NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

AVALON BAY COMMUNITIES, INC., AND MID-ATLANTIC FRAMING, LLC	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY
Third-Party Plaintiffs,	
v.	DOCKET NO.: ESX-L-3752-14
UTICA INSURANCE, et al.	**OPINION**
Third- Party Defendants.	

Dated: August 5, 2016

By: Stephanie A. Mitterhoff, J.S.C.

STATEMENT OF FACTS

Before the court is Third-Party Plaintiffs Avalon Bay Communities, Inc. ("Avalon") and Mid-Atlantic Framing, LLC's ("Mid-Atlantic") Motion for Summary Judgment seeking a declaration that they are entitled to contractual indemnification as well as coverage as additional insureds. This matter arises from a June 1, 2012 incident at a construction project in Somerset, New Jersey. At the time of the incident, Plaintiff, Wemerson Braga, was working in his capacity as a laborer for Moraes Construction. Mr. Braga contends that while working on the roof, he lost his balance and ultimately fell to the ground, sustaining bodily injuries.

Defendant/Third-Party Plaintiff Avalon was the general contractor for the construction project. Avalon contracted with Defendant/Third-Party Plaintiff Mid-Atlantic to conduct the

framing work for the construction project. Mid-Atlantic, in turn, hired Growing Carpentry, LLC ("Growing Carpentry") as a subcontractor to perform the framing work at the project. Growing Carpentry subcontracted the framing work to Moraes Construction, Mr. Braga's employer. After Mr. Braga filed suit against Avalon, Mid-Atlantic, Growing Carpentry and Moraes alleging negligence and seeking compensation for the bodily injuries he sustained from his fall.

Avalon and Mid-Atlantic entered into a contract (the "Master Agreement") for the framing work Mid-Atlantic was to perform on the project. The contract included various indemnification clauses, in which Mid-Atlantic agreed to defend and indemnify Avalon for any claims or liability arising out of or connected to Mid-Atlantic's work on the project. Mid-Atlantic was also required to name Avalon as an additional insured under its general liability insurance policy. Mid-Atlantic has acknowledged its obligations under the Master Agreement and is providing a defense and indemnity to Avalon for the claims alleged by the parties in this lawsuit.

Mid-Atlantic and Growing Carpentry entered into a written subcontract agreement which detailed, among other things, the type of work to be performed by Growing Carpentry at the project site. The subcontractor agreement included two indemnification provisions.

Section 2.14 states:

> Indemnity: Without limiting the generality of any other provision of this Agreement, Subcontractor [Growing Carpentry] shall reimburse, indemnify and hold contractor [Mid-Atlantic] harmless from any loss, damage, liability, claims, demands, cost, and expenses, pending or threatened, attributable to the Work and/or Subcontractor's performance thereof, including without limitation, Subcontractor's warranties hereunder. When the circumstances giving rise to such loss, damage, liability, claims, demands, cost and expenses, may be attributable to more than one Subcontractor, Contractor shall allocate the total between the responsible subcontractors, which allocation shall be binding on the subcontractor.

The second provision, Section 5.6, states:

Indemnity:

a. Subcontractor shall indemnify and hold Contractor harmless from and against any and all claims, suits, judgments, damages, losses and expenses of any nature whatsoever, including Litigation Costs, arising directly or indirectly out of or resulting, either in whole or in part, from any wrongful or negligent act or omission of Subcontractor, any of its agents or employees, or anyone else for whose acts any of them may be liable, including losses and expenses arising out of or in any way related to any injury to Subcontractor's employee(s) or any individual(s) working on the jobsite through Subcontractor. Subcontractor shall not raise as a defense to such obligation any intervening or contributing negligence of any of its Subcontractors or any other person, or anyone for whose acts it or they may be liable, nor shall it raise as a defense to its obligations hereunder any negligence or contributing negligence of Contractor [Mid-Atlantic]. The indemnification obligation under this subsection shall not be limited in any way by any limit on the amount or type of damage, or the existence of compensation or benefits payable by or for Subcontractor under any laws or arrangements.

b. Subcontractor shall indemnify and hold Contractor, its agents, officers and employees, harmless from and against all claims, damages, losses and expenses, including Litigation Costs arising out of or resulting from performance of the Work under this Agreement, including such claim, damage, loss or expense that is attributable to bodily injury, sickness, disease, death, injury or destruction of personal property and loss of use resulting therefrom, **regardless of whether such claim is caused in whole or in part by any act or omission of Subcontractor, or its employees or agents or any other person, and regardless of whether it is caused in whole or in part by Contractor.** (emphasis added).

c. Nothing in this Section 5.6 shall limit Subcontractor's obligations under other indemnification provisions of this Agreement. All indemnification provisions of this Agreement shall survive expiration or termination of this Agreement.

Third-Party Plaintiffs contend that these provisions require Growing Carpentry to indemnify Mid-Atlantic and Avalon in Plaintiff's underlying lawsuit, based both on contractual indemnification and as additional insureds.

On March, 25, 2015, counsel for Third-Party Plaintiffs sent correspondence to counsel for Growing Carpentry demanding defense and indemnification for Mid-Atlantic pursuant to the subcontractor agreement. To date, Growing Carpentry has not responded to the demand letter and has made clear that it is denying such coverage in its opposition to the instant motion.

Third-Party Plaintiffs also contend that they should be afforded insurance coverage as additional insureds under Growing Carpentry's insurance policy. At the time of the underlying incident, Growing Carpentry was insured by a commercial general liability insurance policy, issued by Utica First Insurance Company ("Utica"). Section 3.5 of the subcontractor agreement, entitled "Insurance," states, in pertinent part:

> Contractor [Mid-Atlantic] shall not be liable for any loss or casualty incurred or caused by Subcontractor [Growing Carpentry]. Subcontractor shall, at its own expense, procure and maintain the insurance set forth in Exhibit J until completion and final acceptance of the work by Contractor . . . The insurance requirements shall not limit Subcontractor's obligations under the Agreement or Subcontractor's indemnification, warranty obligations or other liability in any manner.

Exhibit J, the attachment referenced in the provision, is an "Insurance Checklist," that provides:

1. Certificate Holder must be in the name of Mid Atlantic Framing LLC, its Affiliates and subsidiaries;
2. General Liability and Umbrella Liability, $1,000,000 each occurrence/$2,000,000 aggregate; with Additional Insured endorsement naming Mid Atlantic Framing LLC and its Affiliates and Subsidiaries as additional insured for General Liability;
3. Pursuant to paragraph 3(k), the "Subcontractor's policy will be considered primary and non-contributory to Contractor's insurance."

Pursuant to the subcontractor agreement, the Utica Certificate of Liability Insurance does indeed name Mid-Atlantic as an additional insured under the Utica policy. Notwithstanding, Utica is refusing to provide defense and indemnity coverage to Mid-Atlantic as an additional insured. The reason Utica is refusing coverage appears to be due to the additional insured triggering requirement in its policy, which requires a written contract or agreement to establish the requirement that Growing Carpentry had agreed to assume the tort liability of Mid-Atlantic. Specifically, that section states, in pertinent part:

> Insured also includes:
>
> d. Any person or organization whom you are required to name as an additional insured on this policy under a written contract or Agreement.
>
> The written contract or agreement must be:

(1) Currently in effect or becoming effective during the terms of this policy; and
(2) Executed prior to the "bodily injury," "property damage," "personal injury," or "advertising injury."

Utica has taken the position that there is no written contract or agreement that requires Growing Carpentry to name Mid-Atlantic or Avalon as additional insureds. In that regard, Utica avers that the exhibits and underlying contracts purportedly incorporated by reference into the Growing Carpentry contract are not sufficiently incorporated and, accordingly, there are no enforceable agreements to include Mid-Atlantic or Avalon as additional insureds.

With respect to Avalon, Third-Party Plaintiffs point to a section of the subcontract between Mid-Atlantic and Growing Carpentry in support of this assertion. The section states, in pertinent part:

> . . . **Subcontractor [Growing Carpentry] agrees that the Work includes . . . (iii) the contract between Contractor [Mid-Atlantic] and the Owner [Avalon] ('Master Agreement'). The Plans and Master Agreement are, by this reference, incorporated in this Agreement as if set forth at length here in full.** All obligations of the Contractor to Owner under the Master Agreement shall be the obligations of the Subcontractor to the Contractor under this Agreement . . . To the extent Contractor is held liable to the owner for damages, as a result of Subcontractor's acts or omissions, Subcontractor shall be liable to Contractor for such damages. (emphasis added).

Pursuant to this provision, Third-Party Plaintiffs aver that Avalon is entitled to contractual indemnification by way of incorporating the underlying contract between Avalon and Mid-Atlantic into the Growing Carpentry contract, such that all obligations of Mid-Atlantic to Avalon are the obligations of Growing Carpentry, including the obligation to indemnify Avalon.

Plaintiff filed suit naming the various aforementioned contractors and subcontractors, including Avalon and Mid-Atlantic, for negligence. In August 2015, Mid-Atlantic and Avalon filed a Third-Party Complaint seeking a declaratory judgment against Utica to obtain judgment and ancillary monetary relief relative to the rights and obligations of the parties pertaining to insurance coverage. Before the court are Defendant/Third-Party Plaintiffs Mid-Atlantic and

Avalon's Motion for Summary Judgment in the declaratory judgment action, in which they seek a declaration that they are entitled to contractual indemnification from Growing Carpentry and insurance coverage from Utica as additional insureds.

ARGUMENTS OF THE PARTIES

Plaintiffs argue that the plain language of the indemnification provisions in the agreement with Growing Carpentry unambiguously require Growing Carpentry to indemnify both of them against the claims brought against them in the underlying lawsuit. Furthermore, Third-Party Plaintiffs argue that the insurance provisions in the contract clearly and unambiguously require that Mid-Atlantic and Avalon be afforded coverage under the Utica policy as additional insureds. Third-Party Plaintiffs' arguments in favor of indemnification and insurance coverage are largely based on incorporation by reference theories. For example, they argue that Avalon is entitled to indemnification by way of incorporating the underlying contract between Avalon and Mid-Atlantic into the Growing Carpentry contract, such that all obligations of Mid-Atlantic to Avalon are the obligations of Growing Carpentry, including the obligation to indemnify Avalon. They also contend that Mid-Atlantic is covered as an additional insured under the Utica policy by way of incorporating an exhibit into the subcontractor agreement and that Avalon is also covered as an additional insured by way of incorporating the underlying agreement between Avalon and Mid-Atlantic into the subcontractor agreement.

In opposition, Growing Carpentry argues that the indemnification provisions in its contract with Mid-Atlantic do not explicitly provide for indemnity for Mid-Atlantic's own negligence. In that regard, Growing Carpentry avers that the indemnification language fails the Supreme Court of New Jersey's bright-line rule articulated in Azurak, in which it stated, "[a] contract will not be construed to indemnify the indemnitee against losses resulting from its own

negligence unless such an intention is expressed in unequivocal terms." Azurak v. Corporate Property Investors, 347 N.J. Super. 516, 520 (App. Div. 2002). Moreover, Growing Carpentry argues that the existence of two separate and different indemnification provisions in the contract creates ambiguity as to which provision is to apply in what circumstances, and, accordingly, the indemnification provisions must be strictly construed against the indemnitee.

Regarding the contention that it must also indemnify Avalon pursuant to its contract with Mid-Atlantic, Growing Carpentry argues, initially, that it never entered into a written agreement with Avalon. It further argues that no evidence has been submitted to show that Growing Carpentry ever received or accepted a copy of the contract between Mid-Atlantic and Avalon, which is purportedly incorporated by reference into the contract between Growing Carpentry and Mid-Atlantic. Growing Carpentry also argues that the portion of its contract with Mid-Atlantic that purportedly creates a duty to indemnify Avalon does not explicitly state that it must indemnify Avalon for Avalon's own negligence, in violation of Azurak. Finally, Growing Carpentry avers that it is entirely possible that Avalon will be found 100% liable for the happening of the underlying accident. Should this occur, Growing Carpentry contends that the indemnification would be unenforceable pursuant to N.J.S.A. 2A:40A-1, which states that clauses in construction contracts purporting to provide indemnification for an indemnitee's sole negligence are void and unenforceable.

Utica has also submitted opposition and argues, as an initial matter, that the Third-Party Complaint does not seek declaratory relief on behalf of Avalon. In that regard, Utica points to the language of the Complaint, in which it states that Mid-Atlantic is seeking declaratory relief, and does not specifically state that Avalon is seeking same. Substantively, Utica argues that Avalon has failed to show that the additional insured provision was triggered such that Avalon is

covered as an additional insured. In that regard, Utica avers that there was never a written agreement requiring Growing Carpentry to name Avalon as an additional insured. Utica disputes the contention that the contract between Avalon and Mid-Atlantic (which purportedly requires Avalon to be named as an additional insured) is incorporated by reference. Utica argues that in order for a document to be enforceable as incorporated by reference there must be a description of the document such that its identity may be ascertained "beyond doubt," and it must be shown that the party to be bound had "knowledge of and assented to the incorporated terms." Alpert, Goldberg, Butler, Norton & Weiss v. Quinn, 410 N.J. Super. 510, 533 (App. Div. 2009). Utica contends that neither of those requirements have been shown regarding the underlying contract between Avalon and Mid-Atlantic and, therefore, the additional insured provision was not triggered as to Avalon. Regarding Mid-Atlantic's argument that it is entitled to coverage as an additional insured, Utica rebukes that contention by arguing that the additional insured provision was not triggered. In that regard, Utica argues that Exhibit J to the contract, which required Mid-Atlantic be named as an additional insured and which Mid-Atlantic argues was incorporated by reference into the contract, was not sufficiently incorporated into the contract. Utica argues that the exhibit was not sufficiently identified nor was there sufficient knowledge or assent to same and, accordingly, it is not enforceable by way of incorporation by reference. Quinn, supra, 410 N.J. Super. at 533.

DISCUSSION

I. The Summary Judgment Standard

Motions for summary judgment are governed by Rule 4:46-2, which provides that summary judgment should be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." R. 4:46-2. In Brill, the Supreme Court explained that in determining whether a genuine issue of material fact exists, the question is whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Brill explained that "[c]redibility determinations will continue to be made by a jury and not the judge," but "when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Ibid. (citations and internal quotation marks omitted).

II. Analysis

A. Is Mid-Atlantic Entitled to Indemnification for its Own Negligence?

Indemnity contracts are interpreted in accordance with the rules governing the construction of contracts generally. Ramos v. Browning Ferris Industries, Inc., 103 N.J. 177, 191-92 (1986). The fundamental rules of contract construction require that the plain language of a contract first be examined to determine the parties intent as evidenced by the contracts purpose and surrounding circumstances. State Troopers Fraternal Ass'n v. New Jersey, 149 N.J. 38, 47 (1997). In order for an indemnitor to indemnify an indemnitee for the indemnitee's own negligence, New Jersey law requires the intent to do so be set forth unequivocally. See, e.g., Azurak v. Corporate Property Investors, 175 N.J. 110 (2003); Mantilla v. Mall Associates, 167 N.J. 262 (2001). When interpreting indemnity clauses, where the plain language is not ascertainable or the meaning of a clause is otherwise ambiguous, the clause must be strictly construed against the indemnitee. Ramos, supra, 103 N.J. at 191.

Growing Carpentry cites to an Appellate Division case, Meder v. Resorts Int'l Hotel, 240 N.J. Super. 470 (App. Div. 1989) in support of its argument that inconsistent indemnification provisions in a contract result in no indemnification for the indemnitee's own negligence. In Meder, the general contractor and subcontractor of a construction project had multiple contract documents which included three indemnification provisions. The three provisions all clearly provided that the indemnitee be indemnified for the indemnitor's negligence; however, the question became whether any of the provisions provided indemnification for the indemnitee's own negligence. The first provision stated, in pertinent part:

> Contractor further agrees to indemnify Owner and save it harmless from and against any and all claims, actions, damages, liability and expense in connection with loss of life, personal injury or damage to property occurring in or about or arising out of the performance of this contract or occasioned wholly or in part by any act or omission of Contractor, its subcontractors, agents or employees. In case Owner shall be made a party to any litigation commenced by or against Contractor, its subcontractors, agents, or employees, then Contractor shall protect and hold Owner harmless and shall pay all costs, expense and reasonable attorneys' fees incurred or paid by Owner in connection with such litigation provided Owner is not found liable to Contractor in any such litigation.

The second provision stated:

> Contractor agrees to indemnify and hold Owner harmless from liability for any and all losses, claims, damages, expenses and causes of action of every nature whatsoever which may arise out of, or in connection with Contractor's performance under this Purchase Order and which are caused by any act or omission of Contractor or its subcontractors, their servants, agents or employees.

Finally, the third indemnification provision stated:

> The Contractor shall assume the entire responsibility and liability for losses, expenses, demands and claims in connection with or arising out of any injury, or alleged injury, including death or death resulting therefrom . . ., to any person or damage or alleged damage, to property of the Owner or other sustained or alleged to have been sustained in connection with or to have arisen out of or resulting directly or indirectly from the performance of the work by the Contractor, his subcontractors, agents and employees, including losses, expenses or damages sustained by Owner, and agrees to indemnify and hold harmless Owner, his agents and employees from any and all such losses, expenses, damages, demands and claims and agrees to defend any suit or action brought against

> them, or any of them, based on any such alleged injury or damage, and to pay all damages, costs and expenses in connection therewith or resulting therefrom. . . .

The Appellate Division squarely identified the issue as "whether these provisions should be construed to indemnify [the indemnitee] against losses resulting from its own negligence." Meder, supra, 240 N.J. Super. at 478. The court concluded that the provisions do not unequivocally express such an intention and, therefore, the indemnitee was not entitled to indemnification for its own negligence. Id. at 479. In coming to its conclusion, the Meder court recognized that the first provision provides "somewhat more support" for the argument that the indemnitee is entitled to indemnification for its own negligence than the other two provisions. However, the court explained, "if there is any arguable clarity [that the first provision provides indemnification for the indemnitee's own negligence] it quickly dissipates when that language is read, as it must be, in conjunction with the quite different language of [the second provision] and [the third provision]. Ibid.

Thus, contrary to Growing Carpentry's argument, Meder did not involve a situation where there were "conflicting" indemnity provisions in the contract. Rather, the precise issue in Meder was whether any of the three indemnity provisions, read separately or together, expressed an unequivocal intent that Meder had assumed the contractual obligation to indemnify Resorts for its own negligence. The court concluded that the contractual provisions did not unequivocally express that intention and noted that its interpretation was "supported by the principle that ambiguities in an indemnification agreement are to be strictly construed against the indemnitee." Meder, supra, 240 N.J. Super. at 480; citing Ramos v. Browning Ferris Industries, Inc., 103 N.J. 177, 191 (1986).

In this case, in contrast, Section 5.6(b) of the Growing Carpentry/Mid-Atlantic contract states explicitly that Growing Carpentry must indemnify Mid-Atlantic, "regardless of whether

such claim is caused in whole or in part by any act or omission of [Growing Carpentry], or its employees or agents or any other person ***and regardless of whether it is caused in whole or in part by [Mid-Atlantic]***" (emphasis added). This language, the court finds, satisfies the requirements set forth in Azurak in order to require Growing Carpentry to indemnify Mid-Atlantic for its own negligence. See, Sayles v. G&G Hotels, Inc., 429 N.J. Super. 266 (App. Div. 2013) (holding indemnification provision that required indemnification "when the active or passive negligence of [the indemnitee] is alleged or proven" to satisfy Azurak because it "expressly includes" the indemnitee's own negligence in the provision).

Although the other indemnity provision, Section 2.14, does not likewise unequivocally express the intention that Mid-Atlantic is entitled to indemnification for its own negligence, the court does not find the two indemnity provisions to be in conflict. Rather, Section 2.14 is merely silent as to whether Mid-Atlantic is to be indemnified for its own negligence. Meder, as stated, did not cite "inconsistency" among the three indemnity provisions as the basis for its decision; rather the court held that none of the provisions, read separately or together, evinced the unequivocal intent to assume liability for Resorts' own negligence. In this case, because Section 5.6(b) clearly evinces such an intent, the court holds that Growing Carpentry agreed pursuant to the contract to indemnify Mid-Atlantic for its own negligence.

B. Is Mid-Atlantic Entitled to Coverage as an Additional Insured Under Utica's Policy?

Mid-Atlantic also argues that it is entitled to coverage as an additional insured under Growing Carpentry's commercial liability insurance policy, issued by Utica. Again, the "Insurance" section in the subcontractor agreement states, in pertinent part:

> Contractor [Mid-Atlantic] shall not be liable for any loss or casualty incurred or caused by Subcontractor [Growing Carpentry]. ***Subcontractor shall, at its own expense, procure and maintain the insurance set forth in Exhibit J until completion and final***

> ***acceptance of the work by Contractor*** . . . The insurance requirements shall not limit Subcontractor's obligations under the Agreement or Subcontractor's indemnification, warranty obligations or other liability in any manner. (emphasis added).

Exhibit J, the attachment referenced in the provision, is an "Insurance Checklist," which provides:

> 1. Certificate Holder must be in the name of Mid Atlantic Framing LLC, its Affiliates and subsidiaries;
> 2. General Liability and Umbrella Liability, $1,000,000 each occurrence/$2,000,000 aggregate; with Additional Insured endorsement naming Mid Atlantic Framing LLC and its Affiliates and Subsidiaries as additional insured for General Liability;
> 3. Pursuant to paragraph 3(k), the "Subcontractor's policy will be considered primary and non-contributory to Contractor's insurance."

The Utica Certificate of Liability Insurance does indeed name Mid-Atlantic as an additional insured under the Utica policy. Nonetheless, Utica is refusing to provide a defense or indemnity to Mid-Atlantic. In that regard, Utica contends that the additional insured endorsement was not triggered as there is no contract specifically requiring it to name Mid-Atlantic as an additional insured. Utica relies on a section of the Master Subcontract agreement that states, in pertinent part:

> Insured also includes:
>
> e. Any person or organization whom you [Growing Carpentry] are required to name as an additional insured on this policy under a written contract or Agreement.
>
> The written contract or agreement must be:
>
> (3) Currently in effect or becoming effective during the terms of this policy; and
> (4) Executed prior to the "bodily injury," "property damage," "personal injury," or "advertising injury."

Utica has taken the position that there is no written contract or agreement that requires Growing Carpentry to name Mid-Atlantic as an additional insured. In that regard, Utica avers that an exhibit purportedly incorporated by reference into the subcontractor agreement is not sufficiently

incorporated and, accordingly, there are no enforceable agreements to include Mid-Atlantic as an additional insured under its policy.

In order for there to be a proper and enforceable incorporation by reference of a separate document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had "knowledge of and assented to the incorporated terms." Quinn, supra, 410 N.J. Super. at 983. For example, in Quinn, the Appellate Division held that a retainer agreement did not sufficiently incorporate by reference a "master retainer" which was at issue. The court noted that the retainer agreement,

> merely states that the client will be bound "by our standard billing practices and firm policies." This reference is in no way specific or identifiable such that the [firm's] practices and policies "may be ascertained beyond doubt." The reference contained no document dates or an identifiable publication number . . . moreover, there is no indication that the terms of the proposed incorporated document were known or assented by defendants. To the contrary, it is without dispute that defendants were not shown and did not see the document until the fall of 2006. Id.

In contrast, in this case, the insurance provision in the subcontract agreement includes a very clear reference to "Exhibit J" ("Subcontractor shall, at its own expense, procure and maintain the insurance set forth in Exhibit J until completion and final acceptance of the work by Contractor"). The court is unpersuaded by Utica's arguments that it is unclear whether the referenced exhibit was the "proper" Exhibit "J" or whether the exhibit was amended or altered. The insurance provision clearly cites to an exhibit by alphabetic letter, and, as is to be expected, the referenced exhibit sets forth certain specific insurance requirements. Accordingly, the court finds that the exhibit is sufficiently referenced to and identified in the subcontractor agreement.

Utica also argues that there is no evidence that Growing Carpentry possessed knowledge of Exhibit J or that they assented to its terms. The court finds this argument unavailing as it is Utica, not Growing Carpentry, making an argument as to Growing Carpentry's personal

knowledge. Utica's self-serving statements concerning Growing Carpentry's personal knowledge, in the absence of any showing by Growing Carpentry to support same, is insufficient to raise a genuine issue of fact. Moreover, Utica fails to support its contention that evidence of testimony, a signature, or initials indicating assent to Exhibit J's terms is required. In sum, the clear reference to Exhibit J in the insurance provision and the absence of any evidence to show that Growing Carpentry did not either acknowledge or assent to its terms, satisfy the court that Exhibit J was sufficiently incorporated by reference into the subcontractor agreement. Moreover, and contrary to Utica's speculative arguments, the subcontractor agreement and insurance policy were both executed and in effect prior to Plaintiff's bodily injury. As the proofs clearly show, the subcontractor agreement has an effective date of January 12, 2012, the Utica policy's coverage period was from July 14, 2011 until July 14, 2012, and Plaintiff's injury occurred on June 1, 2012. Accordingly, the triggering requirements under Utica's policy are satisfied and Mid-Atlantic is entitled to insurance coverage from Utica as an additional insured. That is so because there are allegations made against Mid-Atlantic that are expressly covered as losses in the Utica policy, which, as discussed, have been triggered as to Mid-Atlantic. See L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 490 (App. Div. 2004) (holding that an insurer's duty to defend an action is determined by whether the allegations set forth in the pleadings fall within the purview of the policy language).

C. Can the Court Determine Mid-Atlantic's Entitlement to Indemnity Prior to an Allocation of Liability at Trial?

Finally, the parties dispute the extent to which the "sole negligence" limitation in the additional insured endorsement affects the indemnity coverage afforded to Mid-Atlantic. The limitation in the additional insured endorsement states, in pertinent part:

The insurance provided the additional insured is limited as follows:

(3) That the person or organization is only an additional insured with respect to liability arising out of:

A. Your Work for that additional insured for or by you

. . . (5) The insurance provided the additional insured does not apply to liability arising out of the sole negligence of the additional insured.

Utica is correct in its assertion that it is premature for the court to declare the scope of indemnity coverage afforded to Mid-Atlantic as an additional insured. Although the court has determined that the additional insured endorsement has been triggered, requiring Utica to assume Mid-Atlantic's defense, it cannot be determined whether Mid-Atlantic must be indemnified as an additional insured until its liability for the underlying claim has been decided at trial. In that regard, there is no differentiation under the endorsement between what constitutes a covered loss for purposes of defense, and what constitutes a covered loss for purposes of indemnity. The only distinction between the trigger of a defense obligation and the trigger of an indemnity obligation is that the former arises based solely on the allegations in the Complaint, whereas the latter arises if Plaintiff will be able to prove at trial whether the incident in the underlying lawsuit was caused, at least in part, by the acts or omissions of the named insured and/or another defendant.

It should be noted that there is nothing in the endorsement that would require a specific allocation of liability, percentage-wise, against Growing Carpentry, in order for Mid-Atlantic to demand indemnity. Cf. Essex Ins. Co. v. Newark Builders, Inc., 2015 N.J.Super. Unpub. LEXIS 1165 (App. Div. 2015) (finding named insured owed additional insured indemnity coverage even though the jury allocated 70% responsibility for the accident against the additional insured, finding that the policy did not specify that in order to receive coverage, an additional insured must be less liable than the primary insured). Accordingly, if Growing Carpentry is found to be

1% responsible for the incident, Mid-Atlantic will be entitled to full indemnification pursuant to the endorsement. Conversely, if Mid-Atlantic is found to be 100% liable, then Mid-Atlantic will not be entitled to indemnification at all.

D. Is Avalon Entitled to Contractual Indemnification from Growing Carpentry?

Avalon argues that it is entitled to contractual indemnification from Growing Carpentry because Mid-Atlantic's indemnification obligations in favor of Avalon set forth in the Master Agreement were incorporated by reference into the subcontractor agreement, such that Growing Carpentry owes said obligations to Avalon.

In opposition, Growing Carpentry argues that it is not required to provide indemnity to Avalon for Avalon's own negligence. Growing Carpentry argues that the language in the Master Agreement and in the subcontractor agreement does not explicitly provide for indemnification for Avalon's own negligence and therefore does not satisfy the requirements set forth in Azurak. Additionally, Growing Carpentry notes that in the Master Agreement there is a provision that states that no other agreements shall bind the parties and yet Avalon now contends that it is bound to the agreement between Mid-Atlantic and Growing Carpentry. Furthermore, Growing Carpentry argues that granting summary judgment is premature at this stage because it is not known how a jury will allocate liability for Plaintiff's underlying accident. Should the jury find Avalon 100% negligent, Growing Carpentry avers that no party could legally indemnify Avalon pursuant to N.J.S.A. 2A:40A-1, which states that clauses in construction contracts purporting to provide indemnification for an indemnitee's sole negligence are void and unenforceable. Finally, Growing Carpentry notes that it did not enter into an agreement with Avalon and no proofs have been presented to show that Growing Carpentry received a copy of the Master Agreement prior to executing its subcontractor agreement with Mid-Atlantic. Accordingly,

Growing Carpentry argues that it cannot owe any duties or obligation to Avalon as it is not in privity with Avalon and because it never acknowledged or accepted any contract which requires same.

In reply to Growing Carpentry's opposition, Third-Party Plaintiffs argue that Section 1.1 of the subcontractor agreement clearly requires that Growing Carpentry "step in the shoes" of Mid-Atlantic with regard to Mid-Atlantic's obligations owed to Avalon under the Master Agreement. Thus, Third-Party Plaintiffs aver, one must look to the Master Agreement to determine Growing Carpentry's indemnification obligations, specifically Section 34 titled "Indemnification." Paragraph 34.1 under the Section states, in pertinent part:

> Contractor [Mid-Atlantic] shall defend, indemnify and save harmless OWNER [Avalon] including its officers, directors, agents, employees, affiliates, parents and subsidiaries, and any other entities required to be indemnified by [Avalon] under the Contract Documents, and each of them of and from any and all claims, demands, allegations, causes of action in law or in equity, damages, penalties, costs, expenses, actual attorneys' fees, experts' fees, consultations; fees, judgments, losses or liabilities, or every kind and nature whatsoever, including, without limitation damages from personal injury, bodily injury, emotional injury, sickness or disease, or death to persons . . . arising out of or in any way connected with or incidental to, the performance of the Work or any of the obligations contained in this Contract.

Importantly, Paragraph 34.3 under the indemnification section goes on to state:

> It is expressly acknowledged and agreed that each of the obligations set forth in Section 34 above are independent, that each shall be given effect, and that each shall apply ***despite any acts or omissions, misconduct or negligent conduct, whether active or passive, on the part of OWNER [Avalon], or other indemnitees***; provided, however, that the duty to indemnify or hold harmless OWNER [Avalon], or other indemnitees shall not apply to Losses caused by the sole negligence or willful misconduct of OWNER [Avalon], or other Indemnitees or their agents, servants or persons for whom the Indemnitee is legally responsible, or for defects in design furnished by such persons . . . (emphasis added).

The language in the indemnification section, specifically under Paragraph 34.3, unequivocally provides that Mid-Atlantic must indemnify Avalon for Avalon's own negligence.

Again, Third-Party Plaintiffs urge that Growing Carpentry must step into the shoes of Mid-Atlantic pursuant to Section 1.1 of the subcontractor agreement, creating direct rights of indemnity and coverage on the part, not only of Mid-Atlantic, but also to Avalon. That provision states, in pertinent part:

> . . . Subcontractor [Growing Carpentry] agrees that the Work includes . . . (iii) the contract between Contractor [Mid-Atlantic] and the Owner [Avalon] ('Master Agreement'). The Plans and Master Agreement are, by this reference, incorporated in this Agreement as if set forth at length here in full. ***All obligations of the Contractor to Owner under the Master Agreement shall be the obligations of the Subcontractor to the Contractor under this Agreement*** . . . To the extent Contractor is held liable to the owner for damages, as a result of Subcontractor's acts or omissions, Subcontractor shall be liable to Contractor for such damages. (emphasis added).

This provision clearly creates a duty by Growing Carpentry to provide to Mid-Atlantic the same obligations, including the duty to provide similar defense and indemnity and coverage, as Mid-Atlantic owes to Avalon. Contrary to Plaintiff's arguments, and even assuming arguendo that Growing Carpentry had an opportunity to review the Master Agreement, there is nothing in the provision that expressly create any obligations from Growing Carpentry to Avalon. Plaintiff's argument is further undercut by the specification that if Mid-Atlantic is required to indemnify Avalon for damages sustained as a result of Growing Carpentry's negligence, then Growing Carpentry is obliged to compensate Mid-Atlantic for any damages paid by Mid-Atlantic to Avalon that is attributable to Growing Carpentry's negligence. The court finds that the import of this language is clear and unambiguous, and contrary to any conclusion that Growing Carpentry owes any direct duty to defend and/or indemnify to Avalon, either contractually or as an additional insured.

CONCLUSION

In conclusion, for the foregoing reasons, Third-Party Plaintiffs' motion for summary judgment is granted in part and denied in part as follows: (1) Third-Party Plaintiff Mid-Atlantic is entitled to coverage under the Utica policy as an additional insured; (2) Third-Party Defendant Growing Carpentry must provide a defense to Mid-Atlantic in Plaintiff's underlying action and reimburse all costs and fees incurred in Mid-Atlantic's defense to date; (3) Third-Party Defendant Growing Carpentry must indemnify Mid-Atlantic for Mid-Atlantic's own negligence, unless Mid-Atlantic is found to be 100% liable for the underlying accident; (4) Growing Carpentry is not required to indemnify or defend Avalon in the underlying action; (5) Avalon is not entitled to coverage as an additional insured under the Utica policy.