

Firm News 10/13/2006

Duty to Defend; Contractual Indemnification; Uninsured Motorist Coverage; First-Party No-Fault; Warranties; Performance Bonds; Common Law Indemnification; Late Notice; Timeliness of Disclaimer; Optional Basic Economic Loss (OBEL) Coverage; Performance Bond/Equitable Subrogation/General Contractor Status

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Duty to Defend. Second Department affirms trial court's denial of motion to withdraw filed by counsel of record for defendant in a personal injury action. Court notes that motions to withdraw as counsel are not appropriate vehicle to test an insurer's right to disclaim coverage. *Seye v. Sibbio*, 2006 WL 2820556 (2d Dept. October 3, 2006). Contractual Indemnification. Second Department affirms summary judgment dismissing third-party contractual indemnification claim by premises owner against plaintiff's employer. Court observes that contract at issue is between employer/third-party defendant and a subsidiary of the owner, not the owner. *O'Berg v. McManus Group, Inc.*, 2006 WL 2821113 (2d Dept. October 3, 2006). Uninsured Motorist Coverage. Second Department affirms order denying insurer's motion to permanently stay arbitration of claim for uninsured motorists benefits. Second insurer demonstrated that it properly disclaimed based on lack of cooperation. Therefore, the vehicle was uninsured for purposes of the uninsured motorist claim against the first insurer. *Continental Ins. Co. v. Lulanaj*, 2006 WL 2821197 (2d Dept. October 3, 2006). First-Party No-Fault. District court dismisses complaint for ambulance company's claim for assigned transportation benefits. Court concludes that fact that policies predate regulation barring assignability of ambulance services does not provide basis for applying regulation retroactively. *Dependable Ambulette, Inc. v. Allstate Ins. Co.*, 2006 WL 2818497 (Dist. Ct. Suffolk Co. October 2, 2006). Warranties. First Department reverses summary judgment in favor of insurer and reinstates complaint for coverage under a jeweler's block policy. Following explosion at a jewelry manufacturing facility which was indisputably caused by employee inadvertence, insurer disclaimed based on breach of warranty requiring insured to maintain videotapes of operations following a loss. Court finds that insurer failed to meet burden of proving the breach of warranty was material under Insurance Law § 3106 where compliance with warranty would not have prevented loss, and where loss itself prevented compliance with warranty. Court finds insurer's other arguments why breach of warranty was material as speculative. *Anjay Corp. v. Those Certain Underwriters at Lloyd's of London*, 2006 WL 2806563 (1st Dept. October 3, 2006). Performance Bonds. Court finds insurer entitled to amounts for which it provided payment, as proven by submission of agreement, affidavits, and cancelled checks. Court also directs payment of collateral pursuant to terms of agreement where defendant contractor had been sued in amounts for which the insurer set reserves. Court declines contractor's arguments that it is entitled to assign receivables for collateral, or that collateral requirement applies only to amounts paid. Court awards attorneys fees per agreement, but withholds award of a specific amount in light of insurer's omission of proof of reasonableness of fees. *Centennial Ins. Co. v. 4-A General Contracting Corp.*, 2006 WL 2829790 (Sup. Ct. Kings Co. October 4, 2006). Common Law Indemnification/Contractual Indemnification. In Labor Law case, Second Department affirms summary judgment in favor of third-party plaintiff/owner's claim for common law indemnification against third-party defendant/engineer where owner demonstrated it did not direct or control plaintiff's work. However, court reverses grant of contractual indemnification in favor of owner where owner did not identify provision of contract with engineer related to indemnification. *Berenson v. Jericho Water Dist.*, 2006 WL 2821354 (2d Dept. October 3, 2006). First-Party No-Fault. Court defers to Insurance Department interpretation of regulation regarding No Fault attorneys fee awards, finding such awards limited to a minimum of \$60 and a maximum of \$850 on a per-assignor, per-suit basis, rather than on a per-claim basis. *Marigliano v. New York Central Mut. Fire Ins. Co.*, 2006 WL 282586 (Civ. Ct. Richmond Co. October 2, 2006). First-Party No-Fault. Court affirms order dismissing assignee's action for a de novo hearing following arbitration. Since award was less than \$5,000, there is no right to de novo adjudication under Insurance Law § 5106(c). *563 Grand Medical, PC v. Prudential Prop. & Cas. Co.*, 2006 WL 2829831 (Sup. Ct. App. Term October 2, 2006). First-Party No-Fault. In an action for no-fault benefits, court observes that insurer's own document indicating submission of claim forms normally cures defects in claimant's own motion papers, but calls on court below to determine whether affidavits submitted by claimant in record on appeal were same as those submitted before the trial court. *Delta Diagnostic Radiology, P.C. v. Country-Wide Ins. Co.*, 2006 WL 2829986 (Sup. Ct. App. Term October 2, 2006). First-Party No-Fault. Court reverses summary judgment in favor of assignee, finding that assignee's attorney's affidavit was insufficient to show that claim forms were admissible as an exception to the hearsay rule. Court finds fact that insurer issued denials in response to forms did not make assignee's forms admissible. Court also finds summary judgment should have been denied based on issue of fact whether the alleged injuries arose out of an insured incident. *Midborough Acupuncture, P.C. v. New York Central Mut. Fire Ins. Co.*, 2006 WL 2829993 (Sup. Ct. App. Term. October 2, 2006). Late Notice. Court grants summary judgment to insurer, upholding

disclaimer for late notice of occurrence in a personal injury case involving a tenant's alleged fall on landlord's premises. Court finds that, as a matter of law, insured's submission of papers in the course of an unrelated rent suit between insured and plaintiff that contained cursory references to the alleged accident does not constitute notice of the occurrence. Court also finds, as a matter of law, that no reasonable juror could credit insured's claim that it reported the accident to its agent. *Chapel Park Villa Ltd. v. The Travelers Ins. Co.*, 2006 WL 2827867 (W.D.N.Y. September 29, 2006). First-Party No-Fault. Court reverses judgment in favor of assignee and grants judgment in favor of insurer where court finds assignee failed to rebut insurer's expert evidence of lack of medical necessity of services. Court rejects trial court's conclusion that medical necessity defense cannot be raised against an assignee who, in its services, does not determine medical necessity of its services. *Tremont Medical Diagnostic, P.C. v. GEICO Ins. Co.*, 2006 WL 2829826 (Sup. Ct. App. Term September 29, 2006). First-Party No-Fault. Court determines that the CPLR, not regulations related to verification of claims, controls discovery in first-party no-fault suits. Court acknowledges scope of typical no-fault suit does not always call for depositions, but that where thousands of claims at issue in case, insurers are entitled to depose provider's sole shareholder regarding defense of fraudulent incorporation. *Carothers v. Ins. Cos. Represented by Bruno, Gerbino & Soriano, LLP*, 2006 WL 2714429 (Civ. Ct. Richmond Co. September 21, 2006). Common Law Indemnification. Court dismisses common law indemnification claim of owner/defendant in negligence action as academic in light of dismissal of all claims and cross-claims against the owner. In doing so, court denies prevailing defendant/owner defense costs claimed under common law indemnification since contract between owner/defendant and contractor/defendant contains indemnification clause favoring the contractor/defendant. *Yun-Long Lin v. Royalton, LLC*, 2006 WL 278721 (Sup. Ct. Kings Co. September 21, 2006). First-Party No-Fault. Court reverses judgment in favor of assignee, holding that plaintiff's failure to offer into evidence statutory billing forms or equivalent failed to establish a prima facie case. *Empire State Psychological Services, P.C. v. Travelers Ins. Co.*, 2006 WL 2829791 (Sup. Ct. App. Term September 21, 2006). First-Party No-Fault. Court affirms award in favor of plaintiff assignee, finding that employee of provider's billing service was competent to testify regarding records admissible under the business records exception to the hearsay rule. Court also rejects argument that plaintiff failed to prove assignment in light of defendant's failure to timely request verification of assignment form. *Pine Hollow Medical, P.C. v. Progressive Cas. Ins. Co.*, 2006 WL 2829824 (Sup. Ct. App. Term September 21, 2006). Timeliness of Disclaimer. Second Department holds that Insurance Law § 3420(d) does not apply when underlying claim does not involve death or bodily injury and affirms trial court's ruling that insured failed to show requisite prima facie showing of resulting prejudice to estop insurer from disclaiming coverage. *Legum v. Allstate Ins. Co.*, 2006 WL 2925347 (2d Dept. October 10, 2006). Common Law Indemnification/Contractual Indemnification. In construction site injury suit brought against site owner, site lessee, and general contractor, court dismissed owner's and lessee's claim for contractual indemnification against general contractor where general contractor never assumed a contractual obligation to indemnify owner or lessee. Court denied, however, general contractor's motion to dismiss owner's and lessee's common-law indemnification claim where general contractor effectively stipulated in a previous order to the award of common-law indemnification in favor of owner and lessee. *Rivera v. Rite Lite Ltd.*, 2006 WL 2919193 (Sup. Ct. Kings Co. October 6, 2006). First-Party No-Fault/Discovery. Appellate Term affirms trial court's order granting insurer's motion to compel discovery regarding insured's incorporation where insurer demonstrated good cause with regard to its defense that plaintiffs were fraudulently incorporated. *Continental Med. Acupuncture Servs., P.C. v. Travelers Ins. Co.*, 2006 WL 2844411 (Sup. Ct. App. Term October 5, 2006). Optional Basic Economic Loss (OBEL) Coverage. Appellate Term reverses trial court's order and grants insurer's motion for summary judgment dismissing complaint upon holding that reductions contained in Insurance Law § 5102(b) are applicable to both the mandatory coverage for basic economic loss and to OBEL coverage. *Balanca v. GEICO Gen. Ins. Co.*, 2006 WL 2828992 (Sup. Ct. App. Term September 21, 2006). Contractual Indemnification/Common-law Indemnification. Court rules that general contractor was not entitled to summary judgment on its claims for contractual and common-law indemnification against plaintiff's employer in a construction site injury case where issues of fact existed regarding the parties at fault for plaintiff's injuries. *Pollack v. Safeway Steel Products, Inc.*, 2006 WL 2846263 (S.D.N.Y. September 29, 2006). Performance Bond/Equitable Subrogation. Court denies all branches of obligee's motion for summary judgment except that which limited surety's recovery to the amount it paid in relation to the specific construction contract where the plain language of the waiver provision did not support the obligee's argument that the surety waived all notice of payments by obligee, obligee did not establish that New York lien law provided surety's exclusive remedy, and contractual limitations period did not apply where surety sought recovery under theory of equitable subrogation. *Nobel Ins. Co. v. City of New York*, 2006 WL 2848121 (S.D.N.Y. September 29, 2006). Performance Bond/General Contractor Status. In an action by a subcontractor on a job for which defendant surety issued a performance bond, surety moved for summary judgment on grounds that surety was not obligated to subcontractor because the parties were not in privity. The court denied surety's motion after finding that issues of fact existed regarding whether surety impliedly obligated itself to pay subcontractor for his work. *Carlo Lizza & Sons Paving, Inc. v. International Fidelity Ins. Co.*, 2006 WL 2844417 (E.D.N.Y. September 29, 2006).