

QBE Ins. Corp. v Olivares

2012 NY Slip Op 31104(U)

April 16, 2012

Supreme Court, New York County

Docket Number: 113827/11

Judge: Peter H. Moulton

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

PRESENT: _____

PART _____

Justice

Index Number : 113827/2011
QBE INSURANCE CORP

INDEX NO. _____

vs.
OLIVARES, SIMON

MOTION DATE _____

SEQUENCE NUMBER : 001
COMPEL/STAY ARBITRATION

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

portion is denied

per attached decision

FILED

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RECEIVED

APR 17 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 4/16/12

[Signature]
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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - Part 40 B

-----X

In the Matter of the Application of
QBE INSURANCE CORPORATION by their
t/p/a COUNTRY WIDE MANAGEMENT SERVICES,

Petitioner(s),

Index No.: 113827/11

-against-

For an Order Staying the Arbitration
Demanded by SIMON OLIVARES

Respondent(s),

-and-

FILED

LEROY BURNEY, "JOHN DOE" &
ALLSTATE INSURANCE COMPANY,

APR 18 2012

Proposed Additional Co-Respondents
-----X
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PETER H. MOULTON, J.S.C:

Petitioner moves for an order staying the arbitration of Respondent's uninsured motorist claim on the grounds that the adverse vehicle, owned by Leroy Burney, was insured by Allstate Insurance Co., on the date of the accident on July 31, 2010. Alternatively, petitioner seeks to stay arbitration because respondent failed to submit a sworn statement with 90 days of the accident, as required under Petitioner's Supplementary Uninsured/Underinsured Motorists Endorsement. Petitioner's attorney attaches the purported policy, but does not state that she has personal knowledge that this policy was issued to Respondent,

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not does she refer to any provision of the policy. Petitioner also seeks to add proposed additional Respondents and seeks discovery.

The Petition is granted to the extent of adding the proposed additional Respondents and temporarily staying the arbitration, pending the determination of the issue of whether the alleged offending vehicle was insured at the time of the accident, including whether any coverage was validly disclaimed by Allstate Insurance Company.

In reply, Petitioner abandons its request to stay the arbitration on the basis that respondent failed to timely submit a sworn statement, as purportedly required in hit and run accidents. Even assuming that the policy attached to the petition was issued to Respondent, petitioner has not established that the accident would constitute a "Hit-and-Run" as defined by the policy. The Uninsured Motorist Endorsement-New York, attached to the policy, requires that the insured report the accident with 24 hours or as soon as reasonably practicable and "shall have filed with the company within 90 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts" (Uninsured Motorist Endorsement-New York at p 21). However,

the policy also defines a "Hit-and-Run Motor Vehicle" to apply only when "there cannot be ascertained the identity of either the operator or the owner" (*id.*). Here, the owner of the vehicle is known. Thus, the accident is not considered a "Hit-and-Run" as defined by the policy. Notably, stolen vehicles are treated separately from hit-and-run accidents (see e.g., *id.* at p 20 [the definition of "Uninsured Motor Vehicle" applies to stolen vehicles, and, another separate category where neither the owner nor driver can be identified, including hit-and-run vehicles]).

Moreover, as demonstrated in opposition to the petition, Respondent did not learn that the offending vehicle was allegedly stolen until more than four months after the accident, when his attorney received a letter from Allstate Ins. Co, dated November 3, 2010, disclaiming coverage because the offending vehicle was reported stolen less than four hours prior to the accident.

Petitioner has met its burden to show that the alleged offending vehicle was insured on the date of the accident (see State Farm Mut. Auto. Ins. Co. v Yeglinski, 79 AD2d 1029 [2d Dept 1981] [once a prima facie case is made out, normally by submission of a Department of Motor Vehicles FS-25 form or similar document, the burden shifts to the claimant to prove that the vehicle in question was never insured or that the insurance had been

cancelled)). The letter sent by Allstate Insurance Co. to Respondent, stating that it determined that its insured was not responsible for the accident because his vehicle was stolen, is not dispositive, and only raises issues of fact.

Petitioner's request for an order requiring Respondent to submit to an EBT and IME, and for other discovery, prior to any uninsured arbitration hearing is denied. Petitioner has not disputed Respondent's contention that Petitioner was aware of the claim on October 5, 2010, when Respondent's counsel sent Petitioner a letter notifying it of the accident. Here, the demand for arbitration is dated, and was mailed, on November 16, 2011-nearly a year later. The failure of an insurer to request discovery until after receiving a Demand for Arbitration has resulted in the waiver of its rights to discovery, absent a justifiable excuse (see Matter of Allstate Ins. Co. v Miles, 280 AD2d 472 [2d Dept 2001]; Matter of Interboro Mut. Indem. Ins. Co. v Pardon, 270 AD2d 266 [2d Dept 2000]; Matter of Liberty Mut. Ins. Co. v Almeida, 266 AD2d 547 [2d Dept 1999]; Matter of Allstate Ins. Co. v Faulk, 250 AD2d 674 [2d Dept 1998])).

It is hereby

ORDERED that the petition is granted to the sole extent that issue of whether the alleged offending vehicle was insured at the

time of the accident, including whether any coverage was validly disclaimed by Allstate Insurance Co., is referred to a Special Referee to hear and report, and, the parties are added as described below; and it is further

ORDERED that Petitioner's request for an order requiring that Respondent submit to an EBT and IME, and other discovery, prior to any uninsured arbitration hearing is denied, and it is further

ORDERED that arbitration is stayed until the Court confirms or rejects the report of the Special Referee by separate motion; and it is further

ORDERED that LEROY BURNEY, and ALLSTATE INSURANCE CO., are added as party co-Respondents, upon Petitioner's service of a copy of this Decision and Order with notice of entry upon each of them, together with copies of all papers previously served in this proceeding, which service shall be made within 60 days from the date hereof, and it is further

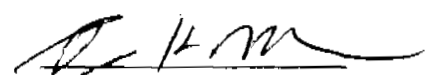
ORDERED that the caption of this proceeding is amended to reflect inclusion of LEROY BURNEY, and ALLSTATE INSURANCE CO. as Additional co-Respondents, and, upon Petitioner's service of a copy of this Decision and Order with notice of entry on the Clerk of this Court and the Trial Support Clerk (Room 158), the Clerks shall mark their records to reflect the amendment, and it is further

ORDERED that Petitioner shall serve a copy of this Decision and Order with notice of entry on Respondent and the arbitrator within 30 days from the date hereof.

This constitutes the Decision and Order of the Court.

DATED: April 16, 2012

ENTER:


J.S.C.

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