

**Matter of Empire Fire & Mar. Ins. Co. v Castro**

2014 NY Slip Op 34055(U)

December 23, 2014

Supreme Court, Kings County

Docket Number: Index No. 500726/2014

Judge: Mark I. Partnow

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23<sup>rd</sup> day of December, 2014.

P R E S E N T:

HON. MARK I. PARTNOW,  
Justice.

----- X

In the Matter of the Application of EMPIRE FIRE  
AND MARINE INSURANCE COMPANY,

Petitioner,

- against -

ALFRED J. CASTRO, JR.,

Respondent.

----- X

DECISION/ORDER

Index No. 500726/2014

Motion Sequence No. 1

The following papers numbered 1 to 7 read on this petition:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

Opposing Affidavits (Affirmations) \_\_\_\_\_

Reply Affidavits (Affirmations) \_\_\_\_\_

Supplemental Affidavits (Affirmations) \_\_\_\_\_

Other Papers \_\_\_\_\_

Papers Numbered

1-3 \_\_\_\_\_

4 \_\_\_\_\_

5, 7 \_\_\_\_\_

6 \_\_\_\_\_

\_\_\_\_\_

Upon the foregoing papers, petitioner Empire Fire and Marine Insurance Company moves for an order, pursuant to CPLR 7503 (b), permanently staying the arbitration commenced by respondent Alfred J. Castro, Jr. against petitioner to determine underinsured or uninsured motorist benefits. Alternatively, petitioner seeks a framed issue hearing on disputed issues and court-ordered discovery prior to arbitration.

### *Background*

Petitioner commenced this special proceeding by filing the instant petition on January 29, 2014; an amended petition was filed on February 24, 2014. Petitioner asserts that on September 17, 2012, respondent, a resident of the City of New York, rented an automobile from petitioner's insured, Enterprise Holdings, Inc. (hereinafter Enterprise) a nationwide car rental company. The petition further states that respondent executed a written agreement reflecting the rental, and was provided with the option to purchase (among other things) insurance coverage representing supplemental uninsured or underinsured motorist (hereinafter SUM) benefits for an additional premium; petitioner alleges that respondent did not purchase SUM coverage.

The petition further states that two days later and while operating the rented automobile, petitioner was involved in a motor vehicle collision with an automobile owned and operated by Kemal Durust. Petitioner asserts that respondent then submitted a personal injury claim against Durust's insurance carrier; that claim was settled—" [w]ithout advising the petitioner"—for the sum of \$25,000 on or about December 13, 2013.

Petitioner claims that "[w]ithout providing proper and timely notice of UIM claim [*sic*]," respondent served on petitioner a demand for supplemental underinsured motorist arbitration. The demand was dated January 7, 2014, and, according to petitioner, was received on or about January 10, 2014. The instant petition ensued.

### *Arguments in Support of Petition*

In support of the instant petition, petitioner first asserts that SUM benefits are not available under the applicable insurance policy. Petitioner notes that the subject vehicle was rented in the State of New York, by a resident of the State, and was subsequently involved in an accident within the State. Petitioner also points out that an endorsement to the subject policy provides uninsured or underinsured motorist benefits in five enumerated states; New York is not one of them. Petitioner adds that an insurance carrier such as itself is not required by State of New York law to provide uninsured or underinsured motorist benefits in car rental policies. Petitioner contends that respondent needed to pay an additional premium in order for him to obtain coverage for uninsured or underinsured motorist benefits in the State of New York; respondent failed to purchase the subject additional coverage.

Anticipating that respondent will advance this argument, petitioner asserts that it is irrelevant for the purposes of uninsured or underinsured motorist benefits that the vehicle was registered with the Vermont motor vehicle authority. To the contrary, argues petitioner, the policy states that a vehicle “rented”—and not “registered”—in certain states have associated coverage for uninsured or underinsured motorist risks. Alternatively, petitioner maintains that the demanded arbitration should be stayed for two additional reasons—first, respondent failed to provide petitioner with timely notice of his claim; second, since Durust’s policy has the same bodily injury limit (\$25,000) as does the policy issued by petitioner, respondent is ineligible for uninsured or underinsured motorist benefits. For these reasons,

petitioner concludes that this court should grant the instant petition and permanently stay the arbitration demanded by respondent.

Alternatively, petitioner asserts that it is entitled to an order requiring pre-arbitration discovery. Specifically, petitioner seeks an order directing respondent to: (1) serve all relevant authorizations for medical records; (2) submit to an examination under oath; and (3) submit to a medical examination. Lastly, petitioner seeks an order directing the parties to appear for a hearing.

### *Arguments in Opposition to Petition*

In opposition to the instant petition, respondent first states that underinsured motorist coverage applies to the rented automobile under the policy issued by petitioner. Respondent notes that the subject policy was issued by an agent in the State of Arizona to petitioner, a “Missouri policy holder[.]” Respondent also points out that the general provisions of the policy are applicable in all fifty states, and, in this case, the subject vehicle was registered in the State of Vermont. Therefore, reasons respondent, “[s]nce the vehicle . . . was registered/licensed in Vermont, originally placed into service in Vermont, and previously ‘rented’ in Vermont”, any endorsements applicable to Vermont are applicable to the instant matter.<sup>1</sup> Thus, argues respondent, since the relevant endorsements page unmistakably states that underinsured and uninsured coverage applies in Vermont, such coverage is applicable to the instant matter. Respondent asserts that if the language of the endorsement is ambiguous, such ambiguity should be construed against petitioner and in favor of respondent.

---

<sup>1</sup> Indeed, respondent claims that since the subject automobile is registered in Vermont, the automobile is in fact “rented” in Vermont for the purpose of interpreting the relevant endorsement.

Also, respondent disagrees with petitioner on the scope and applicability of State of New York policy exclusions. Respondent argues that, contrary to petitioner's contention, the terms of the subject policy do not exclude uninsured or underinsured motorist benefits. Specifically, respondent claims that any State of New York policy exclusions apply only to "amounts paid in settlement of a claim or judgment for which you [the insured] are legally liable." Respondent points out that, in contrast, in this matter he was not liable as a consequence of the subject accident; therefore, the State of New York policy exclusions do not apply. Respondent adds, again, that if the terms of the policy exclusions are ambiguous, such ambiguity should be construed against petitioner and in favor of respondent.

Similarly, respondent argues that whether uninsured or underinsured benefits exceed maximum bodily injury benefits is irrelevant. Respondent reiterates that the subject policy, the subject insurance agent and petitioner (the insured) are all out-of-state persons or entities; any limits on uninsured or underinsured benefits imposed by laws of the State of New York do not apply. Alternatively, respondent states that since his personal automobile insurance policy has a higher maximum bodily injury benefit than petitioner's policy, uninsured or underinsured benefits are not barred.

Also, respondent argues that, as a matter of law, petitioner is precluded from disclaiming coverage. Respondent contends that, by letter dated December 14, 2012 to petitioner's agent for claim processing, he submitted a claim to petitioner for uninsured and underinsured motorist benefits. Respondent also asserts that petitioner was further notified twice about this claim in November of 2013. Respondent argues that since petitioner has not disclaimed coverage for over a year after first being notified—and did not file the instant

petition until approximately 84 days elapsed since the first notice in November of 2013—petitioner is now precluded from disclaiming coverage. Additionally, and anticipating a late notice argument, respondent asserts that petitioner must show it was prejudiced by his alleged late notice; here, petitioner has not presented any evidence of prejudice.

Lastly, and in the alternative, respondent maintains that this court should deny the discovery sought by petitioner. Respondent asserts that he has already participated in both an examination under oath and an insurance physical as part of his no-fault claim against Durust's carrier. Respondent reasons that since the goal of arbitration is expedient resolution of claims, requiring him to provide additional discovery is thus inconsistent with that goal. For these reasons, concludes respondent, the instant petition should be denied in its entirety.

### *Discussion*

The court grants the petition and permanently stays the arbitration against petitioner<sup>2</sup> demanded by respondent. Courts may stay arbitration where the claim made by respondent is not within the purview of the subject insurance policy, and is thus outside the scope of the associated agreement to arbitrate (*Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7 [1980]; CPLR 7503 [b]).

---

<sup>2</sup> In supplemental papers, respondent suggests that he has the right to recover underinsured benefits from Enterprise because Enterprise is self-insured (*Matter of Country-Wide Ins. Co. [Manning]*, 96 AD2d 471, 472 [1st Dept 1983] [“[t]he right to obtain uninsured motorist protection from a self-insurer is no less than the corresponding right under a policy issued by an insurer], *aff'd* 62 NY2d 748 [1984]; *see also ELRAC, Inc. v Suero*, 38 AD3d 544 [2d Dept 2007]). This court notes that, even accepting the suggestion made by respondent, it is nevertheless irrelevant for the purposes of this petition: Enterprise is not a party to this special proceeding and there is no indication that respondent demanded arbitration of underinsured or uninsured motorist claims against Enterprise.

In this matter, first, as petitioner correctly suggests and contrary to respondent's arguments,<sup>3</sup> there was no uninsured or underinsured motorist coverage under the subject policy. Respondent's argument that since the subject vehicle was registered in Vermont (coupled with the national presence of petitioner and its insured), the automobile was "rented" in Vermont (triggering the underinsured coverage described on endorsement page EM 08 08 UM/UIM) lacks merit. Respondent rented the vehicle from Enterprise within the State of New York. Furthermore, petitioner has shown "that underinsurance coverage was made available to but was not purchased by . . . the lessee of the vehicle" (*Lumbermen's Mut. Cas. Co. v Morse*, 152 Misc 2d 482, 483 [Sup Ct NY County 1991]).<sup>4</sup> The fact that the vehicle was registered in a state where uninsured and underinsured motorist coverage must be issued (instead of merely offered) is not relevant (*see e.g. id.* at 486 ["The incident of the vehicle's registration in Rhode Island alone is an insufficient contact upon which to expand the coverage which the parties specifically limited in their contract of insurance"]). Lastly, this court notes that underinsured motorist coverage is not mandatory for vehicles rented within the State of New York (*id.* at 484). Since uninsured and underinsured coverage is not mandatory for vehicles rented in this State, and since respondent did not purchase supplemental underinsured coverage from petitioner, "[i]n the absence of such additional coverage, respondent's demand for arbitration must fail" (*id.* at 486).

---

<sup>3</sup> This court notes that in his supplemental papers, respondent appears to concede this point.

<sup>4</sup> Respondent does not dispute that he did not purchase underinsured motorist benefits.



Respondent's remaining arguments lack merit. First, in view of the foregoing analysis, which establishes that no uninsured or underinsured coverage existed under the subject policy, any alleged late disclaimer of coverage is irrelevant. Since it is undisputed both that respondent did not purchase uninsured or underinsured coverage, and since such coverage is not required for vehicles rented within the State of New York, petitioner has thus demonstrated "a lack of coverage for the occurrence at issue, for which no disclaimer was required" (*1812 Quentin Rd., LLC v 1812 Quentin Rd. Condominium Ltd.*, 94 AD3d 1070, 1071 [2d Dept 2012], citing *Handelsman v Sea Ins. Co.*, 85 NY2d 96, 99 [1994]; *Zappone v Home Ins. Co.*, 55 NY2d 131, 136-137 [1982]; *Schatz v St. Paul Fire & Mar. Ins. Co.*, 269 AD2d 380 [2000]). Next, although respondent is correct that any ambiguity as to coverage should be resolved in favor of the insured (*see e.g. Handelsman v Sea Ins. Co.*, 85 NY2d 96, 101 [1994]), where the provisions of an insurance policy "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*U.S. Fidelity & Guar. Co. v. Annunziata*, 67 NY2d 229, 232 [1986]). Moreover, "the court may not disregard the plain meaning of the policy's language in order to find an ambiguity where none exists" (*Herrnsdorf v Bernard Janowitz Constr. Corp.*, 96 AD3d 1011, 1013 [2d Dept 2012], citing *Acorn Ponds v Hartford Ins. Co.*, 105 AD2d 723, 724 [2d Dept 1984]). Here, there is no ambiguity: the vehicle was rented in the State of New York, no

uninsured or underinsured coverage was required, and respondent did not purchase such coverage.<sup>5</sup>

Lastly, this court addresses the argument raised by respondent in his “supplemental affirmation in opposition to petition”—that as a self-insured entity,<sup>6</sup> Enterprise was required to offer supplemental underinsured motorist coverage for purchase, in writing and at the time he rented the subject vehicle, but did not. As mentioned above,<sup>7</sup> this argument is irrelevant for the purposes of the instant petition, since Enterprise is not a party to this special proceeding. Nevertheless, assuming arguendo that these arguments apply to petitioner, the cases cited by respondent (*Matter of Country-Wide Ins. Co. [Manning]*, 96 AD2d 471, 472 [1st Dept 1983], *affd* 62 NY2d 748 [1984]; *ELRAC, Inc. v Suero*, 38 AD3d 544 [2d Dept 2007]; *Matter of ELRAC, Inc. v Exum*, 73 AD3d 431 [1st Dept 2010]) are inapplicable—these cases stand for the proposition that Enterprise was required to provide *uninsured* motorist benefits. In contrast, here, Durust was not uninsured; to the contrary, respondent received benefits from Durust’s insurance carrier. In any event, respondent has not shown that petitioner, which is Enterprise’s excess insurance carrier, was required to offer him supplemental *underinsured* motorist coverage. Indeed, the subject excess policy

---

<sup>5</sup> Additionally, since there is no underinsured motorist coverage, the arguments concerning underinsured benefits in excess of the maximum personal bodily injury benefits are moot.

<sup>6</sup> Petitioner alleges that Enterprise is self-insured to the statutory minimum limits required by the laws of the State of New York; this allegation is not disputed.

<sup>7</sup> See *supra* n 2.

expressly disclaims underinsured motorist coverage except as required by law—and respondent has not shown that the laws of this State require such coverage.

**Conclusion**

In sum, and for the foregoing reasons, this court grants the instant petition. The arbitration demanded by respondent Alfred J. Castro, Jr. against petitioner Empire Fire and Marine Insurance Company is permanently stayed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW  
SUPREME COURT JUSTICE

**FILED**

JAN 09 2015

KINGS COUNTY CLERK'S OFFICE

