

**Wonder Works Constr. Corp. v Unitech
Assoc. Corp.**

2008 NY Slip Op 30870(U)

March 24, 2008

Supreme Court, New York County

Docket Number: 0106864/2004

Judge: Barbara Kapnick

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 106846/2004
WONDER WORKS CONSTRUCTION
vs
UNITECH ASSOCIATES
Sequence Number : 002
SUMMARY JUDGEMENT

INDEX NO. 106864/04
MOTION DATE _____
MOTION SEQ. NO. 002
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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

MAR 27 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/24/08

[Signature]
BARBARA R. KAPNICK /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X

WONDER WORKS CONSTRUCTION CORP.,

Plaintiff,

-against-

UNITECH ASSOCIATES CORP. f/k/a LAGOS
CONTRACTING, INC., ALLCITY INSURANCE
COMPANY, COMMERCIAL UNDERWRITERS
INSURANCE COMPANY and 333 EAST 66TH
STREET CORPORATION,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

In this action, Wonder Works Construction Corp. ("Wonder Works") seeks a judgment declaring that defendant Allcity Insurance Company ("Allcity") is obligated to defend and indemnify it in the underlying action, 333 East 66th Street Corp. v. Wonder Works, et al., Index No. 602306/00,¹ on the grounds that: (i) Wonder Works is an 'additional insured' under a policy issued by Allcity to Unitech Associates Corp. f/k/a Lagos Contracting, Inc. ("Lagos"); and (ii) Allcity wrongfully disclaimed coverage to Lagos.

FILED
MAR 27 2008
NEW YORK
COUNTY CLERK'S OFFICE

¹ In the underlying action, 333 East 66th Street Corporation seeks to recover damages against Wonder Works and others in connection with the exterior renovation of a building located at 333 East 66th Street, New York, New York, claiming that the building's granite facade was stained during the course of the contractor's work.

Wonder Works also seeks a judgment declaring that defendant Commercial Underwriters Insurance Company ("CUIC") is obligated to defend and indemnify it in the underlying action.

Defendant Allcity now moves for summary judgment declaring that it has no duty to defend or indemnify plaintiff Wonder Works and dismissing all claims and cross-claims against it, on the grounds that:

(1) all of the claims in the underlying action occurred before Wonder Works was added as an additional insured or after the entire policy was cancelled (i.e., there was no "occurrence" during the policy period);

(2) even if Wonder Works had some basis for a claim for insurance coverage for the matters in issue, Wonder Works would still not be entitled to coverage because it failed to provide Allcity with prompt notice of the lawsuit against it; i.e., Wonder Works did not forward a copy of the underlying Complaint or seek coverage from Allcity until it commenced this declaratory judgment action in March 2004;

(3) the claims in the underlying action arise out of a dispute between an owner and a contractor as to the sufficiency of the contractor's work under a construction contract, and do not involve a covered "occurrence" or "accident";

(4) the claims in the underlying action are barred by various specific exclusions in the policy; and

(5) Wonder Works has no standing to litigate the issue of whether or not Allcity's disclaimer with respect to Lagos was valid.

Co-defendant CUIIC argues in partial opposition to the motion that to the extent that this Court determines that the Complaint in the underlying action did, in fact, trigger Allcity's initial duty to defend Wonder Works, this Court should find that Allcity must pay for its pro-rata share of Wonder Works' defense costs in the underlying action.

Wonder Works argues in opposition to the motion that Allcity had a duty to defend it against the property damage claims in the underlying action, since the underlying Complaint did not seek damages for breach of contract.

Wonder Works concedes that the only event which occurred during the policy period was the hiring of an architect, but argues that this is not germane to the issues before this Court on the instant motion because Allcity's broad duty to defend was not dependent on facts learned during discovery in the underlying action.

Wonder Works further argues that Allcity had 'notice' of the underlying occurrence because an Allcity investigator took a

statement from Michael Ambrosino, Vice President of Wonder Works, on July 29, 1996 regarding the damage to the granite.

However, this statement was taken in the course of an investigation of the claim filed by its primary insured (i.e., Lagos) and not as a result of a request for coverage from Wonder Works.

"The law is clear that an insured's obligation to provide timely notice is not excused on the basis that the insurer has received notice of the underlying occurrence from an independent source", including notice received from another insured. Travelers Insur. Co. v. Volmar Constr. Co., 300 A.D.2d 40, 43 (1st Dep't 2002). See also, National Casualty Co. v. Paxson Communications Corp., 304 A.D.2d 391 (1st Dep't 2003); American Manufacturers Mutual Ins. Co. v. CMA Enterprises, Ltd., 246 A.D.2d 373 (1st Dep't 1998).

Therefore, based on the papers submitted and the oral argument held on the record on February 6, 2008, this Court finds that plaintiff's delay in providing notice to Allcity of the underlying claim and lawsuit was unreasonable as a matter of law and relieved Allcity of any obligation to defend and indemnify Wonder Works. See, American Manufacturers Mutual Ins. Co. v. CMA Enterprises, Ltd., supra at 373.

Accordingly, Allcity's motion for summary judgment is granted, and it is

ORDERED and DECLARED that Allcity has no duty to defend and indemnify Wonder Works in the underlying action, and it is further

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

Plaintiff's claims against the co-defendants are severed and continued.

A further conference in this declaratory action, together with the underlying action, shall be held in IA Part 12, 60 Centre Street, Room 341 on April 30, 2008 at 11:00 a.m. Counsel for Wonder Works shall notify counsel for all parties in both actions of the conference date.

This constitutes the decision and order of this Court.

Dated: March 24, 2008


BARBARA R. KAPNICK
J.S.C.

FILED BARBARA R. KAPNICK
MAR 27 2008 J.S.C.
NEW YORK
COUNTY CLERK'S OFFICE