VGFC Realty II, LLC v D'Angelo
2016 NY Slip Op 30279(U)
February 16, 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,

Plaintiff,

-against-

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

Defendants.

Index No: 28211/11

Motion Date: 11/6/15

Motion Seq. No.: 10

The following papers numbered read on this motion by defendant USI Insurance Group for an order granting summary judgment dismissing the amended complaint, with prejudice.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law	1 - 5
Opposing Affirmation-Affidavit-Exhibit.....	6 - 9
Memorandum of Law(USI).....	10
Memorandum of Law(Plaintiff).....	11
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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 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. Mr. Guminiak has alleges claims against VGFC, the lessee of the Washington Street premises for common law negligence, and violations of Labor Law §§200, 240 and 241(6).

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 has asserted causes of action against USI for breach of contract and negligence, based upon USI's alleged failure to timely notify the insurer QBE of the Guminiak accident. 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.

As a general principle, insurance brokers "have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*American Bldg. Supply Corp. v Petrocelli Group, Inc.*, 19 NY3d 730, 735 [2012] [internal quotation marks and citation omitted]; *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734-735 [2014]). In *Murphy v Kuhn*, (90 NY2d 266, 272-273 [1997]), the Court of Appeals recognized that "particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law" and that the question of whether such additional responsibilities should be "given legal effect is governed by the particular relationship between the parties and is best determined on a case-by-case basis" (*Murphy*, 90 NY2d at 272). The court therein identified three exceptional situations that may give rise to a special relationship, thereby creating an additional duty of advisement: "(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (*id.* [citations omitted]; *see also Waters Edge @ Jude Thaddeus Landing, Inc. v B & G Group, Inc.*, 129 AD3d 706, 707 [2d Dept 2015]; *Voss v Netherlands Ins. Co.*, 22 NY3d at 734-735; *Lehneis v Neill*, 117 AD3d 993 [2d Dept 2014]; *Core-Mark Intl. v Swett & Crawford Inc.*, 71 AD3d 1072 [2d Dept 2010]).

A special relationship may also exist where as a matter of routine the client referred all questions regarding insurance claims to its broker and the broker handled all of its insurance needs, including referring its claims to insurers, imposing a duty upon the broker to exercise a reasonable degree of care in notifying the appropriate insurer of any claim reported to it by its client (*see Abetta Boiler & Welding Serv., Inc. v American Intl. Specialty Lines Ins. Co.*, 76 AD3d 412, 413-414 [1st Dept 2010]).

The parties have not established that a course of conducted existed between USI and VGFC with respect to the reporting of claims, although such a course of conduct apparently existed with respect to claims reported by A-Val. It is noted that both USI and VGFC, for various and opposite reasons, assert that VGFC is an affiliate or alter ego of A-Val. USI, in support of this claim seeks to rely upon an affidavit submitted by Ronald J. Zeiger, a senior vice president for Bank of America, N.A. in support of VGFC's motion for summary judgment dismissing the complaint in the *Guminiak* action. VGFC, in opposition to the motion, seeks to rely upon an affidavit submitted by Mr. Zeiger in the within action.

It is undisputed that Mr. Guminiak was employed by A-Val at the time of the accident. However, no evidence has been presented which demonstrates that A-Val and VGFC were a single entity, an alter ego of one another, or affiliate entities. In the *Guminiak* action, the Honorable Frederick R.A. Sampson, in an order dated September 1, 2015, denied VGFC's

motion for summary judgment, finding that Mr. Zeiger an employee of the court appointed administrator of the majority owner of VGFC was appointed four and half years after the accident occurred; that he testified that A-Val and VGFC maintained separate bank accounts, but that he had no knowledge as to what the corporate practices were of each entity at the time of the accident, several years before Mr. Blaskovic's death and prior to Bank of America's appointment as the administrator of his estate; and that despite some similarities and overlapping interests of the decedent, VGFC had failed to submit proof from someone with personal knowledge of the facts at the time of the accident, as to the ownership and control of the entities. The affidavit submitted by Mr. Zeiger herein suffers from the same infirmities. Neither USI nor VGFC has submitted proof by a person with personal knowledge of the facts at the time of the accident, as to the ownership and control of the entities, and thus has not demonstrated that VGFC and A-Val are alter egos of one another or that VGFC is an affiliate of A-Val.

Although the parties sharply dispute as to whether Mr. Guminiak's accident was timely reported by VGFC to USI, this issue is not material to the disposition of USI's motion for summary judgment. Rather, USI seeks summary judgment dismissing the complaint on the grounds that QBE policy's employee exclusion is applicable here, and that no coverage exists under the QBE policy. It is asserted that in the absence of insurance coverage, VGFC cannot establish liability on the part of the broker USI. Plaintiff VGFC, in opposition, asserts that the employee exclusion is inapplicable as a matter of law, and that the insurer waived said exclusion as its disclaimer of coverage was only based on late notice. Plaintiff thus asserts that had USI not failed to provide QBE with timely notice of Guminiak's accident, it would have been entitled to coverage under the subject insurance policy.

QBE's Commercial General Liability Coverage Form provides, in pertinent part, as follows:

2. **Exclusions**

This insurance does not apply to:

e. **Employer's Liability**

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business";

...

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages

because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

This provision of the policy provides that the words you and your refer to the Named Insured shown in the declarations and any other person or person or organization qualifying as a Named Insured under the policy. The policy identifies an insured as a person or organization, " if you are designated in the Declarations", and specifically includes a limited liability company. The policy defines an "employee" as including a leased worker but not a temporary worker.

An insured contract is defined, in pertinent part, as:

" a. [a] contract for a lease of premises. However, that portion of the contract for a lease of the premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract".

...

"f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement".

Initially, " 'in policies of insurance . . . if any one exclusion applies there can be no coverage' " (*Monteleone v Crow Constr. Co.*, 242 AD2d 135, 140-141 [1st Dept 1998] *quoting Zandri Constr. Co. v Firemen's Ins. Co. of Newark*, 81 AD2d 106, 109 [3d Dept 1981] *affd sub nom. Zandri Constr. Co. v Stanley H. Calkins, Inc.*, 54 NY2d 999[1981]; *see also Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 N.Y.3d 467, 471-472 [2005]).

An exclusion from coverage "must be specific and clear in order to be enforced" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 1984]). An ambiguity in an exclusionary clause must be construed most strongly against the insurer *(see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]; *Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d 760 [2d Dept 2007]). "However, the plain meaning of a policy's language may not be disregarded to find an ambiguity where none exists" (*Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.*, 75 AD3d 533, 534[2d Dept 2010]; *see Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d 470, 471 [2d Dept 2003]).

Here, the plain meaning of the exclusion invoked by USI is that the QBE policy does not provide coverage for damages arising out of bodily injury sustained by an employee of any insured in the course of his or her employment (*see Bayport Constr. Corp. v. BHS Ins. Agency*, 117 AD3d 660, 661 [2d Dept 2014]; *Soho Plaza Corp. v Birnbaum*, 108 AD3d 518,

521 [2d Dept 2013]; *Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.*, 75 AD3d at 534; *Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d at 471; *see also Hayner Hoyt Corp. v Utica First Ins. Co.*, 306 AD2d 806, 807 [4th Dept 2003]; *Consolidated Edison Co. of N.Y. v United Coastal Ins. Co.*, 216 AD2d 137 [1st Dept [1995]; Tardy v Morgan Guar. Trust Co. of N.Y., 213 AD2d 296 [1st Dept 1995]). Since Guminiak, the plaintiff in the underlying action, was an employee of an insured, A-Val, his injury is not covered by the policy. The term "an insured" is unambiguous and, when used in the policy, encompasses both A-Val and plaintiff VGFC. Therefore, this exclusion also applies to coverage for other named or additional insureds, including VGFC (*see Bayport Constr. Corp. v. BHS Ins. Agency*, 117 AD3d at 661; *Soho Plaza Corp. v Birnbaum*, 108 AD3d at 521; *Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.*, 75 AD3d at 534; *Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d at 471).

VGFC, however, asserts that based upon the "insured contract" exception, the employer exclusion is not applicable here. In insurance disputes, although the insurer has the burden of proving the applicability of an exclusion (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d at 311), it is the insured's burden to establish the existence of coverage (*see Lavine v Indemnity Ins. Co.*, 260 NY 399, 410 [1933]). Thus, "[where] the existence of coverage depends entirely on the applicability of [an] exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied" (*Copacabana Realty, LLC v Fireman's Fund Ins. Co.*, 130 AD3d 771, 772 [2d Dept 2015], *lv to appeal denied* 26 NY3d 911[2015], *quoting Borg-Warner Corp. v Insurance Co. of N. Am.*, 174 AD2d 24, 31 [3d Dept 1992]).

The effect of the QBE "employer liability" exclusion and the "insured contract" exception is to "to deny coverage for contribution and common-law indemnification but cover the insured for contractual indemnification claims" (*see Monteleone v Crow Constr. Co.*, 242 AD2d 135, 141 [1st Dept 1998]; *see also Yoda, LLC v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 88 AD3d 506 [1st Dept 2011]; *Morales v City of New York*, 239 AD2d 566 [2d Dept 1997]; *Hailey v New York State Elec. & Gas Corp.*, 214 AD2d 986 [4th Dept 1995]). In the underlying action, Mr. Guminiak's claims are premised upon common law negligence and violations of the Labor Law. No claims have been asserted against VGFC for contractual indemnification. Thus, the Guminiak claims are not claims for a "liability assumed by [VGFC] under an insured contract", i.e. a lease, or any other agreement whereby VGFC "agreed to assume the tort liability of another party to pay for "bodily injury" to a "third person or organization". VGFC, thus, has failed to establish that an exception to the employer liability exemption exists here.

Finally, contrary to VGFC's assertions, QBE did not waive its right to deny coverage to VGFC on the grounds of the policy's employer exclusion. QBE, in its letter of November 3, 2008, stated that although VGFC had not yet made a claim under the policy, it was denying coverage on the grounds that this insured had failed to give notice of the Guminiak clain "as soon as practicable" as required by the terms of the policy. QBE also stated in said letter that

"[because there may be additional policy terms and exclusions which could apply based upon additional facts or allegations, QBE does not waive any other provisions of the policy or defenses which may apply and specifically reserves the right to amend, supplement or otherwise modify this letter upon the receipt of additional information". Thus, QBE's letter of November 3, 2008, cannot be regarded as the intentional relinquishment of a known right of the insurer (*see Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698[1980]).

In view of the foregoing, as no coverage exists under the QBE policy, defendant USI's motion for summary judgment dismissing VGFC's amended complaint against said broker, is granted.

Dated: February 16, 2016 .....

J.S.C.