

<b>VGFC Realty II, LLC v D'Angelo</b>
2016 NY Slip Op 30180(U)
February 2, 2016
Supreme Court, Queens County
Docket Number: 28211/11
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 No: 28211/11

Plaintiff,

Motion Date: 11/6/15

-against-

Motion Seq. No.: 9

CARMINE P. D'ANGELO, USI INSURANCE  
SERVICES, LLC and QBE INSURANCE GROUP,

Defendants.

The following papers numbered read on this motion by defendant QBE Insurance Corporation, s/h/a QBE Insurance Group (QBE), for an order granting summary judgment and declaring that QBE has no duty to defend and indemnify plaintiff VGFC Realty II, LLC (VGFC) in the underlying action entitled *Mariusz Guminiak v VGFC Realty II LLC and 240 Washington Street, LLC* (Index No. 25170/2008).

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Upon the foregoing papers this motion is determined as follows:

**Background**

Mariusz Guminiak, a carpenter employed by A-Val Architectural Metal Corp. (A-Val) is alleged to have sustained personal injuries on October 29, 2007, when during the course of his employment he fell from the roof of the premises located at 240 Washington

Street, Mount Vernon, New York. At the time of the accident, the Washington Street property was owned by the City of Mount Vernon Industrial Development Agency(Agency), and leased to VGFC, pursuant to a lease agreement dated November 1, 2006. Said lease agreement states that the Agency had entered into negotiations with A-Val “a corporation affiliated with the Lessee, to induce the Lessee to commence the acquisition of a 72,811 square feet property comprising of two 17,000 square feet and one 8,000 square feet buildings, on approximately 1.67 acres of land and the improvement and renovation of three buildings, all for the purpose of operating an architectural metals manufacturing installation corporation.... to be located at 240-254 Washington Street, Mount Vernon, New York”. The Agency authorized the issuance of bonds in order to finance, in part, said project. The lease states that the lessee, VGFC proposed to sublease the subject real property to A-Val Architectural Metal III LLC (A-Val III) . The lease also provides that the Agency and the lessee VGFC would enter into a mortgage agreement, and that the funding provided by the Agency, including the “Sinking Fund Installments for redemption premium on, if any interest on the 2006 Series Bonds, would be guarantied by A-Val, A-Val III and Vladimir Blaskovic. Said lease agreement was executed by Vladimir Blaskovic as the managing member of VGFC.

VGFC entered into a lease agreement with A-Val III for the subject real property, dated October 1, 2006, for a term commencing on October 1, 2006 and terminating on September 30, 2016. Said lease was executed by Vladimir Blaskovic as the managing member of VGFC and as the managing member of A-Val III. At the time said agreement was executed, VGFC had not yet entered into the lease agreement with the Agency.

Beginning in 1998, Armitage & Company Inc. (Armitage) acted as A-Val 's insurance broker, and placed general liability, commercial liability, commercial automobile liability and excess liability policies with various insurers for A-Val. Carmine D'Angelo was employed by Armitage as an insurance broker. On October 1, 2007, USI Insurance Services LLC (USI) acquired Armitage's assets, at which time Armitage ceased doing business. Mr. D'Angelo ceased to be an employee of Armitage and became an at will employee of USI, with the title of Assistant Vice President.

QBE issued a general commercial liability policy to A-Val, which was in effect from May 29, 2007 through May 29, 2008. Pursuant to said policy's named insured endorsement A-Val, Vladimir Blaskovic, Powell's Cove Realty Corporation, VGFC and A-Val III were all named insureds.

On October 8, 2008, USI requested that QBE provide A-Val with a defense and indemnification with respect to with Mr. Guminiak's accident. Rockville Risk Management Associates, Inc.(Rockville Risk) on behalf of QBE, retained counsel on October 13, 2008 to

render an opinion as to whether coverage would be afforded under the QBE policy.

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, entitled *Mariusz Guminiak v VGFC Realty II LLC 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.

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[2nd Dept 2009]).

On November 3, 2008, Rockville Risk 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 Risk 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, in the *Guminiak* action, VGFC commenced a third party action seeking indemnification and 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. VGFC, in the amended third-party complaint asserted two causes of action against QBE for a declaration to the effect that QBE is obligated to defend and indemnify it in the *Guminiak* action and to recover defense costs incurred in said action. The court in the underlying action, in an order dated February 24, 2011, dismissed the third-party complaint against Carmine D'Angelo, and severed the third party action as to USI and QBE. The severed action was thereafter assigned the within Index Number.

At the time of Mr. Guminiak's accident, Vladimir Blaskovic was the managing member of VGFC, and had a 70% interest in said entity. Mr. Blaskovic was the sole shareholder of A-Val and also had a 100% interest in A-Val III. Mr. Blaskovic died on September 5, 2010 and the underlying action was stayed pending a determination by the Surrogate's Court of a probate petition. On May 15, 2012, the Hon. Peter J. Kelly issued a decree granting probate, in which he appointed Bank of America, North America,

administrator c.t.a. of the estate of the Decedent, and thereafter issued letters of administration to Bank of America, North America, administrator c.t.a. of the Estate of Vladimir Blaskovic.

### **Depositions**

Angela Pamic was deposed on behalf of VGFC on December 21, 2012. Ms. Pamic stated that she was employed by A-Val, from late November 2006 until May 2008, as its office manager and was responsible for its weekly payroll, the payment of payroll taxes, employee benefits, interviewing and hiring. She stated that she was not an employee of any affiliates of A-Val and that she was not an employee of VGFC. She stated that she did not work for VGFC other than preparing mortgage checks for Mr. Blaskovic's signature.

Ms. Pamic stated that as A-Val was planning to move to Mount Vernon, two new entities were formed: A-Val III and VGFC. She stated that she did not know if VGFC had any employees separate from those of A-Val and did not see any employees of VGFC at A-Val's College Point location. She stated that the initials VGFC represented Vladimir Blaskovic, Gary Zucker, Frank Zustovich, and Carlo Valente. She stated that these four individuals were also involved in the operation of A-Val's business; that Zuker, Zustovich and Valente were vice-presidents of A-Val; and that Mr. Blaskovic was the sole owner of A-Val. She also stated that it was her understanding that VGFC owned the building in Mount Vernon where A-Val's offices were presently located, and that she did not know if VGFC conducted any other business.

Ms. Pamic stated that Mr. Blaskovic was her supervisor and that she saw him on a daily basis. Ms. Pamic stated that she would be notified if there was an accident involving A-Val and that she in turn would notify the broker. She stated that she would telephone a woman named Susan Goldberg about workers' compensation claims and send her the paperwork. She states that her primary contact at Armitage was Carmine D'Angelo; that D'Angelo came to A-Val's offices a few times a year; and that Armitage was a broker and that in the event of an accident she would telephone D'Angelo. She did not know whether Armitage was the actual worker's compensation carrier or a broker for the carrier, and did not know if Armitage issued workers' compensation policies to A-Val.

Ms. Pamic stated that her duties at A-Val including reporting potential insurance claims; that Eileen Moran, A-Val's former office manager, instructed her to call Mr. D'Angelo who would then handle the matter or direct her as to what she needed to do; that she was the only person responsible for reporting insurance claims; and that she reported insurance claims to the broker, Mr. D'Angelo. She stated that Mr. D'Angelo would instruct her to report workers' compensation claims to Ms. Goldberg.

Ms. Pamic stated that she first learned of Mr. Guminiak's accident when she received a telephone call from a foreman, Gabe Skorpanic; that Guminiak and Skorpanic were working at 240 Washington Street in Mount Vernon; that Skorpanic told her that Guminiak,

a carpenter, had fallen and that an ambulance had been called; and that within a day of receiving Skorpanic's call, she called D'Angelo. She did not recall the specifics of her conversation with D'Angelo. She identified a fax that was sent to Ms. Goldberg along with a report to notify Goldberg of the workers' compensation claim pertaining to Mr. Guminiak's October 29, 2007 accident. Ms. Pamic stated that she filled out a form for workers' compensation which identified the carrier as the State Insurance Fund, and identified the date of the accident and the date the employer or supervisor's first learned of the accident as October 29, 2007.

Ms. Pamic stated after she called Mr. D'Angelo, she didn't know if she ever spoke with him again about Mr. Guminiak's accident, and that she wouldn't know if any one else at A-Val followed up with D'Angelo or Armitage (USI) as to whether a claim had been processed. She stated that she was not involved in any insurance aspect of Mr. Guminiak's accident after she reported it to Mr. D'Angelo. Ms. Pamic stated that when she called Mr. D'Angelo it was not on behalf of VGFC, as she worked for A-Val, and that she never reported a claim for insurance coverage on behalf of VGFC (Tr 76, 77).

She stated that after Mr. Guminiak's accident, Mr. Blaskovic asked her to send flowers and fruit to him at the hospital. She recalled speaking with Mr. Blaskovic about the accident on one other occasion, during a conference call on December 2, 2008, prior to her execution of an affidavit on December 3, 2008.

Ms. Pamic, in an affidavit notarized on December 3, 2008, stated that she was employed by A-Val an office manager on October 29, 2007 and that her office was located at 15-06 129th Street, College Point, New York. Ms. Pamic states that on October 29, 2007 she received a telephone call from Gabriel Scorpanic, A-Val's foreman at the Mount Vernon job site, who advised her that Mr. Guminiak had fallen from the roof of the Washington Street building and was badly injured. Ms. Pamic stated that after receiving Scorpanic's call, she called Susan Goldberg to notify the worker's compensation carrier, and that she also called Carmine D'Angelo, of Armitage & Co. and informed him about the accident. She states that Mr. D'Angelo told her that she had to notify the worker's compensation carrier, and as she had already done so, she had no further contact with Mr. D'Angelo.

Carmine D'Angelo was deposed on behalf of USI on January 22, 2013. Mr. D'Angelo stated that he was employed by Armitage, a construction insurance brokerage, from October 31, 1994 until October 1, 2007 and that as of October 1, 2007 he was employed by USI until September 2012, as an insurance broker. At the time of the deposition he was employed by Sterling and Sterling, an insurance brokerage.

While employed at Armitage and USI, Mr. D'Angelo placed insurance for clients in the construction field. He stated that A-Val became Armitage's client in 1998; that he first became aware of VGFC in 2006; and that VGFC was the entity that would be set up as the building owner of 240 Washington Avenue, Mount Vernon. He stated that the services

provided by Armitage to A-Val between 1998 and 2006, included the purchase of insurance on its behalf, providing insurance quotes on an annual basis, issuing certificates of insurance, contract review and reporting claims. Mr. D'Angelo stated that he performed the same services on behalf of USI.

Mr. D'Angelo stated that prior to October 2007, he approached Hartan Brokerage Inc. (Hartan), the wholesaler with access to QBE, and obtained an endorsement naming VGFC as an insured on the general liability insurance policy issued by QBE. He stated that VGFC was insured by QBE between 2007 and 2009. He further stated that between 2007 and 2009, he informed Val (Vladimir), Carlo, Gary and whoever was the officer manager at the time, including Angela Pamic, that claims made by A-Val and VGFC were to be communicated to him in writing; and that he would have communicated this requirement via e-mail. He also stated that Armitage employees Dominic Scotto and Joe Santospirito also informed A-Val's employees that claims had to be in writing. Mr. D'Angelo further stated that he had instructed A-Val's employees that if there was an injury to an A-Val employee it should be reported to him in writing and then reported to the general liability carrier, as the injured person's claim could constitute a grave injury and give rise to a third-party claim.

Mr. D'Angelo stated that in 2007 A-Val had a general liability insurance policy with QBE, automobile insurance with Tower Insurance Company, and excess insurance with AIG Chartus, also known as Chartus, as well as property insurance (Tr 45,47). He stated that in 2007, A-Val had workers' compensation insurance with the State Insurance Fund, and that Armitage did not place said insurance with the State Insurance Fund. He stated that Ms. Goldberg was an employee of at Levitt-Furst, the assigned broker for workers' compensation claims.

Mr. D'Angelo stated that a claim on the general liability policy on behalf of either A-Val or VGFC would be reported by Armitage or USI to Hartan Brokerage Inc.(Hartan) by letter, email or fax and that he reported a few automobile claims in 2007 to Hartan on behalf of "A-Val, VGFC"(Tr 85-86). Hartan received claims on behalf of QBE. He stated that on October 29, 2007 and October 30, 2007, he did not receive a telephone call at his office from Ms. Pamic with respect to the Guminiak claim (Tr1 15), as he was attending a convention in Florida (Tr 143). He further stated that he was in Florida for 5 days and did not receive any calls from his office regarding the Guminiak accident.

Mr. D'Angelo stated that no one at VGFC ever sent him notice of Mr. Guminiak's injury. He stated that he first heard Mr. Guminiak's name in October 2008; that he learned that A-Val had reported an accident involving Guminiak to the workers' compensation carrier in late October 2007; and that he requested that Denise Medina provide him with all documents pertaining to the Guminiak claim in October 2008. He stated that USI first provided Hartan of notice of Mr. Guminiak's injury on October 8, 2008.

Dominick Scotto a former 50% owner of Armitage and an employee of USI was

deposed September 10, 2014. He stated that he first became aware of Guminiak's accident when USI received the complaint in the underlying action ; that written confirmation and documentation of any accident was required and that A-Val was advised of this a number of times; and that he had no recollection of conversation with A-Val or VGFC at any time about an accident involving Mr. Guminiak.

Robert Riccobono, a former employee and vice president of construction accounts at Rockville Risk, was deposed on May 27, 2014. He stated that he became aware of Mr. Guminiak's accident on October 8, 2008 when Rockville Risk first received written notice of the accident from Hartan via e-mail; that an investigator, E.R. Quinn, was hired to obtain details of the accident; and that he sent a letter dated October 28, 2008 to A-Val disclaiming coverage on the basis of late notification and the employer liability exclusion, having determined that A-Val and VGFC had notice of the accident and failed to timely notify insurer.

### **Relevant documentary evidence**

VGFC's articles of organization, submitted herein, identifies its members as Vladimir Blaskovic, Gary Zucker, Frank Zustovich and Carlo Valente.

Defendant QBE has submitted copies of emails between Carmine D'Angelo and Denise Medina, dated October 7, 2008 which were identified at Mr. D'Angelo's deposition. These emails demonstrate that A-Val's then office manager Denise Medina requested that Mr. D'Angelo review of an attachment from Guminiak's counsel, and that Mr. D'Angelo, in response, stated the attachment not sent and requested that she re-send it along with particulars of the workers' compensation claim, including the date of loss description of accident, a copy of C-2 if applicable, the amount of lost time in days/return to work. He stated that this information was "imperative as it appears that it may become a GL loss and has not been reported to us." The requested documents were thereafter faxed to USI by A-Val in October 2008.

The QBE policy includes a letter advising its insureds that as of November 1, 2006, Claims Service Bureau will no longer be handling claims on the Hartan Brokerage Inc. "contractor program"; that QBE had appointed Rockville Risk Management Associates, Inc. to "manage pending claims and new reported losses" ; and that "[a]ll new claims reports and correspondence as well as correspondence related to previously reported matters can still be sent to Hartan Brokerage or can be directed to our new claims administrators" identified as Rockville Risk.

With respect to notice, QBE's general liability policy provides, in pertinent part, as follows:

#### **"2. Duties In The Event Of Occurrence, Offense, Claim Or Suit**

a. You Must see to it that we are notified as soon as practicable of an "occurrence" or an



offense which may result in a claim. To the extent possible, the notice should include:

- (1) How, when and where the “occurrence” or offense took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.

b. If a claim is made or “suit” is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or “suit” and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or “suit” as soon as practicable.”

An endorsement modifying the QBE policy added the following paragraph to the “Duties In The Event Of Occurrence, Offense, Claim Or Suit” provisions:

“e. Notice given by or on behalf of the insured or written notice by or on behalf of the injured person or any other claimant, to any agent of ours in New York State, with particulars sufficient to identify the insured, shall be considered notice to us.”

## Discussion

Where, as here, a policy of liability insurance requires the insured to provide notice of an occurrence “as soon as practicable,” notice must be given “within a reasonable time under all the circumstances” (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441, [1972] [internal quotation marks omitted]; see *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 19 [1979]; *Sputnik Rest. Corp. v United Natl. Ins. Co.*, 62 AD3d 689, 689 [2d Dept 2009]).

An insured’s failure to satisfy the insurance policy’s notice requirement constitutes “a failure to comply with a condition precedent which, as a matter of law, vitiates the contract” (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]; see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]; *White v City of New York*, 81 NY2d 955, 957 [1993]; *McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.*, 79 AD3d 981 [2d Dept 2010]). Failure or delay in giving notice may be excused if the insured lacked knowledge that the accident had occurred or had a good faith and reasonable belief of his or her nonliability (see *Ocean Gardens Nursing Facility, Inc. v Travelers Cos., Inc.*, 91 AD3d 734, 736 [2d Dept 2012]; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d 596, 597 [2d Dept 2010]).

Here, as the subject policy was issued sometime in 2007 (its effective dates are May 29, 2007 through May 29, 2008) it is not governed by the 2008 amendment to Insurance Law § 3420 (for policies issued after January 17, 2009), which provides that an insurer can only disclaim coverage based on untimely notice if it shows that it was prejudiced by the failure

to provide timely notice (*see* Insurance Law § 3420 [c] [2] [A]; *see also* *Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021, 1023 [2d Dept 2011]). Under the law as it existed at the time that said insurance policy was issued, the insured bears the burden of raising an issue of fact as to the existence of a reasonable excuse for the delay in giving notice in opposition to the insurer's prima facie showing (*see* *McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.*, 79 AD3d 981, 983 [2d Dept 2010]; *Ponok Realty Corp. v United Natl. Specialty Ins. Co.*, 69 AD3d at 597; *see also* *Ocean Gardens Nursing Facility, Inc. v Travelers Cos., Inc.*, 91 AD3d 734, 736 [2d Dept 2012]; *Tower Ins. Co. of N.Y. v Alvarado*, 84 AD3d 1354, 1355 [2d Dept 2011]). The reasonableness of an insured's good faith belief in nonliability is a matter ordinarily left for trial (*see* *Deso v London & Lancashire Indem. Co. of Am.*, 3 NY2d 127, 129[1957]; *Chiarello v Rio*, 101 AD3d 793 [2d Dept 2012]), and will only be determined as a matter of law where the evidence, when construed in favor of the insured, establishes that the belief was inherently unreasonable or formed in bad faith (*see* *Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021, 1024 [2d Dept 2011]; *Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v Merchants Mut. Ins. Co.*, 84 AD3d 717[2d Dept 2011]; *McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.*, 79 AD3d 981 [2d Dept 2010]).

Here, defendant QBE has made a prima facie showing of entitlement to judgment as a matter of law, as the evidence presented establishes that it did not learn of the underlying October 29, 2007 accident until nearly a year later in October 2008 (*see* *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]; *Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750 [1995]; *Albano-Plotkin v Travelers Ins. Co.*, 101 AD3d 657 [2d Dept 2012]; *Columbia Univ. Press, Inc. v Travelers Indem. Co. of Am.*, 89 AD3d 667 [2d Dept 2011]).

Plaintiff VGFC asserts that it was an alter ego of A-Val, and thus it had a good faith belief that it was entitled to rely upon a defense of workers' compensation. Plaintiff in support of this claim seeks to rely upon the affidavit of Ronald J. Zeiger, a senior vice president for Bank of America, N.A. and VGFC's tax returns for 2005, 2007 and 2008. Mr. Ziegler does not state that he has any personal knowledge of what the corporate or business practices were of each entity at the time of the accident, which was several years before Mr. Blaskovic's death, and prior to Bank of America's appointment as an administrator of his estate. Neither VGFC's tax returns nor the subject insurance policy establishes that these entities were alter ego's on one another. VGFC has not submitted proof in admissible form from someone with personal knowledge of the facts at the time of the accident, as to the ownership and control of the entities.

VGFC's assertion that it had a reasonable, good-faith belief that the accident would not result in liability fails as a matter of law, given that its managing member Mr. Blaskovic was aware the accident while Mr. Guminiak remained hospitalized, it involved an accident at the project site and the injured person had to be transported by ambulance (*see* *Rivera v*

*Core Cont. Constr. 3, LLC*, 106 AD3d 636, 636-637 [1st Dept 2013] *Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [1st Dept 2008]). Moreover, there is no evidence that VGFC undertook any investigation of the incident, or make inquiry regarding its alleged belief that it was entitled to rely upon a defense of workers' compensation. Thus, it could not have formed a reasonable belief of nonliability (see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d at 743-744; [2005]; *Rivera v Core Cont. Constr. 3, LLC*, 106 AD3d at 636-637; *Tower Ins. Co. of N.Y. v Jaison John Realty Corp.*, 60 AD3d 418, 418-419 [1st Dept 2009]).

This court notes that whether Ms. Pamic reported Mr. Guminiak's accident to Mr. D'Angelo on either October 29 2007 or October 30, 2007, is disputed by the parties. However, there is no evidence that Ms. Pamic reported Mr. Guminiak's accident to Mr. D'Angelo's in October 2007, on behalf of VGFC. Rather, Ms. Pamic at her deposition clearly stated that she was not employed by VGFC and that she did not report the accident on behalf of VGFC. There is nothing in her December 2008 affidavit which establishes that she acted on behalf of VGFC in reporting said accident to either the workers' compensation carrier's agent or Mr. D'Angelo.

However, even assuming *arguendo* that Ms. Pamic timely notified Mr. D'Angelo or USI of Mr. Guminiak's accident in October 2007, it is well settled that a policyholder's timely notice to a broker does not "constitute the notice contemplated by the [insurance] policy since a broker is normally the agent of the insured and notice to the ordinary insurance broker is not notice to the liability carrier" (*Strauss Painting, Inc. v Mt. Hawley Ins. Co.*, 24 NY3d 578, 592-595 [2014], quoting (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.* 31 NY2d 436, 442 [1972]; see also N.Y. 2014) *Hartford Fire Ins. Co. v Baseball Off. of Commr.*, 236 AD2d 334, 654 NYS2d 21 [1st Dept 1997], *lv denied* 90 NY2d 803[1997]; *Gershow Recycling Corp. v Transcontinental Ins. Co.*, 22 AD3d 460, 462 [2d Dept 2005]). Contrary to VGFC's assertion, no triable issue of fact exists as to whether Carmine D'Angelo acted as QBE's agent, as there is no evidence whatsoever that Mr. D'Angelo or USI was an agent for QBE. Rather, the evidence presented demonstrates that Armitage, USI and Mr. D'Angelo on behalf of his employer, obtained the subject insurance policy on behalf its clients A-Val and VGFC.

In view of the foregoing, defendant QBE's motion for summary judgment is granted, and it is the declaration of this court that QBE does not have a duty to defend or indemnify VGFC in the underlying action entitled *Mariusz Guminiak v VGFC Realty II LLC and 240 Washington Street, LLC* (Index No. 25170/2008).

Dated: February 2, 2016

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J.S.C.