

<b>Structure Tone, Inc. v Berardi Stone Setting</b>
2011 NY Slip Op 31737(U)
June 27, 2011
Sup Ct, NY County
Docket Number: 110144/2009
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Structure Tone, Inc  
- v -  
Berard: Stone Setting

INDEX NO. 110144/08  
MOTION DATE 1/28/11  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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

	PAPERS 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 together with motion 002 in accordance with the General memorandum decision, order & Secretary judgment

**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: 6/27/11

JANE S. SOLOMON s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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 55

-----X  
STRUCTURE TONE, INC. and ST. JOHN'S  
UNIVERSITY,

Index No. 110144/2009

Plaintiffs,

DECISION, ORDER &  
DECLARATORY JUDGMENT

-against-

BERARDI STONE SETTING, QBE INSURANCE  
CORPORATION and ILLINOIS NATIONAL  
INSURANCE COMPANY,

Defendants.  
-----X

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

**JANE S. SOLOMON, J.:**

Plaintiffs Structure Tone, Inc. (Structure Tone) and St. John's University (St. John's) (together, plaintiffs) seek a declaration that defendants QBE Insurance Corp. (QBE) and Illinois National Insurance Co. (Illinois National) owe a duty to defend and indemnify plaintiffs as additional insureds with respect to an underlying personal injury action involving Patrick Gaudio (Gaudio). Plaintiffs also seek a declaration that defendant Berardi Stone Setting, Inc. (Berardi) is contractually obligated to have procured insurance in connection with a project at St. John's. Illinois National moves in motion sequence 001 for summary judgment dismissing the complaint and declaring that it has no obligation to insure plaintiffs; plaintiffs cross-move for summary judgment in their favor. QBE and Berardi jointly move for summary judgment in motion sequence 002. The motions are decided as follows.

St. John's hired Structure Tone as its general

contractor for a construction project on its Queens campus, pursuant to a written contract called a Maximum Guaranteed Price Agreement, or "GMP Agreement" (QBE Motion, Ex. F). The GMP Agreement states in relevant part as follows:

Section 9.3.1 By appropriate written agreement, [Structure Tone] shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to [Structure Tone] by terms of the Contract Documents [between Structure Tone and St. John's], and to assume toward [Structure Tone] all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which [Structure Tone], by these Documents, assumes toward the University. Nothing contained in the Contract Documents shall create any relationship of contract or agency between the University and any Subcontractor, ...

Section 9.3.3 Insurance requirements for Subcontractors are set forth in this Agreement. The Standard Subcontract in Appendix H-1 and the Standard Subcontract for Design-Build in Appendix H-2 attached incorporate the Insurance requirements in this Agreement.

Section 21.3 INSURANCE TO BE PROVIDED BY GMP CONTRACTOR AND SUBCONTRACTORS

Section 21.3.2 The GMP Contractor [Structure Tone] agrees to procure and maintain all insurance provided below . . . Coverage required herein as well as any other coverage that [Structure Tone] may consider necessary is [Structure Tone]'s sole responsibility. ...

[Specific coverage types and minimum limits are set forth in Sections 21.3.2.1 - 21.3.2.4, including provisions for commercial general liability insurance].

Notably, notwithstanding its title, Section 21 has no specific requirement for insurance that must be obtained by subcontractors. Structure Tone procured commercial general

liability insurance through non-party New Hampshire Insurance Company. Appendix H-1 to the GMP Agreement, which is referenced in Section 9.3.3, is a form identical to a page from the purchase order Structure Tone issued to Berardi [see below]. Appendix H-2 is a blank page marked "intentionally omitted".

Structure Tone subcontracted stonework to Berardi. They entered into a purchase order agreement (the Purchase Order) that required Berardi to procure insurance "in the amount of not less than \$4,000,000 combined single limit, naming Structure Tone as additional insured . . ." (Purchase Order, attached to Illinois National Motion, Ex. C, ¶ 11.3). Paragraph 2 of the Purchase Order states that the subcontractor is bound to Structure Tone for the performance of its work in the same manner as Structure Tone is bound to St. John's under its contract with St. John's (*id.*, ¶ 2).

Berardi secured a primary insurance policy with QBE, which has a limit of \$1 million per occurrence (QBE policy, attached to Motion, Ex. K), and an excess insurance policy with Illinois National, which has a limit of \$5 million per occurrence and in the aggregate (Illinois National Policy, attached to Motion, Ex. L). Berardi caused a certificate of insurance to be given to Structure Tone, which states that "St John's and their [sic] subsidiaries are included as Additional Insureds with respect to work being performed by the Named Insured" (Certificate of Insurance, attached to cross motion, Ex. 5).

The QBE and Illinois National policies afford additional insured status to any organization to whom Berardi is obliged by written contract to provide insurance. The Illinois National policy has a limited definition of who is an insured. It states that a person for whom Berardi is obligated to provide insurance is afforded insurance only with respect to liability arising from Berardi's operations; however, the coverage does not apply to any liability that arises solely from the acts or omissions of such person (Illinois National Policy, Section VII [M], Definitions, as amended by Endorsement No. 5). Also, the Illinois National Policy provides excess insurance in the lesser amount of \$5 million or the amount Berardi promised to procure in its written contract for an additional insured (Section IV, E).

The QBE policy has a notification provision requiring an insured to give notice to it of a claim, or a law suit, as soon as practicable. On October 27, 2007, approximately seven weeks after Gaudio's accident, QBE sent a letter to Structure Tone and AIG<sup>1</sup> as notice of a potential claim (Cross Motion, Ex. 8). Notwithstanding this fact, QBE claims that it did not receive timely notice of the underlying lawsuit.

Gaudio was working for Berardi on September 6, 2007. A Berardi co-worker asked him to get water from a large pail that

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<sup>1</sup> AIG refers to American International Group, Inc. The insurance contracts supplied with these motions show that both New Hampshire Insurance Company (Structure Tone's primary insurer) and Illinois National are AIG companies.

was located near a building under construction (see, Gaudioso EBT, Illinois National motion, Ex. G, 72-75). To get to the pail, he walked between the building and a nearby dumpster. A Structure Tone employee was working on the second floor of the building, throwing debris out the window into the dumpster. Gaudioso was struck by a large piece of sheetrock that a Structure Tone employee threw or dropped from a second story window, and he suffered major injuries. He initiated the underlying lawsuit on November 30, 2008.

On December 11, 2008, the attorney for Structure Tone and St. John's sent a demand letter to QBE by certified mail, return receipt requested, and sent a copy to Illinois National (Tender Letter, attached to cross motion, Ex. 9). The letter was addressed to QBE at 40 Wall Street in New York. Someone named Huang Sien Maung signed the return receipt for QBE. According to the affidavit of an assistant vice president with QBE, 40 Wall Street never has been a valid address for QBE, and QBE never employed a Huang Sien Maung (von Hof affidavit, QBE motion, Ex. I).

QBE alleges that it first learned of the *Gaudioso* action on August 25, 2009, when it received the summons and complaint in this action. On September 18, 2009, plaintiffs' attorney faxed a copy of the Tender Letter to QBE's attorney. On September 29, 2009, QBE denied coverage as to both because the Purchase Order "does not contain an additional insured insurance

procurement provision. Therefore, it does not appear that [plaintiffs] are additional insureds" (Denial Letter, attached to Cross Motion, Ex. 10). The letter also separately disclaims against St. John's for late notice (*id.*). QBE did not disclaim against Structure Tone for late notice until it served its October 12, 2009 verified answer (Cross Motion, Ex. 2, ¶¶ 50 and 51).

In 2010, Gaudioso sought summary judgment in the underlying action on his claims under Labor Law § 240(1) and § 241(6); the motion was granted against the plaintiffs herein only with respect to the § 240(1) claim. There was no finding as to liability on the common law negligence and § 241(6) claims. The court's computer system indicates that the lawsuit settled before trial for \$3,500,000.

Although plaintiffs' complaint and cross motion seek reimbursement of legal fees and costs, they have submitted no proof showing that they incurred such costs, or any other out-of-pocket damages, in connection with the *Gaudioso* action. Structure Tone's primary insurer, New Hampshire Insurance Company, defended plaintiffs in the lawsuit.

## DISCUSSION

### A. The QBE Policy

QBE's denial of coverage for Structure Tone on the ground that it was not named in the Purchase Order as a person to

be included as an additional insured on the QBE policy is meritless. The Purchase Order specifically states that Structure Tone is to be named as an additional insured on Berardi's commercial general liability policy (Motion, Ex. C, ¶ 11.3). However, the Purchase Order makes no mention of St. John's.

Plaintiffs argue that the Purchase Order impliedly names St. John's as a party for which Berardi was obligated to procure insurance because, in paragraph 2, it incorporates the terms of Section 9 of the GMP Agreement. When read together, plaintiffs argue, these provisions require a subcontractor to add St. John's as an additional insured. This argument is unpersuasive; paragraph 2 is reasonably read to mean that the subcontractor is required to perform the actual work in accordance with the contract between Structure Tone and St. John's, not that the subcontractor is also required to purchase the same insurance. Paragraph 2 does not provide notice to Berardi or its insurers that St. John's is an additional insured. Moreover, plaintiffs cite to section 21.3.2 of the GMP Agreement for the argument that subcontractors must name St. John's as an additional insured. That language is not found in the cited section, or any other section readily found, although Section 21.3.2 does specify that "Coverage required herein as well as any other coverage that [Structure Tone] may consider necessary is [Structure Tone]'s sole responsibility."

Next, plaintiffs contend that St. John's is to be an

additional insured based on the certificate of insurance. "A certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure" (*Horn Maintenance Corp. v. Aetna Cas. & Surety Co.*, 225 AD2d 443, 444 [1st Dept 1996]). Further, the certificate contains a disclaimer that it is for information purposes only and confers no rights. Such certificates have been held to be insufficient to establish that a party is an additional insured (*Moleon v. Kreisler Borg Florman General Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]).

Accordingly, St. John's is not an additional insured on the QBE or Illinois National policies.

### 3. QBE's Address & Disclaimer

That QBE had timely notice of the underlying incident is obvious: it notified Structure Tone just seven weeks after the accident. QBE next argues that plaintiffs failed to provide it with timely notice of Gaudio's lawsuit because the Tender Letter was mailed to an incorrect address. Plaintiffs argue that the address was proper because it was obtained from the 2008 New York Lawyers Diary and Manual, which had the following listing:

QBE Insurance Company  
See Country-Wide Insurance Company  
\*\*\*\*  
Country-Wide Insurance Company  
Home Office  
40 Wall Street, N.Y.C. 10005

(Collesano Affirmation in Opposition & Reply, Ex. 1).

The affidavit of QBE's assistant vice president is more persuasive than the Lawyer's Diary as evidence of whether 40 Wall Street was QBE's address. There is no indication that QBE ever consented to accept mail service for notices through "Country-Wide Insurance Company" at that address. Accordingly, the Tender Letter was sent to the wrong address, and it does not constitute notice of the lawsuit.

Plaintiffs argue that QBE is precluded from disclaiming coverage for Structure Tone because the disclaimer states only that St. John's failed to give notice, and makes no reference to Structure Tone. QBE argues that it first received notice of suit for the underlying action on August 25, 2009, and that it did not receive the Tender Letter until September 19, 2009. It contends that it did not disclaim against Structure Tone because it mistakenly believed that the Tender Letter was properly sent in 2008. QBE did not realize this "mistake" until it drafted its verified answer, dated October 12, 2009.

An "insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even [where] the policyholder's own notice of the incident to its insurer is untimely" (*Matter of New York Cent. Mut. Fire Ins. Co. v Aguirre*, 7 NY3d 772, 774 [2006]; Insurance Law § 3420[d]). "The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage" (*Matter of Allcity Ins. Co. (Jimenez)*, 78 N.Y.2d 1054, 1056 [1991]; see also,

*Continental Cas. Co. v. Stradford*, 11 NY3d 443, 449 [2008]).

The Court of Appeals has held that "investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer" (*First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 NY3d 64, 69 [2003]), and that a two month delay may be justified when the insurer needs to analyze a complicated pattern of behavior by an uncooperative insured (*Continental Cas. Co.*, 11 NY3d at 451). Where no explanation for the delay is given, a delay of two months is not justified, as a matter of law (*Hartford Ins. Co. v. Nassau County*, 46 NY2d 1028 [1979]).

Here, the delay is untimely as a matter of law, because the most basic review of QBE's file on August 25, 2009 would have revealed that there was no tender letter. A seven week delay for such an uncomplicated review is not justified.

#### **B. The Illinois National Policy**

St. John's is not an additional insured under the Illinois National policy for the same reason it is not an additional insured on the QBE policy: there is no written agreement obligating Berardi to procure insurance for St. John's.

Illinois National next argues that Structure Tone is not an insured by operation of its amended policy Section VII (M), which provides that a person to whom Berardi was obligated by written contract to provide insurance is an insured, but not with respect to any liability arising solely from that person's

acts or omissions. Illinois National alleges that Gaudio's injury arises solely from Structure Tone's acts, because its employee threw the debris that struck Gaudio.

This argument fails because the facts as described in the complaint and deposition transcript in the *Gaudio* action show that the incident did not arise solely from Structure Tone's acts or omissions. A Berardi co-worker sent Gaudio to fetch water by walking through an active work site and under a window from which debris was being tossed into a dumpster. He walked between the building and the dumpster. While it is clear that the Structure Tone employees bear much of the fault, it cannot be said that Gaudio and the co-worker who directed him toward the accident site had no responsibility. As a result, Illinois National cannot establish that Structure Tone is not its insured under Section VII(M) of the policy. Since it is undisputed that Illinois National received the Tender Letter and did not make a timely disclaimer, Structure Tone is entitled to excess coverage under the Illinois National policy up to the \$4 million limit set forth in the Purchase Order. The Illinois National policy is an umbrella policy excess to primary coverage provided by the QBE and New Hampshire Insurance policies (see, *Tischman Constr. Corp. v Great American Ins. Co.*, 53 AD3d 416 [1<sup>st</sup> Dept 2008]).

Finally, the only relief sought in the complaint against Berardi is a declaration of plaintiffs' legal rights with respect to procuring insurance under the Purchase Order, and they

request a hearing to assess damages in the form of defense costs, attorneys fees and disbursements in defending the *Gaudioso* action. The Purchase Order obligated Berardi to procure insurance naming Structure Tone as an additional insured, which it did, and there is no proof of damages.

For the foregoing reasons, it hereby is

ORDERED that the motions and cross motion are granted in part; and it further is

ADJUDGED and DECLARED that under the terms of the Purchase Order, Berardi was obligated to procure insurance with coverage for Structure Tone; and it further is

ADJUDGED and DECLARED that Structure Tone is an insured under the QBE and Illinois National policies; and it further is

ADJUDGED and DECLARED that QBE has a duty to defend and indemnify Structure Tone in the underlying *Gaudioso* action; and it further is

ADJUDGED and DECLARED that St. John's is not an insured under the QBE and Illinois National policies, and St. John's is not entitled to a defense or indemnification under these policies; and it further is

ADJUDGED and DECLARED that the Illinois National policy provides excess coverage with a limit of \$4 million, said coverage to be excess of primary coverage provided by the New Hampshire Insurance Company and QBE policies; and it further is

ADJUDGED and DECLARED that Berardi does not owe the


duty to indemnify and defend in the Gaudioso action to either plaintiff; and it further is

ORDERED that plaintiffs' claim for legal fees and costs incurred in connection with defending the *Gaudioso* action is dismissed.

Dated: June 27, 2011

FILED  
JUN 27 2011  
CLERK OF COURT

ENTER:

  
\_\_\_\_\_  
J.S.C.

**JANE S. SOLOMON**

**UNFILED JUDGMENT**

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