SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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In the Matter of the Application of STATE FARM INSURANCE COMPANY,

Petitioner,

-against-

JOHN A. WRUBLESKI,

Respondent.

-and-

GEICO GENERAL INSURANCE COMPANY and NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,

Proposed Additional Respondents.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 7512/2012

Motion Date: October 1, 2012
(adjourned to October 19, 2012)

The following papers numbered 1 to 10 were read on this petition to stay the respondent's uninsured motor vehicle arbitration:

Notice of Petition-Petition-Exhibits. 1-3

Amended Notice of Petition-Petition-Exhibits. 4-6

Answer and Affirmation in Opposition-Exhibits.. 7-8

Affidavit in Opposition-Exhibit.. 9-10

Upon the foregoing papers it is ORDERED that the petition is disposed of as follows:

Petitioner brings a special proceeding to stay the uninsured motor vehicle arbitration initiated by respondent pending a hearing on whether the offending vehicle was indeed uninsured, and if so, to obtain discovery attendant to respondent's alleged injuries.

Respondent opposes said petition suggesting that it was not timely served and that in any event that petitioner is barred by the doctrines of res judicata and collateral estoppel from raising the issue of whether an unidentified motor vehicle was responsible for the accident.

As a threshold matter, the Court notes that petitioner's application is untimely. CPLR 7503[c] states in pertinent part that:

> [a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. **Service of the application by mail shall be timely if such application is posted within the prescribed period**. (Emphasis supplied).

Insurers are precluded from seeking a stay of arbitration if the application for said stay is not **served** within the 20 days prescribed by CPLR 7503(c). *See, Spychalski v Continental Insurance Companies,* 45 NY2d 847, 849 (1978). The twenty-day time limit to apply for a stay under CPLR 7503(c) is treated as a statute of limitations, rendering courts powerless to entertain a late application addressed to the threshold questions. *See, Aetna Life & Casualty Co. v Stekardis*, 34 NY2d 182, 185-86 (1974); *Allstate Insurance Company v Calderon*, 14 AD3d 698, 698-699 (2nd Dept. 2005); *Metropolitan Property and Liability Insurance Co. v Hancock*, 183 AD2d 831 (2nd Dept. 1992); *Metropolitan Property & Casualty Insurance Co. v Coping*, 179 AD2d 499 (1st Dept. 1992). "The lateness of even one day results in a complete forfeiture of the insurer's right to content compliance with an arbitration agreement or to challenge the failure to fulfill a condition precedent to arbitration [cit. om]." *Interboro Mutual Insurance Co. v Devone,* 189 Misc2d 605, 607 (Sup. Ct., Nassau, 2001); *see also, Allstate Ins. Co. v Orsini*, 142 Misc2d 25, 27 (Sup. Ct. New York, 1988).

If the demand or notice was served by mail, the twenty-day period begins to run upon the

party's receipt of the document. *See, Knickerbocker Insurance Co. v Gilbert*, 28 NY2d 57, 66 (1971); *see also, Prudential Securities Incorporated v Warsh*, 214 AD2d 739 (2nd Dept. 1995). In the case of mailing, the twenty-day response time is not expanded by CPLR 2103(b)(2) for the reason that CPLR 2103(b)(2) applies only when an action or proceeding is already pending. *See, Cosmopolitan Mutual Insurance Co. v Moliere*, 31 AD2d 924 (1st Dept. 1969).

In this case, petitioner admits in both its original and amended petitions that it was served with the arbitration demand on August 7, 2012. Petitioner had until August 27, 2012 to serve the respondent with the notice of petition and petition to stay the arbitration proceeding. Petitioner's affidavit of service notes that said petition was served upon respondent on August 31, 2012, four days beyond the statutory 20 day time limit to serve such an application. Therefore, this Court is without authority to entertain petitioner's late application.

Even if petitioner's application was timely, it is nevertheless fatally defective. CPLR § 7502 (a) provides that the appropriate procedure for bringing before the court a dispute arising out of an arbitrable controversy is a special proceeding. CPLR § 402 sets forth the required pleadings necessary in a special proceeding and states that "[t]here shall be a petition, which shall comply with the requirements for a complaint in an action . . . " Here, however, the petitioner failed to comply with this very specific and basic pleading requirement by submitting a petition which is not verified by someone with personal knowledge of the facts in this matter, and as such, the application must be denied as a matter of law. *See, United Services Automobile Association v Smith*, 42 AD2d 1032 (4th Dept. 1973). Petitioner's petition is verified by an attorney without personal knowledge of the facts and as such must be disregarded.

Additionally, even if petitioner's special proceeding was timely, the fact remains that it is

collaterally estopped from asserting the position that a framed issue hearing is necessary to determine whether an unidentified vehicle left the scene and was the vehicle responsible for the multi-car accident which ensued.

The doctrine of law of the case precludes a party from relitigating issues previously decided by order of the same court. *See, Baron v Baron*, 128 AD2d 821 (2nd Dept. 1987); *Hoffman v Landers*, 146 AD2d 744 (2nd Dept. 1989); *Detko v McDonald's Restaurants of New York, Inc.*, 198 AD2d 208 (2nd Dept. 1993). "'The doctrine of res judicata prohibits a party from relitigating any claim which could have been or which should have been litigated in a prior proceeding'" (*County of Nassau v. New York State Pub. Empl. Relations Bd.,* 151 A.D.2d 168, 185, 547 N.Y.S.2d 339, *affd.* 76 N.Y.2d 579, 561 N.Y.S.2d 895, 563 N.E.2d 266; *Hyman v. Hillelson,* 79 A.D.2d 725, 726, 434 N.Y.S.2d 742, *affd.* 55 N.Y.2d 624, 446 N.Y.S.2d 251, 430 N.E.2d 1304; *Coliseum Towers Assocs. v. County of Nassau,* 217 A.D.2d 387, 389, 637 N.Y.S.2d 972). "'[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158)." *Finkelstein v Ilan*, 239 AD2d 545, 546 (2nd Dept. 1997). Whether the doctrine be known as *res judicata*, collateral estoppel or issue preclusion, a judgment or confirmed decision in one action is conclusive not only of matters previously litigated, but also as to any matters which might have been so litigated. *See, Schuykill Fuel Corporation v B. & C. Nieberg Realty Corporation*, 250 NY 304, 306 (1929). This is true even as to matters based upon different theories, so long as they arise from the same transaction or series thereof, since one an issue has been tried, all litigation between the parties arising therefrom should be finally determined. *See, Coliseum Towers Associates v County of Nassau*, 217 AD2d 387, 389-390 (2nd Dept. 1996); *Braunstein v Braunstein*, 114 AD2d 46, 53 (2nd Dept. 1985).

"[I]n general the doctrines of claim preclusion and issue preclusion between the same parties (more familiarly referred to as res judicata or direct estoppel) apply as well to awards in arbitration as they do to adjudications in judicial proceedings (Rembrandt Inds. v. Hodges Int., 38 N.Y.2d 502, 381 N.Y.S.2d 451, 344 N.E.2d 383; New York Lbr. & Wood Working Co. v. Schneider, 119 N.Y. 475, 24 N.E. 4; Wiberly v. Matthews, 91 N.Y. 648; 23 Carmody-Wait 2d, N.Y.Prac., Arbitration, s 141:151, p. 80)." *Am. Ins. Co. v Messinger*, 43 NY2d 184, 189-90 (1977). In the instant case, petitioner took the position in two prior arbitration proceedings stemming from the effects of this very accident that a sixth unknown vehicle was responsible for the occurrence of this accident. Petitioner had a full and fair opportunity to litigate that issue and even acknowledged that position in prior proceedings. Now, petitioner wants a third bite at the apple. The third bite, is indeed a poisonous one, and petitioner cannot seek to relitigate issues which were previously decided and determined, whether they be in court or in an arbitration proceeding. Therefore, petitioner's application for a stay and for a framed issue hearing must be denied for all of the reasons set forth herein above. The matter is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: October 22, 2012 E N T E R
Goshen, New York

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HON. CATHERINE A. BARTLETT,
A.J.S.C.