

**Structure Tone, Inc. v ADCO Elec. Corp.**

2009 NY Slip Op 30698(U)

March 26, 2009

Supreme Court, New York County

Docket Number: 107692/07

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 107692/2007

STRUCTURE TONE, INC.

VS.

ADCO ELECTRICAL CORP.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

his motion to/for \_\_\_\_\_

PAGES NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

This judgment may be entered by the County Clerk and notice of entry can be obtained in person. To appear in person at the Judgment Clerk's Desk (Room 141B), counsel or authorized representative must

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

Dated: 3/26/09

WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

[\* 2]  
SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----x  
STRUCTURE TONE, INC.,  
Plaintiff,

Index No.: 107692/07

-against-

DECISION

ADCO ELECTRIC CORP., NATIONAL  
CASUALTY COMPANY, NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA,  
SHERLAND & FARRINGTON, INC. and  
MERCHANTS INSURANCE COMPANY OF NEW  
HAMPSHIRE, INC.,

Defendants.

obtain entry, clerk of court, defendant representative must  
appear in person at the Judgment Clerk's Desk (Room  
1419).

-----x  
TOLUB, J.

This is defendant Merchants Mutual Insurance Company i/s/h/a Merchants Insurance Company of New Hampshire, Inc. (Merchants) motion, pursuant to CPLR 3212, to dismiss the complaint and any and all cross-claims against it on the grounds that it has no duty to defend or indemnify plaintiff Structure Tone, Inc. (Structure Tone) as an additional insured under its policy with Sherland & Farrington, Inc. (S&F). Structure Tone cross-moves against Merchants and S&F for summary judgment, pursuant to CPLR 3212, to declare that Merchants and S&F have a duty to defend and indemnify it as an additional insured under Merchants' general liability insurance policy with S&F.

Facts

The instant action arises from an underlying personal injury

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action commenced in Supreme Court, New York County, entitled *Doreen Jones and Gerald Corso v BFP 245 Park Co., LLC, Brookside Properties, Inc., Structure Tone, Inc., Adco Electrical Corp., and Sherland & Farrington, Inc.*, Index No.: 106070/05. In this underlying action, the plaintiff claims she was injured when she tripped and fell at her place of employment on January 23, 2004 on an electrical box which was placed under the carpet.

Structure Tone was hired as a general contractor for certain work at the premises. As the general contractor, Structure Tone hired subcontractors to perform the work, which included electrical and carpeting installations. According to all of the evidence submitted, this work was completed in 2001, three years before the accident in question.

Structure Tone commenced a third-party action against S&F and Adco Electrical Corp. (Adco), the two subcontractors, for contribution and indemnification. Structure Tone alleges that both subcontractors were obligated to purchase insurance for the protection of Structure Tone.

Structure Tone did not have a formal subcontract with either S&F or Adco. Structure Tone purportedly engaged the subcontractors services by means of a purchase order. In response to a bill of particulars, Structure Tone annexed a "Cost Distribution Detail," with a separate page entitled "Terms and Conditions," by which S&F allegedly agreed to acquire the

insurance to protect Structure Tone.

Merchants argues that the Cost Distribution Detail does not reference the Terms and Conditions, and that neither document is signed by S&F. Conversely, Structure Tone states that the Terms and Conditions is, in the original, on the reverse side of the Cost Distribution Detail.

Additionally, annexed to the bill of particulars is a "Blanket Insurance Indemnity Agreement" dated September 29, 2003. The signature on this document by S&F's representative is followed by a typed date of October 3, 2005, two years after the accident in question. However, this document also bears a stamp indicating that it was received by Structure Tone on October 3, 2003, more than three months prior to the accident in question. Structure Tone maintains that the typed date was written in error.

Merchants issued a general liability insurance policy to S&F with effective dates of coverage from July 29, 2003 through July 29, 2004. According to this policy, an insured person is "the person or organization shown in the Schedule, but only with respect to liability arising out of your ongoing operations performed for that insured." (Merchants' Exhibit A). The policy further states that "[t]his insurance does not apply unless the contract, agreement or permit is made prior to the 'bodily injury' or 'property damage.'" The copy of the policy provided by

[\* 5]  
Merchants does not include an endorsement naming Structure Tone as an additional insured.

In its opposition papers, Structure Tone includes a copy of the same policy between Merchants and S&F, but this copy includes an endorsement in which Structure Tone is named as an additional insured. (Structure Tone Exhibit 10). Structure Tone states that it obtained this copy of the policy from S&F as part of the discovery process in the underlying personal injury action. According to this copy of the policy, Structure Tone was added as an additional insured effective January 7, 2004.

#### Discussion

"The 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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of Merchants' motion seeking a declaration that Structure Tone is not an additional insured under its policy with S&F is denied. Structure Tone's cross motion that Merchants and S&F have a duty to defend and indemnify it in the underlying personal injury action is also denied. Too many questions of fact exist to warrant the granting summary judgment pursuant CPLR §3212.

Not only have two distinctly different copies of the purported policy been produced, but some of the documents claimed to be the written agreements between Structure Tone and S&F are unsigned, and, those that are signed, bear different dates. Since one of the dates was before the accident, and one after, the dates raise a material issue of fact.

The fact that some of the agreements were not signed is not determinative of their legality and enforceability. It has long been held "that a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute—such as the statute of frauds." *Flores v The Lower East Side Service Center, Inc.*, 4 NY3d 363, 368 (2005).

"[A] written agreement may be found to be enforceable if the course of conduct between [the parties], including their writings ... was sufficient to spell out a binding contract notwithstanding the failure of the parties to sign [an] integrated agreement [internal quotation marks and citations

omitted].” *Staub v William H. Lane, Inc.*, 58 AD3d 933, 934 (3d Dept 2009). The problem with the instant motion lies in the fact that neither side has been able to demonstrate conclusively that the indemnification provision was or was not integrated into the purchase order (*Mentesana v Bernard Janovitz Construction Corp.*, 36 AD3d 769 [2d Dept 2007]), or that the parties’ conduct has created the terms of the requisite agreement.

However, regardless of whether Structure Tone was included as a named insured in the policy between Merchants and S&F, or whether or not a written indemnification agreement existed between Structure Tone and S&F prior to the date of the accident the terms of the policy itself exclude the defense and indemnification coverage from Merchants that Structure Tone is seeking.

The policy explicitly states that it only provides coverage for liability arising out of S&F’s “ongoing operations.” In the instant matter, there is no dispute that S&F completed its work at the site in 2001, and that the accident occurred in 2004. No evidence has been presented to indicate that S&F was performing ongoing services at the site after 2001, and it is noted that Structure Tone fails to address this point in any of its papers.

At the time of the accident S&F was not installing, maintaining or testing the carpet it installed in 2001, consequently it had long ceased performing ongoing operations for

[\* 8]

Structure Tone. See generally *Perez v New York City Housing Authority*, 302 AD2d 222 (1<sup>st</sup> Dept 2003). Therefore, by the terms of the insurance policy, Merchants is not obligated to indemnify or defend S&F or any of S&F's additional insureds.

Conclusion

Accordingly, it is

ORDERED that defendant Merchants Mutual Insurance Company i/s/h/a Merchants Insurance Company of New Hampshire, Inc.'s motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that Structure Tone, Inc. is not entitled to additional insurance coverage under the policy of insurance issued by Merchants Mutual Insurance Company i/s/h/a Merchants Insurance Company of New Hampshire, Inc. to Sherland & Farrington, Inc.; and it is further

ADJUDGED and DECLARED that Merchants Mutual Insurance Company i/s/h/a Merchants Insurance Company of New Hampshire, Inc. has no duty to defend or indemnify Structure Tone, Inc. in the underlying personal liability action entitled *Doreen Jones and Gerald Corso v BFP 245 Park Co., LLC, Brookside Properties, Inc., Structure Tone, Inc., Adco Electrical Corp., and Sherland & Farrington, Inc.*, Index No.: 106070/05; and it is further

ORDERED that Structure Tone, Inc.'s cross motion for summary judgment is denied; and it is further

ORDERED that the complaint is hereby severed and dismissed as against Merchants Mutual Insurance Company i/s/h/a Merchants Insurance Company of New Hampshire, Inc.; and it is further

ORDERED that the remainder of this action shall continue.

Counsel for the parties are directed to appear for a preliminary conference on May 8, 2009 at 11:00AM in room 335 at 60 Centre Street.

Dated: 3 | 24 / 09

ENTER:



\_\_\_\_\_  
Walter B. Tolub, J.S.C.

**UNFILED JUDGEMENT**  
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).