UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES FERSZT and WENDY FERSZT,
his wife,

Plaintiffs,

vs.

PRESTIGE CASUALTY INSURANCE
COMPANY,

Defendant.
_____/

CASE NO. 88-CV-72855-DT

HONORABLE LAWRENCE P. ZATKOFF

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the day of

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

INTRODUCTION

This is a declaratory judgment action in which Plaintiffs seek a determination that Defendant Prestige Casualty Insurance Company is liable for payment of a judgment obtained by Plaintiffs against Defendant's Insured, John Ertzbischoff. Defendant has moved for summary judgment; Plaintiffs have responded. The Court will decide the motion without oral argument.

Summary judgment is appropriate where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. Blakeman v. Mead Containers, 779 F.2d 1146 (6th Cir. 1986); Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, ___, 106 S.Ct. 2548, 2552-2553 (1986). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the party opposing the motion. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986); United States v. Diebold, 368 U.S. 654 (1962); Cook v. Providence Hosp., 820 F.2d 176, 179 (6th Cir. 1987); Smith v. Hudson, 600 F.2d 60 (6th Cir. 1979), cert. dismissed, 444 U.S. 986 (1979). In deciding a motion for summary judgment, the Court must consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at ___, 106 S.Ct. at 2512. Although summary judgment is disfavored, this motion may be granted when the trial would merely result in delay and unneeded expense. Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962); A.I. Root Co. v. Computer/Dynamics, Inc., 806 F.2d 673, 675 (6th Cir. 1986). Where the non-moving party has failed to present evidence on an essential element of their case, they have failed to meet their burden and all other factual disputes are irrelevant and thus summary judgment is appropriate. Celotex, 477 U.S. at ___, 106 S.Ct. at 2553; Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. ___, 106 S.Ct. 1348, 1356 (1986)("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)).

I. FACTS

John Ertzbischoff, on April 4, 1982, while operating his 1980 Peterbuilt semi-tractor truck, was involved in a motor vehicle accident. At the time of the accident, Mr. Ertzbischoff's semi-tractor truck was on route from Chicago, Illinois to Romulus, Michigan pulling a 40-foot trailor owned by Willett Interstate System, Inc. (Willett). Willett had trip leased Ertzbischoff's truck for use in interstate commerce. Pursuant to the applicable rules and regulations of the Interstate Commerce Commision (ICC), the ICC permits and company name placards for Willett were on Ertzbischoff's truck. See 49 C.F.R. §§1057(c)(1) and 1058. The trip lease agreement between Ertzbischoff and Willett provided that Willett was required to maintain insurance coverage for protection of the public in accordance with 49 C.F.R. §1043.

James Ferszt, Plaintiff herein, was a passenger in Ertzbischoff's truck at the time of the accident. Ferszt commenced a personal injury lawsuit in the Wayne County Circuit Court. On February 13, 1985, pursuant to a mediation award, a judgment was entered against Mr. Ertzbischoff, in favor of James and Wendy Ferszt in the amount of $25,000. Now, Plaintiffs seek a determination from this Court that Defendant is liable for the $25,000 judgment against Defendant's insured, John Ertzbischoff. Defendant contends that it is not liable for the judgment as Mr. Ertzbischoff's insurance policy did not provide him with liability insurance coverage for the accident on April 4, 1982, because he was not "bobtailing."[1]

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[1]The appearance of the tractor/truck when operating without a trailer has been descriptively referred to as looking like a "bobtail." Hence, the term bobtail insurance coverage which covers the vehicle when it is being operated for personal, non-trucking uses.

II. OPINION

At the time of the accident, Mr. Ertzbischoff was covered by an insurance policy issued by Defendant. It is alleged that the policy provided "bobtail" liability insurance coverage only. Therefore, Defendant argues that Mr. Ertzbischoff's insurance policy did not cover accidents involving the truck while it had a trailer attached. In addition, Defendant contends that Mr. Ertzbischoff's truck, since it was leased by Willett, had liability insurance coverage through Willett pursuant to mandatory requirements of the regulations of the ICC.

A.

Throughout the pendency of this litigation, both parties assumed they did not have a copy of Mr. Ertzbischoff's insurance policy and proceeded without it.[2] However, during the pretrial conference held on August 14, 1989, Plaintiffs' counsel discovered he did in fact have a copy of Mr. Ertzbischoff's insurance policy. From this policy, the parties were able to gather relevant information regarding the extent of Mr. Ertzbischoff's coverage. Defendant filed a supplemental brief explaining the pertinent parts of the policy, in particular, endorsement "A884a".

The language of endorsement A884a states as follows:

> TRUCKERS-INSURANCE FOR NON-TRUCKING USE (MICHIGAN)
>
> This endorsement changes the policy effective on the inception date of the policy unless a different date is indicated below.

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[2]Defendant explained that it does not keep records of policies going back to 1983, which is when Mr. Ertzbischoff's policy expired. Defendant further explained that since it did not provide Mr. Ertzbischoff with a defense in the underlying action in state court, it did not retain a copy of the policy which was discarded long before the instant suit was filed on July 13, 1988.

> This endorsement, effective on 2-26-82 at 12:01 a.m. standard time, forms a part of policy number PA50055 of the Prestige Casualty Insurance Company issued to: John Ertzbischoff.
>
> Agency at Grand Rapids, Michigan.
>
> For the covered auto described in this endorsement, LIABILITY INSURANCE, Michigan Personal Injury and Protection Coverages are changed as follows:
>
> a). LIABILITY INSURANCE does not apply while the covered auto is used in the business to whom it is leased or rented if the lessee has liability insurance sufficient to pay for damages in accordance with chapter 31 of the Michigan Code.

Chapter 31 of the Michigan Code requires that the owner or registrant of a motor vehicle maintain a minimum of twenty thousand dollars ($20,000.00) in liability insurance coverage. Defendant contends that Willett possessed the required insurance coverage by virtue of its insurance obligations mandated by the ICC. The insurance obligations mandated by the ICC are found at 49 C.F.R. §1043.2 and indicate that for all motor vehicles used in the transportation of property, the minimum insurance amount required for bodily injuries is $100,000. That satisfies Chapter 31 of the Michigan Code. Therefore, if the Court determines Willett possessed the insurance coverage as mandated by the ICC, summary judgment will be granted. To do this, the Court will review the ICC rules and regulations.

B.

Based upon federal law, before the ICC may issue an operating permit, which Willett did in fact possess, the carrier must file with the commission a bond, insurance policy or other security approved by the commission guaranteeing payment of any judgment against the carrier for bodily injury or death resulting from negligent operation or use of a motor vehicle while operating under the carrier/lessee's permits. See 49 C.F.R. §1043.1. Furthermore, 49 C.F.R. 387.15 requires that

the bond, policy or security, which must be filed with the commission as a prerequisite to the carrier's receipt of an operating permit, contain the following language:

> [I]n consideration of the premium stated in the policy to which this endorsement is attached, the insurer (the company) agrees to pay, within the limits of liability described herein, any financial judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of the motor vehicle subject to their financial responsibility requirements of §§29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere....
>
> [I]t is understood and agreed that no condition, provision, stipulation or limitation contained in the policy, this endorsement, or any other endorsement thereon or violation thereof, shall relieve the company from liability or from the payment of any financial judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured.

The language of this form, which is commonly referred to as the ICC endorsement, is imputed by law regardless of whether the endorsement is physically attached to the policy. 49 C.F.R. §1043.3. The effect of this endorsement renders the carrier/lessee primarily liable and responsible for any damages or liability arising from the negligent operation or use of the vehicle during the duration of the lease. Haggans v. Glenns Falls Insurance Company, 465 F.2d 1249 (10th Cir. 1972). This primary liability and responsibility of the carrier/lessee continues until such time as the lease is terminated in accordance with the mandatory requirements of 49 C.F.R. §1057.11(c)(1). Section 1057.11(c)(1) provides in pertinent part: "Upon termination of the lease, the authorized carrier shall remove all identification showing it as the operating carrier before giving up possession of the

equipment." The identification which must be removed by the carrier/lessee from the vehicle is described in §1058.2 and consists of the carrier/lessee's ICC permit and the company name placards. 49 C.F.R. 1058.2, 49 C.F.R. 1057.11(c)(1).

As pointed out by the Defendant, these mandatory federal requirements for terminating the lease agreement and the lessee's primary liability for the use and operation of the leased vehicle, are significant in this case because it is undisputed that ICC permits and placards for Willett were still on Mr. Ertzbischoff's truck at the time of the accident. Therefore, Mr. Ertzbischoff's truck had liability insurance coverage through Willett pursuant to the mandatory requirements and regulations of the ICC. In addition, the existence and applicability of the liability insurance coverage from any lease of Mr. Ertzbischoff's truck is strong evidence why Mr. Ertzbischoff only obtained "bobtail" liability insurance coverage.

CONCLUSION

Therefore, based on the briefs filed with the Court and a review of Mr. Ertzbischoff's insurance policy, the Court holds that at the time of the accident, which was the subject of the underlying lawsuit, Willett had primary liability for any personal or property damage. In addition, the Court holds that Mr. Ertzbischoff's insurance policy with Defendant applied only when the truck was being operated without a trailer.

Accordingly, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE