| **Praetorian Ins. Co. v Liberty Mut. Ins. Co.** |
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| 2016 NY Slip Op 33205(U) |
| September 9, 2016 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 23597/14E |
| Judge: Ben Barbato |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PRAETORIAN INSURANCE COMPANY,

Petitioner(s),

- against -

LIBERTY MUTUAL INSURANCE COMPANY A/S/O KEISHA HOLMES,

Respondent(s).

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**DECISION AND ORDER**

Index No: 23597/14E

In this special proceeding to temporarily stay the PIP arbitration initiated by respondent, petitioner seeks a temporary stay of arbitration to compel respondent to provide discovery. Petitioner avers that discovery is warranted insofar as respondent commenced this action before it provided discovery and after agreeing to, but never providing relevant discovery in respondent's separate plenary subrogation action for relief identical to that sought herein. Respondent opposes this motion asserting that the relevant arbitration agreement does not allow for the same.

For the reasons that follow hereinafter, petitioner's motion is hereby granted.

Despite the parties' failure to provide the pleadings, it appears that the instant action is for PIP arbitration. Specifically, respondent seeks reimbursement of sums paid to its

insured as a result of a motor vehicle accident on February 23, 2011. It is alleged that on the foregoing date, a vehicle owned and operated by Keisha Holmes (Holmes) was involved in a motor vehicle accident with a vehicle, after the same was impacted by another vehicle owned by Car Factory, Inc., (CFI) and operated by Jennifer Ramirez (Ramirez). At the time of the accident Homes was insured by respondent and CFI and Ramirez were insured by petitioner. In 2012, after the foregoing accident, it is alleged that respondent - seeking reimbursement of all sums paid to Holmes - initiated a plenary subrogation action in Civil Court, New York County, wherein it named CFI and Ramirez as defendants. Thereafter, in 2014, respondent initiated the instant proceeding seeking arbitration to determine whether petitioner should reimburse respondent for all sums paid to Holmes by respondent.

Petitioner's motion seeking a temporary stay of arbitration is granted. Petitioner demonstrates that given respondent's assertion in the related plenary action that respondent would provide relevant discovery as well as an order mandating the same, it, therefore, sought no discovery in this action. Accordingly, petitioner establishes the existence of extraordinary circumstances and a justifiable excuse for failing to procure discovery prior to the initiation of this action. Thus, a temporary stay for purposes of discovery and an order compelling that discovery is warranted.

It is well settled that generally, parties to a special proceeding are not entitled to discovery insofar as it protracts an otherwise expedited action, thereby undercutting the very purpose of the proceeding (*Town of Pleasant Val. v New York State Bd. of Real Prop. Services*, 253 AD2d 8, 15 [2d Dept 1999]; *Plaza Operating Partners Ltd. v IRM (U.S.A.) Inc.*, 143 Misc 2d 22, 23 [Civ Ct 1989]). If, however, a party to a special proceeding demonstrates the need for discovery, the court can order disclosure (*Town of Pleasant Val.* at 15; *Plaza Operating Partners Ltd.* at 23-24).

Significantly, in special proceedings to stay arbitration pursuant to CPLR § 7503(b), discovery is generally proscribed absent "extraordinary circumstances" (*Hendler & Murray, P.C. v Lambert*, 127 AD2d 820, 821 [2d Dept 1987]; *see De Sapio v Kohlmeyer*, 35 NY2d 402, 406 [1974] ["While a court may order disclosure to aid in arbitration pursuant to CPLR 3102 (subd. [c]), it is a measure of the different place occupied by discovery in arbitration that courts will not order disclosure except under extraordinary circumstances" (internal quotation marks omitted).]; *State Farm Mut. Auto. Ins. Co. v Wernick*, 90 AD2d 519, 519 [2d Dept 1982]). Indeed, the case law prescribes discovery because generally the parties to a proceeding to stay arbitration have ample time to conduct discovery before the initiation of the proceeding (*Govt. Employees Ins. Co. v Mendoza*, 69 AD3d 623, 625 [2d Dept 2010]; *State-Wide Ins. Co. v Womble*, 25 AD3d 713, 714 [2d

Dept 2006]; *New York Cent. Mut. Fire Ins. Co. v Gershovich*, 1 AD3d 364, 365 [2d Dept 2003]). Hence, when a party seeks discovery in a proceeding to stay arbitration, absent a justifiable excuse for failing to obtain it before commencing the proceeding, the court ought not grant such relief (*Govt. Employees Ins. Co.* at 147; *State Farm Mut. Auto. Ins. Co. v Goldstein*, 34 AD3d 824, 824 [2d Dept 2006]). In *Govt. Employees Ins. Co.*, the court granted the petitioner's application to temporarily stay arbitration in order to have the respondent provide discovery when the petitioner demonstrated that the failure to obtain discovery was its reliance on the respondent's assertion that another party was liable (*id.* at 148). In *State Farm Mut. Auto. Ins. Co.*, the court also granted the petitioner's application for a temporary stay of arbitration for purposes of procuring discovery when the petitioner established that it had repeatedly attempted to obtain discovery from the respondent to no avail (*id.* at 824).

In support of the instant motion petitioner submits discovery demands dated September 11, 2012 and served upon respondent on that same date. Specifically, the discovery demands - a demand for bill of particulars, a notice of combined demands, and a notice for deposition - seek discovery in an action titled *Liberty Mutual Insurance Company, et al. v Car Factory, Inc., et al.* (Index No. 22152/12 [Civ Ct 2012]). Petitioner also submits several letters, the last of which was dated September 20, 2013, wherein

petitioner, in the plenary action, apprises respondent that because respondent had failed to provide responses to the foregoing discovery demands, petitioner would seek judicial intervention. Lastly, petitioner submits an order dated June 3, 2014, wherein the court in the plenary action ordered respondent to comply with petitioner's discovery demands by July 30, 2014 and appear for a deposition no later than August 30, 2014.

Based on the foregoing, it is clear that petitioner is entitled to discovery in this special proceeding and a temporary stay of arbitration. While it is true that in special proceedings to stay arbitration pursuant to CPLR § 7503(b), discovery is generally proscribed absent "extraordinary circumstances" (*Hendler & Murray, P.C.* at 821; *De Sapio* at 406; *State Farm Mut. Auto. Ins. Co.* at 519), it is also true that when a party establishes a justifiable excuse for failing to procure discovery prior to the commencement of the special proceeding, the court ought to grant a stay and order discovery (*Govt. Employees Ins. Co.* at 147; *State Farm Mut. Auto. Ins. Co.* at 824). Here, the record establishes that petitioner did in fact make multiple attempts to procure relevant discovery in this action via demands served upon respondent in the plenary subrogration action wherein respondent seeks relief identical to that sought here - namely, reimbursement. Despite those attempts and a court order compelling respondent to provide discovery, respondent nevertheless failed to provide the

same and instead initiated the instant proceeding. In fact, insofar as the instant proceeding was initiated on July 17, 2014, before the discovery deadline ordered by the Civil Court had expired, it cannot be said that petitioner did not make attempts to procure discovery before the this action was commenced. Indeed, given respondent's plenary action, it was reasonable for petitioner to conclude that this arbitration action would not ensue.

Insofar as the discovery sought by respondent - information pertinent to all injuries claimed and for which she was compensated by respondent - it is material and necessary and should be disclosed. To be sure, "[t]he purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits" (*Rios v Donovan*, 21 AD 2d 409, 411 [1st Dept. 1964]). Accordingly, the threshold is whether the information sought is "material and necessary" to the prosecution or defense of an action (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). The terms

> material and necessary, are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, to permit discovery of testimony which is sufficiently related to the issues in

> litigation to make the effort to obtain it in preparation for trial reasonable

(*id.* at 406 [internal quotation marks omitted]). Here, where respondent seeks to have petitioner reimburse it for sums paid to Holmes as a result of the alleged negligence of petitioner's insured, it is beyond cavil that the extent of Holmes' injuries and their cause is both material and necessary to petitioner's defense at arbitration. It is hereby

**ORDERED** that the arbitration herein be temporally stayed for a period of 60 days from service of this Decision and Order with Notice of Entry upon respondent. It is further

**ORDERED** that within 30 days of service of this Decision and Order with Notice of Entry, respondent provide the HIPAA-complaint authorizations requested in petitioner's letter dated January 15, 2014, an authorization for the release of Holmes' no-fault file for the instant accident and the one in June 2010. It is further

**ORDERED** that within 45 days of service of this Decision and Order with Notice of Entry, Holmes appear for an examination under oath and an independent medical examination. It is further

**ORDERED** that petitioner serve a copy of this Order with Notice of Entry upon respondents and proposed additional respondents within thirty (30) days hereof.

**ORDERED** that petitioner serve a copy of this Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : September 9, 2016
Bronx, New York

Ben Barbato, JSC