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CASES OF INTEREST BY TOPIC

By Richard P. Byrne
John D. McKenna

ADDITIONAL INSURED COVERAGE

Indian Harbor Ins. Co. v. Alma Tower, LLC, 2017 WL 3438141 (N.Y. Supt. Ct., Aug. 9, 2017) (Trial Order). S&S HVAC was hired as a subcontractor to perform construction-related work at a premises located in Long Island City, New York. Pursuant to the subcontract, S&S was required to procure an insurance policy listing Alma Tower, LLC, the owner of the premises, and Vordonia Contracting & Supplies Corp., the general contractor for the work at the premises, as additional insureds for bodily injury "caused in whole or in part" by the work of S&S. S&S obtained the relevant policy from Indian Harbor Insurance Company. Thereafter, an employee of S&S was injured while performing work at the premises and he filed two separate actions against Alma and Vordonia. Indian Harbor then commenced a declaratory judgment action seeking a declaration that Alma and Vordonia are not entitled to a defense or indemnification as additional insureds in connection with the claimant's underlying actions. Alma and Vordonia moved for summary judgment. With regard to Indian Harbor's duty to defend, the New York County Supreme Court stated that "[w]here an insurance policy is restricted to liability for any bodily injury "caused, in whole or in part" by the "acts or omissions" of the named insured, the coverage applies to injury proximately caused by the named insured." The Court then found that "[w]hen an employee of the named insured is injured while in the employ of the named insured, the additional insured is entitled to defense because there is a reasonable possibility that the bodily injury is proximately caused by the named insured's acts or omissions." It was then held that Alma and Vordonia made a prima facie showing that Indian Harbor was obligated to defend them as additional insureds as the claimant pleaded and testified that he was an employee of S&S at the time of the alleged accident. More importantly, in one of the underlying actions, the court had determined that the claimant's supervisor, who gave directions to the claimant, including how to perform welding work for the work at the premises, was an employee of S&S. As such, it was determined that there was a "reasonable possibility" that S&S was a proximate cause of the claimant's alleged accident. The Court further held that Indian Harbor's contention that there is an issue of fact as to whether coverage for Vordonia is excluded under the "Ground Up Exclusion" to the Indian Harbor policy was unavailing. In this regard, under Insurance Law §3420(d), an insurer must give written notice as reasonably possible to disclaim coverage to a claimant. The Court held that Indian Harbor's reservation of rights dated April 5, 2013 was not a disclaimer as it did not use "sufficiently definite language" to disclaim coverage and

that Indian Harbor's more than seventeen-month delay to deny coverage under its "Ground Up Exclusion" renders the disclaimer untimely. Accordingly, the Court found that Indian Harbor's duty to defend Alma and Vordonia in connection with the underlying actions had been triggered.

APPLICABILITY OF EXCLUSIONS

Hastings Development, LLC v. Evanston Ins. Co., 2017 WL 2923921 (2d Cir., July 10, 2017). Evanston Insurance Company issued a Commercial General Liability to Hastings Development LLC which contained an Employer's Liability Exclusion that precluded coverage for bodily injury to "an employee of the Named Insured arising out of and in the course of employment by any Insured, or while performing duties related to the conduct of the Insured's business…." While the policy was in effect, Aaron Cohen, an employee of Universal Photonics, Inc., another Named Insured on the Evanston policy, was allegedly injured while operating a machine owned by Hastings in Hastings' building. Cohen then filed suit and Hastings tendered its defense and indemnification to Evanston. Evanston denied coverage on the basis of the employer's Liability Exclusion and Hastings instituted a declaratory judgment action. Evanston moved to dismiss the declaratory judgment and Hastings cross-moved for summary judgment. The district court granted, *inter alia*, partial summary judgment in favor of Hastings, finding that the Employer's Liability Exclusion did not bar coverage for the underlying personal injury action, and Evanston appealed. On appeal, the parties disputed whether Cohen was "an employee of the Named Insured" under the Employer's Liability Exclusion. Specifically, Evanston asserted that the definition of "employee" under the Exclusion, which provided that "[w]herever the word employee appears above, it shall also mean any member, associate, leased worker, temporary worker of, or any person or persons loaned to or volunteering services to, any Named Insured", barred coverage for injured employees of all the listed Named Insureds. Hastings, in turn, argued, among other things, that the policy's Separation of Insureds provision requires that "the Named Insured" language of the Employer's Liability Exclusion should be read "[a]s if each Named Insured were the only Named Insured; and separately to each insured against whom claim is made or 'suit' is brought." Hastings continued that based upon the Separation of Insureds provision and as it was the only insured party seeking coverage, it must be treated as the only Named Insured for the purpose of interpreting the Employer's Liability Exclusion. In finding the Exclusion to be ambiguous, the Second Circuit held that a fair reading of the Exclusion may only exclude coverage for injuries to "an employee of the Named Insured", and in light of the Separation of Insureds clause, "the Named Insured" is Hastings. The Court continued that on the other hand, another reasonable reading of the Employer's Liability Exclusion is that "an employee of the Named Insured" may refer to employees of any of the Policy's listed Named Insureds, given the Exclusion's broad definition of an "employee". It was ultimately held that because the exclusion could support either party's interpretation, the ambiguity requires that the policy be construed in favor of Hastings and, accordingly, Evanston was required to defend Hastings relative to the underlying personal injury action.

Hillcrest Coatings, Inc. v. Colony Ins. Co., 151 A.D.3d 1643 (4th Dept., June 9, 2017). Hillcrest Coatings, Inc. commenced a declaratory judgment action seeking a declaration that Colony Insurance Company is obligated to defend and indemnify it in an underlying environmental tort action. The underlying action alleged that Hillcrest operated its glass, plastic and paper recycling facility in a negligent fashion, allowing hazardous materials and substances to be discharged into and to contaminate the areas where the underlying plaintiffs resided and worked. It was further alleged that Hillcrest operated their facility in a way that has caused a malodorous condition to be created in the surrounding neighborhood. At the time the underlying action was filed, Hillcrest was insured under a Commercial General Liability insurance policy issued by Colony. The policy contained a Hazardous Materials Exclusion, which provided that the insurance would not apply to bodily injury, property damage or personal and advertising injury "which would not have occurred in whole or [in] part but for the actual, alleged or threatened discharge, dispersal, seepage, migration,

release or escape of 'hazardous materials' at any time." Hazardous materials were defined as "'pollutants', lead, asbestos, silica and materials containing them." Pollutants were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Colony moved for summary judgment seeking to dismiss the Complaint, contending that the hazardous materials exclusion precluded coverage for the claims asserted by the underlying plaintiffs. Hillcrest cross-moved for summary judgment. In affirming the trial court's decision, the Fourth Department found that Colony's duty to defend had been triggered. In this regard, the Court held that there was a reasonable possibility of coverage in that Colony did not meet its burden of establishing as a matter of law that the Hazardous Materials Exclusion precludes coverage. Specifically, the underlying plaintiffs alleged that Hillcrest's operation of the facility "caused a malodorous condition to be created in the surrounding neighborhood." The Court noted that while many of the factual assertions in the underlying pleadings allege that the odor resulted from hazardous materials, such odors are not always caused by the discharge of hazardous materials. Inasmuch as there is a reasonable possibility of coverage, the Court held that Colony was obligated to defend Hillcrest relative to the underlying tort action and to reimburse Hillcrest for the cost it expended in connection with its defense.

Swanson v. Allstate Ins. Co., 150 A.D.3d 1299 (2d Dept., May 31, 2017). Bonnie Swanson owned certain improved real property that she used as rental property. Following a period of approximately six months, during which the premises were vacant and unoccupied, damage was sustained as a result of a fire. Swanson sought coverage under the Landlords Package Policy she had procured from Allstate Insurance Company. Allstate denied the claim and Swanson commenced an action seeking a declaration that the loss was covered under the policy. Allstate moved for summary judgment asserting that the loss was precluded from coverage by way of the Vandalism Exclusion, which provided, in relevant part: "[w]e do not cover loss to the property…consisting of, or caused by…[v]andalism. However, we do cover sudden and accidental direct physical loss caused by fire resulting from vandalism unless your dwelling has been vacant or unoccupied for more than 90 consecutive days immediately prior to the vandalism." Vandalism was defined as "willful or malicious conduct resulting in damage or destruction of property." The Supreme Court denied Allstate's motion for summary judgment on the basis that Allstate had failed to cite the exclusion in its declination and thus, had waived its right to rely upon the exclusion pursuant to Insurance Law § 3420(d). In reversing the lower court's decision, the Second Department noted that Insurance Law § 3420(d) expressly applies only to claims for death and bodily injury, and has no application to claims for property damage. Moreover, it was found that Allstate was not precluded from invoking the Vandalism Exclusion under the common-law principles of waiver or estoppel. As such, the Second Department held that Allstate established its prima facie entitlement to judgment as a matter of law on the coverage issue by submitting the findings of a town fire investigator, a county police arson squad investigator, and a private fire investigator retained by Allstate, all of whom determined that the fire was intentionally set. Accordingly, it was held that the setting of the fire constituted "willful or malicious conduct resulting in damage or destruction of property" within the definition of "vandalism" under the policy. Moreover, Allstate submitted the deposition testimony of Swanson wherein it was admitted that the premises had been vacant and unoccupied for more than 90 consecutive days immediately preceding the fire loss. Thus, it was held that the Vandalism Exclusion applied to bar coverage and Allstate's motion for summary judgment should have been granted.

NON-COOPERATION

Jane DeLuca v. RLI Ins. Co., 2017 WL 3496404 (2d Dept., Aug. 16, 2017). Jane DeLuca commenced an underlying action against ML Specialty Construction Inc., among others, to recover damages to her property allegedly caused by construction work performed by ML Specialty on an adjacent property. At the time the work was performed, ML Specialty was insured under a Commercial General Liability insurance policy issued by RLI Insurance Company. ML Specialty notified RLI of

DeLuca's claim and RLI retained counsel to defend that action. Thereafter, RLI disclaimed coverage to ML Specialty on the basis that it failed to cooperate with the assigned counsel and the assigned counsel withdrew from the case. ML Specialty subsequently defaulted in the underlying action and after an inquest, DeLuca obtained a judgment against ML Specialty. DeLuca then commenced an action against RLI seeking to recover the judgment she was awarded against RLI. The parties cross-moved for summary judgment. The Second Department determined that RLI failed to meet its prima facie burden of demonstrating ML Specialty's noncooperation in admissible form. In that regard, the principal proof RLI submitted regarding ML Specialty's alleged refusal to cooperate was letters from the attorneys which had previously defended ML Specialty and reports and emails from a company hired by RLI to perform investigation services. The letters, reports, and emails set forth statements allegedly made by ML Specialty's president, which RLI contended demonstrated ML Specialty's unwillingness to cooperate. The Court determined that these documents were being proffered for the truth asserted therein – that ML Specialty was unwilling to cooperate with counsel – and therefore constituted hearsay and were inadmissible. It was further noted that although RLI submitted an affidavit from the investigator which contained a conclusory assertion that its efforts to obtain ML Specialty's cooperation were unsuccessful, the same was insufficient to meet RLI's "heavy burden" of demonstrating noncooperation.

MISCELLANEOUS

Craft v. New York Central Mut. Fire Ins. Co., 152 A.D.3d 940 (3d Dept., July 13, 2017). In 1967, Katherine Craft built a home in Ulster County, New York. On March 12, 2014, the premises were damaged by fire. At the time of the loss, Craft's daughter-in-law was residing at the premises, which was insured under a fire insurance policy issued by New York Central Mutual Fire Insurance Company. New York Central disclaimed coverage on the basis that Craft did not reside at the premises on the date of the loss. Craft then commenced an action alleging, *inter alia*, that New York Central had breached the insurance policy by failing to provide coverage New York Central moved for summary judgment dismissing the Complaint, and the trial court granted the motion. In finding that the lower court had improperly awarded summary judgment to New York Central, the Third Department noted that the New York Central policy defined "insured location" as the "resident premises" which, in turn, was defined as "[t]he one family dwelling where [the insured] reside[s]." The Court continued that while Craft indicated that she had moved away from the premises approximately nine years prior to the fire so that her son and his family could move in, she never "totally" moved out in that she had a key to the premises and kept furniture, personal items, and some clothing there. Craft also kept the premises as her address on her driver's license and testified that certain utilities bills remained in her name. Moreover, she indicated that she slept at the premises often in order to help care for her grandchildren. As such, the Third Department found that it was arguable that "the reasonable expectation of the average insured" is that Craft's occupancy of the premises, coupled with her claim that she never fully left the premises, was enough to permit coverage under the terms of the policy. Accordingly, it was determined that a question of fact precluded summary judgment as to whether the loss was entitled to coverage under the New York Central policy.

Arch Ins. Co. v. Old Republic Ins. Co., 151 A.D.3d 534, 56 N.Y.S.3d 100 (1st Dept., June 13, 2017). Arch Insurance Company filed a declaratory judgment action against Old Republic Insurance Company seeking a declaration that Old Republic was, among other things, obligated to defend and indemnify Bovis Lend Lease, LMB as an additional insured relative to an underlying personal injury action. Old Republic issued a General Liability insurance policy on which Bovis was named as an additional insured. The Old Republic policy contained a $1 million self-insured retention which provided, among other things, that Old Republic's "obligations under the Coverages of the policy to pay damages…apply in excess of the 'self[-]insured retention'" and that "[r]egardless of the Other Insurance provisions in this policy, the insurance is excess over the 'self-insured retention'". In moving for

summary judgment, Arch argued that the self-insured retention endorsement to the Old Republic policy was overridden by a "primary and non-contributory" endorsement, which was added to the policy on February 21, 2011 and made effective retroactive to September 1, 2009. The endorsement provided: "[a]s respects any person(s) or organization(s) included as an additional insured and with whom you have agreed in a written contract, agreement or permit to provide primary insurance on a noncontributory basis, this insurance will be primary to and non-contributory with any other insurance available to such person(s) or organization(s)". Arch contended that the contractual condition of the primary and non-contributory endorsement had been met as the contract between Bovis and its subcontractor required the subcontractor to procure liability insurance for which Bovis was an additional insured and which is "primary as respects coverage afforded to Additional Insureds". Moreover, it was asserted that the self-insured retention and the primary and non-contributory endorsement plainly contradict each other and that the endorsement was made to conform the policy to the subcontractor's agreement with Bovis. In opposition, Old Republic asserted that the plain language of the self-insured retention makes clear that it applies to coverage afforded to additional insureds. With regard to the primary and non-contributory endorsement, Old Republic argued that it does not override the retention as Arch's reading would provide more coverage for additional insureds like Bovis than it provides to the named insured, which is inconsistent with *Pecker Iron Works of N.Y. v. Traveler's Ins. Co.*, 99 NY2d 391 (2003), which noted that the term "additional insured" is broadly understood to mean an entity enjoying the same protection as the named insured. The trial court found in favor of Arch stating that the primary and non-contributory endorsement had clearly been triggered by the contract between Bovis and its subcontractor and that the primary and non-contributory endorsement must control over the self-insured retention, as it was added later and must be assumed to express the intentions of the parties. On appeal, the First Department affirmed the lower court's decision finding that the Old Republic policy's conflicting self-insured retention clause and primary and non-contributory endorsement could not be reconciled as to Bovis and that the primary and non-contributory clause, which was added after the effective date of the policy containing the self-insured retention clause and made effective retroactively, was controlling. In this regard, it was held that the primary and non-contributory clause expressly provided that it "modifies" the relevant coverage to provide to an additional insured "primary insurance on a non-contributory basis" if such coverage was required by the contract between the named insured and the additional insured, which the contract between Bovis and its subcontractor did. As such, it was reasoned that the subsequently agreed to primary and non-contributory endorsement's requirement of providing insurance on a primary and non-contributory basis is on its face inconsistent with and therefore overrides the self-insured retention provision. The Court further noted that nothing in the construction agreement between Bovis and the subcontractor indicates that Bovis concedes to the self-insured retention. Accordingly, it was held that Old Republic was obligated to share in the defense of Bovis.

Richard P. Byrne is a Partner in the law firm of L'Abbate, Balkan, Colavita & Contini, L.L.P.

Contact: rbyrne@lbcclaw.com

516-837-7317

John D. McKenna is a Partner in the law firm of L'Abbate, Balkan, Colavita & Contini, L.L.P.

Contact: jmckenna@lbcclaw.com

516-837-7370

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