

Travelers Cas. Ins. Co. of Am. v Abreu

2017 NY Slip Op 33242(U)

July 18, 2017

Supreme Court, Bronx County

Docket Number: 22504/2016E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

[* 1]

PART 15

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed
Settle Order
Schedule Appearance

TRAVELERS CASUALTY INSURANCE
COMPANY OF AMERICA,

Index No. 22504/2016E

-against-

Hon. MARY ANN BRIGANTTI

MYRA QUEVEDO ABREU

The following papers numbered 1 to 7 Read on this motion, STAY ARBITRATION
Noticed on May 4, 2016 and duly submitted on the Motion Calendar of April 17, 2017:

	PAPERS NUMBERED	
Notice of Motion- Exhibits and Affidavits Annexed	1,2	
Answering Affidavit and Exhibits	3,4	
Replying Affidavit and Exhibits	5	
_____ Affidavits and Exhibits	6,7	

Upon the foregoing papers, petitioner Travelers Casualty Insurance Company of America ("Petitioner") moves for an order permanently staying the arbitration demanded by respondent Myra Quevedo Abreu ("Respondent"), on the grounds of policy violations, or in the alternative, for an order directing Respondent to provide authorizations for all medical treatment and to appear for an examination under oath and a physical examination, together with such other and further relief as the Court may deem just and proper under the circumstances. Respondent opposes the petition and cross-moves for an order deeming the examination under oath and physical examination waived due to Petitioner's failure to pursue the same in a timely fashion, and for such other or different relief as this Court may deem justified. Petitioner opposes the cross-motion.

Background

On November 6, 2014, Respondent was involved in a motor vehicle accident while driving a vehicle owned by her employer and insured by Petitioner. The other vehicle involved in this accident was operated by Justice Opoku-Yeboah and insured by Progressive Insurance Company ("Progressive") with policy limits of \$25,000/\$50,000. Respondent thereafter commenced a lawsuit against the Progressive vehicle. Petitioner states that on February 26, 2016, Progressive tendered the full amount of its policy to

Respectfully Referred to: _____

Dated: _____

this offer and thereafter executed a stipulation of discontinuance and release in Progressive's favor.

Thereafter, Respondent demanded underinsured motorist arbitration from Petitioner. Petitioner now seeks a permanent stay of that arbitration, on the grounds that the Respondent-Progressive release compromised Petitioner's subrogation rights against Progressive and violated the terms of Respondent's insurance policy, because Respondent failed to obtain Petitioner's consent to settle with Progressive before executing the release. Petitioner also claims that Respondent failed to submit to Petitioner a copy of the summons and complaint against Opoku-Yeboah.

In opposition to the petition, and in support of her cross-motion, Respondent's counsel alleges that he corresponded with representatives of Petitioner in August and October 2015, specifically apprising the representatives of Respondent's intention to make a SUM claim, outlining the extent of Respondent's injuries and issues of liability, and noting the limited coverage on the part of the tortfeasor vehicle. Moreover, these letters specifically stated that an offer of settlement for full policy limits would be imminent, and sought permission to settle the claims against the tortfeasor's insurer. Respondent states that she never received a substantive response her requests for consent to settle. Respondent also notes that she "cc'd" Petitioner on a January 2016 letter sent to the tortfeasor's counsel, again outlining issues of liability and requesting a tender of the full insurance policy amount. Petitioner, again, did not respond to this letter. Respondent thereafter settled her claims against Progressive at some point after February 26, 2016, when Progressive formally tendered its full policy amount. Respondent claims that in light of the foregoing, Petitioner acquiesced to the settlement of the third-party action. Respondent also argues that Petitioner waived any claim for pre-arbitration discovery in the form of an examination under oath or physical examination.

In response, Petitioner denies receiving Respondent's August 25 or October 19, 2015 correspondence. Petitioner also argues that at the time all of these letters were sent, no formal settlement offer was made and therefore Petitioner had no obligation to respond to requests for consent. It is not disputed that Respondent failed to specifically seek Petitioner's consent after a formal tender was made on February 26, 2016. Petitioner therefore argues that Respondent breached its obligations under the insurance policy and therefore she is precluded from seeking SUM benefits under the policy.

Respondent submits a reply affirmation asserting, *inter alia*, that no formal settlement offer is necessary to trigger an insurer's obligation to either consent or not consent. Here, the evidence demonstrates that Petitioner had ample notice of Respondent's intention to settle this matter with the third-party tortfeasor, and Petitioner was obligated to affirmatively respond to these notices.

Applicable Law and Analysis

Generally, an insured who settles with a tortfeasor in violation of a policy condition requiring his or

claim for underinsured motorist benefits under the policy (see *Government Employees Ins. Co. v. Arciello*, 129 A.D.3d 1083, 1084 [2nd Dept. 2015]). An exception exists in situations where the insured advises the insurer of an offer to settle for the full amount of the tortfeasor's policy, which obligates the insurer either to consent to the settlement or advance the settlement amount to the insured and assume the prosecution of the tort action within thirty days (*id.*; 11 NYCRR 60-2.3[f]). If the insurer does not timely respond in accordance with this condition, the insured may settle with the tortfeasor without the insured's consent and without forfeiting his or her right to SUM benefits (*id.*, citing *Matter of Central Mut. Ins. Co. [Bemiss]*, 12 N.Y.3d 648, 659 [2009]). In other words, where, as here, an automobile insurance policy expressly requires the insurer's prior written consent to any settlement by the insured with a tortfeasor, the failure of the insured to obtain that prior consent constitutes a breach of condition of the insurance contract, and disqualifies the insured from obtaining benefits of the policy (*Matter of Metlife Auto & Home v. Zampino*, 65 A.D.3d 1151, 1153 [2nd Dept. 2009], quoting *Matter of State Farm Auto Ins. Co. v. Blanco*, 208 A.D.2d 933, 934 [2nd Dept. 1994]). The insured can nonetheless obtain benefits in this situation where he or she can demonstrate that "the insurer, either by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement" (*id.*).

In this case, there is no dispute that Petitioner did not provide written consent to Respondent's settlement, as required by the SUM endorsement. Respondent, however, has submitted correspondence that she alleges indicates that Petitioner either waived the consent requirement or acquiesced to the settlement by its conduct (see, e.g., *Travelers Home and Marine Ins. Co. v. Kanner*, 103 A.D.3d 736, 738 [2nd Dept. 2013]). The August 20, 2015 letter advises of Respondent's intention to make a claim against the uninsured motorist coverage provisions of Petitioner's insurance policy and notes, in a preliminary fashion, the extent of Respondent's injuries. The August 25, 2015 letter includes documentation from Respondent's treating physician, establishes that Respondent has scheduled her cervical spine fusion surgery, and further notes that Respondent's potential damages are well in excess of the tortfeasor's available insurance coverage. Respondent therefore sought "permission and your consent to permit us to accept the forthcoming tendering of the primary defendant's policy" (Resp. Ex. B). Attached to this correspondence was Respondent's summons and complaint in her action commenced against the tortfeasor. Notably, this letter also referenced a conversation that Respondent counsel's office had with a representative of petitioner. On October 19, 2015, Respondent sent Petitioner yet another letter, stating that the tortfeasor's counsel indicated Progressive's "intention to tender the policy limits, of \$25,000 in light of the operative fusion undergone by the plaintiff" at a court appearance (Resp. Ex. C). This correspondence again requests permission "within the next thirty days" to resolve and settle the matter with the primary defendant. Finally, on January 14, 2016, Respondent "cc'd" Petitioner on correspondence she sent to the tortfeasor's counsel, noting issues of liability and damages, and requesting tendering of the full policy, as well as an affidavit that there is no

2015, wherein Petitioner acknowledges Respondent's intention to pursue an uninsured/underinsured motorist claim, acknowledges the policy limits of the adverse driver, confirming their insured's SUM limits, and requesting a copy of Respondent's MV-104 and any witnesses to the accident. The letter concludes "[w]e reserve our rights to request and [sic] examination under oath and independent medical exams." This letter did not address Respondent's request for consent to settle the matter with the tortfeasor.

In light of the parties' submissions and contentions, this Court determines that a framed issue hearing is necessary to resolve the issue of whether or not Petitioner either waived the written consent-to-settle requirement in its policy, or acquiesced to Respondent's settlement of her action against the tortfeasor through its own conduct, silence, or unreasonable delay. Notably, Respondent's opposing papers contained two exhibits that were not properly e-filed (Exhibits "B" and "I"), and therefore Petitioner had no full opportunity to respond to those documents. Furthermore, Petitioner has denied receipt of Respondent's August 25 and October 19, 2015 letters, thus requiring a hearing to resolve this issue. The Court notes that Respondent's counsel's affirmation in support of his cross-motion did not establish a presumption of proper mailing, because counsel did not allege that he personally mailed the letters until he filed his reply affirmation (*see generally Government Employees Ins. Co. v. Morris*, 95 A.D.3d 887 [2nd Dept. 2012]). At the hearing, the court will entertain further argument as to whether the letters - even if they were indeed sent - constitute proper written notice of a pending settlement offer in compliance with the controlling insurance policy provisions. Following the hearing, Petitioner's request for certain pre-arbitration discovery will be addressed, if necessary.

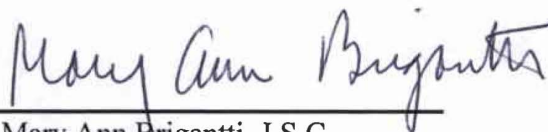
Conclusion

Accordingly, it is hereby

ORDERED, that the petition is granted only to the extent of temporarily staying arbitration and directing a framed issue hearing to be held on October 2nd, 2017, at 9:30AM, at Part 15, Room 702.

This constitutes the Decision and Order of this Court.

Dated: JULY 18, 2017



 Hon. Mary Ann Brigantti, J.S.C.