SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

THOMAS FARRELL,

Plaintiff,

- against -

GEICO INSURANCE AGENCY, INC.,

Defendant.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 12864/11
Motion Seq. No.: 01
Motion Date: 05/04/12
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavits and Exhibits	1
Memorandum of Law in Opposition	2
Reply Affidavit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3001, for an order granting it declaratory judgment declaring that it has no obligation to defend or indemnify plaintiff in connection to an accident which allegedly occurred on or about July 20, 2008. Plaintiff opposes the motion.

Plaintiff has brought the instant action against defendant, his personal auto insurer, seeking a declaration that defendant is obligated to defend and indemnify plaintiff in connection to an automobile accident in which he allegedly struck a pedestrian while driving a vehicle that was neither owned by plaintiff, nor insured by defendant. Plaintiff had an insurance policy (Policy # 4072-59-56-65) with defendant that was in effect from January 31, 2008 through July

31, 2008. Said policy covered plaintiff's 2006 Saturn.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about November 10, 2011. *See* Defendant's Affidavit in Support Exhibit A. Issue was joined on or about November 30, 2011. *See* Defendant's Affidavit in Support Exhibit B.

With respect to the subject accident, it is alleged that, on July 20, 2008, in or around West 46th Street and 5th Avenue, New York, New York, plaintiff was driving a 2007 Dodge Durango that had been rented from Elrac in Floral Park, County of Nassau, New York. Said Durango had been rented by an individual named Kevin Collins, who was not insured by defendant. On the date of the accident, while plaintiff was driving said rental car, he allegedly struck a pedestrian, Abdul Goffar. According to the Police Accident Report, dated July 20, 2008, Mr. Goffar claims that he was crossing the street when a motorist backed up into him knocking him to the ground and that said vehicle then fled the scene. Mr. Goffar was transported from the scene to Roosevelt Hospital. The vehicle involved in the accident was identified as the aforementioned 2007 Dodge Durango. *See* Defendant's Affidavit in Support Exhibit F. Mr. Goffar subsequently commenced a lawsuit in Bronx County Supreme Court against Elrac, Kevin Collins and plaintiff.

On May 6, 2009, two hundred ninety (290) days after the subject accident, plaintiff gave defendant notice of the subject loss. Defendant submits that, on June 3, 2009, it duly and properly disclaimed coverage to plaintiff. Defendant contends that it disclaimed coverage based upon the fact that its first notice of the subject loss was not given by plaintiff until May 6, 2009, two hundred ninety (290) days after the subject accident, therefore plaintiff violated defendant's requirement that it be provided timely written notice of any loss. *See* Defendant's Affidavit in

Support Exhibit H p. 7. Defendant argues that plaintiff may not await the service of a Summons and Verified Complaint upon him to notify defendant of the accident. According to the subject insurance policy, plaintiff was required to provide, as soon as possible, written notice to defendant of "potential" claims, not merely a lawsuit that has been commenced and process served on the insured. Defendant asserts that, "plaintiff's claim of non-liability is insufficient as a matter of law to excuse the delay in notifying GEICO of the potential claim."

Defendant further argues that Elrac, as owner of the rental vehicle in question, must provide primary coverage to plaintiff in any event. Defendant submits that "[w]hile Elrac may claim that it does not owe an obligation to defendant or indemnify MR. FARRELL, for the stated reason that 'he is not an authorized driver under the rental contract', that position has been repeatedly held to be invalid under New York law. New York has long since held that where the renter of a motor vehicle from a rental agency such as Elrac gives the rental vehicle to another person to use, even if that person is not listed as an authorized operator, the vehicle operator is still entitled to a defense and indemnification up to New York minimum limits for the use of that vehicle under the concept of 'constructive consent' under New York law."

Finally, defendant argues that plaintiff, under no circumstances, is entitled to the recovery of any alleged attorneys' fees. Defendant states, "[i]t is the rule in New York State that the plaintiff may not recover attorneys fees against defendant to the extent he is successful. Recovery may not be had in an affirmative action brought by the insured to settle his rights under the policy....The only time an insured can recover in a suit such as this is when he has been cast in a defensive posture by his own insurance company in a suit against him, brought by the insurer, in an effort to free the insurer from its policy obligations."

Defendant argues that the right of an insurer to receive written notice in accordance with

its policy terms and conditions has been held to be so fundamental that the insurer is not obligated to show prejudice to be able to disclaim liability on such a basis. Defendant adds that "[t]his particular accident date of July, 2008, predates any amendment to § 3420 of the Insurance Law on the issue of notice, and, as such, no prejudice need be demonstrated by the defendant, insurer, to prevail."

In opposition to the motion, plaintiff's counsel contends that, on the date of the subject accident, plaintiff was operating the aforementioned rental car in the aforementioned location, when an unidentified male approached him and stated, "[y]ou hit me with your car, you have to give me money." Plaintiff's counsel asserts that plaintiff's response to the unidentified male was that they should notify police, whereupon the unidentified male left the scene. Plaintiff's counsel claims that, on May 5, 2009, plaintiff was served with a Summons and Verified Complaint for a Bronx County Supreme Court action in which Abdul Goffar [the unidentified man] was suing Elrac, Kevin Collins and plaintiff. On May 6, 2009, plaintiff advised defendant of the Bronx County Supreme Court action.

Plaintiff's counsel argues that defendant should be obligated to provide plaintiff insurance coverage "because of Plaintiff's good faith belief in his non-liability excuses his notifying GEICO after being served with the Summons and Complaint." Plaintiff's counsel contends that, "[u]nder the circumstances of this purported accident, Plaintiff reasonably believed that he was being scammed, *i.e.*, extorted for money. On July 20, 2008, at West 46th Street and 5th Avenue, City of New York, County of New York and State of New York, the Plaintiff was operating a rental vehicle, with the permission of the lessor, Mr. Kevin Collins, when an unidentified, Hispanic male approached Plaintiff and stated: 'you hit me with your car, you have to give me money.' When Plaintiff attempted to call the police, the man immediately fled the scene. Plaintiff had no further opportunity to ascertain any other facts. Quite simply,

once the purported accident victim's request for money was denied and that the police were being called, he left the scene. Thus, under these circumstances it was reasonable for Plaintiff to conclude that there *was no accident*."

Plaintiff's counsel argues that "[a] good faith belief that there was no injury may excuse the insured from notifying the insurer about the accident until he becomes aware that there was an injury, provided that the insured's belief is reasonable under all circumstances." Plaintiff's counsel submits that "[d]efendant GEICO's ultimate decision to deny coverage was based on Plaintiff not notifying Defendant GEICO at the time of the alleged accident. What was he to notify them of? That an unidentified Hispanic male claimed to have been hurt by him and demanded money only to leave the scene when the police were called? Thus, Defendant GEICO is requiring Plaintiff, and it's (*sic*) insured, to provide notice based on speculation. This is not reasonable. Conversely, in light of the facts of this particular case, Plaintiff's actions were reasonable. Here, the only way Plaintiff could have known of the claim is when he received notice of a pending lawsuit, whereupon he notified GEICO within two days."

In reply to plaintiff's counsel's memorandum of law in opposition, defendant states, "it is noted that the plaintiff himself offers nothing in opposition to this motion and, rather, relies exclusively upon an attorney's Affirmation. It is axiomatic under New York law that an attorney's Affirmation possesses no first-hand knowledge and, as such, it is probatively valueless in attempting to create a triable issue."

Defendant adds, "[w]hat plaintiff fails to bring to the Court's attention is that the plaintiff was not driving a GEICO insured vehicle, but rather an Elrac rental vehicle. At the very least, GEICO could have been in touch with Elrac, who undoubtedly opened a no-fault file with respect to the personal injury claim of the injured claimant, Mr. Goffar. Elrac would have undoubtedly had information relating to this injured person's name, the claimed injury and

whether any witnesses saw the accident happen. Plaintiff may not avoid his obligations under the GEICO policy merely because he claims the plaintiff 'left the scene'. Of course, the documentary evidence suggests quite the reverse. Annexed to GEICO's motion for declaratory judgment at Exhibit 'F' is the police accident report completed on the very date of the accident. With respect to the Elrac vehicle driven by plaintiff, FARRELL, it is noted to have 'left the scene'. With respect to the injured person, Mr. Goffar, he was found at the accident site and taken from the scene to Roosevelt Hospital in Manhattan. Contrary to plaintiff's suggestion that it was he who wanted to call the police, it was actually the injured party, Mr. Goffar who did so....Contrary to what plaintiff advises the Court, it is not appropriate to await service of a Summons and Complaint when plaintiff is alleged to have backed up an automobile into someone at an accident scene, that person then claims personal injury and that person demands money. Further, it is clear that the only person who sought police intervention was the injured claimant, Mr. Goffar, and not the plaintiff in this case, MR. FARRELL."

Defendant further submits that "plaintiff does not respond in any way, shape or form to that portion of the defendant's motion for declaratory judgment which notes that since the plaintiff was operating an Elrac-owned vehicle, that Elrac must provide a defense and primary coverage to any permissive user of the vehicle....The conclusion should be drawn that plaintiff's failure to respond to the position that Elrac must provide primary coverage to plaintiff, FARRELL, is an acknowledgment of that position."

At the outset, the Court acknowledges the fact that plaintiff, himself, has failed to provide an Affidavit to the Court detailing his version of the events that took place with respect to the subject accident on July 20, 2008. The only version of plaintiff's account was provided by plaintiff's attorney in the "Memorandum of Law in Opposition to Defendant's Motion for an Order Pursuant to CPLR § 3001 Granting Declaratory Judgment for Defendant." Additionally,

nowhere in said Memorandum of Law does plaintiff's attorney even indicate what is the basis for the facts and information provided in same. The Memorandum of Law basically constitutes hearsay that is not even affirmed by counsel. Plaintiff relies solely upon the Memorandum of Law, signed, but not affirmed, by his attorney, who was obviously without personal knowledge of the facts. This does not supply the evidentiary showing necessary to successfully resist the motion. *See* CPLR § 3212(b); *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978). There is no representation made in the Memorandum of Law that the attorney has any personal knowledge of the relevant facts herein. Therefore, the Memorandum of Law is without evidentiary value or effect. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Roche v. Hearst Corp.*, 53 N.Y.2d 767, 439 N.Y.S.2d 352 (1981); *Columbia Ribbon & Carton Mfg. Co. v. A-1-A Corp*, 42 N.Y.2d 496, 398 N.Y.S.2d 1004 (1977).

Accordingly, the only evidence before this Court is the Police Accident Report in which it is stated that plaintiff backed into the pedestrian, knocking the pedestrian to the ground and then fled the scene. *See* Defendant's Affidavit in Support Exhibit F. Further evidence provided by defendant to demonstrate plaintiff's knowledge of the July 20, 2008 incident is plaintiff's response to defendant's Combined Demands which provided the following answer, "Plaintiff does not possess any statements made by defendant other than that which plaintiff previously testified at an examination before trial in the action entitled *Goffar v. Elrac, et al.*, which in sum and substance is 'You hurt me. You give me money' where such statement was made by the purported plaintiff Goffar on or about July 20, 2008, at the time and place of the alleged accident." *See* Defendant's Affidavit in Support Exhibit E ¶ 2. Therefore, the only evidence provided to this Court indicates that plaintiff was aware of the subject accident on the date it allegedly occurred, July 20, 2008. As such, defendant has proven that plaintiff failed to advise defendant of the subject accident until two hundred ninety (290) days after the occurrence. In

turn, plaintiff violated defendant's insurance policy requirement that it be provided timely written notice of any loss and, therefore, defendant was legally entitled to disclaim coverage to plaintiff for the subject accident.

Additionally, as defendant indicated, plaintiff's Memorandum of Law failed address defendant's argument that since the plaintiff was operating an Elrac-owned vehicle, that Elrac must provide a defense and primary coverage to any permissive user of the vehicle. *See Lancer Insurance Company v. Republic Franklin Insurance Company*, 304 A.D.2d 794, 759 N.Y.S.2d 734 (2d Dept. 2003).

As plaintiff has failed to create any issue which would prevent this Court from granting defendant's instant motion, said motion is hereby **GRANTED**. And it is further

ORDERED that defendant has no obligation to defend or indemnify plaintiff in connection to the underlying automobile accident which allegedly occurred on or about July 20, 2008. And it is further

ORDERED that the Verified Complaint in the instant matter is hereby **dismissed**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
July 27, 2012

ENTERED
JUL 31 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE