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I. MECHANIC'S LIEN BASICS

New York's Lien Law provides for the assertion of mechanic's liens when contractors, materialmen and certain other entities improve real property, whether such property is privately or publicly owned. A mechanic's lien for private improvements attaches to the property, whereas a lien for public improvements attaches against the state or municipal fund. *See* Lien Law §§10, 12, & 42.[1]

A. Requirements

For private improvements in the context of commercial construction *(i.e.,* other than single family dwellings as defined by Lien Law §10), a lienor must serve a Notice of Lien upon the owner and the contractor by whom the lienor was engaged either five (5) days before filing the Notice with the county clerk in which the property is located or within thirty (30) days following such filing. Lien Law §§11 & 11-b. The lienor may file the Notice of Lien any time during the progress of the work, but no later than eight (8) months after completing the contract or rendering the last item of service or materials. Lien Law §10[2] After filing the Notice, the lienor has thirty-five (35) days to file proof that it served the Notice upon the owner and contractor; otherwise, the lien terminates. *Id*.

For liens arising out of public improvements, the lienor must file the Notice of Lien with (1) the bureau in charge of the construction and (2) the public entity's comptroller or financial officer during the progress of the work, but no later than thirty (30) days after acceptance of the performance. Lien Law §12. Additionally, the lienor must serve a copy of the Notice of Lien upon the contractor who engaged its services either five (5) days before or simultaneously with filing the Notice of Lien. Lien Law §§11 & 11-c.

Whether arising out of improvements to private or public property, the Notice of Lien must identify the following:

(1) the lienor;
(2) the owner and its interest in the property;
(3) the lienor's employer or the person/entity with whom the lienor contracted to provide improvements to the property;
(4) the nature of the improvements provided and the agreed upon value of same;
(5) the monetary amount owed to the lienor;
(6) when the first and last component of the services or materials

were provided;

(7) a description of the subject property; and

(8) a verification by the lienor or its agent that the information in the Notice of Lien is true to his/her knowledge or upon information and belief.

Lien Law §9.

B. Enforcement and Foreclosure

A lienor must foreclose upon the mechanic's lien within one (1) year from the filing of the Notice of Lien unless the lienor takes statutorily-proscribed measures to extend the lien. Lien Law §§17 and 18. Options available to the lienor include commencement of a foreclosure action and filing of a *lis pendens* with the clerk of the county where the property is located (for private improvements) or with the relevant governmental agency (for public improvements). Lien Law §9. The lienor may also file for an extension with the county clerk or relevant governmental agency, in which case, if the lienor does not file an action within the extended period, a court may order an additional extension.[3]

A mechanic's lien against private property may be enforced against the property and/or the person liable for the debt, whereas mechanic's liens for public improvements are enforceable only against a liable contractor and/or governmental funds. Lien Law §§41, 42 and 60. To enforce a lien against private property, the court may direct the sale of the property and distribution of the proceeds and may appoint a referee to affect such sale.[4]

C. Ability to Waive and Limitations on Lien Rights

1. **Liens not waivable:** "[A]ny contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable." Lien Law §34.

2. **Liens are assignable** by written instrument signed and acknowledged by the lienor at any time before the discharge thereof. Lien §14.

II. PUBLIC PROJECT CLAIMS

Public work projects are governed by New York's Labor Law and must satisfy two conditions: (1) A public entity must be a party to a contract involving the employment of laborers, workers or mechanics; and (2) the contract must concern a "public work project", the primary objective of which must be to benefit the public. Projects for construction, reconstruction, or maintenance done on behalf of a public agency (entity) generally fall within the context of "public work."[5] Minimum rate of hourly wages and supplements as determined by the industrial commissioner must be met for payment of laborers, workingmen or mechanics employed in the performance of the contract, either by the contractor, sub-contractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract.[6] Additionally, state law requires provisions in public works contracts prohibiting discrimination on account of race, creed, color or national origin in employment of citizens upon public works.[7]

To view the list of open contractor opportunities in New York State, visit http://www.ogs.ny.gov/BU/DC/esb/ContractorOpportunities.asp or request electronic notification of construction opportunities at https://online.ogs.ny.gov/DNC/DNCPortal/ECPLogin.aspx?ReturnUrl=%2fDNC%2fDNCPortal%2fSubsAndSuppliers%2fSubsSuppliers.aspx.

A. State and Local Public Work

New York State has a competitive bidding process for the sale of goods or services. Among its many requirements is compliance with the Procurement Lobbying Law; submission of a Non-Collusive Bidding Certification; Sales Tax Certification; and satisfaction of workers' compensation and disability insurance requirements, as well as the CGL, auto, professional and technology D&O coverage requirements as may be specified for a particular project. There are also specific administrative requirements regarding the presentation of a bid, deadlines and packaging requirements.

The New York State Department of Labor has published a helpful guide to this work entitled "Frequently Asked Questions Regarding Public Work - Article 8, Section 220, NYS Labor Law.

1. Notices and Enforcement

The "fiscal office" of the public works project is responsible for enforcement of the Labor Law on that project[8] and the Commissioner of Labor, through the State's Attorney General, has the power to enforce the laws and sue on behalf of the municipality. Costs recoverable include the reasonable costs of investigation and reasonable attorneys' fees.[9]

B. Claims to Public Funds

See Mechanics' Liens, above.

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

Under New York's Civil Practice Law and Rules ("CPLR"), actions to recover damages for an injury to person or property must be commenced within three (3) years (§214), whereas an action upon a contractual obligation or liability, express or implied, must be commenced within six (6) years (§213). A contractor's claim accrues when its damages are ascertainable, which is generally the time by when the work is substantially completed or a detailed invoice of the work performed is submitted.[10]

In New York, statutes of limitation are generally considered procedural law because they are viewed as pertaining to the remedy, rather than the right.[11] The expiration of the time period proscribed in a statute of limitation does not extinguish the underlying right; rather, it bars the remedy[12] and serves as an affirmative defense.[13]

B. Statutes of Repose and Limitations on Application of Statutes

New York does not have a formal statute of repose, which provides a date upon which an action no longer exists, whether it has accrued by that date or not. However, CPLR §202 sets forth New York's borrowing statute and may require a New York court to apply another state's statute of repose. Regardless of whether the relevant sister state holds that its statute of repose is procedural law, New York courts deem such statutes to be substantive law and will therefore borrow them if New York's choice of law jurisprudence so requires.[14] In practice, when a New York court applies a statute of repose, the plaintiff is barred from asserting a cause of action, as opposed to being time-barred from recovery by a statute of limitations.[15]

A *de facto* statute of repose may exist in the form of conditions precedent to suit in cases against certain governmental entities that enjoy common law sovereign immunity. Where the sovereign waives its immunity on the condition that a claimant commence its lawsuit within a specific time period, tolls which would ordinarily be applicable to a statute of limitations may not extend the time period.[16] However, because the State of New York waived its sovereign immunity in 1929 (including a concomitant waiver of immunity for its subdivisions, as well as its counties, cities, towns and villages),[17] notice requirements contained in claims against municipalities are generally not considered conditions precedent.[18] As such, failure to timely comply with such requirements will not prevent the accrual of the action as would a statute of repose.

The general rule in New York is that, when a statute creates a cause of action and attaches a time limit to its commencement, the time limit is an element of the cause of action. The time limit thereby functions as a statute of repose. If the cause was cognizable at common law or by another statute, a statutory time constraint is commonly taken as a statute of limitations and must be asserted as an affirmative defense or is otherwise waived.[19] Statutes of limitations may enjoy tolling provisions such as CPLR §205, while time limitations that are in the nature of conditions precedent to suit do not benefit from such tolls.[20]

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

New York's General Business Law §§777-a and 777-b attach implied warranties to a merchant's sale of a new home unless the merchant and buyer adopt measures specified in the statute to waive them.[21] An implied warranty begins to run on the date title passes to the first person who purchases the home for residential occupancy, or on the date residential occupancy actually occurs, whichever occurs first. *Id*. The following warranties are implied unless waived:

a) One (1) year from and after the warranty date: The home will be free from defects due to a failure to have been "constructed in a

> skillful manner", defined as workmanship and materials meeting applicable building code standards or, in the absence of such standards, local accepted building practices;
>
> b) Two (2) years from and after the warranty date: The plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner; and
>
> c) Six (6) years from and after the warranty date: The home will be free from material defects, defined as physical damage to certain load bearing systems (*e.g.,* foundation systems and footings, beams, girders, *etc.*)

As a condition precedent to commencing an action for breach of implied warranty, the owner must notify the seller in writing of the warranty violation no later than thirty (30) days following the expiration of the relevant warranty period and thereafter shall afford the seller reasonable time to cure it. Gen. Bus. Law §777-a. After satisfying the conditions precedent, the owner must file the action no later than one (1) year following the expiration of the relevant warranty or within four (4) years after the warranty date, whichever of the two is longer. *Id*. In the context of new home sales, the statutory warranties supplant earlier common-law implied warranties.[22]

New York's General Business Law §§770-776 governs contracts for home improvements. Statutory warranties and conditions precedent to filing an action do not apply to contracts for home improvements or new homes built upon land that the contractee already owns;[23] nor does a common-law merchant's implied warranty attach to such contracts.[24] An owner has six (6) years to sue for breach of contract predicated upon contractual warranty violations, which period begins to run upon completion of the actual physical work.[25]

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

Coverage in New York State is largely caselaw driven, as opposed to statutory, and wholly derived from the contents of the insurance contract. Certificates of insurance are not determinative of coverage applicability and may not be relied upon to enforce a claim for coverage. Parties seeking coverage pursuant to a contractual duty to procure insurance or indemnify are well advised to obtain a copy of the insurance policy and additional insured endorsement, if applicable.

B. Trigger of Coverage

New York's mantra, "The duty to defend is broader than the duty to indemnify", reverberates throughout the state's coverage jurisprudence.[26] Wherever a claim is raised where the potential for coverage exists – even where the claims are false or groundless – the duty to defend is triggered.[27] Thus, an insurer will be obligated to provide a defense as long as the allegations in the underlying complaint suggest a reasonable possibility of coverage.[28] In fact, an insurer can only avoid its defense obligation where it can demonstrate as a matter of law that

there is *no possible* factual or legal basis on which it will be obligated to indemnify the insured (obviously, a very high bar).[29]

The New York Court of Appeals adopted an "injury-in-fact" test, identified as "onset of disease, whether discovered or not".[30] Under this test, an insurance policy is triggered when there is a covered "occurrence" that gives rise to an actual injury during the policy period.[31] Therefore, a real but undiscovered injury proved to have existed at the relevant time may establish coverage irrespective of the time the injury became diagnosable.[32]

The burden of proving the existence of coverage rests on the would-be insured, while the burden to prove an exclusion to the policy rests with the insurer.[33] To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in a particular case. However, the burden to prove an exception to an exclusion rests, once again, with the insured. Exclusions are narrowly construed and ambiguities in the contract, including exclusions, are construed against the insurer.[34]

C. Allocation Among Insurers

New York has rejected a joint and several approach to allocation, and has adopted a *pro rata* allocation approach.[35] Under this methodology, liability for injury or damages is allocated among tortfeasors and accordingly, among the triggered insurance policies (priority, of course, being governed by the policies' "other insurance clauses").

D. Issues With Additional Insurance

Additional insured endorsements vary widely as to the scope of the additional insured coverage provided. An endorsement tied to liability "arising out of the named insured's work or operations is not limited to the vicarious liability of the additional insured, but also covers the additional insured's own negligence.[36] A claim by an employee injured on the jobsite, even if not actually working at the time of the accident, is also deemed to have "arisen out of the work."[37] However, where the injured party is not an employee of the named insured or its subcontractors, there must be some causal connection between the accident and the named insured's work for coverage to be triggered.[38]

Other additional insured endorsements are tied to liability arising out of the named insured's "ongoing operations". Essentially, this type of endorsement depends on whether or not the named insured's work had been completed prior to the time of the accident.[39] Evolving law appears to trend toward use of more restrictive additional insured endorsements which depend on a showing of the named insured's negligent acts or omissions or exclude the additional insured's own negligence. Other examples of restrictive additional insured endorsements include limitations for coverage as follows:

(a) to liability "caused, in whole or in part, by [the named insured's] acts or omissions";
(b) to the extent that the additional insured is held liable for [the named insured's acts or omissions];
(c) liability caused by the named insured's negligent acts or omissions;

(d) "only with respect to acts or omissions of the Named Insured";
(e) only for claims "determined to be solely the negligence or responsibility of [the named insured]"; or
(f) claims "arising solely out of your negligence."

Also, there are additional insured endorsements which exclude coverage for "the independent acts or omissions of such additional insured" or the additional insured's sole negligence.

When an additional insured endorsement references the negligence of the additional or named insured, the insurer's duty to indemnify the additional insured is immature and usually cannot be determined at the outset of the litigation.[40] The difficulty with these restrictive additional insured endorsements is that a defense must be provided by the carrier even when the indemnity obligations for additional insureds might not be resolved until a resolution of the underlying personal injury action.

VI. CONTRACTUAL INDEMNIFICATION

New York's General Obligations Law prohibits any contract which purports to require the promisor to indemnify or hold harmless the promisee against liability for damage arising out of the negligence of the promisee, his agents or employees, or indemnitee. *See* Gen. Oblig. Law §5-322.1. In other words, owners and general contractors can contractually require subcontractors to indemnify them for the negligence of third-parties but not for the owners' and general contractors' own negligence.

Courts have been presented with and have enforced "partial indemnity" provisions between contractors.[41] "Partial indemnity" provisions incorporate savings language whereby a subcontractor agrees to indemnify the owner and/or general contractor "to the fullest extent permitted by applicable law" and excludes from the subcontractor's responsibility liability created by the general contractor and/or owner's exclusive negligence.[42] Unlike a "full indemnity" agreement, a "partial indemnity" agreement entitles owners and general contractors only to indemnification commensurate with the subcontractor's apportioned liability.

Any ambiguity about the propriety of such contract-allocated liability was put to rest by the Court of Appeals in 2008, when it ruled that an indemnification provision drafted so as to seek less than full indemnity can permit an owner or general contractor to secure "partial indemnity" or "contractual contribution" from the employer even where the owner or general contractor is partially negligent. [43]

Under New York's Workers' Compensation Law §11, common law contribution or indemnity cannot be obtained from the injured worker's employer unless it is demonstrated that the injured worker sustained a "grave injury" as defined by statute (including death; permanent and total loss of use or amputation of an arm, leg, hand or foot; loss of multiple fingers; loss of multiple toes; paraplegia or quadriplegia; total and permanent blindness; total and permanent deafness; loss of nose; loss of ear; permanent and severe facial disfigurement; loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability).

VII. CONTINGENT PAYMENT AGREEMENTS

A. Enforceability

These agreements have not been frequently litigated in New York; as such, there is very little caselaw addressing them other than the acknowledgment that a "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."[44]

B. Requirements

There are no specific statutory or common law requirements applicable apart from the general rules of contract construction and interpretation.

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

Personal injury litigants may recover damages for past and future pain and suffering; expenses incurred; loss of earnings/diminution in future earning capacity and loss of business profits.[45]

Claims for damages for construction defects are subject to a three year statute of limitations which commences upon completion of construction, regardless of when the damage is discovered.[46] New York does not recognize coverage under commercial general liability policies for claims of defective work.[47] The measure of damages is the fair and reasonable cost of completing or correcting the contractor's performance as of the date of the breach, unless the defect is not remediable, in which case, damages are based on the difference in value between the defective structure and the structure had it been properly completed.[48]

B. Attorneys' Fees Shifting and Limitations on Recovery

New York follows the "American Rule", which does not permit a prevailing litigant to recover attorneys' fees from the losing party unless such award is authorized by agreement of the parties, statute or court rule.[49, 50] Thus, parties may contract for recovery of attorneys' fees.

Under appropriate circumstances, however, attorneys' fees and court costs may be awarded where frivolous claims, defenses, counter-claims and/or cross-claims have been raised. CPLR §8303-a(a).

C. Consequential Damages

Recovery for breach of contract is ordinarily limited to compensation for injuries naturally flowing from the breach or otherwise within the contemplation of the parties at the time they entered into the contract.[51] Consequential damages can include an owner's costs to complete construction and cure defects and omissions, whereas a contractor may recover, among other things, reasonable lost profits, post-bid expenditures required to commence construction, and costs arising from burdensome physical conditions unspecified in the contract.[52]

D. Delay and Disruption Damages

Untimely, completion of construction may entitle the owner to damages equal to additional income that the completed building would have generated during the time the owner was deprived of it.[53] Conversely, a contractor's damages for an owner's delay and disruption of construction may be determined either as: (a) the amount by which the contractor's estimated costs plus overhead and profit exceed its bid for the contract or (b) the amount of the actual additional costs occasioned by the work disruption – including increased costs of equipment and materials, together with allowance for overhead and profit.[54]

E. Economic Loss Doctrine

In the absence of injury to person or property, a plaintiff seeking recovery for economic loss arising out of a defective product is limited to contractual remedies.[55] Where the transfer of personal property predominates, a construction contract constitutes a "sale of goods" such that New York's Uniform Commercial Code ("U.C.C.") applies and may permit a plaintiff to recover economic loss under breach of warranty theories.[56] However, the U.C.C. is not applicable to construction contracts which predominantly govern the provision of services and labor.[57]

Thus, while tort-based claims of economic loss due to failure of a product or construction are barred under the Economic Loss Doctrine ("ELD"), damages to "other property" can be recovered under negligence and/or strict product liability theories. What constitutes "other property" is largely a fact-based determination.

Application of the ELD merely bars tort claims for the recovery of economic damages, but does not preclude recovery of damages through breach of contract and/or breach of warranty claims (to the extent they are available).

F. Interest

Interest on damages for breach of contract is noncompounding and begins to accrue on the date when the claim arises. The judgment for damages continues to accrue interest after it is filed and entered.[58] CPLR §5004 provides for nine percent (9%) interest *per annum,* except where otherwise provided by statute (*e.g.,* interest on judgments against municipalities is capped at a lower rate).

G. Punitive Damages

Punitive damages arising from a breach of contract may be recovered only when necessary to deter conduct that is "gross," "morally reprehensible," and of "such wanton dishonesty as to imply a criminal indifference to civil obligations."[59] The complained-of conduct must be (1) actionable as an independent tort; (2) egregious in nature; (3) directed to the plaintiff; and (4) part of a pattern directed at the public, generally.[60]

New York jurisprudence is unwavering in holding that both punitive damages and statutory treble damages are uninsurable as a matter of public policy.[61]

H. Liquidated Damages

Liquidated damages clauses are enforceable, while penalty clauses – an *ad hoc* question of law assessing whether the damage award is unconscionable or contrary to public policy – are not. Provided that a liquidated damages clause clearly and unambiguously sets forth the amount of compensation that the parties agreed should be paid in order to satisfy a loss of injury resulting from a breach of contract, it is enforceable.[62]

IX. CASE LAW AND LEGISLATION UPDATE

The bill increasing the minimum wage was signed into law in April 2016: The wage increase to $15 per hour is implemented over five years, initially applying to employees of "large businesses" (those with eleven (11) or more employees) in New York City and spreading throughout the state thereafter.

A bill mandating paid employee leave was also signed in April of 2016, this law requires paid employee leave for twelve (12) weeks and is the most comprehensive of its sort in the nation. It will also be phased in over three years but will not be in effect until 2018.

The "Prompt Payment" law was signed in December of 2015. This amended existing law by eliminating the exception for accrual of interest for a period of time a payment from the state comptroller is delayed beyond the required thirty-day period, due to the fund or sub-fund from which the payment is to be made having insufficient cash.

[1] *EMC Iron Works v. City of New York*, 294 A.D.2d 173 (1st Dep't 2002).
2 Where the improvement is related to real property improved or to be improved with a single-family dwelling, the end period is four (4) months from completion of the contract or rendering of the last item of services or materials. Lien Law §10(1).
[3] A lien on real property improved or to be improved with a single family dwelling may only be extended by order of a court of record or a judge or justice thereof. Lien Law §17.
[4] *See, e.g., McCoy v. Bailey,* 24 Misc.2d 875, 875 (Sup. Ct., Nassau Co. 1960).
[5] *See, gen*., Labor Law Article 8.
[6] Labor Law §220-d ("Minimum rate of wage and supplement").
[7] Labor Law §220-e.
[8] Labor Law §223.
[9] Labor Law §224
[10] *C.S.A. Contr. Corp. v. N.Y. City Sch. Constr. Auth*., 5 N.Y.3d 189 (2005).
[11] *Contact Chiropractic, P.C. v. New York City Tr. Auth.*, 31 N.Y.3d 187, 197 (2018) (quoting *Portfolio Recovery Assoc., LLC v. King*, 14 N.Y.3d 410, 416 (2010)).
[12] *Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 55 (1999); *2138747 Ontario, Inc. v. Samsung C&T Corp*., 144 A.D.3d 122, 126 (1st Dep't 2016).
[13] David D. Siegel and Patrick M, Connors, New York Practice, §34 (6th ed. 2018).
[14] *Tanges*, *supra*, at 53.
[15] *Id*.
[16] *Yonkers Contr. Co. v. Port Auth. Trans-Hudson Corp*., 93 N.Y.2d 375, 380 (1999); *Matter of Lindenwood Cut Rate Liquors v. New York State Liq. Auth.*, 161 A.D.3d 1077, 1078 (2d Dep't 2018)
[17] *Florence v. Goldberg*, 44 N.Y.2d 189, 194-95 (1978), *Mahoney v. Temporary Com. Of Investigation*, 165 A.D.2d 233, 237 (3d Dep't 1991).
[18] *Campbell v. City of New York*, 4 N.Y.3d 200, 203 (2005).

[19] *Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 56 (1999) (quoting *Romano v. Romano*, 19 N.Y.2d 444, 447 (1967)).
[20] *Vill. of Pelham v. City of Mt. Vernon*, 302 A.D.2d 397, 398 (2d Dep't 2003).
[21] Gen. Bus. Law §777(6) defines "owner" as the first person to whom the home is sold and, during the unexpired portion of the warranty period, each successor in title to the home and any mortgagee in possession.
[22] *Fumarelli v. Marsam Dev., Inc*, 92 N.Y.2d 298, 300-01 (1998).
[23] *Garan v. Don & Walt Sutton Builders, Inc*., 5 A.D.3d 349, 350 (2d Dep't 2004); *Biggs v. O'Neill*, 309 A.D.2d 1110, 1110 (3d Dep't 2003).
[24] *Meldrim v. Hill*, 260 A.D.2d 836, 838 (3d Dep't 1999).
[25] *Cabrini Med. Ctr. v. Desina*, 64 N.Y.2d 1059 (1985); *Rite Aid of N.Y., Inc. v. R.A. Real Estate, Inc.*, 40 A.D.3d 474, 474 (1st Dep't 2007).
[26] *See Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61, 65 (1991); *One Reason Rd., LLC v. Seneca Ins. Co., Inc.*, 163 A.D.3d 974, 976 (2d Dep't 2018) .
[27] *Frontier Ins. Co. v. State*, 87 N.Y.2d 864, 867 (1995).
[28] *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006); *Colon v. Aetna Life & Cas. Ins. Co*., 66 N.Y.2d 6, 8-9 (1985).
[29] *Servidone Constr. Corp. v. Security Insurance Co*., 64 N.Y.2d 419, 424 (1985); *Hotel des Artistes, Inc. v. Gen. Accident Ins. Co. of Am*., 9 A.D.3d 181, 187 (1st Dep't 2004).
[30] *Cont'l Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 651 (1993).
[31] *Greater N.Y. Mut. Ins. Co. v. Royal Ins. Co*., 238 A.D.2d 261, 261 (1st Dep't 1997) (citing *Continental Casualty Corp. v. Rapid-American Corp.*, 177 A.D.2d 61 (1st Dep't 1992), *aff'd*, 80 N.Y.2d 640 (1993)).
[32] *Am. Home Products Corp. v. Liberty Mut. Ins. Co*., 748 F.2d 760, 765 (2d Cir. 1984).
[33] *Northville Indus. Corp. v. Nat'l Union Fire Ins. Co*, 89 N.Y.2d 621, 634 (1997).
[34] *See*, *e.g*., *Belt Painting Corp. v. TIG Ins. Co*., 100 N.Y.2d 377, 383 (2003) (citing *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co*., 34 N.Y.2d 356, 361 (1974)).
[35] *See Consol. Edison Co. of N.Y. v. Allstate Ins. Co*., 98 N.Y.2d 208 (2002).
[36] *Greater N.Y. Mutual Ins. Co. v. Mut. Maine Office, Inc.*, 3 A.D.3d 44, 48-48 (1st Dep't 2003); *Tishman Constr. Corp. v. CNA Ins. Co*., 236 A.D.2d 211 (1st Dep't 1997); *Charter Oak Fire Ins. Co. v. Trustees of Columbia Univ.*, 198 A.D.2d 134 (1st Dep't 1993).
[37] *See Sandy Cr. Cent. School Dist. v. United Natl. Ins. Co.*, 37 A.D.3d 812 (2d Dep't 2007).
[38] *See*, *e.g*., *Turner Constr. Co. v. Kemper Ins. Co*., 198 Fed. Appx. 28 (2d Cir. 2006).
[39] *See One Beacon Ins. v. Travelers Prop. Cas. Co. of Am*., 51 A.D.3d 1198, 1200 (3d Dep't 2008).
[40] *See Am. Guar. & Liab. Ins. Co. v. CNA Reinsurance Co.*, 16 A.D.3d 154 (1st Dep't 2005) (coverage for building owner for shooting of tenant by intruders under security guard company's insurance policy depended on a finding of the security guard company's negligence); *see also Crespo v. City of New York*, 303 A.D.2d 166 (1st Dep't 2003) (negligence of parties yet to be determined).
[41] *Dutton v. Charles Pankow Builders, Ltd*., 296 A.D.2d 321, 322 (1st Dep't 2002).
[42] *Id*.
[43] *Brooks v. Judlau Contr., Inc*., 11 N.Y.3d 204 (2008).
[44] *Cirino v. City of New York* (*In re World Trade Ctr. Disaster Site Litig.*), 754 F.3d 114, 125 (2d Cir. 2014).
[45] 1B New York Pattern Jury Instructions 2:277 *et seq*. (3rd ed. 2017)
[46] *City Sch. Dist. v. Hugh Stubbins & Assocs*., 85 N.Y.2d 535, 538 (1995).
[47] *I.J. White Corp. v. Columbia Cas. Co.*, 105 A.D.3d 531, 532 (1st Dep't 2013) (citing *George A. Fuller Co. v. United States Fid. & Guar. Co*., 200 A.D.2d 255, 259 (1st Dep't 1994)).
[48] *Mary Imogene Basset Hosp. v. Cannon Design, Inc.*, 127 A.D.3d 1377 (3d Dep't 2015) (citing *Brushton-Moira Cent. Sch. Dist. v. Fred H. Thomas Assocs., P.C.*, 91 N.Y.2d 256 (1998)).
[49] *Congel v. Malfitano*, 31 N.Y.3d 272, 290-91 (2018); *Mount Vernon City School Dist. v. Nova Cas. Co*., 19 N.Y.3d 28, 39 (2012).
[50] *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1 (1986).
[51] *Kenford Co. v. County of Erie*, 73 N.Y. 2d 312, 321-22 (1989).
[52] *Tapalaga v. Gabrielli*, 284 A.D.2d 530, 530 (2d Dep't 2001); *Sarnelli v. Curzio*, 104 A.D.2d 552, 553 (2d Dep't 1984); *Brushton-Moira Central School Dist.*, *supra*, n.50.
[53] *Losei Realty Corp. v. New York*, 254 N.Y. 41, 48-49 (1930); *Bartz v. Hewitt*, 296 A.D.2d 723, 724 (3d Dep't 2002).
[54] *Fehlhaber Corp. & Horn Constr. Co. v. State*, 69 A.D.2d 362, 368-71 (3d Dep't 1977); *Whitmyer Bros., Inc. v.*

State, 47 N.Y.2d 960, 962 (1979).
[55] *U.S. Energy Dev. Corp. v. Superior Well Servs., Inc.*, 155 A.D.3d 1553, 1554 (4th Dep't 2017); *Hodgson v. Isolatek Int'l Corp.*, 300 A.D.2d 1051, 1052-53 (4th Dep't 2002).
[56] *Vitolo v. Dow Corning Corp.*, 234 A.D.2d 361, 363 (2d Dep't 1996); *Word Management Corp. v. AT&T Information Systems, Inc.*, 135 A.D.2d 317, 321 (3d Dep't 1988)..
[57] *Milau Associates, Inc. v. North Ave. Dev. Corp*., 42 N.Y.2d 482 (1977).
[58] *Brushton-Moira Central School Dist., supra, n.50*; CPLR §§5000-5003.
[59] *New York Univ. v. Cont'l Ins. Co*., 87 N.Y.2d 308, 315-16 (1995).
[60] *Id*.
[61] *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334-35 (2913) (citing *Home Ins. Co. v. American Home Products Corp*., 75 N.Y.2d 196 (1990); *McCabe v. St. Paul Fire and Mar. Ins. Co.*, 79 A.D.3d 1612, 1614 (4th Dep't 2010) (1st Dep't 1994)).
[62] *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assn., Inc.*, 24 N.Y.2d 528, 536-37 (2014) (citing *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc*., 41 N.Y.2d 420, 424 (1977)).