

Week of February 5

Contractual Indemnification/Common Law Indemnification/“Grave Injury,” First-Party No-Fault, Classification Limitation Endorsement, Late Notice of Occurrence/Reasonable Excuse, Defenses Against Contribution, UM Arbitration/Notice of Cancellation, Contractual Indemnification/General Obligations Law, Sec. 5-322.1, Additional Insured Coverage, Bad Faith, SUM Limits, Advertising Injury, Validity of Disclaimer/Lead Based Paint Exclusion, Contractual Indemnification, UM Arbitration, Duty to Preserve Damaged Property, Common- Law Indemnification, Auto Exclusion

Contractual Indemnification/Common Law Indemnification/“Grave Injury.” Second Department holds lower court erred in denying employer/third-party defendant’s motion for summary judgment dismissing common law indemnification claims. Partial amputation of index finger does not constitute loss of an index finger sufficient to constitute a “grave injury.” Employer was also entitled to summary judgment dismissing contractual indemnification claim where party seeking indemnification failed to show that indemnification provision relied upon was part of the parties’ contract. *Mentesana v. Bernard Janowitz Construction Corp.*, 2007 WL 178652 (2d Dept. January 23, 2007). First-Party No-Fault. DECISION OF INTEREST. In an action raising the issue of whether insurers may assert the defense of medical necessity against radiologists who perform MRIs pursuant to prescriptions by doctors, Second Department reverses summary judgment in favor of assignees. Court rules that insurers may raise the defense of medical necessity against radiologists because such defense may be raised against the injured party. Assignees stand in the shoes of the injured person. *Long Island Radiology v. Allstate Ins. Co.*, 2007 WL 178897 (2d Dept. January 23, 2007). Classification Limitation Endorsement. In a direct action against the insurer of a defaulting subcontractor, Second Department finds lower court properly denied summary judgment motion seeking to strike the insurer’s defense of no coverage under the policy’s classification limitation endorsement. Court finds issue of fact regarding whether insured’s construction of ramps was an incident of the coverage operations, i.e., dry wall installation. For the same reason, court finds insurer not entitled to summary judgment. *Central Synagogue v. Hermitage Ins. Co.*, 2007 WL 180756 (2d Dept. January 23, 2007). Late Notice of Occurrence/Reasonable Excuse. Second Department reverses denial of summary judgment motion by homeowners insurer that disclaimed coverage for liability arising out of leaking of the insured’s underground storage tank. Court found that, as a matter of law, insureds had no excuse for a 21-month delay in giving notice of the occurrence. Court rejects excuse based on broker’s mistake in notifying the wrong insurer. Court also rejects excuse that insureds were not aware their policy was implicated by the leak since another one of their homeowner insurers advised them that prior policies could be implicated. *Blue Ridge Ins. Co. v. Biegelman*, 2007 WL 182056 (2d Dept. January 23, 2007). Defenses Against Contribution. DECISION OF INTEREST. Second Department rules that one homeowners insurer’s claim against another one of its insured’s homeowners insurers is in the nature of subrogation, and therefore claiming insurer is subject to the same coverage defenses as the insured, i.e., late notice of occurrence. *Blue Ridge Ins. Co. v. Biegelman*, 2007 WL 182056 (2d Dept. January 23, 2007). UM Arbitration/Notice of Cancellation. Court grants temporary stay of arbitration pending a hearing to determine whether insurer that allegedly cancelled the insured’s policy prior to the accident properly used 12-point type in its notice of cancellation, as required by statute. *AutoOne Ins. Co. v. Santos*, 2007 WL 178263 (Sup. Ct. Suffolk CO. January 12, 2007). Contractual Indemnification/General Obligations Law § 5-322.1. After previously granting conditional contractual indemnification, court grants renewal of summary judgment motions, and, based on new discovery indicating owner’s potential negligence, denies conditional indemnification. Court, however, finds indemnification provision requiring indemnification for owner’s own negligence saved by incorporation of words “to the fullest extent permitted by law.” *Ippolito v. Westland South Shore Mall, LLP*, 2007 WL 171912 (Sup. Ct. Suffolk Co. January 10, 2007). Additional Insured Coverage. In connection with an underlying construction injury case, a contractor being defended by its own CGL insurer moves for summary judgment for additional insured coverage from the CGL insurer of a subcontractor. Court denies the motion, finding an issue of fact whether policy covers the location of the occurrence. The blanket additional insured endorsement at issue refers to a schedule of insured location, but neither endorsement nor policy contains any list of insured locations. *Graves Brothers, Inc. v. National Fire & Marine Co.*, 2007 WL 214262 (W.D.N.Y. January 24, 2007). Bad Faith. In connection with an underlying construction injury case, a contractor being defended by its own CGL insurer asserted a bad faith claim against the insurer of a subcontractor that allegedly owes additional insured coverage to the contractor. Court dismisses the bad faith claim on the pleadings, noting that New York does not recognize a bad faith cause of action predicated on denial of coverage. *Graves Brothers, Inc. v. National Fire & Marine Co.*, 2007 WL 189540 (W.D.N.Y. January 23, 2007). SUM Limits. DECISION OF INTEREST. Court grants summary judgment in favor of SUM insurer under policy with \$250,000 limit on insured’s claim for \$150,000. Insured received \$100,000 limit of tortfeasor driver’s policy. However, insured also received \$400,000 from the leasing company that owned the vehicle and was vicariously liable. Court rejects insured’s argument that owner of the vehicle was a separate tortfeasor such that its payment is not subject to aggregation. Court also rejects argument that payment by the owner would not count against the SUM limit if it were paid through self insurance. *Hament v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 143036 (S.D.N.Y. January 18, 2007). Advertising Injury. In a declaratory judgment action commenced by a clothing brand owner against two insurers seeking an order entitling the owner to a defense in an underlying action commenced by the brand’s franchisers for damages allegedly resulting from owner’s sale of the brand to discount stores, First Department affirms summary judgment in favor of the insurers. The trial court properly found that the underlying complaint did not allege that franchisers were injured as a result of the publication of damaging material under the definitions of “personal injury” and “advertising injury” under the policies. *JMZ USA, Inc. v. Lumbermens Mut. Cas. Co.*, 2007 WL 222016 (1st

Dept. January 30, 2007). **Validity of Disclaimer/Lead Based Paint Exclusion.** In a declaratory judgment action commenced by a realtor against its insurer seeking an order entitling the realtor to defense and indemnity in an underlying action commenced by parties alleging injuries from lead paint ingestion, First Department affirms summary judgment in favor of the insurer. The insurer issued a valid disclaimer where it notified all interested parties upon receipt of process that the policy was no longer in effect at the time of the loss, and that, even if the event occurred within the policy effective dates, the loss fell within the policy's Lead Based Paint Exclusion. *3405 Putnam Realty Corp. v. Insurance Corp. of New York*, 2007 WL 222016 (1st Dept. January 30, 2007). **Contractual Indemnification.** In a nuisance action by homeowners against municipality and parties involved with the operation of a nearby cellular telephone tower, Court grants summary judgment in favor of all defendants where homeowners failed to provide expert testimony to support their claim that the alleged noise and vibrations were emitted from the tower. Court dismisses cross-claim by tower property's sublessor for contractual indemnification from both sublessees of tower property. As to sublessor's claim against one sublessee, the respective lease contained a waiver of subrogation clause that precluded sublessor's claim. Court dismisses sublessor's claim against the other sublessee because the liability and indemnity provision of the lease only provided for indemnity claims arising from sublessee's negligence or willful misconduct. *Jedlica v. Town of Hempstead*, 2007 WL 216289 (Sup. Ct. Nassau Co. January 26, 2007). **UM Arbitration.** Third Department reverses trial court's order granting insurer's application to stay underinsured motorist arbitration based upon insurer's 45-day delay in seeking the stay. Under C.P.L.R § 7503(c), that such applications must be brought within twenty days of service of the demand for arbitration. In *re State Farm Ins. Companies*, 2007 WL 174471 (3d Dept. January 25, 2007). **Duty to Preserve Damaged Property.** In a claim by a condominium against its insurer seeking coverage for property damage sustained as a result of freezing pipes in a cooling tower, First Department reverses trial court's order denying insurer's motion to dismiss the complaint where condominium representatives and the insurer's expert agreed that the damaged tower would be stored until expert could conduct a second, more complete examination to determine whether damage was the result of a covered loss. First Department holds that condominium's destruction of the tower prior to the expert's second examination breached the policy condition requiring the insured to set damaged property aside for inspection and to permit the insurer the opportunity to inspect the damaged property as often as reasonably required. *Seaport Park Condominium v. Greater New York Mut. Ins. Co.*, 2007 WL 177662 (1st Dept. January 25, 2007). **Common-Law Indemnification.** In a Labor Law action commenced by subcontractor's employee against property owner, general contractor, and architect, Second Department affirms trial court's order granting architect's motion dismissing general contractor's claim for common-law indemnification where architect demonstrated that he was not responsible for the means and methods of plaintiff's work and the deposition testimony submitted by general contractor failed to show that the architect went beyond the function of an architect. *Zolotar v. Krupinski*, 2007 WL 178257 (2d Dept. January 23, 2007). **Common-Law Indemnification.** In a products liability suit against the manufacturers of the McFlurry blender and the McFlurry spoon agitator in which a restaurant worker was injured while blending a McFlurry, Second Department denies manufacturers' motions to dismiss the complaint and manufacturers' cross-claims for contractual indemnification asserted against one another where blender manufacturer failed to establish that the McFlurry blender was reasonably safe for its intended use, spoon agitator manufacturer failed to show that McFlurry spoon agitator was free of defects, and both manufacturers failed to prove that they were entitled to contractual indemnification. *Wicelinski v. Vita-Mix Corp.*, 2007 WL 178266 (2d Dept. January 23, 2007). **Auto Exclusion.** In insurer's declaratory judgment action seeking an order declaring that it has no obligation to defend or indemnify retailer and retailer's employee in an underlying personal injury action arising from a motor vehicle accident involving a vehicle owned by retailer and driven by retailer's employee, trial court determined that the auto exclusion in the policy relieved insurer of any obligation with respect to two of the three underlying plaintiff's claims, but denied insurer's motion with respect to the negligent hiring claim. Second Department reverses trial court's order denying insurer's motion regarding the negligent hiring claim on the basis that the inclusion of the claim in the underlying action does not alter the fact that the operative act giving rise to recovery is the alleged negligent operation of a motor vehicle, and thus coverage with regards to the negligent hiring claim is also excluded. *Utica First Ins. Co. v. Star-Brite Painting & Paperhanging*, 2007 WL 178291 (2d Dept. January 23, 2007). **Common-Law Indemnification.** In an opinion offering no analysis on this issue, Second Department rules that trial court properly granted a retailer's cross-motion for conditional summary judgment on its claim for indemnification against distributor in landscaper's products liability claim alleging injuries caused by a defective lawnmower. *Rigliani v. Chambers Ford Tractor Sales*, 2007 WL 178316 (2d Dept. January 23, 2007). **Contractual Indemnification.** In a suit commenced by one beauty products distributor against another beauty products distributor seeking a pro rata share of a retailer's defense costs after plaintiff distributor provided defense and indemnity to the retailer in two lawsuits pursuant to agreement, Second Department affirms summary judgment dismissing the complaint on the bases that (1) plaintiff distributor could not enforce the indemnity agreement between defendant distributor and retailer where plaintiff was not a third-party beneficiary of such agreement, and, (2) the language in the agreement between defendant and retailer was ambiguous as applied to past actions, thus the agreement could not be held to have a retroactive effect absent the parties' clear intention. *Quality King Distributors, Inc. v. E&M ESR, Inc.*, 2007 WL 178325 (2d Dept. January 23, 2007).