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CASES OF INTEREST BY TOPIC

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ADDITIONAL INSURED COVERAGE

Spoleta Construction, LLC v. Aspen Ins. UK Ltd., 2016 WI 1136297 (N.Y. Ct. of App., Mar. 24, 2016). Spoleta Construction, LLC subcontracted Hub-Langie Paving, Inc. to perform various construction work. The subcontract required that Spoleta be named as an additional insured on Hub-Langie's Commercial General Liability insurance policy and that Hub-Langie defend and indemnify Spoleta for all claims of bodily injury or physical injury to property arising out of Hub-Langie's work. Thereafter, an employee of Hub-Langie was injured while performing work at the jobsite. Shortly after receiving notice of the injury to Hub-Langie's employee, Spoleta's insurer issued correspondence to Hub-Langie regarding the claim, seeking the contact information for its insurer and requesting that it place its insurer on notice of the claim. Hub-Langie's broker forwarded the letter to Hub-Langie's insurer, Aspen Insurance UK Limited, together with the general liability notice of occurrence/claim form describing the employee's injuries and a copy of the subcontract. Approximately three months later, the employee commenced suit against Spoleta, among others, and Spoleta's counsel notified Aspen of the same, indicating that Spoleta had not yet received a response to its previous request for defense and indemnification. In his correspondence, counsel expressly stated that Hub-Langie was required to defend and indemnify Spoleta and name it as an additional insured on the policy Aspen issued to Hub-Langie. Aspen denied coverage due to late notice because, in its initial letter, Spoleta "framed" itself only as a claimant against Hub-Langie, not as an additional insured of Aspen, and coverage had been denied to Hub-Langie for unrelated reasons. Spoleta then commenced a declaratory judgment action against Aspen, among others, and Aspen successfully moved to dismiss the Complaint. The pertinent notice provision of the policy stated: "You must see to it that [Aspen is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." Notice was to include, to the extent possible: "(1) How, when and where the 'occurrence' or offense took place; (2) The names and addresses of any injured persons and witnesses; and (3) The nature and location of any injury or damage arising out of the 'occurrence' or offense." The Court of Appeals rejected Aspen's argument that Spoleta did not timely see to it that Aspen was notified of an occurrence. Further, the Court noted that the letter itself did not identify the indemnification provision of the subcontract as the basis for the communication – it simply requested a defense and indemnity under the contract without specifically invoking either the indemnification or additional

insured provisions. Moreover, it was noted that Spoleta's letter requested that Hub-Langie "place [its] insurance carrier on notice of this claim" and provided information about the identity of the injured employee, as well as the date, location and general nature of the accident. Thus, the Court found that in addition to requesting that the insurer be put on notice, the letter provided the details that the policy required to be included by an insured when providing notice of an occurrence. Accordingly, the Court of Appeals found that the Appellate Division properly reinstated Spoletta's Complaint against Aspen.

Engrasser Constr. Corp. v. Dryden Mut. Ins. Co., 134 A.D.3d 1516 (4th Dept. Dec. 31, 2015). Engrasser Construction Corporation hired a contractor to install ice blocks on the roof of its commercial building, and an employee of the contractor fell from the roof while installing the same. The employee and his spouse commenced an action against Engrasser alleging common law negligence and violations of the Labor Law. At the time of the accident, the contractor was insured under a general liability policy issued by Dryden Mutual Insurance Company, and an endorsement to the policy named Engrasser as an additional insured. The additional insured endorsement provided that the policy "is amended to include as an insured [Engrasser] BUT only with respect to…its liability for activities of the named insured or activities performed by [Engrasser] on behalf of the named insured." Pursuant to that endorsement, Engrasser sought a defense and indemnification in the underlying action, and Dryden disclaimed coverage. Engrasser thereafter commenced an action seeking a declaration that Dryden had an obligation to defend and indemnify it in the underlying action, and in its Answer, Dryden sought, *inter alia*, a declaration that it had no such obligation. The Fourth Department held that the lower court properly granted Engrasser's Motion for Summary Judgment, declaring that Dryden owes a defense and indemnification to Engrasser in the underlying action. In this regard, the Court reasoned that Engrasser reasonably expected coverage under the endorsement, inasmuch as it was subject to liability for the activities of the named insured, *i.e.*, the injured worker's employer, under the Labor Law. Thus, the Court found that pursuant to the additional insured endorsement, Engrasser was entitled to coverage "with respect to…its liability for activities of the named insured," and that Engrasser was therefore entitled to defense and indemnity under the policy.

TIMELY DISCLAIMER

Batista v. Global Liberty Ins. Co. of New York, 135 A.D.3d 797 (2d Dept. Jan 20, 2016). Ramona Batista 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 its insured in an underlying personal injury action. Global Liberty's insured failed to answer or appear in the underlying action, and a default judgment was entered against him. Approximately one year after receiving the default judgment with notice of entry and nearly three years after learning of the subject claim, Global Entry provided counsel to represent its insured in a hearing to determine the validity of service of the Summons and Complaint in the underlying action. After the trail court determined that Global Liberty's insured was properly served, Global Liberty issued a letter disclaiming coverage on the basis of the insured's alleged failure to cooperate. Batista contended that the purposed disclaimer was invalid because it was untimely served and, in any event, there was no valid basis upon which Global Liberty could disclaim coverage. In affirming the decision of the trial court, the Second Department held that Global Liberty's declination was ineffective. In this regard, it was noted that an insurance company has an affirmative obligation to provide written notice of a disclaimer of coverage as soon as reasonably possible, even where the policyholder's own notice of claim to the insurer is untimely, and that where there is a delay in providing written notice of disclaimer, the burden rests on the insurance company to explain the delay. It was held that under the circumstances of the case, Global Liberty failed to adequately explain its delay in issuing the disclaimer. As such, it was determined that the lower court properly granted Batista's Motion for Summary Judgment to the extent of awarding her the limit of the subject policy, plus interest.

DUTY TO DEFEND

Cumberland Farms, Inc. v. Tower Group, Inc., 2016 WL 1126072 (2d Dept. Mar. 23, 2016). In 2008, Antonios Zevlakis allegedly was injured when he tripped and fell on a sidewalk outside a gas station operated by Noori Auto & Fuel, Inc. pursuant to franchise and lease agreements with Cumberland Farms, Inc. Noori had an insurance policy with Mountain Valley Indemnity Company which listed Cumberland as an additional insured. After the accident, Zevlakis commenced an action against Cumberland to recover damages for personal injuries. Cumberland then commenced an action for, *inter alia*, a judgment declaring that Mountain Valley and its affiliates, Tower Group, Inc. and Tower Group Companies, were obligated to defend and indemnify it in the underlying action. Mountain Valley and the Tower entities moved for summary judgment declaring that they were not so obligated and Cumberland cross-moved for summary judgment. Specifically, Cumberland contended that Mountain Valley and the Tower entities were obligated to defend and indemnify it in connection with the personal injury action because it was named as an additional insured under Noori's policy with Mountain Valley. Mountain Valley and the Tower entities asserted, however, that although Cumberland was an additional insured on the policy, an endorsement to the policy provided that Cumberland was an additional insured "only with respect to [its] liability as a grantor of a franchise to the named 'insured'." They maintained that because the Complaint in the personal injury action did not specifically allege that Cumberland was liable as a franchisor, Cumberland was not entitled to coverage as an additional insured. The Second Department stated that the Complaint in the personal injury action alleged that Cumberland was negligent in its ownership, operation, control and maintenance of the subject gas station. However, the submissions by Mountain Valley and the Tower entities in support of their motion included evidence that Cumberland leased the gas station to Noori as a franchisee. Since Cumberland's liability, if any, would hinge on the scope of its obligations under the agreements entered into with Noori that established their franchisor/franchisee relationship, the allegations of the personal injury Complaint suggested a reasonable possibility of coverage for Cumberland in the underlying action. As such, the Court held that Mountain Valley was obligated to defend and indemnify Cumberland in connection with the personal injury action.

APPLICABILITY OF EXCLUSIONS

Amato v. National Specialty Ins. Co., 134 A.D.3d 966 (2d Dept. Dec. 23, 2015). Stephanie Amato alleged that on December 21, 2007, she sustained injuries as a result of an altercation with an intoxicated patron at an establishment in Richmond County owned by Hylan Bistro, Inc., doing business as Bistro Restaurant. Amato commenced a personal injury action against the patron and Hylan Bistro alleging, *inter alia*, that Hylan Bistro was liable for her injuries for having unlawfully and knowingly sold or provided alcohol to a visibly intoxicated patron, who was known by Hylan Bistro to become intoxicated and violent, and that such intoxication contributed to the patron suddenly assaulting, battering, striking, and/or otherwise injuring Amato. On January 21, 2009, Hylan Bistro provided notice to its insurer, National Specialty Insurance Company, about the incident. On January 26, 2009, after acknowledging receipt of the notice of claim, National Specialty disclaimed coverage based on the existence of an assault and battery exclusion endorsement in the insurance policy issued to Hylan Bistro. Amato thereafter commenced an action seeking a declaration that the National Specialty policy provided coverage for the claims against Hylan Bistro in the personal injury action and that National Specialty was obligated to defend and indemnify Hylan Bistro in that action. National Specialty moved for summary judgment declaring that it was not obligated to defend and indemnify Hylan Bistro in the underlying action and Amato cross-moved for summary judgment. In affirming the lower court's decision, the Second Department noted that an exclusion for assault and/or battery applies if no cause of action would exist "but for" the assault and/or battery. The Court held that National Specialty demonstrated its prima facie entitlement to judgment as a matter of law by establishing that the claims asserted by Amato against Hylan Bistro in the personal injury action fell within the

terms of the assault and battery exclusion endorsement. In this regard, each of Amato's claims in the personal injury action was deemed to arise out of the assault and/or battery, and thus, fell within the policy's exclusion. It was further noted that Amato failed to raise a triable issue of fact as to the applicability of the exclusion any endorsement. Accordingly, the Second Department found that National Specialty had no duty to defend or indemnify Hylan Bistro in connection with Amato's underlying personal injury action.

Netherlands Insurance Company v. U.S. Underwriters Insurance Company, 2015 WL 9295745 (S.D.N.Y. Dec. 17, 2015). U.S. Underwriters Insurance Company issued a Commercial General Liability insurance policy to Bounce! Trampoline Sports during the time Bounce! was leasing space in a building owned by Associates of Rockland County. The insurance policy contained an additional insured endorsement extending coverage to Associates. The policy also contained an exclusion for bodily injury to employees while performing duties related to any insured's business (the "Injury to Employee Exclusion"). In addition, the policy included a Separation of Insureds provision. Bounce! retained Comtex, Inc. to install a CCTV surveillance system on the premises owned by Associates. On July 11, 2011, Jario Valdez, a Comtex employee, was performing work on the premises and sustained injuries when he fell from a ladder. Thereafter, Valdez filed a personal injury action against Associates, among others. Netherlands Insurance Company, Associates' insurer, then commenced an action against U.S. Underwriters seeking a declaration that U.S. Underwriters was obligated to defend and indemnify Associates in connection with Valdez's action. Netherlands and U.S. Underwriters cross-moved for summary judgment. Specifically, Netherlands asserted that the Injury to Employee Exclusion was ambiguous when read in conjunction with the Separation of Insureds provision. In this regard, it was contended that because "the policy applies separately to each insured against whom claim is made or suit is brought…Associates is to be treated as if it were the only insured in construing the coverage provided." Netherlands further asserted that somce Associates could not possibly be liable for the services of Valdez because Associates did not contract with Valdez or his employer, the ambiguity in the provision must be interpreted in favor of Associates. The United States District Court for the Southern District of New York held that although the Separation of Insureds provision required the policy to be read "as if each Named Insured were the only Named Insured," the use of the phrase "any insured" rather than "the insured" in the Injury to Exclusion expressed a different intent – that the exclusion is not limited to injuries sustained by the employees or contractors of one insured party. It was reasoned that to read the Injury to Employee Exclusion, in conjunction with the Separation of Insureds provision, to apply equally but separately to the insured parties would render the phrase "any insured" void and undermine the parties' drafting efforts. Thus, the Court held that the Injury to Employee Exclusion applied to Valdez's injury as to both Bounce! and Associates and, as such, U.S. Underwriters had no duty to defend or indemnify either in connection with the Valdez action.

MISCELLANEOUS

Black Bull Contracting, LLC v. Indian Harbor Ins. Co., 135 A.D.3d 401 (1st Dept. Jan. 5, 2016). Indian Harbor Insurance Company issued a Commercial General Liability insurance policy to Black Bull Contracting, LLC which provided coverage for "operations that are classified or shown on the Declarations or specifically added by endorsement to this Policy." The Declarations page set forth four classifications: (1) "Carpentry—interior"; (2) "Dry Wall or Wallboard Installation"; (3) "Contractors – subcontracted work – in connection with construction, reconstruction, repair or erection of buildings – Not Otherwise Classified"; and (4) "Contractors – subcontracted work – in connection with construction, reconstruction, repair or erection of buildings – Not Otherwise Classified – uninsured/underinsured". Black Bull was retained by United Airconditioning Corp. II and United Sheet Metal Corp. (collectively, "United") to perform certain work on a building in Long Island City owned by United. On August 26, 2011, Luis Mora, an employee of Black Bull, was injured when he was struck by a piece of concrete while he was using a jackhammer to demolish a chimney in the United building. Mora commenced an

action against United and United commenced a third-party action against Black Bull. Black Bull tendered its defense and that of United as an additional insured to Indian Harbor. After a delay of more than two months from its receipt of the notice of claim, Indian Harbor disclaimed coverage on the ground that demolition work by Black Bull, the activity that gave rise to Mora's injury, was not within any of the four classifications of work covered by the policy. Black Bull then commenced an action seeking a declaration that Indian Harbor was obligated to defend and indemnify Black Bull and United relative to the Mora action. Indian Harbor moved to dismiss the Complaint and Black Bull moved for summary judgment. The First Department initially noted that the lower court correctly determined that Indian Harbor's disclaimers, had they been subject to the timeliness requirement of Insurance Law § 3420(d)(2), would have been untimely as a matter of law. In this regard, the record established that Indian Harbor issued separate disclaimers to Black Bull seventy-nine days and eighty-five days after it received the notice of claim. Since the basis of the disclaimers was apparent from the face of the notice of claim and accompanying correspondence, Indian Harbor's delays in issuing the disclaimers were unreasonable as a matter of law. Notwithstanding the untimeliness of Indian Harbor's disclaimers, the First Department determined that the lower court correctly determined that Indian Harbor did not owe Black Bull or United coverage with respect to the Mora action. To that end, the Indian Harbor policy's classifications were found to merely define the activities that were included within the scope of coverage "in the first instance" and did not constitute exclusions from coverage that would otherwise exist. Stated otherwise, the relevant policy language of the Declarations page outlined the activities that were entitled to coverage under the policy. If the loss in question did not arise from the activities within the classifications set forth on the Declarations page, then coverage was lacking "by reason of lack of inclusion" and "the policy as written could not have covered the liability in questions under any circumstances". Accordingly, the First Department held that Indian Harbor had no duty to defend or indemnify Black Bull or United as the lack of coverage for liability arising from an activity outside of those classifications was not based on an exclusion and was not waived by untimely disclaimer.

Lend Lease (U.S.) Construction LMB Inc. v. Zurich American Ins. Co., 22 N.Y.S.3d (1st Dept. Dec. 22, 2015). Extell West 57th Street LLC and Lend Lease (U.S.) Construction LMB Inc., the owner and construction manager of a project to erect a seventy-four story mixed-use hotel and residential building in Manhattan, commenced a breach of contract and declaratory judgment action seeking coverage under a $700,000,000 builder's risk program, consisting of five separate policies issued by various insurers with identical terms, for damage caused by Hurricane Sandy's dislodgement and partial destruction of a tower crane that was affixed to the building for use in the performance of the construction work. The policies insured "against all risks of direct physical loss of or damage to Covered Propery", which included "Property Under Construction" and "Temporary Works". "Temporary Works" was defined as something that is "incidental to the project". The policies excluded coverage for "[c]ontractor'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." On October 29, 2012, high winds from Hurricane Sandy caused the tower crane to partially collapse. The boom flipped over and some parts of the crane broke away, falling to the street below. Extell submitted a claim in the amount of $6,494,723.01 for damage to the tower crane and building, which was denied on the grounds that the tower crane did not constitute covered property and/or was excluded property under the policy. Extell and Lend Lease then commenced suit and the parties cross-moved for summary judgment. In determining whether the crane constituted a temporary structure and was thereby entitled to coverage under the policy, the First Department noted that although the term incidental was not defined in the policy, "it is common practice for the courts…to refer to the dictionary to determine the plain and ordinary meaning of words to a contract". After reviewing various dictionary definitions of "incidental", the Court found that the 750-foot tower crane was not a structure that

was "incidental" to the project. Indeed, rather than ensuing by chance or minor consequence, as Extell's Senior Vice President for Construction Management acknowledged, the "[b]uilding was specifically designed to incorporate the [t]ower [c]rane during construction" and the crane's design and erection involved an "in-depth process" that had to be approved by a structural engineer. Moreover, once it was integrated into the structure of the building, the custom designed tower crane, rather than serving a minor or subordinate role, was used to lift items such as concrete slabs, structural steel and equipment, was integral and indispensable, and not incidental, to the construction of the seventy-four-story high rise, which could not have been built without it. Accordingly, the Court found that the tower crane did not fall within the policy's definition of Temporary Works. It was further held that even if the tower crane could be considered Temporary Works under the policy, damage to it from Hurricane Sandy would not be covered by reason of the contractor's tools, machinery, plant and equipment exclusion. To that end, the Court reasoned that the record established that the tower crane was equipment that was used in the building's construction and was not a permanent part of the building. Notably, the relevant construction contract characterized the crane as "heavy equipment". The tower crane was assembled when the project started, disassembled and completely removed when the project is complete, and then moved to the next job. Thus, the Court determined that the tower crane was, without question, contractor's machinery or equipment that was excluded from coverage. Accordingly, the First Department held that there was no obligation to provide coverage under the builder's risk policy to Extell or Lend Lease in connection with the damage caused by the dislodgement of the crane.

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