

Week of March 14

Settlement, Additional Insured Status/Disclaimers Against Coinsurers, Homeowners Insurance/Exclusion for Flood Coverage, UM Arbitration, Direct Action, Contractual Indemnification, Cancellation/Life Insurance, First-Party No-Fault/Attorneys Fees, First-Party No-Fault

Additional Insured Status/Disclaimers Against Coinsurers. Homeowners insurer and insured settled a fire loss. Checks went uncashed. After the two-year limitations period in the policy, insured commenced an adversary proceeding in bankruptcy court against insurer seeking settlement money. Insurer argued claim was untimely. Court emphasizes that continued investigation, communications, or negotiations between insurer and insured is insufficient to show waiver or estoppel of the policy's limitations period. Court notes that a distinction may be raised where, as in this case, the parties concluded a settlement prior to the expiration of the limitations period. However, court does not decide issue because it finds that settlement agreement constituted a contract separate and apart from the policy, and is subject to a six-year limitations period. Court holds that insurer had not paid the settlement despite tendering two checks, since the checks were not actually cashed. *New York Central Mut. Fire Ins. Co. v. Edwards*, 2007 WL 655916 (N.D.N.Y. February 26, 2007). Additional Insured Status/Disclaimers Against Coinsurers. Insurer and its named insured, a purported property owner, brought an action against the tenant's insurer seeking additional insured coverage in connection with an underlying slip-and-fall case. Court finds that morass of incomplete legal documents and inadmissible assertions creates an issue of fact regarding whether purported owner was successor to the original owner. Court finds that even if Real Property law provision that gives owner's assignee the same rights against tenant as original owner, that the provision would create a claim of breach of contract to procure insurance against the tenant, and would not create rights against the tenant's insurer. Court finds that in the absence of a complete copy of the tenant's insurer's policy, it cannot be determined whether an additional insured endorsement listing the purported owner is a part of the tenant's policy. Court finds issue of fact regarding whether owner and its insurer failed to provide timely notice. Court rejects owner's insurer's argument that tenant's insurer's disclaimer was untimely, citing cases holding that Insurance Law § 3420(d) does not apply to tenders by insurers seeking contribution. Court also notes that lack of additional insured status does not require disclaimer under the statute. *Tower Mineola L.P. v. Potomac Ins. Co. of Illinois*, 2007 WL 677803 (Sup. Ct. New York Co. March 2, 2007). Additional Insured Status/Disclaimers Against Coinsurers. In an action for additional insured coverage between a party to a trade contract and other contracting party's insurer, First Department affirms trial court's order declaring that plaintiff was entitled to coverage despite lost policy where plaintiff properly established through extrinsic evidence that its contract required the procurement of additional insurance coverage in its favor and that the subject policy provided that an additional insured was any entity that entered into a written contract with the defendant's insured to provide insurance. Insurer's claim to have effectively disclaimed on grounds of late notice was precluded where insurer was unable to demonstrate that it issued a written disclaimer citing this basis. *Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc.*, 2007 WL 685863 (1st Dept. March 8, 2007). Homeowners Insurance/Exclusion for Flood Coverage. In an action by insured seeking coverage for water damage, insurer appealed an order vacating a prior judgment that had directed verdict dismissing the action and ordering a new trial. First Department unanimously affirms the lower court's decision to vacate the directed verdict where it was based on the court's "misapprehension of the state of the law concerning an exclusion for flood damage" and the vacating court properly found that an exclusion for flood damage does not apply where a pipe bursts. *Rovelli v. Allstate Ins. Co.*, 2007 WL 656359 (1st Dept. March 6, 2007). UM Arbitration. Second Department holds that six-year statute of limitations for contract actions applies to demands for uninsured motorist benefits against self-insurers, even though such claims are provided by statute. *ELRAC, Inc. v. Suero*, 2007 WL 67862 (2d Dept. March 6, 2007). Direct Action. Insurer was entitled to vacation of default judgment in direct action and restitution of garnished funds from underlying plaintiffs where default judgments in the underlying action were vacated and the action dismissed. *Cordova v. Country-Wide Ins. Co.*, 2007 WL 677761 (Sup. Ct. App. Term February 16, 2007). Direct Action. In an action to recover an unsatisfied judgment against the defendants' insured, plaintiff appealed the trial court's order granting his motion for summary judgment to the extent it only awarded him \$25,000, the coverage limits of defendant's policy. Second Department holds that Insurance Law § 3420(a)(2) permits plaintiff to seek to collect an unsatisfied judgment against insured's carrier, but not in an amount exceeding the applicable limit of coverage. *Smith v. Allstate Ins. Co.*, 2007 WL 677979 (2d Dept. March 6, 2007). Direct Action. In an action to recover damages for breach of an insurance contract, Second Department modifies trial court's order to grant insurer's motion dismissing the insured's claims alleging breach of the covenant of good faith and to recover consequential and punitive damages where the breach of good faith claim was duplicative of plaintiff's breach of contract claim and plaintiff's complaint failed to allege sufficient facts to warrant imposition of punitive damages. Although insurer established that the policy's statute of limitations had expired by the time the action was commenced, insurer was not entitled to dismissal of insured's complaint where insured adequately pleading facts that would establish that plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action. *Paterra v. Nationwide Mut. Fire Ins. Co.*, 2007 WL 678127 (2d Dept. March 6, 2007). Contractual Indemnification. Court holds that condominium board and its members were not third-party beneficiaries of the construction contract between sponsor and contractor, and therefore did not have rights to indemnification against contractor for alleged construction defects. *Board of Managers of the Arches at Cobble Hill Condominium v. Hicks & Warren, LLC*, 2007 WL 556897 (Sup. Ct. Kings Co. February 20, 2007). Cancellation/Life Insurance. In an action by decedent's estranged widow for proceeds of a life insurance policy denied on the basis

of decedent's failure to make monthly premiums, court grants summary judgment in favor of insurer where insurer showed that it notified insured of missed payments and impending cancellation and widow failed to allege that decedent notified insurer of his total disability or that decedent did not receive insurer's cancellation notices. *Gentile v. Fidelity Mut. Life Ins. Co.*, 2007 WL 686505 (Sup. Ct. Onondaga Co. March 8, 2007). First-Party No-Fault/Attorneys Fees. In an action to recover assigned first-party no-fault benefits, court denies insurer's motion for an order revising the attorney's fees awarded to provider upon summary judgment in favor of provider on four causes of action. In a lengthy analysis detailing contradictory interpretations of Insurance Law § 5106(a), court holds that provider is entitled to a minimum attorney's fee of \$60 for each of the four claims. *Marigliano v. New York Cent. Mut. Fire Ins. Co.*, 2007 WL 738904 (N.Y. City Civ. Ct. March 12, 2007). First-Party No-Fault. Summary judgment in favor of provider affirmed where insurer's affidavits regarding assignee's failure to appear for IMEs did not contain personal knowledge of mailing of notices or sufficient knowledge of office mailing procedures to give rise to a presumption of mailing. Insurer also failed to produce anyone with personal knowledge of the nonappearances. Insurer's investigator's claims of fraud were also unsworn and conclusory. *Great Wall Acupuncture v. Utica Mutual Ins. Co.*, 2007 WL 660122 (Sup. Ct. App. Term March 2, 2007).