[* 1]

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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 116648/2009

STRUCTURE TONE

VS

EUROTECH CONSTRUCTION

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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	

FILED

OCT 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 10/7/11
which disposes of motion sequence(s) no. 001 and 002.

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

Dated: 10/7/11

SALIANN SCARPULLA J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----------x,

STRUCTURE TONE, INC., SILVERSTEIN PROPERTIES, INC., 7 WORLD TRADE COMPANY and MOODY'S CORPORATION,

Plaintiffs,

-against-

EUROTECH CONSTRUCTION CORP., QBE INSURANCE COMPANY and ILLINOIS NATIONAL INSURANCE COMPANY,

Defendants.

----------x

Index No. 116648/2009

DECISION AND ORDER

For Plaintiffs:
Barry, McTiernan & Moore
2 Rector Street, 14th Floor
New York, NY 10006

For Defendants Eurotech & QBE:
Mendes & Mount, LLP
750 Seventh Avenue
New York, NY 10019

For Defendant Illinois National Insurance Company:
Sedgwick, Detert, Moran &Arnold, LLP
125 Broad Street, 39th Floor
New York, NY 10004

HON. SALIANN SCARPULLA, J.:

In this declaratory judgment action, defendant excess carrier, Illinois National Insurance Company ("Illinois"), under a policy issued to codefendant Eurotech Construction Corp. ("Eurotech"), moves for an order dismissing the complaint (motion seq. 001). Eurotech and primary insurer, QBE Insurance Company ("QBE"), move for an order granting them summary judgment dismissing the complaint and declaring that they have no duty to defend and indemnify plaintiffs (motion seq. 002) . Plaintiffs, Structure Tone, Inc. ("Structure Tone"), Silverstein Properties, Inc., 7 World Trade Company, and

Moody's Corporation ("Moody's") (collectively "plaintiffs"), alleged additional insureds under those policies, cross-move for an order granting them summary judgment against QBE and Illinois. Motions 001 and 002 are consolidated for disposition.

Background

Moody's, the lessee of certain floors at 7 World Trade Center, entered into a construction management contract with Structure Tone in connection with building out Moody's floors. Under that contract, Structure Tone was required to procure liability insurance for itself and naming, as additional insureds, Moody's, Moody's landlord, and others as may have been required. Structure Tone obtained a liability insurance policy from the New Hampshire Insurance Company which provided that the insurance was "excess over any of the other insurance whether primary, excess, contingent or on any other basis: (1) Unless such insurance [was] specifically purchased to apply as excess of this policy, or (2) you are obligated by contract to provide primary insurance."

Structure Tone then subcontracted with Eurotech to perform carpentry work. The subcontract required Eurotech to obtain liability insurance in an amount of at least $4,000,000 combined single limit, naming Structure Tone and specific owners and others, as may have been required, as additional insureds. The coverage obtained was to "apply on a primary basis irrespective of any other insurance . . . ."

Eurotech obtained primary liability insurance from QBE and excess coverage from Illinois. The QBE policy provided additional insured coverage against certain losses to

any entity for which Eurotech was obligated to procure such coverage, as was required by any contract and/or as evidenced by the insurance certificate "on file with the company." A certificate of insurance, dated April 1, 2008, was issued by Eurotech's insurance agency naming QBE and Illinois as insurers, and indicating primary liability insurance of $1,000,000 per occurrence, and excess coverage of $10,000,000 per occurrence. The certificate provided that Moody's, "(Silverstein Properties), 7 World Trade Center," Structure Tone "and/or its subsidiaries and other related entities, its clients, and/or the building owners/managers" were additional insureds.

The Illinois policy's definition of an "insured" included any entity which was an additional insured in the policies set forth in the scheduled underlying insurance. The schedule listed the QBE policy. Coverage under the Illinois policy was to "follow the terms, definitions, conditions and exclusions of Scheduled Underlying Insurance . . . ." The Illinois policy further provided that "[i]f other valid and collectible insurance applie[d] to damages that [were] also covered by this policy, this policy [would] apply excess of the **Other Insurance**. However, this provision [would] not apply if the **Other Insurance** [were] specifically written to be excess of this policy." (Emphasis in original). Pursuant to the Illinois Policy, "other insurance" does not include "insurance specifically purchased to be excess of this policy." No payment was to be made under the Illinois policy until the limits of scheduled underlying insurance and any other applicable insurance had been exhausted.

Nonparty , Thomas McGinty's ("McGinty"), while working for Eurotech at 7 World Trade Center on April 17, 2007, allegedly stepped off a ladder onto construction debris, fell, and injured his knees, both of which had undergone surgery within the previous few years. McGinty surmised at his deposition that the debris had been caused by workers of another subcontractor. McGinty continued to work until May 1, 2007, but did not bring the alleged accident to Eurotech's, Structure Tone's or any of the other plaintiffs' attention; nor did he ever file a Worker's Compensation claim or fill out any accident form for Eurotech.

By letter dated September 11, 2008, McGinty's attorneys advised Structure Tone's Corporate Claims Manager, Veronica Lewis ("Lewis"), that McGinty was asserting a claim in connection with injuries he suffered as a result of the April 17, 2007 accident. Lewis forwarded the letter to AIG Domestic Claims, Inc. ("AIG"), New Hampshire Insurance Company's representative, for AIG to tender to QBE the defense and indemnity of Structure Tone and its indemnitees. AIG, by letter to QBE dated October 2, 2008,[1] advised it of McGinty's accident and of Eurotech's contractual obligations to defend, indemnify and obtain insurance on behalf of Structure Tone and its indemnitees, and requested QBE provide Structure Tone and its indemnitees with insurance, defense

[1] AIG's October 2 letter apparently incorrectly listed Structure Tone's insurer as another AIG entity, the Insurance Company of the State of Pennsylvania.

and indemnification in connection with McGinty's claims. AIG's letter was issued before plaintiffs herein were served in the McGinty action.

QBE then began an investigation. In an e-mail dated October 10, 2008, Aqueel Rehman ("Rehman") of Eurotech stated to an independent insurance adjuster retained by Rockville Risk Management Associates ("Rockville"), QBE's claims administrator, that Eurotech had no knowledge of the alleged accident until informed of it a few days earlier via an insurance company letter. Rehman's e-mail further indicates that he had been informed by the job site foreman, Neil Reilly ("Reilly"), that no accident had occurred and that McGinty had pre-existing knee problems. Rehman provided the adjuster with Reilly's phone number. The adjuster e-mailed Rockville later that day and advised that follow-up with Reilly would ensue to ascertain whether the accident had ever been previously brought to Eurotech's attention.

By letter of October 13, 2008, Rockville, in response to AIG's October 2 letter, advised AIG of its insureds' duties to notify QBE of an occurrence, and of any suit, as soon as practicable, and noted that it had received notice of the accident almost a year and a half after it had occurred. Rockville indicated that it was in the process of investigating and was reserving all of its rights regarding the request for defense and indemnity, including the right not to participate in the defense of the McGinty matter.

By letter dated January 14, 2009, Rockville advised AIG that QBE had agreed to provide a defense to Structure Tone, but that it was still concerned with AIG's delay in

notifying it of the occurrence, and was continuing to reserve its rights to allow for additional investigation of the notice's timeliness. Rockville further advised AIG of its obligations to provide timely notice of any suit, and to immediately provide all legal papers received in connection with any suit. The law firm of Fischetti & Pesce, LLP was then assigned as a monitoring counselor on behalf of QBE.

Meanwhile, on October 1, 2008, McGinty filed a personal injury action in the Bronx against plaintiffs (the "McGinty action"). Plaintiffs then commenced a third-party action against Eurotech. Issue was joined in the McGinty action on December 17, 2008.

Thereafter, QBE, which had not yet been informed of the McGinty action by plaintiffs, scheduled a May 7, 2009 mediation between McGinty's counsel and QBE, which was represented in that mediation by Fischetti & Pesce. At that mediation, QBE's counsel was informed that McGinty had commenced an action seven months earlier.

By letter dated May 20, 2009, Rockville advised AIG that Structure Tone's seven-month failure to advise QBE of the McGinty action constituted a breach of QBE policy's timely notice of suit provision and that Structure Tone had also breached the policy's cooperation provisions. Consequently, QBE indicated that it was declining to defend and indemnify Structure Tone.

Plaintiffs commenced this action against QBE, Illinois, and Eurotech on November 25, 2009, seeking a judgment declaring that each of the defendants owes them a duty to indemnify, defend, and/or to otherwise provide insurance coverage to plaintiffs for all

risks falling within the scope of those policies, and directing that a hearing be held to assess damages as to plaintiffs' defense costs, counsels' fees, and disbursements in the defense of the McGinty action, and in commencing this action.

In about mid-December 2009, upon being served with the complaint, Illinois' current counsel engaged in a series of e-mails with plaintiffs' counsel. Illinois' counsel advised, on December 18, 2009, that the firm was in the process of becoming counsel for Illinois and had not yet obtained the case file. Counsel, therefore, requested an extension of Illinois' time to answer until February 1, and stated that, as had been agreed in another Structure Tone action, "the extension [was] without prejudice to or waiver of any potential coverage defenses, including late notice." Plaintiffs' counsel responded, "ok as to the extension and your other issues. However, I am requesting you waive any improper service affirmative defense."

By letter of January 4, 2010, Illinois' counsel advised plaintiffs' counsel that Illinois was investigating the coverage issues, and because plaintiffs' counsel had advised that he was unaware of when McGinty's claim and action were first reported to Illinois, Illinois was reserving its right to deny coverage based on violations of policy conditions. Illinois' counsel further indicated that to the extent that McGinty's claim was first reported via the declaratory judgment action, the policy's notice provisions appeared to have been violated. That letter requested documentation from Structure Tone to assist Illinois in its investigation. Specifically, documentation demonstrating Structure Tone's

additional insured status as well as documentation and correspondence predating the McGinty action and relating to his claim were requested. By e-mail of January 26, 2010, Illinois' counsel requested an additional extension to February 15, and stated that as discussed before, Illinois did not waive and reserved its right to assert a lack of timely notice and any other policy defenses. Plaintiffs' counsel responded, "OK on the extension . . . ." On February 12, plaintiffs' counsel agreed to a week's extension of Illinois' time to answer, which extension was requested because the person from Illinois who had the authority to review the answer was traveling.

In its February 23, 2010 answer to plaintiffs' complaint, Illinois asserted, as a ninth affirmative defense, that plaintiffs had failed to comply with the policy's conditions that no insured would, except at that insured's own cost, "voluntarily make payment, assume any obligation, or incur any expense ... without [Illinois'] consent," and regarding plaintiffs' duties to give timely notice of the occurrence and suit and to immediately forward legal papers to Illinois. QBE and Eurotech asserted as affirmative defenses that plaintiffs failed to give timely notice of the occurrence and suit, and immediately provide legal papers concerning the suit.

Motions and Cross Motion

Illinois, which does not concede for purposes of this motion that plaintiffs are additional insureds under its policy, moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint on the ground that plaintiffs failed to notify it of

McGinty's alleged accident and his lawsuit as soon as practicable and immediately provide copies of the legal papers in that action, but instead provided notice when plaintiffs served Illinois with process in the instant action, months after issue had been joined in the McGinty action, and, thus, failed to satisfy policy conditions. QBE and Eurotech, which concede that plaintiffs were additional named insureds under the QBE policy, move for an order granting them[2] summary judgment dismissing the complaint on the ground that plaintiffs failed to provide notice of the McGinty action as soon as was reasonably practicable, and declaring that they have no duty to indemnify and defend plaintiffs under its policy.

Plaintiffs oppose QBE and Eurotech's motion on the grounds that they were not advised of the accident by McGinty's counsel until September 2008, and that plaintiffs timely advised QBE of the occurrence, within 25 days after they learned of it. Additionally, plaintiffs assert that QBE and Eurotech untimely disclaimed coverage by waiting until late May 2009 to do so, and that, in any event, such disclaimer was not based on the failure to timely advise of the occurrence. Plaintiffs also argue that any failure to timely advise of suit was not prejudicial and is insufficient to warrant dismissal of the complaint as to QBE and Eurotech. Thus, plaintiffs seek summary judgment

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[2]Eurotech and QBE do not seek to distinguish between themselves on their motion, nor do they address the complaint's first cause of action predicated on Eurotech's alleged breaches of its duties to procure the required insurance. Accordingly, they will be treated as one for purposes of their motion, and the merits of the first cause of action will not be addressed.

against QBE, adding that their failure to immediately provide QBE with legal papers relating to the McGinty action, was not prejudicial, and is therefore, not an impediment to granting plaintiffs summary judgment.

Plaintiffs also oppose Illinois' motion. Plaintiffs concede in their papers that the first notice to Illinois was its receipt of process in this case, but claims that because Illinois never issued an unequivocal denial of coverage letter, it is barred from disclaiming coverage. Plaintiffs further argue that Illinois' claim that the complaint fails to state a cause of action was wholly conclusory. In reply, Illinois observes that plaintiffs have provided no excuse for failing to notify it earlier of McGinty's alleged accident and lawsuit. Additionally, Illinois argues that its assertion of its ninth affirmative defense constituted a timely disclaimer of coverage, because plaintiffs' counsel agreed via e-mail to extend its time to answer, without prejudice to or waiver of any coverage defense. Illinois further claims that it was entitled to undertake an investigation into all of its possible disclaimer grounds before it disclaimed coverage instead of disclaiming piecemeal, and that, therefore, its disclaimer in its answer, about two months after it was served in this action, was timely.

Plaintiffs assert in support of their cross motion that because they are covered under the Illinois policy (which policy plaintiffs urge affords priority of coverage over the New Hampshire Insurance Company policy) and Illinois never issued a disclaimer of coverage after it was served with process, summary judgment is warranted, declaring that

Illinois has a duty to indemnify and defend them after QBE but before New Hampshire Insurance Company, and awarding plaintiffs legal fees and costs incurred in the McGinty action. Illinois opposes plaintiffs' summary judgment motion based on their failure to timely give notice and provide legal papers, and adds that the Illinois policy is not triggered until plaintiffs' coverage under the New Hampshire Insurance Company policy is exhausted.

Discussion

An insurance policy's provision that notice of an occurrence be given as soon as practicable "requires that notice be given within a reasonable time under all the circumstances." *Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp.*, 31 N.Y.2d 436, 441 (1972); *Zimmerman v. Peerless Ins. Co.*, _ A.D.3d _, 2011 NY Slip Op 05491 (2d Dept 2011). An insured's untimely notice to an insurer of an occurrence vitiates the insurance contract, irrespective of whether a showing of prejudice has been made. *Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp.*, 31 N.Y.2d at 440; *American Home Assur. Co. v. International Ins. Co.*, 90 N.Y.2d 433 (1997) (same rule applied to excess carrier's policy). The purposes of this circumscribed exception to the general rule, that a party seeking to avoid its duty to perform under a contract is required to show a material breach or prejudice, are to permit the insurer to promptly investigate so as to protect itself against fraud, set reserves, and take an early role in settlement negotiations. *Brandon v. Nationwide Mut. Ins. Co.*, 97 N.Y.2d 491, 496 (2002).

However, where the insured has provided timely notice of the occurrence but has not timely provided notice of legal action, denial of coverage is not mandated in the absence of prejudice, because the notice of occurrence serves the goals of the exception. *Id.* at 497. In addition, a party's lackadaisical, as opposed to willful and obstructionist, behavior in failing to forward suit papers does not entitle the insurer to disclaim coverage where timely notice of the occurrence has been provided and no prejudice has been shown. *City of New York v. Continental Cas. Co.*, 27 A.D.3d 28 (1st Dept 2005).

Here, plaintiffs established that QBE was given timely notice of the occurrence once plaintiffs learned of it. Timely notice was established through Lewis's affidavit, in which she asserted Structure Tone's lack of knowledge of the occurrence, until its receipt of McGinty's counsel's September 11, 2008 letter; Lewis's prompt forwarding of that letter to Structure Tone's carrier, resulting in AIG's October 2, 2008 letter to QBE notifying it of the occurrence; and McGinty's deposition testimony, that he never apprised Eurotech or any of the plaintiffs of his alleged accident.

Moreover, even if the notice of occurrence had been untimely, QBE did not timely disclaim on that ground and has failed to meet its burden of explaining its delay. QBE is, therefore, precluded from disclaiming coverage on that ground. *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 1029 (1979); *Hunter Roberts Constr. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 408-409 (1st Dept 2010). Rockville's letter of May 20, 2009 only disclaimed on the basis of the late notice of suit and failure to cooperate. No

explanation has been proffered by QBE or Eurotech of why coverage was disclaimed on the ground of late notice of occurrence for the first time in their answer, served about eight months later.

As to the late notice of suit and failure to immediately forward legal papers, QBE has failed to set forth any facts demonstrating that it has been prejudiced. The e-mails between the insurance adjuster and Rehman, and between the adjuster and Rockville, demonstrate that QBE was able to promptly undertake an investigation. QBE does not indicate that it was impeded in its investigation. Also, QBE was able to participate in the mediation, and it does not dispute that discovery in the McGinty commenced after it had notice of the suit.

Accordingly, QBE and Eurotech's summary judgment motion, which was based only on the untimely notice of suit, is denied. The branch of plaintiffs' cross motion seeking summary judgment against QBE is granted to the extent that plaintiffs seek a judgment declaring that, in connection with the McGinty matter, they are entitled to a defense, and to insurance coverage and indemnification, to the extent of the policy's limits, for all risks which fall within the scope of the policy issued by QBE.

The branch of plaintiffs' motion in which plaintiffs seeks recovery from QBE of plaintiffs' legal fees and costs incurred in defending the McGinty action is granted to the extent that further proceedings shall be conducted in the future to ascertain the amount of any such expenses. *See City of New York v. Continental Cas. Co.*, 27 A.D.3d at 33. The

scheduling of such further proceedings, and the form of such proceedings, (*State Farm Mut. Auto Ins. Co. v. Sparacio*, 25 A.D.3d 777 (2d Dept 2006) (plaintiff entitled to jury trial in defendant insurer's declaratory judgment action alleging plaintiff's untimely notice of claim, where plaintiff successfully moved to strike insurer's request for a nonjury trial)), shall be discussed at the next court conference.

I note with respect to plaintiffs' request for expenses, that the QBE policy contains a provision barring insureds, except at their own expense, from making any payment, assuming any obligation, or incurring any expense without QBE's permission. This provision is pertinent to plaintiffs' request to recover expenses incurred in the defense of the McGinty action because plaintiffs began defending that action without advising QBE.

Illinois' motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) is denied. Compliance with a policy's notice of occurrence provision is a condition precedent to coverage. *Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (2005); *National Union Fire Ins. Co. of Pittsburgh, PA v. Great American E & S Ins. Co.*, _ AD3d _, 2011 NY Slip Op 05859, *2 (1st Dept 2011). As such, plaintiffs were not required to plead that they timely provided notice, but defendant would be required to plead noncompliance. *See* CPLR 3015 (a); *1199 Hous. Corp. v. International Fid. Ins. Co.*, 14 A.D.3d 383 (1st Dept 2005). Therefore, the complaint states a cause of action as to Illinois.

To support its motion to dismiss based upon documentary evidence, Illinois relies on the terms of its policy. However, the movant, on a CPLR 3211 (a) (1) motion, must demonstrate that the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v. Kaufman,* 91 N.Y.2d 425, 430-431 (1998), quoting *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). In other words, "[t]he documentary evidence must resolve all factual issues and dispose of [a] plaintiff's claim as a matter of law." *Foster v. Kovner*, 44 A.D.3d 23, 28 (1st Dept 2007). Here the insurance policy provisions, standing alone, do not resolve all factual issues. Nonetheless, while affidavits "will almost never warrant dismissal under CPLR 3211," *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 595 [2008], they can be considered where they "'conclusively establish that [a plaintiff] has no cause of action.'" *Held v. Kaufman*, 91 N.Y.2d at 430 (1998), citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976)

Here, plaintiffs' counsel conceded in his affirmation in opposition to Illinois' motion, his reply affirmation to Illinois' opposition to plaintiffs' summary judgment motion, and again at oral argument, that Illinois' first notice of the occurrence and suit was when it was served with process in this action, about a year after plaintiffs served their answer in the McGinty action.

Plaintiffs do not assert that this notice of the occurrence and suit was timely. *See e.g. American Mfrs. Mut. Ins. Co. v. CMA Enters.*, 246 A.D.2d 373 (1st Dept 1998) (notice of claim first given in declaratory judgment's summons and complaint untimely

where served nine months after underlying action commenced and two years after plaintiffs learned of incident). Instead, plaintiffs' merely assert in their opposition papers that a disclaimer of coverage letter was never issued as to plaintiffs' failures to comply with policy conditions, and that Illinois was, therefore, precluded from disclaiming coverage now. Plaintiffs' add in their reply papers that the disclaimer set forth in Illinois' answer was unavailing because plaintiffs' extension of Illinois' time to answer did not constitute an extension of its time to disclaim coverage.

This latter assertion is without merit. The general rule is that an insurer that wants to deny or disclaim coverage must do so as soon as it is reasonably possible, and when it fails in that regard, it is barred from doing so, irrespective of whether the insured has given timely notice of the occurrence. *Hunter Roberts Constr. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d at 408-409. The burden is on the insurer to explain its delay, the reasonableness of which usually presents a question of fact. *Id.* at 409. Although the reasonableness of the insurer's delay is computed from the time when the insurer adequately acquires knowledge of the facts supporting the disclaimer (*id.*), the insurer is entitled to conduct a "prompt, reasonable investigation into other possible grounds for disclaimer . . . ," so as to avoid "piecemeal disclaimers." *DiGuglielmo v. Travelers Prop. Cas.*, 6 A.D.3d 344, 346 (1st Dept 2004) (internal citation and quotation marks omitted). Further, a reservation of rights letter is irrelevant to the issue of whether the insurer has

timely issued a disclaimer notice. *Hartford Ins. Co. v. County of Nassau*, 46 N.Y.2d at 1029.

Nevertheless, here Illinois did not simply issue a reservation of rights letter. Nor did plaintiffs – at a time when Illinois' counsel was still in the process of being retained, had not yet received the file, and had not yet conducted an investigation – merely consent to the extension of time to answer. Rather, plaintiffs' agreed to Illinois' "other issues," the only other issue being that the extension of time was "without prejudice to or waiver of any potential coverage defenses, including late notice." Clearly, the import of Illinois' counsel's request and plaintiffs' counsel's consent in this context was that the passage of time granted by the extension would not prejudice Illinois' defenses, including those involving late notice. Otherwise, the request and consent would be meaningless. Moreover, it is readily apparent that plaintiffs agreed to that accommodation because they were simultaneously requesting that Illinois waive any improper service defense. In addition, Illinois was entitled to investigate other possible grounds for disclaiming, including whether plaintiffs were additional insureds and had knowledge of the occurrence in advance of McGinty's lawsuit.

In light of the foregoing, the papers conclusively establish the untimeliness of the notice of occurrence and suit and the forwarding of legal papers in that suit, and that Illinois defenses were timely asserted in its answer. *American Mfrs. Mut. Ins. Co. v. CMA Enters.*, 246 A.D.2d at 373; *Thomson v. Power Auth. of State of N.Y.*, 217 A.D.2d 495,

497 (1st Dept 1995). Even assuming, for argument's sake, that Illinois was not entitled to affirmative relief on the basis of its CPLR 3211 motion, on searching the record, it would be entitled to summary judgment on plaintiffs' cross motion. Accordingly, Illinois' motion is granted to the extent that a declaration is issued that it has no duty to defend, indemnify, or provide coverage to plaintiffs in connection with the McGinty matter, and plaintiffs cross motion is denied. *Lanza v. Wagner*, 11 N.Y.2d 317, 334, *appeal dismissed* 371 U.S. 74, *cert denied* 371 US 901 (1962); *Cusumano v. Extell Rock, LLC*, _ A.D.3d _, 2011 NY Slip Op 05935, *1 (1st Dept 2011); *Rotblut v. 150 E. 77th St. Corp.*, 79 A.D.3d 532 (1st Dept 2010) (where plaintiff not entitled to declaration sought, court erred in dismissing complaint, and should have issued a declaration in defendant's favor).

In light of this determination, I do not reach the issues raised by the cross motion of whether the plaintiffs were additional insureds under the Illinois policy and, if so, whether that policy would be triggered only after the exhaustion of coverage under the New Hampshire Insurance Company policy. *See Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 A.D.3d 140 (1st Dept 2008). In any event, the issue of priority between the Illinois and New Hampshire Insurance Company policies cannot be determined in the absence of the latter entity, which is a necessary party. *David Christa Constr., Inc. v. American Home Assur. Co.*, 41 A.D.3d 1211 (4th Dept 2007).

In accordance with the foregoing, it is

ORDERED that the branch of plaintiffs Structure Tone, Inc., Silverstein Properties, Inc., 7 World Trade Company, and Moody's Corporation's cross motion, in which they seek an order granting them summary judgment against Illinois National Insurance Company on plaintiffs' third cause of action, is denied; and it is further

ORDERED that defendant Illinois National Insurance Company's motion (001), in effect for an order declaring that it has no duty to provide coverage to, and to defend and indemnify plaintiffs in connection with the McGinty matter, is granted with costs and disbursements as taxed by the Clerk of the Court; and it is further

ADJUDGED and DECLARED that defendant Illinois National Insurance Company has no duties to provide coverage to and to defend and indemnify any of the plaintiffs herein in connection with the McGinty matter; and it is further

ORDERED that defendants Eurotech Construction Corp. and QBE Insurance Company's summary judgment motion (002) is denied; and it is further

ORDERED that the branch of plaintiffs Structure Tone, Inc., Silverstein Properties, Inc., 7 World Trade Company, and Moody's Corporation's cross motion seeking summary judgment against QBE Insurance Company on that part of plaintiffs' second cause of action which seeks a declaration that said defendant is obligated, in the action of *Thomas McGinty v. Structure-Tone, Inc., Silverstein Properties, Inc., 7 World Trade Company, L.P., and Moody's Corporation*, Index No. 307933/2008, Bronx County, to defend, provide coverage to, and indemnify, on a primary basis, the plaintiffs, as

additional insureds, to the extent of the QBE Insurance Company's policy limits, for all risks which fall within the scope of the policy issued, is granted; and it is further

ADJUDGED and DECLARED that plaintiffs, Structure-Tone, Inc., Silverstein Properties, 7 World Trade Company, L.P., and Moody's Corporation, are additional insureds under the QBE policy issued to Eurotech Construction Corp., and defendant QBE Insurance Company is obligated to provide, on a primary basis, coverage and a defense to the plaintiffs, Structure-Tone, Inc., Silverstein Properties, Inc., 7 World Trade Company, L.P., and Moody's Corporation, in the said action pending in Bronx County, and is to indemnify them, to the extent of that policy's limits, for all risks which fall within the scope of the policy issued by QBE; and it is further

ORDERED that the branch of plaintiffs' summary judgment cross motion, which seeks recovery from QBE Insurance Company of plaintiffs' legal fees and costs incurred in the defense of the McGinty action pending in Bronx County, is granted to the extent that further proceedings shall be conducted in the future to ascertain the amount of any such expenses, and the scheduling of such further proceedings, and their form, shall be discussed at the next court conference, and any application which plaintiffs are advised to make for costs and disbursements in this action, can be made in such further proceedings; and it is further

ORDERED that the declaratory judgment portion of the second cause of action, and the third cause of action against Illinois National Insurance Company are severed,

and the balance of the second cause of action asserted against QBE Insurance Company and the first cause of action asserted against defendant Eurotech Construction Corp. shall continue; and it is further

ORDERED that the parties are to appear for a conference on December 14, 2011 at 2 p.m. at 80 Centre Street, Room 279.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 7, 2011

ENTER:

Saliann Scarpulla, J.S.C.