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

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In the Matter of

INDEX NO. 405987/02

The Ancillary Receivership of

RELIANCE INSURANCE COMPANY

REPORT OF REFEREE

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MATTER: O'BRIEN & GERE TECHNICAL SERVICES

CLAIM NO: RN 97801825
POLICY NO. NTF 251657602
LEGAL FILE NO. L4616

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TO THE SUPREME COURT OF THE STATE OF NEW YORK::

The undersigned, as Referee, respectfully reports as follows:

I was appointed as Referee by Order of this Court dated the 30th day of November, 2006 to take evidence on objections of the above named claimant , O'Brien & Gere Technical Services, Inc., to the determination of its claims by the Ancillary Receiver, and report thereon.

The determination was that it was not entitled to insurance coverage, either for defense of a counterclaim against it, or for indemnification for the offset against a judgment in its favor, by reason of the counterclaim. The counterclaim against it arose out of construction work that commenced in 1998, and resulted in a decision that found it was entitled to recover on the basis of quantum meruit, but the amount was offset by reason of its liability on the counterclaim..

On December 14th, 2006 I executed the required Oath, and thereafter the parties agreed to a hearing based on submitted papers.

The documents before me consist of the following:

PARTY	DOCUMENT	DATE
O.G.	Submission in support of claim	6/22/06
O.G.	Affidavit of John Sutphen	6/22/06
NYLB	Affidavit of James Walsh	undated
NYLB	Affidavit of Frank Basso	undated

NYLB	Memorandum of Law	7/28/06
O.G.	Affidavit of John Sutphen	8/7/06
O.G.	Affidavit of Roy S. Moore	8/8/06
O.G.	Memorandum of Law	8/8/06
O.G.	Affidavit of John Sutphen	8/16/06
NYLB	Memorandum of law	8/16/06
NYLB	Brief	1/19/07
NYLB	Submission by respondent	1/9/07
O.G.	Affidavit of Steven Goebner	1/29/07
O.G.	Supplemental submission	1/31/07
O.G.	Post Hearing Submission	10/23/07
NYLB	Post trial Brief	10/13/07

Each affidavit contained numerous exhibits, including a copy of the insurance policy under which the claim is made, and a copy of the decision of the USDC for the Eastern District of Missouri.

Following these submissions and my analysis of them, I contacted the attorneys with some questions I had , and again with some further questions. and received letter answers from both sides, dated June 29, 2009,and then proceeded to re-analyze the case.

The question submitted is whether the claim of O'Brien & Gere Technical Services, Inc. (hereinafter "Technical Services" is covered for its claims by the policy issued by Reliance National Indemnity Company, and if so, the extent of the coverage.

Reliance Insurance company issued a "Consultants Environmental Liability Policy" to O'Brien & Gere Engineers, Inc. (hereinafter "Engineers"), under which the claimant, Technical Services, is one of approximately 10 additional insureds, under endorsement No 1. (See page marked BB321 of Exhibit H to affidavit of Sutphen dated June 22, 2006)

The Insuring Agreement provides both Coverage A - Professional Liability, and Coverage B - Contractors Pollution Legal Liability. As amended by Endorsement No. 018, (Page BB307 to Exhibit H of Sutphin affidavit dated June 22, 2006) they are respectively defined as follows:

"Coverage A- PROFESSIONAL LIABILITY
To pay on behalf of the INSURED all sums in excess of he Retention Amount stated in Item 4 of the Declarations which the INSURED shall become legally obligated to pay as DAMAGES and/or CLAIMS EXPENSE as a result of CLAIMS first made against the insured and reported to the Company, in writing, as soon as possible during the POLICY PERIOD. ,..... provided that said CLAIM is a result of any act, error or omission in PROFESSIONAL SERVICES rendered or that should have been rendered by the INSURED or by any person for whose acts, errors or omission the INSURED is legally responsible, and arising out of the conduct of the insured's profession as described in Item 5 of the Declarations. "

"Coverage B - CONTRACTOR'S POLLUTION LEGAL LIABILITY
To pay on behalf of the INSURED all sums in excess of he Retention Amount stated in Item 4 of the Declarations which the INSURED shall become legally obligated to pay as DAMAGES and/or CLAIMS EXPENSE as a result of CLAIMS first made against the insured and reported to the Company in writing, as soon as possible during the POLICY PERIOD, ...for POLLUTION CONDITIONS arising out of the performance of CONTRACTING SERVICES rendered by or on behalf of the INSURED."

and POLLUTION CONDITIONS, which is covered in Coverage B, is defined in Item J of Section II- Definitions, as:

" the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, which results in bodily injury or PROPERTY DAMAGE."

Since none of the items claimed in the offset arise out of "Pollution Conditions" I shall not discuss Coverage B any further.

Endorsement No 019 (Page BB300 of Exhibit H of Sutphin affidavit dated June 22, 2006) with respect to claims expense states at Par 4:"

"The Insured shall pay all DAMAGES up to the amount of the Retention - each CLAIM stated in the Declarations. The INSURED shall also pay all CLAIMS EXPENSE up to 50% of the amount of the Retention- each claim stated in the declarations. To the extent payments for DAMAGES and CLAIMS EXPENSE exceed the Retention stated in the Declarations , any further DAMAGES or CLAIMS EXPENSE shall be paid by the Company, ..."

CLAIMS EXPENSE is further clarified by Endorsement No. 020 (Page BB298 to Exhibit H of Sutphin affidavit dated June 22, 2006) limiting payment of claims for defense to 50% of those incurred.

The DECLARATIONS page of the policy was inadvertently omitted from the affidavit of Mr. Sutphen, but is found as part of Exhibit A (the Policy) to the affidavit of James Walsh

Item 5 of the Declarations states only:

"COVERED PROFESSIONAL SERVICE(S) See endorsement #002"

which in turn merely states that:

"This policy applies to CLAIMS based on or arising out of the following PROFESSIONAL OR CONTRACTING SERVICES only:
1. All PROFESSIONAL OR CONTRACTING SERVICES of the NAMED INSURED(S) subject to the terms and conditions of the Policy to which this endorsement is attached, ...:"

The Policy also contains certain exclusions from coverage. Relevant here is Section IV, EXCLUSIONS., which states:

"A. This policy does not apply: ...

10 (at Page BB332 of the affidavit of John Sutphen dated June 22, 2006)

"Faulty workmanship/Own Work: to any CLAIM based upon or arising out of the cost to repair or replace INSURED'S work in any construction, erection, fabrication, installation, assembly, manufacture, or the work of any subcontractor of the insured or other work on the INSURED'S behalf. This includes, but is not limited to, the cost to investigate the INSURED'S work, or the cost of any materials, parts, labor or equipment furnished in connection n with such repair or replacement."

BASIS and NATURE OF CLAIM:

O'Brien and Gere Technical Services, Inc., a construction management company, had a a sub- contract with Fru-Con/Fluor Daniel Joint Venture, a general contractor, to design and build six buildings in Missouri for the ultimate use of Proctor & Gamble. Their work began in April, 1998 and continued until Technical Services was terminated in April, 1999.

The construction contract, which was ambiguous at best, was abandoned by the parties but the parties continued with the construction of the project until Technical Services was terminated.

Technical Services thereafter commenced an action in the United States District Court (the Court) for the Eastern District of Missouri against the Joint Venture to recover its damages.

The Joint Venture, in turn, filed a counterclaim against Technical Services. The action

was tried and decided in a lengthy and detailed opinion, and the judgment thereon was affirmed by the United States Court of Appeals for the Eighth Circuit.

The judgment awarded Technical Services damages in the amount of $5,365,866. not based on contract damages but on quantum meruit. However on the Counterclaim, which is the basis for Technical Services claim under the policy, the Court, found that Technical Services' work was defective, awarded $1,369,007 to the Joint Venture as "backcharges" resulting in a net judgment in favor of Technical Services in the amount of $3,996,859.

It is these backcharges for which Technical Services seeks recovery under the insurance policy.

The District Court found that the Joint Venture's backcharges were broken into three categories: completion, schedule and rework, and determined that it was entitled to offsets as follows:

Completion	$708, 144.
Schedule	$ 98,663.
Rework	$ 562,200.

Technical Services claims here that it is entitled to reimbursement from its insurer for these sums, in addition to its legal fees of $66,597.64 in defending against the counterclaim.

Technical Services claims its liability for all of the counterclaim damages arose because of its professional negligence in designing the buildings, and points to Page 32 of the District Court's findings of fact in its decision (Page BB129 of Exhibit E to the affidavit of John Sutphen dated June 22, 2006),

. At that page the District Court stated:

> "The Joint Venture established that O'Brien & Gere's costs as reflected in its cost report are not a reasonable measure of value. First, O'Brien & Gere's initial seismic analysis was incorrect. Second, O'Brien & Gere failed to assign to a sub-tier contractor tasks that were O'Brien & Gere's responsibility to complete.... . Third, documents in the record establish that from time to time O'Brien & Gere questioned its sub-contractors costs but nevertheless passed them on to the Joint Venture for payment. Fourth.... ."

The District Court found (pp3-4 of its decision) that a crucial requirement was that the bidders' proposal conform to seismic specifications set out in a document prepared by Simpson,

Gumpertz and Hughes, known as the SGH Report..

From the decision of the District Court, I concluded that plaintiff O'Brien & Gere Technical Services, Inc. did not perform the professional work of engineering and seismic analysis work, that it claims, but that was done by a separate corporate entity, on which it relied for that type of professional work.

This was O'Brien & Gere Engineers, Inc., (Engineers) which I was advised by plaintiff's counsel had a sub-contract with Technical Services to do the seismic analysis. While it appears that the plaintiff appears to rely on an implied claim that that O'Brien & Gere Engineers, Inc. is the same entity as O'Brien & Gere Technical Services, Inc., in fact they are separate corporate entities. Having chosen to use separate corporate forms for their activities, they are bound by that choice.

> "But once they adopt the corporate form and gain the right to the immunities that result they suffer the consequence of limited control and must seek their remedies through the corporation. Drucklieb v. Sam H. Harris, 209 N.Y. 211, 102 N.E. 599. One is not permitted a mental reservation behind the corporate front which is presented to the public with which one deals." Manacher v. Central Coal Co.125 N.Y.S.2d 260, aff'd 284 AD 380, 131 NYS2d 571.

The SGH report identified the area in which the buildings were to be constructed as being in Seismic Zone 28, but apparently Engineers identified it as Seismic Zone 3 (see page 11 of the decision of the District Court) There was an additional requirement, which was not taken into account, of the use of a coefficient from the National Hazard Reduction Program.

The analysis, prepared by Engineers but used by Technical Services, resulted in, among other things, furnishing a substantially inadequate amount of steel and of concrete.

Seismic analysis clearly is professional work, and while O'Brien & Gere Engineers, Inc. might have been liable for professional negligence, Technical Services, Inc., which is not a professional corporation and does not do "professional " work has no right to recover under the insurance policy for what might be the professional negligence of an entity it chose to perform the analysis. While Technical Services is legally responsible under its contract with the Joint

Venture for the performance of those professional services, that responsibility is not covered by the Policy. Coverage A, as previously stated, only grants coverage for

> .."any act, error or omission in PROFESSIONAL SERVICES rendered or that should have been rendered by the INSURED or by any person for whose acts, errors or omissions the INSURED is legally responsible, and arising out of the INSURED's profession..... ." (Underlining added)

Designing buildings, and dong a seismic analysis is clearly the work of architects and engineers; both are professions, requiring study, degrees and licenses. While the work of O'Brien & Gere Engineers Inc. is probably professional, and it is the named insured under the policy, it has made no claim here.

That Technical Services chose Engineers (which was the main insured under the policy) to do the design work, the work of Technical Services did not arise

"out of the INSURED's profession ..."

as required by the insurance Policy. See Coverage A - Professional Liability in Section 1, of the insuring Agreement. The District Court found (See page 32 of its decision) that its claim was

"for its own management services"

but this is not "professional " work.

And in any event, Technical Services has presented no evidence of the amount of any offset it sustained as a result of the improper seismic analysis and design, separate from the offset amounts found by he District Court.

Technical Services might have a cause of action against Engineers, and Engineers might have a claim under its insurance policy, but that is not before me.

Having concluded that the Professional Services portion of the policy, Coverage A, does not cover O'Brien & Gere Technical Services, Inc., my analysis and Report next turns to the separate items found by the District Court The findings of the District Court, as affirmed by the Circuit Court of Appeals, are determinative of the nature of the backcharges.

COMPLETION:

The District Court found that the Joint Venture was entitled to recover $708,144 for work that Technical Services failed to assign to a sub-contractor but had been its responsibility to complete, but that it failed to complete.

SCHEDULE

The District Court allowed the Joint Venture the sum of $98,663. This was based on the milestone dates, which were dates that had been agreed to between the parties. Failure by Technical Services to meet those dates was a breach of its obligation, and apparently caused damage to the Joint Venture.

REWORK

For work done by Technical Services but that had to be redone, the District Court allowed the Joint Venture $562,200.

Not only are these items not covered by Coverage A or by Coverage B - the Contractors Pollution Legal Liability portion of the Policy, but Exclusion No 10 of the Policy states that the policy does not apply

> "To any CLAIM based upon or arising out of the cost to repair or replace the INSURED'S work in any construction, erection, fabrication, installation, assembly, manufacture, or the work of any subcontractor of the INSURED or other work on the INSURED's behalf. This includes, but is not limited to the cost to investigate the INSURED's work, or the cost of any materials, parts, labor or equipment furnished in connection with such repair or replacement."

Although Claimant characterizes these damages as the result of professional negligence, the findings of the District Court clearly show that they fall within Exclusion 10 of the policy. The construction Technical services would like the Court to adopt would turn the liability policy into the equivalent of a performance bond, See Zandri Constr.Co. v Fireman's Ins. Co. of Newark, 81 Ad2d 106, 440 N.y.S.2d 353; Parkset Plumbing & Heating Corp v Reliance Insurance Company et al., 87 A.D.2d 646, 448 N.Y.S. 2d 739; Lowville Producer's Dairy Co-operative , Inc v American Motorists Insurance Company, 198 AD2d 851,604 N.Y.S.2d 421; George A. Fuller Company v United Stated Fidelity and Guaranty Company, 200 A.D.2d 255, 613 N.Y.S.2d 152; see also J.G.A. Construction Corporation v The Charter Oak Fie

Insurance Company et als, 66 A.D.2d 315, 414 N.Y.S.2d 385,

DEFENSES:

The Liquidation Bureau has set forth several defenses to the claims made against it.

Its first defense is that no judgment has been entered against the claimant, and therefore the insurer has no obligation to pay anything. It relies on the provision of the Policy, under which the insurer agrees

> "To pay on behalf of the INSURED all sums in excess of the retention Amount stated in item4 of the Declarations which the INSURED shall become legally obligated to pay as DAMAGES and/or CLAIMS EXPENSE first made against the INSURED....."
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> And damages is defined in Endorsement No. 010 as follows:
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> "DAMAGES meas a monetary judgment, award or settlement of compensatory damages. DAMAGES does not include .....the return of fees or charges for services rendered or expenses incurred by the INSURED for redesign, changes, additions or remedies necessitated by a CLAIM. ..."

and the Bureau argues that since the Joint Venture's claim against the plaintiff was dismissed, the insured had no damages under the policy.

I cannot agree with the Bureau's analysis. A set-off is similar in nature to an award of compensatory damages; if it had been the basis of a separate action there would have been a formal judgment.

The Bureau's second defense is that in any event there is a Limitation to $300,000 -- the limit of liability under the Missouri Property & Casualty Insurance Guaranty Association.

Technical Services argues that the greater part of their work took place in New York, not in Missouri, and that therefore the Missouri law does not apply. It asks this Court to apply the limitations to $1,000,000 based on the limitations found inNew York Law and Regulations. It bases this argument on the claim that the engineering work it did took place in New York.

The construction of the buildings under the contract was clearly in the state of Missouri The failure of Technical Services to complete portions of the work was a failure in Missouri, not in New York. The improper work that was required to be redone was in Missouri.

A Claim filed by Technical Services stated that the location of loss was in Missouri See Exh J to affidavit of James Walsh.

The proportion of the engineering work that was done by O'Brien & Gere Engineers, Inc to the construction work was relatively small. The District Court found that Technical Services claimed that its total costs were $37,910,400. Of this, the engineering work done by Engineers was only $1,800,000, which is less than 5% of the total cost. (See page 32 of the decision)

The engineering work was not done by O'Brien & Gere Technical Services, Inc., but by a different corporation, O'Brien & Gere Engineers, Inc. which apparently is based in New York. Since it is a separate corporation, O'Brien & Gere Technical Services, Inc. cannot rely on the location of the engineering work as a basis for my finding that its work was done in New York.

Under these circumstances, it appears to me that Missouri is the place of work, and the Missouri law should be applied.

O'Brien & Gere Technical Services has also made a claim for attorney fees. In the amount of $66,597.64 which it incurred in defending against the counterclaim by the Joint Venture.

The provision of the Policy which allows the Insured to recover its attorney's fees for expenses it incurred is:

> "Legal defense costs that are incurred shall be applied against the retention up to 50% of the costs of legal defense and, in such event, the company shall be liable for legal defense costs (except those due to any offset against liability limits) exceeding that amount or percentage."

50% of the legal fees amounts to $33,298.82 which must be applied against the retention, which in item 4 of the Declarations is stated to be $250,000. The balance of $33,298.82 is the responsibility of Reliance.

The foregoing is my Report, which is Respectfully submitted.

July 15, 2009

Referee