Week of May 9

Scope of Additional Insured Coverage, Decision of Interest, Disclaimer for Voluntary Payments, Direct Action, Duty to Defend, Agent E&O, Personal Injury Coverage, Common-Law Indemnification, Additional Insured Coverage, First-Party No-Fault, MVAIC No-Fault

Scope of Additional Insured Coverage. DECISION OF INTEREST. In an underlying action for damages to a synagogue caused by a fire during renovations, the construction manager was held liable in part, and the HVAC subcontractor was held not at fault. After construction manager settled its liability, it sued the HVAC subcontractor’s insurer for its defense costs, indemnification for the settlement, and interest as an additional insured under the HVAC subcontractor’s primary and excess policies. Court grants summary judgment in favor of the construction manager. Court rejects insurer’s argument that its named insured’s lack of negligence precludes additional insured coverage, which under the policy is limited to liability arising out of the named insured’s work. Court reviews New York decisions holding that the scope of additional insured coverage is broad, and that liability “arising out” the named insured’s work refers not to causation, but to the general nature of the operation in the course of which the injury was sustained. Turner Construction Co. v. American Manufacturers Mut. Ins. Co., 2007 WL 1288611 (S.D.N.Y. May 2, 2007). Disclaimer for Voluntary Payments. Second Department affirms judgment against insurer requiring it to indemnify plaintiff in an underlying auto accident where insurer failed to issue a disclaimer against its insured after insured settled her counterclaim without insurer’s knowledge or consent. Court notes its insured’s general release would not have precluded a subrogation action if the tortfeasor was aware of the insurer’s rights, but that insurer’s failure to pay its insured requires dismissal of its claim. New York Central Mut. Fire Ins. Co. v. Hildreth, 2007 WL 1289808 (2d Dept. May 1, 2007). Direct Action. Second Department affirms summary judgment in favor of plaintiff in a direct action where insurer was held to insure the vehicle at issue by virtue of its default in proceedings to stay arbitration of UM claims. Also, since insurer failed to offer evidence of its policy limits, court orders plaintiff entitled to the full amount of its judgment. Gaston v. American Transit Ins. Co., 2007 WL 1289958 (2d Dept. May 1, 2007). Duty to Defend. In a declaratory judgment action brought by a municipality against insurer seeking a declaration that a municipal hospital is entitled to a defense in a suit against it alleging defamation, civil rights violations, and interference with business relations, Third Department holds that insurer is obligated to defend hospital under a hospital professional liability (HPL) policy, even where underlying plaintiffs stipulated to discontinue all causes of action but those alleging civil rights violations, where policy covered injury arising out of professional services of an accreditation committee and many of the remaining allegations in the underlying action arose from hospital board’s obligation to review complaints regarding the underlying plaintiff. Third Department notes that its previous interpretation and application of the duty to defend was “not as broad as it should have been” in light of the Court of Appeals analysis articulated in Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131 (2006). Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 2007 WL 1287894 (3d Dept. May 3, 2007). Agent E&O. In an action by insured alleging breach of contract and negligence against insurance agency that sold insured his homeowner’s policy, Third Department reverses the denial of insurer’s summary judgment motion. Where insured admitted at deposition that he did not read the policy or request additional coverage for his art collection, insured’s “conclusive presumptive knowledge of the terms and limits of the policy,” defeat his causes of action for the replacement value of his art collection after it was lost in a fire, regardless of trial court’s finding that the insurance agency had reason to know that insured’s possessions included a fine art collection. Stone v. Rullo Agency, Inc., 2007 WL 1287956 (3d Dept. May 3, 2007). Personal Injury Coverage. First Department affirms summary judgment in favor of insurers, dismisses insured’s complaint, and declares that insurers have no duty to defend or indemnify insured in underlying claims for antitrust. Court holds that alleged antitrust violations did not fall within the “malicious prosecution” provision of personal injury coverage because allegations that insured brought “sham litigation” do not transform the antitrust claims into ones for malicious prosecution. The Purdue Frederick Co. v. Steadfast Ins. Co., 2007 WL 1322333 (1st Dept. May 8, 2007). Common-law Indemnification. In a personal injury action brought on behalf of an infant injured by a toy purchased from defendant retailer, First Department reverses denial of retailer’s motion for summary judgment seeking common-law indemnification from toy distributor and grants conditional summary judgment in favor of retailer. Court holds that retailer’s motion should have been granted where the distributor purchased the subject toys from the manufacturer, the distributor sold them to the retailer, and the distributor did not allege that retailer modified the toy. A party lower in the chain of distribution is entitled to common-law indemnification from the one highest in the chain of distribution, due to the latter’s closer, continuing relationship with the manufacturer and superior position to exert pressure to improve the safety of the product. Lowe v. Dollar Tree Stores, Inc., 2007 WL 1288382 (1st Dept. May 3, 2007). Additional Insured Coverage. First Department reverses denial of site owner’s motion for summary judgment declaring that general contractor’s insurer had a duty to provide additional insured coverage to owner in an underlying construction injury action, and upon a search of the record, grants summary judgment to insurer declaring that it has no duty to defend owner in the underlying action. Where policy provided additional insured coverage “as required by contract, provided the contract is executed prior to loss,” trial court erred in concluding that the term “executed” is ambiguous because it can be interpreted in two ways – (1) a signed contract; or (2) a

contract that has been fully performed. Court holds that, under either interpretation, owner was not an additional insured where the contract was never reduced to writing and the accident occurred five days before the completion of the job. New York Central Mut. Fire Ins. Co. v. Hildreth, 2007 WL 1289808 (2d Dept. May 1, 2007). First-Party No-Fault. First Department affirms trial court’s order, at the close of provider’s case, denying insurer’s motion to dismiss for failure to establish a prima facie case and directs judgment in favor of provider where insurer admitted in its responses to provider’s interrogatories that it received provider’s no-fault claims and made partial payment on those claims. In light of insurer’s admissions, court properly refused to hear insurer’s argument that provider failed to submit proof that the claims had been mailed and received. Fair Price Medical Supply, Inc. v. St. Paul Travelers Ins. Co., 2007 WL 1307903 (1st Dept. May 4, 2007). MVAIC No-Fault. Court affirms summary judgment in favor of insurer, holding that even if provider’s inadvertent submission of the claim to the wrong insurer justified an initial delay, provider failed to provide any reasonable justification for the three-and-a-half month delay between provider’s notice of its mistaken submission and its notice to MVAIC. NY Arthroscopy & Sports Medicine PLLC v. Motor Vehicle Acc. Indemnification Corp., 2007 WL 1307907 (Sup. Ct. App. Term May 4, 2007). MVAIC No-Fault. Court grants summary judgment in favor of MVAIC where provider’s assignor, although “qualified,” was not “covered” in light of her failure to timely serve a notice of intention. Court finds provider failed to produce evidence to support argument that denial letter issued by MVAIC should estop MVAIC from relying on assignor’s failure to serve a notice of intention. Akita Medical Acupuncture, P.C. v. Motor Vehicle Indemnification Corp., 2007 WL 1247243 (Dist. Ct. May 1, 2007). First-Party No-Fault. Court reverses summary judgment in favor of provider seeking reimbursement of that amount of acupuncture fees not paid by insurer, and grants summary judgment in favor of insurer. Deferring to Superintendent’s interpretation of the regulations, court finds that in light of lack of a scheduled fee for acupuncture services, insurer was entitled to pay the claim based on rates charged for similar services by chiropractors. Citing increased litigation of the issue, court urges the Superintendent to promulgate a fee schedule for acupuncture services. Great Wall Acupuncture v. GEICO General Ins. Co., 2007 WL 1228768 (Sup. Ct. App. Term April 24, 2007).