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Uninsured Motorist Coverage First-Party No-Fault - Timeliness of Denial

Additional Insured Status. DECISION OF INTEREST. In general contractor's action against subcontractor's insurer seeking additional insured coverage in connection with a worker's underlying bodily injury action, Court of Appeals holds that general contractor was not entitled to additional insured coverage where endorsement provided that general contractor was an additional insured only with respect to liability arising out of subcontractor's operations. Where general contractor admitted in the underlying action that subcontractor was not negligent in causing the accident, there was no longer any connection between the accident and the risk for which coverage was intended. *Joseph Worth Const. Co., Inc. v. Admiral Ins. Co.*, 2008 WL 1899978 (May 1, 2008). Additional Insured Coverage/Priority of Coverage.

DECISION OF INTEREST. Fourth Department reverses trial court's holding that primary insurer providing additional insured coverage to a general contractor must provide sole primary coverage without coinsurance from general contractor's own primary insurer. Court holds that priority of coverage is determined by the language of the two policies, and not the terms of the contract between general contractor and subcontractor. Court holds that the two policies must share equally. *B.F. Yenny Construction Co., Inc. v. One Beacon Ins. Co.*, 2008 WL 1838086 (4th Dept. April 25, 2008).

Insured Status/Garage Liability. Customer of a consultant who locates cars from dealers that customer might wish to purchase was injured while on a test drive in a dealer's car. Fourth Department affirms trial court's grant of summary judgment finding insurer must defend and indemnify customer as an insured under dealer's garage liability policy. Court finds that customer was a permissive user, as required by the policy, but was not a customer of the dealer where customers are excluded as insureds. Customer dealt only with the consultant, and had no dealings at all with the dealer. *Graphic Arts Mut. Ins. Co. v. Russell*, 2008 WL 1839171 (4th Dept. April 25, 2008). Late Notice - Reasonable Excuse.

Court affirms finding of a fact issue regarding whether general contractor had a reasonable excuse for not proving notice of a workplace accident involving an employee of a subcontractor until service of summons and complaint. Although general contractor was aware of the accident and injury, court notes that subcontractor advised general contractor that it would place its own carrier on notice, that general contractor may have reasonably believed it was not a fault for the accident, and where general contractor had never previously been sued for a workplace injury. *North Country Ins. Co. v. Jandreau*, 2008 WL 1821466 (3d Dept. April 24, 2008). Validity of Disclaimer/Insurance Law § 3420(d).

In a coverage dispute arising from an underlying Labor Law action, Fourth Department modifies order on grounds that trial court erred in finding that the insurer's failure to send its disclaimer directly to certain parties seeking coverage rendered the disclaimer invalid where the disclaimer was sent instead to those parties' insurer. *The Cincinnati Ins. Cos. v. Sirius America Ins. Co.*, 2008 WL 1914952 (4th Dept. May 2, 2008). Additional Insured Coverage.

In lessor's action against lessee's insurer seeking a declaration that insurer must defend and indemnify lessor in an underlying action, Fourth Department rejects lessor's argument that he was an additional insured under the policy's blanket additional insured endorsement where endorsement provided coverage for those parties that the lessee was required to name as an additional insured under the policy and the subject lease merely required lessee to procure coverage for the mutual benefit of lessor and lessee. Fourth Department also rejects lessor's argument that it was an intended third-party beneficiary under lessee's policy where there was no suggestion of any intent to extend coverage to lessor. A dissenting opinion argues that the lease required the lessor to be named an additional insured. *Joseph Kassis v. The Ohio Cas. Ins. Co.*, 2008 WL 1914956 (4th Dept. May 2, 2008). Duty to Procure. In restaurant's action against lessor for damages arising after lessor's scaffold obscured lessor's awning, First Department dismisses restaurant's complaint where lease provided that lessor will not liable to restaurant for damages arising from blocked or darkened windows and that

restaurant will procure business interruption coverage reimbursing restaurant for earnings losses. The waiver clause shielded lessor by requiring restaurant to procure insurance and was valid and enforceable. *Hooters of Manhattan, Ltd. v. 211 West 56 Associates*, 2008 WL 1902455 (1st Dept. May 1, 2008). Contribution/General Obligations Law § 15-109(c). In personal injury action arising from a trip on debris on defendant supermarket's sidewalk, First Department affirms order denying supermarket's claim for contribution from neighboring store. Where supermarket settled with the plaintiff and the record failed to establish any contractual or common-law duty on the part of neighboring store to indemnify the supermarket, claim for contribution was barred by General Obligations Law §15-109(c). *Farrell v. Gristede's Supermarkets, Inc.*, 2008 WL 1869034 (1st Dept. April 29, 2008). Contractual Indemnification/General Obligations Law § 5-321. In a decision with little factual background or analysis, First Department affirms order granting summary judgment in favor of lessor on its claim for defense and indemnity against lessee. Court holds that lease indemnification provision does not violate General Obligations Law § 5-321 given that the parties are sophisticated commercial entities and lessee was obligated under the lease to procure insurance. *Rivera v. Ray Bari Pizza*, 2008 WL 1869113 (1st Dept. April 29, 2008). Contractual Indemnification. In patient's personal injury action arising from an alleged malfunction in a motorized adjustable bed, Third Department affirms portion of order denying summary judgment on bed manufacturer's cross-claim for contractual indemnification against bed installer where contract provided for indemnification in favor of manufacturer for claims arising from installer's negligence. Manufacturer's motion was premature where there had been no finding of negligence on the part of installer. *Steuhl v. Home Therapy Equipment, Inc.*, 2008 WL 1902025 (3d Dept. May 1, 2008). Contractual Indemnification. In a decision with little factual background or analysis, Second Department affirms order granting summary judgment in favor of third-party plaintiff on its claims for contractual indemnification against third-party defendants. Court holds that Workers Compensation Law 11 does not vitiate a provision in a written contract by which an employer expressly agrees to provide indemnification. *Falkowski v. Krasdale Foods, Inc.*, 2008 WL 1903785 (2d Dept. April 29, 2008). Common-Law Indemnification. Second Department finds that owner is entitled to summary judgment dismissing plaintiff's Labor Law 240(1) claim, but finds that since trial court properly denied owner's summary judgment motion to dismiss plaintiff's negligence claims, denying cross-claim for common-law indemnification was also proper. *Cambry v. Lincoln Gardens*, 2008 WL 1903804 (2d Dept. April 29, 2008). Contractual Indemnification. In a store lot slip-and-fall accident case, Fourth Department holds trial court properly granted summary judgment dismissing owner's third-party common-law indemnification claim against plow contractor where owner did not establish contractor assumed the duty of care. Trial court also properly dismissed contractual indemnification claim since contract contained no indemnification provision. *Zemotel v. Jeld-Wen, Inc.*, 2008 WL 1839111 (4th Dept. April 25, 2008). Uninsured Motorist Coverage. Fourth Department holds that under binding AAA rules, arbitrator in UM action improperly granted injured person's application to change venue from Erie County to Richmond County where injured party resided more than 100 miles from Richmond County. In the Matter of *Erie Ins. Co. (Malcolm)*, 2008 WL 1837860 (4th Dept. April 25, 2008). Uninsured Motorist Coverage. Second Department reverses grant of a petition to permanently stay uninsured motorist where insurer-petitioner did not establish that alleged tortfeasor driver was insured under a policy issued to a business where petitioner failed to show that business employed the alleged tortfeasor. *Continental Ins. Co. v. Biondo*, 2008 WL 1823050 (2d Dept. April 22, 2008). Uninsured Motorist Coverage. In an action by insurer to stay the arbitration of a claim for uninsured motorist benefits, First Department affirms order granting insurer's petition after a framed issue hearing where the special referee determined that insurer presented sufficient evidence that the involved hit-and-run vehicle had insurance at the time of the accident. The injured party presented a license plate that fell off the other vehicle during the accident that belonged to a vehicle matching the injured party's description of the hit-and-run vehicle. *American Transit Ins. Co. v. Wason*, 2008 WL 1869219 (1st Dept. April 29, 2008). Uninsured Motorist Coverage. In an action by insurer to stay the arbitration of a claim for uninsured motorist benefits, Second Department reverses order granting insurer's petition after a special referee at a framed issue hearing admitted into evidence a police report identifying the involved hit-and-run vehicle by license plate and vehicle description. Court holds that the contents of the police report were not admissible as present sense impressions where witness made a note of the license plate and then relied on the note to relate the license plate number to the police and evidence did not show how much time had elapsed between the witnesses observations and her report to the police. *Phoenix Ins. Co. v. Golaneck*, 2008 WL 1903492 (2d Dept. April 29, 2008). First-Party No-Fault - Timeliness of Denial. In an action to recover assigned first-party, no-fault medical payments, court affirms order denying provider's motion for summary judgment on its claims where insurer raised a triable issue of fact regarding the timeliness of its denial by submitting evidence in the form of an affidavit of an employee with personal knowledge that a denial of claim form was timely issued to the provider. *St. Vincent's Hosp. of Richmond v. Government Employees Ins. Co.*, 2008 WL 1902681 (2d Dept. April 29, 2008).