

**Structure Tone, Inc. v Harleysville Worcester Ins.
Co.**

2011 NY Slip Op 32115(U)

July 27, 2011

Sup Ct, NY County

Docket Number: 101795/08

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.
Justice

PART 8

Index Number : 101795/2008
STRUCTURE TONE
VS.
HARLEYSVILLE WORCESTER
SEQUENCE NUMBER : 006
RESTORE ACTION TO CALENDAR

INDEX NO. 101795/08
MOTION DATE 7/24/11
MOTION SEQ. NO. 006

motion to/for Restore to Calendar
Substantive | No(s) 1-11
| No(s) on default
| No(s) _____

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that this motion ~~is~~ 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).

Plaintiff's motion is granted, on default. Accordingly, it is ORDERED that plaintiffs' motion to restore the case to the trial calendar is granted upon condition that plaintiffs file a new note of issue and pay the appropriate fee therefor; and it is further ORDERED that, within 20 days from entry of this order, plaintiff file a note of issue and statement of readiness with, and serve a copy of this order with notice of entry on, the Trial Support Office (Room 158), along with proof of payment of the appropriate fee; and it is further ORDERED that upon receipt of the foregoing, the Clerk of the Trial Support Office shall restore the case to the trial calendar; and it is further ORDERED that the Clerk of the Court file and accept the attached Amended Decision, Order & Judgment which now contains the correct caption of this matter.

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

Dated: July 27, 2011


JOAN M. KENNEY, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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).

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

STRUCTURE TONE, INC., and HILTON HOTELS CORPORATION,

Plaintiff,

-against-

HARLEYSVILLE WORCESTER INSURANCE CO.,
and TOBIN WOODWORKING, INC.,

Defendants.

**AMENDED
DECISION, ORDER &
JUDGMENT**

Index № 101795/08
Motion Seq. 004, 005

-----X
JOAN M. KENNEY, J.:

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions for summary judgment.

Papers	Numbered
Notice of Motion, Exhibits, Affirmation (Seq.004)	1-12
Affirmation in Opposition	13, 14
Notice of Motion, Exhibits, Affidavits and Memo of Law (Seq. 005)	1- 10
Affirmation in Opposition	11
Reply Affirmation to Seq. 004 and 005	12, 13

Motion Sequences 004 and 005 are consolidated for disposition herein.

In this action seeking a declaratory judgment, plaintiff Structure Tone, Inc. (Structure Tone) seeks an Order, pursuant to CPLR 3212, declaring that defendant Harleysville Worcester Insurance Co. (Harleysville) is obligated to defend and indemnify Structure Tone as an additional insured under a policy of insurance it (Harleysville) issued to defendant Tobin Woodworking, Inc. (Tobin) (Motion Seq. 004).

Defendant Tobin seeks an Order, pursuant to CPLR 3212, dismissing the complaint and all claims against it on the grounds that it fulfilled its insurance obligations to Structure Tone.

FACTS, PROCEDURE and ARGUMENTS

Structure Tone commenced this action to resolve the parties' insurance coverage dispute stemming from an underlying personal injury/labor law action, *Pasqual Gagnon and Janet Gagnon v Hilton Hotels Corp., Hilton Resorts Corp., NYH Condominium, Monarch Construction Corp., and Structure Tone, Inc.*, currently pending in Supreme Court, New York County under New York County Index No. 110517/07 (the Gagnon Action). The plaintiffs in that action, Pasqual Gagnon (Gagnon) and his wife, seek damages as a result of physical injuries he allegedly sustained while working as a sub-subcontractor on a renovation project at the Hilton Hotel located at 1335 Avenue of the Americas, New York, New York. Structure Tone was a general contractor for the renovation project, and Gagnon's employer, nonparty American Wood Installers, Inc. (American Wood), was the sub-subcontractor hired to perform some of the woodworking services Tobin had agreed to perform under its Purchase Order agreement with Structure Tone. According to Gagnon, on the day of his accident, September 2, 2005, he was in the process of installing hinges on doors at the Hilton Hotel when he was suddenly struck by a door. Although he was in pain, Gagnon did not receive any emergency medical treatment at the scene.¹

Approximately two years after the accident, Gagnon and his wife commenced their labor law and personal injury action based upon the September 2, 2005-incident. Their summons and complaint were served and filed on or about July 31, 2007, and issue was joined by service of

¹At his deposition, Gagnon testified that he was injured after a door fell onto him, that he was in pain but that he was, nevertheless, able to stand up. He then spoke with his foreman, filled out an accident report, took the train out to Syosset, N.Y., and he went to North Shore University Hospital, where he was x-rayed (no broken bones found), was prescribed Vicodin and instructed rest (Gagnon Deposition, at 50 - 58).

defendant's answer on or about September 25, 2007. Following commencement of the Gagnon Action, Structure Tone's insurance carrier, AIG, sent a letter tendering the defense and indemnification of its insured to Tobin's insurance carrier, Harleysville. The tender letter, which is undated but appears to have been written on or before October 17, 2007, is based upon requirements set forth in the executed Purchase Order and Structure Tone's Blanket Insurance/Indemnity Agreement (Blanket Agreement) which obligated Tobin to procure certain insurance with respect to itself and Structure Tone (See Exhibits "5" and "6" to Notice of Motion papers). More specifically, Tobin's responsibilities under the Purchase Order included installing wood doors, crown molding and window valances on two floors of the Hilton Hotel. The Purchase Order also required Tobin to execute Structure Tone's Blanket Agreement which, in turn, obligated Tobin to procure "Comprehensive General Liability . . . with a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least \$4,000,000 per occurrence and aggregate. The limit may be provided through a combination of primary and umbrella/excess liability policies" (Blanket Agreement § 3.2). The Blanket Agreement also required Tobin to name Structure Tone as an additional insured on its comprehensive general liability insurance policy (Blanket Agreement § 3.2 [d]); to indemnify and hold harmless Structure Tone from and against any and all claims caused by Tobin's negligence which arise, in whole or part, from the work performed under the Purchase Order (Blanket Agreement § 6); and to defend and bear the costs of defending any actions or proceedings brought against Structure Tone arising out of Tobin's negligence (*id.*).

By letter dated November 12, 2007, Harleysville acknowledged Structure Tone's request for a defense and indemnification. The letter was addressed to Structure Tone's legal counsel. By letter dated November 27, 2007, Harleysville responded directly to AIG stating, in relevant part:

“The loss occurred on September 2, 2005, and your request for defense and indemnification was not received until October 17, 2007, over two years after the injury occurred. It is our position that your delay in requesting defense and indemnification is not considered prompt notice, as required of a potential additional insured pursuant to the conditions under the policy.

* * *

... Since Harleysville Insurance Company was placed on notice over two years after the incident, there is no coverage under the policy for Structure Tone Inc. as a potential additional insured based on the late notice. However, at this time we will continue to investigate this loss, and review to see if there is a contractual obligation to indemnify and defend Structure Tone Inc.”

As of January 2008, the defense and indemnification issues remained unresolved. This prompted Structure Tone to commence the instant declaratory judgment action against both Harleysville and Tobin. The summons and complaint was served and filed on or about January 30, 2008, issue was joined by the service of Tobin’s and Harleysville’s answers, on or about March 28, 2008 and May 5, 2008, respectively, and discovery ensued.

By letter dated May 7, 2008, Harleysville sent AIG a follow up letter confirming its denial to AIG’s request for a defense and indemnification for both additional insured and contractual considerations with respect to Structure Tone’s involvement in the Gagnon Action. In addition to its finding of late notice, Harleysville’s “Litigation Specialist” Donna Houston noted that:

“... [b]ased on the investigation completed to date, which indicates that the owner, Hilton Hotel’s employees moved the wooden doors causing them to fall and strike the plaintiff on the back there is no active negligence on the part of our insured whose activities had been completed and removed from the sequence of events that resulted in the plaintiff’s injuries. Therefore, without any active negligence on the part of our insured we find no triggering of any contractual obligations owed to Structure Tone.”

However, approximately 10 months later, another “Litigation Specialist” for Harleysville, Joanne Daley, sent a letter, dated March 30, 2009, to counsel for Structure Tone, stating, in relevant

part, that:

“Harleysville hereby agrees to assume the defense and indemnity of Structure Tone, Inc. in the [Gagnon Action] . . . subject to Structure Tone Inc.’s agreement to waive its right to reimbursement of all past legal fees and disbursements expended in the defense of Structure Tone, Inc. in the Gagnon Action.” (See Exhibit “9” to Notice of Motion).

The letter, which recognizes Structure Tone as an additional insured for all purposes, contains no explanation for Harleysville’s change of position and implicit waiver of any late notice and/or contractual obligations concerns or objections.

Nevertheless, Harleysville opposes the within motion, asserting that it timely disclaimed coverage in response to Structure Tone’s belated notice, and that Gagnon’s accident did not result from, or arise out of, Tobin’s work or ongoing operations, the contractual prerequisite for additional insured status (Aff. in Opp., ¶¶ 10, 13). Nowhere in its affirmation in opposition does Harleysville explain its reversion to its prior position, or even acknowledge that it had sent a letter assuming the defense and indemnification of Structure Tone as an additional insured.

DISCUSSION

It is well settled that “[w]here a policy of liability insurance requires that notice of an occurrence be given as soon as practicable, such notice must be accorded the carrier within a reasonable period of time. The insured’s failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent, which, as a matter of law, vitiates the contract” (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005] [internal quotation marks and citations omitted]). Likewise, an insurer seeking to disclaim coverage must act promptly, giving notice as soon as reasonable and practicable once it learns of the grounds for a disclaimer of liability or denial of coverage (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 68 - 69 [2003]; *Hartford Ins.*

Co. v County of Nassau, 46 NY2d 1028, 1029 [1979]).

With respect to late notice, the parties fail to adequately address how and when Structure Tone learned of Gagnon's accident, the key issues in determining the reasonableness of the two year delay between the accident and AIG's tender letter to Harleysville (*see Allstate Ins. Co. v Gross*, 27 NY2d 263, 270 [1970]). Nevertheless, after having accepted the tender, Harleysville's renewed attempt to disclaim on the ground of late notice is both untimely and unreasonable as a matter of law.

Additionally, in as much as the underlying claim involved a door which was part of the woodwork contemplated under the Purchase Agreement, it cannot be said, as a matter of law, that Gagnon's injuries did not occur while, or in conjunction with, the work Tobin was contractually obligated to complete. This theory for disclaimer, even if it had not been waived in the letter of March 30, 2009, is unavailing, and Harleysville's renewed denial, approximately three years after the initial insurance tender from AIG, is tardy.

Turning to Tobin's motion for summary judgment, it is undisputed that Tobin procured commercial general liability and excess/umbrella liability insurance from Harleysville under general liability policy number GL 3J3833, in the amount of \$1 million per occurrence and \$2 million aggregate, and excess/umbrella policy number BE 3J3833, in the amount of \$5 million per occurrence and aggregate, which were in effect for the relevant period of December 7, 2004 to December 7, 2005. It is also undisputed that the general liability policy contains the following additional insured endorsement (CG 2033 1001): "Additional Insured - Owners, Lessees or Contractors - Automatic Status When Required in Construction." Accordingly, Tobin obtained the insurance coverage required of it under the Purchase Order and Blanket Agreement.

In anticipation of an order from this court granting Structure Tone's motion, Harleysville

requested, via its affirmation in opposition, an order denying additional insured coverage to Structure Tone from Harleysville on a primary basis. Nowhere in its motion does Structure Tone request a specific finding as to primary coverage, and a reply affirmation is not the proper vehicle for introducing new or different issues and claims for relief (*see Myung Chun v North Am. Mtge. Co.*, 285 AD2d 42, 45 [1st Dept 2001]; CPLR 2214, 2215). As a result, the issue is not properly before this court for resolution.

Accordingly, it is

ORDERED that plaintiff, Structure Tone, Inc.'s motion, under motion sequence 004, declaring that defendant Harleysville Worcester Insurance Co. is obligated to provide a defense and indemnification for Structure Tone, Inc. as an added insured in the action of *Pasqual Gagnon and Janet Gagnon v Hilton Hotels Corp., Hilton Resorts, Corp., NYH Condominium, Monarch Construction Corp., and Structure Tone, Inc.*, Index No. 110517/07, New York County, is granted with costs and disbursements to plaintiff, Structure Tone, Inc. as taxed by the Clerk; and it is further

ADJUDGED and DECLARED that Harleysville Worcester Insurance Co. is herein obligated to provide a defense and indemnification in the said action pending in New York County; and it is further

ORDERED that defendant Tobin Woodworking, Inc.'s motion to dismiss the complaint, under motion sequence 005, as against Tobin Woodworking, Inc., is granted; and it is further

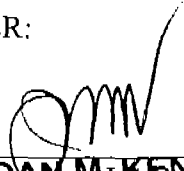
ORDERED, that the Clerk of the Court shall enter judgment in favor of Tobin Woodworking, Inc. and against plaintiff, Structure Tone, Inc., and co-defendant (if applicable) dismissing the complaint and any cross claims against Tobin Woodworking, Inc., only with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of

costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 27, 2011

ENTER:



JOAN M. KENNEY
J.S.C.

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).