

VGFC Realty II, LLC v D'Angelo

2013 NY Slip Op 33742(U)

February 15, 2013

Sup Ct, Queens County

Docket Number: 28211 2011

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

VGFC REALTY II, LLC,

Index

Number 28211 2011

Plaintiff,

Motion Date October 3, 2012

-against-

Motion Seq. No. 3

CARMINES P. D'ANGELO, USI INSURANCE
SERVICES, LLC, AND QBE INSURANCE
GROUP,

Defendants.

The following papers numbered 1 to 9 read on this motion by plaintiff VGFC Realty II, LLC (VGFC) for an order compelling defendant QBE Insurance Corp.,(QBE) [sued herein as QBE Insurance Group], to respond to plaintiff's notice of discovery and inspection dated February 11, 2012, and amending the preliminary conference order with respect for the dates for disclosure.

	Papers <u>Numbered</u>
Order to Show Cause-Affirmation-Affidavit of Service-Exhibits	1-4
Opposing Affirmation-Exhibits	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers this motion is determined as follows:

Mariusz Guminiak is alleged to have sustained personal injuries on October 29, 2007, when during the course of his employment he fell through the roof of the premises located at 240 Washington Street, Mount Vernon, New York. Mr. Guminiak was employed by A-Val Architectural Metal III LLC (A-Val). At the time of the accident, the subject property was owned by the City of Mount Vernon Industrial Development Agency, and leased to VGFC.

On October 16, 2008, Mr. Guminiak commenced a special proceeding for leave to serve a late notice of claim against the property owner, the City of Mount Vernon

Industrial Development Agency, in the Supreme Court, Westchester County. Said petition was denied pursuant to an order of the Appellate Division, Second Department on December 22, 2009 (*Matter of Guminiak v City of Mount Vernon Industrial Development Agency*, 68 AD3d 1111 [2d Dept 2009]).

On October 14, 2008, Mr. Guminiak commenced an action in this court to recover damages for the injuries he sustained in the October 29, 2007 accident against VCFC and 240 Washington Street LLC, Index No. 25170/2008. Said action against 240 Washington Street LLC was discontinued with prejudice pursuant to a stipulation dated December 16, 2008 and filed on December 24, 2008.

QBE had issued a general commercial liability policy to A-Val, naming VGFC as a named insured. QBE asserts that VGFC was apprised of the accident by A-Val's project manager on October 29, 2007. On October 8, 2008, A-Val's insurance broker USI Insurance Services LLC (USI) requested that QBE provide A-Val with a defense and indemnification under a commercial general liability insurance policy issued by QBE.

Rockville Risk Management Associates, Inc. (Rockville) acting as QBE's third-party claims administrator and agent, retained Abrams, Gorelick, Friedman & Jacobson, LLP (AGF & J) as counsel on October 13, 2008 to render an opinion as to whether coverage would be afforded under the QBE policy.

On November 3, 2008, Rockville on behalf of QBE denied coverage to A-Val on the grounds that it had failed to timely notify the insurance of the occurrence as soon as practicable, and pursuant to the policy's "employer's liability exclusion".

On November 3, 2008, Rockville on behalf of QBE sent VGFC a letter, stating that although it had not yet received a claim from VGFC, the insurer was disclaiming coverage on the grounds that it had failed to give timely notice of the claim "as soon as practicable" as required by the insurance policy.

In February 2010, VGFC commenced a third party action for indemnification and for declaratory judgment against Carmine P. D'Angelo, Armitage & Company Inc., and QBE, and thereafter served an amended third-party complaint and supplemental summons, whereby USI was substituted for Armitage & Company Inc. VGFC, in the amended third-party complaint asserted two causes of action against QBE and seek a declaration to the effect that QBE is obligated to defend and indemnify it in the underlying action entitled *Mariusz Guminiak v VGFC Realty II, LLC*, Index No. 25170/2008, and to recover defense costs incurred in the underlying action. The court, in an order dated February 24, 2011, dismissed the third-party complaint against Carmine

D'Angelo, and severed the third party action as to the remaining third-party defendants.

On November 28, 2011, USI served QBE with a notice for discovery and inspection, and QBE served its response on February 7, 2012. QBE subsequently produced its claim file which was maintained by Rockville, and the entire insurance policy, as well as a privilege log. The privilege log listed various documents including correspondence and reports between QBE, Rockville Risk, legal counsel, and Quinn & Co., QBE's investigator. VGFC, in a companion motion, sought an order directing QBE to provide it with copies of the documents listed in the privilege log. This court, in order dated February 14, 2013 (Motion Seq.#2), granted the relief sought only as to the documents which were in existence prior to November 3, 2008.

Plaintiff's VGFC served a notice for discovery and inspection, dated February 11, 2012, on defendant QBE. QBE served its response on July 12, 2012. Plaintiff now seeks an order compelling defendant QBE to produce all of the documents sought in the February 11, 2012 notice.

"CPLR 3101(a) provides that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' Nevertheless, unlimited disclosure is not mandated (*see County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944 [2d Dept. 2012]). It is well settled that the terms "material and necessary" encompass any information "bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

At issue here is whether QBE properly disclaimed under the subject insurance policy on the grounds of failure to provide timely notice of the occurrence. In order to succeed on its claims against QBE, plaintiff is required to establish that it gave timely notice to the insurer, in compliance with the terms of the policy,

QBE in response to USI's discovery demand provided plaintiff with a copy of the insurance policy and the claim file, with the exception of documents listed in the privilege log. This court, in the order of February 14, 2013 (Motion Seq No. 2) determined that certain documents, which were sought by both VGFC and USI, are exempt from disclosure, and directed QBE to provide copies of documents which were in existence prior to November 3, 2008. Nonetheless, QBE is required to either state with specificity the items it already disclosed and to provide a privilege log as to items it claims are exempt from disclosure.

As to item 19 which seeks QBE's entire underwriting file for VGFC, and item 20 which seeks QBE's entire underwriting file for USI, plaintiff has failed to establish that these documents are material and necessary to the prosecution of this action. An insurance policy is a contract, the unambiguous terms of which cannot be altered by extrinsic evidence (see *Penske Truck Leasing Co. v Home Insurance Co.*, 251 AD2d 478 [2d Dept. 1998]). It is undisputed that VGFC was a named additional insured under the policy issued to A-Val, and there is no claim that the policy did not require the insureds to give notice of any occurrence, as defined in the policy, as soon as practicable. Therefore, discovery of the underwriting files is not necessary, as it is undisputed that the policy is clear on its face (see generally *White v Continental Cas. Co.*, 9 NY3d 264 [2007]).

Finally, plaintiff has failed to establish that the documents sought in items 27, 28 and 29, consisting of all contracts in effect on October 29, 2007 between QBE and Armitage, between QBE and USI, and between QBE and Hartan Brokerage, Inc., are material and necessary to the prosecution of this action. To the extent that plaintiff is seeking to determine whether these brokers were acting as brokers for the insurer as of the date of accident, plaintiff's demand is overly broad.

In view of the foregoing, plaintiff's motion is granted to the extent that defendant QBE is directed to serve plaintiff with a more specific response to the February 11, 2012 notice, with the exception of items 19, 20, 27, 28, and 29.

That branch of plaintiff's motion which seeks an amendment of the preliminary conference order with respect to the dates for disclosure is denied, as a compliance conference order was issued on November 13, 2012.

Dated : February 15, 2013
D:48

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J.S.C.