

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D33764  
O/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - January 9, 2012

REINALDO E. RIVERA, J.P.  
RANDALL T. ENG  
PLUMMER E. LOTT  
SANDRA L. SGROI, JJ.

2011-03708

DECISION & ORDER

Bauerschmidt & Sons, Inc., respondent, v Nova  
Casualty Company, appellant.

(Index No. 677/08)

Melito & Adolfsen, P.C., New York, N.Y. (Ignatius John Melito of counsel), for  
appellant.

Meyer, Suozzi, English & Klein, P.C., Garden City, N.Y. (Robert N. Zausmer of  
counsel), for respondent.

In an action, inter alia, for a judgment declaring that the defendant is obligated to  
defend and indemnify the plaintiff in an underlying action entitled *Fiore v Bauerschmidt & Sons,  
Inc.*, pending in Supreme Court, Kings County, under Index No. 3509/09, the defendant appeals from  
a judgment of the Supreme Court, Queens County (Kitzes, J.), entered March 9, 2011, which, after  
a nonjury trial, is in favor of the plaintiff and against it declaring that it must defend and indemnify  
the plaintiff in the underlying action.

ORDERED that the judgment is affirmed, with costs.

On an appeal from a judgment entered after a nonjury trial, the power of this Court  
“to review the evidence is as broad as that of the trial court, bearing in mind . . . that due regard  
must be given to the decision of the Trial Judge who was in a position to assess the evidence and the  
credibility of the witnesses” (*Tornheim v Kohn*, 31 AD3d 748, 748, quoting *Universal Leasing  
Servs. v Flushing Hae Kwan Rest.*, 169 AD2d 829, 830; see *Northern Westchester Professional Park  
Assoc. v Town of Bedford*, 60 NY2d 492, 499; *Huner v State of New York*, 90 AD3d 992; *A. Montilli*

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*Plumbing & Heating Corp. v Valentino*, 90 AD3d 961). Applying this standard here, the record supports the Supreme Court's determination that the plaintiff's delay in notifying the defendant of the underlying incident was reasonably based on a good faith belief of nonliability (see *Tri-State Consumer Ins. Co. v Yaskin*, 304 AD2d 560, 561; *Eveready Ins. Co. v Robinson*, 300 AD2d 436, 437; *Abbey Richmond Ambulance Serv. v Northbrook Prop. & Cas. Ins. Co.*, 281 AD2d 501, 501-502). We decline to disturb the Supreme Court's determination.

The defendant's remaining contentions are without merit.

RIVERA, J.P., ENG, LOTT and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino  
Clerk of the Court