

ESSEX INSURANCE COMPANY,

Plaintiff,

v.

NEWARK BUILDERS, INC., D&J HOME BUILDERS, LLC, CARLOS FERREIRA, PREFERRED TANK SERVICES, SUMMIT REAL ESTATE SERVICE, MIN KAMAR, PMJ CONSTRUCTION, LLC, C. FREITAS PLUMBING & HEARING, ABC CORPORATIONS 1-5 AND JOHN DOES 1-5,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: ESSEX COUNTY

DOCKET NO. L-9354-07

CIVIL ACTION

Return Date: April 17, 2009

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**BRIEF ON BEHALF OF DEFENDANT, D&J HOME BUILDERS, LLC,  
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

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**TABLE OF CONTENTS**

COUNTERSTATEMENT OF FACTS. .... 1

RELEVANT PROCEDURAL HISTORY..... 6

LEGAL ARGUMENT..... 8

POINT I

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AND DEFENDANT’S CROSS-MOTION SHOULD BE GRANTED BECAUSE THE UNDISPUTED MATERIAL FACTS SHOW THAT THE PLAINTIFF CANNOT ESTABLISH GROUNDS TO DENY COVERAGE TO D&J HOME BUILDERS UNDER THE INDEPENDENT CONTRACTOR/SUBCONTRACTOR AND CONTRACTUAL LIABILITY EXCLUSIONS IN THE LIABILITY POLICY.. .... 8

POINT II

THE INDEPENDENT CONTRACTOR/SUBCONTRACTOR EXCLUSION DOES NOT BAR COVERAGE UNDER THE LIABILITY POLICY BECAUSE THE UNDISPUTED FACTS SHOW THAT NEWARK BUILDERS WAS ON SITE AND DIRECTLY SUPERVISING THE WORK OF FREITAS PLUMBING AT THE TIME THE ACCIDENT OCCURRED.. .... 10

POINT III

THE CONTRACTUAL LIABILITY EXCLUSION DOES NOT BAR COVERAGE IN THIS CASE BECAUSE NEWARK BUILDERS IS LIABLE TO D&J HOME BUILDERS FOR DAMAGES BY LAW EVEN IN THE ABSENCE OF ITS CONTRACTUAL INDEMNIFICATION OBLIGATION.. 16

CONCLUSION..... 20

## TABLE OF AUTHORITIES

### CASES

<u>Aetna Casualty and Surety Co. v. Lumbermens Mutual Casualty Co.</u> , 136 A.D.2d 246, 527 N.Y. Supp. 2d 143 (4 <sup>th</sup> Dep't 1988).	16
<u>American Wrecking Corp. v. Burlington Insurance Co.</u> , 400 N.J. Super. 276 (App. Div. 2008).	12
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986).	7
<u>Argent v. Brady</u> , 386 N.J. Super. 343 (App. Div. 2006).	10, 12
<u>Brill v. The Guardian Life Ins. Co.</u> , 142 N.J. 520 (1995).	7, 8
<u>Cartel Capital Corp. v. Fireco of New Jersey</u> , 81 N.J. 548 (1980).	17, 18
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986).	8
<u>County of Hudson v. Selective Ins. Co.</u> , 332 N.J. Super. 107 (App. Div. 2000).	14
<u>Daily v. Somberg</u> , 28 N.J. 372 (1958).	16
<u>Erdo v. Torcon Construction Company</u> , 275 N.J. Super. 117 (App. Div. 1994).	9
<u>Federal Home Loan Mortgage Corp v. Scottsdale Insurance Co.</u> , 316 F. 3d 431 (3 <sup>rd</sup> Cir. 2003).	14
<u>Hackensack Water Co. v. General Accident Ins.</u> , 84 N.J. Super. 479 (App. Div. 1964).	16
<u>Hawthorne v. South Bronx Community Corp.</u> , 78 N.Y.2d 433, 576 N.Y. Supp. 2d 203 (1991).	16
<u>Judson v. Peoples Bank &amp; Trust Co. of Westfield</u> , 17 N.J. 67 (1954).	8
<u>Karadis Bros. Painting Co. v. Pennsylvania National Mutual Ins. Co.</u> ,	

119 N.J. Super. 446 (Ch. Div. 1972). .....	16
<u>Kievit v. Loyal Protective Life Ins. Co.</u> , 34 N.J. 475 (1961). .....	12
<u>Mazzilli v. Accident and Casualty Insurance Company of Switzerland</u> , 35 N.J. 1 (1961.). .....	10
<u>Meier v. New Jersey Life Insurance Co.</u> , 101 N.J. 597 (1986). .....	9
<u>New Milford Bd. of Educ. v. Juliano</u> , 219 N.J. Super. 182 (App. Div. 1987). .....	18
<u>Ohio Cas. Ins. Co. v. Flanagan</u> , 44 N.J. 504 (1965). .....	16
<u>Pearl Assurance Co. v. Watts</u> , 58 N.J. Super. 483 (App. Div. 1960.). .....	14
<u>Public Service Electric &amp; Gas Co. v. Waldroup</u> , 38 N.J. Super. 419 (App. Div. 1955). .....	16, 17
<u>Reliance Ins. Co. v. Armstrong World Industries</u> , 259 N.J. Super. 538 (Law Div. 1992), <u>opinion modified</u> , 265 N.J. Super. 148 (Law Div. 1993), <u>rev'd on other grounds</u> , 292 N.J. Super. 365 (App. Div. 1996). .....	16

**STATUTES**

<u>N.J.S.A. 2A:15-5.1</u> . .....	5, 18
<u>N.J.S.A. 2A:53A-1</u> . .....	5, 17
<u>N.J.S.A. 59:2-5</u> . .....	13
<u>N.J.S.A. 59:2-6</u> . .....	13

## COUNTERSTATEMENT OF FACTS

On or about January 31, 2003, D&J Home Builders, LLC (“D&J”), as General Contractor, entered a contract with Newark Builders, Inc. (“Newark Builders”), as Subcontractor (the “Subcontract”), under which Newark Builders was responsible to perform certain work in connection with the construction of a 2-family home located at 146 Ridgewood Avenue, Newark, New Jersey. (See Defendant’s Additional Statement of Material Facts (“Additional SOMF”), ¶ 1.)

During the time period in issue, Jorlinar Santos (a/k/a John Santos) was the owner of Newark Builders and Julmar Santos was a supervisory employee of the company. (Id., ¶¶ 4-5.)

Newark Builders was retained to build the home at 146 Ridgewood Avenue from the ground up, and was responsible for all the actual day-to-day activities on the job site. (Id., ¶ 2.)

Under the Subcontract, Newark Builders was responsible for, among other things:

hiring, supervision and control of all other trade subcontractors on the job;

meeting with the subcontractors before they started construction;

conducting safety meetings and safety discussions with subcontractors;

inspecting the work of subcontractors;

scheduling and coordinating the subcontractors’ work;

handling the day-to-day disputes that occurred on the job;

clarifying plans and, at times, providing subcontractors with materials;

periodically performing physical labor, such as digging the footing of the house or doing tile work; and  
controlling when the work of subcontractors was done.

(Id., ¶ 3.) Moreover, Newark Builders had an overall duty to provide safety on the job site for the subcontractors it retained and brought on to the job site. (See Defendant’s Responsive Statement of Material Facts, ¶ 9.)

In contrast, D&J did not do any inspections or act in a supervisory capacity on the site, and had nothing to do with the hiring of subcontractors by Newark Builders. (See Defendant’s Additional SOMF, ¶ 6.) In fact, under the Subcontract, D&J was not authorized to give instructions or orders directly to subcontractors retained by Newark Builders unless designated as an authorized representative of Newark Builders. (Id., ¶ 7.)

During the time period complained of, Jorlinar Santos and Julmar Santos shared the responsibility for supervising work performed on jobs for which Newark Builders had been hired. (Id., ¶ 5.) This included supervising work performed by subcontractors and coordinating the timing and sequence of the subcontractors’ work. (Id.) Representatives from Newark Builders were on the Ridgewood Avenue job site every day, at least several times a day. (Id., ¶ 8.) When supervising this job, Julmar and Jorlinar Santos would visit the site, speak with the subcontractors and inspect the work of subcontractors to make sure the work was being done correctly and on schedule. (Id.) If necessary, Julmar Santos would discuss with the subcontractors a better or easier way to perform the work. His primary concern was to make sure the work of the subcontractors was done properly. (Id.)

Newark Builders hired C. Freitas Plumbing (“Freitas Plumbing”) to do the plumbing work for the Ridgewood Avenue project. (Id., ¶ 9.) Jorlinar Santos met with the plumber before the

job and gave him the plans for the work. (See Defendant’s Responsive Statement of Material Facts, ¶ 10.) Newark Builders supervised the plumbing work done by Freitas Plumbing. (See Defendant’s Additional SOMF, ¶ 10.) If the Santos brothers observed that work was being done incorrectly, they would tell Freitas it had to be changed. (Id.) Freitas Plumbing never took direction from anyone other than Newark Builders while it was performing work at 146 Ridgewood Avenue. (Id., ¶ 11.)

Normally, a plumber on a construction job will dig the trenches needed to lay the pipes from inside the foundation of the house to the curb using a backhoe. When Freitas Plumbing worked on jobs for Newark Builders, however, Newark Builders sometimes excavated the trenches that were dug for the plumbing work. (Id., ¶ 12.)

On January 5, 2005, Carlos Ferreira (“Ferreira”), an employee of Freitas Plumbing, allegedly sustained personal injuries while working in an excavated trench on the Ridgewood Avenue project. According to Ferreira, as he was attempting to make a sewer pipe connection, the wall of the trench collapsed in on him and a large rock struck his right knee, injuring him. (Id., ¶ 13.)

Newark Builders was responsible for digging the trench Ferreira was working in when he was injured. The trench in issue was excavated by Negron (a/k/a Fernando), an employee of Newark Builders. No one else assisted Negron in digging the trench. (Id., ¶ 14.)

Newark Builders also was on site at the time of Ferreira’s accident. Negron was at the job site at the time the accident occurred, and may have witnessed the accident. In addition, Julmar Santos was on the job site two or three times on the day of the accident to observe the work on the site. (Id., ¶ 15.)

Under the Subcontract, Newark Builders agreed to “indemnify and hold harmless D&J Home Builders and its employees and agents, among others, from and against “claims, damages, losses and expenses...arising out of or resulting from performance of [Newark Builders’] . . . to the extent caused by the negligent acts or omissions of Newark Builders or its Subcontractors or Sub-Subcontractors.” (Id., ¶ 16.)

Newark Builders also executed a Hold Harmless Agreement under which the company agreed to defend, indemnify and hold harmless D&J and its principal, Dino Gaglioti, and their consultants, agents and employees, from and against “any all claims, suits, losses or liability . . . for or on account of injury to or death of persons, including subcontractor’s employees, subcontractor’ subcontractors or their employees. . . caused, in whole or in part, by any act or omission, or alleged act or omission, of [Newark Builders], its employees or agents, whether caused in part by a party indemnified hereunder.” (Id., ¶ 17.) The Hold Harmless Agreement required Newark Builders to provide a Certificate of Insurance prior to starting work under which D&J and Dino Gaglioti, among others, were required to be named as an Additional Insured on each subcontractor general liability policy. (Id., ¶ 18.)

In furtherance of its obligations to D&J and Gaglioti, Newark Builders purchased a commercial general liability insurance policy from Essex Insurance Company, bearing policy number 3CM9739 (the “Liability Policy”) under which Newark Builders is identified as the Named Insured. (Id., ¶ 19.) As part of the “Insuring Agreement” under the Liability Policy, Essex Insurance agreed to pay “those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which the insurance applies. The insurance applies to bodily injury caused by an “occurrence” – i.e. accident, in the coverage territory. (Id., ¶ 20.)



By way of an Additional Insured Endorsement to the Liability Policy, D&J was listed under the WHO IS AN INSURED section of the Liability Policy as an Additional Insured with respect to “negligent acts or omissions of the Named Insured” and for occurrences, claims and coverage not otherwise excluded in the Liability Policy. (Id., ¶ 23.) On or about October 14, 2004, a Certificate of Insurance was issued to D&J confirming that Essex Insurance Company issued the Liability Policy to Newark Builders and that D&J was listed as an Additional Insured on the Liability Policy. (Id., ¶ 24.)

## RELEVANT PROCEDURAL HISTORY

On or about December 28, 2006, Carlos Ferreira filed a Complaint in this Court, bearing docket no. 010493-06, against multiple defendants, including Newark Builders and D&J (the “Personal Injury Action”), alleging negligence and seeking damages for personal injuries he allegedly sustained while installing sewer lines in the trench on the construction site located at 146 Ridgewood Avenue in Newark. (See Exhibit A.) The Complaint was amended several times, culminating in the filing of a Fourth Amended Complaint and Jury Demand on or about November 28, 2007. (See Exhibit 1.)

On or about January 11, 2008, Essex Insurance Company filed an Amended Complaint, bearing docket no. L09354-7 (“Declaratory Judgment Action”) seeking a declaratory judgment that it is not obligated to provide a defense or indemnification to Newark Builders or D&J in connection with the claims asserted by Ferreira in the Personal Injury Action. (See Amended Complaint for Declaratory Judgment, Exhibit 18.)

On February 7, 2008, an Answer to the Fourth Amended Complaint was filed on behalf of D&J in the Personal Injury Action. In its Answer, D&J asserted cross-claims for both common law and contractual indemnification against its co-defendants, including Newark Builders. (See Exhibit 13, at 5.) D&J also asserted a cross-claim for contribution against Newark Builders, among others, pursuant to the terms of the Joint Tortfeasors Contribution Act, N.J.S.A. 2A:53A-1 et seq., and the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 et seq. (Id., at 6.)

On June 17, 2008, an Answer to the Amended Complaint for Declaratory Judgment and a Counterclaim was filed in the Declaratory Judgment Action on behalf of D&J. (See D&J’s Answer to Amended Complaint for Declaratory Judgment, Exhibit 19.)

On December 9, 2008, the Court entered an Order consolidating the Personal Injury Action and this Declaratory Judgment action for the purposes of discovery only. Following completion of discovery, on February 17, 2009, Plaintiff filed a motion for summary judgment declaring that it is not obligated to provide coverage or a defense or indemnification to Newark Builders or D&J under the Independent Contractor/Subcontractor and Contractual Liability exclusions in the Liability Policy. This opposition and cross-motion are submitted in response.

## LEGAL ARGUMENT

### POINT I

#### **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AND DEFENDANT'S CROSS-MOTION SHOULD BE GRANTED BECAUSE THE UNDISPUTED MATERIAL FACTS SHOW THAT THE PLAINTIFF CANNOT ESTABLISH GROUNDS TO DENY COVERAGE TO D&J HOME BUILDERS UNDER THE INDEPENDENT CONTRACTOR/SUBCONTRACTOR AND CONTRACTUAL LIABILITY EXCLUSIONS IN THE LIABILITY POLICY**

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Under New Jersey law, summary judgment in favor of a moving party will be rendered only “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 matter of law.” R. 4:46-2. In deciding a summary judgment motion, the trial court’s “function is not ... to weigh the evidence and determine the truth ... but to determine whether there is a genuine issue for trial.” Brill v. The Guardian Life Ins. Co., 142 N.J. 520, 536 (1995), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Applying that standard requires courts to engage in an analytical process essentially the same as that necessary for a directed verdict: specifically, to determine “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law’....” Brill, 142 N.J. at 535-36 (citation omitted.) In making that determination, the trial judge must consider “whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

The Brill court cautioned that the dispute must not only be “genuine,” but “substantial.”

The Court stated:

[I]f the opposing party [in a summary judgment motion] offers ... only facts which are immaterial or of an insubstantial nature, a mere scintilla, “fanciful, frivolous, gauzy or merely suspicious,” he will not be heard to complain if the court grants summary judgment....

Brill, 142 N.J. at 529 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954)). The moving party has the burden to show there is an absence of genuine issues of material fact in dispute requiring a trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Essex Insurance has completely failed to meet its burden in this case for obtaining summary judgment under the Independent Contractor/Subcontractor and Contractual Liability exclusions. As we show below, the Independent Contractor/Subcontractor exclusion is inapplicable to this case because the undisputed facts show that Newark Builders was on site and directly supervising the work of Freitas Plumbing at the time of the injury, thus triggering an exception to the exclusion. Additionally, the Contractual Liability exclusion is inapposite because it does not apply in situations where, as here, the liability that is assumed by contract would exist independent of the contract. Even when viewed in the light most favorable to the Plaintiff, the facts in this record demonstrate that the Plaintiff has no grounds for summary judgment and D&J Home Builders is entitled to judgment as a matter of law. As a result, Plaintiff’s application for summary judgment should be denied, Defendant’s cross-motion for summary judgment should be granted, and this Court should enter judgment declaring that Essex Insurance Company is required to provide a defense and indemnification to D&J Home Builders in the Personal Injury Action as an Additional Insured under the Newark Builders Liability Policy.

## POINT II

### **THE INDEPENDENT CONTRACTOR/SUBCONTRACTOR EXCLUSION DOES NOT BAR COVERAGE UNDER THE LIABILITY POLICY BECAUSE THE UNDISPUTED FACTS SHOW THAT NEWARK BUILDERS WAS ON SITE AND DIRECTLY SUPERVISING THE WORK OF FREITAS PLUMBING AT THE TIME THE ACCIDENT OCCURRED**

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It is well settled that insurance policies should be liberally construed in favor of the insured and coverage afforded to the full extent that a fair interpretation of the policy will allow. Meier v. New Jersey Life Insurance Co., 101 N.J. 597, 611 (1986). Observing that “the primary object of all insurance is to insure,” the Appellate Division has stated that when reviewing insurance policies, “[a] construction should be taken which will render the contract operative, rather than inoperative, and which will sustain the claim for indemnity, if reasonably possible, rather than exclude it.” Erdo v. Torcon Construction Company, 275 N.J. Super. 117, 120 (App. Div. 1994). Accordingly, when reviewing an insurance policy, as with any contract, the Court’s function is to “search broadly for the probable intent of the parties in an effort to find a reasonable meaning in keeping with the express general purposes of the policy.” Id.

Any judicial examination of a policy exclusion must proceed in accordance with these guiding principles. Thus, where “the policy provision under examination relates to the inclusion of persons other than the named insured within the protection afforded, a broad and liberal view is taken of the coverage extended. But, if the clause in question is one of exclusion or exception, designed to limit the protection, a strict interpretation is applied.” Erdo, 275 N.J. Super. at 120, quoting Mazzilli v. Accident and Casualty Insurance Company of Switzerland, 35 N.J. 1, 8 (1961). Moreover, when considering an exclusion from coverage, any ambiguity in a policy must be strictly construed against the insurer so that reasonably anticipated coverage is provided.

Argent v. Brady, 386 N.J. Super. 343, 351 (App. Div. 2006).

The Independent Contractor/Subcontractor clause in the Liability Policy excludes coverage under the Policy for the injuries sustained by an employee of an independent contractor/subcontractor of the Named Insured (i.e., Newark Builders) unless the Named Insured is, in part, “on site, directly supervising the work of the independent contractor/subcontractor at the time of injury or damage. . . .”<sup>1</sup> Essex Insurance contends that Newark Builders was neither on site nor directly supervising the work of its plumbing subcontractor at the time of Ferreira’s injury, and thus is not entitled to the benefit of the exception. (Plaintiff’s Brief, at 8-10.) In fact, the undisputed evidence in the record reveals that the exact opposite is true.

Both Carlos Ferreira and Mario Freitas, the owner of Freitas Plumbing, testified that an individual named Negron (a/k/a Fernando), an employee of Newark Builders, was on site at the time of the accident. (See Defendant’s Additional SOMF, ¶ 15.) Negron dug the trench that collapsed on Ferreira. (Id., ¶ 14.) He may even have witnessed the accident inside the trench. (Id., ¶ 15.) In addition, it is undisputed that Julmar Santos, a managerial employee of Newark Builders, was on site multiple times on the day of the accident. (Id., ¶ 15.) These facts are indisputable proof that Newark Builders was “on site” within the meaning of the Independent Contractor/Subcontractor exclusion. Although Plaintiff bases its motion for summary judgment solely on the fact that *Julmar Santos* was not on site at the moment the accident occurred (Plaintiff’s Brief, at 2, ¶12), this fact is immaterial in light of this other, undisputed evidence that

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The clause also requires a showing that “the Named Insured’s actions, inactions or omissions are the direct cause of the injury or damage, or the injury or damage is directly caused by an employee of the Named Insured.” (See Exhibit 4, § 7.L.2.) Although the Plaintiff does not address this standard in its brief, the undisputed facts discussed above -- which show that Newark Builders dug the trench that collapsed onto Ferreira and had a duty to ensure safety on the site -- satisfy this standard. (See Defendant’s Additional SOMF, ¶¶ 3-15.)

establishes Newark Builders' presence on the job site both at the actual time of the accident and multiple other times on the day of the accident.

It also cannot credibly be disputed that Newark Builders directly supervised the work of Freitas Plumbing at the time of Ferreira's injury. Newark Builders was hired to build the Ridgewood Avenue home from scratch, and thus was on site every day, sometimes several times a day, supervising the subcontractors' work and coordinating the timing and sequence of the subcontractors' work. (See Defendant's Additional SOMF, ¶¶ 5, 8.) The company was responsible for the hiring, supervision and control of all other trade subcontractors on the job; meeting with the subcontractors before they started construction; conducting safety meetings and safety discussions with subcontractors; inspecting the work of subcontractors; scheduling and coordinating the subcontractors' work; handling the day-to-day disputes that occurred on the job; clarifying plans and, at times, providing subcontractors with materials; performing physical labor at times, such as digging the footing of the house or doing tile work; and controlling when the work of subcontractors was done. (Id., ¶ 3.) When necessary, the Santos brothers would counsel subcontractors on a better or easier way to perform the work to ensure that the work of the subcontractors was done properly. (Id., ¶ 8.)

Although the Plaintiff would have this Court believe that Newark Builders did little more than provide general supervision and some light carpentry work, the record in this case reveals the company exercised direct supervision of the work of subcontractors, including Freitas Plumbing. Newark Builders met with Freitas Plumbing before the subcontractor started its work and conducted safety meetings and safety discussions with the company. (See Defendant's Responsive Statement of Facts, ¶¶ 7-8 and Defendant's Additional SOMF, ¶¶ 3-15.) Newark Builders inspected Freitas Plumbing's work. (Defendant's Responsive Statement of Facts, ¶ 7;

Defendant's Additional SOMF, ¶ 10.) Mario Freitas, the owner of Freitas Plumbing, testified that if the Santos brothers observed that plumbing work was being done incorrectly, they told Freitas it had to be changed. (Defendant's Additional SOMF, ¶ 10.) This is evidence that Newark Builders exercised direct control not only over the timing and sequence, but also over the manner in which Freitas performed its work, and thus were directly supervising the work. Furthermore, even if the policy language addressing the supervision requirement were deemed ambiguous, because Essex Insurance is seeking to enforce an exclusion from coverage, that ambiguity must be strictly construed against Essex Insurance so that the liability coverage that D&J reasonably anticipated would be provided for negligent acts on the Ridgewood Avenue job is provided. See American Wrecking Corp. v. Burlington Insurance Co., 400 N.J. Super. 276 (App. Div. 2008), citing Argent v. Brady, 386 N.J. Super. 343, 351 (App. Div. 2006); Kievit v. Loyal Protective Life Ins. Co., 34 N.J. 475 (1961) (If the controlling language of a policy will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied.)

In support of its argument that Newark Builders did not directly supervise the work of Freitas Plumbing, Plaintiff asks this Court to give weight to the fact that the City of Newark had a responsibility to inspect the plumbing work after it was completed. (Plaintiff's Statement of Facts, ¶ 8; Plaintiff's Brief, at 8-9.) However, the fact that the municipality was required to inspect and sign off on the plumbing work is irrelevant to the question of whether Newark Builders directly supervised that work prior to its completion and subsequent municipal inspection. The City of Newark did not usurp or assume Newark Builders' primary responsibility to supervise the work of its subcontractors and ensure the safety of the job by inspecting the work. If Plaintiff's argument were taken to its logical conclusion, municipalities



would become the sureties of all private construction work simply by virtue of their municipal power to inspect and approve the work. Clearly no such obligation is imputed to municipalities in the exercise of their municipal powers. In fact, in recognition of “the almost unlimited exposure to which public entities would otherwise be subjected if they were liable for the numerous occasions on which they issue, deny, suspend or revoke permits and licenses,” municipalities are expressly granted immunity for such activities under State law. See 1972 Task Force Comment to N.J.S.A. 59:2-5 (providing tort claim immunity for a public entity’s issuance, denial, suspension or revocation of permits, licenses, etc.,); see also N.J.S.A. 59:2-6 (providing tort claim immunity for a failure to inspect or negligent inspection of property.)

Perhaps more importantly, in arguing that “Newark Builders is not responsible to oversee if the trench is dug properly,” (Plaintiff’s Brief, at 2, ¶ 7), the Plaintiff ignores the one undisputed fact that arguably is most dispositive of the parties’ motions: Newark Builders was the party that excavated the trench in which Ferreira was injured. As such, it clearly was Newark Builders’ responsibility to oversee that the trench was dug properly. If Newark Builders and D&J are entitled to coverage under an exception to the Independent Contractor/Subcontractor exclusion in a situation where Newark Builders directly supervised the excavation of the trench, *a fortiori*, they must be afforded coverage when Newark Builders dug the trench itself and caused the injury that is at the heart of the claim for coverage. This is particularly true for D&J, as an Additional Insured under the Newark Builders Liability Policy, since “New Jersey courts have given a broad and liberal interpretation to common insurance policy language pertaining to coverage for additional insured parties for injuries arising out of the conduct of the main policy holder.” Federal Home Loan Mortgage Corp v. Scottsdale Insurance Co., 316 F. 3d 431, 444 (3<sup>rd</sup> Cir. 2003), citing County of Hudson v. Selective Ins. Co.,

332 N.J. Super. 107 (App. Div. 2000).

Essex Insurance has no valid basis to seek to deny coverage under the Independent Contractor/Subcontractor clause because it is clear from the undisputed facts that Newark Builders falls within the exception to that policy exclusion. The weight of the evidence in the record shows that Newark Builders not only was on site at the time of the injury and directly supervising the work of Freitas Plumbing, but, in fact, was directly responsible for the work that caused Ferreira's accident. Accordingly, summary judgment should be entered in Defendant's favor declaring the exclusion inapplicable and directing Essex Insurance to provide a defense and indemnification to D&J as an Additional Insured under the Liability Policy.

However, should this Court find that the evidence is not so one-sided to justify judgment in favor of D&J as a matter of law, at a minimum, it is clear that there are genuine issues of material fact concerning the scope of Newark Builders' responsibilities on the job, whether it directly supervised the work of Freitas Plumbing and whether it caused the injury to Ferreira which are sufficient to preclude the entry of summary judgment in the Plaintiff's favor. When there are disputed facts in a declaratory judgment action, the resolution of those facts should be made by a jury if requested. Pearl Assurance Co. v. Watts, 58 N.J. Super. 483 (App. Div. 1960.) Plaintiff has failed to meet its burden to show an absence of material fact disputes that would justify the court removing these issues from a jury as a matter of law. Accordingly, Plaintiff's motion for summary judgment must be denied.

### POINT III

#### **THE CONTRACTUAL LIABILITY EXCLUSION DOES NOT BAR COVERAGE IN THIS CASE BECAUSE NEWARK BUILDERS IS LIABLE TO D&J HOME BUILDERS FOR DAMAGES BY LAW EVEN IN THE ABSENCE OF ITS CONTRACTUAL INDEMNIFICATION OBLIGATION**

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In its Answer to the Fourth Amended Complaint, D&J has asserted cross-claims for contractual and common law indemnification and contribution against Newark Builders. (Exhibit 13, at 5-6.) Defendant’s contractual indemnification claim is based upon the Subcontract and Hold Harmless Agreement. (See Defendant’s Additional SOMF, ¶¶ 16, 17.) Because D&J has asserted a contractual indemnification claim, Plaintiff argues that it is not obligated to provide coverage under the Liability Policy pursuant to a Contractual Liability exclusion, which excludes from coverage “bodily injury” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. (See Plaintiff’s Brief, at 9-11.) This argument is fatally flawed because it ignores key language in the Contractual Liability exclusion clause, applicable to this case, which states that the Contractual Liability exclusion does not apply to liability for damages “that the insured would have in the absence of the contract or agreement”.<sup>2</sup> (Exhibit 9, 2.b(1)) (Emphasis added.)

It is not uncommon for general liability policies to have a contractual liability exclusion that excludes from coverage liabilities that are assumed by the insured under a contract. Karadis Bros. Painting Co. v. Pennsylvania National Mutual Ins. Co., 119 N.J. Super. 446 (Ch. Div.

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Inexplicably, Plaintiff’s argument addressing the Contractual Liability exclusion completely ignores this applicable exception, and instead creates a straw argument focusing on an exception pertaining to liabilities assumed under an “insured contract” that plainly does not apply in this case. (See Plaintiff’s Brief, at 9-11.)

1972). When the contractual obligation is one that would not have existed independently by law, courts will uphold the exclusion of liability under such exclusion clauses. Id. at 452 (citing cases).

However, it is well settled when there is another legal basis for the insured liability that is independent from the contractual assumption – for example, under principles of tort law, common law indemnification or contribution -- the contractual liability exclusion will not apply and the insured will be liable regardless of his contractual undertaking. See Reliance Ins. Co. v. Armstrong World Industries, 259 N.J. Super. 538 (Law Div. 1992), opinion modified, 265 N.J. Super. 148 (Law Div. 1993), rev'd on other grounds, 292 N.J. Super. 365 (App. Div. 1996); Karadis, supra, 119 N.J. Super. at 452; see also Ohio Cas. Ins. Co. v. Flanagan, 44 N.J. 504, 520-522 (1965); Hackensack Water Co. v. General Accident Ins., 84 N.J. Super. 479, 484 (App. Div. 1964). Accord Hawthorne v. South Bronx Community Corp., 78 N.Y.2d 433, 576 N.Y. Supp. 2d 203 (1991); Aetna Casualty and Surety Co. v. Lumbermens Mutual Casualty, 136 A.D.2d 246, 527 N.Y. Supp. 2d 143 (4<sup>th</sup> Dep't 1988). This common law principle is reflected in the language of the exclusion clause, which creates an exception for liability for damages “that the insured would have in the absence of the contract or agreement”. (See Exhibit 9.)

It is beyond dispute that Newark Builders is potentially liable in damages to D&J for damages arising out of its negligence on the Ridgewood Avenue project upon grounds that are wholly independent of its contractual undertaking to D&J. Under New Jersey common law, an implied right of indemnification exists where one party, without fault, is subject to the tort liability of another. Daily v. Somberg, 28 N.J. 372, 385 (1958); Public Service Electric & Gas Co. v. Waldroup, 38 N.J. Super. 419, 432 (App. Div. 1955). Common law indemnification is generally available when a defendant's liability is secondary rather than primary, and “merely

constructive, technical, imputed or vicarious.” Waldroup, 38 N.J. Super. at 432; Cartel Capital Corp. v. Fireco of New Jersey, 81 N.J. 548, 566 (1980).

D&J did not perform inspections of subcontractors’ work or act in a supervisory capacity on the Ridgewood Avenue site, nor was it involved in Newark Builders’ hiring of subcontractors. (See Defendant’s Additional SOMF, ¶ 6.) In fact, under the Subcontract, D&J was not authorized to give instructions or orders directly to subcontractors retained by Newark Builders unless designated as an authorized representative of Newark Builders. D&J is not and cannot be primarily liable for any negligence by Newark Builders or its subcontractors. If D&J is subject to tort liability in this case, it could only be vicariously liable through the negligence of Newark Builders or a subcontractor that Newark Builders directly supervised. Even without contractual indemnification from Newark Builders, D&J will be entitled to indemnification from Newark Builders under the common law. Indeed, this is the very liability that the Liability Policy is intended to provide protection against.<sup>3</sup>

D&J also would be entitled to statutory contribution from Newark Builders in the event of an allocation of tort liability in this case. Under the Joint Tortfeasors Contribution Law, a right to contribution exists when the damaged party recovers a money judgment or judgments against one or more joint tortfeasors, and one of these tortfeasors pays damages which exceed his or her proportionate or fair share of liability. See N.J.S.A. 2A:53A-1 through A-5. The amount of each tortfeasor’s fair share is allocated according to an allocation of percentages under the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 through 5.3. See Cartel Capital

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The Liability Policy is supposed to pay “those sums that the insured becomes legally obligated to pay as damages” because of bodily injury caused by an accident. (See Defendant’s Additional SOMF, ¶20.) As an Additional Insured under the Liability Policy, Essex is obligated to indemnify D&J Home Builders with respect to “negligent acts or omissions of the Named Insured....” (Id., ¶ 23.)

Corp, 81 N.J. at 569. This right of contribution exists by statute independent and irrespective of a contractual indemnification provision between alleged tortfeasors. Indeed, the right of contribution differs from the common law right of indemnification in a number of significant ways. See, e.g., New Milford Bd. of Educ. v. Juliano, 219 N.J. Super. 182 (App. Div. 1987).

D&J's cross-claims against Newark Builders are not limited to a theory of contractual indemnification. D&J also is suing Newark Builders for common law indemnification and for contribution under the Joint Tortfeasors Contribution Law. (Exhibit 13, at 5-6.) By focusing myopically on the contractual indemnification clause, the Plaintiff has ignored independent legal grounds that exist under the common law and statutory law to support the imposition of liability upon Newark Builders and Defendant's cross-claims for indemnification and contribution. Those independent grounds render Plaintiff's reliance upon the Contractual Liability exclusion as a basis to deny coverage invalid under both the express language of the Policy and applicable law.

**CONCLUSION**

For the foregoing reasons, Defendant, D& J Home Builders, LLC, respectfully requests that this Court deny Plaintiff's motion for summary judgment, grant Defendant's cross-motion for summary judgment, and enter judgment declaring that Essex Insurance Company is required to provide coverage and a defense and indemnification to D&J Home Builders in the Personal Injury Action as an Additional Insured under the Newark Builders' Liability Policy.

Respectfully Submitted,

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By: \_\_\_\_\_  
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Dated: April 6, 2009