

Structure Tone, Inc. v Universal Servs. Group, Ltd.

2010 NY Slip Op 31446(U)

June 9, 2010

Supreme Court, New York County

Docket Number: 602105/06

Judge: Carol Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 602105/2006

STRUCTURE TONE

INDEX NO. _____

vs
UNIVERSAL SERVICES GROUP

MOTION DATE 5/12/10

Sequence Number : 004

MOTION SEQ. NO. _____

PARTIAL SUMMARY JUDGMENT

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

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

Motion sequence 004 is decided in accordance with the accompanying Memorandum Decision. It is hereby


ORDERED that defendant USG's motion for summary judgment dismissing the complaint, as to it, is granted and the first and second causes of action of the complaint are severed and dismissed with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant USG's motion to amend its answer to add a counterclaim is denied; and it is further

ORDERED that counsel for USG shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: 6/9/10



J.S.C.

HON. CAROL EDMEAD

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):

PAPERS NUMBERED
FILED
JUN 11 2010
NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
STRUCTURE TONE, INC. and WHOLE FOODS
MARKET GROUP, INC.,

Plaintiffs,

-against-

Index No. 602105/06

UNIVERSAL SERVICES GROUP, LTD. and
ILLINOIS UNION INS. CO.,

Defendants.

FILED
JUN 11 2010
NEW YORK COUNTY CLERK'S OFFICE

CAROL EDMEAD, J.S.C.:

This action, like the underlying case, *Structure Tone, Inc. v Universal Services Group, Ltd.*, NY County Index No. 106810/06 (the Related Action), arises out of the construction of the Whole Foods Market (Market) in the AOL/Time Warner building at Columbus Circle. Plaintiff Structure Tone, Inc. (Structure Tone) was the general contractor. Defendant Universal Services Group, Ltd. (USG) was the waterproofing subcontractor. After construction was completed and the Market had opened, a number of leaks occurred, causing damage to areas below the Market. USG now moves: (1) pursuant to CPLR 3025 (b), for leave to amend its answer to include a counterclaim; (2) pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint; and (3) pursuant to CPLR 3212 (e), for partial summary judgment on the proposed counterclaim, which alleges that the contract between Structure Tone and Whole Foods required Whole Foods to procure an all-risk insurance policy listing USG as an additional insured, that Whole Foods failed to do so, and that, consequently, Whole Foods is liable to USG for the latter's liability, if any, to Structure Tone in the Related Action.

The complaint alleges two causes of action as against USG, to wit, that USG breached its contract with Structure Tone (first cause of action), and an alleged contract with Whole Foods (second cause of action) by failing to provide Whole Foods and Structure Tone with liability and property damage insurance. It is undisputed, however, that USG did provide such insurance. See Del Sordo Affirm. (2/19/10), Exhs. C (Zurich American Ins. Co. general liability policy issued to USG and naming Whole Foods as an additional insured), and D (general liability policy issued to USG by defendant Illinois Union Insurance Company, and including as an additional insured any entity that USG is contractually required to insure). Accordingly, this court grants that branch of USG's motion that seeks dismissal of the claims alleged as against it.

While leave to amend a pleading should, generally, be freely given absent prejudice or surprise arising directly from the delay (CPLR 3025 [b]; *Eighth Ave, Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404 [1st Dept 2009]), amendments that are proposed after a note of issue has been filed and that, like the proposed amendment here, allege new facts, are subject to close scrutiny. *Sheets v Liberty Alliances, LLC*, 37 AD3d 170 (1st Dept 2007). The note of issue in this action was filed more than a year ago, and the only reason that USG gives for its delay in moving for leave is that "[a]lthough the specifications under the contract [between Whole Foods and Structure Tone] were made available to USG at the job site, the exact contract terms of the entire contract were not completely known or understood." Affidavit of Martin McMahon, the

USG project manager at the time of construction, attached to Del Sordo Affirm., as Exh K. Not only is the reason that USG gives for its delay far from compelling, inasmuch as Mr. McMahon does not even suggest that the facts pertinent to USG's proposed counterclaim were not knowable years ago, but more importantly, USG's proposed counterclaim (a copy of which is not included in its papers) is not susceptible of proof. Generally, an all-risk insurance policy, purchased to cover losses that arise in the course of construction, terminates with the conclusion of the construction. See e.g. *Slattery Skanska, Inc. v Bombardier Tr. Corp.*, 67 AD3d 1 (1st Dept 2009); *Rhino Excavating Corp. v Assurance Co. of Am.*, 20 Misc 3d 1107(A), 2008 NY Slip Op 51254 (U), (Sup Ct, Nassau County 2008). The damages that USG would have been insured against in such a contract would not have included any of the damages that Structure Tone seeks from USG in the Related Action, inasmuch as the occurrences that gave rise to those damages all took place after construction had been completed and Whole Foods was in possession of the space. USG can only speculate that, had Whole Foods purchased an all-risk policy naming USG as an additional insured, that policy would have covered occurrences arising out of the construction of the Market, but occurring after the completion of construction.

Accordingly, it is hereby

ORDERED that defendant USG's motion for summary judgment dismissing the complaint, as to it, is granted and the first and second causes of action of the complaint are severed and dismissed


with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant USG's motion to amend its answer to add a counterclaim is denied; and it is further

ORDERED that counsel for USG shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: June 9, 2010

ENTER:


Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
JUN 11 2010
NEW YORK
COUNTY CLERK'S OFFICE