

Matter of GEICO Ins. Co. v Frank

2005 NY Slip Op 30553(U)

September 23, 2005

Supreme Court, New York County

Docket Number: 106698/05

Judge: Rolando T. Acosta

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

In the Matter of the Application of

GEICO INSURANCE COMPANY,

DECISION/ORDER

Petitioner,

Index No. 106698/05

-v-

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

To Stay Arbitration Sought By:
ANNETTE FRANK,

Respondent

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The following papers were considered in reviewing petitioner's application for an order pursuant to Article 75 of the CPLR to stay arbitration

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Papers

Numbered

Petition and Notice of Petition
Affirmation in Opposition
Reply Affirmation

1, 2 (Exhibits A-B)
3 (Exhibits A-C)

FILED
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NEW YORK
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This action arises out of a motor vehicle accident that occurred in New York City on December 9, 2004, in which respondent Annette Frank alleges she sustained injuries, and who is now seeking arbitration. Petitioner, Government Employees Insurance Company ('GEICO'), contends that respondent Annette Frank has failed to submit sufficient proof that the alleged offending vehicle in the accident, a 1994 Ford van with Connecticut license plate 37054, was in fact

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uninsured, which is a condition precedent to arbitration under the endorsement under which the claim is made. Respondent demands arbitration, claiming that the alleged offending vehicle was uninsured.

Petitioner seeks an order to stay arbitration permanently pursuant to CPLR §7503, or in the alternative for a temporary stay of arbitration pending a hearing on the issue of whether the offending vehicle was insured, and to join Traveler's Indemnity Company and Children's Storefront, the insurer and the owner of the offending vehicle, respectively, to be joined as additional respondents to this party. Petitioner also requests that respondent provide medical records and authorizations, and to submit to an examination under oath and physical examinations, if after a hearing it is determined that respondent is entitled to proceed to arbitration.

Petitioner's application for an order to permanently stay arbitration is granted. In a prior proceeding commenced in Supreme Court, New York County under Index Number 101728/04, the owner of the alleged offending vehicle, Children's Storefront, moved for summary judgment dismissing Annette Frank's claim on the grounds that the offending vehicle was stolen prior to the accident, and thus Children's Storefront was not liable for the negligence of the vehicle thief who struck Annette Frank.

Annette Frank defaulted and the summary judgment motion was granted and

an order so indicating was issued on April 25, 2005 dismissing the suit. Thus the effect of the order was a judgment that the vehicle owned by Children's Storefront was stolen as the time of the accident, relieving Storefront from any liability. *See Pow v. Black*, 182 A.D.2d 484 (1st Dept. 1982) (theft of an offending vehicle in a hit and run rebutted the statutory presumption that the vehicle was being operated with the owner's consent, and thus relieving the owner of any liability).

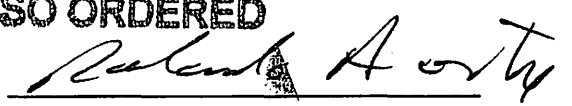
A judgment on default must be given *res judicata* effect, thus precluding a new suit on the same claim. *Watson & Co. v. Klein*, 44 Misc.2d 607, *Aff'd* 24 A.D.2d 559 (1st Dept. 1965). The judgment of a court with proper jurisdiction over the parties and of the subject matter operates as *res judicata*, even if obtained through default. *Haiman v. Haiman*, 8 Misc.3d 1024(A) *citing Riehle v. Margolies*, 279 U.S. 218, 255(1929). Thus, the issue of whether the offending vehicle in the accident of December 9, 2004 was uninsured was already judicially determined as a result of the default judgment rendered against respondent, and this Court is bound to honor that judgment. Accordingly, it is therefore

ORDERED that petitioner's application for a permanent stay of arbitration is granted.

This constitutes the Decision and Order of the Court.

Dated: September 23, 2005

SO ORDERED



Hon. Rolando T. Acosta, J.S.C.
ROLANDO T. ACOSTA
J.S.C.

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