

American Tr. Ins. Co. v Hanover Ins. Co.

2011 NY Slip Op 33448(U)

December 23, 2011

Sup Ct, NY County

Docket Number: 116288/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 116288/2009
AMERICAN TRANSIT INSURANCE
vs.
HANOVER INSURANCE COMPANY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 116288/2009
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/Order to Show Cause _____ Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/23/11

[Signature]
HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**Supreme Court of the State of New York
County of New York: Part 10**

-----X
American Transit Insurance Company,

Plaintiff,

-against-

Hanover Insurance Company,

Defendant.
-----X

Decision/Order

Index No.: 116288/09

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers **Numbered**

Pltf's n/m [3212], 1

Pltf's DM affid, exhs, JLC affirm [sep back] 2

Def's n/ x-m [3212] aff in supp & opp w/VPC affirm 3

Pltf's reply in supp & aff. in opp. x-mo. w/JLC affirm. 4

Def's reply w/VPC affirm. 5

Transcript. 6

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Hon. Judith J. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by American Transit Insurance Company ("American Transit" or "Plaintiff"), seeking a judgment declaring that it does not have a duty to defend or indemnify defendant Hanover Insurance Company ("Hanover" or "defendant") in connection with a motor vehicle accident involving Wilson Encalada ("Encalada"). Plaintiff moves for summary judgment (CPLR § 3212) against Hanover claiming that the policy of insurance issued to Encalada by plaintiff for the vehicle involved in the accident was not in effect at the time of the accident. Defendant cross-moves for summary judgment (CPLR § 3212) asking the

court to satisfy a judgment in favor of defendant in the amount of \$96,783.21. Since issue has been joined, but the note of issue has not yet been filed, the time restrictions of CPLR § 3212 have not been triggered, consequently this motion can be considered on the merits.

Brill v. City of New York, 2 N.Y.3d 648 (2004).

Facts and Arguments Presented

The following facts are undisputed unless otherwise indicated:

American Transit issued a car insurance policy number BY25R-A303646 ("Policy") on behalf of Encalada for his 1995 Lincoln, VIN: 1LNLM82W2SY601718 ("95 Lincoln") effective from May 9, 2005 to March 1, 2006. On January 3, 2006, a Friday, Encalada spoke with Juan Carlos at Pacifico Travel ("Pacifico") to request a change of vehicles on the Policy from Encalada's 95 Lincoln to his 1998 Lincoln, VIN: ILNFM81W6WY685594 ("98 Lincoln"). That same day, Pacifico faxed the request to Tillman Brokerage, Inc. ("Tillman") which forwarded the endorsement request to American Transit. The endorsement request states in part:

NOTE: AS THE OWNER/DRIVER OF THIS POLICY I UNDERSTAND THAT IF THE TRANSFER VEHICLE IS NOT REGISTERED WITH THE DEPARTMENT OF MOTOR VEHICLES I AM RESPONSIBLE FOR REPORTING IT TO THE PRODUCER AND/OR INSURANCE COMPANY. I WILL ALSO NOTIFY MY PRODUCER AND/OR THE INSURANCE COMPANY OF ANY NEW PLATES ISSUED BY THE DEPT OF MOTOR VEHICLES. (Plf's Exhibit B).

American Transit claims that this portion of the endorsement request indicated that it is the responsibility of the insured to register the replacement vehicle with the Department of Motor Vehicles ("DMV").

Effective January 4, 2006, American Transit removed the 95 Lincoln from the Policy

and replaced it with the 98 Lincoln. American Transit claims that it sent an amendatory endorsement, on January 3, 2006, to Encalada and Tillman, confirming that it removed the 95 Lincoln from the Policy and replaced it with the 98 Lincoln.

Two days after Encalada's request to transfer the Policy, but before the transfer of the license plates, on January 6, 2006, the 95 Lincoln was involved in a motor vehicle accident ("January 6th accident") with a Hanover insured vehicle. On January 26, 2006, American Transit disclaimed coverage on the basis that the 95 Lincoln was not covered by a Policy in effect at the time of the January 6th accident.

Following the January 6th accident, Hanover commenced an action, on July 11, 2007, in the Supreme Court of the State of New York, County of Albany (Hanover Insurance Company v. Encalada Wilson, under Index No.5313/07) ("underlying action 1"). In underlying action 1, Hanover alleged that as the insured of the owner of the other car involved in the January 6th accident, it had a subrogated claim. After underlying action 1 was dismissed for lack of proper service, Hanover commenced a second action in the Supreme Court of the State of New York, County of Albany (Hanover Insurance Company v. Encalada Wilson, under Index No. 7387/08) ("underlying action 2"). On August 31, 2009, Hanover obtained a default judgment against Encalada in this action.

On September 26, 2007, after receiving a copy of the summons and complaint in underlying action 1, American Transit notified Encalada and Hanover's counsel that it would not be providing coverage for the vehicle involved in the January 6th accident, because the Policy was not in effect for the 95 Lincoln. American Transit sent similar notices after being served with Hanover's motion for default judgment in the underlying action 1, and again, on October 16, 2009, after receiving a copy of the default judgment

in the underlying action 2. American Transit claimed that the Policy was not in effect for the 95 Lincoln and even if there had there been a policy in effect, it disclaimed coverage for late notice of the underlying action 2.

Hanover opposes the motion and cross-moves for a declaration that American Transit is responsible for satisfying the default judgment it obtained against Encalada in underlying action 2. In its answer, Hanover asserted a counterclaim, alleging that the American Transit policy was in effect for the 95 Lincoln on January 6, 2006, the date of the accident and that it can recover for the monetary sums it paid to its own insured.

Encalada has filed for bankruptcy. Pursuant to Insurance Law § 3420[b][1], the judgment would be enforceable directly against American Transit if coverage otherwise exists. This action rests on whether the Policy between American Transit and Encalada covered Encalada's 1995 Lincoln on January 6, 2006. American Transit argues that the irrefutable facts establish there was no such coverage.

Hanover argues that American Transit's position is based upon conclusory statements and documentation, which it unilaterally claims establish the effective dates of the purported substitution, while assuming that certain administrative tasks were, in fact, performed; and further assumes actual mailings took place without providing any proof thereof, and advances statements which are contradicted by the deposition transcripts of Tillman Brokerage, Inc., one of its authorized agents, as well as its own insured, Encalada.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Zuckerman v. City of New York, 49 N.Y.2d 557, 562

(1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562.

A cancellation is not effective until notice is received by the insurer, regardless of the intentions of the insured. Savino v. Merchants Mut. Ins. Co., 44 N.Y.2d 625 (1978). Therefore, statutory requirements for the giving of notice, before the cancellation of compulsory insurance policies will become effective, have no application where the cancellation is effected through the request of the insured and not at the behest of the insurer. Hanover Ins. Co. v. Eggelton, 88 A.D.2d 188 [3d Dept. 1982], *aff'd*, 57 N.Y.2d 1020 [1982]. An insured's request for cancellation of a policy must be made to the insurer or its authorized agent. Country-Wide Ins. Co. v. Wagoner, 57 A.D.2d 498 (4th Dept. 1977), *judgment rev'd on other grounds*, 45 N.Y.2d 581(1978).

American Transit claims that Encalada's request to have the 95 Lincoln removed from the Policy and the 98 Lincoln added relieved it of any contractual obligation to provide a defense or indemnify Encalada in connection with the January 6, 2006 accident. The court agrees.

Hanover's argument, that American Transit should be held responsible for defending and/or indemnifying Encalada because it was not Encalada's intent to drive an uninsured vehicle and that Mr. Encalada believed that the 95 Lincoln, was still insured is without any factual support and inconsistent with applicable case law.

Hanover merely asserts conclusory language and refers to selective portions of the

[* 7]

deposition of Encalada. Furthermore, Hanover does not support its conclusions with an affidavit from Encalada, but even so, Encalada's uncertainty of when the transfer of the Policy would occur, upon registration or upon the effective date of the policy endorsement does not alter the outcome in this action. Encalada's own statements indicate that he was aware that the insurance was transferred from the 95 Lincoln to the 98 Lincoln prior to the accident. Specifically, Encalada requested that the insurance coverage on the 95 Lincoln be cancelled and transferred to the 98 Lincoln on January 3, 2006. In recounting his January 3, 2006 visit to Pacifico to request the transfer, Encalada testified:

When I bought the new car, I went to Pacifico Travel. I asked them, you know, please, I need to transfer the insurance from the 1995 to the newer car, Lincoln, 1998. They said to me, okay, no problem, we are going to do it. They did it [that day].
(Encalada Tr. 20: 13-19).

It is also uncontroverted that Encalada went to the DMV on January 9, 2006, three days after the accident, to complete the registration process for the 98 Lincoln. There is no "uncertainty of the facts" which would preclude summary judgment on behalf of American Transit. It has been established that the effective date of the transfer was prior to the accident on January 6, 2006. The undisputed facts show that the insurance coverage was transferred from the 95 Lincoln to the 98 Lincoln on January 4, 2006 at the latest. Furthermore, the deposition testimony of James Errigo ("Errigo"), on November 17, 2010 ("Errigo Tr.") established that the transfer was effectuated prior to the accident. Errigo, the broker at Tillman who processed Encalada's insurance transfer request for Pacifico with American Transit, testified that he issued the endorsement request on January 3, 2006 and faxed it to American Transit at 1:41 p.m. that same day. (Errigo Tr. 11 :6-12). The Certificate of Insurance issued by American Transit which was filed with the

Department of Motor Vehicles by Encalada on January 9, 2006 lists the effective date of the coverage on the 98 Lincoln as 12:01 a.m. on January 4, 2006. Therefore, the insurance on the 1995 Lincoln lapsed as of 12:00 a.m. on January 4, 2006.

Hanover's argument that the motion should be denied because it has not been able to locate Patricia Ferron is rejected. In a prior decision, dated May 19, 2011, the court stated that the "defendant is given 30 days to depose Patricia Fe[r]ron....In the event defendant fails to depose Ms. Fe[r]ron as provided herein, that failure may not be asserted as a basis for opposing the [motion for] summary judgment."

Although Hanover "alleges" that Encalada never signed the endorsement the document purports to be signed by Encalada. Encalada claims at his deposition that the signature is not his, however this does not establish the document as a forgery or that it was not signed on his behalf by his agent. With regards to accusations of forged signatures, "something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." Banco Popular v. Victory Taxi Mgmt., Inc., 1 NY3d at 384 (2004). Hanover maintains that the signature purporting with be Encalada's signature on the guaranty differs from his real signature, and that it is "not his signature." Such assertion is insufficient to defeat a motion for summary judgment, where, there is substantial evidence that Encalada requested and otherwise authorized the transfer of the insurance policy from the 95 Lincoln to the 98 Lincoln. Hanover's conclusory statements that the signature on the application is a forgery does not raise a triable issue of fact (Banco Popular North America v. Victory Taxi Management, Inc., *supra*). Therefore, plaintiff's motion for summary judgment must be and, hereby is, granted.

Conclusion

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff, American Transit Insurance Company's, motion for summary judgment against defendant, Hanover Insurance Company, is granted; and it is further

ORDERED that defendant, Hanover Insurance Company's, cross-motion for summary judgment plaintiff, American Transit Company, is denied; and it is further

ORDERED, DECLARED AND ADJUDGED that American Transit Insurance Company does not have a duty to defend or indemnify defendant Hanover Insurance Company in connection with Wilson Encalada's motor vehicle accident of January 6, 2006; and it further

ORDERED that any requested relief not otherwise expressly granted herein is deemed denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
 December 23, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.

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