

NOT DESIGNATED FOR PUBLICATION

JRW
MTA

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 0205

LISA VIERING AND STEPHEN VIERING

VERSUS

LIBERTY MUTUAL INSURANCE COMPANY AND/OR
LM GENERAL INSURANCE COMPANY, AARON
MICHAEL DICK, BARRY DICK, AND FEATHER & FIN
RANCH, INC.

Judgment Rendered: SEP 27 2017

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2014-13231

Honorable Reginald Badeaux, Judge

* * * * *

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* * * * *

BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McClemond, J. concurs.

WELCH, J.

The plaintiffs/appellants, Lisa Viering and Stephen Viering, appeal a district court judgment resulting in the dismissal of their action against the defendant/appellee, Travelers Casualty Company of America. For the reasons set forth below, we affirm the judgment of the district court.

FACTUAL BACKGROUND

On June 24, 2014, at approximately 12:40 p.m., plaintiff, Lisa Viering, was operating a friend's van and travelling in an easterly direction on U.S. 190 near the intersection of LA. 433. At the same time, the defendant, Aaron Michael Dick, was permissively operating a Mercury Mountaineer owned by his father, Barry Dick, in a westerly direction on the same highway. It is undisputed that the Dick vehicle crossed the centerline of the road and struck the front left side of the van being operated by Mrs. Viering. Unfortunately, Mrs. Viering sustained serious debilitating injuries as a result of the accident.

PROCEDURAL HISTORY

On July 17, 2014, the plaintiffs filed their initial petition for damages naming as defendants, Aaron Dick, Barry Dick, Liberty Mutual (Barry Dick's automotive insurer), and Feather & Fin Ranch, Inc. ("Feather & Fin"). Feather & Fin is a family owned entity that engages in the exotic fish wholesale business, and Barry Dick's employer. The petition alleges that Aaron Dick was also an employee of Feather & Fin and acting within the course and scope of his employment at the time of the accident. Based on the allegations regarding Aaron Dick's status as an employee, the petition asserted Feather & Fin was liable under the doctrine of respondent superior and/or principal agent. The petition also asserted individual liability on the part of Barry Dick on the basis that he personally owned the vehicle that Aaron Dick was driving at the time of the

accident. The claim against Barry Dick was later amended to include a claim for negligent entrustment.

On January 21, 2016, the plaintiffs filed a second amended petition.¹ The second amended petition alleged that Aaron Dick was performing errands for Barry Dick, individually *and* for Feather & Fin on the day of the accident. The second amended petition named Travelers Casualty Insurance Company of America (“Travelers”), as a defendant based on its role as the liability insurer of Feather & Fin. The plaintiffs alleged that Aaron Dick was in the course and scope of employment on behalf of Feather & Fin, and that the vehicle he was operating was covered under the Travelers policy. Finally, the plaintiffs asserted general claims of fraud, deceit, and bad faith against Travelers for failure to provide payment on the claim despite having sufficient information to demonstrate no valid defense.²

On May 3, 2016, Travelers filed a preemptory exception raising the objection of no cause of action challenging only the plaintiffs’ allegations of fraud, deceit, and bad faith, and sought to have the allegations of fraud struck for the failure to provide the necessary factual specificity required for such claims. Travelers also asserted the plaintiffs had no statutory basis to assert a third-party claim of bad faith against Travelers.

On June 23, 2016, two days before the hearing on Travelers’ exception of no cause of action, the plaintiffs filed a motion for leave and a fourth amended petition. The plaintiffs acknowledged in the motion for leave that the purpose of

¹ Prior to the filing of the second amended petition, an amended petition was filed adding the following defendants: (1) Progressive Security Insurance Company, the plaintiffs’ uninsured/underinsured motorist coverage provider, and (2) Progressive Paloverde Insurance Company, the uninsured/underinsured motorist coverage provider for the van being operated by Mrs. Viering at the time of the accident. The allegations contained therein are not relevant to the instant appeal.

² The plaintiffs’ second amended petition also asserted claims of fraud, deceit, and bad faith against Barry Dick’s personal automotive insurer, Liberty Mutual. However, the plaintiffs later dismissed Liberty Mutual from this action in an order signed by the district court on September 7, 2016.

the fourth amended petition was to allege with greater specificity the factual support for their fraud, deceit, and bad faith claims against Travelers.³ At the June 28, 2016 hearing, the district court sustained Travelers' exception of no cause of action, and struck the allegations of fraud, deceit, and bad faith from the second amended petition. The district court did not grant the plaintiffs the opportunity to amend pursuant to La. C.C.P. art. 934. The district court's ruling was reduced to a signed judgment on July 20, 2016, which dismissed the plaintiffs' fraud, deceit, and bad faith claims without prejudice.⁴ The district court declined to hear the plaintiffs' motion for leave related to the fourth amended petition, noting that it was recently filed and would be set for a later scheduled hearing. The plaintiffs did not seek appellate review of the July 20, 2016 judgment.

Motions at Issue on Appeal:

On August 4, 2016, Travelers filed the following pleadings: (1) a motion to quash its La. C.C.P. art. 1442 corporate deposition of Travelers noticed by the plaintiffs; (2) a motion for summary judgment seeking dismissal of the plaintiffs' claims; and (3) a memorandum in opposition to plaintiffs' motion for leave of court to file the fourth amended petition.

³ The plaintiffs had previously filed a third amended petition asserting a claim against National Union Fire Insurance Company of Pittsburg, as the alleged umbrella liability coverage provider for Feather & Fin. The allegations contained therein are not relevant to the instant appeal.

⁴ We make several observations about the ruling on Travelers' exception of no cause of action. The second amended petition asserted claims for both general liability coverage as well as fraud, deceit, and bad faith. The exception of no cause of action is the improper procedural vehicle for seeking partial dismissal of a party's claims. See Pitre v. Opelousas General Hospital, 530 So.2d 1151, 1162 (La. 1988) (when the allegations of the petition state a cause of action as to any part of the demand, the exception of no cause of action must be overruled.). Thus, the granting of Travelers' exception of no cause of action and striking of certain paragraphs from the second amended petition did not comply with the established jurisprudence. However, the plaintiffs did not appeal the judgment. Additionally, the July 20, 2016 judgment sustaining the exception of no cause of action did not specify whether the dismissal of the specified claims for fraud, deceit, and bad faith were with or without prejudice; thus, the dismissal was without prejudice. See Allen v. Allen, 2016-0407 (La. App. 1st Cir. 12/22/16), 210 So.3d 477, 480; State ex rel. Dept. of Soc. Serv. v. A.P., 2002-2372 (La. App. 1st Cir. 6/20/03), 858 So.2d 498, 503 n.10. The net effect of these observations is that the plaintiffs were not precluded from filing an amended petition asserting claims of fraud, deceit, and bad faith due to the July 20, 2016 ruling on the exception. However, as set forth below, the granting of Travelers' motion for summary judgment and finding no basis for coverage, rendered the plaintiffs' attempts to amend their claims in the fourth amended petition moot.

In its summary judgment, Travelers posited three arguments. First, Travelers argued that Aaron Dick was not an employee of Feather & Fin at the time of the accident. Second, Travelers asserted a lack of support for the plaintiffs' claim that Aaron Dick was in the course and scope of employment for Feather & Fin on the date of the accident. Third, Travelers maintained there was no coverage under the Travelers policy for the vehicle being operated by Aaron Dick at the time the accident. Travelers points out that Barry Dick's vehicle was not a scheduled vehicle listed in the policy, nor was there any evidence to demonstrate that it was being hired or borrowed by Feather & Fin. Specifically, Travelers correctly noted that the test under a hired vehicle provision was whether the hirer or borrower exercised dominion, control, or the right to direct the use of the vehicle. See Schroeder v. Bd. of Supervisors of Louisiana State Univ., 591 So.2d 342, 347 (La. 1991). Travelers argued that even if the plaintiffs could prove that Barry Dick's vehicle was borrowed by Feather & Fin and being used by Aaron Dick with Feather & Fin's permission, coverage would be unavailable due to a provision in the policy excluding coverage for employees when the auto in question is owned by the employee or a member of his household.

Travelers' motion to quash asserted the deposition of its representatives was unnecessary as there is no evidence to support a finding of coverage based on earlier discovery, including the depositions of Barry Dick, Aaron Dick, and a corporate representative of Feather & Fin. Travelers noted that further discovery would not change this fact. Travelers attached a list of objections to the topics identified in the plaintiffs' notice. Travelers' objections pointed out that the Travelers policy had been provided to the plaintiffs and that the policy was the best evidence of its content and coverage provided therein. As for plaintiffs' requests regarding how premiums were calculated (i.e. off the number of employees, gross

net, or net payroll), Travelers maintained that such information was privileged, proprietary, and privileged as a trade secret.

Similarly, in opposing the plaintiffs' motion for leave to file the fourth amended petition, Travelers argued that without a grounds to trigger coverage, no legal basis existed to support the plaintiffs' reasserted allegations of fraud, deceit, and bad faith against Travelers in the fourth amended petition. Further, Travelers argued that similar allegations had previously been struck by the district court when it sustained Travelers' exception of no cause of action. Notably, all of the above referenced matters were set for hearing by the district court on October 11, 2016, shortly after filing.

On September 28, 2016, the plaintiffs filed an opposition to Travelers' motion to quash opposing the motion on several grounds. First, the plaintiff contended that Barry Dick's receipt of a monthly car allowance from the company raised an issue of coverage under the Travelers' policy. However, the plaintiffs referenced no provision under the policy to support this assertion. Second, the plaintiffs asserted that they had the right to depose Travelers on the basis that they were recently made a party to the action, four months prior to Travelers filing its motion for summary judgment. Finally, the plaintiffs asserted that the deposition of Travelers was necessary so that their expert in insurance coverage could render an opinion as to coverage.

On October 5, 2016, the plaintiffs filed a motion to continue the October 11, 2016 hearing on Travelers' motion for summary judgment. The plaintiffs maintained that they could not fairly respond to Travelers' motion for summary judgment until given the opportunity to depose Travelers and receive the requested documents; therefore, the hearing on the summary judgment should be continued pending the district court's determination of Travelers' motion to quash. Critically, the plaintiffs did not file a memorandum or any documents in opposition

to Travelers' motion for summary judgment. Under La. C.C.P. art. 966(B)(2), said opposition was required to be filed fifteen days prior to the October 11, 2016 hearing.

October 11, 2016 Hearing

At the October 11, 2016 hearing, the plaintiffs argued that they were unable to file an opposition to Travelers' motion for summary judgment because of Travelers refusal to submit to a La. C.C.P. art. 1442 deposition and the pending motion to quash. The district court disagreed and denied the plaintiffs' motion to continue and granted Travelers' motion to quash. The district court granted Travelers' motion for summary judgment, and noted the plaintiffs' failure to file an opposition resulted in a waiver of oral argument. The district court's rulings on the motions were based on its finding that, after extensive discovery, there was no evidence that Aaron Dick was an employee of Feather & Fin, in the course and scope of employment at the time of the accident, and/or that he was driving a company vehicle at the time of the accident. Finally, the district court denied the plaintiffs' motion for leave to file the fourth amended petition.⁵ In written reasons for judgment, the district court stated:

The court finds that extensive discovery has already taken place in this case. There is no evidence that Aaron Dick was working for Feather & Fin, Inc. at the time of the accident. There is no evidence that Aaron Dick was within the course and scope of employment at the time of accident. There is no evidence that he was driving a company vehicle at the time of the accident. Therefore, the plaintiffs will not be able to meet their burden of proof for any one of the issues in this case against [Travelers'] Casualty Insurance Company of America.

⁵ A motion for summary judgment filed by Barry Dick challenging the plaintiffs' claims of negligent entrustment was also ruled on at the October 11, 2016 hearing. The plaintiffs filed a separate appeal from the ruling on Barry Dick's motion for summary judgment, which is addressed in a separate opinion by this court. See Viering v. Liberty Mutual Ins. Co., 2017-0204 (La. App. 1st Cir. 09/27/17), ---WL---

The plaintiffs now appeal the district court's judgment dismissing their action against Travelers.⁶ The plaintiffs assert that the district court erred in the following respects: (1) granting Travelers' motion to quash; (2) denying the plaintiffs' motion to continue the hearing on Travelers' motion for summary judgment; (3) granting Travelers' motion for summary judgment; and (4) denying the plaintiffs' motion for leave to file their fourth amended petition.

LAW AND DISCUSSION

Travelers' Motion for Summary Judgment

We first consider the plaintiffs' assertion that the district court erred in granting Travelers' motion for summary judgment. We find that the determination of the matters at issue in this appeal all hinge on the threshold issue of whether coverage exists under Travelers' policy for losses caused by Aaron Dick as a result of the June 24, 2014 accident.

An appellate court reviews a district court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Smith v. Our Lady of the Lake Hosp., Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750. The motion should be granted only if "[a]fter an opportunity for adequate discovery ... the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(A)(3).⁷ A fact is "material" when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable

⁶ A rule to show cause was issued by this court on February 17, 2017, noting that the district court's original judgment appeared to lack decretal language identifying the plaintiffs as the parties against whom the judgment was rendered and improperly stated that it was signed on "December 2, 2017." In response, the district court amended the judgment on February 23, 2017 and clarified that the Vierings' claims were dismissed and that the original judgment had been signed on "December 2, 2016." Given the amended judgment, we maintain the appeal.

⁷ Louisiana Code of Civil Procedure article 966 was amended by 2015 La. Acts, No. 422, § 1, effective January 1, 2016. The amended version of La. C.C.P. art. 966 applies to the instant motion for summary judgment as it was filed after January 1, 2016.

theory of recovery. **Smith v. Our Lady of the Lake Hosp., Inc.**, 639 So.2d at 751.

The burden of proof rests with the mover. La. C.C.P. art. 966(D)(1). Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. *Id.* The burden then shifts to the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. *Id.*

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in the light of the substantive law applicable to the case. **Gaspard v. Graves**, 2005-1042 (La. App. 1st Cir. 3/29/06), 934 So.2d 158, 160, writs denied, 2006-0882, 2006-0958 (La. 6/16/06), 929 So.2d 1286 and 1289. Travelers' liability for the plaintiffs' losses is contractually contingent upon the liability of its insured, Feather & Fin. The plaintiffs seek recovery from Feather & Fin under the theories of respondeat superior or vicarious liability, and assert that the vehicle being operated by Aaron Dick was a covered auto under the policy.

The basis for an employer's liability for its employee's tort is found in La. C.C. art. 2320. An employer is liable for a tort committed by its employee if, at the time, the employee was acting within the course and scope of her employment. **Baumeister v. Plunkett**, 95-2270 (La. 5/21/96), 673 So.2d 994, 996. The course of employment refers to time and place; scope refers to the employment-related risk of injury. **Benoit v. Capitol Mfg. Co.**, 617 So.2d 477, 479 (La. 4/12/93). The coverage available under the Travelers policy for Barry Dick's vehicle is

determined by the policy as an insurance policy is a written contract, and as such, coverage is determined by the intent of the parties expressed in the words of the policy. La. C.C. art. 2045; see also **Reynolds v. Select Properties, Ltd.**, 634 So.2d 1180, 1183 (La. 1994).

In support of its motion for summary judgment, Travelers attached the following: (1) a copy of the commercial automobile policy issued to Feather & Fin for the period of August 20, 2013 to August 20, 2014; (2) copies of the petition, amended petition, and second amended petition; (3) excerpts from the October 6, 2015 deposition of Aaron Dick; (4) excerpts from the October 6, 2015 deposition of Barry Dick; (5) excerpts from and exhibits to the October 6, 2015 deposition of Mona Dick, the corporate representative of Feather & Fin; and (6) the responses of Aaron Dick and Barry Dick to plaintiffs' requests for admissions.

As a result of the 2015 amendments to La. C.C. art. 966(B), the parties must now submit all documents in either the memorandum in support of or the opposition to the motion. The court may only consider those documents filed in support of or in opposition to the motion for summary judgment, and shall consider any documents to which no objection is made. La. C.C.P. 966(D)(2). Further, all objections to any documents submitted for the district court's consideration must be raised in the opposition or reply memorandum. La. C.C.P. art. 966(D)(2). Therefore, the plaintiffs' failure to file an opposition to Travelers' motion for summary judgment requires the court to consider all documents submitted by Travelers in support of its motion under La. C.C.P. art. 966(D)(2).

The evidence submitted in support of Travelers' motion for summary judgment establishes that Aaron Dick and Barry Dick lived together in Barry Dick's house at the time of the accident, which is located across the street from the office of Feather & Fin. Aaron Dick testified that on June 24, 2014, he asked Barry Dick if he could borrow his SUV to go to the store to purchase cigarettes.

Barry Dick also testified that on the day of the accident, he loaned his vehicle to his son to go to the store. Aaron Dick testified that he did not have a job at the time of the accident and that he had been laid off from a construction-related job two weeks prior. There was nothing in the documents attached to Travelers' motion for summary judgment to indicate that Aaron Dick was working on the day of the accident.

The documents submitted also established that Barry Dick's Mercury Mountaineer, which was involved in the accident, had been donated to him by Feather & Fin in 2012, and the vehicle was insured under a personal insurance policy at the time of the accident. Feather & Fin owned only two vans that were used by employees for deliveries, and said vans are the only listed vehicles on the coverage schedule.

Further, review of the policy and submissions to the motion supports Travelers' assertions that Barry Dick's vehicle was not covered under the Travelers' policy. First, as discussed in detail below, the submissions attached to the motion are uncontroverted that Aaron Dick was not in the course and scope of employment at the time of the accident. Second, there is nothing submitted with the motion to suggest that the Barry Dick's vehicle was hired, leased, or borrowed by Feather & Fin. Even if it could be proven that the wages paid to Barry Dick included a reimbursement of expenses for the use of his vehicle, this still does not constitute a "hiring" or "leasing" of his vehicle. See Miller v. Superior Shipyard & Fabrication, Inc., 2001-2683 (La. App. 1st Cir. 11/8/02), 836 So.2d 200, 205; Gore v. State Farm Mutual Ins. Co., 26,417 (La. App. 2nd Cir. 1/25/95), 649 So.2d 162, 165, writ denied, 95-0481 (La. 4/21/95), 653 So.2d 555. Third, review of the policy demonstrates that coverage for a covered auto is excluded "if the covered 'auto' is owned by that employee or a member of his household." Thus, review of the policy supports Travelers' assertion that even if the plaintiffs could

prove that Barry Dick's vehicle was borrowed by Feather & Fin and being used by Aaron Dick with Feather & Fin's permission, coverage would be unavailable due to the provision in the policy excluding coverage for the action of an employee when the auto in question is owned by the employee or a member of his household. Here, it is uncontroverted that Barry Dick owns the vehicle and resided in the same household as Aaron Dick at the time of the accident; therefore, the exclusion applies.

On the issue of Aaron Dick's employment status, we note that the documents attached to Travelers' motion for summary judgment contain conflicting testimony and information regarding the dates that Aaron Dick was an employee of Feather & Fin. In the attached deposition excerpts, Mona Dick, Feather & Fin's representative, testified that the only income tax wage documentation regarding Aaron Dick in the company files was dated from the period May 17, 2010 to September 10, 2010. The said Form W-2 Wage and Tax Statements for 2010 were attached to the deposition and Travelers' motion.

Further, attached to Mona Dick's deposition is a list of employees who worked at Feather & Fin in 2014; Aaron Dick was not listed. Mona Dick also produced work schedules and expense reports for the week of June 23, 2014 to June 27, 2014; however, Aaron Dick was not listed on the schedule, and there is no evidence that Aaron Dick submitted any expense reports to Feather & Fin for the week of the accident. In requests for admissions attached to the motion, Barry Dick denied that Aaron Dick was ever employed by Feather & Fin following his release from jail in 2012.

As noted above, Aaron testified that he did not have a job at the time of the accident due to being laid-off a construction-related job two weeks prior. However, Aaron Dick did testify that he had worked for Feather & Fin on two separate occasions – once upon leaving high school, and most recently “two or

three years” before the October 2015 deposition in a maintenance position. On this topic Aaron Dick testified, in part, as follows:

Q. Two or three years ago, what did you do [for Feather & Fin]?

A. Maintenance, changing light bulbs and moving fish tanks around and stuff like that.

Q. Your family business, did you draw a check?

A. Yes, sir.

Q. Do you know what’s the difference between W-2 earnings and 1099?

A. Yes, sir. It was W-2.

Q. Did you file income tax?

A. This past year, with Feather [&] Fin Ranch, yes, sir.

Q. After this deposition, your attorney’s going to get, I’ll probably put it as an exhibit, we’re going to be asking you to supply certain documents. And so your income taxes which is going to be one of them, do you think you could do that?

A. I guess so.

We find that the evidence submitted in support of Travelers’ motion for summary judgment raises a question of fact as to whether Aaron Dick worked for Feather & Fin after 2010. However, even recognizing this inconsistency, for liability to attach to Feather & Fin, and, thus, Travelers, the plaintiffs would be required to come forward with submissions to demonstrate that Aaron Dick was in the course and scope of employment at the time of the June 24, 2014 accident.

Here, there is nothing in the submissions associated with Travelers’ motion before this court and the district court that controvert the testimony that Aaron Dick was on a personal mission in his father’s personal vehicle to go to the store when the accident occurred. Thus, we must find that Travelers’ motion successfully pointed out an absence of factual support for the plaintiffs’ assertion that there is coverage under the policy for Aaron Dick’s negligence. La. C.C.P.

art. 966(D)(1). In their appellant brief, the plaintiffs suggest that the district court erred in failing to consider evidence supporting their claims that was contained in memorandums in support and in opposition to other motions that they had filed in the case. We disagree. Louisiana Code of Civil Procedure article 966(D)(2) makes clear that when ruling on a motion for summary judgment, the court “may consider only those documents filed in support or opposition to the motion for summary judgment.” [Emphasis added.] See also La. C.C.P. 966, 2015 Comment (k).

Motion to Continue – Motion to Quash

The plaintiffs contend that the district court erred in granting Travelers’ motion to quash and in denying the plaintiffs’ motion to continue. The crux of plaintiffs’ arguments on both of these rulings asserts that their inability to depose Travelers prohibited them from filing an opposition to the motion for summary judgment.⁸

When discovery is alleged to be incomplete, a district court has the discretion either to hear the summary judgment motion or to grant a continuance to allow further discovery. See Simoneaux v. E.I. du Pont de Nemours and Co., 483 So.2d 908, 912 (La. 1986). A defendant may file a summary judgment motion at any time, but the motion shall be granted only “[a]fter an opportunity for

⁸ The plaintiffs’ motion to continue urging inadequate discovery was filed *after* the mandatory time delays for filing an opposition set forth in La. C.C.P. art. 966(B)(2). A motion to continue filed after the delays set forth in La. C.C.P. art. 966(B)(2) cannot substitute for a timely filed opposition to the motion for summary judgment. Additionally, we observe that in four of the six cases cited by the plaintiffs in their appellant brief to support the continuance of the matter, the parties seeking a continuance all filed oppositions to the motions for summary judgment urging an inadequate time for discovery. See State of Louisiana v. Louisiana Land & Exploration Co., 2012-0884 (La. 1/30/13), 110 So.3d 1038, 1042; Rivas v. Wal-Mart Stores, Inc., 2015-0668 (La. App. 5th Cir. 3/16/16), 194 So.3d 639, 640; Dunn v. Robichaux, 2016-0241, 2016-0426 (La. App. 3rd Cir. 11/2/16), 206 So.3d 932, 937; Bass P’ship v. Fortmayer, 2004-1438 (La. App. 4th Cir. 3/9/05), 899 So.2d 68, 73. Further, the plaintiffs’ contention that Dunn v. Robichaux controls herein is not borne out by review of the opinion as the court’s reversal of the granting of the motion for summary judgment was primarily based on the fact that only the motion to continue had been set for hearing on the date that the district court ruled on both the motion to continue and the motion for summary judgment. Dunn v. Robichaux, 206 So.3d at 937.

adequate discovery.” La. C.C.P. art. 966(A)(1). The mere contention of an opponent that he lacks sufficient information to defend a motion for summary judgment because of mover’s failure to comply with discovery is insufficient to defeat the motion. **Crocker v. Levy**, 615 So.2d 918, 920 (La. App. 1st Cir. 1993). The requirement of “adequate discovery” has been construed to mean that there is no absolute right to delay action on a summary judgment motion until discovery is complete; rather, the requirement is only that parties have a fair opportunity to carry out discovery and to present their claim. **Welch v. East Baton Rouge Parish Metro. Council**, 2010-1532 (La. App. 1st Cir. 3/25/11), 64 So.3d 249, 254; **Judson v. Davis**, 2004-1699 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1116, writ denied, 2005-1998 (La. 2/10/06), 924 So.2d 167.⁹

A continuance shall be granted if at the time a case is to be tried, (1) the party seeking the continuance shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his case; or (2) that a material witness has absented himself without the contrivance of the party applying for the continuance. La. C.C.P. art. 1602. Louisiana Code of Civil Procedure article 1605 provides that “[e]very contested motion for continuance shall be tried summarily and contradictorily with the opposite party.” In a summary proceeding, a copy of any order of court assigning a date and hour for hearing the matter shall be served on the defendant. La. C.C.P. art. 2594. While citation is not essential in a summary proceeding, a judgment rendered against a defendant who has not been served with process and has not entered a general appearance is an absolute nullity. La. C.C.P. art. 2594; **Barrios v. Barrios**, 95-1390 (La. App. 1st Cir. 2/23/96), 694 So.2d 290, 294, writ denied, 96-0743 (La. 5/3/96), 672 So.2d 691.

⁹ The 2015 Comments to La. C.C.P. art. 966 provide that subparagraph (A)(3) does not change the law and that this subparagraph “makes clear that a motion for summary judgment should be heard and granted only after there has been an opportunity for adequate discovery.” The 2015 Comments also state that “[a] continuance should be granted to a party who has not had adequate time to conduct discovery relating to the issues in the motion.” *Id.*

Travelers was not served with the order setting the motion for hearing on the date of the motion for summary judgment. Under the circumstances, it cannot be said that Travelers' appearance at the hearing on October 11, 2016 signified that it was notified of the nature of the proceeding and was making a general appearance, which would waive lack of notice. Moreover, Travelers objected to lack of notice at the hearing, which it was required to appear for on other scheduled motions other than the motion to continue.

In addition to this critical procedural error, the record contains sufficient evidence to support a finding that the plaintiffs had failed to show that despite the exercise of due diligence, they were unable to obtain evidence material to their case. See La. C.C.P. art. 1602. The instant suit has been pending since July 17, 2014. The depositions of Aaron Dick, Barry Dick, and the corporate representative of Feather & Fin were taken in October of 2015, before Travelers was brought into the action by the plaintiffs. Scheduling records and expense reports were produced in October of 2015, which failed to reveal any indication that Aaron Dick had been working for Feather & Fin on the date of the accident or even the week of the accident. Further, the plaintiffs made no effort to compel or subpoena Aaron Dick's tax records, including the Form W-2 discussed at his October 6, 2015 deposition, nor did the plaintiffs seek to notice the depositions of other employees of Feather & Fin to determine the veracity of testimony they had received.

In light of the above principles and review of the record, we find no abuse of discretion in the district court's denial of the plaintiffs' motion to continue or in its decision to proceed with ruling on the motion for summary judgment.

With regard to the motion to quash, the plaintiffs' opposition asserted that they had the right to depose Travelers on coverage because they were recently made a party to the action, four months prior to Travelers filing its motion for summary judgment. They also asserted that they had retained an insurance

coverage expert to determine the “major issue” of “whether there is coverage under Travelers’ policy to the President/owner’s personal vehicle being operated by an employee.” However, as noted above, a party does not have an absolute right to delay a motion for summary judgment until discovery is complete, when it is clear that no genuine issues of material fact exist. See Crocker v. Levy, 615 So.2d at 920.

Coverage under the Travelers policy is determined by the intent of the parties expressed in the words of the policy. La. C.C. art. 2045; see also Reynolds v. Select Properties, Ltd., 634 So.2d at 1183. The Travelers policy was produced to the plaintiffs and attached to the motion for summary judgment. Travelers established in its motion for summary judgment that there is no genuine issue of material fact that the Travelers policy does not provide coverage for the negligence of Aaron Dick on the date of the accident. We note that the opposition to the motion to quash makes several factual assertions apparently aimed at suggesting that coverage issues exist, including that Aaron Dick was living on the Feather & Fin premises at the time of the accident and that Barry Dick was the owner of the company; however, these assertions are directly contradicted by the record in multiple places.

Further, as discussed above, we find that the plaintiffs had a fair opportunity to carry out discovery and to present their claim in the three years that this matter has been pending. The plaintiffs did not present any argument in their opposition to the motion to quash to demonstrate how the deposition of Travelers on these issues would yield a factual basis for coverage under the policy that was not possible under the previous discovery. Compare Welch v. East Baton Rouge Parish Metro. Council, 64 So.3d at 254 (the plaintiff demonstrated to the trial court a very specific necessity for deposing the witness and had filed a motion to compel said deposition.)

Based on the above, we find no error in the district court's ruling on the motion for summary judgment, and we find no abuse of discretion in the district court's granting of Travelers' motion to quash. In sum, if there is no coverage under the policy, there is no reason to conduct the deposition of Travelers at this point.

Fourth Amended Petition

After an answer has been filed, the authorization of the filing of a supplemental and/or amending petition is within the discretion of the trial judge. La. C.C.P. arts. 1151 and 1155; **Harris v. Union Nat. Fire Ins. Co.**, 2014-1603 (La. App. 1st Cir. 6/18/15), 175 So.3d 1008, 1012. Thus, a district court's ruling on an amendment to the pleadings will not be disturbed on appeal unless an abuse of discretion has occurred that indicates a possibility of resulting injustice. **Rainey v. Entergy Gulf States, Inc.**, 2001-2414 (La. App. 1st Cir. 11/8/02), 840 So.2d 586, 589, on reh'g, 2001-2414 (La. App. 1st Cir. 6/25/04), 885 So.2d 1193.

Based on its decision to grant Travelers' summary judgment, the district court denied the plaintiffs' motion to for leave to file a fourth amended petition. As noted above, we find no error in the district court's determination that there is no genuine issue of material fact as to whether there is coverage under the policy for the negligence of Aaron Dick. It logically follows that in the absence of a basis for finding coverage, there is no legal basis to support a claim that Travelers is liable to the plaintiffs for alleged fraud or bad faith in connection with failing to pay the claim or for breach of good faith and fair dealing in connection with this claim.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court granting the motion for summary judgment and the motion to quash filed by Travelers Casualty Company of America, and denying the motion to continue and motion for leave of court to file a fourth amended and supplemental petition filed by Lisa Viering and Stephen Viering. All costs of this appeal are assessed against the plaintiffs/appellants, Lisa Viering and Stephen Viering.

AFFIRMED.