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New York Second Department Finds Additional Insured Coverage in Favor of Landlord, Examines Late Notice Prejudice Requirement

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In the recent case of *523 BWAY, LLC v. Erie & Niagara Ins. Ass'n, 2025 NY Slip Op 01598 (App. Div.)*, the New York Appellate Division, Second Department examined an additional insured endorsement providing coverage to a landlord for "liability arising out of the ownership, maintenance or use of that part of the premises designated below leased, rented, or leased to the named insured." The insured, a dentist, leased an office from the plaintiff, 523. An employee of the dental office tripped and fell in the parking lot adjacent to the premises.

The court found that, even though the parking lot was not expressly included in the lease as part of the subject property, the insured dentist had at least a license to use the parking lot, and that the parking lot was the only mean of accessing the dental office. As such, the court concluded that the injury at issue arose out of the use of the subject property.

In addition, the court examined the prejudice requirement of NY Ins. Law 3420(a), stating, in part, that, for notice provided more than two years late, it is the insured's burden to prove that the insurer was not prejudiced. Prejudice is defined as materially impairing the ability of the insurer to investigate or defend the claim. Here—although 523 provided notice to the insurer more than two years after the suit was filed—523 established that the insurer was able to perform a full review and investigation of the claim, such that the insurer's rights were not prejudiced.

Finally, the court found that the insurer's denial of coverage for late notice was itself late, having been issued at least 3 months after the insurer asserted it had learned of grounds for its late notice defense.

This case illustrates, once again, the courts' broad reading of "arising out of" in certain contexts. It is also one of the few cases to examine the late notice prejudice requirement, concluding that if an insurer is able to fully investigate a claim, there will likely be no finding of prejudice sufficient to support a late notice denial. Should the case be that evidence or witnesses are no longer available, perhaps a different result would have been reached.

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