UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-20623-CIV-ALTONAGA/Goodman

GREAT LAKES INSURANCE SE,

Plaintiff/Counter-Defendant,

v.

BOAT RENTAL MIAMI, INC.; *et al.*,

Defendants/Counter-Plaintiffs.
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ORDER

THIS CAUSE came before the Court on Plaintiff/Counter-Defendant, Great Lakes Insurance SE's Motion for Summary Judgment [ECF No. 104], filed February 17, 2020, and Defendants/Counter-Plaintiffs, Boat Rental Miami, Inc. ("BRM") and Miami Boat Rental, Inc.'s ("MBR['s]") (together, "Counter-Plaintiffs['']") Motion for Summary Judgment [ECF No. 106], filed February 18, 2020.[1] Counter-Plaintiffs filed a Memorandum of Law in Opposition [ECF No. 113] to Great Lakes's Motion, to which Great Lakes filed a Reply [ECF No. 116]; and Great Lakes filed a Response in Opposition [ECF No. 115] to Counter-Plaintiffs' Motion, to which Counter-Plaintiffs filed a Reply [ECF No. 119]. The Court has carefully considered the Fifth Amended Complaint ("FAC") [ECF No. 98], Counter-Plaintiffs' Third Amended Counter-Claim [ECF No. 100], the parties' written submissions,[2] the record, and applicable law. For the following reasons, Great Lakes's Motion is granted, and Counter-Plaintiffs' Motion is denied.

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[1] The Court declines Great Lakes's invitation to deny Counter-Plaintiffs' Motion as untimely (*see* Great Lakes's Resp. [ECF No. 115] 8–9), as the Court accepted Counter-Plaintiffs' Motion and Statement of Material Facts as timely filed (*see* Mar. 11, 2020 Order [ECF No. 120]).

[2] The parties' factual submissions include: Great Lakes's Statement of Material Facts ("Great Lakes's Facts") [ECF No. 103]; Counter-Plaintiffs' Response to Great Lakes's Statement of Material Facts ("Counter-Pls.' Resp. Facts") [ECF No. 112]; Great Lakes's Reply to Counter-Plaintiffs' Counter-

I. BACKGROUND

This is an insurance coverage dispute concerning Great Lakes's duty to defend and indemnify Counter-Plaintiffs in a state-court personal injury lawsuit filed by Defendant, Claudia Baerlin-Gallegos. (*See generally* FAC). Great Lakes is a German corporation. (*See* FAC ¶ 6). Counter-Plaintiffs are Florida corporations. (*See* Third Am. Countercl. ¶¶ 1–2). Counter-Plaintiffs are wholly owned by Edgardo Velez. (*See* Great Lakes's Facts ¶ 4). Baerlin-Gallegos is domiciled in Miami Beach and is a citizen of Florida. (*See* FAC ¶ 9).

Counter-Plaintiffs operate a boat rental business at Miamarina at Bayside in downtown Miami. (*See* Great Lakes's Facts ¶¶ 2–3). To reach the boats, passengers "walk alongside a wooden dock, then down a set of steps leading to a floating dock where vessels are moored." (*Id.* ¶ 23). Velez owns the steps and floating dock. (*See id.* ¶ 24; *id.*, Ex. G, Velez Dep. [ECF No. 103-7] 14,[3] 13:6–7 ("Q. Who purchased the steps or dock piece? A. I purchased both.")).[4]

A. Baerlin-Gallegos's Personal Injury Lawsuit

On July 2, 2017, Baerlin-Gallegos and a group of friends rented boats from MBR. (*See* Counter-Pls.' Facts ¶ 2). "The group was large enough to require two boats" (*id.* ¶ 3), and the boat Baerlin-Gallegos was on was owned by BRM (*see id.* ¶ 5). The boat was tied at the end of the floating dock. (*See id.* ¶ 4). To reach the boat, Baerlin-Gallegos walked down a set of steps, which

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Statement of Material Facts ("Great Lakes's Reply Facts") [ECF No. 117]; Counter-Plaintiffs' Statement of Material Facts ("Counter-Pls.' Facts") [ECF No. 105]; and Great Lakes's Counter-Statement of Material Facts ("Great Lakes's Resp. Facts") [ECF No. 114].

[3] The Court relies on the pagination generated by the CM/ECF database, which appears in the headers of all court filings.

[4] Great Lakes states "BRM designed, purchased and installed the floating docks and marine stairs," citing in part Velez's deposition transcript. (Great Lakes's Facts ¶ 24). Counter-Plaintiffs "do not agree to the accuracy of this statement as written" and state "[t]he deposition testimony speaks for itself." (Counter-Pls.' Resp. Facts ¶ 24 (alteration added)).

was attached to a wooden platform leading to the floating dock. (*See id.* ¶ 6; *see also* Great Lakes's Facts ¶ 23). Baerlin-Gallegos tripped and fell "[a]t the base of the platform," allegedly breaking her foot.[5] (Counter-Pls.' Facts ¶ 10 (alteration added)).

On September 22, 2017, Baerlin-Gallegos sued BRM for personal injuries in state court. (*See generally* Compl. for Personal Injury [ECF No. 1-5]). On May 1, 2019, Baerlin-Gallegos filed an Amended Complaint for Personal Injury ("State Court Complaint") [ECF No. 105-2], adding MBR as a defendant. (*See generally id.*).

In the State Court Complaint, Baerlin-Gallegos alleges she "suffered injury to her left foot after falling while boarding the boat rented from [Counter-Plaintiffs] on July 2, 2017, at the Miamarina at Bayside . . . ." (*Id.* ¶ 10 (alterations added)). Counter-Plaintiffs "provided the boat, controlled access to the dock where the boat was moored, and provided access to [Baerlin-Gallegos] to the floating dock[] and boat where she was injured." (*Id.* ¶ 11 (alterations added)). According to Baerlin-Gallegos, "[h]ad it not been for [Counter-Plaintiffs'] ownership and operation of the boat[,] no one would have had any reason to use the stairs and floating dock." (*Id.* ¶ 12 (alterations added)).

Baerlin-Gallegos alleges she "proceeded to board the boat by way of the floating dock stairs" and "[o]n the last step of the stairs [her] foot slipped, which caused her to suffer a fracture."[6] (*Id.* ¶ 13 (alterations added)). She alleges Counter-Plaintiffs "did not warn [her] that the stairs

[5] Great Lakes states Baerlin-Gallegos "tripped and fell on the set of stairs" leading to the floating dock. (Great Lakes's Facts ¶ 40). Counter-Plaintiffs "disagree[] with this statement," insisting "she fell on the floating dock, not on the stairs." (Counter-Pls.' Resp. Facts ¶ 40 (alteration added)). The Court relies on Counter-Plaintiffs' characterization of Baerlin-Gallegos's fall, as Great Lakes does not dispute it. (*See* Counter-Pls.' Facts ¶ 10; Great Lakes's Resp. Facts ¶ 10).

[6] As noted, Counter-Plaintiffs disagree with this characterization. Counter-Plaintiffs state "[a]lthough Ms. Baerlin-Gallegos did plead that she fell on the stairs, both her testimony and that of others supports the fact that she fell on the floating dock, not on the stairs." (Counter-Pls.' Resp. Facts ¶ 40 (alteration added)).

moved, were slippery, were wet, did not have proper railings, and were of uneven height." (*Id.* ¶ 12 (alteration added)). Baerlin-Gallegos alleges that after she fell, she "proceeded to crawl on to the boat and was not offered by assistance by [Counter-Plaintiffs]." (*Id.* ¶ 13 (alteration added)). She states her "injury may have been exacerbated and aggravated further on the boat, because [she] was not afforded medical treatment she needed; and without having been rendered such care may have aggravated [the injury] while on the boat." (*Id.* ¶ 14 (alterations added)).

Baerlin-Gallegos states two negligence claims under federal maritime law and state law respectively, alleging Counter-Plaintiffs breached their duty to her by failing to (1) warn her of dangers associated with boarding the boat; (2) provide her with a reasonably safe means of boarding the boat; (3) assist her in boarding the boat; and (4) give her medical care after she was injured. (*See id.* ¶¶ 15–40). Great Lakes provided a defense in Baerlin-Gallegos's suit and has continued to defend, raising a reservation of rights at around the time it brought this declaratory judgment action. (*See* Counter-Pls' Mot. 4 & n. 7).

B. The Insurance Policies

Great Lakes issued an insurance policy to MBR providing Hull and Machinery and Third Party Liability coverage from October 11, 2016 through October 11, 2017.[7] (*See* Great Lakes's Facts ¶ 1; Counter-Pls.' Facts ¶ 14; *id.*, Ex. C, Fleet Policy and Endorsement ("Fleet Policy") [ECF No. 105-3]). Regarding third-party liability, the Fleet Policy states: "[W]e provide coverage for any sum or sums which you or any other covered person become legally liable to pay and shall pay as a result of ownership or operation of [the] Scheduled Vessel." (Fleet Policy 7 (alterations

[7] The parties stipulated BRM is an additional insured under the Policy issued to MBR for purposes of this action and Baerlin-Gallegos's lawsuit. (*See* Great Lakes's Facts ¶ 16).

added)). The boat at issue in Baerlin-Gallegos's lawsuit was scheduled on the Fleet Policy. (*See* Great Lakes's Facts ¶ 14).

MBR's boat rental business was previously insured by a "standard commercial general liability policy" issued by First Flight Insurance Group. (Counter-Pls.' Facts ¶ 17). Great Lakes underwrote the Fleet Policy "knowing it was insuring a boat rental operation and having seen the prior policy." (Counter-Pls.' Mot. 11). Regarding third-party liability, the First Flight policy provided: "This insurance only applies to bodily injury, property damage, personal injury, advertising injury, and medical expenses arising out of the ownership, maintenance or use of the premises shown in the Schedule and operations necessary, or incidental to, those premises and operations." (Great Lakes's Facts, Ex. C, First Flight Policy [ECF No. 103-3] 13 (internal quotation marks omitted)). The First Flight policy lists the location of the boat rental business at 401 Biscayne Boulevard, Slip 28, as the insured premises. (*See id.*; Great Lakes's Facts ¶ 10). The parties agree Baerlin-Gallegos's claims would have been covered by the First Flight policy. (*See* Great Lakes's Facts ¶ 12).

C. Great Lakes's Coverage Lawsuit

Great Lakes initiated this action on February 18, 2019 (*see generally* Compl. [ECF No. 1]), filing its Fifth Amended Complaint on February 10, 2020 against Counter-Plaintiffs and Baerlin-Gallegos (*see generally* FAC). Great Lakes seeks a declaration that it does not have a duty to defend or indemnify Counter-Plaintiffs in Baerlin-Gallegos's lawsuit under the Fleet Policy. (*See* FAC ¶¶ 29–39). On February 10, 2020, Counter-Plaintiffs filed a Third Amended Counterclaim, seeking a contrary declaration that the Fleet Policy does impose on Great Lakes a duty to defend and indemnify them in Baerlin-Gallegos's lawsuit. (*See* Third Am. Countercl. ¶¶ 18–42). The parties' competing motions for summary judgment ask the Court to determine whether Great Lakes

has a continuing duty to defend and indemnify Counter-Plaintiffs against the claims brought by Baerlin-Gallegos in the state case.

II. LEGAL STANDARD

Summary judgment may only be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a), (c). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" if the evidence could lead a reasonable jury to find for the non-moving party. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court draws all reasonable inferences in favor of the party opposing summary judgment. *See Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000).

If the non-moving party bears the burden of proof at trial, the moving party may obtain summary judgment simply by: (1) establishing the nonexistence of a genuine issue of material fact as to any essential element of a non-moving party's claim, and (2) showing the Court there is insufficient evidence to support the non-moving party's case. *See Blackhawk Yachting, LLC v. Tognum Am., Inc.*, No. 12-14209-Civ, 2015 WL 11176299, at *2 (S.D. Fla. June 30, 2015) (citations omitted). "Once the moving party discharges its initial burden, a non-moving party who bears the burden of proof must cite to . . . materials in the record or show that the materials cited do not establish the absence or presence of a genuine dispute." *Id.* (citing Fed. R. Civ. P. 56(c)(1); alteration added; internal quotation marks omitted).

"Summary judgment may be inappropriate even where the parties agree on the basic facts [] but disagree about the inferences that should be drawn from these facts." *Whelan v. Royal*

Caribbean Cruises Ltd., No. 1:12-cv-22481, 2013 WL 5583970, at *2 (S.D. Fla. Aug. 14, 2013) (alteration added; citation omitted). Where "reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment" and proceed to trial. *Id.* (citations omitted).

III. DISCUSSION

The issue both motions raise is whether the Fleet Policy's third-party liability provision covers Baerlin-Gallegos's claims. As stated, under the Fleet Policy, the insurer "provide[s] coverage for any sum or sums which you or any other covered person become legally liable to pay and shall pay as a result of ownership or operation of [the] Scheduled Vessel." (Fleet Policy 7 (alterations added)). The Fleet Policy defines "'[o]perate, operation, operating'" as "to navigate or to be in physical control of or to be at the helm of the Scheduled Vessel." (*Id.* 5 (alteration added)). The parties agree Counter-Plaintiffs are insureds under the Fleet Policy and the boat at issue in Baerlin-Gallegos's lawsuit is scheduled on the Fleet Policy. (*See* Great Lakes's Facts ¶¶ 14, 16). What the parties dispute is whether Baerlin-Gallegos's claims arise as "a result of ownership or operation of [the boat]." (Fleet Policy 7 (alteration added); *see generally* Great Lakes's Mot.; Counter-Pls.' Mot.).

A. New York Insurance Law

Interpretation of Insurance Contract

The parties agree the Fleet Policy is governed by New York law. (*See* Fleet Policy 17; Joint Stipulation [ECF No. 92-1] ¶ 11). Under New York law, the burden is on the insured to establish coverage. *See Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218 (2002) (citations omitted).

"When a dispute arises involving the terms of an insurance contract, New York insurance law provides that an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 42 (2d Cir. 2006) (quotation marks and citations omitted). "In New York, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court.'" *Dish Network Corp. v. Ace Am. Ins. Co.*, No. 16-cv-4011, 2019 WL 7047341, at *5 (S.D.N.Y. Dec. 23, 2019) (citation omitted).

"Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent or where its terms are subject to more than one reasonable interpretation." *Id.* (quotation marks and citation omitted). Yet "provisions in a contract are not ambiguous merely because the parties interpret them differently[.]" *Mount Vernon Fire Ins. Co. v. Creative Hous. Ltd.*, 88 N.Y.2d 347, 352 (1996) (alteration added; citation omitted). "Once a court concludes that an insurance provision is ambiguous, the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract." *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275–76 (2d Cir. 2000) (quotation marks and citations omitted).

The Duty to Defend

"In New York, an insurer's duty to defend is exceedingly broad and distinct from the duty to indemnify. . . . The duty to defend is measured against the allegations of pleadings[,] but the duty to pay is determined by the actual basis for the insured's liability to a third person." *Euchner-USA, Inc. v. Hartford Cas. Ins. Co.*, 754 F.3d 136, 140 (2d Cir. 2014) (alterations added; quotation marks and citations omitted).

The duty to defend "remains even though facts outside the four corners of the pleadings indicate that the claim may be meritless or not covered[.]" *Auto. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006) (first alteration adopted; other alteration added; quotation marks and citation omitted). "An insurer, however, has no duty to defend where there are no circumstances under which it would be required to indemnify the insured for any damages for which the insured might be found liable in the underlying action. Thus[,] if an insurer can demonstrate as a matter of law that the allegations of the underlying complaint do not bring the claim within the coverage afforded by the policy, the insurer has no duty to defend." *Avondale Indus., Inc. v. Travelers Indem. Co.*, 774 F. Supp. 1416, 1424 (S.D.N.Y. 1991) (alteration added; citations omitted).

"[W]hile it is true that a court should be hesitant to leave the boundaries of the complaint in making its determination on an insured's duty to defend, . . . it need not ignore positive proof, extrinsic to the complaint, that assists in clarifying an ambiguous allegation[.]" *Town of Moreau v. Orkin Exterminating Co.*, 165 A.D.2d 415, 418 (3d Dep't 1991) (alterations added; citations omitted). Nevertheless, "the extrinsic evidence relied upon may not overlap with the facts at issue in the underlying case[.]" *United States Underwriters Ins. Co. v. Image By J & K, LLC*, 335 F. Supp. 3d 321, 331 (E.D.N.Y. 2018) (alteration added).

The Duty to Indemnify

Regarding the duty to indemnify, "[i]t is [] well settled that because the duty to defend is broader than the duty to indemnify, a finding by a court that there is no duty to defend automatically means that there is no duty to indemnify." *State of N.Y. v. Blank*, 745 F. Supp. 841, 844 (N.D.N.Y. 1990) (alterations added; citation omitted); *see also Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39, 42 (2d Cir. 1991) (holding the district court correctly granted summary judgment to the insurer on the issue of its duty to defend and stating "[s]ince there is no duty to

defend, there also is no corresponding duty to indemnify" (alteration added)); *EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co.*, 905 F.2d 8, 11 (2d Cir. 1990) ("Initially we note that the duty to defend is broader than the duty to indemnify. Thus, it is unnecessary to engage in a separate analysis of [one insurer's] independent claim that it has no duty to indemnify apart from both insurers' claims that they have no obligation to defend." (alteration added; citations omitted)).

B. The Competing Motions

Great Lakes argues Baerlin-Gallegos's claims are not covered by the Fleet Policy, so it has no duty to defend or indemnify Counter-Plaintiffs. (*See generally* Great Lakes's Mot.). Great Lakes contends Counter-Plaintiffs were not "operating" the vessel at the time of Baerlin-Gallegos's injury, and her injury was not "a result of" the vessel. (*Id.* 11–18). Counter-Plaintiffs argue Great Lakes has a duty to defend and indemnify them in Baerlin-Gallegos's lawsuit. (*See generally* Counter-Pls.' Mot.). Counter-Plaintiffs assert the Fleet Policy clearly covers Baerlin-Gallegos's claims based on the allegations in the State Court Complaint, particularly allegations the injury may have been exacerbated and aggravated further on the boat. (*See id.* 10–13).

The correctness of Great Lakes's position turns on whether it can show Baerlin-Gallegos's claims are not *a result of* the ownership or operation of the vessel.[8] Great Lakes maintains the language of the Fleet Policy is not ambiguous[9] and urges the Court to apply a three-part test under

[8] The parties dispute whether Counter-Plaintiffs were "operating" the boat at all. Great Lakes explains Counter-Plaintiffs were not navigating or in physical control of the vessel in accordance with the Fleet Policy's definition of "operating." (Great Lakes's Mot. 11–12). Counter-Plaintiffs insist MBR was in physical control of the vessel when Baerlin-Gallegos fell because "[t]he vessel was tied to a private dock only accessible to MBR's staff and customers, and MBR's staff supervised the movement of the customers to the boats while they were boarding, gave them safety instructions, and untied the lines to cast them off." (Counter-Pls.' Opp'n 12 (alteration added)). As discussed in this Order, even if Counter-Plaintiffs were operating the boat at the time of Baerlin-Gallegos's fall, Baerlin-Gallegos's injury, including the allegation it "may have been exacerbated and aggravated further on the boat," was not a result of the ownership or operation of the boat in accordance with the Fleet Policy.

[9] Counter-Plaintiffs point to evidence of email exchanges regarding procurement of the Fleet Policy to clarify the parties' intent "if the Court believes the [Fleet Policy] language to be ambiguous." (Counter-

New York law, which originated in the context of automobile liability insurance. (*See* Great Lakes's Mot. 12–17). The test provides "an accident has resulted from the use or operation of a covered automobile" when three requirements are met: "1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury[.]" *U.S. Oil Ref. & Mktg. Corp. v. Aetna Cas. & Sur. Co.*, 181 A.D.2d 768, 768–69 (2d Dep't 1992) (alteration added; quotation marks and citations omitted). This test is derived from insurance principles. *See Goetz v. Gen. Acc. Fire & Life Assur. Corp.*, 47 Misc. 2d 67, 68–69 (App. Term 1965) (stating the three-part test was "set[] up" by "Section 4317 of 7 Appleman Insurance Law and Practice" (alteration added)).

Counter-Plaintiffs oppose use of this test. Relying on *Argentina v. Emery World Wide Delivery Corp.*, 93 N.Y.2d 554 (1999), Counter-Plaintiffs state "the basis for the three-prong test . . . is New York's no fault statute and requirements of New York's Vehicle and Traffic Law[,]" which "do not apply to marine insurance policies or boats[.]" (Counter Pls.' Opp'n 14 (alterations added)).

Great Lakes is correct *Argentina* does not counsel against use of the test. (*See* Great Lakes's Reply 8–9). As Great Lakes observes, "[t]he *Argentina* court was not construing insurance coverage." (Great Lakes's Reply 8 (alteration added)). Rather, the court in *Argentina* answered two certified questions about the interpretation of New York's Vehicle and Traffic Law. *See*

Pls.' Opp'n 10 (alteration added)). The Court agrees with Great Lakes the relevant language in the Fleet Policy is not ambiguous. (*See* Great Lakes's Reply 10); *see also Ruge v. Utica First Ins. Co.*, 32 A.D.3d 424, 425–26 (2d Dep't 2006) (finding "no ambiguity as to the plain and ordinary meaning of the auto exclusion" providing the insurer "was not obligated to 'pay for bodily injury, property damage, personal injury or advertising injury that arises out of the ownership, operation, maintenance, use, occupancy, renting, loaning, entrusting, supervision, loading or unloading of an auto'" (alteration adopted)).

Argentina, 93 N.Y.2d at 559–64. The court held that for purposes of liability for a third-party's injuries under the statute, loading and unloading a vehicle constitutes use or operation of the vehicle and the vehicle need not be the proximate cause of the injury. *See id.*

Admittedly, *Argentina* provides "[t]he basis for the three-prong test." (Counter-Pls.' Opp'n 14 (alteration added)). Cases determining insurance coverage have relied on *Argentina* to illustrate when liability results from the use or operation of a vehicle. *See, e.g.*, *Progressive Cas. Ins. Co. v. Yodice*, 276 A.D.2d 540, 542 (2d Dep't 2000) (citing *Argentina* for the proposition "[a]lthough the truck itself need not be the proximate cause of the injury, . . . 'negligence in the use of the vehicle must be shown, and that negligence must be a cause of the injury'" (first and second alteration added; other alteration adopted; citations omitted)). But merely because *Argentina* was interpreting an automobile statute does not mean its reasoning cannot be applied to accidents involving boats. The Court can see no principled or textual reason to treat the insuring provision of an automobile policy differently than a virtually identical insuring provision of a vessel policy. (*See* Great Lakes's Reply 9); *see also Peters v. Firemen's Ins. Co.*, 79 Cal. Rptr. 2d 326, 328 (Ct. App. 1998) ("The standard [for liability coverage] applies with equal force to boats and is not limited solely to motor vehicles. Vehicles and boats are a means of transporting people from one location to another[.]" (alterations added)).

Counter-Plaintiffs provide little guidance as to how the language of the insuring agreement should be interpreted. (*See* Great Lakes's Reply 7). In asserting the Court should not apply the three-part test, Counter-Plaintiffs merely state "the [Fleet Policy] must be considered on its own merits." (Counter-Pls.' Opp'n 15 (alteration added)). Counter-Plaintiffs' arguments, supported by virtually no legal authority, boil down to the proposition that the plain language of the Fleet Policy demonstrates Baerlin-Gallegos's claims are covered. (*See id.* 15–16). The Court agrees

with Great Lakes the test is appropriate to guide the Court's analysis of whether the Fleet Policy covers Baerlin-Gallegos's claims, resulting in a duty to defend and indemnify.

Applying the test, Great Lakes argues Baerlin-Gallegos's injury does not fulfill any of the three prongs. (*See* Great Lakes's Mot. 15–17). Great Lakes explains (1) Baerlin-Gallegos's injury did not arise out of the inherent nature of the boat because her injury "had already been completed before [she] even touched the subject [v]essel" (*id.* 15 (alterations added)); (2) her injury did not arise within the natural territorial limits of the boat because "the dock is an extension of land as a matter of law[] and is otherwise not a part of the [v]essel" (*id.* (alterations added)); and (3) the boat did not itself produce her injury in that it had "nothing to do with" her injury and did not proximately cause or aggravate her injury (*id.* 16–17 (internal quotation marks omitted)).

According to Counter-Plaintiffs, "Great Lakes'[s] arguments that [Baerlin-Gallegos's] injury did not arise out of the inherent nature of the vessel or within the natural territorial limits of the vessel" do not follow "the dictates of the [Fleet Policy]." (Counter-Pls.' Opp'n 15 (alterations added)). Counter-Plaintiffs "do[] not disagree that the inherent nature of the vessel should be considered in understanding the meaning of the policy," but they maintain "the inherent nature of the vessel is as a captained or bareboat charter vessel" and "operation of such a vessel includes boarding the customers onto the boats with their things and informing them about the safety devices on board." (*Id.* (alteration added)). With respect to the "natural territorial limits" prong, Counter-Plaintiffs state the Fleet Policy does not "require a covered loss to happen inside the vessel;" and "[i]f one were to consider the natural and territorial limits of the vessel to include the area within which its expected operations, including boarding, loading and unloading take place, then the floating stairs/dock to which the vessel was tied are within the natural territorial limits of the vessel." (*Id.* (alteration added)). Counter-Plaintiffs do not address the third prong of the test.

The crux of the duty-to-defend inquiry is whether negligent use of the boat is alleged to have contributed to the accident. Later cases have articulated the three-part test as follows: "'the determination of whether an accident has resulted from the use or operation of a covered vehicle requires consideration of whether, *inter alia*, the accident arose out of the inherent nature of the vehicle and whether the vehicle itself produced the injury or, in other words, whether the use of the vehicle was a proximate cause of the injury.'" *Nat'l Cas. Co. v. Am. Safety Cas. Ins. Co.*, 812 F. Supp. 2d 505, 512–13 (S.D.N.Y. 2011) (quoting *Eagle Ins. Co. v. Butts*, 269 A.D.2d 558, 558–59 (2d Dep't 2000)). Although application of the *U.S. Oil* test "where the accident occurs during the loading or unloading of property from a covered vehicle . . . does not require a showing that the vehicle itself produced the injury," "it is insufficient to show merely that the accident occurred during the period of loading or unloading." *Butts*, 269 A.D.2d at 559 (alteration added). Rather, "the accident must be the result of some act or omission related to the use of the vehicle." *Id.* (citation omitted). New York law thus establishes that even when an accident that does not occur on a vehicle still occurs during use or operation of the vehicle, the accident was not *a result of* use or operation of the vehicle if negligent use of the vehicle did not contribute to the accident.

In *Butts*, for example, the plaintiff in the underlying personal injury action was leading a horse from a van down an attached ramp when the horse jumped on the ramp, throwing the plaintiff to the ground. *See id.* at 558. The plaintiff alleged "the accident was caused by [the horse and van owner's] negligent training of the horse." *Id.* (alteration added). The insurer of the van disclaimed coverage. *See id.*

The court determined the injury "did not result from the 'ownership, maintenance or use'" of the van, even though the insurer "concede[d] that the term 'use' in the policy encompassed the activity of loading and unloading the subject van." *Id.* (alteration added). The court found "[t]here

were no allegations that [the owner] used the van negligently or that the condition of the van in any way contributed to the accident." *Id.* at 559 (alterations added).

Similarly, Baerlin-Gallegos makes no allegations in her State Court Complaint regarding negligent use of the boat or how the condition of the boat in some way contributed to her injury. Although the parties dispute whether Baerlin-Gallegos fell on the steps or the floating dock, the four corners of Baerlin-Gallegos's Complaint nevertheless show she did not fall on the boat.[10] (*See* State Ct. Compl. ¶ 13 (alleging Baerlin-Gallegos "proceeded to board the boat by way of the floating dock stairs," and "[o]n the last step of the stairs [her] foot slipped, which caused her to suffer a fracture" (alterations added))).

Baerlin-Gallegos only makes two allegations that arguably relate to the role of the boat in her accident. The first is "[h]ad it not been for [Counter-Plaintiffs'] ownership and operation of the boat no one would have had any reason to use the stairs and floating dock." (*Id.* ¶ 12 (alterations added)). But whether Counter-Plaintiffs' ownership or operation of the boat was a "but-for" cause of Baerlin-Gallegos's injury is not the relevant inquiry; rather, it is whether negligent use of the boat allegedly contributed to her injury.

The second is the allegation Baerlin-Gallegos's injury "may have been exacerbated and aggravated further on the boat, because [she] was not afforded medical treatment she needed; and without having been rendered such care may have aggravated [the injury] while on the boat." (*Id.*

[10] In its application of the three-part test, Great Lakes argues the boat did not itself produce Baerlin-Gallegos's injury, citing to her deposition testimony that the boat did not have anything to do with her accident. (*See* Great Lakes's Mot. 16–17; *see also* Great Lakes's Facts ¶ 45 ("Q: Did the boat itself have anything to do with your fall? A: No[.]" (alteration added))). The Court does not rely on evidence extrinsic to the State Court Complaint to amplify Baerlin-Gallegos's allegations, as the "allegations unambiguously state that [Baerlin-Gallegos] fell on the stairs and/or the dock," and thus the State Court Complaint "on its face" shows her claims "do[] not come within the coverage grant." (Great Lakes's Reply 13 (alterations added; emphasis omitted)).

¶ 14 (alterations added)). But According to Baerlin-Gallegos's factual allegations, any exacerbation of her injury was due to Counter-Plaintiffs' failure to provide her medical care on the boat, not due to their negligent use of the boat. Great Lakes correctly observes "the mere fact that the [v]essel was the situs of her injury is not enough to trigger coverage." (Great Lakes's Reply 14 (alteration added)); *see also United Servs. Auto. Ass'n v. Aetna Cas. & Sur. Co.*, 75 A.D.2d 1022, 1022 (4th Dep't 1980) ("Not every injury occurring in or near a motor vehicle is covered by the phrase "use or operation[.]" (alteration added)).

Baerlin-Gallegos alleges Counter-Plaintiffs were negligent in helping customers board the boat. She alleges Counter-Plaintiffs breached their duty to her by failing to (1) warn her of dangers associated with boarding the boat; (2) provide her with a reasonably safe means of boarding the boat; and (3) assist her in boarding the boat. (*See* State Ct. Compl. ¶¶ 15–40). For example, she states Counter-Plaintiffs "did not warn [her] that the stairs moved, were slippery, were wet, did not have proper railings, and were of uneven height." (*Id.* ¶ 12 (alteration added)).

Counter-Plaintiffs insist Baerlin-Gallegos's injury arose from their operation of the boat because "[t]he operation of such a vessel includes boarding the customers onto the boats with their things." (Counter-Pls.' Opp'n 15 (alteration added)). And so Counter-Plaintiffs assert the Court may "reasonably conclude that the vessel was being operated by MBR at the time of [Baerlin-Gallegos's] fall."[11] (Counter-Pls.' Opp'n 14 (alteration added)). Again, "it is insufficient to show merely that the accident occurred during the period of [boarding]." *Butts*, 269 A.D.2d at 559 (alteration added). Two cases involving ambulette services in similar factual scenarios help elucidate this point.

[11] Counter-Plaintiffs assert *Farmers Home Insurance Co. v. Insurance Company of North America*, 20 Wash. App. 815 (Ct. App. 1978), provides "legal support for covering a fall while on the dock, as happened here[.]" (Counter-Pls.' Opp'n 12 (alteration added)). *Farmers Home* is "neither controlling nor persuasive" (Great Lakes's Reply 13), as *Farmers Home* did not apply New York law.

In *Elite Ambulette Corporation v. All City Insurance Company*, the underlying plaintiff was injured when he fell from a wheelchair provided by the ambulette driver and attendant while the plaintiff was waiting inside his home to board the ambulette. *See* 293 A.D.2d 643, 644 (2d Dep't 2002). The court held "the accident did not arise from 'the ownership, maintenance or use' of a covered ambulette," as provided in the insurance policy, because "[w]hile the terms 'use and operation' do include acts of loading and unloading . . . , the accident herein occurred away from, and incidental to, the covered vehicle." *Id.* (alterations added; citation omitted). "As alleged in his complaint in the underlying action, [the underlying plaintiff's] injuries occurred inside his home, as a result of a defective wheelchair and a careless attendant. The covered ambulette parked outside was not in any way involved in the accident." *Id.* (alteration added).

In *Wasau Underwriters Insurance Company v. St. Barnabas Hospital*, the underlying plaintiff alleged she was transported to the hospital by the ambulette service, was left unattended at the entrance, and slipped and fell as a result of the ambulette service's lack of supervision and care. *See* 145 A.D.2d 314, 314 (1st Dep't 1988). The insurer sought a declaration it was not obligated to defend or indemnify the ambulette service under an automobile liability policy providing "for coverage for accidents 'resulting from the ownership, maintenance or use of a covered auto.'" *Id.* The court held the accident did not arise from the use or operation of the ambulette, "[r]egardless of what services [the ambulette service] is required to provide to its patients in escorting them into the hospital[.]" *Id.* at 315 (alterations added).

These cases illustrate the conclusion that Baerlin-Gallegos's allegations that Counter-Plaintiffs were negligent in helping her board the boat do not mean her injury was as a result of the boat. It is immaterial that helping customers board the boat was part of Counter-Plaintiffs' operation of the boat. *See Elite Ambulette Corp.*, 293 A.D.2d at 644; *St. Barnabas Hosp.*, 145

A.D.2d at 315. Baerlin-Gallegos would have had to allege use of the vessel was "more closely related" to her injury for her claims to be covered under the Fleet Policy and for Great Lakes to be required to provide a defense. *Elite Ambulette Corp.*, 293 A.D.2d at 644 (citations omitted).

One of Counter-Plaintiffs' counterarguments merits some discussion. Counter-Plaintiffs contend "Great Lakes rewrites [the] policy language" by stating the question is whether Baerlin-Gallegos's injury was a result of Counter-Plaintiffs' ownership or operation of the boat, rather than whether Counter-Plaintiffs became legally liable to pay as a result of their ownership or operation of the boat. (Counter-Pls.' Opp'n 5 (alteration added)). In support, Counter-Plaintiffs cite *Transport Indemnity Company v. Schnack*, 131 Cal. App. 3d 149, 150 (Ct. App. 1982), which purportedly includes "a helpful discussion of this distinction." (Counter-Pls.' Opp'n 5–6).

In *Schnack*, an aircraft insurance policy provided the insurance company would "pay on behalf of the Insured . . . all sums which the Insured shall become legally obligated to pay as damages because of . . . injury to or destruction of property . . . caused by an occurrence and arising out of the ownership, maintenance, or use of the aircraft[.]" 131 Cal. App. 3d at 150–51 (alterations added; italics omitted). The court was asked "only to plumb the meaning of 'arising out of.'" *Id.* at 152. The court held "the fueling of an aircraft 'arises out of' its 'use or maintenance,' as provided by [the] policy . . . , and that liability for damages proximately caused thereby is within the policy coverage." *Id.* at 150 (alterations added).

Contrary to Counter-Plaintiffs' contention, *Schnack* did not discuss a distinction between language referring to injuries and language referring to liability to pay. If anything, the language of the insurance policy in *Schnack* is more similar to Great Lakes's phrasing of the language in the Fleet Policy. Counter-Plaintiffs do not otherwise explain why this distinction is significant. As Great Lakes states, "the question of coverage does not turn on 'legally liable to pay,' but upon the

trigger — whether such legal liability to pay is 'as a result of' [Counter-Plaintiffs'] 'ownership or operation of the Scheduled Vessel.'"[12] (Great Lakes's Reply 6 (alteration added)).

In sum, the four corners of Baerlin-Gallegos's State Court Complaint do not demonstrate Counter-Plaintiffs' negligent use of the boat contributed to the accident. Baerlin-Gallegos's claims therefore are not a result of ownership or operation of the vessel in accordance with the Fleet Policy,[13] and Great Lakes does not have a duty to defend Counter-Plaintiffs in Baerlin-Gallegos's lawsuit. A determination that Great Lakes has no duty to indemnify Counter-Plaintiffs follows, as it arises from the same determination that Great Lakes has no duty to defend and is based on the undisputed material facts presented. *See Atlantic Cas. Ins. Co. v. Value Waterproofing, Inc.*, 918 F. Supp. 2d 243, 261–62 (S.D.N.Y. 2013) ("It is also appropriate to reach the question of the plaintiff's duty to indemnify []. First, the determination that [the insurer] has no duty to indemnify [the insured] arises from the same determinations that conclude it has no duty to defend []. As a result, a ruling on the former issue does not required more extensive fact finding than a determination on the latter." (alterations added)).

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff/Counter-Defendant, Great Lakes Insurance SE's Motion for Summary

[12] The court in *Schnack* held the term "arising out of" meant "originating from[,] having its origin in, growing out of or flowing from[,] . . . incident to, or having connection with, the use of the vehicle." *Schnack*, 131 Cal. App. 3d at 152 (alterations adopted; other alterations added; quotation marks omitted). To the extent Counter-Plaintiffs are advocating a similar definition of "as a result of," they provide no reason the Court should utilize this test.

[13] The parties do not attempt to make a distinction between injuries as a result of "ownership" of the vessel versus "operation" of the vessel. Nor do New York cases make that distinction. For example, in *Butts*, *Elite Ambulette Corporation*, and *St. Barnabas Hospital*, the insurance policies covered injuries resulting from the ownership, maintenance, or use of the vehicles. *See Butts*, 269 A.D.2d at 558; *Elite Ambulette Corp.*, 293 A.D.2d at 644; *St. Barnabas Hosp.*, 145 A.D.2d at 314. Furthermore, New York cases indicate the words "operation" and "use" are interchangeable. *See, e.g.*, *Butts*, 269 A.D.2d at 558.

Judgment **[ECF No. 104]** is **GRANTED**.

2. Defendants/Counter-Plaintiffs, Boat Rental Miami, Inc. and Miami Boat Rental, Inc.'s Motion for Summary Judgment **[ECF No. 106]** is **DENIED**.

3. Final judgment will issue by separate order.

DONE AND ORDERED in Miami, Florida, this 16th day of April, 2020.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record