At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on December 12, 2006.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

THE BOARD OF EDUCATION OF THE LIVERPOOL CENTRAL SCHOOL DISTRICT

Plaintiff,

v.

UTICA MUTUAL INSURANCE CO.; GRAPHIC ARTS MUTUAL INSURANCE CO.; DODGE CHAMBERLIN LUZINE WEBER ASSOCIATES ARCHITECTS, INTEGRATED BUILDING SYSTEMS ENGINEERING, CONSULTANTS, P.C.; VIKING MECHANICAL, INC. and DOES 1-20,

Defendants,

DECISION AND ORDER ON MOTION

Index No.: 2004-4164
RJI No.: 33-06-4131

APPEARANCES: **STEPHEN CIOTOLI, ESQ., OF O'HARA & O'CONNELL**
For Plaintiff

KENNETH L. BOBROW, ESQ., OF FELT EVANS, LLP
For Defendants Utica Mutual Insurance Company and Graphic Arts Mutual Insurance Company

KENNETH G. VARLEY, ESQ., OF DONOHUE, SABO, VARLEY & HUTTNER, LLP
For Defendants Dodge Chamberlin Luzine Weber Associates Architects and Integrated Building Systems Engineering Consultants, P.C.

The plaintiff, Board of Education of the Liverpool Central School District, moves for

summary judgment against defendants Utica Mutual Insurance Company and Graphic Arts Mutual Insurance Company on its first and second causes of action in its first amended complaint. The first cause of action alleges that the defendants breached an insurance contract between the parties by improperly denying coverage for mold damage that occurred in the Liverpool High School library in August of 2003, based upon exclusions contained in the policy. The second cause of action seeks a Declaratory Judgment that the defendants have acted in bad faith by denying coverage. The defendants have cross-moved for summary judgment dismissing the complaint against defendant Utica Mutual as an improper party to the action, and further move for summary judgment dismissing the complaint in its entirety against defendant Graphic Arts based upon the policy exclusions.

The plaintiff has not opposed defendant Utica Mutual's motion to dismiss based on the fact that it is not a proper party to the action and, in fact, a review of the subject insurance policy shows that the policy is between defendant Graphic Arts and the plaintiff. A party can only be held liable for a breach of contract if it entered into the contract; where the defendant is not a party it bears no liability thereunder. *See, Prospect Plaza Tenant Association v. New York City Housing Authority*, 11 AD3d 4000 (1st Dept. 2004); *see also, Williams v. DiCarlo*, 235 AD2d 819 (3d Dept. 1997). As such, the motion by defendant Utica Mutual to dismiss the complaint against it is granted.

Defendant Graphic Arts Mutual issued to the plaintiff a general commercial property insurance policy which was in effect on the date of the alleged loss in September of 2003. While plaintiff's employees were preparing the Liverpool High School to open for the new school year they discovered evidence of mold growth in the high school library, which plaintiff alleges damaged both real and personal property. Mold was found on the books, furniture, carpeting and

other items in the library. Plaintiff thereafter filed a claim for coverage for such damages and for the cost of remediation.

Both parties' experts inspected the building. A report was issued by Building Science Investigations, Inc. (BSI), dated November 12, 2003 the expert retained by the plaintiff, who opined that the mold damage developed over the course of approximately two weeks during a time of high humidity where the HVAC system drew the humid air into the library, which caused a rapid growth of mold. That report confirmed the presence of mold growth on the carpet, furnishings and books, and noted that both minimum water activity and fourteen days of growth were required to cause such damage. It further noted that a visual inspection of the library did not illustrate any significant sources of the moisture, with the exception of an elevated relative humidity level and that "based upon these findings we believe that the source of the moisture that promoted the growth of mold in the library resulted from the elevated relative humidity condition." It further noted that this level "was caused by the introduction of moist unconditioned air from the crawl space, deficiencies in the design/operation of the HVAC system and an unusually high amount of precipitation over the past summer...we believe that the outdoor weather conditions were the most significant factor in the growth of mold.". The report indicates that swipe samples confirmed the presence of, *inter alia*, "aspergillus penicilliodes" " aspergillus restrictus" and "aspergillus versicolor". Environmental Research Management (ERM), an expert retained by the defendant, provided a report dated October 10, 2003, opining that the cause of the mold condition was excessive outdoor humidity brought into the building by the HVAC system, which suggested that the system was inadequate, the design of which was modified by defendants Dodge Chamberlain and Integrated Building Systems. The report concluded that the HVAC system did not cause the mold issues, nor exacerbate it due to failure

and that the unit was the source of excess humidity due to outside air, but did so while operating in a normal design mode. It also noted that samples were sent to a laboratory for microbiological analysis to determine the "viable fungi types and concentration levels**."**

Thereafter, on October 31, 2003, a claims manager for the defendant notified plaintiff that it was disclaiming coverage, based upon the following exclusions under the subject policy, upon which defendant Graphic now relies: 1) rust, corrosion, fungus, decay and deterioration; 2) dampness or dryness of atmosphere; and 3) faulty, inadequate or defective design specifications, workmanship and repair.[1] Thereafter, the plaintiff initiated this lawsuit seeking $118,976.43 as the cost for remediation of the mold contamination in the library and further damages as they may continue to accrue.

Section B(2)(d)(2) of the subject policy excludes coverage for damage caused by "rust, corrosion, fungus, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself". *Section B(2)(d)(2).* There is no dispute that the language contained in the defendant's exclusion has been approved by the Department of Insurance[2]. The plaintiff argues that this exclusion does not apply since the terms "mold" and "fungus" are covers the term "mold". A Court should construe in insurance policy provisions including an exclusion according to its plain and ordinary meaning. *See, Village of Cedarhurst v. Hanover Insurance Co.*, 89 NY2d 293 (1996). Courts often resort to dictionary definitions to determining the plain meaning. *See, Rosner v. Metropolitan Property and Liability Insurance Company*, 96 NY2d 475 (2001). Webster's Third New International Dictionary defines the word fungus as " any of the numerous chiefly saprophytic or parasitic plants that constitute the division fungi; [and] include the molds, mildews, rusts, smuts...*". Webster's Third New International Dictionary*

(1981, p. 992). Oxford English Dictionary defines fungus as a “mushroom, toadstool or one of the allied plants, including the various forms of mould”. *Oxford English Dictionary (1971, p. 1096).* Random House Webster's College Dictionary defines mold as “a growth of minute fungi forming on vegetable or animal matter commonly as a downy or furry coating and associated with decay or dampness or any of the fungi that produce such a growth; mildew”. *Random House Webster's College Dictionary (2000).* Such dictionary definitions are “useful guideposts”. *See, Rosner, supra.* In addition, the term “aspergilius”**,** as identified in the plaintiff’s own expert reports is defined as “any of a genus (aspergillus) of ascomycetous fungi with branched radiate sporophores, including many common molds”. *Merriam Webster Unabridged Dictionary*. Where the terms are ambiguous or capable of more than one interpretation, the terms must be resolved in favor of the insured and against the insurer, *See**, 242-44 East 77th Street, LLC v. Greater New York Mutual Insurance Company*, 31 AD3d 100 (1st Dept. 2006). Where the language is clear and unambiguous, however, it is the court’s responsibility to interpret the written instrument. *See, Hartford Acc. & Indem. Co. V. Wesolowski*, 33 NY2d 169 (1973). The burden is on the insurer to establish that the term relied upon “is capable of only one meaning as defined by the average man.” *Sincoff v. Liberty Mutual Fire Insurance Co.*, 11 NY2d 396 (1962). Where an insurer intends to exclude liability, the intention must be clearly expressed in terms that apply in a particular case and it cannot be subject to other interpretations. *See, Continental Casualty Co. v. Rapid American Corp.,* 80 NY2d 640 (1993). This exclusion provision must be construed narrowly in favor of coverage; exclusions “must be specific and clear in order to be enforced” and “are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.” *General Accident Insurance Co. v. U.S. F. & G.*, 193 AD2d 135 (3d Dept. 1993). Where an exclusion clause is relied upon to deny coverage

as it is here, the burden rests upon the defendant insurance company to demonstrate that the only reasonable interpretation of the allegations of the complaint brings them within the exclusion. *See, Town of Mesina v. Health Care Underwriters Mutual Insurance Co*., 98 NY2d 435 (2002). In the present case, the plaintiff has offered only conclusory allegations with respect to the difference in the two terms and has offered nothing to show how the terms are distinguishable scientifically or otherwise. Inasmuch as the term is clear here and since the plaintiff's own expert report defines the mold as a type of fungus, the strict construction of the exclusion dictates that mold damage was excluded under the subject policy. As such, the plaintiff's motion for summary judgment is denied and the defendant's cross-motion for summary judgment is granted.

Based upon the foregoing, this Court will not reach the plaintiff's remaining contentions that defendant Graphic Arts improperly denied coverage pursuant to based on sections B(2)(d)(7)(a) or B(3)(c) of the policy, which exclude from coverage loss to personal property due to dampness or dryness of atmosphere and faulty or defective design, respectively.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the plaintiff's motion for summary judgment on the first and second causes of action is denied**,** and it is further

ORDERED, that the defendant Graphic Art's cross-motion for summary judgment on the first and second causes of action is granted.

ENTER

Dated: January 31, 2007
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

[1] The defendants cited two additional exclusions in that letter, but do not rely on those exclusions with respect to this motion.

[2] See, affidavit of Melissa Porten, defendant State Filings Systems Analyst, which has not been refuted by the plaintiff.