

Firm News 12/15/2006

Contractual Indemnification, Broker E&O, Material Misrepresentation/Broker E&O, First-Party No-Fault, Contractual Indemnification/Breach of Contract to Procure Insurance, Business Interruption, Property Damage/Building Collapse, New York Property/Casualty Insurance Security Fund, Insurance Law Sec.3420(d), Broker E&O/Negligent Procurement, Common Law Indemnification, SUM Arbitration

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Contractual Indemnification. Second Department reverses denial of summary judgment motion of commercial lessee for contractual indemnification against owner in connection with a dismissed slip-and-fall case. Court finds the lessee is entitled to its defense costs. *Moser v. Lavipour & Co., Inc.*, 2006 WL 3525389 (2d Dept. December 5, 2006). Broker E&O. Second Department reverses denial of summary judgment motion made by broker in a failure to procure case, and orders summary judgment in favor of the broker. Insured claimed broker failed to procure insurance sufficient to close a gap in coverage on a boat. Court finds insured requested a quote for a boat he was contemplating purchasing, but did not actually inform the broker when the boat was purchased or request coverage from the broker. Court also holds that insured is presumed to have read and assented to the umbrella policy procured for him, which included a \$300,000 deductible for liability claims relating to the boat. Court also grants summary judgment in favor of a second broker that procured the insured's primary coverage since there was no special relationship between insured and broker, and since insured requested only the minimum liability coverage for the boat. The insured did not request coverage for the gap between his primary coverage limit and his umbrella deductible, and the broker was under no duty to advise insured to obtain such coverage. *Loevner v. Sullivan & Strauss Agency, Inc.*, 2006 WL 3526474 (2d Dept. December 5, 2006). Contractual Indemnification. Second Department modifies lower court's denial of third-party defendant's motion for summary judgment dismissing the contractual indemnification claim against it, and grants the motion. In connection with a dismissed slip-and-fall case, court dismisses the property owner's contractual indemnification claim against plaintiff's employer as academic, except with respect to claims to recover third-party defendant's defense costs. *Hoover v. International Business Machines Corp.*, 2006 WL 3526801 (2d Dept. December 5, 2006). Material Misrepresentation/Broker E&O.

In a decision without facts or analysis, Second Department reverses denial of insurer's motion for summary judgment, and finds that insurer proved as a matter of law that insured made a material misrepresentation in its application for insurance, entitling insurer to rescind the policy. Court also finds broker entitled to judgment as a matter of law based on insured's failure to raise an issue of fact regarding a special relationship with broker or brokers negligence in failing to procure the correct type of insurance. *Curiel v. State Farm Fire and Cas. Co.*, 2006 WL 3528498 (2d Dept. December 5, 2006). First-Party No-Fault.

Court reverses summary judgment in favor of provider where its corporate officer's affidavit lacked sufficient personal knowledge of provider's office practices with respect to claims forms. Affidavit was therefore insufficient to establish a foundation for admission of the forms under the business records exception to the hearsay rule. Court also finds an issue of fact regarding whether alleged injuries arose from an insured accident. *Dan Medical, P.C. v. New York Central Mutual Fire Ins. Co.*, 2006 WL 3489008 (Sup. Ct. App. Term December 1, 2006). See also *Delta Diagnostic Radiology, P.C. v. Liberty Mut. Ins. Co.*, 2006 WL 3489028 (Sup. Ct. App. Term December 1, 2006) (affirming denial of provider's summary judgment motion on same basis); *Mega Supply and Billing Inc. v. Auto One Ins. Co.*, 2006 WL 3489030 (Sup. Ct. App. Term. December 1, 2006) (same). First-Party No-Fault.

Denial of provider's motion for summary judgment affirmed. Court finds corporate officer's affidavit lacked sufficient personal knowledge of provider's office practices with respect to claims forms. Affidavit was therefore insufficient to establish a foundation for admission of the forms under the business records exception to the hearsay rule. *PDG Psychological P.C. v. Eveready Ins. Co.*, 2006 WL 3489027 (Sup. Ct. App. Term December 1, 2006). First-Party No-Fault.

Court reverses summary judgment in favor of insurer, and grants summary judgment in favor of provider. Insurer submitted timely denials based on lack of medical necessity, and attached peer review reports and/or IME report. Court, however, finds insurer precluded from raising defense of medical necessity because denial forms were couched entirely in conclusory language and did not state the reasons for denial with a high degree of specificity required by regulation and case law. A concurring judge writes separately to note that although precedent requires concurring in the result, he believes a claim denial form's attachment of a peer review report is sufficient to comply with the regulations regarding content of denials. The concurring judge states that the regulations require the insurer only to refer to a peer review report/IME report in a denial, and produce the report only upon a request that the provider can prove was mailed. *Boai Zhong Yi Acupuncture Services, P.C. v. Progressive Cas. Ins. Co.*, 2006 WL 3490404 (Sup. Ct. App. Term

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November 28, 2006). Contractual Indemnification/Breach of Contract to Procure Insurance.

In a slip-and-fall case, court finds owner and lessee of commercial property entitled to contractual indemnification from contractor because alleged accident arose out of contractor's work. Court also grants summary judgment in favor of owner/lessee based on contractor's failure to obtain insurance coverage. *Trano v. Federated Dept. Stores, Inc.*, 2006 WL 3524377 (Civ. Ct. New York City December 6, 2006). Business Interruption.

On the appeal of a commercial property owner's claim for business losses following the September 11, 2001 attacks, First Department reverses the trial court's order denying insurer's motion for partial summary judgment declaring that the period of restoration ended when tenants were permitted to return to the insured's property. First Department holds that a "necessary suspension" is a temporary, total cessation of business operations, not merely a slowdown in activity, and insured's business interruption loss is restricted to the period between the attack and tenants' return to their apartments. *Broad Street, LLC v. Gulf Ins. Co.* 2006 WL 3593049 (1st Dept. December 12, 2006). Property Damage/Building Collapse.

First Department affirms the trial court's order dismissing insured's complaint seeking coverage for loss arising from building collapse where the subject policy defined its additional coverage for collapse as "an abrupt falling down or caving in" and trial evidence demonstrated that insured's building was sinking, out of plumb, and leaning, but still standing. *Rector St. Food Enterprises, Ltd. V. Fire & Cas. Ins. Co. of Connecticut*, 2006 WL 3512439 (1st Dept. December 7, 2006). New York Property/Casualty Insurance Security Fund.

First Department affirms the trial court's determination that Superintendent's decision to disallow New York Property/Casualty Insurance Security Fund coverage where claimant's vehicle was garaged outside of New York and subject accident occurred outside of New York was rational and consistent with Insurance Law §§ 7602(f) and 7604. *In re Ancillary Receivership of Reliance Ins. Co.*, 2006 WL 3512920 (1st Dept. December 7, 2006). Insurance Law § 3420(d).

In a dispute over insurance coverage in connection with an underlying personal injury action, First Department modifies trial court's determination that insurer is precluded from raising late notice defense based on insurer's untimely disclaimer. Court holds that trial court erred in not finding that the untimely disclaimer precluded insurer from raising any policy exclusion as a defense to coverage. *City of New York v. Utica Mutual Ins. Co.*, 2006 WL 3512997 (1st Dept. December 7, 2006). Broker E&O/Negligent Procurement.

In an action by a jeweler against its insurer and its brokers to recover the value of goods stolen from insured's store, court denies brokers' motion to dismiss the complaint as time-barred and for failure to state a claim. Court holds that the limitations period for plaintiff's negligent procurement claim accrued when the policy in effect was issued, not years before when the defendants first procured a policy for plaintiffs. Court further holds that brokers' claim that plaintiffs fail to state a cause of action and the brokers' request that the court consider extrinsic evidence to decide the issue equates to a summary judgment motion, and that such motion is premature prior to the filing of an answer and the completion of discovery. Court grants branch of brokers' motion seeking the dismissal of claims against the broker in his individual capacity where plaintiffs failed to set forth any proof disputing that broker took all actions in his capacity as the president of the brokerage. *Kurt Wayne, Inc. v. Lead Underwriters at Lloyds London and Subscribers under Policy Number WSO3133OX*, 2006 WL 3510629 (Sup. Ct. New York Co. December 6, 2006). Common Law Indemnification.

Second Department holds that trial court erred in denying subcontractors' cross-motion for summary judgment dismissing claims for indemnification where the party claiming entitlement to indemnification was determined to not be acting as the general contractor on the project in which plaintiff's employer was involved. *Vicente v. Roy Kay, Inc.*, 2006 WL 3524302 (2d Dept. December 5, 2006). SUM Arbitration.

Second Department reverses trial court's order denying insurer's petition to permanently stay the arbitration of an uninsured motorist claim. Where a judge determined that the insurer timely filed its petition and then referred the issue of coverage to a judicial hearing officer, Second Department holds that the judicial hearing officer was without authority to re-determine the issue of timeliness and was in error in holding as ambiguous the policy provision excluding SUM coverage for injuries sustained in a vehicle not covered under the policy. *USAA Casualty Ins. Co. v. Hughes*, 2006 WL 3525109 (2d Dept. December 5, 2006).