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CASES OF INTEREST BY TOPIC

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ADDITIONAL INSURED COVERAGE

Zurich American Ins. Co. v. Endurance American Specialty Ins. Co., 145 A.D.3d 502, 43 N.Y.S.3d 40 (1st Dept. Dec. 8, 2016). Zurich American Insurance Company commenced a declaratory judgment action seeking a declaration that Newmark Knight Frank (and certain other entities) were entitled to additional insured coverage under an insurance policy that Endurance American Specialty Insurance Company issued to Kras Interior Contracting Corp. The Endurance policy provided additional insured coverage to "[a]ny entity required by written contract…to be named as an insured." On October 11, 2012, Newmark sent a purchase order/agreement to Kras, which stated that "THIS PURCHASE ORDER AND AGREEMENT IS A LEGAL AGREEMENT BETWEEN [KRAS] AND NEWMARK…. BY ACCEPTING THE ORDER, [KRAS] HEREBY AGREES TO BECOME BOUND BY THE TERMS OF THIS AGREEMENT." The purchase order/agreement specifically required Kras to obtain a policy naming Newmark as an additional insured. However, the purchase order/agreement contained no signature lines and, as such, was not signed. Kras accepted Newmark's purchase order/agreement by beginning to perform the work. On November 11, 2012, a Kras employee was injured on the job and sued the property owner. Zurich, the insurer for Newmark, sought additional insured coverage for Newmark (and the owner) from Endurance. However, Endurance refused and Zurich filed suit. Thereafter, Endurance moved for summary judgment arguing that Newmark did not qualify as an additional insured because the purchase order/agreement was unsigned. In affirming the lower court's denial of Endurance's motion, the First Department noted that the Endurance policy requires a written contract, not a signed one. The Court stated that there was no doubt that a written contract (the purchase order/agreement that Newmark sent to Kras) existed at the time of the accident. Moreover, although the purchase order/agreement did not contain signature lines and was unsigned, it stated that "BY ACCEPTING THE ORDER, [KRAS] AGREES TO BECOME BOUND BY THE TERMS OF THIS AGREEMENT." As such, the Court found that the unsigned purchase order constituted a written contract for purposes of the additional insured endorsement to the Endurance policy.

APPLICABILITY OF EXCLUSIONS

Country-Wide Ins. Co. v. Excelsior Ins. Co., 46 N.Y.S.3d 96 (1st Dept. Feb. 2, 2017). An employee of Truck-Rite Distributions Systems Corp., was injured while

unloading a trailer owned by R&L Carriers, Inc. and leased to Truck-Rite. Specifically, the employee was injured while unloading material from inside a shipping trailer onto an attached lift gate. The lift gate failed, causing the employee to fall. The employee commenced an action to recover for personal injuries against R&L, which in turn commenced a third-party action against Truck-Rite, for *inter alia*, contractual and common-law indemnification. Country-Wide Insurance Company, which issued a Truckers Policy to Truck-Rite, provided Truck-Rite with a defense and indemnity relative to the third-party action. Truck-Rite was also insured under a Commercial General Liability insurance policy issued by Excelsior Insurance Company that contained an "Aircraft, Auto or Watercraft" Exclusion which preluded coverage for bodily injury "arising out of" the use, including loading and unloading, of autos operated or rented or loaned to Truck-Rite (the "Auto Exclusion"). "Auto" was defined as "a land motor vehicle, trailer or semitrailer designed for travel on public roads." Subsequent to the resolution of the underlying action, Country-Wide commenced suit against Excelsior seeking reimbursement for the amounts it paid relative to the underlying action and both parties moved for summary judgment. The First Department initially 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 held that as the underlying plaintiff's accident occurred while he was unloading material from a shipping trailer, an activity clearly encompassed by the Auto Exclusion, Country-Wide was not entitled to reimbursement from Excelsior. The fact that the employee's injury was allegedly caused by the defective nature of the trailer lift did not impact the exclusion's applicability as "[t]he focus of the inquiry is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained."

Guzy v. New York Central Mut. Fire Ins. Co., 2017 WL 112508 (3d Dept. Jan. 12, 2017). Derek Prindle commenced a personal injury action against John Guzy alleging that Guzy shot Prindle in the abdomen. Guzy tendered the defense of Prindle's action to New York Central Mutual Fire Insurance Company, which had issued homeowners and umbrella insurance policies to Guzy. After New York Central disclaimed coverage, Guzy commenced an action seeking a declaration that New York Central owed a duty to defend him relative to Prindle's lawsuit. Following joinder of issue, Guzy moved for summary judgment. Under the terms of the homeowners insurance policy, New York Central was obligated to provide Guzy with a defense in a legal action involving bodily injury caused by an occurrence, which was defined as an accident. The umbrella policy also contained an exclusion that barred coverage for "expected or intended" conduct. New York Central contended that Guzy's act of shooting Prindle was intentional, thereby brining it outside the ambit of the homeowners insurance policy or within the umbrella policy's exclusion. In finding that New York Central had a duty to defend Guzy, the Third Department noted that Prindle's Complaint alleged that Guzy "assault[ed] [Prindle]…by shooting [Prindle] in the abdomen" and that "as a result of the assault," Prindle sustained personal injuries. Although Prindle's Complaint also alleged that Guzy was arrested and criminally charged with assault, there was no further specification as to the criminal charges raised against Guzy. The Court reasoned that inasmuch as an assault may derive from an individual's recklessness or criminal negligence, a reasonable possibility exists that Guzy's actions were not intentional. Furthermore, while the allegation in Prindle's Complaint describing Guzy's actions as "intentional and criminal" was relevant in determining whether New York Central has a duty to defend, it was noted that such conclusory allegations drafted by a third-party is not the focal point. As such, the Court held that because the shooting could reasonably be interpreted as having stemmed from Guzy's unintentional conduct, New York Central's duty to defend was triggered relative to the Prindle action.

Herbert v. Dryden Mut. Ins., 54 Misc.3d 1205(A) (N.Y. Sup. Ct., Tompkins Cnty., Jan. 4, 2017). In October 2008, plaintiffs purchased a three-story, six-unit dwelling in Ithaca, New York. When plaintiffs purchased the property, it was vacant and in a state of disrepair. Plaintiffs, acting as their own general contractor, commenced substantial repairs and renovations to the property. In that regard, the plaintiffs hired an architect, replaced windows, door and siding, and installed new plumbing. In the fall of 2008, the

plaintiff's hired Yaman Contracting to remove a three-story front porch and replace it on the same foundation with a one-story porch; this project was completed in the spring of 2009. Plaintiffs hired an architect, replaced windows, doors and siding, and installed new plumbing. In August 2009, plaintiffs hired J.D. Ferro Roofing, LLC to tear off and dispose of the existing roof on the entire house, with the exception of the newly-completed one-story porch, and install additional roof decking and new shingles; this project was completed by May 2010. The plaintiffs were subsequently sued by an employee of J.D. Ferro Roofing wherein it was alleged that he was injured while working at the premises. The plaintiffs tendered their defense and indemnification to their insurer, Dryden Mutual Insurance Company, which disclaimed coverage based upon the structural alteration exclusion. The structural alteration exclusion barred coverage for "bodily injury or property damage arising out of structural alterations which involve changing the size of or moving buildings or other structures, new construction or demolition operations performed by or on behalf of the named insured". The plaintiffs filed suit seeking a declaration of coverage under the Dryden policy and the parties subsequently cross-moved for summary judgment. The Tompkins County Supreme Court stated that when construing exclusionary clauses in liability insurance policies, the New York Appellate Division has held that the plain meaning of "demolition" is the "complete tearing down, razing or destruction of [an] entire building". It was undisputed that the building on the plaintiffs' property was not completely torn down, removed, or razed, and the Court found that Dryden completely failed to meet its high burden of establishing that its definition of "demolition operations" included the removal of the old roof coverage as the only reasonable interpretation of the exclusion. In that regard, the Court noted that Dryden erroneously asserted that "it [was] undisputed that the roof on the plaintiffs' property was demolished and a new roof constructed. In that regard, the plaintiffs contend that no demolition occurred at the property. Moreover, the undisputed evidence established that the old roof was removed only down to the existing wooden roof deck, leaving the structure of the roof intact. A new layer of 3/8" plywood was then installed on the existing deck prior to the installation of new roof shingles. The Court noted that the removal of the old roof, down to the layer of the existing roof deck, was not done for the purpose of destroying or permanently removing any part of the building, much less the entire building; rather, it was done for the specific purpose of improving the building by permitting proper replacement of a worn-out component of the structure. Accordingly, the Court granted the plaintiffs' motion for summary judgment finding that Dryden had an obligation to defend and indemnify the plaintiffs relative to the underlying action.

LATE NOTICE

Minasain v. IDS Property & Cas. Ins. Co., 2017 WL 219105 (2d Cir. Jan. 19, 2017) (Summary Order). Nikolai Minasian and Harutyun Minasian commenced suit against IDS Property Casualty Insurance Company and State Farm Fire & Casualty Company seeking coverage in connection with a loss they sustained as a result of a burglary at their apartment on January 1, 2014. IDS had issued a Tenant's insurance policy to the Minasians which was in effect on the date of loss and required the insureds to provide notice of a loss "as soon as reasonably possible". In addition, State Farm issued a Renter's Insurance policy and Personal Articles Insurance policy to the Minasians, which required "immediate notice" of a loss and that a loss be reported "as soon as practicable", respectively. Each of the policies at issue provided coverage for theft. Although the Minasains became aware of the burglary the day it occurred, they did not report the loss to either IDS or State Farm until March 28, 2014 and, as such, the insurers disclaimed coverage on the basis of, *inter alia*, the failure to give timely notice. Subsequent to the institution of litigation, IDS and State Farm moved for summary judgment. In affirming the District Court's award of summary judgment to IDS and State Farm, the Second Circuit noted an insured's obligation to provide notice is triggered when the circumstances known to the insured would have suggested to a reasonable person the possibility of a claim. The Court held that the burglary of January 1, 2014 would have suggested to a reasonable person the possibility of a claim in light of the policies' theft coverage, and that the eighty-six day delay that followed was unreasonable as a matter

of law. The Court reasoned that the same sections of the policies that required notice be given to the insurer also required that notice be provided to the police in case of theft—which the Minasains did on the day of the burglary—suggesting that the insured is expected to contact both the insurer and the police at or about the same time. Moreover, the State Farm policies further required the insured to submit a formal proof of loss within sixty and ninety days, respectively, after loss. As such, the Court found that the preliminary notice requirement in the policies could only be reasonably construed to require notice sooner than when a proof of loss is due. In addition, the Court likewise affirmed the portion of the District Court's ruling that the Minasains' alleged lack of sophistication did not excuse their notice delay.

PROPERTY DAMAGE

Elite Catering Company, Inc. v. National Specialty Insurance Co., 2017 WL 353528 (N.Y. Sup. Ct., Richmond Cnty., Jan. 23, 2017). Elite Catering, Inc. purchased a policy which included commercial general liability and commercial property coverage from National Specialty Insurance Co. relative to its catering business located in Staten Island, New York. Although Elite declined to purchase separate flood coverage, it did purchase an additional rider from NSI providing enhanced coverage for damages caused by sewer and drain back-ups, food spoilage, loss of business income, and power outages. Elite claimed to have suffered extensive property damage, food spoilage, and loss of business income following Superstorm Sandy, which struck Staten Island on October 29, 2012. When the principals of Elite returned to the premises on the day after the storm, they found the restaurant to be filled with refuse, including grease and sewage. Elite filed a claim with NSI for damages resulting from an apparent sewer back-up. However, six months later, Elite receive a certified letter from NSI denying coverage on the ground that all of the alleged damages were the result of "flooding" a circumstance specifically excluded under the policy. Elite then commenced an action seeking, *inter alia*, a declaration that it was entitled to coverage for the loss. In moving for summary judgment and dismissal of the Complaint, NSI maintained that (1) Elite's insurance policy clearly and unambiguously excluded coverage for flood damage, and (2) pursuant to its "anti-concurrent causation" language, the policy also unambiguously excluded coverage for covered losses if those losses were occasioned, even in part, by uncovered causes, *i.e.*, that damages caused by a combination of uncovered losses (*e.g.*, flood) and covered losses (*e.g.* a sewer back-up) rendered the entire loss non-compensable. In opposition, Elite argued, among other things, that all of its damage (*i.e.*, food spoliation, the loss of business income, clean-up, and renovation costs) arose as a result of a sewer back-up for which Elite had purchased special coverage. Elite further asserted that its purchase of the additional coverage for sewer back-ups created a reasonable expectation on its part that damages attributable to the failure of the municipal sewer system would be covered. It further argued that there was confusion in the policy generated by the effect of the "anti-concurrent causation" exclusion on the rider providing additional coverage for damage attributable to, *e.g.*, sewer back-up. In denying NSI's motion in part, the Richmond County Supreme Court held that it was unable to find, as a matter of law, whether the facial inconsistency in the policy language noted by Elite was subject to "no other reasonable interpretation, when read together [with the failure to purchase flood insurance], other than to exclude coverage for all losses caused by any combination of covered and non-covered occurrences", or represents a trap into which an "average insured" might fall as a result of the purchase of additional coverage specifically written to cover sewer and drain back-ups. Accordingly, the Court noted that the issue at bar is not whether flood losses are properly excluded from coverage (which the Court indicated clearly were), but whether the application of the "anti-concurrent causation" exclusion stated in the body of the policy, was under the facts, "consistent with the reasonable expectations of the average insured" purchasing dedicated coverage for losses caused by, among other things, the failure of the municipal sewer system to keep up with climatic changes of whatever nature. The Court held that the language of the policy in question, when viewed as a whole, prevented it from finding as a matter of law, that NSI has demonstrated its *prima facie* right to the dismissal of Elite's cause of action for breach of contract. Moreover, it remained to

be proven whether the damage sustained by Elite were caused by (1) the failure of the sewer system or the power outage initiated by Con Edison in advance of the storm, (2) the storm itself, or (3) a combination of both.

MISCELLANEOUS

Certified Multi-Media Solutions, Ltd. V. Preferred Contractors Insurance Company Risk Retention Group, LLC, 2017 WL 28419 (2d Cir. Jan. 3, 2017) (Summary Order). In 2008, Getronics USA Inc. hired Certified Multi-Media Solutions, Ltd., an electrical contracting company, to provide electrical services at a shopping mall in the Bronx. Thereafter, Certified procured an insurance policy from Preferred Contractors Insurance Company Risk Retention Group, LLC consisting of a commercial general liability policy which contained certain manuscript policy provisions, including Endorsement 23. Anthony Balzano, an employee of Certified, was subsequently injured while performing electrical work at the shopping mall, and sued the mall owner, the lessee of the premises, and the general contractor. The lessee and Getronics filed third party Complaints against Certified for, *inter alia*, breach of contract and indemnification. Certified sought coverage under the PCIC policy for its defense, and PCIC informed Certified that, pursuant to Endorsement 23, the policy would only provide up to $10,000 of coverage, rather than the full $1 million policy limits for the claims arising from Balzano's injuries. Certified then filed suit against PCIC seeking a declaratory judgment that the policy provides up to $1 million in coverage and that PCIC was required to defend and indemnify the underlying action. The first paragraph to Endorsement 23, which was entitled "Action Over", provided in relevant part: "Notwithstanding the limit of coverage shown in the Declarations and/or Section III…, $10,000 only is the most we will pay as damages for any and all claims, including any claim for contractual indemnification, arising from or related to an 'bodily injury', 'property damage' or 'personal injury' sustained by an employee of an insured while injured, harmed or damaged in the scope of such employment." The second paragraph to Endorsement 23 continued: "In any action brought by such employee if [the Named Insured is] impleaded into said action, or if any third party action over is commenced against [the Named Insured], irrespective of the claims or theories set forth therein, the $10,000 limit of coverage as provided in this endorsement shall apply when: [the employee sustains a "grave injury"] and [the Named Insured was required to be insured under a workers' compensation policy]." In affirming the decision of the District Court, the Second Circuit held that the first paragraph of Endorsement 23 covers claims arising from injuries or property damage sustained "by an employee of an insured," while the second paragraph applies "if you are impleaded into said action" or "if any third party action over is commended against you." The use of "you" in the policy refers to the "Named Insured shown in the Declaration", which is Certified. The Court found that the use of "you" indicates that the second paragraph to Endorsement 23 applies specifically to Certified, while the first paragraph applies generically to any insured. In addition, the Court further noted that throughout the policy, there were references to the "Named Insured", "Insured", and "Named Insured and/or Insured", suggesting that the two were distinct and not the same entities. As such, the Second Circuit held that PCIC's reading of the policy would render the second paragraph of Endorsement 23 superfluous. In this regard, if "an insured" in the first paragraph included the Named Insured, there would be no need for the second paragraph. Furthermore, PCIC's reading would create a contradiction, as the first paragraph would impose a $10,000 cap with respect to Certified only when there was a "grave injury." The Court determined that Certified's reading of the policy avoided this contradiction and gave effect to both paragraphs of Endorsement 23. Accordingly, because Balzano was an employee of Certified and did not suffer grave injuries, the $10,000 cap did not apply to claims arising from his injuries and Certified was entitled to up to $1 million in coverage under the policy.

Cybercreek Entertainment, LLC v. U.S. Underwriters Insurance Company, 2016 WL 7374233 (W.D.N.Y. Dec. 20, 2016). U.S. Underwriters Insurance Company issued an insurance policy to Cybercreek Entertainment, LLC that provided coverage for commercial property damage. The insurance policy included a cancelation clause which provided, in relevant part: "[U.S. Underswriters] may cancel [the] policy by mailing or

delivering to [Cybercreek] written notice of cancellation at least…10 days before the effective date of cancellation if [U.S. Underwriters cancel[s] for nonpayment of premium; or…30 days before the effective date of cancellation if [U.S. Underwriters] cancel[s] for any other reason." Subsequent to the issuance of the policy, U.S. Underwriters cancelled the policy by providing written notice on August 27, 2014, effective September 30, 2014. Cybercreek thereafter sustained a loss and commenced suit against U.S. Underwriters for breach of contract. U.S. Underwriters moved to dismiss the Complaint arguing that the policy was cancelled according to its terms before the loss occurred, and, therefore, no breach occurred. Finding in favor of U.S. Underwriters, the United States District Court for the Western District of New York held that the clear terms of the policy allowed U.S. Underwriters to cancel the policy for "any" reason, so long as U.S. Underwriters provided 30-days' notice. The Court reasoned that even if the cancellation clause could be read as being silent on whether cause was required to cancel the policy (which the Court stated it could not), the Court must assume that the policy was terminable without cause. Moreover, it was noted that because the policy was written on an excess line basis, it was not subject to the statutory restrictions placed upon an insurer's ability to cancel a policy set forth in Insurance Law § 3426. The Court further opined that U.S. Underwriters' reason for cancelling the contract was wholly immaterial to the Court's analysis. Cybercreek further argued that the policy was procedurally unconscionable because Cybercreek's signatory "had no meaningful opportunity to negotiate" the specific terms and that the agreement was substantively unconscionable cause it was one-sided an left Cybercreek with no recourse. The Court rejected both of those assertions. With regard to procedural unconscionability, it was noted that while lack of experience can be a factor in determining procedural unconscionability, conclusory allegations were not sufficient to establish a basis for such a finding as Cybercreek made no allegations that its signatory was inexperienced in running a business and the pleadings suggested that the business was in operation for at least three years prior to the cancellation of the policy. Furthermore, Cybercreek entered into at least two insurance policy contracts before the policy at issue and there was no allegation that Cybercreek lacked meaningful choice in entering into the agreements. It was further held that the cancellation clause was not substantively unconscionable as it was not one-sided because it permitted Cybercreek to cancel the policy at any time by mailing or delivering to U.S. Underwriters advance written notice of cancellation. Finally the Court rejected Cybercreek's argument that the cancellation clause was ambiguous. In this regard, the policy provided that, with sufficient notice, U.S. Underwriter can cancel the policy "for nonpayment of premium; or…for any other reason." The Court fund that under common usage, "any other reason" was not open to more than one interpretation—U.S. Underwriters could rely on whatever ground or cause it wanted to cancel the policy, so long as it provided the requisite notice.

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