

--- N.Y.S.2d ----

--- N.Y.S.2d ----, 2007 WL 226654 (N.Y.A.D. 1 Dept.), 2007 N.Y. Slip Op. 00582

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3405 Putnam Realty Corp. v. Insurance Corp. of New York N.Y.A.D. 1 Dept., 2007. Only the Westlaw citation is currently available.

Supreme Court, Appellate Division, First Department, New York.

3405 PUTNAM REALTY CORP., Plaintiff,

v.

INSURANCE CORPORATION OF NEW YORK, et al., Defendants-Respondents,

Kindo Kelly, an infant by his mother and natural guardian, Ramonita Ortiz, et al., Defendants-Appellants.

Jan. 30, 2007.

[David A. Kapelman](#), New York, for appellants.

**Gold, Stewart**, Kravatz & Stone, LLP, Westbury ([Jeffrey B. Gold](#) of counsel), for respondents.

[SAXE](#), J.P., [MARLOW](#), [SULLIVAN](#), [NARDELLI](#), [GONZALEZ](#), JJ.

\*1 Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered March 28, 2005, which, to the extent appealed from, granted defendant insurer's cross motion for summary judgment dismissing plaintiff's complaint and denied the cross motion by defendants Kelly and Ortiz for summary judgment to strike defendant insurer's answer to their cross claim, unanimously affirmed, without costs.

Kelly and Ortiz are plaintiffs in an underlying action against plaintiff 3405 Putnam Realty for injuries allegedly arising due to ingestion of lead paint. 3405 Putnam Realty brought the instant declaratory judgment action to have its insurer defend and indemnify it under the insurance policy it had issued. The insurer contends that it disclaimed coverage in a timely fashion, sending notice both to plaintiff herein and to Kelly and Ortiz in the underlying action. Only Kelly and Ortiz appeal.

Kelly and Ortiz would not ordinarily have standing to bring an action for the relief sought in their cross claim (see [Lang v. Hanover Ins. Co.](#), 3 NY3d 350 [2004]). However, the insured named Kelly and Ortiz, who failed to obtain a judgment in the underlying

personal injury action prior to suing the tortfeasor's insurer, as required by [Insurance Law § 3420](#), as party defendants in the action, thereby allowing them to contest the issue of coverage anew in the instant case (see [Maroney v. New York Cent. Mut. Fire Ins. Co.](#), 5 NY3d 467, 471 [2005]).

The insurer properly disclaimed under the facts of this case, which included its notification to all interested parties upon receipt of process. Moreover, while the disclaimer, a copy of which was forwarded to Kelly and Ortiz's attorney, stated that the policy was no longer in force and effect, the insurer included language in that disclaimer specifically stating that "In the event this loss was within the policy effective dates, there would be no coverage for this loss" under its Lead Based Paint Exclusion (cf. [Matter of Worcester Ins. Co. v. Bettenhauser](#), 95 N.Y.2d 185 [2000]). Under these circumstances, the disclaimer was valid (see [M-Dean Realty Corp. v. General Sec. Ins. Co.](#), 6 AD3d 169 [2004]).

We have considered appellants' other contentions and find them without merit.

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