Nationwide Affinity Insur. Co. (Lopez)
2017 NY Slip Op 31053(U)
April 4, 2017
Supreme Court, Suffolk County
Docket Number: 09920/2016
Judge: William G. Ford
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

c

SHORT FORM ORDER **INDEX NO.: 09920/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 12/22/16
Motion Seq #: 001 Mot D

---x

In the Matter of the Application of

NATIONWIDE AFFINITY INSURANCE COMPANY,

Petitioner,

For a Judgment Staying the Arbitration Commenced by

RIGOBERTO LOPEZ,

Respondent,

-&-

ANTHONY MANNESE & ALLMERICA FINANCIAL INSURANCE COMPANY,

Proposed Additional Respondents.

---x

PLAINTIFF'S ATTORNEY:
Gialleonardo Frankini & Harms
330 Old Country Rd., Suite 200
Mineola, NY 11501

DEFENDANT'S ATTORNEY:
Cannon & Acosta, LLP.
1923 New York Ave.
Huntington, NY 11746

Concerning Petitioner's application pursuant to CPLR 7503 to stay pending insurance arbitration, the Court has considered the following papers in reaching its determination as follows:

1. Petitioner's Notice of Petition pursuant to CPLR 7503(c) dated October 17, 2016; Verified Petition of Andrew J. Frank, Esq. dated October 17, 2016; Exhibits A – E;
2. Respondent's Affirmation in Opposition of Roger Acosta, Esq. dated October 28, 2016; Exhibits A – D;
3. Reply Affirmation in Further Support dated November 10, 2016; Exhibit F; it is

ORDERED that the Verified Petition brought before this Court pursuant to CPLR 7503(c) seeking to permanently stay a pending liability automobile insurance arbitration, or in the alternative for an order temporarily staying the same and an order compelling respondent to comply with pre-arbitration discovery is determined as follows.

This matter is pending before this Court on the Petition brought by petitioner Nationwide Affinity Insurance Company ("petitioner" or "Nationwide") pursuant to CPLR 7503(c) to stay pending insurance arbitration before the American Arbitration Association ("AAA") concerning respondent Rigoberto Lopez ("respondent" or "Lopez") demand for SUM arbitration.

This special proceeding arises out of a motor vehicle accident which occurred on February 4, 2016 on Motor Parkway at or near the intersection with Washington Avenue in the Town of Islip, County of Suffolk, New York involving Lopez and proposed additional respondent Anthony Mannese ("Mannese"). Lopez has alleged that he was hit in the rear and that Mannese fled the scene of the accident rendering the incident a "hit and run" accident. Further, Lopez has applied for no-fault benefits and made a claim for underinsured motorist benefits under his liability insurance policy issued by petitioner. On the papers presently before the Court, the record reflects that Lopez is a Nationwide insured under Policy Number 6631F374566, which was in effect at the time of the incident referenced above.

To wit, Nationwide's policy with Lopez states a pertinent to this proceeding that in the event an insured makes a supplementary underinsured or underinsured motorist benefits claim that:

> The insured and every other person making claim hereunder shall, as may reasonably be required, submit to examinations under oath by any person we name and subscribe the same ....
>
> The insured shall submit to physical examinations by physicians we select when and as often as we may reasonably require. The insured .... Shall upon each request from us authorize us to obtain relevant medical reports and copies of relevant records.
>
> If any insured making claim under this SUM coverage and we do not agree that such insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, or do not agree as to the amount of payment that may be owing under this SUM coverage, then at the option and upon written demand o such insured, the matter of matters upon which such insured and we do not agreed shall be settled by arbitration administered by the American Arbitration Association ...

The Court takes note that petitioner's policy to respondent clearly notes that its home office is located in Columbus, Ohio 43215-2220.

Nationwide seeks to stay the arbitration on the theory that Lopez has failed to cooperate or otherwise satisfy policy conditions precedent entitling him to proceed to arbitration on his

claim, namely by complying with pre-arbitration discovery requests dated October 14, 2016 seeking an examination before trial under oath, independent medical examination, and the provision of medical records and/or authorizations to obtain the same. Thus petitioner argues that the document exists as *prima facie* evidence raising a material and triable issue of fact on whether Mannese had liability insurance in place at the time of the accident, necessitating the request for a stay of arbitration.

Petitioner further argues that respondent has failed to carry his burden of establishing lack of insurance coverage for Mannese's vehicle on the date in question, and thus cannot meet that condition precedent required prior to remitting this matter to arbitration. IN that regard, petitioner submits a Suffolk County Police accident investigation report in amended form which it purports to indicate that Mannese operated a 2010 Dodge Ram truck bearing New York license plate number CNY-8650, insured by Allmerica Financial Alliance Insurance Company

For his part, Lopez opposes the application arguing that Nationwide's application is untimely under the 20 day statute of limitation imposed by CPLR 7503. Lopez states that he by counsel served a Notice of Intent to Arbitrate dated February 25, 2016 on Nationwide by facsimile and certified first class mail, return receipt requested which was delivered at claims office associated with petitioner in Alabama on March 3, 2016. Respondent thus argues that the appropriate time period to measure timeliness here is from that notice, rather than the Demand for Arbitration filed with AAA on September 29, 2016. The instant proceeding was commenced with filing of the notice of petition and verified petition on October 18, 2016, several months and a significant time later than the statutory 20 day time period.

Additionally, respondent argues that it has substantially complied with petitioner's discovery requests, all that being outstanding or remaining is Lopez appearing for or submitting to an IME or EBT. Thus respondent argues he has complied with any preconditions standing in his way from arbitrating his claims against petitioner.

"CPLR 7503(c) requires that an application to stay arbitration be made within 20 days after service of a notice of intention to arbitrate" (***Matter of Liberty Mut. Ins. Co. v. Zacharoudis***, 65 AD3d 1353, 1353–1354, 885 NYS2d 610 [2d Dept 2009]; *see* ***Matter of Fiveco, Inc. v. Haber***, 11 NY3d 140, 144 [2008]; ***Matter of Land of the Free v. Unique Sanitation***, 93 NY2d 942, 943 [1999]; ***Matter of Steck [State Farm Ins. Co.]***, 89 NY2d 1082, 1084 [1996]). To be considered a valid notice of the intention to arbitrate, the notice must identify the agreement under which arbitration is sought and the name and address of the person serving the notice in addition to containing the statutory 20–day warning that failure to commence a proceeding to stay arbitration will preclude an objection to arbitration (*see* CPLR 7503[c]; ***Matter of Blamowski [Munson Transp.]***, 91 NY2d 190, 195 [1997]; ***State Farm Mut. Auto. Ins. Co. v. Szwec***, 36 AD2d 863, 321 NYS2d 800 [1971]; ***State Farm Mut. Auto. Ins. Co. v Urban***, 78 AD3d 1064, 1065, 912 NYS2d 586, 587 [2d Dept 2010]). Unless a party makes an application for a stay of arbitration within the statutory 20–day period, CPLR 7503(c) generally precludes the party from objecting to the arbitration thereafter (*see* ***Hermitage Ins. Co. v Escobar***, 61 AD3d 869, 869, 877 NYS2d 413, 414 [2d Dept 2009][internal citations omitted]).

The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay" (***Matter of AutoOne Ins. Co. v. Umanzor***, 74 AD3d 1335, 1336, 903 NYS.2d 253; ***see Matter of***

Metropolitan Prop. & Cas. Ins. Co. v. Singh, 98 AD3d 580, 581, 949 NYS2d 638). Thereafter, the burden is on the party opposing the stay to rebut the prima facie showing (***see Matter of Metropolitan Prop. & Cas. Ins. Co. v. Singh***, 98 AD3d at 581, 949 N.Y.S.2d 638; ***Matter of American Intl. Ins. Co. v. Giovanielli***, 72 AD3d 948, 949, 900 NYS2d 108).

The uninsured motorist indorsement of an insurance policy does not operate unless and until it has been established that there was no insurance coverage on the offending vehicle on the date of the accident (*see* ***Matter of Nationwide Ins. Co. v. Sillman***, 266 AD2d 551, 552, 699 NYS2d 98; ***Matter of State Farm Mut. Ins. Co. v. Vazquez***, 249 AD2d 312, 670 NYS2d 901; ***Matter of Eagle Ins. Co. v. Sadiq***, 237 AD2d 605, 655 NYS2d 601; ***New York Cent. Mut. Fire Ins. Co. v Julien***, 298 AD2d 587, 587, 749 NYS2d 73, 74 [2d Dept 2002]).

An unexcused and willful refusal to comply with disclosure requirements in an insurance policy is a material breach of the cooperation clause and precludes recovery on a claim (***see Lentini Bros. Moving & Stor. Co. v. New York Prop. Ins. Underwriting Assn.***, 53 NY2d 835, 837, 440 NYS2d 174; ***Baerga v. Transtate Ins. Co.***, 213 AD2d 217, 623 NYS2d 587; ***2423 Mermaid Realty Corp. v. New York Prop. Ins. Underwriting Assn.***, 142 AD2d 124, 130–132, 534 NYS2d 999; ***Ausch v. St. Paul Fire & Mar. Ins. Co.***, 125 AD2d 43, 50, 511 NYS.2d 919). Compliance with such a clause is a condition precedent to coverage, properly addressed by the court (***see Matter of County of Rockland [Primiano Constr. Co.]***, *supra; compare* ***Great Canal Realty Corp. v. Seneca Ins. Co., Inc.***, 5 NY3d 742, 800 NYS2d 521).

It is well settled that CPLR 3102(c) permits the Court to order discovery in aid of Arbitration. Second Department precedent acknowledges that an insurer is entitled to have a physical examination in situations similar to the case before the Court. ***See State Farm Mutual Automobile Ins. Co. v. Wernick***, 90 AD2d 519, 455 NYS2d 30 (1982). Additionally, it is indeed a provident exercise of discretion for the Court to order a deposition and physical examination in aid of Arbitration. ***See State Farm Insurance Co. v. McManus***, 249 AD2d 311, 670 NYS2d 599 (1998).

A court may properly exercise its discretion in temporarily staying arbitration and ordering medical authorizations, discovery of medical records and reports, depositions and physical examination in aid of arbitration. ***Progressive Casualty Ins. v. Jackson***, 49 AD3d 748 (2d Dept. 2008); ***Matter of State-Wide Insurance Company v. Womble***, 25 AD3d 713 (2d Dept. 2006).

The Second Department has clearly held that "physical contact is a condition precedent to an arbitration based upon a hit and run accident involving an unidentified vehicle" (***Matter of Great N. Ins. Co. v. Ballinger***, 303 AD2d 503, 504, 757 N.Y.S.2d 309; *see* Insurance Law § 5217; ***Matter of Allstate Ins. Co. v. Moshevev***, 291 AD2d 401, 402, 737 NYS2d 118; ***Matter of State Farm Mut. Auto. Ins. Co. v. Johnson***, 287 AD2d 640, 732 NYS2d 21). "The failure of the police accident report to mention contact with another vehicle raises a factual issue as to whether there actually was physical contact between insured's vehicle and a 'hit and run' vehicle" (***Matter of Midwest Mut. Ins. Co.***, 64 AD2d 985, 408 NYS2d 822; *see* ***Matter of Bisignano v. Interboro Mut. Indem. Ins. Co.***, 235 AD2d 419, 420, 652 NYS2d 546; ***Matter of Allstate Ins. Co. v. Weiss***, 178 AD2d 529, 577 NYS2d 319). Therefore, a framed issue hearing is necessitated to resolve such a material issue of fact (***Eveready Ins. Co. v Scott***, 1 AD3d 436, 437–38, 767 NYS2d 31, 32–33 [2d Dept 2003]; *see also* ***New York Cent. Mut. Fire Ins. Co. v***

Vento, 63 AD3d 841, 843–44, 882 NYS2d 126, 128 [2d Dept 2009]["[p]hysical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle" thus "[w]hen there is an issue of fact as to whether physical contact occurred, a hearing on the issue must be conducted"]).

Production of a police accident report containing the vehicle's insurance code satisfies petitioner's *prima facie* burden of production that the proposed additional respondent insured the offending vehicle *(see* ***Matter of Eagle Ins. Co. v. Rodriguez,*** 15 AD3d 399, 790 NYS2d 167; ***Matter of Liberty Mut. Ins. Co. v. McDonald***, 6 AD3d 614, 615, 775 NYS2d 83; ***Matter of Eagle Ins. Co. v. Beauvil***, 297 AD2d 736, 747 NYS2d 774; ***Utica Mut. Ins. Co. v Colon***, 25 AD3d 617, 618, 807 NYS2d 634, 635 [2d Dept 2006]; ***New York Cent. Mut. Fire Ins. Co. v Licata***, 24 AD3d 450, 451, 807 NYS2d 380, 381 [2d Dept 2005]).

The determination as to whether a vehicle is underinsured is made by comparing the bodily injury limits of the claimant's insurance policy with the bodily injury limits of the tortfeasor's policy (***Allstate Ins. Co. v DeMorato,*** 262 AD2d 557, 694 NYS2d 67 [2d Dept 1999]), and coverage is available only when the bodily injury limits of liability of the tortfeasor's insurance policy are less than the bodily injury limits of liability of the insured's policy (*see* ***Matter of State Farm Mutual Auto. Ins. Co. v Roth,*** 206 AD2d 376, 613 NYS2d 713 [2d Dept 1994]).

Based on all of the parties' arguments and the record, this Court finds that petitioner had knowledge sufficient to have brought this application on receipt of respondent's notice of intention to arbitrate, and thus this application is untimely. Nevertheless, this Court will grant the petition in part solely to the extent that pursuant to CPLR 3102(c) this Court hereby issues an order compelling respondent to comply with petitioner's outstanding pre-arbitration requests to produce, namely, to comply with and submit to an IME and EBT, and thus the pending SUM arbitration before AAA is stayed for a period of time not to exceed 90 days. Therefore, respondent shall have complied with these requests and requirements on or before July 7, 2017(*see* (*see* ***Matter of State Farm Mut. Automobile Ins. Co. v Wernick,*** 90 AD2d 519, 455 NYS2d 30 [2d Dept 1982]; ***Allstate Ins. Co. v Baez,*** 269 AD2d 392, 702 NYS2d 878 [2d Dept 2000]).

Further, since this Court finds that the question of availability of insurance concerning Mannese's vehicle to be hotly contest and ripe for review. Accordingly, this Court determines that independent and adequate grounds exist to stay the pending SUM arbitration for the purposes of a framed issue hearing before this Court to determine whether or not Mannese's vehicle was indeed insured at the time of the accident forming the gravamen of this proceeding.

Accordingly, it is

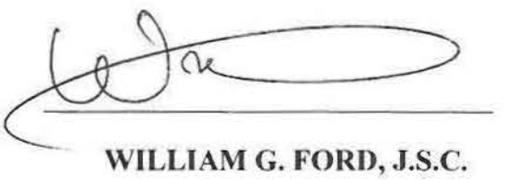
ORDERED that the parties **appear before this Court for the purposes of a framed issue hearing to be held on or before September 11, 2017;** and it is further

ORDERED that the Verified Petition is hereby amended to add as additional proposed respondents Anthony Mannese and Allmerica Financial Insurance Company; and it is further

ORDERED that petitioner served a copy of this order with notice of entry on respondent and additional respondents on or before April 28, 2017.

The foregoing constitutes the decision and order of this Court.

Dated: April 4, 2017



WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**