

**Matter of Discover Prop. & Cas. Ins. Co. v
McCullough**

2012 NY Slip Op 30614(U)

March 9, 2012

Sup Ct, NY County

Docket Number: 108141/2011

Judge: Robert E. Torres

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 29

Index Number : 108141/2011
DISCOVER PROPERTY
vs
MCCULLOUGH, DERICK
Sequence Number : 001
COMPEL OR STAY ARBITRATION

INDEX NO. 108141/2011
MOTION DATE 11/18/2012
MOTION SEQ. NO. 001
MOTION CAL. NO. 47

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1
2,3
4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

MAR - 9 2012

COUNTY CLERK'S OFFICE
NEW YORK

decided in accordance with the attached decision.

This Constitutes the Decision and Order of the Court.

Dated: 2/14/2012


ROBERT E. TORRES J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

2/14/12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 29
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

IN THE MATTER OF THE Application for an Order Staying
All Arbitration Proceedings Attempted to be had between
DISCOVER PROPERTY and CASUALTY INSURANCE
CO., and GALLAGHER BASSETT SERVICES, INC.,
As Third-Party Administrator of the CITY OF NEW YORK,
NEW YORK CITY DEPARTMENT OF EDUCATION,
and AMBOY BUS CO., INC.,

INDEX NUMBER:108141/2011

Petitioner,

-against-

DERICK MCCULLOUGH

Respondent,

and

THOMAS HEARD, EAN HOLDINGS, LLC (a/k/a ENTERPRISE),
and ELCO ADMINISTRATIVE SERVICES, and "JOHN DOE" the
driver of Proposed Additional Respondent Vehicle Name and Identity
currently Unknown,

Proposed Additional
Respondents.

The within action arises out of a motor vehicle accident that occurred on September 20, 2010 on Lexington Avenue, near its intersection with East 122nd Street in Manhattan. The respondent was the driver of the petitioner's vehicle in the course of his employment at the time of the accident. According to respondent driver's MV-104 and the Police accident Report, the proposed additional respondent's vehicle, driven by Thomas Heard, sideswiped petitioner's bus.¹ Notably, there is no dispute as to the lack of negligence on the part of respondent driver Derick McCullough which would have caused or contributed to the subject accident. The vehicle driven by Thomas Heard, a 2010 Chrysler with NY Plate No. FAC5089, was a rental car registered by EAN and believed to be

¹

The MV-104 is submitted as Exhibit A of the petition and the Police Accident Report is submitted as Exhibit B of the petition.

self insured on the date of the accident.

Petitioner now moves for an Order pursuant to C.P.L.R. § 7503, permanently staying the arbitration sought by the Respondent on the grounds that respondent failed to file a timely Notice of Claim and failed to establish that the offending vehicles were “uninsured” which is a prerequisite to their Petition for arbitration. Alternatively, Petitioner seeks a temporary stay of arbitration directing that the proposed additional respondents be added as respondents and setting the matter down for a frame issue hearing. In the event said relief is denied, the petitioner seeks an order requiring the respondent to furnish the petitioner with discovery prior to the proceeding to arbitration.

Respondent DERICK MCCULLOUGH opposes the petition except for the branch seeking to add the additional party respondents. As to said branch, respondent McCullough takes no position. Respondent McCullough argues that there is no requirement herein to file a Notice of Claim against the City of New York or Department of Education as said parties were not the owner of the vehicle being operated by the Respondent. Moreover, respondent McCullough argues that he did not fail to establish that the offending vehicles were “uninsured” because although the offending vehicle was covered in normal instances by EAN Holdings LLC’s insurance, it provides no coverage herein as the operator of the vehicle was arrested at the scene for unauthorized use and a valid disclaimer was issued to that effect.

Proposed additional respondents-EAN HOLDINGS, LLC (hereinafter “EAN”) and ELCO ADMINISTRATIVE SERVICES (hereinafter “ELCO”) oppose be joined as additional respondents. EAN and ELCO maintain that petitioner has failed to establish personal jurisdiction over them because they were not properly served as mandated by the statute. Additionally, EAN and ELCO argue that New Jersey choice of law governs because the rental agreement was issued in New Jersey

to a New Jersey registered vehicle. EAN and ELCO also argue that non-permissive use operator voids insurance coverage under the subject rental agreement. Specifically, they maintain that Thomas Heard was not listed in the rental agreement as an operator and allegedly stole the rental car.² Finally, EAN and ELCO maintain that the New Jersey insurance carrier may deny coverage due to lack of cooperation on behalf of named insured and driver.

It is well settled that in a proceeding in which an insurer is seeking a stay of uninsured motorist arbitration, the petitioning insurer “bears the initial burden of proving that the offending vehicle was in fact insured at the time of the accident.” Matter of Eagle Insurance Company v. Tichman, 185 A.D.2d 884, 885 (2nd Dept. 1992). In other words the petitioning insurer must establish a prima facie case of coverage for the adverse or offending vehicle. “On an application to stay arbitration, the petitioner has the burden of establishing the existence of evidentiary facts, sufficient to conclude that there is a genuine preliminary issue, which requires a trial and justifies a stay.” National Grange Mutual Insurance Co. v. Diaz, 111 A.D.2d 700 (1st Dept. 1985).

In the case at bar, the Court finds petitioner has met its burden. Issues of fact have been raised of whether the offending vehicle was insured on the date of the accident. Thus, THOMAS HEARD, EAN HOLDINGS, LLC (a/k/a ENTERPRISE), and ELCO ADMINISTRATIVE SERVICES, and “JOHN DOE” the driver of Proposed Additional Respondent Vehicle Name and Identity currently unknown must be joined as a party respondents to the proceeding for a hearing to resolve these issues. (Matter of Lumbermens Mut. Cas. Co. v. Beliard 256 A.D.2d 579 [2nd Dept. 1998]; Matter of Nationwide Ins. Co. v. Sillman, 266 A.D.2d 551 [2nd Dept. 1999]; New York Central Mut. Fire

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EAN and ELCO maintain that an individual that identified himself as Milton Williams, the authorized renter of the subject vehicle, called the Enterprise Newark, NJ Assistant Branch Manager Chamila Muherjee on September 21, 2010 and informed her that his “guest” stole the subject rental card. They submit Ms. Muherjee’s notarized affidavit as Exhibit C of their papers.

Ins. Co. v. Rozenberg, 281 A.D.2d 330[1st Dept. 2001]).

Accordingly, it is

ORDERED, that leave is granted to join THOMAS HEARD, EAN HOLDINGS, LLC (a/k/a ENTERPRISE), and ELCO ADMINISTRATIVE SERVICES, and "JOHN DOE" the driver of Proposed Additional Respondent Vehicle Name and Identity currently unknown to the proceedings as additional respondents; and it is further

ORDERED that Petitioner's motion is granted to the extent that the arbitration is temporarily stayed pending a framed issue hearing to determine all coverage issues; and it is further

ORDERED that petitioner is hereby directed to serve said additional respondents with a supplemental notice of petition, and a supplemental petition pursuant to C.P.L.R. § 1003, and it is further

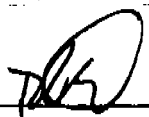
ORDERED that the respondent is directed to produce a copy of all relevant medical records and authorizations, and to submit to an Examination Under Oath and a physical examination prior to proceeding to arbitration; and it is further

ORDERED that said framed issue hearing is hereby referred to a Special Referee to hear and report; and it is further

ORDERED that a copy of this order with notice of entry shall be served upon the Special Referee Clerk, Room 119M to arrange a date for the reference to a Special Referee.

This shall constitute the decision and order of this Court.

Dated: February 16, 2012



Hon. Robert E. Torres

ROBERT E. TORRES
JUDGE

FILED

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NEW YORK