QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

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ADDITIONAL INSURED COVERAGE

Mack-Cali Realty Corp. v. NGM Ins. Co., 2014 WL 3732847 (2d Dept. July 30, 2014). Westchester County Electric, Inc. ("WCE") leased property from Mack-Cali Realty Corporation and Mack-Cali CW Realty Associates, LLC (collectively referred to as "Mack-Cali"). Pursuant to the lease, WCE agreed to name Mack-Cali as an additional insured on its liability insurance and to hold it harmless for any claims or injuries caused by WCE's occupancy of the premises. WCE obtained Business Owner's liability insurance through NGM Insurance Company and additional insured coverage was provided to Mack-Cali under the policy for liability arising out of the ownership, maintenance, or use of the leased premises. Thereafter, a UPS worker commenced a personal injury action against WCE and Mack-Cali after he allegedly fell while climbing onto the loading dock at the premises to deliver packages to WCE. Mack-Cali tendered its defense to NGM and NGM disclaimed coverage. Resultantly, Mack-Cali commenced an action against NGM seeking a declaration that it had a duty to defend and indemnify Mack-Cali in connection with the personal injury action. In rendering its decision, the Second Department stated that there was a causal relationship between the UPS worker's injury and the risk for which coverage was provided – namely, bodily injury sustained by third parties during an activity relevant to the operation of WCE's business and, therefore, additional insured coverage had been triggered. The Court reasoned that as the UPS worker was delivering packages to the premises which were intended for WCE, the accident occurred in the course of an activity incidental to the operation of the space leased. Moreover, the Court noted that the loading dock where the accident occurred was necessarily used for loading and unloading deliveries intended for WCE and, thus, by implication was part of the premises that WCE was licensed to use under the lease. As such, the Second Department found that the UPS worker's injury arose out of the use of the leased premises and, accordingly, Mack-Cali was entitled to additional insured coverage under the NGM policy.

Liberty Mut. Ins. Co. v. Zurich American Ins. Co., 2014 WL 1303595 (S.D.N.Y. Mar. 28, 2014). On March 11, 2008, Louis DiMauro sustained injuries while working at a premises in Manhattan when a ladder he was descending became partially unbolted

from the wall. At the time of his injury, DiMauro was employed as an elevator mechanic by Schindler Elevator Corporation. Pursuant to an agreement between Schindler and the owner of the premises, Schindler was required to name the owner as an additional insured under its liability policy. Schindler had procured a Commercial General Liability insurance policy from Zurich American Insurance Company, which provided additional insured coverage for liability "caused, in whole or in part, by" Schindler's acts or omissions. DiMauro subsequently commenced an action against the owner, which was insured by Liberty Mutual Insurance Company. After the settlement of the DiMauro action, Liberty Mutual commenced a declaratory judgment action against Zurich seeking a declaration that, among other things, it was entitled to reimbursement from Zurich for the amount it contributed to the settlement. Liberty Mutual moved for summary judgment and Zurich cross-moved asserting that the owner was not entitled to additional insured coverage under the policy as Schindler was not negligent nor did it commit an act or omission that caused DiMauro's injuries. In rendering its decision, the United States District Court for the Southern District of New York held that the "caused, in whole or in part, by" language of the Zurich additional insured endorsement had been triggered as it was undisputed that DiMauro was injured while working on behalf of Schindler in furtherance of its operations for the owner. The Court stated that it is not necessary to determine that Schindler was somehow negligent as any act or omission by Schindler or someone acting on its behalf will suffice if carried out in the performance of the named insured's ongoing operations for the additional insured. Additionally, it was noted that there is no bright-letter rule that "caused by" necessarily implies proximate cause especially when modified by the clause, "in whole or in part". As such, the Court found that Zurich was obligated to provide coverage and reimburse Liberty Mutual in connection with the DiMauro action.

APPLICABILITY OF EXCLUSIONS

Scottsdale Indem. Co. v. Beckerman, 2014 WL 4435706 (2d Dept. Sept. 10, 2014). In or around 2005, Robert Entel and his limited liability company, Lexjac, LLC (collectively referred to as "Lexjac") offered to dedicate a parcel of land to the Village of Muttontown, but the Village declined the offer. Lexjac instead delivered a conservation easement over the parcel to the Village. Thereafter, in 2007, the Village rescinded its 2005 resolution and accepted the dedication. Lexjac challenged the rescission by commencing two actions against the officers of the Village – one in federal court for violations of constitutional rights and the other a hybrid action for a declaratory judgment and pursuant to CPLR Article 78 in the state court. The Village officials sought coverage from Scottsdale Insurance Company, which insured the Village and its officials for claims arising out of the officials' wrongful acts. Scottsdale disclaimed coverage for the Lexjac actions based upon the policy exclusion for "[a]ny injury or damage arising out of or resulting from a taking that involves or is in any way related to the principles of eminent domain, inverse condemnation…or dedication by adverse use or by whatever name used". Scottsdale then commenced a declaratory judgment action against the Village officials seeking a declaration that the cited exclusion absolved its obligation to defend or indemnify the Village officials. In finding in favor of Scottsdale, the Second Department noted that in the context of a policy exclusion, the phrase "arising out of" is unambiguous and is interpreted broadly to mean "originating from, incident to, or having connection with." The Court further explained that if the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling within such an exclusion, and none of the causes of action that he or she asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action. The Court held that as the Lexjac actions clearly arose out of a taking that involved and/or was in any way related to

the principles of eminent domain, inverse condemnation, or dedication, that Scottsdale had met its burden of demonstrating as a matter of law that the Village officials were not entitled to coverage in connection with the underlying actions.

AmGuard Ins. Co. v. Country Plaza Assocs. Inc., 2014 WL 3016544 (E.D.N.Y. July 3, 2014). AmGuard Insurance Company commenced an action against its insureds, Country Plaza Associates Inc. d/b/a Cool Fish Restaurant, Cool Fish Company, Inc., and Tom Schaudel (collectively referred to as "Country Plaza"), seeking a declaratory judgment that it had no obligation to defend Country Plaza in connection with an underlying action commenced against it by a former employee, Mark Scordo. The underlying action was based upon an alleged telephone call Schaudel made to Scordo's prospective employer during which Schaudel allegedly told the prospective employer not to hire Scordo. AmGuard moved for summary judgment contending that Country Plaza was not entitled to coverage pursuant to policy exclusions which barred coverage for employment-related practices and intentional conduct. In this regard, the AmGuard policies at issue excluded coverage for the following: (i) bodily injury and personal and advertising injury arising out of any refusal to employ, termination, or employment-related practices such as defamation; and (ii) for bodily injury that was expected or intended from the standpoint of any insureds. In rendering its decision, the United States District Court for the Eastern District of New York noted that Schaudel's alleged conduct followed Scordo's termination and various disputes over unpaid wages and claims that Schaudel had explicitly told the prospective employer not to hire him. Specifically, the underlying Complaint alleged: "Following his termination, [Scordo] sought employment at other local restaurants as a bar tender. After being offered a comparable position at a competing restaurant Defendant Schaudel telephoned [Scordo's] prospective employer and advised them not to hire [Scordo]. As a direct result of this telephone call, [Scordo's] offer of employment was rescinded." As such, the Court found that the alleged conduct arose directly from, and could not have occurred but for, Scordo's employment with Country Plaza and was thereby precluded from coverage under the Employment-Related Practices Exclusion. The Court further held that the policies' Expected or Intended Injury exclusion also barred coverage for Country Plaza in connection with the underlying action. In this regard, the Court stated that in his Complaint, Scordo only alleged intentional conduct and, in particular, that Schaudel called the prospective employer "to dissuade them from hiring [Scordo]," which "constitutes…intentional infliction of harm." The Court reasoned that "[n]othing in his [C]omplaint suggest[ed] that [Country Plaza] acted in anything less than an intentional manner with respect to this call and the other employment-related claims. In fact, Scordo cannot even establish a prima facie tort unless he demonstrates that [Country Plaza] acted with malice."

Bayport Construction Corp. v. BHS Ins. Agency, 117 A.D.3d 660 (2d Dept. May 7, 2014). Bayport Construction Corp. procured a Commercial General Liability insurance policy from Mt. Hawley Insurance Company. Pursuant to a contract with Kiska Group, Ltd., Bayport was hired as a trade contractor for a construction project in Brooklyn. The contract also required Bayport to have insurance naming Kiska, among others, as additional insureds. As such, Bayport procured insurance from Mt. Hawley which contained an endorsement naming those parties as additional insureds. Thereafter, an employee of Bayport was allegedly injured while working at the construction project and commenced an action against Kiska and other parties, all of which were named additional insureds under the Mt. Hawley policy. Mt. Hawley disclaimed coverage based upon, *inter alia*, an Employer's Liability Exclusion which precluded coverage for bodily injury to "[a]n 'employee' of any insured arising out of and in the course of…[e]mployment by any insured." Bayport then instituted an action seeking, *inter alia*, a judgment declaring that Mt. Hawley was obligated to

defend and indemnify it and the additional insureds in the underlying action. In rendering its decision on competing Motions for Summary Judgment, the Second Department held that Mt. Hawley established its prima facie entitlement to judgment as a matter of law as the plain meaning of the exclusion was that the policy did not provide coverage for damages arising out of bodily injury sustained by an employee of any insured in the course of his or her employment. The Court reasoned that as plaintiff in the personal injury action was an employee of Bayport, the injury was not covered by the policy and that the Employer's Liability Exclusion equally applied to the additional insureds.

LATE NOTICE

GuideOne Ins. Co. v. Darkei Noam Rabbinical College, 120 A.D.3d 625 (2d Dept. Aug. 20, 2014). In July 2005, David Sigler was allegedly injured when he slipped and fell on property owned by Keren Hachesed and Keren Hachesed, Inc. (collectively referred to as "Hachesed") and leased to Darkei Noam Rabbinical College and Darkei Noam, Inc. (collectively referred to as "Darkei Noam") By September or October 2005, Darkei Noam had learned that someone had fallen at the property, but did not investigate further. Thereafter, Sigler commenced a personal injury action against Hachesed. On June 6, 2006, a few days after Darkei Noam learned about the action against Hachesed, it notified its liability insurance carrier, GuideOne Insurance Company of the underlying incident. GuideOne disclaimed coverage for the loss on the basis that Darkei Noam did not provide timely notice and subsequently commenced a declaratory judgment action seeking a declaration that it was not obligated to extend a defense or indemnification. In rendering it decision, the Second Department held that GuideOne made a prima facie showing of entitlement to judgment as a matter of law with evidence that Darkei Noam learned of the underlying incident in September or October 2005, but waited until June 2006, approximately nine months later, to notify GuideOne. (We note that the policy was issued prior to 2009 and, thus, was not subject to the changes to Insurance Law § 3420 requiring an insurer to demonstrate prejudice in order to disclaim coverage on the basis of late notice.) Moreover, the Court found that, contrary to Darkei Noam's contentions, GuideOne's disclaimer was timely as a matter of law. In this regard, GuideOne demonstrated that it issued its declination twenty-four days after receiving notice of the underlying incident, and that during that time, it diligently investigated the possibility of a disclaimer based upon late notice.

Spoleta Constr., LLC v. Aspen Insurance UK Ltd., 2014 WL 3377203 (4th Dept. July 11, 2014). Shane VanDerwall commenced a negligence action against Spoleta Construction, LLC, among others, seeking damages for injuries he allegedly sustained on a construction project in December 2008 during the course of his employment with Hub-Langie Paving, Inc. Prior to the incident, Spoleta retained Hub-Langie to perform paving work at the project. Pursuant to their agreement, Hub-Langie agreed to indemnify and hold Spoleta harmless as well as to name it as an additional insured under its liability policy with Aspen Insurance UK Limited. Spoleta first received notice of VanDerwall's accident in December 2009 and, in January 2010, Spoleta's liability carrier notified Hub-Langie of VanDerwall's claim and requested, among other things, that Hub-Langie place its insurance carrier on notice. Thereafter, Hub-Langie provided Aspen with a General Notice of Occurrence/Claim form pertaining to VanDerwall's alleged accident. In April 2010, VanDerwall commenced an action against Spoleta and Spoleta demanded that Aspen provide a defense and indemnity. In response, Aspen disclaimed coverage on the basis of untimely notice. In this regard, the Aspen policy provided, in relevant part, that the insured "must see to it" that Aspen is notified as soon as practicable of an occurrence which might result in a claim. Spoleta then commenced a declaratory judgment action seeking a

declaration that Aspen had a duty to defend and indemnify it in connection with the underlying action and Aspen moved to dismiss the Complaint. In reversing the decision of the trial court, the Fourth Department found that the January 2010 letter from Spoleta's insurer and the form Hub-Langie sent to Aspen at Spoleta's request satisfied Spoleta's duty under the policy to "see to it" that Aspen was notified of the occurrence as soon as practicable. The Court reasoned that contrary to the trial court's conclusion, the Aspen policy did not require that written notice of an occurrence come directly from Spoleta, it simply required that Spoleta see to it that Aspen was notified. It was further noted that to the extent the term "see to it" was ambiguous, the ambiguity must be construed in Spoleta's favor. As such, the Fourth Department held that the trial court erred in dismissing Spoleta's Complaint against Aspen.

TIMELY DISCLAIMER

Key Fat Corp. v. Rutgers Cas. Ins. Co., 2014 WL 4435963 (2d Dept. Sept. 10, 2014). On June 30, 2006, Manuel Guallpa sustained injuries while performing construction work for his employer, Bando Construction, Inc. at a property Bando leased from Key Fat Corp. Guallpa commenced a personal injury action against Key Fat which, in turn, instituted a third-party action against Bando. Key Fat's insurer, Seneca Insurance Company, tendered the defense and indemnification of Key Fat to Bando and its insurer, Rutgers Casualty Insurance Company. On March 26, 2007, Rutgers informed Bando that it was disclaiming coverage in connection with the personal injury action based upon an exclusion in its policy. By way of correspondence dated April 17, 2007, Rutgers informed Seneca of the disclaimer; Key Fat, however, was not informed. A judgment was ultimately entered in favor of Guallpa against Key Fat. Thereafter, Key Fat and Seneca commenced a declaratory judgment action against Rutgers contending, among other things, that it untimely disclaimed coverage in connection with the underlying action. Rutgers moved for summary judgment. In affirming the trial court's decision, the Second Department noted that, pursuant to Insurance Law § 3420, when a claim involves death or bodily injury, the insurer is required to provide its insured or any other claimant with timely notice of disclaimer. As such, the Court held that Key Fat and Seneca had demonstrated as a matter of law that Rutgers was estopped from disclaiming insurance coverage under its policy due to its untimely disclaimer and was required to reimburse Key Fat attorney's fees and litigation expenses.

Ferreira v. Global Liberty Ins. Co. of New York, 2014 WL 3605809 (2d Dept. July 23, 2014). Darling Ferreira commenced an action pursuant to Insurance Law § 3420(a)(2) against Global Liberty Insurance Company of New York to recover the amount of an unsatisfied judgment against Global's insured in an underlying personal injury action. Thereafter, Ferreira moved for summary judgment asserting that Global's declination, which was issued on March 28, 2012 on the basis of the insured's failure to cooperate, was invalid as it was untimely and did not deny coverage on the basis of Ferreira's failure to inform Global of the lawsuit. In modifying the Order of the trial court, the Second Department held that Global's disclaimer was ineffective. In this regard, the Court stated that Global was aware of the underlying personal injury action and of the ground for disclaimer by January 6, 2012. Nevertheless, Global did not disclaim coverage until March 28, 2012 – almost three months later. As such, the Second Department held that Global's declination was untimely as a matter of law.

AUTOMOBILE INSURANCE

Allstate Ins. Co. v. Staib, 2014 WL 2838951 (1st Dept. June 24, 2014). William Staib sought coverage under an automobile insurance policy he procured from Allstate Insurance Company for injuries sustained when an unrestrained and unattended dog sitting in Staib's parked car bit Staib's niece as she walked by the vehicle. After Staib's

niece and her parents commenced a personal injury action against him, Allstate commenced a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify Staib in connection with the lawsuit. Allstate contended that the automobile policy did not afford coverage for the incident as it fell outside the scope of coverage afforded by the policy, which provides coverage for "all damages an insured person is legally obligated to pay…because of bodily injury or property damage…from claims for accidents arising out of the ownership, maintenance or use, loading or unloading of an insured auto." In affirming the trial court's decision, the First Department found that the injuries did not arise out of the "ownership, maintenance or use" of the automobile. In this regard, the Court stated that the vehicle itself did not produce the injury, nor did the accident arise out of the inherent use of the vehicle. Rather, the automobile was merely the situs of the accident, which was insufficient to trigger coverage under the terms of the Allstate policy. As such, the Court held that Allstate had no duty to defend or indemnify Staib in connection with the personal injury action.

MISCELLANEOUS

General Motors, LLC v. B.J. Muirhead Co., Inc., 2014 WL 3882573 (4th Dept. Aug. 8, 2014). General Motors, LLC and B.J. Muirhead Co., Inc. entered into an agreement whereby B.J. Muirhead would provide certain maintenance services at a plant owned and operated by General Motors. The agreement provided that B.J. Muirhead "shall maintain insurance coverage with carriers acceptable to [General Motors] and in the amounts set forth in the Special Terms," which in turn required, *inter alia*, that B.J. Muirhead obtain insurance for "liability arising from premises." After one of B.J. Muirhead's employees commenced an action against General Motors alleging that he was injured by a dangerous condition on the premises, B.J. Muirhead's insurer declined to defend General Motors on the ground that General Motors was not named as an insured or otherwise covered by its policy. General Motors then commenced a breach of contract action against B.J. Muirhead contending that it failed to comply with the contractual requirement that it obtain insurance protecting General Motors. In reversing the trial court's decision, the Court held that the agreement at issue did not require B.J. Muirhead to procure insurance coverage on behalf of General Motors. The Court rejected General Motor's contention that the agreement was reasonably susceptible of an interpretation requiring that B.J. Muirhead obtain additional insured coverage on behalf of General Motors. In this regard, the Court noted that a provision in a contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically stated. Further, the Court indicated that contract language, as in the agreement at issue, which merely required the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured. In sum, the Court found that, contrary to General Motor's assertions, although the insurance rider to the agreement required B.J. Muirhead to obtain insurance on the premises, there was no requirement that General Motors be named as an additional insured. As such, General Motor's action was dismissed.

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