

Structure Tone LLC v Selective Way Ins. Co.

2024 NY Slip Op 33018(U)

August 23, 2024

Supreme Court, New York County

Docket Number: Index No. 656694/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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STRUCTURE TONE LLC, SUCCESSOR BY MERGER TO
STRUCTURE TONE, INC.,

Plaintiff,

INDEX NO. 656694/2020

MOTION DATE 06/01/2021

MOTION SEQ. NO. 001

- v -

SELECTIVE WAY INSURANCE COMPANY,

Defendant.

**DECISION + ORDER ON
MOTION**

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SELECTIVE WAY INSURANCE COMPANY,

Third-Party Plaintiff,

Third-Party
Index No. 595662/2021

-against-

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46 were read on this motion for PARTIAL SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, plaintiff’s motion for partial summary judgment is denied, for the reasons set forth in the opposition papers (NYSCEF Doc. Nos. 36, 41) and the exhibits attached thereto, in which the court concurs, as summarized herein.

This declaratory judgment action arises out of defendant’s denial of coverage to plaintiff in an underlying personal injury action captioned *Dorville v Structure Tone, Inc., et al.*, bearing index No. 154832/2017, and pending in this court before the Hon. Lyle E. Frank (the “underlying action”). In the underlying action, the plaintiff alleges that he was injured by a door installed by ST’s subcontractor, nonparty Patella Woodworking Corp., d/b/a Patella

Woodworking (“Patella”). The reader is referred to the recent summary judgment decision of Justice Frank in the underlying action for a fuller account of the facts and circumstances thereof (*Dorville v Structure Tone, Inc., et al.*, index No. 154832/2017, NYSCEF Doc. No. 582-587). As is relevant to this matter, defendant denied plaintiff’s tender of the underlying action on the ground that there was no basis to conclude that Patella’s operations had caused the plaintiff’s injury in the underlying action.

Plaintiff commenced this action seeking a declaratory judgment that it is an additional insured under defendant’s primary and umbrella policies issued to Patella; that such coverage is primary and non-contributory; and for a money judgment in the amount of its defense costs in the underlying action. Presently, plaintiff seeks partial summary judgment on its claim that it is an additional insured under the primary policy, and for its defense costs incurred to date. Defendant opposes the motion, claiming that such coverage, if any, is excess only by the terms of the policy, and that issues of fact related to the contract terms require denial of the motion.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court

should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, issues of fact regarding the existence and extent of coverage preclude summary judgment. There are two contracts between plaintiff and Patella, only one of which was in force at the time Patella's work on the project was completed in September 2015.¹ The contract, which is dated March 17, 2015, provides that Patella shall "purchase, maintain and provide insurance with the coverages, types and limits specified at www.certfocus.com under the above Project Number" (contract, NYSCEF Doc. No. 22 at C0011). The contract also provides later that "the insurance and indemnification provisions are set forth in the separate Blanket Insurance/Indemnity Agreement signed by [Patella], the terms of which are incorporated herein. In the absence of said Agreement, the following indemnification and insurance provisions shall apply" (*id.* at C0012, § 11). Finally, the contract provides that Patella shall obtain insurance meeting certain parameters, which do not include that the insurance shall be primary and non-contributory (*see id.*, § 11.3). Plaintiff submits a document captioned "Insurance Requirements," which purports to be taken from plaintiff's website, certfocus.com, and includes the requirement that insurance acquired by Patella be primary and non-contributory (Insurance Requirements, Moynihan aff, NYSCEF Doc. No. 21, Exhibit 4 [found at NYSCEF page 270 of 287]). The document's bottom right corner bears the date "12/1/2016," however; and there is no indication in the record to confirm that these requirements existed at the time plaintiff and Patella entered

¹ Plaintiff has withdrawn so much of the motion that seeks to rely on the subsequent contract entered into in December 2015 (reply memorandum of law, NYSCEF Doc. No. 45 at 8).

into their agreement in March 2015. No blanket agreement existed at the time Patella completed its work. If the “Insurance Requirements” document does not accurately reflect the incorporated requirements, then the remaining provisions of the contract do not require that additional insured coverage be primary and non-contributory.

The reason this dispute is important lies in the provisions of the insurance policy, specifically the “Additional Insured – Owners, Lessees or Contractors – Automatic Status When Required in Construction Agreement With You” endorsement (the “endorsement”). The endorsement provides that coverage under the policy “shall be excess with respect to [additional insureds]; any other valid and collectable insurance that person or organization has shall be primary with respect to this insurance, unless this coverage is required to be primary and/or not contributory in the contract or agreement [with any additional insured]” (policy, NYSCEF Doc. No. 23 at D0211). The above issue of fact prevents the court from determining whether the contract with Patella actually requires the additional insured coverage to be primary and/or non-contributory, and, therefore, the court cannot declare at this time that plaintiff is entitled to a primary and non-contributory defense in the underlying action. Therefore, the motion must be denied (*Rotuba Extruders*, 46 NY2d at 231).

Accordingly, it is hereby

ORDERED that plaintiff’s motion for partial summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1166, 111 Centre Street, New York, New York, on September 11, 2024, at 2:15 PM. Prior to the conference, the parties shall meet and confer regarding discovery and, in lieu of appearing at the conference, may submit a proposed preliminary conference order, in a form that substantially

conforms to the court's form Commercial Division Preliminary Conference Order located at https://ww2.nycourts.gov/courts/ljd/supctmanh/preliminary_conf_forms.shtml, to the Principal Court Attorney of this Part (Part 38) at ssyaggy@nycourts.gov.

This constitutes the decision and order of the court.

ENTER:



<u>8/23/2024</u>				<u>LOUIS L. NOCK, J.S.C.</u>
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				OTHER
				REFERENCE