

**C**

Supreme Court, Appellate Division, First  
Department, New York.  
WAL-MART STORES, INC., Plaintiff-Respondent,  
v.  
UNITED STATES FIDELITY AND GUARANTY  
COMPANY, et al., Defendants-Appellants.

Oct. 14, 2004.

**Background:** Insured sued fire insurer for breach of contract. The Supreme Court, New York County, Diane A. Lebedeff, J., denied insurer's motions to dismiss on limitations and res judicata grounds. Insurer appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

- (1) suit was not time-barred, and
  - (2) prior federal ruling regarding applicable limitations period lacked preclusive effect.
- Affirmed.

West Headnotes

**[1] Insurance**  **3560**  
217k3560 Most Cited Cases

**[1] Insurance**  **3564(3)**  
217k3564(3) Most Cited Cases

Although fire insurance policies provided that any suit brought to recover for losses "shall not be barred if commenced within the time prescribed therefor in the statutes of the State of New York," policies did not specifically mention or incorporate by reference the requirement in the standard fire insurance policy of the State that any such lawsuit be commenced within 24 months after inception of the loss, and therefore insured was entitled to rely on six-year statute. McKinney's Insurance Law § 3404(e); McKinney's CPLR 213.

**[2] Motions**  **31**  
267k31 Most Cited Cases

Motion court properly declined to reach defendants' argument on ground that it was improperly raised for first time in reply.

**[3] Insurance**  **3557**  
217k3557 Most Cited Cases

Prior federal ruling regarding applicable limitations period lacked preclusive effect, since plaintiff insured was not in functional "privity" with its additional insured that was party in federal action, and had no incentive to participate in that action, since its rights were not dependent on those of additional insured.

**[4] Judgment**  **829(3)**  
228k829(3) Most Cited Cases

Any doubts regarding preclusive effect of prior federal ruling were properly resolved in plaintiff's favor.

**[5] Motions**  **42**  
267k42 Most Cited Cases

Defendant's motion to renew was properly denied in absence of any explanation for defendant's failure to submit "new" materials on original application.

**\*\*25** Mound, Cotton, Wollan & Greengrass, New York (Todd A. Bakal of counsel), for United States Fidelity and Guaranty Company, appellant.

Clausen Miller P.C., Chicago, IL (Melissa A. Murphy-Petros of counsel), for Lexington Insurance Company, appellant.

**\*\*26** Morgan, Lewis & Bockius LLP, New York (David A. Luttinger, Jr. of counsel), for respondent.

TOM, J.P., SAXE, WILLIAMS, MARLOW, SWEENEY, JJ.

**\*300** Order, Supreme Court, New York County (Diane A. Lebedeff, **\*301 J.**), entered June 26, 2003, which denied defendants' motions to dismiss the action for failure to commence within the contractual limitations period and on the ground of res judicata, and order, same court and Justice, entered on or about December 1, 2003, which, to the extent appealable, denied defendants' motions to renew, unanimously affirmed, with costs.

[1][2] Plaintiff seeks damages for breach of contract in this insurance coverage dispute. The policies provided that any suit brought to recover for losses "shall not be barred if commenced within the time prescribed therefor in the statutes of the State of New York," but did not specifically mention or incorporate by reference the requirement in the standard fire

784 N.Y.S.2d 25  
11 A.D.3d 300, 784 N.Y.S.2d 25, 2004 N.Y. Slip Op. 07389  
(Cite as: 11 A.D.3d 300, 784 N.Y.S.2d 25)

insurance policy of this State (*see Insurance Law § 3404[e]*) that any such lawsuit be commenced within 24 months after inception of the loss. As a result, plaintiff was entitled to rely on the six-year statute (CPLR 213) (*see 1303 Webster Ave. Realty Corp. v. Great Am. Surplus Lines Ins. Co.*, 63 N.Y.2d 227, 231, 481 N.Y.S.2d 322, 471 N.E.2d 135 [1984]; *United Tech. Corp. v. American Home Assur. Co.*, 989 F.Supp. 128, 158 [D.Conn.1997]; *Port of Seattle v. Lexington Ins. Co.*, 111 Wash.App. 901, 915-919, 48 P.3d 334, 341-343 [2002]; *see also Guadagno v. Colonial Coop. Ins. Co.*, 101 A.D.2d 947, 475 N.Y.S.2d 926 [1984]; *Conte v. Yorkshire Ins. Co.*, 5 Misc.2d 670, 163 N.Y.S.2d 28 [1957]). The motion court properly declined to reach defendants' argument regarding the application of CPLR 202 on the ground that it was improperly raised for the first time in reply.

[3][4] The prior federal ruling regarding the applicable limitations period lacked preclusive effect since plaintiff was not in functional "privity" with its additional insured that was a party in the federal action, and furthermore had no incentive to participate in that action (*see e.g. Jeffreys v. Griffin*, 1 N.Y.3d 34, 42, 769 N.Y.S.2d 184, 801 N.E.2d 404 [2003]) since its rights were not dependent on those of the additional insured. Any doubts regarding the preclusive effect of the ruling were properly resolved in plaintiff's favor (*see Buechel v. Bain*, 97 N.Y.2d 295, 305, 740 N.Y.S.2d 252, 766 N.E.2d 914 [2001], *cert. denied* 535 U.S. 1096, 122 S.Ct. 2293, 152 L.Ed.2d 1051 [2002]).

[5] Renewal was properly denied in the absence of any explanation for the failure to submit the "new" materials on the original application. We have considered defendants' remaining contentions and find them unavailing.

11 A.D.3d 300, 784 N.Y.S.2d 25, 2004 N.Y. Slip Op. 07389

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