

<b>Structure Tone, Inc. v Travelers Indem. Co.</b>
2015 NY Slip Op 30706(U)
April 29, 2015
Supreme Court, New York County
Docket Number: 159598/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
STRUCTURE TONE, INC.,

Plaintiff,

- v -

Index No.  
159598/2014

**DECISION  
and ORDER**

Mot. Seq. 002

THE TRAVELERS INDEMNITY COMPANY,  
HARLEYSVILLE INSURANCE COMPANY OF  
NEW YORK, ZURICH AMERICAN INSURANCE  
COMPANY, NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA,  
BURLINGTON INSURANCE COMPANY, and  
CASTLEPOINT INSURANCE COMPANY

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Structure Tone, Inc. (“Plaintiff” or “STI”), brings this action for breach of contract and declaratory relief regarding various insurers’ alleged coverage obligations in connection with a personal injury lawsuit for bodily injuries allegedly sustained in a construction site accident. The underlying personal injury action is currently pending in the Supreme Court of New York, New York County, under the caption, *Zoran Scekcic v. SL Green Realty Corp., et al.*, Index No. 113386/2010 (the “Scekcic Action”).

Defendants National Union Fire Insurance Company of Pittsburgh, P.A. (“National Union”), Zurich American Insurance Company (“Zurich”), Castlepoint Insurance Company (“Castlepoint”), and Harleystown Insurance Company of New York (“Harleystown”) filed answers to Plaintiff’s complaint with affirmative defenses and cross-claims on November 17, 2014, November 21, 2014, December 19, 2014, and January 30, 2015, respectively.

Defendant Burlington Insurance Company (“Burlington”) now moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing Plaintiff’s complaint for lack of standing to maintain the instant action against Burlington.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t, 2003] [internal citations omitted]; CPLR § 3211[a][7]). The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution. (*Security Pac. Natl. Bank v. Evans*, 31 A.D.3d 278, 279 [1st Dep’t 2006]).

Under New York common law, “an injured person possessed no cause of action against the insurer of the tortfeasor.” (*Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 353 [2004] quoting *Jackson v Citizens Cas. Co.*, 277 NY 385, 389 [1938]). When a plaintiff acquired a judgment against the insured and the insured failed to satisfy the judgment due to insolvency, the plaintiff could not sue the insurance company directly because there was no privity of contract between plaintiff and the insurance carrier. (*Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 353 [2004]). Even when a tortfeasor had coverage under an existing insurance policy, the common-law rule created a hardship for an injured party who lacked the means to sue the insolvent tortfeasor’s insurance company directly and was therefore unable to gain access to available insurance proceeds. (*Id.* at 353-54 [2004]).

Insurance Law § 3420 “modifies” New York common law by granting injured third parties a limited cause of action against insurers. (*Commonwealth Land Title Ins. Co. v. Am. Signature Servs., Inc.*, 2014 U.S. Dist. LEXIS 22172, 1 at \*13 [E.D.N.Y. Feb 20, 2014] citing *Lang*, 3 N.Y.3d at 354; Ins. Law § 3420). Pursuant to Insurance Law § 3420, an injured third party has a right to sue the tortfeasor’s

insurer under limited circumstances: the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment, and await payment for 30 days. (*Lang*, 3 N.Y.3d at 354; Ins. Law § 3420[a][2]; Compliance with these requirements is a “condition precedent to a direct action against the insurance company.” (*Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 354 [2004]).

With respect to Burlington, Plaintiff’s complaint asserts one cause of action, Plaintiff’s seventh cause of action for declaratory judgment, against Burlington. Plaintiff’s complaint alleges that, “[o]n or about June 11, 2010, STI entered into a contract to act as a construction manager for a construction project located at 1515 Broadway, New York, New York (the ‘Project’).” Plaintiff’s complaint asserts:

On or about September 22, 2010, React Industries, Inc. (“React”) entered into a purchase order with STI to act as a subcontractor and to perform work at the Project, and on or about February 18, 2010, React executed a Blanket Insurance/Indemnity Agreement, which applies to all work performed by React for STI (the purchase order and Blanket Insurance/Indemnity Agreement executed by React hereinafter collectively known as the “STI-React Contract,” a copy of the STI-React Contract is attached hereto as Exhibit B)

(Compl. ¶ 19). Plaintiff’s complaint further alleges that, “[o]n or about August 3, 2010, React entered into a subcontract with FL Mechanical, LLC (‘FLM’) for FLM to perform work at the Project”. (Compl. ¶ 30).

Plaintiff’s complaint alleges that Burlington issued a commercial liability policy to FLM (the “Burlington Policy”), and that this policy names React as an additional insured. (Compl. ¶¶ 33, 35). Plaintiff’s complaint alleges that, “[o]n or about September 30, Zoran Scekic, an employee of FLM, was allegedly injured while performing work on the Project (the ‘Accident’).” (Compl. ¶ 40). Plaintiff’s complaint alleges that, “[o]n or about November 4, 2010, Mr. Scekic commenced [the Scekic Action] against STI and others, seeking damages as a result of the Accident”. (Compl. ¶ 41). Plaintiff’s complaint asserts, “On or about March 19, 2011, and subsequent dates thereafter, STI brought third-party actions against FRP and React, asserting, inter alia, a claim for contractual indemnification for the Scekic Action”. (Compl. ¶ 42).

Plaintiff's complaint asserts that, "[p]ursuant to the terms of the Burlington Policy, Burlington is obligated to defend and indemnify React in connection with the Scekic Action, including the contractual indemnification claim asserted by STI against React." (Compl. ¶ 77). Plaintiff's complaint further asserts:

An actual cause and justiciable controversy exists regarding Burlington's obligations under the Burlington Policy with regards to indemnification in connection with the Scekic Action, and a declaratory judgment, pursuant to N.Y. C.P.L.R. § 3001 and N.Y. Insurance Law § 3420, is necessary and appropriate to determine the rights and duties of STI and Burlington pursuant to the Burlington Policy.

(Compl. ¶ 77).

Here, even accepting Plaintiff's allegations as true, the four corners of Plaintiff's complaint do not plead any contract or privity between Plaintiff and Burlington. Plaintiff's complaint does not allege that Plaintiff is named as an additional insured under the Burlington Policy, and the four corners of Plaintiff's complaint do not plead a judgment against Burlington's insured in the Scekic action. Indeed, Plaintiff's complaint does not contain any factual allegations sufficient to support an inference that the conditions precedent to a third party direct action against an insurance company have been met. To the contrary, Plaintiff's complaint alleges that the Scekic Action is currently pending, and that the parties were unable to resolve their claims at mediation. (Compl. ¶ 46).

Accordingly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint are insufficient to allege a direct claim by Plaintiff, as claimant, against Burlington, as insurer, based on Burlington's purported obligation to React under the alleged Burlington Policy. Furthermore, to the extent that Plaintiff seeks coverage under the Burlington Policy for a future money judgment that has yet to be obtained, Plaintiff's complaint as against Burlington is premature.<sup>1</sup>

Wherefore, it is hereby

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<sup>1</sup> Burlington does not move to dismiss any cross-claims asserted against it. Accordingly, to the extent that National Union, Zurich, Castlepoint, or Harleysville assert any cross claims against Burlington in their respective answers to Plaintiff's complaint, those claims stand and are not addressed herein.

ORDERED that Burlington's motion to dismiss Plaintiff's complaint as against Burlington is granted and Plaintiff's complaint as against defendant Burlington Insurance Company is dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that Plaintiff's complaint as against the remaining defendants is severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 29 2015

  
EILEEN A. RAKOWER, J.S.C.