

Grave Injury/Workers' Compensation Law Sec. 11. DECISION OF INTEREST. Settlement Agreements/Excess Coverage, Marine Property Coverage, Earth Movement Exclusion, Contractual Indemnification/General Obligations Law Sec. 5-321, Broker Liability, First-Party No-Fault

Grave Injury/Workers' Compensation Law Sec. 11. DECISION OF INTEREST. In a personal injury action arising from a construction accident, Third Department modifies order to dismiss indemnification claim against plaintiff's employer where loss of a single eye was not a "permanent and severe facial disfigurement" under Workers' Compensation Law. Court notes that plaintiff wore a prosthesis that caused there to be little or no difference in his appearance since the accident. *Giblin v. Pine Ridge Log Homes, Inc.*, 2007 WL 2002589 (3d Dept. July 12, 2007). Settlement Agreements/Excess Coverage. In connection with an underlying Labor Law action, third-party defendant/employer's primary CGL insurer entered into an agreement with defendants' insurers regarding allocation of settlement. The primary insurer paid over its limits and pursued coverage for the coverage against the excess insurer. Excess insurer was not a party to the agreement. Court denies motion for summary judgment by primary insurer seeking enforcement of agreement against excess insurer. Court rules that since excess insurer was not invited to join in agreement (as opposed to refusing to participate), CPLR barred enforcement of the agreement against the excess insurer. Court also rejects primary insurer's arguments that excess insurer waived its right to defend against agreement because it was aware of the claim. Court also rejects primary insurer's argument that excess insurer was obligated to issue a timely disclaimer under Insurance Law § 3420(d). However, court notes that its decision does not address whether excess insurer owes coverage under the terms of its policy. *National Union Fire Ins. Co. of Louisiana v. Universal Fabricators*, 2007 WL 2059840 (S.D.N.Y. July 18, 2007). Marine Property Coverage. Insured and insurer made cross-motions for summary judgment in action seeking coverage for a sunken ship and its on-board equipment. Court denies both motions, finding an issue of fact regarding whether cause of sinking was lack of seaworthiness arising from negligent maintenance and repair, or from covered peril of "action of the sea." For same reason, court finds issue of fact regarding whether there is coverage under policy's liner negligence clause. Court denies summary judgment with respect to insurer's *uberrimae fidei* and material misrepresentation arguments based on issue of fact regarding seaworthiness. Court finds that implied warranty of seaworthiness applies to "time" policies, but that doctrine was partially waived by policy's liner negligence clause. With respect to valuation of on-board equipment, court finds that both original purchase price and actual cash value are irrelevant because policy values property based on actual retail replacement value, subject to specific caps. *Royal Indemnity Co. v. Deep Sea International*, 2007 WL 2059826 (S.D.N.Y. July 13, 2007). Earth Movement Exclusion. Insureds sued for coverage under their homeowners policy for damage to their home caused by a broken pipe under their foundation. Court grants summary judgment to insurer. Court notes that both insureds and insurer agree that the damage was caused by settling earth, and, therefore, whether settling occurred because pipe leaked, or pipe leaked because earth settled, the damage was excluded by the earth movement exclusion. Court notes enforceability of the policy's anti-concurrent cause provision. Court finds no basis to estop insurer from denying coverage since insurance never indicated the loss was covered. *Alamia v. Nationwide Mut. Fire Ins. Co.*, 2007 WL 2005575 (S.D.N.Y. July 11, 2007). Contractual Indemnification/General Obligations Law § 5-321. In commercial tenant's action against out-of-possession landlord and property manager arising from injuries to tenant when security gate fell, First Department modifies order to dismiss complaint against property manager where landlord was responsible for roof repairs and security gate was damaged by water from roof leak. Property manager was entitled to dismissal of complaint where plaintiff failed to show that manager was in exclusive control of the premises since individual liability cannot be based upon nonfeasance unless plaintiff establishes such control. A lengthy dissent opined that summary judgment in favor of both defendants was appropriate where landlord was responsible under the lease for maintenance of public areas and security gate was not damaged in an area accessible to the public. *Hakim v. 65 Eighth Ave., LLC*, 2007 WL 2050960 (1st Dept. July 19, 2007). Broker Liability. In a breach of contract action against insurance broker, First Department reverses order and dismisses action against broker where the Third Department previously affirmed the trial court's holding that an affidavit of plaintiff's president stating that broker was verbally notified shortly after the loss was insufficient to raise an issue of fact as to whether there was prompt notice, thus it is irrelevant whether broker breached its agreement with plaintiff by obtaining a policy that failed to provide the full coverage plaintiff sought. *US Pack Network Corp. v. Travelers Property Cas.*, 2007 WL 2003411 (1st Dept. July 12, 2007). First-Party No-Fault. In an action to recover first-party no-fault benefits, court affirms denial of provider's motion for summary judgment where affidavit of provider's president failed to show that he had personal knowledge of provider's policies and procedures. Upon searching the record, court grants summary judgment in favor of insurer where un rebutted evidence established that there was no medical necessity for the MRIs that the provider performed. *A Khodadadi Radiology, P.C. v. N.Y. Cent. Mut. Fire Ins. Co.*, 2007 WL 1989432 (Sup. Ct. App. Term July 3, 2007). First-Party No-Fault. In an action to recover first-party no-fault benefits, court reverses order and holds that provider is entitled to summary judgment where insurer's affidavit detailing office mailing procedure did not reflect personal knowledge that the insurer complied with such policies with respect to the subject denial letter. A dissent argued that provider failed to establish a prima facie case and that insurer established a timely denial. *PDG Psychological, P.C. v. Lumbermans Mut. Cas. Co.*, 2007 WL 1989436 (Sup. Ct. App. Term July 3, 2007).