

State Farm Mut. Auto. Ins. Co.
2012 NY Slip Op 31245(U)
April 26, 2012
Supreme Court, Nassau County
Docket Number: 21125/08
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

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**In the Matter of the Petition of
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,**

Petitioner,

**For an Order Staying the Arbitration attempted to be
had by**

ROSA MARIA MARQUEZ and SINDY M. OSORIO,

Respondents,

-and-

THOMAS CLEMONS,

Proposed Additional Respondent.
-----X

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**DECISION AFTER
FRAMED ISSUE
HEARING**

Pursuant to an order of this court (Marano, J., January 10, 2012) the previously ordered framed issue hearing was severed from the pending tort action and directed to proceed. On February 8th and 9th, 2012 a hearing was held. The court makes the following findings of fact and conclusions of law.

Police Officer Joseph Savino, an eighteen year veteran of the Hempstead Police Department, testified that on December 25, 2004 he responded to the scene of an automobile accident in the vicinity of Chasner Street and Front Street in Hempstead, New York. Upon his arrival, there was only one automobile at the scene. He was advised that the other automobile left the scene of the accident. The front seat passenger of the remaining vehicle, Ms. Olga Osorio, provided him with the license plate number of the other vehicle. Officer Savino ran the plate number in his patrol car and received information that the automobile was registered to Thomas Clemons who resides on Terrace Avenue in Hempstead, approximately one-half mile from the accident site. Officer Savino does not recall how he received the license plate number, but stated he does not speak Spanish.

Olga Osorio, the owner of a gray Toyota Corolla which remained at the scene, testified that she understands a little English but needed a Spanish interpreter for this proceeding. She testified that she was seated in the front passenger seat of her vehicle on December 25, 2004 at approximately 10:30 p.m. when it was struck in the rear. Her daughter, Rosa Marquez, was operating the motor vehicle. The other passengers included Sindy Osorio and her baby and Rosa Osorio, who has since passed away.

Ms. Osorio testified that before the accident she did not see the automobile that struck her vehicle and that after the accident, the vehicle left the scene. She testified that the other vehicle pushed her vehicle "far away." Olga Osorio testified that the other vehicle was green in color and was operated by a black man, and there was another man in the automobile, but she could not describe him. She was unsure of the model of the automobile. Ms. Osorio testified that the green car had its headlights on, and there were no lights illuminating the license plate. Ms.

Osorio does not recall anything else about the other automobile. She had no recollection of the distance between the street lights in the area and her vehicle.

She never saw the license plate of the other car, but before the automobile left the scene, she wrote down the license plate number of the fleeing vehicle, as given to her by passenger Sindy Osorio. Sindy Osorio repeated the license plate number two times before Ms. Osorio wrote it down on an envelope. The police came to the scene, and she gave the envelope to operator, Rosa Marquez, who related the information in English to the officer.

Sindy Osorio testified that she was a rear seat passenger in an automobile operated by Rosa Marquez that was struck from behind at 10:30 p.m. on December 25, 2004. Before the accident, she did not see the automobile that struck them. After the accident, their car was pushed forward less than a car length. Sindy Osorio looked out the back window and observed a green four-door car. A tall, dark skinned man got out of the car and looked at the damage. He remained at the scene approximately ten seconds and then returned to his automobile and drove away. When asked on cross examination to estimate how long ten seconds was, she was unable to do so. At the time she was worried about the other passengers in the car, including her young daughter. She did not observe any other occupants in the other motor vehicle.

After the accident, Sindy Osorio took off her seat belt looked at the plate and wrote the plate number down on her hand. She then called out the plate number to her aunt two times. She observed her aunt write the plate number down. She also compared the numbers on her hand to those on the paper her aunt had written down. However, she testified at an earlier deposition on October 31, 2008 that she wrote the license plate down on a piece of paper which she handed to

Rosa Osorio. She has no independent recollection of the license plate number today, but testified that she was able to see the license plate clearly.

At the hearing she could not recall how long the police remained at the scene. However, at the earlier deposition, she testified that the police only remained at the scene for five seconds. and that it was too dark to see if the other car had any damage. She testified that her memory is better today than it was four years ago, but she had no recollection of whether the headlights of the other car were on or off.

Rosa Marquez, the driver of the Toyota automobile, testified that she was operating her mother's car on December 25, 2004 at 10:30 p.m. and was stopped at a red traffic light when she observed an automobile in her rear view mirror which struck her in the rear. She remembers the other vehicle was green but did not recall whether it had its headlights on. She testified that a man got out of the car after the impact, but cannot recall anything else about him. Ms. Marquez also had no recollection of how long this vehicle remained at the scene.

Ms. Marquez testified that she did not remember taking down the license plate number of the vehicle that struck her, nor does she recall anyone writing down or giving her the license plate number. At an earlier deposition, on October 30, 2008 she testified that Sindy saw the license plate and wrote it down on a piece of paper.

She testified that the police came to the scene, and that she did not recall the manner in which she gave the officer the plate number. However, at the deposition, Ms. Marquez testified that it was probably true that no one gave the piece of paper with the license plate number to the officer.

The proposed additional respondent, Thomas Clemons, testified that neither he nor his automobile were in an accident on December 25, 2004. His automobile, a 1996 green Pontiac Grand Am, was not in operating condition on that date, as it would not start, and was parked on Terrace Avenue about 200 feet from Fulton Street. The car hadn't worked for approximately one week. He got the car started some time after Christmas Day and drove it to a friend's house to be worked on.

Mr. Clemons testified that on December 25, 2004 between 10:00 p.m. and 11:00 p.m. his friend had picked him up at another friend's house in Roosevelt and dropped him off at his residence in Hempstead. He purchased two car batteries after New Years Day and produced receipts at a small claims proceeding in February of 2005, but he has does not recall what subsequently happened to them. Mr. Clemons testified that there was no front end damage to his automobile. Introduced into evidence were two photographs of Mr. Clemons' automobile as it looked in January 2005. The only observable damage was a nick on the right side fender of the automobile adjacent to the headlight.

Melody Clemons-Smith, the daughter of Thomas Clemons, testified that she picked up her father on Christmas morning 2004 and took him to her mother's home. Later that day, at approximately 2:30 p.m., she drove her father to his friend's house. At the time, she picked up her father at his residence and saw her father's car parked on the street. She was not exactly sure where the car was parked but it was not on Terrace Avenue.

Physical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle *see* Insurance Law § 5217; *Matter of New York Cent. Mut. Fire Ins. Co. v. Vento*, 63 A.D.3d 841, 843, 882 N.Y.S.2d 126; *Matter of Travelers Indem.*

Co. v. Panther, 61 A.D.3d 984, 985, 878 N.Y.S.2d 174; *Matter of Eveready Ins. Co. v. Scott*, 1 A.D.3d 436, 437, 767 N.Y.S.2d 31). “The insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable” (*Matter of Nova Cas. Co. v. Musco*, 48 A.D.3d 572, 573, 852 N.Y.S.2d 229; see *Matter of Newark Ins. Co. v. Caruso*, 14 A.D.3d 613, 614, 787 N.Y.S.2d 892).

The burden of proof is upon the respondents Osorio and Marquez to prove by a fair preponderance of the credible evidence that the Clemons vehicle was the vehicle that struck their vehicle on December 25, 2004. In making such a determination, the court must not only assess the evidence but also assess the credibility of the testifying witnesses (see gen., *Golding v Gottesman*, 41 AD3d 430). Numerous inconsistencies in the testimony were revealed during the hearing. Not only were the witnesses' testimony at variance with each other but also each individual witness testified inconsistently on different occasions. It must be noted that the inconsistencies were attributable to all of the witnesses. Any inconsistencies in the testimony, raise an issue of credibility that must be resolved by the fact finder (see *Martinez v Martinez*, 93 AD2d 767; *Camarillo v. Sandoval*, 90 A.D.3d at 593, 933 N.Y.S.2d 906).

The credible evidence demonstrates that Rosa Marie Marquez, Sindy Osorio and Olga Osorio observed that a green automobile struck their vehicle in the rear on the date in question. Thomas Clemons testified that he owns a green Pontiac. Although there are inconsistencies as to who wrote down the plate number and what type of paper it was written upon, the credible evidence reveals that Sindy Osorio obtained the plate number from the green automobile. The

plate number was provided to the police officer who responded to the scene. The officer ran the plate number on the computer in his patrol car. The plate came back to the automobile owned by Thomas Clemons, who lives one-half mile from the scene of the accident. It is interesting to note that Thomas Clemons testified his car was inoperable and was parked on Terrace Avenue the week before Christmas until after Christmas Day. His daughter, Melody Clemons-Smith, however, testified that she observed her father's automobile parked on a street other than Terrace Avenue on Christmas Day.

The inconsistencies raised by the respondents are attributable to collateral matters. Further, it is almost eight years since the accident and approximately three and one-half years since the depositions and, therefore, the discrepancies can be attributable to the lapse of time.

The petitioners have met their burden by demonstrating that the Clemons vehicle was the vehicle that struck the automobile owned and operated by the respondents herein. As a result, the arbitration demanded by respondents is permanently stayed.

This is the order and judgment of this court.

Dated: Mineola, New York
April 26, 2012

ENTERED
APR 30 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTERED

HON. JEFFREY S. BROWN, J.S.C.

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