



Appellate Division, First Department, Modifies Trial Court Order, Delivering Summary Judgment Win to Builder's Risk Insurers in Sandy Tower Crane Coverage Dispute

FOR IMMEDIATE RELEASE

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On December 22, 2015, the Appellate Division for the First Department ruled in favor of a market of insurers, represented by Mound Cotton, declaring that the Insurers "have no obligation to provide coverage under the builder's risk policy" for a multi-million dollar tower crane which suffered extensive damage at the insured Project during Hurricane Sandy.

The market – comprised of Zurich, ACE, XL, Travelers, and Axis – collectively issued a \$700,000,000 builder's risk policy, insuring a building under construction located at 157 West 57th Street in Manhattan. The Project, constructed by owner/developer Extell and construction manager Lend Lease, is a seventy-four floor mixed use hotel and residential building.

Strong winds during Superstorm Sandy caused the boom of the tower crane, standing nearly 750 feet above street level, to whip about, flip back on itself, and, ultimately, hang precariously over the street and Project until it could be secured and removed. Parts of the tower crane fell to the street, while others struck the glass façade of the building, causing minimal damage. The removal and replacement of the damaged tower crane delayed construction of the Project for an extended period.

Thereafter, Extell and Lend Lease sought coverage under the builder's risk policy for losses incurred in connection with the damaged tower crane, including a claim under the Delay in Completion Coverage endorsement to the policy. Insurers denied coverage on the grounds that the tower crane was not Covered Property within the meaning of the builder's risk policy, and that the policy's exclusion for "contractor's tools, machinery, plant and equipment" precluded coverage for the claim.

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On September 16, 2013, Lend Lease and Extell separately filed for summary judgment, seeking a declaration of coverage under the policy and alleging breach of contract against the insurers. Mound Cotton, on behalf of the market, opposed these motions and cross-moved for summary judgment. By decision and order dated January 15, 2015, the trial court denied all parties' motions and ordered discovery to proceed, stating that "issues of fact" surrounded "whether the Tower Crane was intended to become a permanent part of the Project, which is relevant to the applicability of the Contractor's machinery and equipment exclusion." All parties appealed the trial court's order to the First Department, where oral argument was held in May 2015.

On December 22, 2015, the Appellate Division modified the trial court's order on the law and granted the Insurers' cross-motions for summary judgment.

By majority opinion, the Appellate Division agreed with Insurers' arguments that the tower crane did not constitute a covered "Temporary Works" as defined in the policy. Specifically, the majority held that the tower crane could not be considered a "temporary structure" as used in the definition of "Temporary Works," because it was not "incidental to the project." In this regard, the majority recognized that the insured Project was specifically designed to incorporate the tower crane during construction. Moreover, the majority held that rather than serving a minor or subordinate role, the tower crane was used to lift items such as concrete slabs, structural steel and equipment, and was therefore integral and indispensable to the project.

In addition, the majority concluded -- applying the principle of *ejusdem generis*, in which the meaning of an undefined term is ascertained by reference to the words surrounding it -- that the tower crane was nothing like the words surrounding the undefined term "temporary structure," i.e., scaffolding, formwork, falsework, shoring, fences and office and job site trailers. Thus, the Appellate Division found that the tower crane did not constitute a covered "Temporary Works." The court also held that the tower crane constituted "equipment" as used in the contractor's machinery and equipment exclusion, and was therefore excluded property under the policy.

Two Justices dissented from the majority's decision and it is anticipated that this will be appealed to New York's highest appellate court, the Court of Appeals.

Phil Silverberg, Mark Katz, and Sanjit Shah represented Zurich American Insurance Company in this case on behalf of Mound Cotton.