[* 1]

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

In the Matter of the Application of ALLSTATE INSURANCE COMPANY, to Stay Arbitration,

Petitioner,

- against -

RENE PADILLA and RIGOBERTO CRUZ,

Respondents,

- and -

ELSA MALDONADO and STATE FARM INSURANCE COMPANY,

Proposed Additional Respondents.

----------X

DECISION AND ORDER

By: JERRY GARGUILO, J.S.C.
I.A.S. Part 47

Index No. 12-9628

Mot. Seq. #001 - RRH

Return Date: May 21, 2012
Adjourned: May 23, 2012

ROBERT P. TUSA, ESQ.
Attorney for Petitioner
898 Veterans Memorial Highway, Suite 320
Hauppauge, New York 11788

CANNON & ACOSTA, LLP
Attorney for Respondents
1923 New York Avenue
Huntington Station, New York 11746

This proceeding, which is to stay arbitration of the respondents' claim for uninsured motorist benefits, arises out of a May 30, 2011 accident involving the respondents' vehicle, which was insured by the petitioner, and a vehicle owned by Rigoberto Boquin and operated by Elsa Maldonado ("the Maldonado vehicle"), which was allegedly insured under a policy issued by State Farm Fire and Casualty Company ("State Farm").

According to the petition, on March 19, 2012, the respondents served a demand to arbitrate their claim, which the petitioner received on March 27, 2012. It appears from the notice of petition that this proceeding was commenced on April 16, 2012. Pursuant to CPLR 7503 (c), an application to stay arbitration must be made by the party served with a demand for arbitration or a notice of intention to arbitrate within 20 days from the date of receipt of the demand or notice (*see* ***Matter of Eagle Ins. Co. v Pierre-Louis***, 306 AD2d 344, 762 NYS2d 249 [2003]). The petitioner alleges, therefore, that the petition is timely.

By way of this proceeding, the petitioner seeks a permanent stay of arbitration on the ground that the Maldonado vehicle was, in fact, insured by State Farm on the date of the accident,

and that any purported cancellation of that policy on May 12, 2011 was ineffectual. Alternatively, the petitioner requests that Maldonado and State Farm be joined as additional respondents and that the matter be set down for a framed issue hearing on the issue of available insurance. In the event the request for a permanent stay is denied, the petitioner seeks a temporary stay pending the completion of certain discovery to which it claims it is entitled under its policy.

The respondents, in opposition, contend that the petition is untimely as a matter of law–irrespective of the timing of their demand for arbitration–because it was not made within 20 days after the petitioner's earlier receipt of notices of intention to arbitrate served by the respondents. Additionally, the respondents assert that they have provided the petitioner with all the discovery required under the policy.

State Farm also opposes the petition, claiming that the policy insuring the Maldonado vehicle was validly canceled effective May 12, 2011 and was not in effect on the date of the accident.

"Uninsured motor vehicle" is defined in the relevant policy endorsement to include a vehicle that, through its ownership, maintenance or use, results in bodily injury to an insured, for which "no bodily injury liability insurance policy or bond applies * * * at the time of the accident."

As a threshold matter, the court must first address the question of whether, as the respondents contend, notices of intention to arbitrate were served on the petitioner some six months or more prior to the commencement of this proceeding and, hence, whether the petition is untimely.

In support of their claim that the petition is untimely, the respondents submit the affirmation of their attorney, to which are annexed copies of (i) a letter dated June 23, 2011, bearing the notation "Certified Mail–Return Receipt Requested" and a certified mail item number, addressed to the petitioner at its Kennesaw, Georgia address, together with a notice of intention to arbitrate on behalf of Rene A. Padilla presumably enclosed with the letter, (ii) a USPS "Track and Confirm" printout indicating that an item bearing a label number identical to the certified mail item number listed on the June 23 letter was delivered in Kennesaw, Georgia on July 1, 2011, (iii) a letter dated October 20, 2011, bearing the notation "Certified Mail–Return Receipt Requested" and a certified mail item number, addressed to the petitioner at its Kennesaw, Georgia address, together with a notice of intention to arbitrate on behalf of Rigoberto Cruz presumably enclosed with the letter, and (iv) a USPS "Track and Confirm" printout indicating that an item bearing a label number identical to the certified mail item number listed on the October 20 letter was delivered in Kennesaw, Georgia on October 25, 2011.

The court finds the respondents' evidentiary showing insufficient (*cf.* ***Matter of Allstate***

Ins. Co. [Patrylo], 144 AD2d 243, 533 NYS2d 436 [1988]). CPLR 7503 (c) requires that a demand for arbitration or a notice of intention to arbitrate "be served in the same manner as a summons or by registered or certified mail, return receipt requested." Here, while it appears that mailings were made, and notwithstanding the notations on the respective letters, it does not appear from either of the "Track and Confirm" printouts, nor from the attorney's personal knowledge, nor from evidence of signed postal receipts, that delivery was by certified mail, return receipt requested (*cf.* ***Matter of Colonial Penn Ins. Co. v Ennab***, 168 AD2d 494, 562 NYS2d 736 [1990], *lv denied* 78 NY2d 851, 573 NYS2d 69, *appeal dismissed* 78 NY2d 953, 573 NYS2d 648 [1991]; ***Matter of Sea Ins. Co. v Hopkins***, 91 AD2d 998, 457 NYS2d 862 [1983]). As for the contents of the mailings, the respondents have failed to offer any evidence–whether by the testimony of a witness with personal knowledge of the mailings or of standard office practice and procedure for such mailings–that the notices were, in fact, included with the mailings (*compare* ***New York & Presbyt. Hosp. v Allstate Ins. Co.***, 29 AD3d 547, 814 NYS2d 687 [2006] *with* ***Westchester Med. Ctr. v Liberty Mut. Ins. Co.***, 40 AD3d 981, 837 NYS2d 210 [2007]). Absent proof sufficient to demonstrate prima facie that the notices were duly mailed, the court is constrained to reject the respondents' claim.

The analysis thus proceeds to the question of whether the Maldonado vehicle was insured at the time of the accident.

"In a proceeding to stay arbitration of a claim for uninsured motorist benefits, the claimants' 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 Lumbermens Mut. Cas. Co. v Quintero***, 305 AD2d 684, 685, 762 NYS2d 82, 83, *lv denied* 100 NY2d 515, 769 NYS2d 201 [2003]).

Here, the petitioner met its prima facie burden by producing a copy of the police accident report, which contained a vehicle identification code identifying State Farm as the insurer of the Maldonado vehicle (*see* ***Matter of Continental Ins. Co. v Biondo***, 50 AD3d 1034, 857 NYS2d 588 [2008]; ***Matter of Government Empls. Ins. Co. v McFarland***, 286 AD2d 500, 729 NYS2d 739 [2001]). In opposition, State Farm submits the affirmation of its attorney, to which are annexed copies of a notice of cancellation effective May 12, 2011, a record purporting to document the mailing of the notice to the policyholder, and an "Insurance Activity Expansion" report purporting to evidence the timely filing of the cancellation with the New York State Department of Motor Vehicles. While the court finds such evidence, without more, insufficient to conclusively rebut the petitioner's showing (*cf.* ***Matter of Prudential Prop. & Cas. Ins. Co. v Mortise***, 178 AD2d 646, 577 NYS2d 884 [1991]), it is sufficient to raise a question of fact whether the policy was validly canceled prior to the date of the accident. A hearing is appropriate, therefore, to determine the issue of coverage (*see* ***Matter of Eagle Ins. Co. v Tichman***, 185 AD2d 884, 586 NYS2d 1010 [1992]), which issue should not be resolved without the joinder of Maldonado and State Farm as additional respondents (*see* ***Matter of Victoria Select***

Ins. Co. v Munar, 80 AD3d 707, 914 NYS2d 683 [2011]; ***Matter of New York Cent. Mut. Ins. Co. v Davalos***, 39 AD3d 654, 835 NYS2d 247 [2007]; *see also* CPLR 401, 1001).

The petitioner's further request for a temporary stay of arbitration to allow it to conduct a physical examination, to obtain an examination under oath, and to obtain medical records, is rejected as there is no indication on the record that any such demands were made prior to the commencement of this proceeding, despite ample opportunity (*see* ***Matter of New York Cent. Mut. Fire Ins. Co. v Gershovich***, 1 AD3d 364, 766 NYS2d 596 [2003]; ***Matter of Allstate Ins. Co. v Urena***, 208 AD2d 623, 618 NYS2d 219 [1994]). In any event, the respondents claim to have complied with all discovery required under the policy by submitting to an examination under oath and by providing the petitioner with complete copies of all medical records and applicable authorizations–a claim which the petitioner does not controvert.

Accordingly, it is

ORDERED that the petition is granted to the extent of temporarily staying the arbitration pending the joinder of the additional respondents and a hearing to determine whether State Farm insured the Maldonado vehicle at the time of the accident, and is otherwise denied pending a further determination by the court consistent with this decision and order; and it is further

ORDERED that the petitioner shall join the additional respondents as parties by serving them in the manner set forth below; and it is further

ORDERED that the petitioner, within 20 days of the date of this decision and order, shall serve upon the additional respondents, in a manner prescribed for service of a summons under CPLR article 3, a copy of this decision and order with notice of its entry, together with a supplemental notice of petition and supplemental petition bearing the caption as amended below; and it is further

ORDERED that the petitioner, within 20 days of the date of this decision and order, shall serve upon the respondents, in a manner provided for service of papers generally, a copy of this decision and order with notice of its entry, together with a supplemental notice of petition and supplemental petition bearing the caption as amended below; and it is further

ORDERED that the petitioner, within 20 days of the date of this decision and order, shall serve upon the clerk of the court, by personal delivery, a copy of this decision and order with notice of its entry; and it is further

ORDERED that the petitioner, within 30 days of the date of this decision and order, shall file with the court copies of all papers so served, together with proof of such service; and it is further

ORDERED that the caption is hereby amended to read as follows:

----------X

In the Matter of the Application of ALLSTATE INSURANCE COMPANY, to Stay Arbitration,

Petitioner,

- against -

RENE PADILLA and RIGOBERTO CRUZ,

Respondents,

- and -

ELSA MALDONADO and STATE FARM FIRE AND CASUALTY COMPANY,

Additional Respondents.

----------X

and that the clerk of the court shall mark the court's records to reflect the amended caption; and it is further

ORDERED that the parties and their attorneys shall appear for a hearing on November 14, 2012 at 11:00 a.m. in Part 47 of the Supreme Court of the State of New York, County of Suffolk, One Court Street, Riverhead, New York, to determine whether State Farm insured the Maldonado vehicle at the time of the accident.

Dated: 9/11/12

J.S.C.

HON. JERRY GARGUILO

TO: RICHARD T. LAU & ASSOCIATES
Attorney for State Farm Fire & Cas. Co.
P.O. Box 9040
Jericho, New York 11753