

Week of June 6

Business Interruption Coverage. DECISION OF INTEREST, First-Party No Fault - Claim Documentation, DECISION OF INTEREST, Late Notice of Occurrence/Untimely Disclaimer, General Obligations Law Sec. 5-322.1/Contractual Indemnification, Contractual Indemnification - Incorporation Clauses, Material Misrepresentation, MVAIC Benefits - Qualified Person, First-Party No-Fault - Prejudgment Interest, Late Notice

Business Interruption Coverage. DECISION OF INTEREST. In a business coverage dispute arising out of the September 11 attack on the World Trade Center, court grants partial summary judgment in favor of insurer. Insured operated retail stores in the WTC concourse mall that were the most profitable in its chain. Insured contended that the "period of liability" for its "time element" coverage extends until it is able to operate new stores in the rebuilt WTC. Court rejects the insured's argument, and accepts insurer's argument that reference to "equivalent operating conditions" in provision setting forth the end of the "period of liability" refers to building and equipment, and not to the same sales environment of profit-earning potential. Court observes that the policy's separate "leasehold interest" coverage is the coverage that applies to the insured's interest in a particular leased site. Court states that its decision is in accord with prior 9/11 business interruption cases. Court, however, states that it is implicit that business interruption coverage does not end until insured can build a "reasonably equivalent store in a reasonably equivalent location." Court grants summary judgment to insurer declaring that "period of liability" does not refer to the rebuilt WTC, but does not make findings regarding what is a reasonably equivalent store or location. Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co., 2007 WL 1549050 (S.D.N.Y. May 30, 2007). First-Party No-Fault – Claim Documentation. DECISION OF INTEREST. In what it characterizes as a novel question, court holds that an insurer's failure to respond to a provider's notice to admit the receipt of claims cannot support the provider's prima facie case. Court observes that under the CPLR, notices to admit are not properly used in connection with material facts, therefore provider cannot rely on the failure to respond to a notice to admit to prove its prima facie case. RJ Medical, P.C. v. All-State Ins. Co., 2007 WL 1519069 (Civ. Ct. Bronx Co. May 23, 2007). Late Notice of Occurrence/Untimely Disclaimer. In a coverage action in connection with a Labor Law case, Second Department affirms lower court's determination that owner and contractor's 5-month and 10-month delays, respectively, in providing notice of occurrence are unreasonable as a matter of law where both entities knew of the occurrence the day it happened. However, court reverses that part of the decision that found insurer's 47-day in disclaiming reasonable where record is silent regarding when insurer completed its investigation. Temple Construction Corp. v. Sirius America Ins. Co., 2007 WL 1559845 (2d Dept. May 29, 2007). General Obligations Law § 5-322.1/Contractual Indemnification. Second Department finds lower court erred in denying owner's and general contractor's motion for summary judgment for contractual indemnification against subcontractor. Court observes that indemnification provision does not violate General Obligations Law § 5-322.1 because it includes "to the fullest extent permitted by law" language. Court also holds that indemnification provision is enforceable since Labor Law § 200 claims against owner and contractor were dismissed, and that owner and contractor were therefore not negligent. Lesisz v. Salvation Army, 2007 WL 1560089 (2d Dept. May 29, 2007). Contractual Indemnification – Incorporation Clauses. First Department affirms dismissal of third-party claims for contractual indemnification and failure to procure insurance under a subcontract where claims were based upon promises made in the prime contract to which parties to the subcontract were not signatories. Although the prime contract was incorporated by reference into the subcontract, such incorporation clauses in a construction subcontract bind a subcontractor only as to provisions relating to the scope, quality, character, and manner of the work to be performed by the subcontractor. Adams v. Boston Properties Ltd. Partnership, 2007 WL 1598962 (1st Dept. June 5, 2007). Material Misrepresentation. First Department modifies trial court's denial of insurer's motion for summary judgment to dismiss insured's complaint and rescind its policy. Insurer was entitled to rescind the policy ab initio where affidavit of chief underwriter and insurer's company guidelines established that insurer would not have issued policy in its present form if insured disclosed his history of chronic back pain. Insured's intent to defraud was established as a matter of law where he conceded that he knew that the submissions on his application were false. Dwyer v. First Unum Life Ins. Co., 2007 WL 1599016 (1st Dept. June 5, 2007). MVAIC Benefits – Qualified Person. In an application for leave to assert a claim against MVAIC by a driver injured after being pulled into another vehicle by persons asking directions, court denies driver's application where driver was an "insured" person not qualified under Insurance Law § 5202(b) to pursue a MVAIC claim because she is still considered an occupant of the insured vehicle where her departure therefrom was part of a temporary interruption to her journey. The court further determined that if the facts demonstrated that the driver was injured by deliberate and intentional acts of the unidentified parties pulling her into their vehicle, her injuries were not the result of an "accident" and the absence of a collision precluded recovery against MVAIC. Kobeck v. Motor Vehicle Acc. Indemnification Corp., 2007 WL 1597989 (Sup. Ct. Madison Co. June 4, 2007). First-Party No-Fault – Prejudgment Interest. On an order to show cause brought by insurer to clarify the court's decision and order awarding provider no-fault benefits and attorneys' fees, court rejects provider's claim that interest begins to accrue on an untimely denial and/or improper denial of no-fault benefits thirty days after insurer received provider's bills for no-fault benefits, and holds that such interest does not begin to accrue under the no-fault regulations until the no-fault claimant requests arbitration or initiates a lawsuit. Vista Surgical Supplies, Inc. v. State Farm Mut. Auto. Ins. Co., 2007 WL 1585458 (Civ. Ct. City of New York May 30, 2007). Late Notice. In an action by insurer seeking a declaration that it owed no duty to insured or injured party in underlying personal injury action based upon

insured's and injured party's failure to comply with policy's notice provision, Second Department reverses order and grants summary judgment for insurer where insurer established its prima facie entitlement to judgment as a matter of law by demonstrating that insured and injured party failed to provide timely notice of the accident, insured failed to raise a triable issue of fact regarding the existence of a reasonable excuse for its delay, and injured party failed to raise a triable issue of fact regarding whether he diligently attempted to identify insurer. *Seneca Ins. Co. v. W.S. Distribution, Inc.*, 2007 WL 1559504 (2d Dept. May 29, 2007).