FILED APR 3 0 2024 HARTFORD J.D.

DOCKET NO. X07-CV-22-6158436-S : SUPERIOR COURT

UNITED STATES AIRCRAFT INSURANCE GROUP, : JUDICIAL DISTRICT OF HARTFORD

v. : COMPLEX LITIGATION DOCKET

INTERSTATE AVIATION, INC., ET AL. : APRIL 30, 2024

MEMORANDUM OF DECISION RE MOTION FOR SUMMARY JUDGMENT, # 123

On September 2, 2021, a 2009 Cessna 560XL Citation XLS+ aircraft, FAA Registration No. N560AR (Aircraft), crashed following an unsuccessful takeoff from Robertson Airport in Plainville, Connecticut (Accident). The plaintiff/insurer of the Aircraft, United States Aircraft Insurance Group (plaintiff), issued a policy of insurance, Policy # SIHL1-H691 (Policy), to Interstate Aviation, Inc. (Interstate) as the named insured. The policy names Brookhaven Properties, LLC (Brookhaven), Timothy Haviland and Nancy Haviland as additional endorsed insureds.[1] Brookhaven either owned or had a lease-hold interest in the Aircraft and entered into an Administrative Services & Charter Lease Agreement with Interstate. The plaintiff commenced the present action seeking a declaratory judgment against its insureds, the defendants, that it has no obligation to provide "coverage pursuant to the Policy for the accident occurring on September 2, 2021." Before the court is the plaintiff's motion for summary judgment in which it asserts that there are no genuine issues of material fact that one of the pilots on the flight was not trained according to the mandate of the policy and thus it had no duty to defend or indemnify the defendants. Because the court finds that a question of material fact exists, the motion is denied.

On the day of loss, September 2, 2021, the Aircraft was piloted by Willim O'Leary, as pilot-in-command, and Mark Morrow, as co-pilot.[2] For coverage to adhere, the policy contains

[1] Collectively, Interstate, Brookhaven, Timothy Haviland and Nancy Haviland are referred to as the defendants.
[2] Both pilots died as a result of the Accident.

#163.00

"limitations on use" that have to be met in order for coverage to apply to a flight of the Aircraft. Paragraph 1.L of the policy provides that "[t]o be covered under your policy the Aircraft must be owned, maintained or used only for the Aircraft use described on the Coverage Summary Page and flown only by a pilot or pilots described there. . . ." The Coverage Summary Page defines "Pilots" as "[a]ny two pilot crew properly certified for the flight involved who ha[ve] been approved by William P. O'Leary and *who ha[ve] successfully completed and passed the manufacturers approved ground and flight school for the insured make and model during the twelve (12) months preceding the month in which the flight involved occurs*." (Emphasis added.)

The plaintiff asserts that no genuine issue of material fact exists that Morrow did not meet the ground and flight school requirement. In support of its motion, the plaintiff asserts that it had sent several letters to Interstate seeking evidence that Morrow had completed the required training with no response providing proof of such training; that the only response received by Interstate[3] to formal discovery requests from Interstate and Brookhaven related to the plaintiff's request for information and documentation of any ground and/or flight school training attended by Morrow was that they were unaware of any training for the Aircraft by Morrow; and a February 4, 2019, pilot application by Morrow independently received by the plaintiff, in which Morrow indicates that the date of his last biennial flight review, and refresher/transition courses, was on November 21, 2018, on aircraft types other than that of the Aircraft type. Interrogatory responses by Interstate aver that Morrow's relationship as an independent contractor with it began on February 6, 2021.

[3] Attached to its motion for summary judgement were the discovery requests sent to Brookhaven but not the responses to it. At oral argument, the defendants asserted that they do not concede that Morrow was not certified as required by the policy, only that they have been unable to find any record of such as of the date of the argument.

At oral argument, counsel for the plaintiff argued, without providing authority either in its briefing or at argument, that summary judgment burdens shift when the movant is trying to prove a negative, here that Morrow had not "successfully completed and passed the manufacturers approved ground and flight school for the insured [Aircraft]." The court is not persuaded that such a burden shifting is applicable to the present case.

Summary judgment may be rendered if "the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" Practice Book §17-49. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Stuart v. Freiberg*, 316 Conn. 809, 820-21, 116 A.3d 1195 (2015). "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue." (Internal quotation marks omitted.) *Fiano v. Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019).

"Even assuming that the plaintiff faces a difficult challenge in ultimately proving its case at trial, that assumption cannot form the basis for granting a motion for summary judgment. So

extreme a remedy as summary judgment should not be used as a substitute for trial or as a device intended to impose a difficult burden on the non-moving party to save his [or her] day in court unless it is clear that no genuine issue of fact remains to be tried. . . . A judge's function when considering a summary judgment motion is not to cull out the weak cases from the herd of lawsuits waiting to be tried; rather, only if the case is dead on arrival, should the court take the drastic step of administering the last rites by granting summary judgment." (Internal quotation marks omitted.) *Mott v. Wal-Mart Stores East, LP*, 139 Conn. App. 618, 631, 57 A.3d 391 (2012). It is for these reasons that "the applicable standard for assessing motions for summary judgment disfavors arguments premised on the plaintiff's alleged lack of evidence." *Cannizzaro v. Marinyak*, Superior Court, judicial district of Fairfield, Docket No. CV-075007388-S, 2010 WL 4723413, *1 (November 2, 2010, *Dooley, J.*).

The premise that the nonmovant has insufficient evidence to defeat summary judgment ignores the burden our courts place on the movant to establish "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49. The only circumstance in which a movant seeking summary judgment may be absolved of the obligation to demonstrate the absence of any material facts is when the nonmovant requires expert testimony to prove their case but has been precluded from doing so. See e.g. *Fortin v. Hartford Underwriters, Ins. Co.*, 139 Conn. App. 826, 59 A.3d 247, cert. granted, 308 Conn. 905, 51 A.3d 1098 (2013) (summary judgment entered after motion to preclude); *Byrne v. Grasso*, 118 Conn. App. 444, 985 A.2d 1064 (2009), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010) (summary judgment granted in legal malpractice case following preclusion of expert because of no timely disclosure); *McVerry v. Charash*, 96 Conn. App. 589, 901 A.2d 69, cert. denied, 280 Conn. 934, 909 A.2d 961 (2006) (summary judgment entered after

expert testimony was precluded via motion for sanctions after party violated scheduling order). The present case presents with a different posture.

In advancing its motion for summary judgment, the plaintiff posits that "[d]uring discovery in this action Defendants have produced no evidence (and USAIG has independently located none) that the second-in-command pilot on the accident aircraft met an express condition precedent to coverage;" Pl.'s Mem. of Law in Supp. of Mot. for Summ. J., # 123, p. 2; and that "[n]o evidence exists indicating that Mark Morrow, the second-in-command on the September 2, 2021 flight of the Aircraft, met the Flight School Requirement during the prior year or, in fact, that he had ever done so." Id., p. 3. The plaintiff misapprehends its burden on summary judgment, which, as set forth above, is to establish that there is no question but that Morrow did not meet the ground and flight school requirement. This it has not done.

The fact that neither Interstate nor Brookhaven provided the plaintiff with any evidence of Morrow having completed the training requisite for coverage does not establish the lack of such training on summary judgment. This establishes, at best, that they did not have any in their possession. Similarly, the response to interrogatories that Interstate was "unaware of any training for the Aircraft by Morrow," is dispositive only to show that there was a lack of knowledge on their part as to Morrow's training on the aircraft. Finally, Morrow's job application to his prior employer in February of 2019, is not dispositive of the issue that he had no ground or flight training on the Aircraft at the time of the loss, September 2, 2021. Instead, such provides only the basis to infer that Morrow did not have the requisite ground or flight school training as of February of 2019, approximately two and a half years before the Accident.

Subsequent to oral argument, the plaintiff successfully moved to supplement the record. The supplemented records included Morrow's December 2, 2019 Record of Training with Flight

Safety International, in which the plaintiff represents that Morrow received his ground and flight school training. The plaintiff asserts that the records provided do not reflect that Morrow took or passed "the approved ground and flight school for the insured [Aircraft] make and model during the twelve (12) months preceding the month in which the flight involved occurs." The plaintiff further provided an unauthenticated copy of a portion of the Aviation Investigation Final Report issued by the National Transportation Safety Board for this accident. The section provided recited that its review of Morrow's available training records reflects no attendance at a ground and flight school for the Aircraft and that an attorney for Morrow's family represented that the family "had no recollection of whether he had attended training for the Cessna 560 series." Pl.'s Suppl. Regarding Pl.'s Mot. for Summ. J., #152, p. 56.

Ignoring the lack of authentication for any of the records or the hearsay contained therein, the documents submitted by the plaintiff fail to establish a lack of a genuine issue of fact that Morrow did not possess the requisite training on the Aircraft. At best, the records establish that Morrow had not completed the training as of December 2, 2019, the date of Flight Safety's Record of Training, a little less than two years before the date of this accident on September 2, 2021. The plaintiff offers no evidence of any nature as to what, if any, training Morrow received from December of 2019 through the date of the accident, nor that he had no such training, including completing "the manufacturers approved ground and flight school for the insured" aircraft, as required for coverage under the Policy.

Because the plaintiff has not established the absence of a genuine issue of material fact as to Morrow's lack of ground and flight school training on the aircraft, the motion for summary judgment is denied.

THE COURT

/s/ #435707

Cesar A. Noble
Judge, Superior Court