SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice **Part 36**

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

JAVIER ADORNO,

Respondent.

INDEX NO. 110698/11

MOTION SEQ. NO. 001

The following papers, numbered 1-4 were considered on this motion to stay arbitration:

PAPERS	**NUMBERED**
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	**1, 2**
Answering Affidavits — Exhibits	**3**
Replying Affidavits	**4**
Cross-Motion: [ ] Yes [X] No	

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

BACKGROUND

Petitioner Government Employees Insurance Company (GEICO) commenced this special proceeding against respondent Javier Adorno (Adorno) to stay an arbitration. Respondent Adorno filed a Demand for Arbitration dated September 1, 2011 (Arbitration Demand), based on injuries allegedly sustained by him in an accident on February 10, 2010 (Subject Accident) involving an allegedly uninsured/underinsured motorist. The Arbitration Demand was based on an insurance policy issued by GEICO providing uninsured/underinsured motorist benefits (GEICO Policy).

Petitioner moves: (i) to permanently stay arbitration until respondent Adorno has complied with all conditions precedent under the GEICO Policy; or alternatively, (ii) to direct respondent Adorno to produce all relevant medical records and authorizations, including a no-fault authorization, and submit to an examination under oath and physical examinations.

The Subject Accident involved a 2001 Cadillac (2001 Cadillac), operated by non-party Tyease

Clark and a 2008 Honda (2008 Honda), operated by respondent Adorno. Respondent Adorno was stopped at a red light when she was rear-ended by the 2008 Honda. A police accident report (Police Report) was filled out on the date of the Subject Accident.

Thereafter, respondent Adorno filed the Arbitration Demand referring to an insurance policy, issued by GEICO, providing uninsured motorist benefits. By letter dated September 9, 2011, GEICO requested that respondent Adorno agree to discovery. GEICO, alleging that respondent Adorno has failed to comply with the conditions precedent to arbitration, then commenced this proceeding arguing that a permanent stay of the arbitration is necessary given that respondent Adorno failed to provide written notice as soon as practicable. Alternatively, GEICO contends that a temporary stay of the arbitration is necessary for discovery.

DISCUSSION

GEICO claims that respondent Adorno has failed to fully comply with the necessary conditions precedent to arbitration as required by the GEICO Policy. Specifically, GEICO contends that a person seeking Supplementary Uninsured/Underinsured Motorists (SUM) coverage must provide written notice as soon as practicable, the insured and every person making a claim must submit to examinations under oath, and the insured must submit to physical examinations by physicians selected by GEICO as often as reasonably required. *See* Petition, Exhibit B, p. 14.

In opposition, respondent Adorno argues that the arbitration should not be permanently stayed as GEICO was placed on notice of his uninsured/underinsured motorist claims by letter dated March 8, 2010. The March 8, 2010 letter states that Kramer & Pollack, LLP "is filing a claim for all applicable no-fault, uninsured and underinsured motorist benefits on behalf of Javier Adorno for injuries sustained in an automobile accident which occurred on February 10, 2010." Affirmation in Opposition, Exhibit A. Respondent Adorno also contends that GEICO's petition to stay arbitration is untimely, as are GEICO's

discovery demands.

As a preliminary matter, the within petition is timely in that it was filed within 20 days after service of the Arbitration Demand as required by CPLR § 7503. "The law is well settled that the 20-day period provided in CPLR 7503(c) is to be computed from the time the demand for arbitration is received, not from the time it is mailed." *Allstate Ins. Co. v Metayer*, 137 AD2d 454, 455 (1st Dep't 1988). Furthermore, "[i]n calculating the time in which a stay application is to be made, the day on which the demand is received is not included." *Id.* Here, the Arbitration Demand, dated September 1, 2011, was received on September 2, 2011 and the petition filed on September 20, 2011. Accordingly, the petition was filed within the requisite 20 day period, and thus, denial on such basis is not warranted.

Respondent Adorno further objects to GEICO's petition in that the request for discovery is untimely. Respondent Adorno contends that GECIO was provided with notice on March 8, 2010 but failed to seek discovery until September 9, 2011. However, GEICO argues that the purported notice dated March 8, 2010 was too overbroad and speculative to constitute notice of respondent Adorno's claim for no-fault, uninsured and underinsured motorist benefits. Further, GEICO argues that the GEICO Policy unequivocally requires respondent Adorno to submit to discovery prior to arbitration.

CPLR § 3102(c) states that "disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." The Court of Appeals has found that "[w]hile a court may order disclosure to aid in arbitration...courts will not order disclosure except under extraordinary circumstances." *De Sapio v Kohlmeyer*, 35 NY2d 402, 406 (1974)(internal quotations omitted). Moreover, "[c]ourt-ordered disclosure is not justified except where it is absolutely necessary for the protection of the rights of a party." *International Components Corp. v Klaiber*, 54 AD2d 550, 551 (1st Dep't 1976).

Relying on the Appellate Division, Second Department, petitioner argues that "[p]etitions to stay

arbitration are properly denied when...the carrier had ample time to obtain the discovery sought and unjustifiably failed to utilize that opportunity." Affirmation in Opposition, ¶ 9 (internal quotations omitted). *See Matter of Allstate Ins. Co. v Urena*, 208 AD2d 623 (2nd Dep't 1994). However, the Appellate Division, Second Department also held that where "[t]he claimant has alleged physical injuries...[, i]f he is not compelled to submit to a physical examination, petitioner will be severely prejudiced...[and i]n contradistinction, the claimant will suffer no prejudice if compelled to submit to the examination. [The court found] no indication in the record that petitioner intended to waive its right to compel the claimant to submit to a physical examination, or that its delay in seeking the examination constituted a dilatory ploy." *Matter of State Farm Mutual Automobile Ins. Co. v Wernick*, 90 AD2d 519, 519-520 (2nd Dep't 1982).

Here, respondent Adorno is alleging serious injuries resulting from the Subject Accident. Based on the submissions before the court, GEICO's alleged delay in seeking discovery was not a "dilatory ploy". *Id.* GEICO argues that it did not receive notice until the Arbitration Demand, dated September 1, 2011. By September 9, 2011, GEICO requested discovery from respondent Adorno, a mere 8 days following receipt of the Arbitration Demand. Further, "[t]he strong policy of this State requires the courts to enforce arbitration agreements as written". *CSP Technologies, Inc. v Hekal*, 57 AD3d 372, 373 (1st Dep't 2008). In support of its petition, GEICO proffers the Conditions section of the GEICO Policy, ¶¶ 2 and 3, which states, in relevant part:

> 2. Notice and Proof of Claim: ...The insured...shall...submit to examinations under oath by any person we name and subscribe the same. ...
>
> 3. Medical Reports: The insured shall submit to physical examinations by physicians we select when and as often as we may reasonably require. The insured...shall upon each request from us authorize us to obtain relevant medical reports and copies of relevant records.

Petition, Exhibit B, p. 14. While respondent Adorno alleges that GEICO failed to submit a copy of the GEICO policy, and instead submits copies of portions of UM/UIM insurance forms, it is undisputed that

the GEICO Policy required discovery prior to arbitration. Parties are permitted to contract and agree to rules and conditions to arbitration. *CSP Technologies, Inc. v Hekal*, 57 AD3d at 372. As such, the portion of petitioner's motion seeking a stay of the arbitration for discovery is granted.

Accordingly, it is

ORDERED that the petition to stay arbitration is granted to the extent that respondent Javier Adorno is ordered to provide all relevant medical records and authorizations, and to submit to an examination under oath and an independent medical examination, to be scheduled with petitioner Government Employees Insurance Company within 60 days of service hereof; and it is further

ORDERED that arbitration is stayed pending such examination under oath and independent medical examination as ordered above; and it is further

ORDERED that petitioner shall serve a copy of this order, with notice of entry, upon respondent and the arbitrator within 30 days of entry hereof.

This constitutes the decision and order of this Court.

Dated: 4/10/12

DORIS LING-COHAN, J.S.C.

Check one: **[X] FINAL DISPOSITION** **[ ] NON-FINAL DISPOSITION**

Check if Appropriate: [ ] DO NOT POST

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