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CASES OF INTEREST BY TOPIC

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ADDITIONAL INSURED COVERAGE

Burlington Insurance Co. v. New York City Transit Authority, 2017 NY Slip Op 04384 (Ct. of App. June 6, 2017). The Burlington Insurance Company issued an insurance policy to Breaking Solutions, Inc. ("BSI") which, by endorsement, provided additional insured coverage to New York City Transit Authority and MTA New York City Transit in certain circumstances. During the coverage period, a NYCTA employee fell off an elevated platform as he tried to avoid an explosion after a BSI machine touched a live electrical cable buried in concrete at the excavation site. The employee and his spouse subsequently brought an action against New York City and BSI, asserting Labor Law claims, negligence, and loss of consortium. The City impleaded NYCTA and MTA and while Burlington initially accepted their defense under a reservation, Burlington later withdrew its defense and disclaimed coverage on the basis that NYCTA and MTA were not additional insureds within the meaning of the policy because NYCTA was solely responsible for the accident that caused the injury. Burlington then commenced an action seeking a declaration that NYCTA and MTA were not entitled to coverage under the policy relative to the underlying matter. The Court of Appeals found that giving the words in the additional insured endorsement – namely, that additional insured coverage was limited to liability for bodily injury "caused, in whole or in part" by the acts or omissions of the named insured – their plain an ordinary meaning, the endorsement requires proximate cause of the named insured in order to be implicated. In this regard, it was noted that the additional insured endorsement at issue expresses in lay terms what the courts have long defined as "proximate causation". In rendering its decision, the Court rejected NYCTA's and MTA's call to adopt the First Department's conclusion that the phrase "caused by" does not materially differ from the phrase "arising out of" and results in coverage even in the absence of the named insured's negligence. In relying on various New York decisions, the Court stated that "arising out of" is not the functional equivalent of "proximately caused by". The Court agreed with the dissent in that interpreting "arising out of" and "caused, in whole or in part" by differently does not compel the conclusion that the endorsement incorporates a negligence requirement, but indicated that it does compel the phrase "caused, in whole or in part" by to be interpreted to require more than "but for" causation. It was further noted that the Court's interpretation, coupled with the endorsement's application to act or omissions that result in liability, supported the determination that proximate cause of the named

insured was required in order to implicate coverage under the additional insured endorsement. In support of its decision, the Court also noted that the "caused, in whole or in part" by language was adopted by the ISO to replace the "arising out of language" with the intention that coverage only be provided for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence. The Court found that as the underlying plaintiff's injury was due to NYCTA's sole negligence in failing to identify, mark or de-energize the electrical cable, BSI was not at fault and thus, the proximate cause requirement had not been met and Burlington had no duty to provide coverage to NYCTA or MTA in connection with the underlying matter.

Atlantic Ave. Sixteen AD, Inc. v. Valley Forge Ins. Co., 2017 WL 2347084 (2d Dept. May 31, 2017). Linea 3, doing business as Marilena Imports, operated a wedding and party-favor supply business in a portion of a building owned by Atlantic Ave. Sixteen AD, Inc. Linea rented space in the building pursuant to a written lease with Atlantic, which provided that the building's parking lot was a common area and that Atlantic was responsible for maintaining the common areas, including snow and ice removal. In January 2011, an employee of Linea was allegedly injured when he slipped and fell on a patch of black ice in the building's parking lot as he was walking from his car to the building to begin work. The employee commenced an action against Atlantic, among others, to recover damages for personal injuries. Prior to the incident, Linea had obtained a Commercial General Liability insurance policy from Valley Forge Insurance Company which was in effect at the time of the alleged accident. The Valley Forge insurance policy contained an endorsement providing additional insured coverage for "liability arising out of the ownership, maintenance or use of that part of the premises leased to [Linea] and shown in the Schedule". The "Schedule" stated that Linea had leased "unit 1" of the building and made no reference to the parking lot. Atlantic tendered its defense and indemnification to Valley Forge relative to the underlying action, but Valley Forge denied Atlantic's tender on the basis that the potential liability did not arise out of the ownership, maintenance, or use of a part of the premises leased to Linea. Specifically, Valley Forge asserted that according to the lease, the parking lot was a common area outside of the leased premises and that Atlantic was responsible for snow and ice removal in the parking lot. Atlantic, among others, thereafter commenced an action seeking, *inter alia*, a declaration that Valley Forge was obligated to defend and indemnify Atlantic in connection with the underlying action. Valley Forge moved for summary judgment, the trial court granted the motion, and Atlantic appealed. The Second Department held that Valley Forge established its prima facie entitlement to judgment as a matter of law. In this regard, the additional insured endorsement unambiguously provided that Atlantic was an additional insured only for liability "arising out of" the "ownership, maintenance or use" of the "premises leased" to Linea. As Linea leased only a portion of the building from Atlantic (not the parking lot where the incident occurred) and Linea had no duty to maintain the parking lot, the Court found that there was no causal relationship between the injury and the risk for which coverage was provided and thus, the underlying injury as not a bargained-for-risk.

77 Water Street, Inc. v. JTC Painting & Decorating Corp., 148 A.D.3d 1092 (2d Dept. Mar. 29, 2017). Structure Tone Inc. and 77 Water Street, Inc. commenced an action against Allied World Assurance Company seeking a declaration that Allied was obligated to defend and indemnify them as additional insureds relative to an underlying personal injury action commenced by an employee of Allied's insured, JTC Painting & Decorating Corp. The underlying complaint alleged that JTC entered into a subcontract with Structure Tone, which was the general contractor, to perform work at the renovation site, and that 77 Water Street was the owner of the property. Structure Tone and 77 Water Street moved for summary judgment arguing that JTC and Structure Tone had entered into two written contracts, a blanket insurance/indemnity agreement and an unsigned purchase order, wherein JTC agreed to procure liability insurance under which Structure Tone and 77 Water Street were to be named as additional insureds. The Second Department held that Structure Tone and 77 Water Street demonstrated that the blanket insurance/indemnity agreement was a written contract executed by Structure Tone and JTC prior to the incident, and that it required JTC to obtain

comprehensive general liability insurance naming Structure Tone as an additional insured under the policy. As such, the Court found that Structure Tone qualified as an additional insured under the endorsement to JTC's commercial general liability insurance policy with Allied. However, it was found that 77 Water Street failed to demonstrate, *prima facie*, that JTC was required by written contract to name 77 Water Street as an additional insured under its insurance policy with Allied. In this regard, it was noted that the blanket insurance/indemnity agreement required JTC to name "specified owners" as additional insureds under its insurance policy, and Structure Tone and 77 Water Street failed to submit any evidence that 77 Water Street was a specified owner. The Court further stated that assuming that the purchase order constituted a "written contract" within the meaning of the endorsement, the purchase order did not require JTC to name 77 Water Street as an additional insured under its policy.

APPLICABILITY OF EXCLUSIONS

Cincinnati Ins. Co. v. Roy's Plumbing, Inc., 2017 WL 2347562 (2d Cir. May 31, 2017). Roy's Plumbing, Inc. appealed an order granting Cincinnati Insurance Company's motion for summary judgment declaring that Cincinnati Insurance had no duty to defend or indemnify Roy's Plumbing in an underlying state court action related to chemical contamination at Love Canal near Niagara Falls. In affirming the lower court's decision, the Second Circuit stated that Cincinnati Insurance met its burden of demonstrating that the allegations of the underlying action fell within the insurance policy's pollution exclusion. In this regard, the policy excludes "[b]odily injury or property damage which would not have occurred in whole or in part but for the actual alleged or threatened discharge, dispersal, seepage, migration, release, escape or emission of pollutants at any time." Moreover, the policy defined "pollutant" as being both "substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment" and "any solid [or] liquid…irritant or contaminant, including…waste." The underlying suit claimed damages related to personal injuries and contamination of property caused by toxic chemicals. While the parties disputed whether the complained-of chemicals include sewage, and Roy's Plumbing argued that sewage may not constitute a "pollutant," the Second Circuit stated that it had no doubt that sewage is "generally recognized in industry or government to be harmful or toxic to persons." Moreover, Roy's Plumbing contended that the underlying Complaint speaks of "pressure," and it may thereby be seeking damages from harm caused by the force of liquids permitted to build within the sewer rather than by chemical toxicity. In rejecting this assertion, the Court found that the relevant passage of the underlying Complaint clarifies that pressure was merely the mechanism allowing chemicals to escape from the sewer; it was not alleged as an independent cause of action. Lastly, Roy's Plumbing suggested that the pollution exclusion was overbroad, and therefore created an ambiguity, because if read literally it would deny coverage for most damages due to plumbing work and thereby create tension with those parts of the policy clearly covering such work. The Court likewise rejected this argument stating that New York courts have limited the reach of pollution exclusions to "those cases where the damages alleged are truly environmental in nature, or where the underlying complaint alleges damages resulting from what can accurately be described as the pollution of the environment." As such, the Court found that the exclusion was not overly broad. Accordingly, the allegations of the underlying Complaint fell within the pollution exclusion and Cincinnati Insurance had no duty to defend or indemnify Roy's Plumbing in connection with the underlying action.

Northfield Ins. Co. v. Queen's Palace, Inc., 2017 WL 1957475 (E.D.N.Y. May 10, 2017). Northfield Insurance Co. issued a commercial general liability insurance policy to Queen's Palace, Inc. which provided coverage for lawsuits claiming damages because of "bodily injury" caused by an "occurrence". By way of endorsement, the policy contained an Assault and Battery Exclusion, which excluded coverage for "'[b]odily injury' or 'property damage' arising out of any act or 'assault' or 'battery' committed by any person, including any act or omission in connection with the prevention or

suppression of such 'assault' or 'battery'." On July 26, 2014, Eduardo Rojas was beaten to death while standing in line waiting to enter a nightclub in Woodside, New York, which was allegedly owned by Rosewood Realty, L.L.C. and leased by Queen's Palace. Rojas' Estate commenced an action for wrongful death and alleged that Rojas "was assaulted, dragged, pistol whipped, and killed by the individuals being removed from the [nightclub]." After receiving notice of the incident, Northfield disclaimed coverage citing the Assault and Battery Exclusion and stating that "because the injury to [Rojas] arose out of the assault and/or battery of [Rojas] committed by any person" there was no coverage under the policy. The United States District Court for the Eastern District of New York first noted that where an insurance policy contains an assault and battery exclusion and where no cause of action would exist "but for" an assault, the underlying tort claim is "based on" the assault, the exclusion precludes coverage, and the insurer has no duty to provide coverage, regardless of the theory of liability asserted against the insured. The Court found that the Assault and Battery Exclusion in the Northfield policy unambiguously excludes "'[b]odily injury' or 'property damage' arising out of any act or 'assault' or 'battery' committed by any person, including any act or omission in connection with the prevention or suppression of such 'assault' or 'battery'." The Court stated that regardless of whether Rojas' Estate asserted a claim in the underlying action sounding in negligence, it was clear that those claims would not exist "but for" the assault perpetrated against Rojas. Accordingly, it was held that the Assault and Battery Exclusion precludes coverage under the policy and Northfield had no duty to defend or indemnify Queen's Palace in the underlying action.

Lend Lease (US) Constr. LMB Inc. v. Zurich American Ins. Co., 28 N.Y.3d 675, 71 N.E.3d 556 (Ct. of App. Feb. 14, 2017). In October 2012, Extell West 57th Street LLC was constructing a 74-story skyscraper at 157 West 57th Street in Manhattan. Extell had retained Lend Lease (US) Construction LMB Inc. to act as the construction manager for that project and, in that capacity, Lend Lease had contracted with Pinnacle Industries II, LLC for certain structural concrete work with respect to that endeavor. Pursuant to its contract with Lend Lease, Pinnacle was to furnish and install, among other things, two diesel fuel tower cranes. One of those cranes was installed on a reinforced slab on the 20th floor of the building and, once all other trade work was completed at the project, it was to be dismantled and removed from the site. Several components of the crane, including beams cast into the slab and materials reinforcing the locations at which the crane was "tied" to the building as it arose next to that edifice, were designed to permanently remain part of the building upon the completion of construction. By October 29, 2012, the crane had risen approximately 750 feet from its base. On that day, Superstorm Sandy made landfall in the New York City area causing damage to the crane. At the time of that incident, Extell was the named insured on a program of builder's risk insurance containing coverage in the amount of $700 million (the total estimated cost of the project). The program was referred to as the "policy," but was actually an amalgamation of five separate insurance contracts, each of which was issued by a different insurer and each of which covered a different percentage of the aggregate risk. Zurich American Insurance Company assumed half of the aggregate risk and furnished the "lead" policy with respect to that exposure. Zurich and the other insurers issued a declination of coverage with regard to the crane damage and Lend Lease and Extell filed suit seeking, among other things, a declaration that the crane is covered property under the policy and that coverage for the crane is not subject to any policy exclusion. In rendering its decision, the Court of Appeals noted that the threshold question of whether the policy covers the crane in the first instance turns on whether the crane was a "temporary…structure" within the meaning of the policy. In relying on previous decisions which had defined "structure" as including "any production or piece of work artificially built up or composed of parts joined together in some definite manner", the Court first concluded that the crane was a "structure" for purposes of the policy. The Court further held that the crane was "temporary" in that it was anchored and tied to the building only "during construction" and was to be "removed when…no longer needed." It was then determined that although the crane constituted a temporary structure, coverage for the loss was excluded by way of the contractor's tools exclusion which provides that "[t]h[e] Policy does not insure against loss or damage to…Contractor's tools,

machinery, plant and equipment including spare parts and accessories, whether owned, loaned, borrowed, hired or leased, and property of a similar nature not destined to become a permanent part of the INSURED PROJECT, unless specifically endorsed to the Policy." In particular, Extell asserted that the exclusion does not apply because the crane does not constitute a "tool" or "equipment" within the meaning of the contractor's tools exclusion. It was noted by the Court, however, that the exclusion also precludes coverage for "machinery," and the crane falls squarely within this definition of that term. "Machinery" means, among other things, "machines in general or as a functioning unit," and "machine" is defined as "a *mechanically*, electrically, or electronically operated device for performing a task". Although Extell submitted evidence that "components of [the crane were to] permanently remain part of the [b]uilding following the completion of construction," those "components" consisted primarily of reinforcements and ties, and the record conclusively reflected that the principal parts of the crane were "not destined to become a permanent part of the [building]" upon the completion of construction. As such, it was held that the contractor's tools exclusion applies to the crane. Moreover, the Court was not persuaded by Extell's and Lend Lease's arguments that the contractor's tools exclusion was so broad that it rendered the coverage afforded under the temporary works provision of the policy illusory. In this regard, the Court found that the contractor's tools exclusion did not defeat *all* of the coverage afforded under the policy's temporary works provision. For example, the exclusion would not defeat coverage initially granted for such things as the cost of erecting scaffolding, for "temporary buildings," and for such other things as "formwork, falsework, shoring, [and] fences," which are not "tools" within the meaning of the exclusion. As such, it was determined that the enforcement of the exclusion does not create a result that "'would have the exclusion swallow the policy'".

DISCLAIMER OF COVERAGE

Ability Transmission, Inc. v. John's Transmission, Inc., 2017 WL 2261055 (2d Dept. May 24, 2017). In May 2012, Susan Crescimano allegedly was injured when she tripped and fell in a pothole in the parking lot of John's Transmission, Inc., which leased the premises from Ability Transmission, Inc. Crescimano then commenced a personal injury action against Ability, among others. John's Transmission had purchased insurance from Merchants Mutual Insurance Company, which named Ability as an additional insured. Ability sought a defense and indemnity relative to the Crescimano action from Merchants and Merchants, in turn, disclaimed coverage. Thereafter, Ability commenced suit seeking a declaration that Merchants was obligated to provide it with a defense and indemnification in connection with the underlying action. Ability moved for summary judgment and Merchants cross-moved for summary judgment dismissing the Complaint. The Second Department first noted that when an insurer disclaims coverage for death or bodily injury arising out of an accident, "the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated". It continued that an insurer's justification for denying coverage is strictly limited to the grounds stated in the disclaimer and thus, an insurer waives any ground for denying coverage that is not specifically asserted in its declination, even if that ground would otherwise have merit. The Court found that in its declination, Merchants disclaimed coverage on the basis that Ability was not named as an additional insured under the policy, which was factually incorrect. Moreover, the exclusion upon which Merchants subsequently relied upon to defeat coverage was not mentioned in its declination. As such, it was held that Merchants waived any ability to rely on exclusions that were not outlined in the disclaimer and therefore, Merchants was obligated to defend and indemnify Ability in the underlying action.

LATE NOTICE

Ramlochan v. Scottsdale Ins.c Co., 2017 WL 2259846 (2d Dept. May 24, 2017). Plaintiffs commenced an action pursuant to Insurance Law § 3420(a)(2) to recover the amount of an unsatisfied judgment against the tortfeasor's insurer, Scottsdale Insurance Company, and for a judgment declaring that Scottsdale was obligated to satisfy the judgment. The plaintiffs moved

for summary judgment and Scottsdale cross-moved for summary judgment declaring that it has no obligation to satisfy the judgment on the basis of late notice. In affirming the decision of the lower court, the Second Department found that Scottsdale demonstrated that its insured knew of the occurrence immediately and received a letter of representation from the plaintiff's attorney in June 2008, but waited until September 25, 2009 to notify Scottsdale. It was noted that because the Scottsdale policy was issued prior to the amendment to Insurance Law § 3420, Scottsdale was not required to show that it was prejudiced by the failure to give timely notice in order to satisfy its burden. The plaintiffs further asserted that Scottsdale unreasonably delayed in disclaiming coverage. The Court likewise rejected this contention stating that while the Insurance Law requires an insurer to give written notice of a disclaimer of coverage as soon as reasonably possible, an investigation into the issues affecting the decision whether to disclaim may excuse the delay. The Court held that under the circumstances of the case, Scottsdale's delay in issuing the disclaimer of coverage was reasonably related to the completion of a necessary, thorough, and diligent investigation into issues affecting its decision to disclaim. As such, the Second Department held that the trial court properly denied the plaintiff's motion for summary judgment and granted Scottsdale's cross motion for judgment finding that Scottsdale was not obligated to satisfy the plaintiffs' judgment.

BN Partners Associates, LLC v. Selective Way Ins. Co., 148 A.D.3d 1592 (4th Dept. Mar. 24, 2017). BN Partners Associates, LLC , The Golub Corporation, and LeChase Construction Services, LLC filed suit against Selective Way Insurance Co. seeking a declaration that Selective was obligated to defend and indemnify BN, Golub, and LeChase relative to an underlying personal injury action under a commercial general liability insurance policy Selective issued to JAG I, LLC. The underlying action arose when an employee of JAG was injured while working on property owned by BN and leased by Golub pursuant to a subcontract between JAG and LeChase, the general contractor. In its Answer, Selective denied any obligation to the BN, Golub, and LeChase on the basis that they had failed to timely notify it of the claim or the underlying suit and that they had failed to immediately forward copies of legal papers received in connection with the underlying lawsuit. BN, Golub, and LeChase moved for summary judgment on their declaratory judgment cause of action on the ground that they provided timely notice to Selective in the form of (1) a letter that LeChase's insurance carrier sent to JAG, dated September 27, 2011, informing it of the lawsuit and advising JAG to turn the matter over to its insurance carrier, and (2) a voicemail message with JAG's insurance agent following up on that letter. Selective cross-moved for summary judgment, seeking a declaration that it has no obligation to defend or indemnify BN, Golub, and LeChase in connection with the underlying lawsuit because it did not receive notice of the claim or lawsuit until it was served with the declaratory judgment complaint, and that a delay of nearly seventeen months after BN, Golub, and LeChase learned of the lawsuit was untimely as a matter of law. Selective further argued that the voice mail message to JAG's insurance agent did not suffice insofar as it was not written notice as required by the policy and was not notice to Selective's agent. The Fourth Department found that the Selective policy unambiguously required an insured to provide Selective with written notice of a claim or lawsuit brought against an insured and to send Selective copies of any legal papers received in connection with the claim or lawsuit. The Court further concluded that Selective met its initial burden of establishing that BN, Golub, and LeChase failed to provide notice of the claim or lawsuit as a matter of law inasmuch as Selective's employee averred that Selective did not receive notice of the underlying lawsuit until nearly seventeen months after the undisputed latest date when BN, Golub, and LeChase learned of the underlying lawsuit and where BN, Golub, and LeChase offered no excuse for the delay. Moreover, the Court rejected the contention that they provided Selective with adequate notice via the voicemail message left with JAG's insurance agent and the letter sent to JAG informing each of the underlying lawsuit as the policy required that BN, Golub, and LeChase "see to it that [Selective] receive[s] written notice of the claim or 'suit' as soon as practicable". As such, the Court concluded that the telephonic voicemail message did not constitute the requisite notice in writing and thus, Selective had no duty to defend or indemnify BN, Golub, and LeChase relative to the underling action.

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