

Notice/Additional Insured, Duty to Disclaim, Excuse for Late Notice, Common Law Indemnification/ Contractual Indemnification/Failure to Procure Insurance, General Obligations Law § 5-322.1/Common Law Indemnification/Contractual Indemnification/”Grave Injury”; Insurance Law § 3420(d)/Excuse for Late Notice, Notice of Claim/ Pollution Exclusion, Duty to Defend/Contractual Indemnification, Additional Insured Status, Excuse for Late Notice, Scope of Stay in Receivership Action, General Obligations Law § 15-303/Common-law Indemnification

Notice/Additional Insured. In an opinion without facts, Second Department modifies lower court decision granting additional insured's motion for summary judgment seeking a declaration of the duty to defend and indemnify in connection with an underlying personal injury case. Court finds issue of fact regarding whether additional insured satisfied conditions of coverage by exercising reasonable diligence to ascertain the existence of the coverage. *Greenman-Pedersen, Inc. v. Zurich American Ins. Co.*, 2007 WL 102586 (2d Dept. January 16, 2007). Duty to Disclaim. Second Department modifies lower court judgment to grant summary judgment in favor of insurer in an action seeking a declaration of the duty to defend and indemnify in connection with an underlying personal injury case. Court finds that policy unambiguously identified New York as one of the states for which no coverage is provided. Since there was no coverage, there was no duty to disclaim. *Commercial Union Ins. Co. v. Liberty Mutual Ins. Co.*, 2007 WL 102720 (2d Dept. January 16, 2007). Excuse for Late Notice. Second Department reverses summary judgment in favor of insurer who denied claim for disability benefits based on late notice. Insured claimed that his mental disability reasonably prevented him from providing timely notice. Lower court conducted a framed issue hearing on the issue of the insured's alleged disability, and concluded that the evidence did not support his claim of mental incapacity. Court held conducting a framed issue hearing was error, and that once lower court found an issue of fact regarding reasonableness of the insured's delay, court should have denied the insurer's motion for summary judgment. *Bailer v. Guardian Life Ins. Co.*, 2007 WL 102733 (2d Dept. January 16, 2007). Common Law Indemnification/Contractual Indemnification/Failure to Procure Insurance. Court denies third-party plaintiffs' motion for default judgment against contractors for contractual and common law indemnification and failure to procure insurance in connection with a construction defects case. Court finds that third-party plaintiffs failed to show any connection between the work of the contractors and the damages claimed against them in the first-party action. Court finds third-party plaintiffs failed to establish a contract in their favor or a contract containing indemnification provisions. Court finds third-party plaintiffs failed to establish a contract to procure insurance in their favor. *The Board of Managers of the Bay Club Condominium v. Bay Club of Long Beach, Inc.*, 2007 WL 102343 (Sup. Ct. Nassau Co. January 11, 2007). General Obligations Law § 5-322.1/Common Law Indemnification/Contractual Indemnification/”Grave Injury.” In an action in which an employee was allegedly partially paralyzed following the collapse of a wall cabinet in her employer's leased office, court finds General Obligations Law § 5-322.1 does not bar owner's contractual indemnification claim against tenant in light of owner's lack of negligence. Although plaintiff's claims against owner were dismissed, owner was still entitled to its defense costs against the tenant. Court also denies employer's motion for summary judgment dismissing owner's common law indemnification claim against the employer where there is an issue of fact regarding whether plaintiff's alleged partial paralysis constituted a “grave injury” under the Workers Compensation Law. *Miller v. Astucci U.S. Ltd.*, 2007 WL 102092 (S.D.N.Y. January 16, 2007). Insurance Law § 3420(d)/Excuse for Late Notice. In salon's declaratory judgment action against its insurer, First Department affirms summary judgment in favor of insurer that denied coverage in connection with a personal injury action against the salon on the bases of late notice and a policy exclusion for services rendered with equipment used in violation of law. Although salon's four-month delay was reasonable where the salon notified its insurer immediately upon receipt of the summons and complaint, and where the underlying plaintiff testified that she experienced no pain, considered the wound superficial, and did not initially seek medical treatment, insurer's denial of coverage based on the policy exclusion was supported by the evidence and was sufficiently specific under Insurance Law § 3420(d) to render such notice timely. *Massot v. Utica First Ins. Co.*, 2007 WL 112109 (1st Dept. January 18, 2007). Notice of Claim/Pollution Exclusion. In insured's declaratory judgment action against its insurers seeking coverage in connection with an underlying action alleging damages as a result of insured's fuel spill, Third Department affirms trial court's order denying insured's motion for summary judgment. Where the issue was not presented in the record on appeal, Third Department declines to consider insured's argument that the policies required insurers to show prejudice from the lack of notice. *Bender v. Peerless Ins. Co.*, 2007 WL 117426 (3d Dept. January 18, 2007). Duty to Defend/Contractual Indemnification. In municipality's breach of contract action against maintenance contractor in which municipality sought declaration of entitlement to the reimbursement of defense costs arising from a personal injury action commenced by maintenance contractor employee, court holds that municipality is entitled to defense costs where the indemnification clause in the contract between the parties was written in broad terms with the unmistakable intent to broaden maintenance contractor's liability under common law rules of implied indemnity, and where the contract language unambiguously gave rise to three distinct obligations of the maintenance contractor to defend, to indemnify, and to hold harmless. *Jose Lopez v. County of Rockland*, 2007 WL 116365 (Sup. Ct. Rockland Co. January 18, 2007). Additional Insured Status. In declaratory judgment action commenced by owner's insurer against subcontractor's insurer seeking a declaration that owner was entitled to defense and indemnity as an additional

insured under subcontractor's policy in connection with a Labor Law action commenced by subcontractor's employee, Third Department affirms summary judgment in favor of owner's insurer where policy endorsement in subcontractor's policy incorporated parties identified in the declarations as additional insureds and a declarations extension in the policy specifically listed the owner as an additional insured. *Travelers Indem. Co. v. Commerce & Industry Ins. Co. of Canada*, 2006 WL 3916516 (3d Dept. January 18, 2007). Excuse for Late Notice. In general contractor's declaratory judgment action against its insurer arising from insurer's denial of coverage for a Labor Law action commenced by a subcontractor's employee, Third Department affirms the trial court's order denying both parties' motions for summary judgment. Court holds that trial court did not err in holding that the reasonableness of the general contractor's delay in notifying its insurer was an issue properly left for the jury's determination where general contractor's president testified that he did not immediately contact the insurer because the subcontractor was supervising its employee when the injury occurred, the subcontractor had previously shown the general contractor's president proof of liability and workers' compensation coverage, the general contractor's president believed that the subcontractor's insurance would cover any claim, and the general contractor had minimal experience with work site accidents. *Klersy Bldg. Corp. v. Harleysville Worcester Inc. Co.*, 2006 WL 3916518 (3d Dept. January 18, 2007). Scope of Stay in Receivership Action. In a personal injury action against a scaffolding owner, the scaffolding owner's answer was struck and plaintiffs were awarded damages after the scaffolding owner's insurer went into receivership. Second Department holds that the trial court properly denied scaffolding owner's motion to vacate the order striking its answer on the ground that it was void ab initio due to the order in the insurer's receivership action that imposed a stay on actions in which the insurer was legally obligated to provide a defense. The stay imposed in the receivership action did not apply because the insurer was not obligated to defend the scaffolding owner since the scaffolding owner had a self-insured retention agreement, never tendered or exhausted its full limits, and the policy provided that insurer had no duty to defend where its coverage was excess. *Wilson v. Galicia Contracting & Restoration Corp.*, 2007 WL 101831 (2d Dept. January 16, 2007). General Obligations Law § 15-303/Common-law Indemnification. In a dental malpractice action, Second Department reverses trial court's order denying dental professional's motion to discontinue the action and granting co-defendants' motion to amend their answer to assert cross-claims against dental professional for contribution and common-law indemnification after plaintiff and dental professional entered into a stipulation that the action against the dental professional would be discontinued with prejudice. Second Department holds that the stipulation of discontinuance constituted a release within the meaning of General Obligations Law § 15-303 and served to relieve the dental professional from liability to any other person for contribution, but any verdict against the remaining defendants would be reduced in the amount of the dental professional's equitable share. The trial court erred in granting co-defendants' motion where claims of common-law indemnification were barred because any potential liability would be as joint tortfeasors and where there was no vicarious liability because the dental professional was an independent contractor, not an employee. *Tereshchenko v. Lynn*, 2007 WL 101859 (2d Dept. January 16, 2007).