

**Structure Tone, Inc. v Eagle Dismantling Corp.**

2007 NY Slip Op 33366(U)

October 16, 2007

Supreme Court, New York County

Docket Number: 0109074/2003

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

STRUCTURE TONE, INC., TRIZECHAN ONE NEW YORK PLAZA, LLC, and ZURICH-AMERICAN INSURANCE COMPANY,  
Plaintiffs,  
and

INDEX NO. 109074 /2003

AMERICAN HOME ASSURANCE COMPANY,  
Intervening Plaintiff,

MOTION DATE 12/21/06

- v -

EAGLE DISMANTLING CORP, and DIAMOND.,  
STATE INSURANCE COMPANY  
Defendants.

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

This motion is decided in accordance with the accompanying memorandum decision.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/16/07

WALTER B. TOLUB, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X  
STRUCTURE TONE, INC., TRIZECHAHN ONE NY  
PLAZA LLC, and ZURICH-AMERICAN INSURANCE  
COMPANY,

Index No.  
109074/03

Plaintiffs,

-and-

AMERICAN HOME ASSURANCE COMPANY,

Intervening Plaintiff,

-against-

Motion Sequence No.  
004

EAGLE DISMANTLING CORP. and DIAMOND  
STATE INSURANCE COMPANY,

Defendants.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1418).

-----X  
WALTER B. TOLUB, J.:

This action has its genesis in a December 1, 2001 fire and explosion at One New York Plaza, New York, New York ("the building") which resulted in injuries to firefighters and civilians on the scene. At least five lawsuits were brought as a result of this fire.

Plaintiffs seek a declaration that Structure Tone, Inc. ("Structure Tone") and TrizecHahn One NY Plaza LLC ("TrizecHahn") are entitled to defense and indemnification from defendant Eagle

Dismantling Corp. ("Eagle") and from defendant Diamond State Insurance Company ("Diamond State"), as Eagle's primary liability as well as umbrella liability insurer. Additionally and alternatively, Structure Tone and TrizecHahn seek the recovery of monetary damages from Eagle and Diamond State for the defendants' breach of contract in failing to provide defense and indemnification in the underlying actions.

Defendants presently seek an order declaring that (1) Diamond State's umbrella liability policy does not provide coverage to either Structure Tone or TrizecHahn until the limits of the Zurich primary liability policy are exhausted; (2) any coverage for Structure Tone and TrizecHahn under Diamond State's umbrella liability policy is limited to \$3,000,000; and (3) intervening plaintiff American Home Assurance Company ("American Home") is a co-insurer under its umbrella liability policy with Diamond State on its umbrella for any finding of liability against Structure Tone and TrizecHahn in the underlying actions.

Plaintiffs cross-move for summary judgment ordering Diamond State to defend,<sup>1</sup> indemnify, and pay costs and interest to Structure Tone and TrizecHahn in the underlying actions: (1) without contribution from Zurich, and (2) up to a limit of \$1,000,000 under the Diamond State primary policy and an

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<sup>1</sup>After this court's April 4, 2006 Decision and Order, Diamond State has agreed defend both Structure Tone and TrizecHahn in the underlying actions.

additional \$9,000,000 under the Diamond State excess policy.

### **Background**

On December 1, 2001, Eagle had been engaged to demolish and remove a chiller unit in a portion of the building owned by TrizecHahn. According to plaintiffs, on the date in question, Eagle employees were using oxy-acetylene torches to cut the titanium condenser tubes inside the chiller unit when a fire broke out. The plaintiffs allege that, shortly after the fire department responded, an explosion occurred which injured members of the fire department and the general public.

Within four days of the accident, plaintiffs assert that both Structure Tone and TrizecHahn tendered to Eagle and Diamond State claims for defense and indemnification in any potential legal actions arising from the December 1, 2001 incident. Despite numerous communications between the parties, plaintiffs claim that by May, 2003, there was no definitive response to the tender of claims, necessitating the commencement of this action.<sup>2</sup>

By decision dated April 4, 2006, this court determined that both Structure Tone and TrizecHahn were entitled to coverage as additional insureds under defendant Diamond State's primary and

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<sup>2</sup>According to plaintiffs, after commencement of this action, Diamond State sent an October 22, 2003 letter to plaintiffs, offering to provide indemnification to Structure Tone and TrizecHahn, but plaintiffs maintain that such offer was subject to unacceptable conditions and limitations, and was thus rejected.

excess insurance policies. This determination was based upon a written March 2001 communication between Structure Tone and Eagle which required that insurance be provided to Structure Tone and the "Owner/Client" of the location involved, as well as a written communication between TrizecHahn and Eagle.

Further determinations as other issues contained in the motion and cross motions were held in abeyance until the intervening plaintiff, American Home, was joined. This has now been done, and the motion and cross motion are decided herein.

#### **Discussion**

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). "[I]t must clearly appear that no material and triable issue of fact is presented" (Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Eagle had regularly been engaged as a sub-contractor by Structure Tone and had entered into a December 22, 1997 Blanket Insurance/Indemnity Agreement ("the Agreement") controlling all such work (see Notice of Motion, Exh. G). Section 3 of the

Agreement required "a certificate of insurance attaching both endorsement and declaration pages of the policy showing Structure Tone, Inc. as named insured and indicating that the following limits are in full force during the term of the [A]greement." With respect to comprehensive general liability, the limits are set forth in subsection 3.2 of the Agreement, which requires, "a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least \$4,000,000 per occurrence and aggregate per job. The limit may be provided through a combination of primary and umbrella/excess policies" (Id.).

The Agreement was then incorporated into a November 15, 2001 Purchase Order (the "Purchase Order"), which was drawn up to cover the removal of the chiller unit from the building (see Notice of Motion, Exh. F). The Purchase Order then revisits the liability insurance requirements of the Agreement, which demand liability insurance "in amounts of not less than \$4,000,000" (see Purchase Order, Paragraph 11.3).

#### **Insurance Policies**

There are four insurance policies that are at the heart of the this action. In two of the policies, a primary liability policy and an umbrella liability policy issued by Diamond State, Eagle is a named insured. In the other two, also a primary liability policy and an umbrella liability policy, issued by Zurich and American Home respectively, Structure Tone is the

named insured.

Eagle's Liability Policies

*Primary Liability Policy*

Eagle's primary liability policy (# L7134853), as issued by Diamond State, had a policy term of January 31, 2001 through January 31, 2002, a per occurrence limit of \$1,000,000, and a general aggregate of \$2,000,000. That policy contained subsection 4 of the Commercial General Liability Coverage Form (ISO Form CG 00 01 01 96), Section IV-Commercial General Liability Conditions, which is entitled "Other Insurance." Under that subsection, when there is "other valid and collectable insurance" available, "if this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below."

The subsection 4 b contains a listing of the only circumstances when the insurance coverage would be excess, including coverage: "(1) [t]hat is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for 'your work'; (2) [t]hat is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner; or (3) [i]f the loss arises out of the maintenance or use of aircraft, 'autos' or watercraft to the extent not subject to Exclusion g. of Coverage A (Section I)."

Subsection c. of the Other Insurance subsection states that,

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurers share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

#### *Umbrella Liability Policy*

Diamond State additionally issued an umbrella liability policy (#CU59515) to Eagle; that policy had the same term as the primary one issued by the insurer, and listed the primary liability insurance policy described above as underlying coverage. That umbrella policy had a per occurrence and aggregate limit of \$9,000,000, and contained several endorsements, including two entitled "Contractors Limitation Endorsement" and "Following Form Clause."<sup>3</sup>

Included under "Section III-Who is an Insured" of the Commercial Umbrella Liability Policy provisions (CU1), is the provision granting coverage to "[a]ny person or organization qualifying as an insured under any policy of 'underlying

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<sup>3</sup>Under both of these endorsements, coverage under the policy is subject to "valid and collectible 'underlying insurance.'" "Underlying insurance" is defined in the policy as "the coverage afforded under insurance policies designated in ... the Declarations and any renewals or replacements of those policies" (see Eagle's Umbrella Liability Policy, Section VI, ¶ 25).

insurance.'" However, the "Who is an Insured" provision contains a limitation as follows: "[t]his policy does not afford such person or organization limits of insurance in excess of the lesser of: (1) [t]he minimum limit of insurance you agreed to provide; or (2) [t]he limit of insurance under this policy."

Finally, the umbrella liability policy contains Section V-Conditions, provision 10, entitled "Other Insurance." Under that provision,

If other insurance and collectible insurance is available to the insured for "ultimate net loss"<sup>4</sup> we cover under this policy, our obligations under this policy are limited as follows:

a. As this is excess over any other insurance, whether primary, excess, contingent or on any other basis, except such insurance as is specifically purchased to apply in excess of this policy's Limit of Insurance, we will pay only our share of the amount of "ultimate net loss," if any, that exceeds the sum of:

- (1) [t]he total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) [t]he total of all deductible and self-insured amounts under this or any other insurance.

#### Structure Tone's Liability Policies

##### *Primary Liability Policy*

Zurich issued a general liability policy to Structure Tone (#GLO 3499856-00), effective October 31, 2001. The policy term

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<sup>4</sup> "Ultimate net loss" is defined under the policy as "the total amount of damages for which the insured is legally liable in payment of 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising liability.'" (*Id.* at 24).

was for one year, and contained a \$1,000,000 per occurrence and \$2,000,000 aggregate limit (with a \$250,000 per occurrence deductible). The policy also contained an ISO form entitled Commercial General Liability Coverage Form (CG 01 01 07 98), however, as the differing form number suggests, its provisions are different. That coverage form contains an "Other Insurance" subsection with a substantial addition to that which is contained in the Diamond State primary policy issued to Eagle.

The form states:

[i]f other valid and collectible insurance is available to the insured for a loss that we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance. This insurance is primary except when b. below applies.

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b. Excess Insurance. This insurance is excess over ... (2) [a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

#### *Umbrella Liability Policy*

Structure Tone also had an umbrella liability insurance policy (#BE 8714389), issued by American Home, with the same effective date and term as the primary liability policy with Zurich. That policy had a \$50,000,000 limit, both per occurrence and in the general aggregate. Section J of the "VI. Conditions" portion of the American Home policy contains the following language: "J. Other Insurance[.] If other valid and collectible

insurance applies to a loss that is also covered by this policy, this policy will apply excess of the other insurance. However, this provision will not apply if the other insurance is specifically written to be excess of this policy."

**Limit Available Under the Diamond State Umbrella Policy**

Diamond State asserts that any indemnification owed to Structure Tone and TrizecHahn under the Diamond State umbrella liability policy is limited to \$3,000,000. It makes this contention based upon its admission that the parties have agreed that the \$1,000,000 per occurrence limit available in the Diamond State primary policy would provide coverage to Structure Tone and TrizecHahn, and then asserts that by the language of the Agreement, the Purchase Order, and the "Who Is Insured" provision of the umbrella policy itself, the total available insurance should be \$4,000,000. Hence, it maintains that only \$3,000,000 of the \$9,000,000 total umbrella liability policy limit should be available to Structure Tone and TrizecHahn.

A careful review of the documents themselves, however, reveals otherwise. The Agreement requires comprehensive general liability limits of "a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least \$4,000,000 per occurrence and aggregate per job" (see Agreement, subsection 3.2, above). The Purchase Order, which incorporates the terms of the Agreement, additionally contains a provision that requires

comprehensive general liability "in amounts of not less than \$4,000,000" (See Purchase Order, paragraph 11.3, above). The umbrella liability policy itself states that the maximum to be paid an insured is "the lesser of: (1) [t]he minimum limit of insurance you agreed to provide; or (2) [t]he limit of insurance under this policy."

Both the Agreement and the Purchase Order require at least \$4,000,000 of coverage. The policy itself allows for payment up to the minimum an insured "agreed to provide." Further, it is unclear as to what Eagle limits intended to provide to Structure Tone or TrizecHahn. The only proffered indications of Eagle's intent are the Certificates of Insurance that Eagle requested to be sent by its broker to both of those entities, and on each of the two Certificates of Insurance (issued March 14, 2001 and November 16, 2001, respectively), the limits listed for excess coverage were \$9,000,000 (See Notice of Motion, Exhs. J, K). While this in itself is not conclusive evidence of Eagle's intentions, defendants have not proffered any evidence to indicate another intention.

"While unambiguous provisions of a policy are given their plain and ordinary meaning, where there is ambiguity as to the existence of coverage, doubt must be resolved in favor of the insured and against the insurer" (Tomco Painting & Contracting, Inc. v Transcontinental Ins. Co., 21 AD3d 950, 951 [2d Dept

2005])). Here there is ambiguity as to what Eagle's intentions were within the meaning of the umbrella liability policy, and as such, that ambiguity is resolved in favor of the full availability of the \$9,000,000 limit of the Diamond State umbrella liability policy.

#### **Priority of Coverage**

Defendants contend that the coverage afforded under Zurich's primary liability policy, as issued to Structure Tone, must be exhausted prior to reaching Diamond State's umbrella liability policy, and that American Home is a co-insurer with Diamond State on excess coverages.

This court has already determined that Structure Tone and TrizecHahn are additional insureds under the Diamond State policies, enjoying all the rights of a named insured under those policies (see Pecker Iron Works of New York, Inc. v Traveler's Ins. Co., 99 NY2d 391 [2003]), and it now must determine when each of the policies at issue herein is triggered.

"The anomaly involved in establishing a pecking order among multiple insurers covering the same risk arises from the fact that although the insurers contract not with each other but separately with one or more persons insured, each attempts by specific limitation upon the rights of its insured to distance itself further from the obligation to pay than have the others" (State Farm Fire and Cas. Co. v LiMauro, 65 NY2d 369, 372

[1985]).

This court holds that the Diamond State primary policy is the first to be triggered in response to any underlying actions. This is based upon a close examination of the "Other Insurance" clauses contained in both the Diamond State and Zurich primary policies. "In determining a dispute over insurance coverage, we first look to the language of the policy. We construe the policy in a way that 'affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect'" (Consolidated Edison Co. of New York, Inc. v Allstate Ins. Co., 98 NY2d 208, 221-222 [2002] (quoting Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 493 [1989]; see also Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa., 5 NY3d 157 [2005])).

Under the Diamond State primary policy, none of the three exceptions to providing primary coverage, as found in the "Other Insurance" provision subsection b., are applicable to the action at hand. The Zurich primary policy "Other Insurance" provision, however, contains additional exceptions as to when liability coverage under that policy will be excess instead of primary. One such instance is applicable herein, i.e., where "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

As there is no question that the "Additional Insured-Owners, Lessees or Contractors" endorsement (SL-46) was added to the Diamond State primary policy, and that both Structure Tone and TrizecHahn are additional insureds under the policy pursuant to that endorsement, paragraph b. of the "Other Insurance" provision is triggered.

Therefore, based upon the terms of the "Other Insurance" provisions in the Diamond State and Zurich primary policies, the Diamond State policy is hereby considered primary and the Zurich policy offers excess coverage to both Structure Tone and TrizecHahn (See Harleysville Ins. Co. v Travelers Ins. Co., 38 AD3d 1364 [4th Dept 2007]; see also Serio v U.S. Fire Ins. Co., 41 AD3d 459 [2d Dept 2007]).

It is after the limits of the Diamond State primary policy are exhausted that Zurich's primary coverage will be triggered (prior to that of Diamond State's umbrella policy). A plain reading of the policy terms, as well as the premiums paid for coverage and intentions of the terms of insurance, requires such an outcome (see State Farm Fire and Cas. Co. v LiMauro, 65 NY2d 369, supra). "Because the Zurich policy was purchased for primary coverage, despite its 'other insurance' clause whereby it would provide only excess coverage under certain conditions, and the Diamond State policy was purchased only for excess coverage, the Diamond State policy is 'last on the risk'" (Cheektowaga Cent.

School Dist. v Burlington Ins. Co., 32 AD3d 1265, 1268 [4th Dept 2006] (where by coincidence the insurance companies involved are the same as those in the action herein)).

Finally, with respect to the priority of coverage between the Diamond State and the American Home umbrella policies, both policies state that they are excess over any other insurance.<sup>5</sup>

[A]n insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility[,] must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies.

(State Farm Fire and Cas. Co. v LiMauro, 65 NY2d at 375-376).

There is no question that the Diamond State umbrella policy contemplates contribution with another policy (see Diamond State Umbrella Policy, Section V-Conditions, provision 10), and although the American Home policy does not do so, it does not by its language negate such possibility (see American Home Umbrella Policy, VI. Conditions, subsection J).

"Where such terms in two or more policies conflict--as two policies that purport to be excess over each other--insurers must contribute in the proportion their policies bear to the limit of coverage at that level" (Jefferson Ins. Co. of New York v Travelers Indem. Co., 92 NY2d 363, 372 [1998]; see also

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<sup>5</sup>The exception to this is when policies are specifically purchased to apply in excess of the particular umbrella policy. However, this exception is not at issue in the action herein.

Nationwide Mut. Ins. Co. v Travelers Ins. Co., 8 AD3d 861 [3rd Dept 2004]).

Therefore, this court holds that each of the Diamond State and American Home policies must contribute in proportion to the total limit of liability available at the umbrella liability level.

#### **Order**

Accordingly, it is hereby

ADJUDGED and DECLARED that the full \$9,000,000 limit of liability in Diamond State Insurance Company umbrella liability policy # CU59515 is available to Structure Tone, Inc. and TrizecHahn One NY Plaza, LLC for indemnification in the underlying action; and it is further

ADJUDGED and DECLARED that Diamond State Insurance Company policy # L7134853 is the first policy triggered in response to adjudged liability on the part of Structure Tone, Inc. and TrizecHahn One NY Plaza, LLC in the underlying action; and it is further

ADJUDGED and DECLARED that when the limits of Diamond State Insurance Company policy # L7134853 are exhausted, Zurich-American Insurance Group policy # GLO 3499856-00 will respond to further adjudged liability on the part of Structure Tone, Inc. and TrizecHahn One NY Plaza, LLC in the underlying action up to, and including, the exhaustion of its policy limits; and it is


further

ADJUDGED and DECLARED that upon the exhaustion of the limits of Diamond State Insurance Company policy # L7134853 and Zurich-American Insurance Group policy # GLO 3499856-00, Diamond State Insurance Company policy # CU59515 and American Home Assurance Company policy # BE 8714389 will contribute in proportion to the total limit of liability available between the two policies, until any such policy limits are exhausted; and it is further

ADJUDGED and DECLARED that upon the exhaustion of the limits of either of the Diamond State Insurance Company policy # CU59515 or American Home Assurance Company policy # BE 8714389, the other policy will respond in full.

Dated: 10/16/07

ENTER:

  
 \_\_\_\_\_  
 HON. WALTER B. TOLUB, J.S.C.

**UNFILED JUDGMENT**  
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