

Week of October 3

Policy Limitations Period. In an action over a first-party property damage claim under a homeowners policy, court grants insurer's motion for summary judgment. Court bases decision on established law that an insurer's investigation of claim and partial payment of claim does not estop insurer from relying on policy's two-year limitations period. Court finds insurer did nothing to lull insureds from foregoing their right to sue. Court notes insurer consistently reserved all of its rights, and made no statements that it intended to forego the policy's limitation period. Court also rejects argument that the limitations period provision is ambiguous. *Penna v. Peerless Ins. Co.*, 2007 WL 2769668 (W.D.N.Y. September 24, 2007).

Material Misrepresentation. Insured was a bar sued for wrongful death as a result of the death of an underage customer in a drunk driving accident. Insurer commenced action to rescind policy when, in the course of defending the underlying action, insurer learned that insured had been cited multiple times for underage drinking in five-year period prior to renewal. Court finds insured misrepresented whether it had been cited for such violations in its renewal application. Court rejects argument that application's reference to "fined or cited" refers only to violations for which insured was convicted. Court finds insurer's underwriting evidence sufficient to prove insurer would not have issued the policy but for the misrepresentation. *United States Liability Ins. Co. v. Trance Nite Club, Inc.*, 2007 WL 2782714 (S.D.N.Y. September 24, 2007).

Rental Dwelling Coverage/Prejudgment Interest. Second Department holds that trial court properly granted summary judgment to insured in action for coverage under a rental dwelling policy for loss of rent. Insured's rental property became uninhabitable due to lead paint. Insurer's disclaimer denied coverage for lead abatement and bodily injury, but failed to deny coverage for lost rent, which the policy expressly covers. However, court finds trial court improperly calculated prejudgment interest on entire principal amount, rather than on a rolling monthly basis. *State Farm Fire and Cas. Co. v. Browne*, 2007 WL 2782264, 2007 WL 2782137 (2d Dept. September 25, 2007).

Oral Notice/Agent Liability. In connection with an underlying bodily injury action, Second Department reverses that part of trial court's judgment finding that oral notice to insurer's agent did not constitute notice. Court finds policy did not unambiguously require written notice. Court affirms summary judgment in favor of agent on claim by insured based on finding that agent of the insurer owed no duty to the insured. *Compass Construction of New York v. Empire Fire & Marine Co. of Omaha*, 2007 WL 2783005 (2d Dept. September 25, 2007).

Auto Fraud/Enforceability of Settlements. Insurer issued a check following its insured's pre-suit release of a liability claim following an auto accident. However, insurer stopped payment on the check after concluding the accident was staged. In insurer's suit to declare policy void, defendants issued order to show cause to enforce the settlement. Court finds that CPLR mechanisms to enforce settlements do not apply since release was made prior to suit. *State Farm Mut. Auto. Ins. Co. v. Mamadou*, 2007 WL 27772405 (Sup. Ct. Kings Co. September 24, 2007).

Coinsurance/Prejudgment Interest. On reargument in a dispute between an insurer that provided employers liability coverage to insured under a wrap-up policy and the insured's own employers liability insurer, court adheres to its decision that both insurers owe coverage. Court rejects argument that because one policy specifically refers to the project at issue and the other does not, that the latter policy does not also provide coverage. Court, however, rules that coinsurer does not owe the other insurer prejudgment interest from the point that the underlying case was settled, since there was no contractual relationship between the two insurers. *AIU Ins. Co. v. Nationwide Mut. Ins. Co.*, 2007 WL 2850455 (Sup. Ct. New York Co. September 24, 2007).

First-Party No-Fault - Fraudulent Incorporation. On insurer's motion for summary judgment, court finds an issue of fact whether individual provider was an employee or independent contractor, but grants summary judgment to insurer based on unrebutted evidence that provider was fraudulently incorporated, specifically, that psychologist listed in the articles of organization was not a member, owner, or shareholder. *Multiquest, P.L.L.C. v. Allstate Ins. Co.*, 2007 WL 2729253 (Dist. Ct. September 20, 2007).

Insurance Law § 3420(d). In masonry subcontractor's third-party action against its insurer for coverage in an underlying personal injury action, First Department affirms order declaring that insurer was obligated to defend and indemnify subcontractor where trial court properly determined that the 37-day delay between insurer's receipt of investigator's report and insurer's disclaimer was unreasonable as a matter of law. The reasons for insurer's disclaimer were readily apparent from the documents delivered to the insurer. *Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co.*, 2007 WL 2828868 (1st Dept. October 2, 2007).

Common-Law/Contractual Indemnification. In breach of contract action arising from a construction project, Fourth Department holds trial court properly denied third-party plaintiff contractor's motion for summary judgment on its claims for common-law and contractual indemnification against third-party defendant contractors. Common-law indemnification claim was premature where issue of fact existed regarding third-party plaintiff's negligence. Contractual indemnification claim was properly denied where it was unrefuted that third-party defendant's work did not cause roof to leak. *Baillie Lumber Co., L.P. v. A.L. Burke, Inc.*, 2007 WL 2812174 (4th Dept. September 28, 2007).

Voluntary Coverage/Waiver of Coverage Defenses. In insurer's action against masonry subcontractor seeking an order declaring that it owed no duty to indemnify subcontractor for legal costs in underlying action, Fourth Department modifies order to declare that insurer was obligated to reimburse subcontractor for legal costs. Insurer waived its right to disclaim coverage because it implicitly conceded coverage by participating in the binding arbitration in the underlying action, defending the subcontractor in the arbitration, and indemnified the subcontractor pursuant to the arbitration determination. Trial court erred in concluding that the coverage action was dismissed pursuant to a stipulation in the underlying action where attorney in underlying action had no authority to negotiate the dismissal of the declaratory judgment action. *National Grange Mut. Ins. Co. v. T.C. Concrete Const., Inc.*, 2007 WL 2812399 (4th Dept. September 28, 2007).

SUM Arbitration - Timely Notice. In an action to stay arbitration of a SUM claim, Fourth Department reverses order denying the petition where trial court erred in determining that claimant provided insurer with timely notice as a matter of law. Issue of fact existed as to whether claimant knew or should have known that the tortfeasor was underinsured prior to providing notice of the potential claim more than one year after the accident. Medical records supported insurer's argument that claimant should have known he suffered a serious injury nine months prior to notice. Other medical records supported claimant's excuse for the delay based upon his hopes that his symptoms would improve. *Progressive Ins. Companies v. De Witt*, 2007 WL 2812555 (4th Dept. September 28, 2007).

Notice of Cancellation. Fourth Department affirms order granting partial summary judgment in favor of insured where insurer failed to comply with the requirement of Insurance Law § 3426(h) to refer to Insurance Law § 3426(c)(1)(A) in its notice canceling insured's policy for nonpayment of premiums. Literal compliance with the applicable statutes is the rule and any ambiguity in the language is to be strictly construed against the insurer. *Sweeney v. Preferred Mut. Ins. Co.*, 2007 WL 2812641 (4th Dept. September 28, 2007).

Misrepresentation/Duty to Cooperate. In action brought by commercial insured against insurer after a fire loss, First Department affirms order denying insurer's motion to dismiss insured's complaint where insurer did not sustain its burden of showing that insured's misrepresentations about the loss were intentional and willful. Insured may have made its initial claim of near-total loss in good faith after garment industry professionals and the public adjuster opined that smoke damage made all goods unfit for sale. Insurer failed to show that disputes between insured and insurer amounted to an outright refusal to provide requested information. *Positive Influence Fashions, Inc. v. Seneca Ins. Co.*, 2007 WL 2792482 (1st Dept. September 27, 2007).