LEGAL NEWS IN BRIEF

News in a Flash for Subrogation and Insurance Professionals

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POLICY EXCLUSION

Diaco Construction v. Ohio Security Ins. Co.
NJ Appellate Division
A-2717-17T3; 2019 N.J. Super. Unpub. LEXIS 1726
(August 2, 2019)

Plaintiff unsuccessfully appealed denial of coverage for the cost of removal of an excavator from the river into which it slipped while Plaintiff's employee was operating same. The policy provided coverage for "[p]hysical injury to tangible property, including all resulting loss of use of that property," and for "[l]oss of use of tangible property that is not physically injured." Contrariwise, the policy excluded coverage for property damage to "real property on which you…are performing operations, if the 'property damage' arises out of those operations; or…[t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it," or to "'impaired property' or property that has not been physically injured." The Appellate Division upheld the trial judge's analysis that there was no covered "loss of use," as the excavator's presence in the river did not curtail use of the river, and there was no "physical injury," i.e. detrimental alteration, to same. Moreover, the "impaired property" exclusion applied since Plaintiff restored the river to its prior condition, and the "damage to property" exclusion also applied as Plaintiff was performing ongoing work on the river when the accident occurred. ■

RELEASE OF CLAIMS

Nesby v. Fleurmond
NJ Appellate Division
A-0958-16T4; 2019 N.J. Super. LEXIS 162
(November 18, 2019)

Plaintiff collected PIP benefits from Plaintiff's insurer and settled a bodily injury claim with the insurer of the vehicle operated by the tortfeasor, signing a full release. Plaintiff then sought recovery from two policies issued to resident relatives of the tortfeasor. Plaintiff was not entitled to PIP benefits from said policies because Plaintiff was not related to the policyholders and was not occupying those policies' insured vehicles. In addition, those policies could not be "stacked" with the benefits Plaintiff already received from Plaintiff's insurer. Nor could Plaintiff access those policies' bodily injury coverage since Plaintiff had already released the tortfeasor from liability. Plaintiff's "Longworth" letter issued prior to the release was unavailing, since a "Longworth" letter relates to underinsured motorist claims, while Plaintiff's claim was a liability claim. ■

DELAYED NOTICE

Dimaria v. Travelers Ins. Grp.
NJ Appellate Division
A-0728-18T4; 2019 N.J. Super. Unpub. LEXIS 2050
(October 4, 2019)

The Appellate Division upheld dismissal of the insured's claim for a declaration of coverage by Travelers. Plaintiff sustained injuries in a vehicular accident on January 4, 2014. After finding no coverage through worker's compensation or the adverse driver's purported insurance, Plaintiff notified his personal carrier, Travelers, of the accident on September 9, 2016. Travelers denied Plaintiff's UM

claim because Plaintiff failed to "promptly" notify Travelers of the accident, in violation of Travelers' policy. Plaintiff's late notice foreclosed Travelers' right of subrogation of the potential UM benefits and prejudiced Travelers' ability to investigate the cause of the accident and the drivers' respective fault for same. ■

"OTHER INSURANCE"

First Mercury Ins. Co. v. State Farm Mut. Auto. Ins. Co.
NY County Supreme Court
65 Misc. 3d 1220(A)
(October 29, 2019)

Defendant, a subcontractor in a BI action brought by its employee, had coverage under policies with First Mercury and State Farm. The employee had sustained injuries when attempting to unload pallets of cement from Defendant's flatbed truck. First Mercury's general liability policy provided that its coverage is excess to any other insurance where a covered loss has occurred that arises out of the use or maintenance of an auto. State Farm's automobile policy stated that State Farm will "pay the proportion of damages payable that [their] applicable limit bears to the sum of [their] applicable limit and the limits of all other valid and collectible liability coverage that applied to the accident," but that their coverage will apply as excess over any other valid coverage that is provided for a non-owned car or a temporary substitute car. Since the truck at issue was neither non-owned nor a temporary substitute, State Farm's provision operates as a "pro rata" clause, and is primary to First Mercury's policy, which "other insurance" provision is an excess clause. First Mercury's obligation to defend thus does not arise until State Farm's policy coverage is exhausted. ■

DUTY TO TENANT

Giraldi v. Cervini
NJ Appellate Division
A-0160-18T2; 2019 N.J. Super. Unpub. LEXIS 2183
(October 24, 2019)

In 2012, Plaintiff entered into a month-to-month residential rental agreement with Defendants. When Plaintiff moved into the leased premises, she purportedly observed a half-inch wide crack in one of the front porch steps, and informed Defendants of the possible defect shortly thereafter. Defendants failed to perform the requested repair. Exactly four years from the date the lease began, Plaintiff caught her foot in the gap in the stair tread when descending the porch, and fell, sustaining injuries. The Court upheld summary judgment for Defendants, due to the non-latent nature of the defect, Plaintiff's long-term residency at the leased premises, and Plaintiff's awareness of the condition of the stairs and the risk of harm posed by that condition before the accident. ■

EXTENSION OF TIME TO SERVE PROCESS

Gamble v. Galeas-Acosta
Suffolk County Supreme Court
2019 NYLJ LEXIS 4007; 2019 NY Slip Op 51780(U)
(November 4, 2019)

Plaintiff timely filed suit on January 8, 2019, four days before the applicable SOL period lapsed, and sent the pleadings to process servers six days thereafter. Due to a "secretarial inadvertence," Plaintiff's counsel discovered on June 7, 2019 that the pleadings had not been served, and filed a motion two weeks later for an extension of time to serve in the interests of justice. The Court in granting Plaintiff's motion reasoned that Plaintiff's counsel made the discovery of the oversight only 29 days after the expiration of the initial 120-day period in which to serve process. Counsel's error was not attributable to Plaintiff. Lastly, two of Defendants' passengers had actions pending against Defendants since 2017, and so Defendants would not be prejudiced by service of the present pleadings. ■

"MODE OF OPERATION"

Nelson v. Wal-Mart Stores
U.S. Dist. Ct., D.N.J.
Civil Action No. 18-8646 (NLH/JS)
(October 22, 2019)

Plaintiff sustained injuries in a slip and fall at a Walmart store, purportedly due to a wipe on the floor, possibly one of the cart wipes provided by the store. Invoking the mode-of-operation doctrine, which would obviate a showing of actual or constructive notice of the dangerous condition, Plaintiff argued that a substantial risk of injury was inherent in Defendant's method of doing business. The Court in granting summary judgment for Defendant held that Plaintiff was unable to establish that the wipe at issue emanated from a self-service aspect of Defendant's business, nor, "absent proof of reasonable foreseeability of harm or 'recurring incidents' stemming from the store's provision of cart wipes," that the provision of cart wipes created a hazard. ■

Happy New Year to all.