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CASES OF INTEREST BY TOPIC

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ALLOCATION AND EXHAUSTION OF INSURANCE COVERAGE

In re Viking Pump, Inc., 2016 WO 1735790 (N.Y. Ct. of App. May 3, 2016). Viking Pumps, Inc. and Warren Pumps, LLC acquired pump manufacturing businesses from Houdaille Industries in the 1980s. Those acquisitions later subjected Viking and Warren to significant potential liability in connection with asbestos exposure claims. From 1972 to 1985, Liberty Mutual Insurance Company provided Houdaille with primary insurance and umbrella excess coverage through successive annual policies. Beyond that, Houdaille obtained additional layers of excess insurance through annual policies issued by various excess insurers, including a number of policies issued by TIG Insurance Company, among others (hereinafter, the "Excess Insurers"). Viking and Warren sought coverage under the Liberty Mutual policies, and the Delaware Court of Chancery determined that both companies were entitled to exercise rights as insureds under those policies. As the Liberty Mutual coverage neared exhaustion, litigation arose regarding whether Viking and Warren were entitled to coverage under the additional excess policies issued to Houdaille by the Excess Insurers and, if so, how indemnity should be allocated across the triggered policy periods. The majority of the excess policies at issue followed form to a "non-cumulation" of liability or "anti-staking" provision in the Liberty Mutual umbrella policies and those excess policies that did not follow form to the Liberty Mutual non-cumulation provision contained a similar two-party "Prior Insurance and Non-Cumulation of Liability" provision. In the underlying litigation, the parties cross-moved for summary judgment with respect to the availability of coverage and the allocation of liability under the excess policies. On appeal, the Delaware Supreme Court certified the following questions to the New York Court of Appeals: "1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions? [and] 2. Given the Court's answer to Question #1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?" In determining the manner in which the excess policies should be allocated, the Court of Appeals first noted that in the absence of policy language weighing in favor of a different conclusion, pro rata allocation was the preferable method of allocation in long-tail claims in

light of the inherent difficulty of tying specific injuries to the particular policy periods; nevertheless, the Court recognized that "different policy language" might compel all sums allocation. As such, the Court stated that it must decide whether the presence of a non-cumulation clause or a non-cumulation and prior insurance provision mandates all sums allocation. In this regard, it was remarked that generally, non-cumulation clauses prevent stacking, the situation in which "an insured who has suffered a long term or continuous loss which has triggered coverage across more than one policy period…wishes to add together the maximum limits of all consecutive policies that have been in place during the period of the loss." In relying on case law in various jurisdictions, it was held that it would be inconsistent with the language of the non-cumulation causes to use pro rata allocation here. The Court indicated that such policy provisions plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence by acknowledging that a covered loss or occurrence may "also [be] covered in whole or in part under any other excess [p]olicy issued to the [Insured] prior to the inception date" of the instant policy. By contrast, the very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period – meaning that no two insurance policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence. In a pro rata allocation, the non-cumulation clauses would be rendered surplusage – a construction that cannot be countenanced under New York's principles of contract interpretation, and a result that would conflict with New York's previous recognition that such clauses are enforceable. With regard to whether the policies should be exhausted horizontally or vertically, it was noted that all of the excess policies at issue primarily hinge their attachment on the exhaustion of underlying policies that cover the same policy period as the overlying excess policy, and that are specifically identified by either name, policy number, or policy limit. Accordingly, the Court determined that vertical exhaustion was more consistent than horizontal exhaustion as this language tied attachment of the excess policies specifically to identified policies that span the same policy period. The Court was unpersuaded that the "other insurance" clauses in the Liberty Mutual umbrella policies compelled horizontal exhaustion. To that end, the Court reasoned that "other insurance" clauses "apply when two or more policies provide coverage during the *same* period, and they serve to prevent multiple recoveries from such policies," and that such clauses "have nothing to do" with "whether any coverage potentially exists[s] at all among certain high-level policies that were in force during *successive years*".

RESCISSION

Great American Ins. Co. of New York v. L. Knife & Son, Inc., 2016 WL 1453514 (1st Dept. Apr. 14, 2016). Great American Insurance Company of New York commenced an action against its insured, L. Knife & Son, Inc., and moved for summary judgment declaring the insurance policy it issued to L. Knife *void ab initio* on the ground that L. Knife misrepresented the total insurable value of the insured premises and its contents. On appeal, the First Department held that the motion court correctly denied Great American's motion, since Great American failed to establish as a matter of law that L. Knife had made any misrepresentations. The Court reasoned that although Great American's quotation for the policy contained the statement that it was basing the premium on the $7 million total insurable value of the insured premises, L. Knife did not provide any information on the insurance application regarding the total insurable value of the premises' contents. In this regard, the broker submitted an affidavit stating that she recalled Great American's wholesale insurance broker asking her only to provide the amount of coverage desired and that "is precisely what [she] provided." Although the wholesale broker later sent Great American an email indicating the "contents value", the Court determined that an issue of fact existed as to whether the broker was acting on L. Knife's behalf. After Great American issued the policy, its own investigation of the property, which could have uncovered the total insurable value of the property and its contents, resulted in no underwriting activity, and other internal documents suggested that the decision to issue the policy and the premium charged were not

tethered to the total insurable value. The First Department found that there were also factual issues surrounding whether any purported misrepresentation would have been "material" such that it would have the effect of voiding the policy, which is ordinarily a question of fact.

APPLICABILITY OF EXCLUSIONS

Hermitage Ins. Co. v. Skyview & Son Constr. Corp., 137 A.D.3d 712 (1st Dept. Mar. 31, 2016). Stalin Ivan Diaz was injured while working as an employee of 786 Iron Works Corporation on a construction project rehabilitating a premises owned by Muhamet Mirzo and Suzana Mirzo. Skyview & Son Construction Corp. acted as the general contractor for the project and hired Iron Works as the framing subcontractor. Diaz's injury occurred outside the premises when a steel metal rolling gate fell on him. Following his injury, Diaz commenced an action against the Mirzos and Skyview in Queens County alleging negligence and Labor Law violations. Hermitage insurance Company provided coverage to the Mirzos and Skyview under two separate policies. Aspen Insurance UK Limited provided coverage to Iron Works. Hermitage commenced a declaratory judgment action and moved for summary judgement declaring that it had no duty to defend or indemnify the Mirzos and Skyview in connection with Diaz's action based on exclusions contained within the policies. The First Department, affirming the decision of the trial court, noted that the Hermitage policies excluded coverage for injuries arising from the work of independent contractors or subcontractors, unless the independent contractors or subcontractors specifically agreed to name the Mirzos and Skyview as additional insureds on their own policies. Iron Works was the Named Insured on a policy issued by Aspen that provided that Aspen would provide additional insured coverage only if Iron Works agreed in writing to make that entity an additional insured. The Court found that as there was no writing on the record in which Iron Works agreed to name the Mirzos or Skyview additional insureds under its policy, coverage was unavailable under the Aspen policy and excluded under the Hermitage policies. Furthermore, the Hermitage policies limited coverage to specific types of interior work. However, Diaz was performing work outside the building at the time of his accident and, accordingly, Hermitage had was found to have no obligation to defend or indemnify the Mirzos or Skyview on this basis as well.

TIMELY DISCLAIMER

Provencal, LLC v. Tower Ins. Co. of New York, 2016 WL 1354865 (2d Dept. Apr. 6, 2016). Tower Insurance Company of New York issued a commercial property insurance policy insuring certain premises owned by Provencal, LLC. On June 23, 2011, heavy rains caused water damage to the premises, including the collapse of a retaining wall at the boundary of the premises. Tower disclaimed coverage for the loss based upon an exclusion for certain water events, contending that damage caused by water under the ground surface pressing on, or flowing or seeping through, foundations, walls, floors, or paved surfaces was not covered by the policy. Provencal commenced an action against Tower to, *inter alia*, recover damages for breach of the policy. The parties entered into a stipulation regarding the underlying facts, including that the retaining wall collapsed due to the force of runoff water from a neighbor's property, which funneled into a drainage basin adjacent to the retaining wall, creating excessive water pressure against the wall. The trial court agreed with Tower that the damage to the retaining wall was not covered under the policy because the policy excluded losses caused by flood and/or surface water and dismissed the Complaint. On appeal, Provencal did not dispute that the exclusion applied to the facts of the case and, therefore, would bar coverage for the damage sustained to the retaining wall. Instead, Provencal argued that because Tower did not identify this exclusion in its declination to Provencal, Tower was precluded from relying upon it. In affirming the lower court's decision, the Second Department stated that where the underlying insurance claim does not arise out of an accident involving bodily injury or death, Insurance Law § 3420 and its heightened requirements do not apply. Thus, Tower's failure to specifically identify the flood and surface water exclusion in its

disclaimer letter was to be considered under common-law waiver and/or estoppel principles. To this end, waiver, which is a voluntary and intentional relinquishment of a known right, did not apply because "the failure to disclaim based on an exclusion will not give rise to coverage that does not exist." Under the principles of estoppel, an insurer, though in fact not obligated to provide coverage, may be precluded from denying coverage upon proof that the insurer "by its conduct, otherwise lulled [the insured] into sleeping on its rights under the insurance contract". As noted, estoppel requires proof that the insured has suffered prejudice by virtue of the insurer's conduct. The Court determined that because Provencal failed to make the requisite showing of prejudice, there was no basis to estop the defendants from relying on policy exclusions not detailed in their letter disclaiming coverage. Accordingly, the Second Department held that the lower court properly found that the collapse of the retaining wall was not entitled to coverage under the Tower policy.

LATE NOTICE

Martin Associates, Inc. v. Illinois Nat. Ins. Co., 137 A.D.3d 503 (Mar. 8, 2016). Martin Associates, Inc. brought an action seeking a declaration that its excess insurer, Illinois National Insurance Company, was obligated to provide coverage to Martin for a personal injury action commenced against it. Illinois National contended that it had no obligation to provide coverage because Martin provided late notice. The First Department determined that the record demonstrated that the information disclosed to Martin's intermediaries, *i.e.*, its insurance broker and its attorneys, between October 2006 and March 2011 suggested a reasonable possibility that the underlying personal injury action would exceed Martin's $1 million primary coverage, thereby triggering Martin's obligation to notify its excess insurer, Illinois National. However, none of these intermediaries provided notice of the occurrence to Illinois National. Moreover, Martin received a copy of the injured party's notice of claim in April 2006 and the Summons and Complaint in the personal injury action in August 2006, both of which it forwarded to its broker; yet it failed to provide notice to Illinois National or take other steps to insure that Illinois National received notice. Thus, the Court held that Martin's notice to Illinois National in November 2011 was untimely, and that Illinois National's disclaimer, issued 26 days after it received Martin's notice, was timely as a matter of law.

ADDITIONAL INSURED COVERAGE

313-315 West 125th Street L.L.C. v. Arch Specialty Ins. Co., 138 A.D.3d 601 (1st Dept. Apr. 26, 2016). 313-315 West 125th Street L.L.C. owned the building where the plaintiff in the underlying Labor Law action was injured while working on a construction project. Solil Management LLC, 313 West's managing agent, hired Katselnik & Katselnik Group Inc. as the general contractor for the project pursuant to a written form agreement that referred to Solil as "the Owner". Arch Specialty Insurance Company issued a Commercial General Liability insurance policy to Katselnik. When 313 West tendered its defense in the underlying action to Arch, Arch denied coverage on the ground that the underlying construction contract named Solil as the Owner and did not reference 313 West. As a result, 313 West commenced a declaratory judgment action seeking coverage. To the extent the agreement between Solil and Katselnik incorrectly identified Solil as the Owner, 313 West sought reformation of the contract. The First Department held that 313 West clearly and convincingly established that Katselnik intended to indemnify the true owner, 313 West, and that, as a result of mutual mistake, the agreement misidentified Solil, the managing agent, rather than 313 West itself, as the "Owner" of the property where the work was to be performed. In this regard, the agreement was signed by Solil's Director of Commercial Management, Joseph Grabowski, "As Agent." At his deposition, Grabowski testified that he "negotiated the price and…signed the contract for the owner," by which he meant 313 West. Louisa Little, who had been the manager of Solil since 2008, submitted an affidavit stating that Grabowski executed the contract as agent for 313 West, but that in reducing the parties'

agreement to writing, Solil was erroneously inserted in the provision for the Owner. Moreover, numerous provisions in the agreement were structured around the true property owner, 313 West, as the real party in interest, for whose benefit the work was performed. Katselnik's vice president, Arkadi Katselnik, confirmed that he agreed and intended to indemnify and procure additional insured coverage for 313 West. Furthermore, numerous Certificates of Insurance naming 313 West as an additional insured on Katselnik's policies were offered to show the intent of the parties, *i.e.*, that 313 West was to be protected by the indemnity clause in the agreement as the real party in interest. Accordingly, the Court determined the contract provision requiring Katselnik to procure insurance covering "the Owner" as an additional insured referred to 313 West, rather than Solil, and the amendment of the insurance policy "to include as an additional insured those persons or organizations who are required under a written contract with [Katselnik] to be named as an additional insured" effectively named 313 West as an additional insured.

PREMIUM AUDIT

Seneca Ins. Co. v. Certified Moving & Storage Co., LLC, 138 A.D.3d 504 (1st Dept. Apr. 12, 2016). From 2002 through 2005, in three successive policies, Seneca Insurance Company provided Commercial General Liability insurance for Certified Moving and Storage Co. and Certified Installation Services, LLC (collectively, "Certified"). The premiums were based upon Certified's payrolls for the trucking and warehouse operations of the business. The initial premiums, however, were deposit premiums. Seneca maintained the right under the policies to conduct payroll audits after the conclusion of the policy periods to determine the final premium. During one of these audits, Seneca determined that the installation business and payroll was a far more substantial portion of Certified's business then the insurer had previously realized. Accordingly, Seneca sought to reclassify the policy and premium amounts to reflect the risks it actually believed it took under the policy. Seneca filed an action, seeking payment of the premiums and alleging that Certified misrepresented the nature of its business when applying for insurance coverage. Certified filed a third-party claim for indemnification against its broker, Frenkel & Co., claiming that it relied on Frenkel's representations in completing the application for insurance; specifically, that the installation payroll was not needed. Certified moved for summary judgment dismissing the Complaint, arguing that Insurance Law § 3426(d)(1) precluded Seneca from attempting to recover additional premiums under the policy. The First Department found that Certified's argument to be unavailing and determined that Insurance Law § 3426(d)(1) permits the collection of additional premiums in instances where the policy terms call for it through the conduct of an audit. Moreover, the Court remarked that even if § 3426(d)(1) did not apply, there would be, at the very least, a question of fact concerning whether the additional premium increase exceptions of § 3426(c)(1)(D) & (E) apply based upon Certified's alleged omissions in filling out the policy applications.

MISCELLANEOUS

Vikram Constr. Inc. v. Everest Nat. Ins. Co., 2016 WL 2337848 (2d Dept. May 4, 2016). On November 13, 2007, Jesus Perdomo was allegedly injured during the course of his employment with Teji Construction, Inc., which was a subcontractor of Vikram Construction, Inc. at a construction project. Vikram alleged that during the relevant time period, Teji was required to maintain a Commercial General Liability insurance policy naming Vikram as an additional insured and that Teji provided a Certificate of Insurance stating that Teji had liability insurance with Atlantic Casualty Insurance Company on which Vikram had been named as an additional insured. Vikram produced a Certificate of Insurance which was dated December 13, 2007, and stated that the policy number was BINDER121307 with a policy term running from December 13, 2007, until December 13, 2008. The certificate further stated that it was "issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." Perdomo commenced an action seeking

damages for his alleged personal injuries against, among others, Vikram. Vikram then commenced a declaratory judgment action against Atlantic seeking a declaratory judgment that Atlantic was obligated to defend and indemnify it in the underlying action. Atlantic moved for summary judgment declaring that it was not so obligated. The trial court denied the motion naming 313 West as as premature with leave to renew after the completion of discovery. The Second Department, reversing the lower court's decision, found that Atlantic established its prima facie entitlement to judgment as a matter of law declaring that it was not obligated to defend or indemnify Vikram in the underlying action by submitting evidence demonstrating that it did not issue the subject insurance policy to Teji. Atlantic submitted the affidavit of its Vice President of Claims, who averred that Atlantic had no records indicating that a policy was ever issued by Atlantic to Teji and that it never issued a policy that began with the letters "BINDER". It was noted that even if the Certificate of Insurance produced by Vikram raised a triable issue of fact as to whether Atlantic issued a policy to Teji, the effective date noted on the face of that certificate was after the date of the incident upon which the underlying action as based. Accordingly, the Court held that Atlantic was not obligated to defend and indemnify Vikram in connection with the underlying action.

Kinsale Ins. Co. v. OBMP NY, LLC, 2016 WL 1169513 (S.D.N.Y. Mar. 22, 2016). Edward Gaskin and Shamekka Green commenced an action against OBMP NY, LLC, among others, after they were injured at a nightclub operated by OBMP on March 31, 2014 at approximately 2 a.m. Gaskin and Green alleged that a Commercial General Liability insurance policy Kinsale Insurance Company issued to OBMP covered their injuries. Kinsale sought a declaratory judgment that the policy was cancelled March 31, 2014 at 12:01 a.m. – approximately two hours before Gaskin and Green's injuries occurred – and therefore, it had no duty to defend or indemnify OBMP relative to the underlying action. Kinsale moved for summary judgment. Pursuant to the terms of the Kinsale policy, Kinsale was permitted to cancel the policy if OBMP failed to pay its premiums by "mailing or delivering…written notice of cancellation at least…[t]en days before the effective date of the cancellation." Under the policy, OBMP agreed to pay premiums to Kinsale according to Kinsale's rates and Kinsale was permitted to conduct a periodic audit to determine if additional premiums were owed and to notify OBMP of any unpaid balance. Kinsale conducted an audit in January 2014 and determined that OBMP owed additional premiums, which it communicated to OBMP via an insurance broker. As of March 18, 2014, OBMP had not paid the additional premiums owed to Kinsale. On March 18, 2014, Kinsale sent OBMP, via mail and OBMP's insurance agent, a notice of cancellation stating that the policy would be cancelled effective "3/31/2014 at 12:01 a.m." The notice further indicated that "on the date referenced above, coverage under your policy will terminate." Although the notice of cancellation was returned to Kinsale as undeliverable, OBMP had actual notice of the impending cancellation. In granting Kinsale's summary judgment motion, the United States District Court for the Southern District of New York found that Kinsale effectively cancelled the policy prior to the injuries alleged by Gaskin and Green. In this regard, Kinsale had the right to cancel the policy if OBMP failed to pay the requisite premiums. To effectuate a cancellation, Kinsale was required to send written notice to OBMP's last known mailing address at least ten days prior to the cancellation date. The parties did not dispute that OBMP failed to pay the required premium and that Kinsale mailed a notice of cancellation to OBMP's last known mailing address on March 18, 2014, more than ten days prior to the cancellation date of March 31. Pursuant to the terms of the policy, Kinsale was entitled to determine the date of the cancellation and it was undisputed that the notice of cancellation provided that the policy would end at 12:01 a.m. on March 31, 2014. It was further undisputed that Gaskin's and Green's injuries occurred around 2 a.m. on March 31, approximately two hours after the cancellation became effective. Accordingly, it was determined that under the unambiguous terms of the policy, the injuries suffered by Gaskin and Green fell outside the scope of the policy and, as such, Kinsale had no duty to defend or indemnify OBMP in connection with the underlying action.

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