

Matter of National Union Fire Ins. v Giacona
2012 NY Slip Op 33422(U)
August 14, 2012
Sup Ct, New York County
Docket Number: 151750/2012
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number: 151750/2012
IN THE MATTER OF: NATIONAL UNION FIRE INS.
vs.
GIACONA, JOSEPH
SEQUENCE NUMBER: 001
COMPEL OR STAY ARBITRATION

INDEX NO. 151750/12
MOTION DATE 6/13/12
MOTION SEQ. NO. 001

The following papers, numbered 3 to 16 were read on this e-filed petition to stay arbitration

Notice of Petition— Petition — Exhibits A-E No(s).
Affirmation in Opposition— Exhibit A; Affirmation in Opposition—Exhibit A No(s).
Replying Affirmation No(s).

Upon the foregoing papers, it is ORDERED that this petition to stay arbitration is granted to the extent that a framed issue hearing is directed, and the arbitration is stayed pending such framed issue hearing, and that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court (or to hear and determine, upon stipulation of the parties) on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- 1) the issue of whether respondent provided petitioner with timely written notice of claim under the UM endorsement to petitioner's policy;
2) the issue of whether the driver of a 1998 Acura owned by Angel Mendez had the permission, express or implied, of Angel Mendez to operate that vehicle on July 8, 2011;
3) the issue of whether Geico Indemnity Company validly disclaimed coverage to Mendez for the motor vehicle accident on July 8, 2011 on the ground that the vehicle was not being driven with Mendez's permission;
4) the issue of whether the Court acquired personal jurisdiction over proposed additional respondents Angel Mendez and Geico Indemnity Company.

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Matter of National Union Fire Ins. Co. v Giacona, Index No. 151750/2012

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter to an available JHO/Special Referee to hear and report as specified as above (or to hear and determine, upon stipulation of the parties), and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 30 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (available at <http://www.courts.state.ny.us/suptctmanh/refpart-infosheet-10-09.pdf>) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part or by the JHO/Special Referee in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a]) and, except as otherwise directed by the assigned JHO/Special Referee, the trial of the issues specified above shall proceed day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

(Continued . . .)

Matter of National Union Fire Ins. Co. v Giacona, Index No. 151750/2012

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon; and it is further

ORDERED that petitioner is directed to effectuate personal service of a copy of this order with notice of entry, together with copies of all papers previously served in the proceeding, upon proposed additional respondents ANGEL MENDEZ and GEICO INDEMNITY COMPANY, who upon such personal service shall be added as party respondents; and it is further

ORDERED that the caption of this proceeding is amended to reflect inclusion of said additional party respondents as follows:

**In the Matter of the Application for an Order
Staying the Arbitration between**

NATIONAL UNION FIRE INSURANCE COMPANY,

Petitioner,

- v -

**JOSEPH GIACONA, ANGEL MENDEZ and GEICO
INDEMNITY COMPANY,**

Respondents.

and it is further

ORDERED that the County Clerk (60 Centre St Room 141B) and the Clerk of the Trial Support Office (60 Centre St Room 119) shall mark their records to reflect the amendment, upon service by petitioner on each of them of a copy of this order with notice of entry and a copy of an affidavit of personal service upon the proposed respondents.

(Continued . . .)

***Matter of National Union Fire Ins. Co. v Giacona*, Index No. 151750/2012**

This petition to stay an uninsured motorist arbitration arises out of a motor vehicle accident that allegedly occurred on July 8, 2011 on 9th Street between 4th and 5th Avenues in Brooklyn. Petitioner is the insurer of the vehicle driven by respondent Joseph Giacona and allegedly owned by Verizon Communications, Inc. According to a police report, the other vehicle allegedly involved in the accident was a 1998 Acura with license plate FFP9897, allegedly owned by Angel Mendez and insured by Geico Indemnity Company (Geico). The driver of Mendez's vehicle on the date of the alleged accident is unknown.

By a letter dated January 16, 2012 addressed to respondent's attorney, GEICO disclaimed all liability to Giacona under the policy issued to Mendez, stating that, "our investigation indicates that the 1998 Acura involved in the loss was not being driven with the permission of Angel Mendez, the owner, at the time of the occurrence. Therefore, there is no coverage for this loss." On or about March 23, 2012, respondent filed a demand for arbitration with petitioner before the American Arbitration Association, claiming that the other vehicle was uninsured.

Petitioner seeks an order permanently staying the arbitration. Petitioner contends that respondent did not provide timely written notice to petitioner. Paragraph 3 under the Conditions section of the "Uninsured Motorist Endorsement – New York" states, in pertinent part, "Within 90 days or as soon as practicable, the insured or other person making claim shall give us written notice of claim under this UM endorsement." (Petition, Ex D [CA 31 13 09 96].) According to petitioner, notice was provided on October 24, 2011, more than 90 days after the accident allegedly occurred.

In reply, petitioner states that "the endorsement required that notice of claim be provided within 30 days or as soon as possible." (Matera Reply Affirm. ¶ 7.) The requirement of notice "as soon as reasonably practicable, but in no event more than 30 days after the date of accident . . ." appears in the New York Mandatory Personal Injury Protection Endorsement (Petition, Ex D [CA 22 32 01 11]), not the UM endorsement (Petition, Ex D [CA 31 13 09 96].) Paragraph 1 of the Conditions section to the UM endorsement states, "None of the Insuring Agreements, Exclusions or Conditions of the policy shall apply to this UM coverage except "Duties After an Accident or Loss"; "Fraud", and "Termination" if applicable." (Petition, Ex D [CA 31 13 09 96].)

(Continued . . .)

***Matter of National Union Fire Ins. Co. v Giacona*, Index No. 151750/2012**

Petitioner also contends that Geico insured Mendez's vehicle on the date of the accident. Although Geico disclaimed coverage on the ground that Mendez did not authorize use of his vehicle, petitioner argues that the presumption of permissive use under Vehicle Traffic Law § 388 (1) was not rebutted. According to petitioner, Mendez never reported that his 1998 Acura was stolen, and that no stolen vehicle report was ever filed with the police.

Respondent argues that notice was timely because it was made three months before Geico issued the formal denial in writing on January 16, 2012. Although GEICO's letter dated January 16, 2012 does not state, on its face, that Mendez's vehicle was stolen, GEICO states that Mendez's vehicle "was in a state of theft at the time of the accident." (Gemma Opp. Affirm. ¶ 3.)

Factual questions arise as to whether respondent provided petitioner with timely written notice of claim under the UM endorsement to petitioner's policy; whether the driver of a 1998 Acura owned by Angel Mendez had the permission, express or implied, of Angel Mendez to operate that vehicle on July 8, 2011; and whether Geico Indemnity Company validly disclaimed coverage to Mendez for the motor vehicle accident on July 8, 2011 on the ground that the vehicle was not being driven with Mendez's permission. These issues are hereby referred to a Special Referee to hear and report (or to hear and determine, upon stipulation of the parties).

Geico contends that, if a framed issue hearing is necessary, petitioner should come forward with proof that Mendez's vehicle was involved in the automobile accident on July 8, 2011. (Gemma Opp. Affirm. ¶ 4.) However, GEICO does not dispute that the vehicle identified in the police report as the 1998 Acura with license plate FFP9897, was registered to Mendez.

As petitioner indicates, Angel Mendez and Geico must be joined as additional respondents to this proceeding, and the caption must be amended accordingly. Petitioner is reminded that "[j]urisdiction over a nonparty to a proceeding to stay arbitration cannot be obtained by the service upon it of the notice of petition and petition by either ordinary mail or certified mail, whether or not such service is authorized by a court order." (*Matter of American Transit Ins. Co. v Carillo*, 307 AD2d 220 [1st Dept 2003].)

Therefore, affidavits of the personal service directed herein shall be

(Continued . . .)

Matter of National Union Fire Ins. Co. v Giacona, Index No. 151750/2012

submitted in the Special Referee Part at the first appearance before the Special Referee, who is also empowered to hear and report (or hear and determine, if all the parties so stipulate) whether the Court has personal jurisdiction over the proposed additional respondents.

Dated: 8/14/12
New York, New York


_____, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

HON. MICHAEL D. STALLMAN