Matter of Mercury Ins. Group v Brown-Fort
2011 NY Slip Op 34169(U)
December 12, 2011
Supreme Court, Albany County
Docket Number: 5293-11
Judge: Richard M. Platkin

[* 1]

STATE OF NEW YORK
SUPREME COURT

ORIGINAL

COUNTY OF ALBANY

In the Matter of the Application of
MERCURY INSURANCE GROUP,

Petitioner,

For a Judgment Permanently Staying the Arbitration against

JOCELYN BROWN-FORT,

Respondent,

-and-

KHAHONDO ALKEBULAN, MALIKAH A. ALKEBULAN, PROGRESSIVE INSURANCE COMPANY and GEICO INSURANCE COMPANY,

Proposed Additional Respondents.

DECISION & ORDER

Index No. 5293-11
RJI No.: 01-11-104522
(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

In this proceeding brought pursuant to CPLR article 75, petitioner Mercury Insurance Company ("Mercury") seeks a judgment permanently staying arbitration demanded by respondent Jocelyn Brown-Fort ("respondent"). Mercury also seeks an order adding as additional respondents Government Employees Insurance Company ("GEICO"), which is sued here as GEICO Insurance Company, Progressive Insurance Company ("Progressive"), Khahondo Alkebulan ("Mr. Alkebulan"), and Malikah A. Alkebulan ("Ms. Alkebulan"). GEICO and Progressive oppose the petition insofar as it seeks to add them as respondents. Respondent opposes the petition insofar as it seeks to permanently stay the arbitration. The Alkebulans have not appeared in the proceeding.

BACKGROUND

This proceeding arises from an incident that occurred on October 9, 2010 near the intersection of 1st Street and 26th Avenue in Queens, New York. On that day, respondent, along with her sister, Ms. Alkebulan, and another sister, traveled from Brooklyn to Queens after

learning that Mr. Alkebulan was there with Ms. Alkebulan's 2007 Toyota Camry ("the vehicle"). The sisters were seeking to retrieve the vehicle from Mr. Alkebulan. At that time, according to statement by respondent, the Alkebulans were experiencing marital problems, and Mr. Alkebulan had taken the vehicle without Ms. Alkebulan's permission. Upon finding the vehicle parked behind a building in Queens with Mr. Alkebulan and a passenger in it, respondent approached the passenger door, which had a window partially down, seeking to confront Mr. Alkebulan. According to respondent, Mr. Alkebulan started to put the car in reverse, and respondent attempted to toss her cell phone with a "GPS" tracking device into the backseat of the vehicle. During that attempt, respondent's bracelet became caught in the window. Respondent then purportedly ran along the side of the car as it continued to back up until Mr. Alkebulan allegedly turned sharply into respondent. That turn freed respondent's wrist from the vehicle but also caused her to fall to the ground. Respondent eventually was transported to a hospital where she was admitted for approximately 20 days, suffering, among other injuries, fractures to her ribs and skull.

Respondent apparently submitted a claim regarding the incident to Ms. Alkebulan's insurance carrier, Progressive. On January 3, 2011, Progressive disclaimed coverage. First, in a letter sent to Ms. Alkebulan, Progressive disclaimed due to Ms. Alkebulan's misrepresentation at the time she took out the policy that she was a resident of South Carolina rather than New York, although Progressive acknowledged that it may still be obligated to pay $25,000 to Ms. Brown-Fort for any liability on Ms. Alkebulan's part. That letter also referenced a disclaimer sent to Mr. Alkebulan on the same date, which noted that Progressive was not obligated to provide coverage under the policy since "the event giving rise to any alleged bodily injury did not constitute an

'accident'" under the terms of the policy. Additionally, Progressive noted that, since the alleged injuries arose as a result of an intentional act, the intentional act exclusion in the policy also limited coverage to $25,000 (*see* Progressive Letter [dated 1-3-11], Petition Exhibit E).

Similarly, GEICO disclaimed coverage following respondent's submission of a claim. According to that disclaimer letter, GEICO relied, in part, on the intentional act exclusion in the policy, noting: "This disclaimer is made because of [sic] our investigation reveals that you intentionally drove your 2007 Camry Toyota into the person or property of the above name claimant" (GEICO Letter [dated 1-17-11], *id.*, Exhibit D). GEICO also cited that its insured failed to give it timely notice of the claim (*see id.*).

Thereafter, on July 20, 2011, respondent demanded arbitration for a claim against Mercury for uninsured motorist benefits under respondent's motor vehicle policy. Mercury commenced this proceeding to permanently stay such arbitration. Mercury contends that, given the above disclaimers, "a framed issue hearing is necessary to determine whether the exclusions upon which GEICO and Progressive rely are applicable and whether the purported denial letters are timely under . . . Insurance Law 3420 (d)" (Petition at ¶ 13). Furthermore, Mercury seeks to add GEICO, Progressive and the Alkebulans as respondents in this proceeding. Following review of all of the submissions in this proceeding, this Decision & Order now follows.

DISCUSSION

"'In a proceeding to stay arbitration of a claim for uninsured motorist benefits, the claimant's insurer has the initial burden of proving that the offending vehicle was insured at the time of the accident, and thereafter the burden is on the party opposing the stay to rebut that prima facie showing'" (*Matter of American Intl. Ins. Co. v Giovanielli*, 72 AD3d 948, 949 [2d

Dept 2010] [quoted case omitted]; *see Matter of State Farm Mut. Auto. Ins. Co. v Mazyck*, 48 AD3d 580, 580-581 [2d Dept 2008]; *Matter of Mercury Ins. Group v Ocana*, 46 AD3d 561, 562 [2d Dept 2007]). In rebutting a prima facie showing, an opposing party must demonstrate either "a lack of coverage or a timely and valid disclaimer of coverage" (*Matter of State Farm Mut. Auto Ins. Co.*, 48 AD3d at 581; *see Matter of Mercury Ins. Group*, 46 AD3d at 562).

Here, Mercury has met its prima facie burden by demonstrating that the vehicle involved in the incident was insured at the time of incident by both Progressive and GEICO (*see Matter of American Intl. Ins. Co.*, 72 AD3d at 949). Both of these companies acknowledged as much in the disclaimer letters attached to Mercury's petition.

As to Progressive, it has rebutted Mercury's showing. The policy at issue provides under Part 1 – Liability to Others: "If you pay the premium for this coverage, we will pay damages for bodily injury and property damage for which an insured person becomes legally responsible because of an accident" (Progressive Policy at 2, Hanson Affidavit, Exhibit A). As Progressive argues, respondent's claim does not arise from an accident but, rather, from an intentional act by Mr. Alkebulan. Accordingly, Progressive has demonstrated that there is no coverage under the policy (*see Matter of Travelers Indem. Co. v Cruz*, 40 AD3d 362, 362 [1st Dept 2007]; *see also Progressive No. Ins. Co. v Rafferty*, 17 AD3d 888, 889 [3d Dept 2005]). Furthermore, no issue exists whether Progressive's disclaimer on this ground was timely since a disclaimer is not necessary where coverage does not exist under the terms of the policy (*Matter of Atlantic Mut. Cos. v Ceserano*, 5 AD3d 382, 384 [2d Dept 2004], citing *Zappone v Home Ins. Co.*, 55 NY2d

131 [1982]; *see Matter of Prudential Prop. & Cas. Ins. Co. v Hobson*, 67 NY2d 19, 21 [1986]).[1] Given that there is no coverage under Progressive's policy, the Court denies that branch of Mercury's motion seeking to join Progressive as a respondent in this proceeding.

As to GEICO, it has failed to rebut Mercury's showing. Section 1 pertaining to, among other things, bodily injury liability of the subject GEICO policy provides that GEICO "will pay damages which an insured becomes legally obligated to pay because of . . . bodily injury sustained by a person . . . arising out of the ownership, maintenance or use . . . of the owned auto or a non-owned auto" (GEICO Policy at 4, Richardson Affirmation, Exhibit C). Unlike the Progressive policy discussed above, the GEICO policy does not limit its coverage to accidents. Accordingly, GEICO's argument that there is no coverage here due to the fact respondent's alleged bodily injury arose from an intentional act rather than an accident is unavailing in light of the relevant policy language.

Otherwise, the Court agrees with GEICO that its disclaimer based on the intentional act exclusion was proper (*see Progressive No. Ins. Co.*, 17 AD3d at 889). As the Third Department noted in *Progressive No. Ins. Co.*:

> It is now well settled that there exists 'a narrow class of cases in which the intentional act exclusion applies regardless of the insured's subjective intent'. In such cases, 'the intentional act exclusion applies if the injury is inherent in the nature of the wrongful act.' An injury is held to be 'inherent in the nature' of an act when the act is so exceptional that 'cause and effect cannot be separated; that to do the act is necessarily to do the harm which is its consequence and that since unquestionably the act is intended, so also is the harm'" (*id.*, [quoted cases omitted]).

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[1] As to Progressive's argument that the policy was void at it inception due to a misrepresentation made by the insured regarding her residency, Progressive is precluded from denying coverage to respondent on this ground (*Matter of Global Liberty Ins. Co. of NY v Pelaez*, 84 AD3d 803, 803-804 [2d Dept 2011]).

Here, respondent's injuries were inherent in the act of Mr. Alkebulan's backing up and turning the car into respondent while her bracelet was entangled in the window (*see id.*). Furthermore, the Court rejects Mercury's argument that Mr. Alkebulan's actions can be viewed as anything other than intentional (*see id., see also Carmean v Royal Indem. Co.*, 302 AD2d 670, 672 [3d Dept 2003]).

Since the lack of coverage forming the basis of GEICO's disclaimer rests on a policy exclusion, the timeliness of GEICO's notice of disclaimer becomes an issue (*see Matter of Great Am. Ins. Co. v Tomaino*, 293 AD2d 944, 946 [3d Dept 2002]; *see also Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 189 [2000]). Generally, "[t]he reasonableness of a delay in issuing a disclaimer must be determined from the time the insurer was aware of facts sufficient to disclaim" (*Halloway v State Farm Ins. Cos.*, 23 AD3d 617, 620 [2d Dept 2005], *lv denied* 6 NY2d 708 [2006]; *see Matter of New York Cent. Mut. Fire Ins. Co. v Gordon*, 46 AD3d 1296, 1298 [3d Dept 2007]).

Here, based on the sparse factual record compiled on the instant application, the Court is unable to determine whether GEICO timely disclaimed coverage (*see* Insurance Law § 3420 [d] [2] [requiring an insurer to give written notice of a disclaimer "as soon as is reasonably possible"]; *New York Cent. Mut. Fire Ins. Co. v Majid*, 5 AD3d 447, 448 [2d Dept 2004]). Further, "timeliness almost always presents a factual question requiring an assessment of all relevant circumstances surrounding a particular disclaimer" (*Continental Cas. Co. v Stradford*, 11 NY3d 443, 449 [2008]). In this instance, the record discloses that the claim arose on October 9, 2010 and that GEICO issued its disclaimer on January 17, 2011. Moreover, GEICO's

disclaimer notes an investigation occurred and also lists the insured's non-cooperation as a reason for the disclaimer. Accordingly, GEICO's submissions raise a factual issue whether its disclaimer was timely made, warranting a framed-issue hearing (*see Matter of Victoria Select Ins. Co. v Munar*, 80 AD3d 707, 708 [2d Dept 2011]; *Matter of New York Cent. Mut. Ins. Co. v Davalos*, 39 AD3d 654, 656 [2d Dept 2007]; *Matter of AutoOne Ins. Co. v Hutchinson*, 71 AD3d 1011, 1013 [2d Dept 2010]).

Given the need for a hearing, Mercury's application to add GEICO and the Alkebulans as necessary parties is granted (*see e.g. Matter of Lumbermens Mut. Cas. Co. v Beliard*, 256 AD2d 579, 580 [2d Dept 1998]). Further, pending the addition of these parties and the hearing, the pending arbitration is temporarily stayed.[2]

Therefore, it is

ORDERED that the branch of the petition seeking to add proposed additional respondents Khahondo Alkebulan, Malikah A. Alkebulan and GEICO Insurance Company is granted; and it is further

ORDERED that petitioner is directed to serve the petition and all other submissions in this matter on Khahondo Alkebulan, Malikah A. Alkebulan within 30 days of this Court's Decision and Order; and it is further

ORDERED that GEICO Insurance Company is deemed served in this proceeding; and it is further

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[2] The Court has reviewed the parties' remaining contentions, concluding that they either lack merit or are not necessary to consider given the Court's determination.

ORDERED that the branch of the petition seeking to add proposed additional respondent Progressive Insurance Company is denied; and it is further

ADJUDGED that the branch of the petition as asserted against proposed additional respondent Progressive Insurance Company is dismissed; it is further

ORDERED that the arbitration as demanded by respondent Jocelyn Brown-Fort is temporarily stayed pending further proceedings in this matter; and finally it is

ORDERED that petitioner's counsel shall serve copies of this Decision & Order upon respondent and the proposed additional respondents within twenty days of the date hereof.

This constitutes the Decision & Order of the Court. The original of this Decision & Order is being transmitted to petitioner's counsel. The Court is retaining the papers for further proceedings. The signing of this Decision & Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: December 12, 2011
Albany, New York

RICHARD M. PLATKIN, A.J.S.C.

Papers Considered:

12.23.11

1. Notice of Petition
2. Petition verified A ...ibits A-E;
3. Certification pursu... ...rmed August 11, 2011;
4. Affirmation of Mar... ...sser, Esq., affirmed September 22, 2011;
5. Affidavit of Paul G. Hanson, Esq., sworn to September 9, 2011, with annexed Exhibits A-B;
6. Affidavit of Wayne Terwilliger sworn to September 6, 2011;
7. Affirmation of Brian D. Richardson, Esq., affirmed September 21, 2011, with annexed Exhibits A-C;
8. Reply Affirmation of Joseph DeDonato, Esq., affirmed September 16, 2011;
9. Reply Affirmation of Joseph DeDonato, Esq., affirmed September 27, 2011.