

Contractual Indemnification Malpractice Insurance - Sexual Assault Covered Accident - Sexual Assault Direct Actions Legal Malpractice Insurance - Known Potential Claims Exclusion Construction Defects Prejudgment Interest/Good Faith & Fair Dealing Estoppel Limitations Period SUM Arbitration - Exclusion for Insured's Vehicle Automobile Physical Damage First Party No-Fault - Insured Incident Late Notice - SUM Coverage First-Party No-Fault - Medical Necessity First-Party No-Fault - Admission of Documents First-Party No-Fault - Timely Denial

Contractual Indemnification. In a personal injury action against building owner and elevator company alleging that plaintiff was injured by elevator doors, First Department affirms motion court's order granting conditional summary judgment to building owner on its cross-claims for contractual indemnification against elevator company where: (1) there was no showing of negligence on building owner's part, and; (2) the elevator company agreed to indemnify building owner for injuries arising from elevator company's maintenance, repair, inspection, and servicing of the elevators. *Ianotta v. Tishman Speyer Properties, Inc.*, 2007 WL 4302814 (1st Dept. December 11, 2007).

Malpractice Insurance - Sexual Assault. In insured physician's action against medical malpractice insurer seeking an order declaring that insurer was obligated to provide a defense and indemnity in an underlying sexual assault claim, Third Department affirms order granting summary judgment in favor of insurer. Physician alleged that the claimant, a co-worker, was under his care at the time of the alleged assault, thus the claim was a covered claim arising from professional services. Court holds that insurer was entitled to summary judgment where claimant's complaint never complained about physician's professional services and any examination "merely provided the occasion for the alleged assault and did not convert plaintiff's acts into professional malpractice." *Elashker v. Medical Liability Mut. Ins. Co.*, 2007 WL 4258843 (3d Dept. December 6, 2007).

Contractual Indemnification. In electrician's negligence and Labor Law action against owner, general contractor, and drywall subcontractor, First Department affirms part of order granting contractual indemnity against drywall subcontractor in favor of general contractor and owner. Court rejects subcontractor's argument that accident did not arise out of subcontractor's work since plaintiff was injured while performing electrical work under electrician's subcontract with owner, not drywall work under drywall subcontractor's contract with owner. The indemnity provision to which the drywall subcontractor agreed is broad and contained no language limiting its scope. *Urbina v. 26 Court Street Associates, LLC*, 2007 WL 4259443 (1st Dept. December 6, 2007).

Covered Accident - Sexual Assault. In an action by employer against its insurer seeking coverage for an underlying action alleging negligent hiring and retention of a sexual assailant in which judgment was entered in favor of victim, First Department affirms order in favor of insured where liability in the underlying action was based upon negligent hiring and supervision, not respondeat superior, thus the sexual assault was a covered accident within the meaning of the policy and the exclusion for injuries expected or intended from the standpoint of the insured does not apply. *NYAT Operating Corp. v. GAN Nat. Ins. Co.*, 2007 WL 4259613 (1st Dept. December 6, 2007).

Direct Actions. In an action arising from a motor vehicle accident, court grants motion by alleged tortfeasor's insurer for dismissal of loss of consortium claims asserted by the spouses of injured parties on the ground that spouses do not have standing to sue absent a judgment against the insured tortfeasor. Pursuant to Insurance Law § 3420, spouses cannot assert this cause of action directly against the insurer without having first been awarded a judgment against the insured. *Federov v. Hussain*, 2007 WL 4303521 (Sup. Ct., Kings Co. December 4, 2007).

Legal Malpractice Insurance - Known Potential Claims Exclusion. Second Circuit Court of Appeals affirms summary judgment in favor of malpractice insurer, finding coverage excluded under the policy because the claim at issue was reasonably foreseeable at the time the policy was issued. Court notes that although no controlling New York decision has addressed the issue of whether a client's assurances that it will not sue for malpractice are material to the exclusion, insurer would be entitled to summary judgment regardless given the clear evidence of a breach of duty to the client. *Westport Ins. Corp. v. Goldberger & Dubin, P.C.*, 2007 WL 4201386 (2d Cir. November 29, 2007).

Construction Defects. General contractor was sued in a subrogation suit after garage it had completed construction on suffered damage when a concrete floor collapsed under the weight of a truck. General contractor's insurer brought an action seeking a declaration that it is not obligated to defend or indemnify insured. Court grants summary judgment to insurer, concluding that to find coverage would improperly transform the CGL policy into a surety bond. Court states that its conclusion that there was no occurrence is not inconsistent with the fact the policy provided products-completed operations coverage, noting that such coverage is intended for property damage or bodily injury caused by the insured's work, not damage to the insured's work itself. Court also finds insured failed to provide timely notice of occurrence in light of its immediate knowledge of the damage. Insurer did not report the damage until it received a claim letter by the owner's insurer, two years after the incident. Court also rejects insurer's argument that insured should be estopped from withdrawing its defense. Court also grants summary judgment to insured's broker that procured the coverage. *Transportation Ins. Co. v. AARK Construction Group, Ltd.*, 2007 WL 4284161 (E.D.N.Y. December 7, 2007).

Prejudgment Interest/Good Faith & Fair Dealing. In connection with a property damage liability claim, the underlying plaintiffs prevailed in a direct action against a contractor's insurer. Plaintiffs moved to have prejudgment interest from the time of the occurrence added to the judgment. Court denies the motion, finding that a condition precedent to the policy's provision for prejudgment interest is that the insurer investigated the claim. Since insured disclaimed immediately on the basis of late notice, court finds insurer did not investigate the claim, and therefore prejudgment interest was not owed. Court rejects plaintiffs' argument that insurer failed to investigate in bad faith. Court finds that insurer's decision to disclaim on late notice grounds without further investigation, although mistaken, was not undertaken in bad faith. *MCI LLC v. Rutgers Cas. Ins.*, 2007 WL 4258190 (S.D.N.Y. December 4, 2007).

Estoppel. Plaintiff in an underlying bodily injury action against a nightclub was informed by defense counsel on the eve of trial that there was no insurance coverage because the policy was issued by

a non-admitted carrier that had been placed into liquidation. Underlying court held that claims administrator was estopped from denying coverage, and held an inquest for damages against the club. Judgment in favor of plaintiff went unsatisfied, and she commenced a separate action against the claims administrator and defense counsel for the amount of judgment on the theory that they are estopped from denying the existence of coverage. Court grants both defendant's motions to dismiss, finding that estoppel cannot be used to create a right that does not exist. Court observes that neither defense counsel nor claims administrator issued an insurance policy to the underlying defendant. *Velasquez v. GAB Robins North America*, 2007 WL 4209264 (Sup. Ct. Queens Co. November 26, 2007). Limitations Period. Court affirms summary judgment in favor of insurer where insured's claim was untimely under the policy's two-year limitations period. Court observes that evidence of settlement negotiations, without more, does not constitute waiver or give rise to estoppel. *Notaro v. Allstate Ins. Co.*, 2007 WL 4234684 (Sup. Ct. App. Term November 21, 2007). SUM Arbitration - Exclusion for Insured's Vehicle. In insurer's action to permanently stay arbitration of a claim by uninsured motorcycle owner seeking coverage as resident relative for injuries sustained on his motorcycle, court grants insurer's petition and holds that motorcycle owner is precluded from recovering underinsurance benefits where exclusion in policy provided that SUM coverage does not apply to bodily injury to an insured incurred while occupying a motor vehicle owned by that insured. *Government Employees Ins. Co. v. Lang*, 2007 WL 4246032 (Sup. Ct., Queens Co. December 3, 2007). Automobile Physical Damage. In insured's action against insurance broker and insurer seeking physical damage and theft coverage for their stolen vehicle, court denies insurer's and broker's motions to dismiss the complaint based upon one insured's receipt of notice of suspension of physical damage coverage based upon insured's failure to arrange for insurer to inspect vehicle. Where insurer and broker established that notice was provided to one insured, but not both, they had not complied with the requirements of 11 NYCRR Part 67, and their motions should be denied. *Wright v. Progressive Northeastern Ins. Co.*, 2007 WL 4270780 (Sup. Ct. Queens Co. November 29, 2007).

First-Party No-Fault - Insured Incident. In an action to recover assigned first-party no-fault benefits, court reverses order granting summary judgment to provider where insurer submitted an affidavit of its investigator that established that its denials were based upon a founded belief that the alleged injuries did not arise out of an insured incident. *A.M. Medical Services, P.C. v. State Farm Mut. Ins. Co.*, 2007 WL 4244786 (Sup. Ct. App. Term November 29, 2007). First-Party No-Fault. In an action to recover no-fault medical payments, court affirms order denying summary judgment in favor of provider where provider's submission of employee's conclusory affidavit failed to lay foundation of submitted evidence as business records, thus provider failed to make a prima facie showing of entitlement to summary judgment. *Gentle Care Acupuncture, P.C. v. Allstate Ins. Co.*, 2007 WL 4303709 (Sup. Ct. App. Term December 7, 2007); *Friendly Physician, P.C. v. Progressive Ins. Co.*, 2007 WL 4231908 (Civil Ct., City of New York December 3, 2007). Late Notice - SUM. Third Department affirms denial of petition to stay arbitration of a SUM claim. Insurer disclaimed based on late notice where insured did not provide notice of SUM claim until two weeks after receiving letter on behalf of tortfeasor advising of tortfeasor's insurance limits. Court rejects insurer's argument that insured should have known sooner that tortfeasor was potentially underinsured, noting that "suspicion" of underinsurance is insufficient to trigger notice requirement. Court notes that insurer did not allege that insured failed to exercise reasonable diligence to determine tortfeasor's coverage limits. *New York Municipal Insurance Reciprocal v. McGuirk*, 845 N.Y.S.2d 577 (3d Dept. November 21, 2007). UM Coverage. Second Department reverses order denying insurer's petition to permanently stay arbitration of a claim for uninsured motorist benefits where issue as to whether liability insurer of offending vehicle validly disclaimed coverage for lack of cooperation warranted hearing on motion to permanently stay arbitration. Contrary to motion court's determination, insurer made a prima facie showing that the offending vehicle was insured by submission of the police report showing the vehicle's insurance code, thus shifting the burden to the offending vehicle's insurer to establish a lack of insurance coverage. The submission of the disclaimer letter by insurer of the offending vehicle raised factual questions regarding the validity of the disclaimer that warrant a hearing. *Mercury Ins. Group v. Ocana*, 2007 WL 4246547 (2d Dept. December 4, 2007). First-Party No-Fault - Medical Necessity. Following trial, court finds insurer sustained burden of demonstrating that MRIs were not medically necessary, but finds provider submitted sufficient rebuttal evidence to prove medical necessity, and awards judgment in favor of provider. Court states that uncertainties are to be resolved in favor of the insured, and cites insured's age, complaints, and the results of objective tests in finding for the provider. *Kings Highway Diagnostic Imaging, P.C. v. AutoOne Ins. Co.*, 2007 WL 4209260 (Civ. Ct. Kings Co. November 27, 2007). First-Party No-Fault - Admission of Documents. Court reverses summary judgment in favor of provider, finding that provider failed to establish its prima facie case where the affidavit of its corporate officer failed to lay a foundation for the admission of plaintiff's claim documents where affidavit did not establish that corporate officer had personal knowledge of provider's practices and procedures. *V.S. Medical Services, P.C. v. Farm Family Insurance*, 2007 WL 4234650 (Sup. Ct. App. Term November 21, 2007). See also *Impulse Chiropractic, P.C. v. Countrywide Insurance*, 2007 WL 4244915 (Sup. Ct. App. Term November 21, 2007) (affirming denial of provider's motion for summary judgment). First-Party No-Fault - Timely Denial. Court affirms summary judgment in favor of provider. Court rejects insurer's argument that action was barred by provider's election to arbitrate no-fault claims arising from the accident as lacking evidence. Court finds that insurer's defenses of lack of medical necessity and excessive fees are precluded based on insurer's failure to prove a timely denial. Court finds that insurer's affidavit did not establish personal knowledge of mailing of denials or standard office practice and procedure to ensuring proper mailing of denials. A dissent argues that provider's papers admitted the timeliness of insurer's denial. *Delta Diagnostic Radiology, P.C. v. Farmers New Century Ins. Co.*, 2007 WL 4234672 (Sup. Ct. App. Term November 21, 2007).