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-

RICHARD KLARE,

Respondent.

-and-

BOSNA EXP. LINES, INC., HUSO GUSTOR, CLEMENS AND ASSOCIATES, INC., ESTES EXPRESS LINES, and LINCOLN GENERAL 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. 3501/2012
Motion Date: June 6, 2012
(adjourned to October 2, 2012)

The following papers numbered 1 to 10 were read on this petition to stay the respondent's underinsured motor vehicle arbitration as well as the oral argument of October 2, 2012:

Notice of Petition-Petition-Exhibits 1-3

Affirmation in Opposition of Frank Kunzier, Esq.-Exhibits. 4-5

Affirmation in Opposition of Richard E. Weber, Jr., Esq.-Exhibits. 6-7

Affirmation in Opposition of Joseph C. Baiocco, Esq.-Exhibits. 8

Reply Affirmation-Exhibits. 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 on the grounds of late notice and improper arbitration forum, and alternatively to permit it to obtain discovery including medical reports for all health care providers of respondent and an examination under oath.

This action stems from a motor vehicle accident which occurred on April 13, 2006 in New Jersey between respondent, a New York resident and New York policyholder, and a Missouri driver driving a truck registered in Illinois. Petitioner claims that on April 11, 2012, it received an arbitration demand from respondent's counsel naming a New Jersey arbitrator to resolve an uninsured motorist claim under respondent's New York automobile policy. Petitioner asserts that the designation of a New Jersey arbitrator specifically violated the terms of the policy with respondent which called for all arbitrations to be conducted by the American Arbitration Association. Moreover, petitioner claims that the demand for arbitration was made six (6) years after the accident and 4 ½ years after Lincoln General issued a disclaimer of coverage on the truck allegedly responsible for the accident. Lincoln's disclaimer letter is dated December 17, 2007, a copy of which was sent to respondent. Respondent, through his counsel, claims never to have received the letter until March 9, 2012, a little over four years after the letter was issued.

Petitioner further contends that Lincoln's disclaimer itself is invalid due to its lateness since the disclaimer is 19 months after the accident and that at least a framed issue hearing is needed to ascertain whether Lincoln's disclaimer was valid.

Respondent claims only through his attorney that he never received the December 17, 2007 disclaimer, a fact belied by the face of the letter indicating that it was sent, and fails to submit any affidavit attesting to when it was received, the conditions under which it was eventually received, and that it was not received 4 ½ years earlier when originally sent.

Respondent's opposition, in fact, is devoid of any admissible evidence. Instead, respondent's counsel takes the position that this entire matter should be resolved in New Jersey,rather than New York, claiming that petitioner availed itself of New Jersey to litigate other aspects of this case including the PIP claim against the proposed additional respondents, and therefore should be obligated to litigate these issues in a New Jersey court, or at least have New Jersey law apply. Respondent fails to cite one New York precedent to convince this Court that New York is an improper forum for the resolution of the arbitration issues presented here. Petitioner claims that the policy at issue was issued in New York to a New York resident and the terms of which it seeks to enforce are based upon New York law.

The first issue to be determined is that of which law to apply and the proper situs of any arbitration. It is undisputed that respondent is a New York resident. It is further undisputed that petitioner's policy issued to respondent was issued in New York, conforming to the terms of New York's Insurance Law and regulations. The contract between the petitioner and respondent therefore has a New York nexus and respondent failed to cite one authority in New York to indicate that New York law should not apply here to the terms of the obligation. It should come as no surprise to respondent that he is expected to abide by New York law since his policy was issued here and he lives here. As such, New York law applies to this matter.

The next issue to be determined is that of the propriety of the stay. The terms of the policy are abundantly clear – all arbitration issues are to be resolved by the American Arbitration Association, not a private arbitrator of the respondent's choosing. This choice of arbitrator is mandatory pursuant to the required SUM endorsement required by 11 NYCRR 60-2.3(f). Given the clear and unambiguous language concerning the arbitration forum, petitioner's motion for a

permanent stay must be granted on this issue alone.

Even if the arbitration forum was not an issue, the respondent failed to demonstrate that the allegedly offending vehicle was uninsured on the date of the accident. None of the parties submits any evidence of when Lincoln General was first informed of the accident's occurrence. In its disclaimer letter of December 17, 2007, Lincoln General does not disclaim based upon late notice, so it is presumed that it received timely notice of the accident. However, Lincoln's disclaimer is predicated upon the fact that its insured, Bosna Exp. Lines, Inc., failed to specifically add the vehicle which was involved in the subject accident until 5 days after the accident occurred, in specific derogation of the policy's terms which requires notice of acquisition of all after acquired vehicles within 30 days of the acquisition (Petitioner's Exhibit D).

Stacked on to Lincoln's disclaimer is petitioner's assertion of late notice of the claim. Respondent, through his counsel, first notified petitioner of the uninsured motorist claim via notice of arbitration on April 4, 2012 which notice was not received until April 11, 2012. Respondent's Exhibit G is a letter from Lincoln General dated March 9, 2012 enclosing a copy of the December 17, 2007 disclaimer letter. The December 17th letter indicates that it was originally sent to respondent personally at his home address. Respondent's counsel specifically denies receipt of the letter and presents no admissible evidence of non-receipt, not even an affidavit from his own client to that effect. Instead, respondent's counsel relies upon his own hearsay statements which themselves cannot be considered by this Court.

Lincoln's disclaimer is dated December 17, 2007 for an accident which occurred on April 13, 2006 for which Lincoln does not deny that it was timely notified. Its reason for disclaimer is

the failure of its insured to list and cover the vehicle involved in the accident until after the accident actually occurred. This Court is in no position to rule on the issue of late notice of disclaimer on Lincoln General's part vis-a-vis its insured since that policy was neither issued in nor was delivered in New York.

The sole issue for determination here is when petitioner was notified timely either by respondent or another person or entity. In this case, there is a complete absence of proof of timely notification.

> Where an insurance policy, such as the one in this case, requires an insured to provide notice of an accident or loss as soon as practicable, such notice must be provided within a reasonable time in view of all of the facts and circumstances (*see Merchants Mut. Ins. Co. v. Hoffman,* 56 N.Y.2d 799, 801–802, 452 N.Y.S.2d 398, 437 N.E.2d 1155; *Travelers Indem. Co. v. Worthy,* 281 A.D.2d 411, 721 N.Y.S.2d 400). "Providing an insurer with timely notice of a potential claim is a condition precedent, and thus '[a]bsent a valid excuse, a failure to satisfy the notice requirement vitiates the policy' " (*Sayed v. Macari,* 296 A.D.2d 396, 397, 744 N.Y.S.2d 509, quoting *Security Mut. Ins. Co. of N.Y. v. Acker–Fitzsimons Corp.,* 31 N.Y.2d 436, 440, 340 N.Y.S.2d 902, 293 N.E.2d 76; *see Argo Corp. v. Greater N.Y. Mut. Ins. Co.,* 4 N.Y.3d 332, 339, 794 N.Y.S.2d 704, 827 N.E.2d 762).
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> Insurance Law § 3420(a)(3) gives the injured party an independent right to give notice of the accident and to satisfy the notice requirement of the policy. However, the injured party has the burden of proving that he or she, or counsel, acted diligently in attempting to ascertain the identity of the insurer, and thereafter expeditiously notified the insurer (*see Steinberg v. Hermitage Ins. Co.,* 26 A.D.3d 426, 428, 809 N.Y.S.2d 569). "In determining the reasonableness of an injured party's notice, the notice required is measured less rigidly than that required of the insured [ ]" (*Malik v. Charter Oak Fire Ins. Co.,* 60 A.D.3d 1013, 1016, 877 N.Y.S.2d 114 [internal quotation marks omitted]). "The injured person's rights must be judged by the prospects for giving notice that were afforded him, not by those available to the insured.

Spentrev Realty Corp. v United Nat. Specialty Ins. Co., 90 AD3d 636 (2nd Dept. 2011).

> "In the context of supplementary uninsured/underinsured motorist (hereinafter SUM) claims, it is the claimant's burden to prove timeliness of notice, which is measured by the date the claimant knew or should have known that the tortfeasor

> was underinsured" (*Matter of Progressive Northeastern Ins. Co. v. McBride,* 65 A.D.3d 632, 633, 884 N.Y.S.2d 167; *see Matter of Metropolitan Prop. & Cas. Ins. Co. v. Mancuso,* 93 N.Y.2d 487, 495, 693 N.Y.S.2d 81, 715 N.E.2d 107; *Matter of Liberty Mut. Ins. Co. v. Gallagher,* 68 A.D.3d at 773, 890 N.Y.S.2d 589). "Timeliness of notice is an elastic concept, the resolution of which is highly dependent on the particular circumstances" (*Matter of Progressive Northeastern Ins. Co. v. McBride,* 65 A.D.3d at 633, 884 N.Y.S.2d 167; *see Matter of Metropolitan Prop. & Cas. Ins. Co. v. Mancuso,* 93 N.Y.2d at 494, 693 N.Y.S.2d 81, 715 N.E.2d 107; *Matter of Liberty Mut. Ins. Co. v. Gallagher,* 68 A.D.3d at 773, 890 N.Y.S.2d 589). "In determining whether notice was timely, factors to consider include, inter alia, whether the claimant has offered a reasonable excuse for any delay, such as latency of his/her injuries, and evidence of the claimant's due diligence in attempting to establish the insurance status of the other vehicles involved in the accident" (*Matter of Progressive Northeastern Ins. Co. v. McBride,* 65 A.D.3d at 633, 884 N.Y.S.2d 167; *see Matter of Metropolitan Prop. & Cas. Ins. Co. v. Mancuso,* 93 N.Y.2d at 493, 693 N.Y.S.2d 81, 715 N.E.2d 107; *Matter of Liberty Mut. Ins. Co. v. Gallagher,* 68 A.D.3d at 773, 890 N.Y.S.2d 589).

Gilliard v Progressive, 96 AD3d 718 (2nd Dept. 2012). In the instant case, petitioner came forward with a prima facie case for late notice. The letter disclaiming coverage from Lincoln General is dated December 17, 2007 and appears to have been sent to respondent. Respondent came forth with no admissible evidence or any affidavit that it was not received. Then, respondent received notice of the disclaimer again on March 9, 2012. Respondent waited until April 4, 2012 to advise petitioner of the disclaimer. Since there is no admissible evidence demonstrating non-receipt of the disclaimer in 2007, it is unreasonable as a matter of law to notify petitioner 6 years after the incident and 4 ½ years after the disclaimer of the fact that the disclaimer occurred. Additionally, the respondent's policy with petitioner specifically requires that notice of any action filed is a condition precedent to coverage (Petitioner's Exhibit A, Condition 4). There is no evidence submitted here that respondent notified petitioner of the underlying lawsuit against Bosna.

All in all, petitioner met its prima facie burden to permanently stay the arbitration in this case. Respondent came forth with no admissible evidence to rebut it, and therefore petitioner's application is granted in its entirety. Petitioner's remaining relief in attempting to add proposed additional respondents is rendered moot by this foregoing.

The foregoing constitutes the decision and order of this Court.

Dated: October 9, 2012 E N T E R
Goshen, New York

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