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

----------X

STRUCTURE TONE, INC. and
200 FIFTH AVENUE OWNER LLC,

Plaintiffs,

Index No. 154651/2012
Motion Seq. 002

-against-

NATIONAL CASUALTY COMPANY, TOWER INSURANCE GROUP and KLEINKNECHT ELECTRIC COMPANY, INC.,

Defendants.

----------X

HON. CAROL ROBINSON EDMEAD:

MEMORANDUM DECISION

In this declaratory judgment insurance action, defendant National Casualty Company ("National") moves for summary judgment dismissing this action and declaring that it is not required to defend and/or indemnify plaintiffs, 200 Fifth Avenue Owner, LLC ("200 Fifth") and Structure Tone, Inc. ("Structure Tone") (collectively, "plaintiffs") in connection with an underlying personal injury accident action (the "underlying action").[1]

In response, plaintiffs cross move for summary judgment holding that National is required to defend and indemnify them as additional insureds on a primary, non-contributory basis and reimburse them for legal fees and costs incurred in the prosecution of this action.

Factual Background

By way of background, Structure Tone was allegedly acting as the construction manager of a renovation project (the "project") at a building located at 200 Fifth Avenue, New York, New

---

[1] *Steve Farrington and Shantie Farrington his wife v Structure Tone, Inc. and 200 Fifth Avenue Owner*, Index No. 24748/11, Supreme Court, Queens County (the "underlying action").

York (the "Building") and subcontracted a portion of the work to defendant Kleinknecht Electric Company, Inc. ("KEC"). On January 29, 2003, Structure Tone and KEC entered into a "Blanket Insurance/Indemnity Agreement" (the "Agreement") wherein KEC was required to maintain liability insurance coverage of $4 million per occurrence and to include an "Endorsement naming Structure Tone Inc. as an Additional Insured and endorsement of specified owners and other Additional Insureds as may be required from time to time."

On February 6, 2009, Structure Tone issued a purchase order to KEC wherein KEC agreed to provide all labor and materials in connection with certain electrical work for the project (the "Purchase Order"). The Purchase Order was subject to certain "Terms and Conditions" printed on the reverse side of the Purchase Order, and the Terms and Conditions incorporated by reference the insurance and indemnity provisions in the Agreement. The Purchase Order states that it "is not binding until accepted." Structure Tone issued other similar purchase orders to KEC during the project for different aspects of the work at the Building, some of which contain a signature under the line entitled "Accepted."

National issued a policy to KEC for the period of February 28, 2009 to February 28, 2010 (the "Policy" or "National Policy"). The Policy contains an additional insured endorsement, providing coverage to any:

> "person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy . . . . only in respect to liability . . . caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.

The National Policy also contains an endorsement entitled "Exclusion-Designated Operations Covered By A Consolidated (Wrap-Up) Insurance Program" which provides that:

> "This insurance does not apply to 'bodily injury' . . . arising out of or either your ongoing operations or operations included within the 'products-completed operations hazard' at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved."

An employee of KEC, Steve Farrington ("Farrington"), was allegedly injured while working at the project, and commenced the underlying action against both 200 Fifth and Structure Tone. In turn, 200 Fifth and Structure Tone commenced a third party action against KEC for common law and contractual indemnification for Farrington's claims.

Consequently, in this action, 200 Fifth and Structure Tone seek a declaration that they are entitled to coverage as additional insureds under the KEC's Policy with National.

Now in support of dismissal, National argues that the additional insured endorsement in the Policy only extends coverage to those entities for whom KEC is performing operation and only when KEC and such entity "have agreed in writing in a contract or agreement" that such entity "be added as an additional insured" under its Policy. Discovery reveals that there is no binding, enforceable written contract governing KEC's work at the Building at the time of the alleged incident under which KEC was required to obtain additional insured coverage on plaintiffs' behalf. Therefore, plaintiffs failed to satisfy the preconditions to coverage under the additional insured endorsement in that they failed to identify which of the numerous purchase orders actually governed Farrington's and KEC's work at the time of the accident, and that any such purchase order was formally accepted or countersigned by KEC so as to constitute a binding agreement. In addition, neither the purchase orders nor the Agreement required KEC to provide

additional insured coverage to 200 Fifth. And since 200 Fifth did not directly contract with KEC, 200 Fifth lacks privity with KEC so as to qualify as an additional insured under the endorsement.

National also contends that plaintiffs cannot rely on the certificate of insurance apparently prepared on February 27, 2009 by KEC's insurance broker, Allied North America Brokerage of New York, LLC ("Allied"). Although the certificate refers to plaintiffs as additional insureds, it also states that the certificate "confers no rights upon the certificate holder" and "does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies" listed thereon. National denies issuing this certificate, given that its "Producer," Allied, is not an agent or authorized representative of National.

Further, National also argues that during the litigation, it discovered (and plaintiffs concede), that plaintiffs were provided with coverage in the underlying action by the Insurance Company of the State of Pennsylvania (the "Structure Tone Policy"), which specifically provides coverage for all "Wrap-Up Construction" operations. This policy designates the construction project as one of the designated wrap-up projects for which coverage applies. Therefore, the Wrap-Up Exclusion in National's Policy bars coverage to both plaintiffs.

In opposition, plaintiffs argue that the pleadings and Bill of Particulars in the underlying action sufficiently allege that Farrington's accident arose out of the work KEC was hired to perform. The relied upon purchase orders and Agreement as attested to by Structure Tone's Corporate Claims Manager, Brendan Moynihan ("Moynihan"), were in effect at the time of Farrington's alleged accident. Thus, plaintiffs submitted proof that both the purchase orders and Agreement are applicable to trigger the additional insured endorsement in the National Policy.

Since an insurer's duty to defend "arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" and the focus of the insurance provision is not the precise cause of the accident, but upon the general nature of the operation in the course of which the injury was sustained, the applicable agreements satisfy the pre-condition to coverage and, based on Farrington's allegations, plaintiffs are additional insureds entitled to coverage.

As to National's contention that 200 Fifth did not enter into a contract with KEC, National is estopped from asserting its position that 200 Fifth is not entitled to coverage because there is no written agreement between 200 Fifth and KEC. Insurance Law §3240(d) requires an insurer to issue its disclaimer or denial of coverage as soon as is reasonably possible. On November 15, 2011 and October 10, 2012, Structure Tone's claims administrator Chartis tendered the defense and indemnity of Structure Tone and 200 Fifth on a primary, non-contributory basis. However, National never responded to the tenders, or offered an explanation why a disclaimer was not issued given the policy language. Therefore, 200 Fifth is entitled to additional insured coverage.

Further, the Wrap-Up Exclusion is only applicable to National's named insured, KEC if KEC was covered under a "wrap-up" policy. Such exclusion is not applicable to Structure Tone or 200 Fifth because, unlike KEC, neither of them is a Named Insured but rather an Insured (additional insured) as defined by the "you" and "yours" terms in the National Policy. Therefore, even though Structure Tone and 200 Fifth are being afforded coverage under a wrap policy in the underlying action, the Wrap-Up Exclusion in the National Policy does not preclude additional insured coverage to Structure Tone and 200 Fifth.

In support of their cross-motion, plaintiffs argue that under the purchase orders between Structure Tone and KEC and Agreement, KEC was required to name plaintiffs as additional insureds on KEC's insurance policy. The purchase orders also required KEC to indemnify and hold harmless and defend plaintiffs from all claims and legal fees arising from or in connection with the work performed by KEC pursuant to the purchase orders.

In opposition, National argues that plaintiffs have still failed to identify which of the purchase orders actually governed the precise work Farrington and KEC were performing when the alleged accident occurred that was formally accepted or executed by KEC, and Moynihan's conclusory allegations, not based on personal knowledge of the facts, fail to address these deficiencies. Therefore, plaintiffs failed to rebut National's *prima facie* showing and cannot establish their entitlement to the relief they seek.

National also points out that plaintiffs' papers are silent as to the certificate of insurance. And, it is undisputed that 200 Fifth did not contract directly with KEC for the work performed at the Building, as required to qualify as an additional insured. Neither the Agreement nor purchase orders requires KEC to provide additional insured coverage for 200 Fifth.

And, the doctrine of estoppel cannot be used to create coverage where none exists. Therefore, National's failure to promptly disclaim coverage cannot be used to confer additional insured status upon plaintiffs.

National adds that coverage on a primary and non-contributory basis is unwarranted because under the governing "other insurance" provision in the Structure Tone Policy provides that its coverage will be primary except under circumstances listed under the Excess Insurance subsection. The Structure Tone Policy also contains an "Amendment of Other Insurance"

endorsement which provides that coverage will be excess unless Structure Tone is contractually obligated to provide primary insurance. The contract documents produced in discovery show that Structure Tone was contractually obligated to maintain primary coverage to protect its interests regarding liability arising from its actions or its subcontractors' actions. Thus, the coverage available to plaintiffs under the Structure Tone Policy is primary, with a $2 million per-occurrence limit (while National's Policy provides a $1 million per-occurrence limit (or 33% of the combined $3 million available), rendering National's Policy co-primary). And, although 200 Fifth is not a named insured under the Structure Tone Policy, to the extent 200 Fifth is entitled to coverage under any policy issued to it as named insured, the issue of priority of coverage available to 200 Fifth cannot be resolved without comparing such a policy to the two policies at issue herein.

It is also argued that the Wrap-Up Exclusion does not require that KEC itself be enrolled or otherwise entitled to coverage under the wrap-up insurance program. The Exclusion is triggered since liability for KEC's operations is provided under a wrap-up insurance program that has been provided by the prime contractor/project manager of the construction project in which KEC is involved. Plaintiffs assert that their liability in the underlying action arises from KEC's operations, and plaintiffs are being defended under the Structure Tone Policy, which specifically provides coverage for all wrap-up construction operations including the project.

Furthermore, plaintiffs, as insureds, cannot obtain extra contractual damages such as attorneys' fees for the declaratory judgment action they commenced in the absence of any showing of bad faith on the part of National, which has not been alleged herein.

In reply in support of their cross-motion, plaintiffs point out that National failed to submit

any affidavit from their insured, KEC, or from someone with knowledge that the purchase orders and Agreement are not for the work at the time of the incident. The affirmation from National's counsel, who lacks personal knowledge, is insufficient. That plaintiffs do not identify which purchase order governed the work is of no moment in light of Farrington's allegations and Moynihan's claims that KEC's work was pursuant to the purchase orders.

Further, the other insurance clause in the Structure Tone Policy states that it is excess over the other insurance whether primary, excess contingent or any other basis. When compared to the other insurance clause of National's Policy, the National Policy provides primary, non-contributory coverage and the Structure Tone Policy becomes excess. National fails to address the other insurance clause in its motion. National's other insurance clause indicates that its policy is primary unless the exceptions apply, and none of the exceptions apply; indeed, National's Policy was not purchased as an excess policy.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon

documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Once the *prima facie* showing is made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212[b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

The party claiming insurance coverage "bears the burden of proving entitlement, and is not entitled to coverage if not named as an insured or an additional insured on the face of the policy [internal citation omitted]" (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 570-571 [1st Dept 2006]; *Kidalso Gas Corp. v Lancer Ins. Co.*, 21 AD3d 779 [1st Dept 2005]). The court must look to the four corners of the insurance policy itself to determine whether plaintiffs qualify as an additional insured (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]; *see Sanabria v American Home Assurance Co.*, 68 NY2d 866, *supra*).

Where insurance policy specifically provides that there must be a written agreement between the insured and the organization seeking coverage to add that organization as an additional insured, and no such agreement exists, such organization is not entitled to coverage as an additional insured (*AB Green Gansevoort, LLC v Peter Scalamandre & Sons, Inc.*, 102 AD3d 425, 961 NYS2d 3 [1st Dept 2013]).

In *Cusumano v Extell Rock, LLC*, 86 AD3d 448, 927 NYS2d [1st Dept 2011]), the subject

insurance policy provided coverage to additional insureds when "you [Regions Facility Services, Inc. (Regions)] have agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured ..." The subject construction agreement, which named "Hard Rock" as an additional insured was not signed by either Regions or *Hard Rock*, the "Work Authorization" was only signed by Regions, and the signature page, which included a signature line for Hard Rock to sign, was not signed at the time of the accident. Therefore, the Court held that Hard Rock was not entitled to additional insured status (*citing Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253, 850 NYS2d 455 [a legal document signed by one party is not considered to be executed as that term is used in an insurance policy] and *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571, 824 NYS2d 230 [2006]).

At the outset, it is noted that "A [insurer's] disclaimer is unnecessary when a claim does not fall within the coverage terms of an insurance policy (*Markevics v Liberty Mut. Ins. Co.*, 97 NY2d 646, 761 NE2d 557 [2001]). An additional insured endorsement is an addition, rather than a limitation, of coverage (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 33 AD3d 570, 824 NYS2d 230 [1st Dept 2006] *citing Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 84, 610 NYS2d 219 [1st Dept 1994]; *Burlington Ins. Co. v NYC Transit Auth.*, 38 Misc 3d 1205(A), 969 NYS2d 801 [Supreme Court, New York County 2012] (an insurer is not required to disclaim coverage as to the Transit Authorities, given that they were not additional insureds under the endorsement)). Therefore, contrary to plaintiffs' contention, the failure of National to disclaim coverage on the ground that plaintiffs are not insureds or additional insureds under the National Policy is inconsequential.

Here, the relevant portions of the National Policy noted above expressly provide that there must be a written agreement between the insured and the organization seeking additional insured status in order to add that organization as an additional insured.

As to 200 Fifth, it is undisputed that no contract exists between KEC, the insured, and 200 Fifth, let alone any agreement requiring that 200 Fifth be added as an additional insured to KEC's insurance policy. Therefore, National established its entitlement to dismissal of 200 Fifth's claim for a declaration that it is entitled to additional insured coverage under National's Policy.

As to Structure Tone, National's mere contention that plaintiff failed to identify any purchase orders that KEC "accepted" under which KEC agreed to name Structure Tone as an additional insured on the KEC's policy, is insufficient. Pointing out that only *some* of the purchase orders were formally accepted or countersigned by KEC, and thereby conceding that others were formally accepted and signed by KEC, is insufficient to affirmatively establish, as the movant, that no agreement exists requiring KEC to name Structure Tone as an additional insured.

In any event, contrary to National's contention, the affidavit of Moynihan is not conclusory, but unequivocally states that "At the time of Mr. Steve Farrington's alleged accident on October 8, 2009, KLEINKNECTH ELECTRIC COMPANY, INC. was performing work pursuant to the Purchase Orders and Blanket Insurance/Indemnity Agreement, and that the Purchase Orders and Blanket Insurance/Indemnity Agreement were in effect on the day of Mr. Farrington's accident." Such affidavit is sufficient, at this juncture, to raise an issue as to whether (1) the purchase orders constitute a "contract or agreement" requiring KEC to add Structure Tone as an additional insured on KEC's policy and (2) the underlying accident

occurred during "the performance of" KEC's "ongoing operations for" Structure Tone. As to the latter, the "focus of an 'arising out of' clause is not on the precise cause of the accident but on the general nature of the operation in the course of which the injury was sustained (*Hunter Roberts Const. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 904 NYS2d 52 [1st Dept 2010] *citing Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 AD3d 461, 883 NYS2d 207 [2009], *affd.* 15 NY3d 34, 904 NYS2d 338, 930 NE2d 259 [2010]). "As the Court of Appeals explained in *Regal*, "the phrase 'arising out of' in an additional insured clause" has been interpreted to "mean originating from, incident to or having connection with. It requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (15 NY3d at 38, 904 NYS2d at 341, 930 NE2d at 262 [internal quotation marks and citation omitted]). Therefore, dismissal of Structure Tone's claim for coverage under the National Policy is denied.

As to whether the Wrap-Up Exclusion applies so as to bar coverage to plaintiffs under the Policy, the Court finds that said Exclusion does apply to bar coverage.[2]

Such Exclusion applies to "'bodily injury' . . . arising out of either your ongoing operations or operations included within the "products completed operations hazard" at the location described in the Schedule of this endorsement, as a consolidated (wrap-up) insurance program has been provided by the prime contractor . . . ." It is uncontested that the schedule of Named Insureds lists, *inter alia*, KEC, but not Structure Tone or 200 Fifth. And, it is noted that the definition of "your", page 1 of 16 Commercial General Liability CG00011207, states

[2] Plaintiffs do not assert their estoppel argument premised on untimely disclaimer as to National's second basis for disclaimer, to wit: the Wrap-Up Exclusion.

"throughout this policy the words "you" and "your" refer to the Named Insured shown in the declarations and any other person or organization qualifying as a Named Insured under this policy."

However, it cannot be said that the Exclusion is only applicable to KEC's as National's "Named Insured." The Exclusion applies to bodily injury, *i.e.*, Farrington's alleged personal injury, "arising from" KEC's "ongoing operations," and when wrap-up insurance has been provided. The language of the Exclusion does not require that KEC be enrolled in the wrap-up program, but that a wrap-up insurance program exist and cover a bodily injury that arose from KEC's operations. It is uncontested that a wrap-up insurance policy was provided by Structure Tone, that Farrington's accident arose from KEC's ongoing operations, and that the wrap-up Structure Tone Policy are being defended under such policy. Therefore, since the Wrap-Up Exclusion applies, summary judgment dismissing the plaintiffs' claims for coverage is warranted.

As such, plaintiffs' cross-motion for summary judgment holding that National must indemnify them as additional insureds is unwarranted.

Further, plaintiffs' cross-motion for attorneys' fees is also unwarranted under the circumstances, as plaintiffs commenced this affirmative, declaratory judgment action against the insurer for defense *and indemnity* coverage (*First Jeffersonian Assocs. v Insurance Co. of N. Am.*, 262 AD2d 133, 691 NYS2d 506 [1st Dept 1999] (finding that although insurer was obligated to defend plaintiff at the outset of the underlying action, plaintiff was not entitled to recover its legal expenses in prosecuting the instant action) *citing Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12 [1979] (litigation expenses may not be had in an affirmative declaratory judgment "action brought by an assured to settle its rights . . . but only when he has been cast in a

defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations")).

However, the branch of plaintiffs' cross-motion for an order directing National to defend is granted solely to extent that National's duty to defend the underlying claims were triggered and remained in effect until the determination that the Wrap-Up Exclusion applies to bar coverage to plaintiffs. "An insurer's duty to defend is liberally construed and is broader than the duty to indemnify," in order to ensure an adequate defense of the insured, "without regard to the insured's ultimate likelihood of prevailing on the merits of a claim" (*Savik, Murray & Aurora Const. Management Co., LLC v ITT Hartford Ins. Group*, 86 AD3d 490, 927 NYS2d 634 [1st Dept 2011]; *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co.*, 16 NY3d 257, 264, 920 NYS2d 763, 945 NE2d 1013 [2011]). "A liability insurer has a duty to defend its insured in pending litigation if the pleadings allege a covered occurrence, even though the facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered" (*Savik, Murray & Aurora Const. Management Co., LLC v ITT Hartford Ins. Group, supra, citing Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63, 571 NYS2d 672, 575 NE2d 90 [1991]). However, although the obligation to defend is broader than the duty to indemnify," it "does not extend to claims not covered by the policy" (*Seneca Ins. Co., Inc. v Cimran Co., Inc.*, 106 AD3d 166, 963 NYS2d 182 [1st Dept 2013] *citing National Gen. Ins. Co. v Hartford Acc. & Indem. Co.*, 196 AD2d 414, 415, 601 NYS2d 4 [1st Dept 1993]). And, "[I]f the allegations interposed in the underlying complaint allow for no interpretation which brings them within the policy provisions, then no duty to defend exists" (*Seneca Ins. Co., Inc. v Cimran Co., supra*). It cannot be disputed that the allegations in the complaint and third-party complaint in the

underlying action, *i.e.*, that Farrington was injured while he was performing work for his employer, KEC, which was engaged by Structure Tone to perform certain electrical services pursuant to an agreement. By letter dated November 15, 2011, Chartis tendered the defense of Structure Tone and 200 Fifth to National, indicating that KEC was a subcontractor of Structure Tone, when Farrington, an employee of KEC, tripped and fell on construction debris and suffered injuries. Chartis advised that it received Farrington's complaint (which is dated October 25, 2011) and which alleged that Structure Tone and 200 Fifth (the putative additional insureds) violated Labor Law §200, 240, and 241. There is nothing in said complaint to indicate that the Wrap-Up Exclusion applied. Therefore, Farrington's pleadings alleged a covered occurrence, thereby triggering National's duty to defend.

However, once a determination is made that, as a matter of law, an insurer bears no obligation to indemnify the purported insured under any provision of the insurance policy, a declaration may be made that there is no obligation to defend (*Spoor-lasher Co., Inc. v Aetna Casualty and Surety Co.*, 39 NY2d 875, 352 NE2d 139, 386 NYS2d 221 [1976] ("A declaration that there is no obligation to defend could now properly be made only if it could be concluded as a matter of law that there is no possible factual or legal basis on which Aetna might eventually be held to be obligated to indemnify Spoor-Lasher under any provision of the insurance policy—the duplicate hold-harmless provision or possibly some other provision"); *cf., Westpoint Intern., Inc. v American Intern. South Ins. Co.*, 71 AD3d 561, 899 NYS2d 8 [1st Dept 2010] (" An insurer has a duty to defend so long as there is any possibility of coverage under the policy, and here the possibility of coverage has not been eliminated)).

In light of the above, plaintiffs' cross-motion for summary judgment in granted, in part, to

the extent of holding that National's obligation to defend plaintiffs under the National Policy was triggered and such obligation is deemed terminated upon the instant decision of this Court. National's duty to defend in this regard is undisturbed by the potential existence of other coverage afforded to plaintiffs

However, "In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue" *(BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 871 NE2d 1128, 840 NYS2d 302 [2007]).

The Structure Tone Policy provides, under its "Amendment of Other Insurance" endorsement, that it is excess over any other insurance, *i.e.*, the National Policy, "Unless such [National] insurance is specifically purchased to apply as excess (which National denies it was), *or* unless "you [Structure Tone] are obligated by contract to provide primary insurance." A review of National's submissions indicates that Structure Tone was obligated to obtain insurance (see Structure Tone Policy affording coverage "Where Required By Written Contract" and Article 11 Insurance and Bonds §11.1, entitled Contractor's Liability Insurance cited by National).[3]

However, the National Policy provides, under its "Amendment to Other Insurance Condition" endorsement, that it is primary unless the excess provision applies, and the excess provision provides that the Policy is excess over *any other insurance* (*i.e.*, the Structure Tone

---

[3] The Contractor shall purchase from and maintain . . . such insurance required by the Contract Documents as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable: . . . .2 claims for damages because of bodily injury . . of the Contractor's employees; .3 claims for damages because of bodily injury . . . of any person other than the Contractor's employees; . . . ."

Policy) "*That is* valid and *collectible insurance available to you* . . . ." (Emphasis added). That the Structure Tone Policy currently affords plaintiffs *defense* coverage is not dispositive as to whether such Policy constitutes collectible insurance. And, because the carrier for the Structure Tone Policy is not party to this declaratory judgment action, and there is no determination that the Structure Tone Policy is "collectible" by plaintiffs, it cannot be said that the National Policy is primary as a matter of law. Thus, the priority of coverage cannot be determined, at this juncture (*BP Air Conditioning Corp. v One Beacon Ins. Group*, *supra* (agreeing that priority of coverage could not be determined where *none of the other insurance carriers were parties to the declaratory judgment action* and no other relevant policies have been submitted).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant National Casualty Company for summary judgment dismissing this action and declaring that it is not required to defend and/or indemnify plaintiffs, 200 Fifth Avenue Owner, LLC and Structure Tone, Inc. in connection with the underlying personal injury accident action is granted solely to the extent that National is not required to indemnify plaintiffs in the underlying action; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment holding that National Casualty Company is required to defend and indemnify them as additional insureds on a primary, non-contributory basis and reimburse them for legal fees and costs incurred in the prosecution of this action is granted solely to the extent that National is obligated to defend plaintiffs, and such

obligation expired upon the date of the Court's instant decision; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: February 27, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD