

**Silverite Constr. Co., Inc. v One Beacon Ins. Co.**

2008 NY Slip Op 30920(U)

March 26, 2008

Supreme Court, New York County

Docket Number: 0603379/2006

Judge: Judith J. Gische

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

PRESENT.

PART 19

Justice

Index Number : 603379/2006

**SILVERITE CONSTRUCTION CO. INC**

VS.

**ONEBEACON INSURANCE COMPANY.**

SEQUENCE NUMBER : # 002

SUMMARY JUDGMENT

INDEX NO. 603379-06

MOTION DATE #002

MOTION SEQ. NO. #002

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

are read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No *83212 also*

Upon the foregoing papers, it is ordered that this motion

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

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

**FILED**

MAR 3 1 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: March 26 2006

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----x  
Silverite Construction Company, Inc. and  
New York City Department of  
Environmental Protection,

Plaintiffs,

-against-

One Beacon Insurance Company,  
as successor of American Specialty  
Insurance Company and  
United Aluminum Door, Inc.,

Defendants.  
-----x

**DECISION/ ORDER**

Index No.: 603379/06

Seq. No.: 002

Present:

Hon. Judith J. Gische

J.S.C.

**FILED**  
MAR 3 1 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Pltfs' n/m [3212] w/SDS affid, exhs .....	1
Def OneBeacon x/m [3212] w/JMR affirm, exhs .....	2
Pltfs' reply/ opp to x/m w/SDS affid .....	3
Def OneBeacon reply/ opp w/JMR affirm .....	4
Transcript 12/20/07 .....	5

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action for a declaratory judgment. Issue has been joined. The court now has before it a motion by plaintiffs, and a cross motion by defendants, for summary judgment. Since the motions are timely, they will be decided. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

**Arguments**

Plaintiff New York City Department of Environmental Protection ("DEP") is the owner of the Newtown Creek Water Pollution Control Plant ("the project"). It hired co-plaintiff Silverite Construction Company, Inc. ("Silverite") to act as its general contractor and to provide labor, material, etc., in connection with that project. Silverite entered into a sub-contract with defendant United Aluminum Door, Inc. ("UAD"). UAD, in turn, entered into a sub-subcontract with Architcraft, Inc. ("Architcraft").

An Architcraft employee ("Pemberton") was injured at the project on March 23, 2004. He filed a notice of claim with the City (DEP) dated March 29, 2004. A "50-h" hearing was held on May 19, 2004. Thereafter, he commenced an action against the DEP and Silverite in Supreme Court, Kings County (Pemberton v. City of New York, DEP and Silverite Construction Company, Inc., Index No. 16854/04) ( the "Pemberton action"). The DEP was served with the summons and complaint on June 4, 2004; Silverite was served September 21, 2004.

As per article 13 of UAD's subcontract with Silverite, made January 14, 2002, UAD agreed, and was obligated, to maintain commercial general liability insurance ["CGL"], naming Silverite and DEP as additional insureds of its policy. UAD had a CGL policy in effect with a predecessor of OneBeacon Insurance Company ("OneBeacon") at the time of the accident (Policy No. 760-00-74-24-001).

OneBeacon has disclaimed coverage because they claim plaintiffs are not additional insureds and because they did not timely provide notice of an occurrence within the meaning of UAD's policy. Plaintiffs now seek a declaration that not only are they additional insureds under UAD's policy with OneBeacon, but they are also entitled to defense and indemnification in the Pemberton action. Defendants have now

retreated from their original legal position (and defense) that the plaintiffs are not additional insureds. This point is now conceded, and what remains to be decided are the timeliness claims raised by each side.

Plaintiffs contend that they did not delay in providing OneBeacon with timely notice of an occurrence, but did so as soon as "practicable," thereby complying with their obligations under UAD's CGL policy with OneBeacon. Plaintiffs argue that Pemberton was injured March 23, 2004, but returned to work only six (6) days later on March 29, 2004, leading Silverite personnel in charge of safety to believe that Pemberton's injuries were not "serious," or at least would not give rise to (or support) a Labor Law claim against them. Although plaintiffs admit that a Silverite employee/supervisor reported Pemberton's accident on the day it happened ("iron worker slipped on ice, 3<sup>rd</sup> floor, back injury") in the daily inspection, it was not included in the monthly site safety audit report for March 2004.

Plaintiffs further contend once DEP was served with the summons and complaint in the Pemberton action, it immediately notified Silverite's liability insurer ("Zurich") of the lawsuit, first by phone and then by letter dated July 12, 2004 with a copy of the summons and complaint. Silverite, the City and DEP are all named defendants in the caption. By letter dated July 8, 2004, Zurich notified OneBeacon of "an accident that occurred to Joseph Pemberton . . ." OneBeacon responded to that letter, containing Zurich's tender and accord, with a request for more information. In its response dated July 21, 2004, OneBeacon also stated that it did not believe that Silverite was an additional insured under UAD's policy, therefore it needed the requested documents.

By letter dated July 22, 2004, Zurich sent OneBeacon a copy of the summons

and complaint in the Pemberton action and again tendered its defense, this time, however, for all the plaintiffs in this action. Zurich also provided OneBeacon with copies of the contracts and insurance certificates, but not the 50-h hearing transcript. OneBeacon asked for that transcript in its correspondence dated August 11, 2004. Zurich/Silverite complied. By separate letter, also dated August 11<sup>th</sup>, OneBeacon disclaimed Zurich's tender, on the basis that: 1) Silverite, the City and DEP were not additional insureds under UAD's policy, and 2) even if they were, they had not timely notified OneBeacon of an occurrence/ possible claim against them until July 8, 2004.

Plaintiffs argue that the timeliness of their notice to OneBeacon must be measured by a more forgiving standard than that which would be applicable to the named insured holding the policy (i.e. UAD). Plaintiffs argue further that although the facts necessary to disclaim coverage based on timeliness were known to OneBeacon by July 8, 2004 because the letter specifically referenced the "date of loss" as being March 23, 2004, OneBeacon delayed its issuing its disclaimer. Plaintiffs contend that OneBeacon waived the defense of an untimely notice by them, and therefore they cannot assert it now.

Plaintiffs argue that they are similarly situated, united in interest, and therefore DEP gets the benefit of Silverite's timely notice to OneBeacon of an occurrence, and therefore, OneBeacon's waiver of the timeliness defense.

Plaintiff also argue that the delay in notifying OneBeacon of an occurrence, if any, is *de minimus* and OneBeacon was notified soon after the Pemberton action was actually commenced.

Defendants argue in opposition, and in support of their own cross motion for

summary judgment, that DEP knew as soon as March 29, 2004 that there had been an occurrence and that Pemberton was, in fact, going to bring a lawsuit against them.

OneBeacon argues that Silverite knew about the accident the day it happened and had reason to believe a claim could be brought against it, based on the report that Pemberton had slipped and injured his back while on the job. Thus, OneBeacon contends any delay by Silverite is unreasonable, and inexcusable.

Alternatively, defendants contend that were the plaintiffs afforded the benefit of the July 8, 2004 notification date about an occurrence, it was too late since the accident happened 6 weeks before OneBeacon was notified. Defendants argue even if the notice was, in fact, timely, OneBeacon timely disclaimed the tender by Zurich once it completed its investigation which was delayed by plaintiffs cooperation in providing the necessary information. OneBeacon separately argues that, in any event, the timeliness requirements of Insurance Law § 3420 (d) applies only to insurers and their insureds, not between insurers.

OneBeacon is opposed to DEP having the benefit of Silverite's notice, if it is found to be timely, because it contends each of these additional insureds had an independent obligation to notify OneBeacon.

#### **Law Applicable to Summary Judgment Motions**

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065

(1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

To the extent that plaintiffs seek a declaration that they are additional insureds under UAD's policy with OneBeacon, there are no issues of fact for trial. This point is conceded by defendants. Plaintiffs are, therefore, entitled to summary judgment in their favor declaring them additional insureds under UAD's policy with OneBeacon.

#### *Silverite's Notice to OneBeacon*

It is undisputed that plaintiffs were obligated to provide OneBeacon with notice of an occurrence that might result in a claim against the plaintiffs and that such notification had to be made by Silverite "as soon as practicable." "As soon as practicable" has been found to mean "within a reasonable time in view of all of the facts and circumstances." The Doe Fund, Inc. v. Royal Indem. Co., 34 A.D.3d 399 (1<sup>st</sup> Dept. 2006). Unless an insured has a reason or excuse for its delay in providing timely notice, then failure to comply with this condition precedent can form the basis for the denial of coverage by the insurer. Argo Corp. v. Greater N.Y. Mut. Ins. Co., 4 NY3d 332, 339 (2005); Security Mut. Ins. Co. of N.Y. v. Acker-Fitzsimons Corp., 31 N.Y.2d 436, 441 (1972). If an insured has a reasonable belief in non-liability, this may excuse the insurer's failure to timely notify the insurer of an occurrence. SSBSS Realty Corp. v. Public Service Mut. Ins. Co., 253 A.D.2d 583 (1<sup>st</sup> Dept 1998).

The issue of whether the belief is "reasonable" is not, however, based on the insured's subjective opinion of whether the claim has merit, or it will "ultimately be found liable for the injury, but whether [it] has a reasonable basis for a belief that no claim will

be asserted against [it]." SSBSS Realty Corp. v. Public Service Mut. Ins. Co., 253 A.D. 2d at 584. The burden of establishing the reasonableness of its belief lies with the insured. If no excuse or mitigating factor is presented for why the insured notified the insurer untimely, then the issue of reasonableness poses a legal question for the court to decide rather than an issue for the trier of fact. Id.

The court finds that under the facts and circumstances that existed at the time of Pemberton's accident, it was unreasonable for Silverite to have delayed in reporting it to OneBeacon and it was unreasonable for Silverite to believe no claim would be asserted against it.

Mr. Harris was deposed on behalf of Silverite. He testified that Silverite was responsible for on site safety, and held 'tool box' meetings. Silverite also prepared daily inspection reports and a monthly safety audit. Although Pemberton's accident was documented in the March 23, 2004 daily report on the date of the accident, and Silverite had all the necessary information to report the occurrence to OneBeacon, it failed to do so.

The fact that Pemberton returned to work only six (6) days after his accident, and Silverite interpreted this as his accident not being "serious" does not support its present argument, that the decision not to report the accident was reasonable or based on a reasonable belief of non-liability. Rather than report the accident, Silverite concluded it was "nothing," and Pemberton's accident would not support a Labor Law section 241 (6). Therefore, its opinion and subjective belief of non-liability was the only reason Silverite did not report the accident. The court decides, as a matter of law, that Silverite had no reasonable excuse for its delay in failing to timely notify OneBeacon of an

occurrence, that could possibly lead to a claim against it. Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., supra (lack of knowledge that accident had occurred).

Having failed to do so, Silverite did not comply with its obligations as an additional insured under UAD's policy.

*DEP's Notice to OneBeacon*

Pemberton's accident took place March 23, 2004. He returned to work on the 29<sup>th</sup>, the same day he filed a notice of claim against the City. Thereafter, the City held a 50-h hearing on May 19, 2004. Pemberton served the City with the summons and complaint on June 4, 2004. It was not until July 22, 2004 - four (4) months after Pemberton's accident - that Zurich first notified OneBeacon of the accident. Security Mut. Ins. Co. of New York v. Acker-Fitzsimons Corp., supra. DEP presents no excuse for its delay, but argues that it is similarly situated to Silverite, in the hopes that Silverite's notice would be found to be timely. Since Silverite's notice was not timely, this argument is rendered moot, and is, therefore, unavailing.

*OneBeacon's disclaimer*

Silverite urges the court to consider and decide whether OneBeacon's own delay in disclaiming Zurich tender constitutes a waiver of the defense of late notice by the additional insureds. Insurance Law § 3420(d) requires that an insurer "give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured" after it learns of a valid reason to support the disclaimer. Pennsylvania Lumbermans Mut. Ins. Co. v. D & Sons Constr Corp., 18 AD3d 843, 845 (2<sup>nd</sup> Dept 2005). The purpose of the statute is to protect the injured person, and any other interested party "who has a real stake in the outcome, from being prejudiced by a

belated denial of coverage.” Bovis Lend Lease v. Royal Surplus Lines Insurance Co., 27 AD2d 84 (1<sup>st</sup> Dept 2005) (internal citations omitted).

Defendants argue persuasively that the real party in interest was Zurich, not the plaintiffs. Zurich is not OneBeacon’s insured. Rather, Zurich’s letter was in pursuit of reimbursement by OneBeacon of its insured and additional insured’s defense and indemnification expenses. Zurich’s letter to OneBeacon states: “Please be advised that Zurich North America is the general liability insurance carrier for Silverite and its additional insureds, City of New York and Department of Environmental Protection . . .” The July 8<sup>th</sup> letter contains similar language, but only refers to Silverite. As between insurers, Insurance Law § 3420 (d) does not apply, mooting out plaintiffs’ argument that OneBeacon’s disclaimer was untimely. Bovis Lend Lease LMB, Inc. v. Royal Surplus Lines Ins. Co., 27 AD3d at 92.

The court nonetheless goes on to consider whether OneBeacon’s disclaimer was timely, in light of circumstances at the time. The court finds that it was. The first letter from OneBeacon to Zurich did not expressly deny coverage, but simply expressed OneBeacon’s opinion that Silverite was not an additional insured. In that letter, OneBeacon asked for documents to verify Silverite’s claim, that it was an additional insured. After Zurich provided OneBeacon with the summons and complaint and a copy of the 50-h transcript, OneBeacon disclaimed coverage. That letter was unequivocal, providing specific reasons for the denial, and stating OneBeacon had completed its investigation. OneBeacon has proved that did not delay in notifying Silverite/Zurich of its disclaimer. Silverite has failed to raise any issues of fact that have to be tried.

## Conclusion


Defendants have make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., supra. Plaintiffs have not only failed in proving their claims against defendants, they have also failed to demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., supra. (1986); Zuckerman v. City of New York, supra. The court has resolved the issues of law raised in connection with these motions, as it has the right and obligation to do, without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept 2003). Therefore, defendants are entitled to summary judgment in their favor against the plaintiffs.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated:           New York, New York  
                  March 26, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
MAR 31 2008  
NEW YORK  
COUNTY CLERK'S OFFICE