TRAUB LIEBERMAN
STRAUS & SHREWSBERRY LLP

TLSS Attorneys Eric D. Suben and Meghan E. Ruesch Obtain Dismissal of Claim for Additional Insured Coverage

October 7, 2014

Westland South Shore Mall, L.P., sued Maryland Casualty Company for additional insured coverage under a policy issued to the Mall's tenant Buffalo Wild Wings. Maryland Casualty moved to dismiss the complaint on the basis that the policy did not contain any additional insured endorsement and the Mall did not qualify as an insured under any other provision of the policy. Westland opposed the motion on two grounds: 1) the copy of the policy submitted with the motion was not properly authenticated; and 2) a certificate of insurance identified Westland as an additional insured, albeit under a policy issued to a different Buffalo Wild Wings entity. The court denied Maryland Casualty's motion.

TLSS attorneys **Eric D. Suben** and **Meghan E. Ruesch** moved to renew and reargue, arguing that the policy was properly authenticated in the first instance by attorney affirmation, but in any event submitted a certified copy with the renewed motion. TLSS further argued that the certificate of insurance containing standard disclaimer language, while identifying a different named insured, clearly referenced the same issuing company, policy number, and policy period, and as such constituted a judicial admission by Westland that it relied on the same policy in its claim for coverage. Finally, TLSS argued that the disclaimer language in the certificate of insurance refuted Westland's claim for additional insured coverage on that basis.

The court granted TLSS' motion to reargue, dismissing the complaint against Maryland Casualty and finding that the certified policy established that Westland was "not listed as an additional insured by an endorsement, on any declarations page, or elsewhere within the policy" and as such did not qualify as an insured under the policy. The court further found that the certificate of insurance established that Westland was relying on the same policy for its claim, but was issued "for information only" and, as such, could not support additional insured status. In conclusion, the court held that "the documents conclusively resolve all factual issues, and they establish that [Maryland Casualty] has a defense as a matter of law." The complaint was dismissed accordingly.

Westland South Shore Mall, L.P. v. NYCT Restaurant Enterprises, et al., Index No. 13-60448, Supreme Court of the State of New York, Suffolk County (slip op. 9/25/14).

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP

TLSS Attorneys Jerri A. DeCamp and Mario Castellitto Obtain Summary Judgment in New York Labor Law Matter

October 20, 2014

In *DeRosas v. Rosmarins Landholdings, LLC, et al.,* (NYS Supreme Court, Orange County) plaintiff claims that he sustained injuries as a result of being struck in the head by a portion of a tree that he was cutting with a 16 inch gas powered chain saw in connection with his employment as a maintenance worker/grounds keeper with Camp Rosmarins, Inc. Plaintiff sued the property owner, Rosmarins Landholdings, LLC and the president of Camp Rosmarins, Inc. alleging violations of New York State Labor Law §§200, 240(1) and 241(6) and common law negligence. Plaintiff asserted that he had to climb atop a pile of clay debris on the property in order to cut the branches of trees that had fallen down as a result of Hurricane Sandy. As he was sawing, he claims that he heard something snap and that a portion of the tree fell and struck him in the head. Plaintiff is receiving workers' compensation benefits pursuant to a decision of the Workers' Compensation Board which designated Camp Rosmarins, Inc. as his employer.

Per the Court's October 14, 2014 Order, TLSS was successful in obtaining dismissal of all claims as against the president of the Camp in that plaintiff is barred by the exclusive remedy provisions of the Workers' Compensation Law. Workers' Compensation is the exclusive remedy for claims against not only employers, but also co-employees when both the plaintiff and the co-employee are acting within the scope of their employment at the time of their injury. It is well-settled that parties are co-employees in all matters arising from and connected with their employment.

With regard to plaintiff's Labor Law §240(1) claim, attorneys **Mario Castellitto** and **Jerri DeCamp** argued that the case law uniformly holds that: (1) a tree is not a "structure" within the meaning of Section 240; and (2) tree cutting constitutes routine maintenance which is not a protected activity under Section 240, unless it occurs in the context of some other activity involving a structure that is protected by the statute. In an effort to evade these holdings and bring himself within the ambit of Section 240, plaintiff argues that the pile of clay debris on which he was standing at the time of the accident constituted a "structure" and that he was engaged in a protected Section 240 activity, to wit, "demolition," "repairing," "altering," or "cleaning" of the pile. The Court held that the pile of clay and debris does not qualify as a "structure" even under the broadest definition applicable in Labor Law §240(1) cases. The Court further held that even if the pile of clay and debris were deemed a "structure," plaintiff was not engaged in a protected Section 240 activity involving the pile.

In dismissing the plaintiff's Labor Law §241(6) claim, the Court agreed with the defendants in that the provision is inapplicable where, as here, the plaintiff's activity did not arise from construction, demolition or excavation work.

Finally, with regard to the plaintiff's §200 and common law negligence claims, the Court held that there is no evidence that the defendant out of possession land owner had any authority to supervise or control the plaintiff's work involving the cutting of trees for the Camp. Furthermore, with respect to any alleged dangerous condition on the premises, the Court found that the evidence established that the pile of clay debris does not, in and of itself, constitute a dangerous condition which proximately caused plaintiff's injury.

TRAUB LIEBERMAN
STRAUS & SHREWSBERRY LLP

TLSS Attorneys Michael Knippen, Brian Bassett and Kate Dempster Obtain Summary Judgment on Behalf of Insurer in a Declaratory Judgment Action

August 26, 2014

Traub Lieberman Straus & Shrewsberry LLP attorneys **Michael Knippen**, **Brian Bassett**, and **Katherine Dempster** recently prevailed on summary judgment on behalf of an insurer in a declaratory judgment action to determine applicable policy limits in an underlying personal injury suit. The underlying plaintiff filed a lawsuit in the Circuit Court of Cook County, Illinois, Law Division, wherein he alleged he was assaulted by another patron at a local bar. He brought causes of action for negligent provision of security against the bar, bartender, and owner. The bar tendered the suit to its commercial general liability carrier under a policy providing a per occurrence limit of $1,000,000, which included an intentional acts exclusion but was modified by endorsement to also include an Assault and Battery Limitation with a $100,000 sublimit. The insurer took the position that despite the allegations of negligence, the bar's alleged liability arose from a "battery" as that term is defined in the Policy, and therefore the only possibility of coverage fell within the Assault and Battery Limitation. The underlying plaintiff then filed a declaratory judgment action Circuit Court of Cook County, Illinois, Chancery Division, captioned *Ricky Vosler v. Landmark American Insurance Company, et al*, No. 2013CH08596, arguing that the Policy's per occurrence limit of $1,000,000 was available to satisfy any judgment against the bar. Upon cross motions for summary judgment and after entertaining oral argument, the judge denied the underlying plaintiff's Motion for Summary Judgment, granted the insurer's Motion for Summary Judgment, and dismissed the action, finding that the maximum indemnity owed for the underlying suit was $100,000 pursuant to the Assault and Battery Limitation.

TRAUB LIEBERMAN
STRAUS & SHREWSBERRY LLP

TLSS Partners Mike Kiernan and Burks Smith Win Jury Trial on Conditions Defense for Large Property Insurer

August 21, 2014

On August 13, 2014, Traub Lieberman Straus & Shrewsberry LLP partners **Mike Kiernan** and **Burks Smith**, from the firm's Florida office, won a Defense Verdict in a jury trial involving a claim for property damage to a residential dwelling in Sarasota, Florida. The damage in question was allegedly caused by a lightning strike in June, 2009. In *Thomas Volpe & Maureen Volpe v. State Farm Florida Insurance Company*, (Sarasota Circuit Court Case No. 2010-CA-5950-NC), the Plaintiffs claimed that the insurer wrongfully denied their claim, allegedly entitling them to complete replacement of their barrel tile roof, together with a statutory claim for attorneys' fees, costs, and pre-judgment interest. At trial, Attorneys Kiernan and Smith presented evidence that the damages claimed by the Plaintiffs were not covered, and that the Plaintiffs had "failed to exhibit the damaged property" as required by the Conditions section of the Policy. The Plaintiffs responded by alleging that the carrier has simply ignored the evidence of damage, which they claimed was available for inspection for a year following the claimed loss. Ultimately, the jury disagreed with the Plaintiffs' assertions, and specifically found that the Plaintiffs had materially breached their insurance policy by failing to properly exhibit the damages, resulting in substantial prejudice to the carrier. Thus, the jury rejected the Plaintiffs' claims in their entirety, resulting in a Defense Verdict for the insurer.