowing from." Merrimack Sch. Dist. v. Nat'l Sch Bus Serv., Inc., 140 N.H. 9, 12–13 (1995) (quoting

Carter v. Bergeron, 102 N.H. 464, 470–71 (1960)). The phrase therefore indicates intent "to enter into a comprehensive risk allocation scheme." Id. "Arising out of" does not mean that any losses or claims must have been *caused* by AECOM's negligence or breach. Nor does it necessarily require an action for negligence or breach. A claim merely has to *involve* an alleged negligent act or omission in the performance of the contract. See Posen Constr., Inc. v. City of Dearborn, No. 311214, 2015 WL 339761, at *5 (Mich. Ct. App. Jan. 27, 2015) (unpublished opinion) (interpreting a contract imposing a duty to defend "against all claims or demands involving negligent performance" by an engineer to mean that the duty to defend arose upon a claim involving conduct by the engineer characterized by a lack of due care). Therefore, the provision cannot reasonably be interpreted to limit the scope of the duty to defend by requiring a determination of an underlying claim for breach or negligence in order to impose a duty to defend or indemnify.

Other courts have held that similar language imposes a broad duty to defend triggered by a complaint alleging negligence or breach by the indemnitor. For example, the indemnity agreement in McCleary v. City of Glens Falls imposed a duty to defend "from any and all claims, (including without limitation third party claims for personal injury and/or real or personal property damage), [and] causes of action" that the indemnitee "may suffer as a result of" the indemnitee's "activities, conduct, omissions, non[]feasance or misfeasance" in the performance of its contractual duties. 819 N.Y.S.2d 607, 611–12 (N.Y. App. Div. 2006). The court reasoned that "[n]othing in the broad language of the . . . agreement conditions the . . . duty to defend . . . on a predicate finding of fault." Id. It therefore concluded that where the indemnitor agreed to defend "against any claims arising from the [indemnitor's] 'activities, conduct, omissions,

non[]feasance or misfeasance'" in the performance of its contractual duties, the third-party complaint alleging negligence by the indemnitor "triggered the [indemnitor's] duty to defend." Id.

AECOM's asserts that the phrase "only to the extent arising from" any negligence or omission by AECOM limits its duty to defend to reimburse the Town for the proportional amount of the defense costs directly related to claims in which AECOM was actually found negligent or in breach. This argument is not persuasive. It overlooks critical language broadening the scope of the duty to defend and incorrectly recasts its duty to defend as a duty to merely reimburse. The term plainly imposes duties to "indemnify, . . . defend . . . and reimburse." If this language were interpreted as only requiring AECOM to reimburse the Town for costs of an unsuccessful defense, then the language imposing a separate duty to defend would be given no effect. Cf. MT Builders, L.L.C. v. Fisher Roofing Inc., 197 P.3d 758, 768 (Ariz. Ct. App. 2008) (holding that where the contract required the subcontractor only to "indemnify and hold harmless" without a separate express duty to defend, then the parties agreed only that the subcontractor would reimburse the general contractor's defense costs). Consequently, the Court concludes the ordinary meaning of the duty to defend provision in this case contemplates a duty to defend broader than AECOM's duty to indemnify, and AECOM's duty to defend arises upon a complaint against the Town alleging conduct by AECOM characterized as negligence or breach of contract.

D

Finally, the Court must determine whether Penta's complaint against the Town sufficiently alleges claims involving AECOM's negligence or breach of contract, within the scope of the provision, thereby triggering AECOM's duty to defend. Penta seeks to

recover payments it alleges the Town owes under the Construction Contract. Penta's complaint includes claims for breach of contract, unjust enrichment, quantum meruit, and negligent misrepresentation. (Cull Aff. Ex. 6.) The Complaint specifically alleges AECOM designed the upgrade, which included preparing the Specifications that form the basis of Penta's contract with the Town. Penta states that it completed construction according to AECOM's Specifications, which called for the use of WesTech disc filters. (Cull Aff. Ex. 6, at ¶¶ 4, 8.) However, Penta alleges the WWTF failed to meet the required effluent limits due to the WesTech disc filters' inability to handle the required flow of wastewater, which was a condition outside of Penta's control. (Cull Aff. Ex. 6, at ¶¶ 9–12.) Accordingly, Penta maintains it has achieved full contract performance and is entitled to payment of the balance of its contract price, which the Town refused to pay. (Cull Aff. Ex. 6, at ¶ 15.) In its breach of contract count, Penta specifically contends the Town's refusal to pay was based upon a condition not attributable to Penta—phosphorous levels in excess of those promised by the Specifications. (Cull Aff. Ex. 6, at ¶¶ 16–17.) Penta's unjust enrichment and *quantum meruit* counts incorporate the same factual argument under different legal theories. (Cull Aff. Ex. 6, at ¶¶ 19–25.) Finally, Penta's negligent misrepresentation claim specifically claims that "[b]y inviting bids on the Contract Documents as prepared by its agent AECOM, [the Town] made certain representations to bidders, including Penta, that input levels of . . . phosphorous would be in accordance with those set forth in the Contract Documents." (Cull Aff. Ex. 6, at ¶ 27.)

These claims rely on factual allegations clearly involving AECOM's alleged negligence or breach of contract in designing the Project and producing the Specifications. The Complaint, fairly read, asserts that if not for AECOM's alleged failure

to design the Project and prepare the Specifications to achieve the required phosphorous levels, then the WWTF would have met the promised phosphorous levels, the Project would have reached final completion, and Penta would be entitled to payment from the Town. These claims clearly arise from AECOM's contract performance, and the factual allegations necessarily characterize AECOM's performance as negligent or in breach of its contractual obligation to design the Project to achieve the promised phosphorous levels.

Accordingly, the Court finds that Penta's Complaint alleges claims against the Town within the scope of the duty to defend provision, and Penta's complaint therefore triggered AECOM's duty to defend. By denying the Town's tender of defense, AECOM breached its duty to defend. The Court consequently finds, with respect to AECOM's duty to defend, that there is no genuine issue of material fact, and the Town is entitled to judgment as a matter of law. Therefore, the Town's Motion for Partial Summary Judgment as to Count IV of the Third Party Complaint is GRANTED.

III

The Town also claims it is entitled to attorney's fees incurred in enforcing AECOM's duty to defend because AECOM's denial of the Town's request was in bad faith. "[W]here an individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention, an award of counsel fees on the basis of bad faith is appropriate." Harkeem v. Adams, 117 N.H. 687, 691 (1977). The Court does not agree that the Town's rights under the duty to defend provision so clearly required AECOM to provide a defense to Penta's Complaint such that AECOM's denial of the Town's request to defend constituted bad faith. Therefore, the Town is not entitled to attorney's fees on that basis.

In sum, the Town's Motion for Partial Summary Judgment as to Count IV of the Third Party Complaint is GRANTED with respect to AECOM's duty to defend, but the Town's request for attorney's fees is DENIED.

SO ORDERED.

5/11/16
DATE

s/Richard B. McNamara
Richard B. McNamara
Presiding Justice