

Repwest Ins. Co. v Hanif
2021 NY Slip Op 30820(U)
March 9, 2021
Supreme Court, Kings County
Docket Number: 512013/17
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of March, 2021.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

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REPWEST INSURANCE COMPANY,
U-HAUL CO. OF NEW YORK AND VERMONT, INC.,
and 2010 U-HAUL TITLING 2, LLC,

Plaintiffs,

Mot. Seq. No. 5

- against -

Index No. 512013/17

NAZIM HANIF,
DINORAH CARMEN ANGLERO,
DARIO FERRER DE LA CRUZ,
and RAMON DUARTE GARCIA,

Defendants,

- and -

JOSE D. ORTEGA
and HEREFORD INSURANCE COMPANY,

Nominal Defendants.

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<u>Recitation, as required by CPLR § 2219 (a), of the e-filed papers considered:</u>	<u>NYSCEF #:</u>
Notice of Motion, Affirmation (Affidavits), and Exhibits Annexed _____	<u>121-130</u>
Affirmations in Opposition and Exhibits Annexed _____	<u>140-167, 170</u>
Reply Affirmations and Exhibits Annexed _____	<u>168-169; 176-178</u>

In this action, plaintiffs, Repwest Insurance Company (“Repwest”), U-Haul Co. of New York and Vermont, Inc. (“UHNY”), and 2010 U-Haul Titling 2, LLC (“UHT2”) move for summary judgment against (1) defendants Dinorah Carmen Anglero, Dario Ferrer De La Cruz, and Ramon Duarte Garcia (collectively, “defendants” or “passenger defendants”), and (2) nominal defendant Hereford Insurance Company (“HIC”), for a declaration that Repwest, as the claims administrator on behalf of UHT2, has no duty to provide insurance coverage to the passenger defendants for any of their alleged injuries arising out of the collision that occurred on October 9, 2013 (“the collision”) involving a livery vehicle insured by HIC and a vehicle rented by defendant Nazim Hanif (“Hanif”) from UHNY, which is owned and self-insured by UHT2. Defendants jointly, and HIC, individually, oppose plaintiffs’ motion.

The livery vehicle, a Chevrolet Suburban (“SUV”) that was owned and operated by nominal defendant Jose D. Ortega, was struck in the rear by a Ford E250 cargo van (“van”), which was owned by UHT2 and had been rented by UHNY to Hanif. On June 20, 2014, an adjuster, hired by Repwest, audio taped his interview with Hanif (“Hanif Interview”) at the latter’s home regarding the circumstances surrounding the collision. According to the audiotape, transcribed approximately six months later on December 7, 2014 and the unsigned transcript of the interview, Hanif stated to the adjuster that he was merely a passenger in the van at the time of the collision, where an individual unknown to him who was driving it, hit the rear end of the SUV causing the collision, and promptly escaped from the van before the police arrived. An uncertified copy of the motor vehicle accident report completed by police on the date of the collision indicates, contrary to the Hanif Interview, that Hanif was the driver of the van.

Contemporaneous with the interview, Hanif executed a document titled “Affidavit¹” (“Hanif Statement”), which characterized the collision as a staged accident. Additionally, Hanif executed a Claims Withdrawal Form, albeit without stating any reasons therefor. Four days later, on June 24, 2014, Repwest sent a letter to Hanif disclaiming coverage based on his admission that the accident was staged. The letter was returned to Repwest as undelivered.

On June 18, 2014, the passenger defendants commenced an action against Hanif, and UHT2 to recover damages for personal injuries they allegedly sustained as a result of the accident (*see Anglero v Hanif*, Index No. 505599/14 [Sup. Ct. Kings County]) (“the underlying action”). UHT2 moved to dismiss the underlying action as against it under CPLR § 3211 (a) (1) and (7), based upon its contention that the collision was staged. By decision and order, dated April 22, 2015, UHT2’s motion was denied on the ground that all the documents tendered by UHT2 to establish the collision was staged (*i.e.*, the Hanif Interview, Hanif Statement, and Claims Withdrawal Form, as well as the affidavit of the interviewing adjuster) were inadmissible (*see Anglero v Hanif*, 2015 NY Slip Op 30723[U]). In preparation for UHT2’s motion for leave to renew, Hanif executed, before a notary public, an affidavit,

¹The document was Hanif’s statement witnessed by the adjuster and thus, was not an affidavit in proper form, sworn to before a notary public.

dated June 15, 2015, in which Hanif stated (in ¶¶ 3-4 thereof) that: (1) “[t]he [c]ollision was intentionally caused and was in no way accidental in nature;” and (2) he had “personal knowledge that the [c]ollision was intentionally caused because [he] participated in it with the expectation that [he] would profit monetarily as a result” (the Hanif Affidavit). UHT2’s motion for leave to renew was denied by order, dated October 22, 2015, because it failed to proffer reasonable justification for its belated submission of the Hanif Affidavit. On appeal, the denials of UHT2’s motions, both the initial motion and subsequent motion for leave to renew, were affirmed, with the alternative ruling specifically addressing the Hanif Affidavit that “[i]n any event, the newly submitted evidence would not have changed the prior determination” (*see Anglero v Hanif*, 140 AD3d 905, 907 [2d Dept 2016]). Thereafter, the underlying action was stayed by order dated July 31, 2019, pending resolution of the instant action but these two matters were not consolidated.

After losing its appeal in the underlying action, UHT2, joined by its claims administrator, Repwest, commenced this action on June 19, 2017 against Hanif, the passenger defendants, and HIC as one of the nominal defendants, for a declaration that plaintiffs were not required to defend and indemnify Hanif with respect to the underlying action, and that they had no duty to afford coverage to the passenger defendants for any claims arising out of the collision. On August 10, 2017, HIC answered the complaint.² Thereafter, UHT2 and Repwest moved for, and were granted by order, dated June 17, 2019, a default judgment against Hanif.

Plaintiff now moves by pre-Note of Issue motion for summary judgment for a declaration of no coverage to the passenger defendants for the alleged injuries they may have sustained in the collision. Plaintiffs are relying, in principal part, on the Hanif Affidavit which, as noted, was prepared and filed at the preliminary stage of the underlying action.

² HIC’s answer also contained a loss-transfer counterclaim for no-fault benefits it paid on behalf of the passenger defendants. HIC’s counterclaim was dismissed for lack of subject matter jurisdiction (*see Repwest Ins. Co. v Hanif*, 178 AD3d 973 [2d Dept 2019]).

“A deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident” (*State Farm Mut. Auto. Ins. Co. v Laguerre*, 305 AD2d 490, 491 [2d Dept 2003]). Even where the individual claiming benefits had no involvement in causing the collision but was merely an innocent injured party, coverage is denied because the collision was not a covered accident (*see Matter of Nationwide Gen. Ins. Co. v Pontoon*, 123 AD3d 1040, 1041 [2d Dept 2014]; *Matter of Liberty Mut. Ins. Co. v Goddard*, 29 AD3d 698, 698-699 [2d Dept 2006]).

The burden of proof on an insurer seeking to disclaim coverage is “by a preponderance of the evidence; [the insurer is] not required to establish that the subject collision was the product of fraud, which would require proof of all of the elements of fraud, including scienter, by clear and convincing evidence” (*V.S. Med. Services, P.C. v Allstate Ins. Co.*, 25 Misc 3d 39, 41 [App Term, 2d Dept 2009] [internal citation omitted]).

Here, the only admissible evidence proffered by plaintiffs is the Hanif Affidavit which he executed, at Repwest’s request, following the court’s denial of UHT2’s initial motion to dismiss the underlying action.³ Significantly, Hanif was not deposed in this action, or in the underlying action, and thus, has not been subjected to a thorough examination. Inasmuch as summary judgment is the procedural equivalent of a trial, granting plaintiffs relief at this time is premature considering the scarce record developed in this action to date. More fundamentally, plaintiffs may not circumvent the appellate order in the underlying action by moving in this action, *before Hanif’s deposition is taken and discovery is completed*, for the same relief prayed for in the motion to dismiss that was filed at the preliminary stage of the underlying action.

Additionally, this court is cognizant that, in *Lopez v Baptiste*, Index No. 6854/14 (Sup Ct, Kings County), a driver’s affidavit and unsigned transcript together with the affidavit of an investigator who

³ Everything else proffered by plaintiffs in support of the instant motion is inadmissible either because it is: (1) unsigned by Hanif (Hanif Interview); (2) not in the form of an affidavit sworn to before a notary public (Hanif Statement); (3) not probative (Claims Withdrawal Form); (4) uncertified (the motor vehicle accident report); or (5) unsupported by the personal knowledge of the facts surrounding the collision (pretrial deposition of Repwest’s litigation supervisor Robert Dunston) (*see Progressive Advanced Ins. Co. v McAdam*, 139 AD3d 691, 692 [2d Dept 2016]; *New S. Ins. Co. v Dobbins*, 71 AD3d 652, 653 [2d Dept 2010]).

lacked personal knowledge were held sufficient to establish that the collision was staged. However, that decision is neither persuasive nor binding on this court (*see Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). Further, contrary to plaintiffs' contention, a prior default judgment against Hanif in this action does not collaterally estop the passenger defendants and HIC, from contesting lack of coverage (*see Hereford Ins. Co. v McKoy*, 160 AD3d 734, 735-736 [2d Dept 2018]).

Accordingly, plaintiffs' motion is denied with leave to renew upon completion of discovery, including (unless expressly waived by the passenger defendants and HIC) Hanif's pretrial deposition, and the filing of a note of issue.

The foregoing constitutes the decision and order of the court.

E N T E R,



HON. INGRID JOSEPH, J.S.C.