

**Elefky Enters., Inc. v Utica First Ins.  
Co.**

2008 NY Slip Op 30056(U)

January 7, 2008

Supreme Court, New York County

Docket Number: 0603275/2004

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PRESENT: Hon. \_\_\_\_\_ J.S.C. PART 12  
Justice

ELFKY ENTERPRISES, INC.

INDEX NO. 603275104

- v -

UTICA FIRST INSUR. CO.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

J.S.C.

FILED

JAN 11 2008

NEW YORK COUNTY CLERK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: \_\_\_\_\_

Dated: 1/7/08

Check one:  FINAL DISPOSITION

Signature: \_\_\_\_\_  
BARBARA R. KAPNICK J.S.C.  
 NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
ELEFKY ENTERPRISES, INC. d/b/a  
MANHATTAN MUFFIN,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 603275/04  
Motion Sequence No. 001

UTICA FIRST INSURANCE COMPANY,  
HERO CROWN DENTAL LAB, INC.,  
COLLEGIATE REFORMED PROTESTANT  
DUTCH CHURCH OF THE CITY OF NEW YORK,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

On or about June 23, 2004, plaintiff Elefky Enterprises d/b/a Manhattan Muffin ("Manhattan Muffin") sustained property damage to its leased premises at 11 John Street, New York, New York,, when a water pipe from an upstairs office occupied by defendant Hero Crown Dental Lab, Inc. ("Dental Lab") ruptured or burst. The building was owned by Collegiate Reformed Protestant Dutch Church of the City of New York ("Dutch Church").<sup>1</sup>

Plaintiff filed a claim with its insurer, defendant Utica First Insurance Company ("Utica"), which had issued it a Business Owners Policy. By letter dated June 23, 2004, the very same day as the incident, Utica notified plaintiff that it was "sorry to inform you that we cannot be of assistance to you with this matter" on the

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<sup>1</sup> Dutch Church was originally named as a defendant herein. However, the action against it was discontinued before it served an answer in exchange for \$15,000.00 in rental credits.

ground that the type of loss plaintiff had sustained was not covered within the named perils set forth in the policy.

In this action, plaintiff seeks to recover damages against defendant Dental Lab, including lost income, lost business property and loss of the use of its leased premises, for alleged: (a) negligence (first cause of action); and (b) breach of its obligations under its Lease with Dutch Church to obtain and maintain comprehensive general liability insurance regarding its dental facility (second cause of action).<sup>2</sup>

Plaintiff also seeks a judgment declaring that defendant Utica is liable under its contract of insurance with plaintiff to indemnify plaintiff for all losses, damages and expenses, including legal fees, associated with this incident (third cause of action) and awarding damages against defendant Utica (fourth cause of action).

Defendant Utica now moves for summary judgment declaring, pursuant to CPLR § 3001, that Utica has no coverage obligations to plaintiff for the alleged loss at issue in the instant lawsuit

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<sup>2</sup> Plaintiff contends that it is a third party beneficiary of that agreement.

under the policy of insurance issued by it to plaintiff which specifically provides, in relevant part, as follows:

PERILS COVERED

The Perils Covered apply to Coverage A - Buildings, Coverage B - Business Personal Property and Coverage C - Loss of Income.

In the following Perils Covered, the term "we cover" means "we insure against direct physical loss."

\* \* \*

3. Explosion - We cover loss caused by explosion. This peril does not include loss caused by rupturing or bursting of water pipes (emphasis supplied); rupturing, bursting or operating of pressure release devices; electrical arcing; mechanical breakdown or rupturing or bursting of moving parts of machinery caused by centrifugal force; or rupturing or bursting due to the expansion of contents of a building or structure due to water.

Plaintiff argues in opposition that: (i) the policy is ambiguous because there are no exclusions for water damage caused by the flow of water from above the premises, even though there is an exclusion for water damage from surface waters, water below the surface, or leaks into a building; and (ii) that there are triable issues of fact as to whether or not this loss is covered under the policy since Utica never investigated the cause of the loss.

Based on the papers submitted and the oral argument held on the record on September 5, 2007, this Court finds that plaintiff

has failed to establish that the language of the exclusion is ambiguous. The provision must, therefore, be given its "plain and ordinary meaning," and this Court must "refrain from rewriting the agreement" (Government Empls. Ins. Co. v. Kligler, 42 N.Y.2d 863, 864 [1977]).

Plaintiff's Vice President, Vivien Elefky, testified at her deposition that she went up to the Dental Lab and saw "a pipe under a sink that was a flexi pipe that came out or burst." Therefore, this Court is constrained to find that the above-cited exclusion applies in this case.

Accordingly, defendant Utica's motion for summary judgment is granted, and it is hereby

ORDERED and DECLARED that Utica has no coverage obligations to plaintiff for the alleged loss at issue in this action, and it is further

ORDERED that the Clerk may enter judgment dismissing plaintiff's claims against defendant Utica with prejudice and without costs or disbursements.

Plaintiff's claims against defendant Dental Lab are severed and continued, and are removed pursuant to CPLR § 325(d) to the

Civil Court, New York County, by separate order issued simultaneously herewith.

This constitutes the decision and order of this Court.

Date: January 7, 2008



Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE