

Judgment rendered January 15, 2014
Application for rehearing may be filed
within the delay allowed by Art. 2166,
La. C.C.P.

No. 48,664-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

RONALD OLIVO AND DIANE OLIVO

Plaintiffs-Appellants

versus

PROGRESSIVE SECURITY INSURANCE
COMPANY, KEWIN LESHAY AND
PROTECTIVE INSURANCE COMPANY

Defendant-Appellees

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 560,678

Honorable Leon L. Emanuel, III, Judge

* * * * *

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* * * * *

Before BROWN, CARAWAY and MOORE, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16.3, Uniform Rules, Courts of Appeal.

MOORE, J., concurs with reasons.

CARAWAY, J.

This appeal arises from the district court's grant of motion for summary judgment in favor of defendant, Protective Insurance Company. Plaintiffs Ronald and Diane Olivo named Protective Insurance Company as a defendant alleging it was the uninsured/underinsured motorist coverage provider for Ronald Olivo's employer, FedEx Freight, Inc. Protective Insurance Company moved for summary judgment on the basis that FedEx Freight, Inc. had rejected uninsured/underinsured motorist coverage. Ronald and Diane Olivo argued that the uninsured/underinsured motorist coverage rejection was invalid. Finding that Protective Insurance Company failed to provide sufficient evidence to meet its burden of proof on its motion for summary judgment, we reverse.

Facts and Procedural Background

On July 2, 2011, Ronald Olivo ("Olivo") was operating a truck-tractor pulling two trailers for his employer FedEx Freight, Inc. ("FedEx"), when a 1994 Chevrolet Impala driven by Kewin Leshay crossed the center of Interstate 20 and collided head on with Olivo's truck. As a result of this accident, Olivo sustained several severe and permanent injuries after his vehicle burst into flames. Olivo's injuries required extensive surgeries.

Following this collision, Olivo filed this lawsuit on July 28, 2012, naming Kewin Leshay, his liability insurer Progressive Security Insurance Company, and FedEx's uninsured/underinsured motorist insurer Protective Insurance Company ("Protective") as defendants. Olivo alleged that the insurance provided by Progressive Security Insurance Company was

insufficient to cover his damages and that Protective is required to cover the remaining damages under the uninsured/underinsured motorist (“UM”) coverage resulting from Protective’s policy.

Subsequently, Protective filed a motion for summary judgment on the basis that FedEx had validly rejected UM coverage in Louisiana. In support of its motion for summary judgment, Protective produced a document called “Uninsured Motorists, Underinsured Motorists and No Fault Policy” with a policy number of XP1243 (“policy XP1243”), which included a declarations page, common policy conditions, and a truckers coverage form. Included in this policy were numerous forms and endorsements pertaining to UM coverage for various states in which FedEx operates. Significantly, policy XP1243 specifically states that its coverage “does not provide bodily injury and property damage liability insurance.” Policy XP1243 was therefore apparently issued in conjunction with another Protective policy of insurance, numbered X-1790, covering FedEx. Nevertheless, the only reference to policy X-1790 was on the declarations page of policy XP1243 in Item 6 stating that the premium for policy XP1243 was that included in policy X-1790. The obligations of Protective and FedEx under policy X-1790 are entirely unknown on this appellate record.¹

¹Counsel for Protective during oral argument stated that FedEx was self-insured up to what she thought was \$5,000,000. However, she did not state whether this was a nationwide limit or the limit on each claim. She stated that Protective’s coverage started after this \$5,000,000 limit. However, the record does not reflect this fact. La. R.S. 22:1295(3) provides: Any party possessing a certificate of self-insurance as provided under the Louisiana Motor Vehicle Safety Responsibility Law, shall be an “insurer” within the meaning of uninsured motorist coverage provided under the provisions of this Section. This provision shall not be construed to require that a party possessing a certificate of self-insurance provide uninsured motorist coverage or that such coverage is provided by any party possessing such a certificate.

The declarations page of the nationwide policy XP1243 in Item 4 states the following for its limit:

The most we will pay for one “accident” or “loss”:

- (a) under UNINSURED MOTORISTS and UNDERINSURED MOTORISTS is the minimum amount required by law in the state where the covered auto is principally garaged after all rights of rejection and selection of lower limits have been exercised by you,

* * * * *

Protective also supported its motion for summary judgment with a State of Louisiana Uninsured/Underinsured Motorist Bodily Injury Coverage Form (“UMBI form”) purportedly executed by FedEx. This form is identical to the form prescribed by the Commissioner of Insurance except that for numbered options 2 and 3 on the form, where an insured can select economic-only coverage or economic-only coverage below bodily injury liability limits, the choices for both types of economic-only coverage have “N/A” preprinted in the blanks on the form.

For option 4 on the UMBI form, the initials “RSG” are written next to the choice stating, “I do not want UMBI coverage. I understand that I will not be compensated through UMBI coverage for losses arising from an accident caused by an uninsured/underinsured motorist.” An illegible signature is written above the blank for the “Signature of Named Insured or Legal Representative.” Above the portion of the form labeled “Print Name” is written “Richard” followed by what appears to be the letters G-O-L-D and a few more illegible letters. Above the date blank is written “10-1-10.” In the box for policy number is written “XP1243.” Below the policy number box is a box containing the words “Protective Insurance Company.”

The UMBI form includes the following parenthetical in its fourth introductory paragraph: “Economic-Only UMBI Coverage may not be available from your insurance company. In this case, your company will have marked options 2 and 3 below as ‘Not Available’ or ‘N/A.’” Also, at the bottom of the form, a notation is found that states, “Issued per LDOI Bulletin 08-02 8-29-08; UA 182e (Ed. 9-08) Walters Kluwer Financial Services | Uniform Forms (TM); Page 1 of 2.”

Along with the UMBI form, Protective also submitted the affidavit of Richard Goldabar and Louisiana Department of Insurance Bulletin No. 08-02, which provides instructions for executing the UMBI form. The affidavit states that Richard Goldabar is the Vice-President of Legal and Risk Management for FedEx Freight, Inc., and that on October 1, 2010, he executed a waiver of UM coverage on behalf of FedEx. The affidavit also states that the waiver was for the policy numbered XP1243 with a policy period commencing on October 1, 2010. The declarations page for policy XP1243 states that the policy extended for one year from that date.

In opposition to Protective’s motion for summary judgment, Olivo submitted only a blank UMBI form promulgated by the Louisiana Commissioner of Insurance on August 29, 2008. Olivo argued that there were numerous errors pertaining to FedEx’s attempted execution of the waiver of UM coverage on the form allegedly signed by Richard Goldabar. Additionally, Olivo argued that the policy number on the form is not correctly indicated and that the policy number that should have been in the

policy number box of the form was apparently the number for the Protective policy, X-1790.

Following oral argument on the motion, the district court determined that no material issue of fact existed regarding FedEx's execution of the UMBI form and that the rejection was valid as a matter of law. Therefore, the district court dismissed Olivo's claims against Protective. It is from this judgment that Olivo appeals.

Louisiana UM Law

In Louisiana, UM coverage is provided for by statute and embodies a strong public policy. *Duncan v. U.S.A.A. Ins. Co.*, 06-0363 (La. 11/29/06), 950 So. 2d 544 (citations omitted). The object of UM insurance is to provide full recovery for automobile accident victims who suffer damages caused by a tortfeasor who is not covered by adequate liability insurance. *Gray v. American Nat. Property & Cas. Co.*, 07-1670 (La. 02/26/08), 977 So. 2d 839, *citing Duncan, supra*.

UM coverage is determined not only by contractual provisions, but also by applicable statutes. *Id.* Thus, under the UM statute, the requirement of UM coverage is an implied amendment to any automobile liability policy, even when not expressly addressed, as UM coverage will be read into the policy unless validly rejected. *Id.* The UM statute is to be liberally construed, and the statutory exceptions to coverage are to be interpreted strictly. La. R.S. 22:1295(1)(a)(i); *Gray, supra, citing Duncan, supra*. Generally, a party who demands performance of an obligation must prove the existence of the obligation. La. C.C. art. 1831. A party who asserts that

an obligation is null or that it has been modified or extinguished, must prove the facts or acts giving rise to the nullity, modification, or extinction. *Id.* However, an insurer bears the burden of proving any insured named in the policy rejected in writing the coverage equal to bodily injury coverage or selected lower limits. *Gray, supra, citing Duncan, supra.*

Discussion

From the summary judgment evidence submitted by Protective, we find merit in Olivo's second issue raised in this appeal, which states:

Is the presentation of an insurance policy which is not the policy which provides liability coverage sufficient for this insurer to win summary judgment?

Olivo is correct that the UMBI form submitted by Protective in support of summary judgment states that it applies to "Policy Number XP1243." Policy XP1243 is also in the record yet it specifically states that it "does not provide bodily injury and property damage liability insurance." The asserted rejection by FedEx of UM coverage is not shown therefore to apply to an automobile liability policy from which UM coverage could arise.

With this summary judgment challenge by Protective, Olivo may rest on the allegation in his petition of a Protective automobile liability policy issued to FedEx "containing uninsured/underinsured motorist coverage on the vehicle operated by" Olivo. As shown by the statutory policy pronouncements in the above jurisprudence, the burden of proof demonstrating the absence of UM coverage rested entirely on Protective. It was required to show that UM coverage was not expressly addressed and

provided in the alleged automobile liability policy with FedEx and was properly rejected by FedEx in connection with such policy. Otherwise, Protective might have also proven that it issued no automobile liability policy at all to FedEx.

Thus, we are left with a UMBI rejection form that is not shown to be tied to an automobile liability policy. All the while, Protective's summary judgment evidence admits that another policy, X-1790, exists, but its contents are never revealed or explained by the evidence. Importantly, there is no affidavit of a Protective employee/agent identifying and explaining the UMBI form and how it relates to any policy of automobile liability insurance issued to FedEx.

Protective's brief to this court is most revealing in its addressing of this problem concerning its burden of proof and the lack of evidence of an automobile liability policy. It states:

The Olivos first raised this issue at the hearing of this matter and never briefed this issue prior to this appeal precluding Protective the opportunity of properly rebutting this argument with introducing additional evidence into the record of the proceedings.

The admittedly missing evidence is what Code of Civil Procedure Article 966 identifies as proof of an essential element of a claim of a party who would bear the burden of proof for that element at trial. *See* La. C.C.P. art. 966. As a matter of procedure, if a moving party who will bear the burden of proof at trial does not produce sufficient and undisputed facts of each essential element for its claim in its motion for summary judgment, the motion should be denied. Here, Olivo's allegation of an automobile liability policy importing, expressly or otherwise, UM coverage was not defeated by

Protective's contrary evidence in support of summary judgment. Additional evidence, as Protective tacitly now admits, was required for summary judgment. Accordingly, the trial court's ruling is reversed.

Conclusion

For the foregoing reasons, the judgment of the trial court is reversed.

Costs of this appeal are assessed to appellee.

REVERSED.

MOORE, J.

I respectfully concur, solely on the technical ground conceded in brief by Protective Insurance: the liability policy, XP 1790, was not attached to the motion for summary judgment or admitted for purposes of the motion as required by La. C. C. P. art. 966 E(2). On remand, Protective is entitled to reassert the motion for summary judgment, this time attaching the correct policy. On the principal issue raised by the Olivos, I would find that the UM rejection fully complies with La. R.S. 22:1295 (1)(a)(ii) and *Duncan v. USAA Ins. Co.*, 2006-363 (La. 11/29/06), 950 So. 2d 544, and on that basis I would affirm the summary judgment.