

**Structure Tone, Inc. v Atlas-Acon Electric Services Corp.**

2008 NY Slip Op 31771(U)

June 20, 2008

Supreme Court, New York County

Docket Number: 0112012/2006

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

Justice

PART 7

Structure Tone

INDEX NO.

112012/06

MOTION DATE

1/23/08

MOTION SEQ. NO.

01

MOTION CAL. NO.

138

Atlas - Acorn

The following papers, numbered 1 to 9 were read on this motion to/for Summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-J

1-2

Answering Affidavits — Exhibits A-I; Exhibits A-C

3-5

Replying Affidavits

6-8

Cross-Movant's Reply

9

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are denied  
in accordance with the attached Memorandum Decision and  
Order.

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

**FILED**  
JUN 25 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

**MICHAEL D. STALLMAN**  
J.S.C.

Dated: 6/20/08

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----X  
STRUCTURE TONE, INC.,

Index No. 112012/06

Plaintiff,

DECISION AND ORDER

- against -

ATLAS-ACON ELECTRIC SERVICES CORP.,  
UTICA NATIONAL ASSURANCE COMPANY,  
and FIREMEN'S FUND INSURANCE COMPANY,

Defendants.

-----X  
HON. MICHAEL D. STALLMAN, J.:

Plaintiff Structure Tone, Inc. moves for summary judgment against defendants, in an action for a declaratory judgment as to insurance coverage. Defendant Utica National Assurance Company cross-moves for summary judgment dismissing the action as to it.

**Background**

Structure Tone was the general contractor on a construction project in which defendant Atlas-Acon Electric Services Corp. (Atlas) was a subcontractor. Under paragraph 11.1 of Structure Tone's Purchase Order with Atlas (Notice of Motion, Ex. E), Atlas was obligated to indemnify Structure Tone in accordance with the terms of the parties' Blanket Insurance/Indemnity Agreement. *Id.*, Ex. F. Paragraph 11.2 required Atlas to indemnify Structure Tone "to the fullest extent permitted by law." Under paragraph 11.3 of the Purchase Order, Atlas was to provide Comprehensive General Liability Insurance naming Structure Tone as an additional insured. The same requirement was made in paragraph 3.2 of the Blanket

Insurance/Indemnity Agreement.

Utica issued a Commercial General Liability policy of insurance to Atlas, citing Atlas as the named insured. Notice of Cross Motion, Ex. G. The General Liability Extension Endorsement to the policy provides that "any person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by the Commercial General Liability Coverage form will be an additional insured ... ." *Id.*, Ex. H, ¶ 11(a)(1). This coverage was to be limited, however, "to the extent that such additional insured is held liable for your [Atlas's] acts or omissions arising out of and in the course of ongoing operations performed by [Atlas] or [Atlas's] subcontractors for such additional insured; ... ."

A Certificate of Insurance was provided to Structure Tone identifying it as an additional insured and certificate holder under the Utica policy. *Id.*, Ex. G. The Certificate of Insurance remonstrates that "[t]his certificate is issued as a matter of information only and confers no rights upon the certificate holder." *Id.*

On June 4, 2005, non-party Frank Callan (Callan), an employee of Atlas, fell off a ladder at the site, injuring himself. Callan does not attribute the accident to anything wrong with the ladder, but, instead, testified at his deposition that he fell when he became "woozy" and nauseous as he stood on the ladder, due to the

fact that, as it was a Saturday, the building was not air conditioned, and was extremely hot. Deposition of Callan, Notice of Cross Motion, Ex C, at 38. According to Structure Tone's project manager, the air conditioning was never on in the building on Saturdays, because it would have cost Structure Tone \$10,000 per day to have the air conditioning turned on. The implication of this testimony is that Structure Tone, by failing to provide air conditioning, might be found negligent and held liable for Callan's injuries, at least in part.

In a decision of the Appellate Division, First Department, dated June 12, 2008, the Court modified a decision of this Court dated May 21, 2007. See *Callan v Structure Tone*, \_\_\_AD3d\_\_\_, 2008 NY Slip Op 05382. The Appellate Division found that Structure Tone was strictly liable to Callan under Labor Law § 240 (1), but that there was a question of fact as to Structure Tone's liability, if any, under Labor Law § 200 and common-law negligence.<sup>1</sup>

Apparently, neither Atlas nor Structure Tone notified Utica of the accident at the time it occurred. However, Structure Tone notified both Atlas and Utica, in a letter dated July 18, 2005

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<sup>1</sup> In the May 21, 2007 decision, this Court found that there was also a question of fact as to whether Atlas's negligence in failing to provide fans at the jobsite made it liable for Callan's injuries. This finding belies Atlas's claim that it has already been established in the prior decision that "there is no evidence of any liability on the part of ATLAS-ACON in the underlying action" Affidavit of Frederick C. Aranki, at unnumbered page 11.

(Notice of Motion, Ex. H), that Callan had commenced an action against Structure Tone (the Callan action). Structure Tone demanded a defense and indemnification both as an indemnitee of Atlas, and as an additional insured under the Utica policy.

Apparently, Structure Tone brought a third-party action against Atlas in the Callan action, on grounds of negligence and indemnification. Atlas apparently tendered the defense and indemnification of the third-party action to Utica sometime thereafter.

Utica responded in a letter directed to Atlas dated April 12, 2006, which was also sent to the attention of Structure Tone's attorneys. *Id.*, Ex. I. In the letter, Utica offered Utica a defense, but declined to indemnify it, based on the fact that Atlas was named in the Callan action only as a third-party defendant on theories of indemnification and employer's liability, grounds purportedly not covered under the Utica policy. Although Structure Tone provides a copy of this letter as if it were a response to its own tender to Utica of the previous year, it is not clear if such is the case, and there is no letter among the motion papers purporting to be a letter from Utica to Structure Tone specifically declining to defend or indemnify Structure Tone in the Callan action on any ground. Nevertheless, it is the April 12, 2006 letter to Atlas which Structure Tone identifies as Utica's denial to Structure Tone's tender in the Callan action.

In the present motion, Structure Tone argues that Utica's denial of its claim is untimely, and therefore, without effect as a matter of law, requiring Utica to indemnify Structure Tone. Structure Tone also seeks alternative relief, in the event that this Court does not agree with its untimeliness of denial argument; Structure Tone seeks a declaration that Atlas breached its agreement to provide insurance coverage for Structure Tone as an additional insured. Utica maintains, that it was not obligated to notify Structure Tone of its decision to decline to indemnify it, because the claims against Structure Tone do not fall within the parameters of the General Liability Extension Endorsement.

#### **Discussion**

“‘[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’” *Ayotte v Gervasio*, 81 NY2d 1062, 1062 (1993), quoting *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); see also *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. See *Alvarez v Prospect Hospital*, 68 NY2d 320, *supra*; *Kesselman*, 29 AD3d 302, *supra*.

Insurance Law § 3420 (d) requires that:

[i]f under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

"A failure by the insurer to give such notice as soon as is reasonably possible after it first learns of the accident or grounds for disclaimer of liability or denial of coverage, precludes effective disclaimer or denial." *Hartford Insurance Company v Nassau County*, 46 NY2d 1028, 1029 (1979). This rule applies even if the insured's notice of the incident to the insurer is itself untimely. *First Financial Insurance Company v Jetco Contracting Corp.*, 1 NY3d 64 (2003).

This rule does not apply, however, and a timely disclaimer under section 3402 (d) is not required, "when a claim falls outside the scope of the policy's coverage portion." *Matter of Worcester Insurance Company v Bettenhauser*, 95 NY2d 185, 188 (2000). In such cases, "the insurance policy does not contemplate coverage in the first instance, and requiring payment of a claim upon a failure to timely disclaim would create coverage where it never existed." *Id.*; see also *Zappone v Home Insurance Company*, 55 NY2d 131 (1982).

In the present case, the language purporting to make Structure Tone an additional insured is limited to situations where the injury arose out of Atlas's "acts or omissions" arising out of

Atlas's operations. In other words, the policy does not make Structure Tone an additional insured for injuries arising out of its own acts or omissions, even if those acts or omissions occurred in the course of Atlas's operations. This is critical because, in the present matter, there is a factual issue as to whether Callan's injuries occurred as a result of Structure Tone's negligence. If Structure Tone, not Atlas, is found liable to Callan in negligence, Structure Tone will not be an additional insured under the General Liability Extension Endorsement, and the late notice of disclaimer will be irrelevant, as it may not be a basis to create coverage where none exists. See *Matter of Worcester Insurance Company v Bettenhauser*, 95 NY2d 185, *supra*.

The case of *Crespo v City of New York* (303 AD2d 166 [1<sup>st</sup> Dept 2003]) is instructive. In *Crespo*, as in the present case, the additional insured endorsement in a policy obtained by a subcontractor at a construction site, which purported to make the construction manager an additional insured, did so only to the extent that the construction manager was held liable for the acts or omissions of the subcontractor. The Appellate Division, First Department held that:

[i]nasmuch as it has not been determined whether plaintiff's harm was caused by negligence of [the subcontractor], and it remains possible that the trier of fact will find that plaintiff's harm was caused by negligence by [the construction manager], it cannot now be determined whether [the construction manager's] claim falls within the subject additional insured endorsement.

*Id.* at 167. Under those circumstances, the construction manager could not claim a right to indemnification on the basis of untimely notice from the insurer until the issue of negligence was resolved. Summary judgment was denied. See also *National Union Fire Insurance Company of Pittsburgh, PA v Utica First Insurance Company*, 6 AD3d 681, 682 (2d Dept 2004) (“[w]here a clause limits the circumstances in which a party is an additional insured under an insurance policy and the underlying claim falls outside the limited coverage provided, disclaimer pursuant to Insurance Law § 3420 [d] is not required”).

In the present case, it is not yet determined whether Callan’s accident was caused by Atlas’s or Structure Tone’s negligence. If it is found that Atlas was not the cause of Callan’s injuries, there will be no coverage under the Utica policy. Therefore, under *Crespo*, whether Utica’s late notice is sufficient to deny indemnification to Structure Tone depends on a factual determination of negligence.

Structure Tone does not prevail in this action based on the Certificate of Insurance. It is settled that coverage is not created by the existence of a certificate of insurance “issued as a matter of information only.” *Rodless Properties, L.P. v Westchester Fire Insurance Company*, 40 AD3d 253, 254 (1<sup>st</sup> Dept 2007); see also *Cendant Car Rental Group v Liberty Mutual Insurance Company*, 48 AD3d 397 (2d Dept 2008). Therefore, Structure Tone’s

possession of the certificate of insurance does not afford it coverage as an additional insured.

Utica argues, in opposition to Structure Tone's motion, that summary judgment may not be granted because there is other insurance which might have been triggered.<sup>2</sup> If so, Utica contends that there must be a review of the other policy in order to determine priority of coverage. However, the issue of the potential existence of another competing insurance policy, and priority of coverage, has no bearing on the question of whether Utica is obligated to indemnify Structure Tone; rather, it is a matter between the insurers which is not raised in this action.

Structure Tone maintains that, in the event that it is determined that it is not an additional insured under the Utica policy, it is entitled to summary judgment against Atlas, alleging that Atlas breached its contract by failing to make Structure Tone an additional insured under the Utica policy. However, it cannot be determined on these motion papers whether Atlas breached the contract, because it appears that Structure Tone is only an additional insured in some circumstances, and not others. This is a matter of contract interpretation, and the intent of the parties in making the agreement.

Structure Tone also seeks to hold Utica to the provisions of the Purchase Order and Blanket Insurance/Indemnity Agreement. See

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<sup>2</sup> Apparently, Structure Tone is insured by AIG.

Reply Affirmation of William D. Joyce, III, at unnumbered page 2. In the context of determining the rights of insurance companies vis-a-vis "other insurance" clauses, courts have found that "insurance policy provisions take precedence over conflicting provisions found in contracts between insureds [citation omitted]." *Bovis Lend Lease LMB v Great American Insurance Company*, \_\_\_AD3d\_\_\_, 855 NYS2d 459, 464 (1<sup>st</sup> Dept 2008); see also *B.F. Yenny Construction Company, Inc. v One Beacon Insurance Group*, 50 AD3d 1477 (4<sup>th</sup> Dept 2008). Similarly, the additional insurance provisions in insurance policies should not be subordinated to the language in subcontracts calling for additional insured coverage. Utica is not liable under any contract between Structure Tone and Atlas. Its only liability, if any, is based on the policy between it and Atlas.

Because the determination of the present action is dependent on determinations of negligence yet to be made in the Callan action, this action shall be stayed pending the resolution of the Callan action.

Accordingly, it is

ORDERED that the motion brought by plaintiff Structure Tone, Inc. for summary judgment against defendants is denied; and it is further

ORDERED that the cross motion brought by defendant Utica National Assurance Company for summary judgment dismissing the

complaint as to it is denied; and it is further

ORDERED that this action is stayed pending the resolution of the action *Callan v Structure Tone, Inc.*, Index No. 108305/05, pending in this Court.

Dated: June 20, 2008  
New York, New York

ENTER:



J.S.C.

**MICHAEL D. STALLMAN**  
J.S.C.

**FILED**

JUN 25 2008

NEW YORK