

<b>Nationwide Gen. Ins. Co. v Berroa</b>
2021 NY Slip Op 31240(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 657079/2020
Judge: Carol R. Edmead
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

NATIONWIDE GENERAL INSURANCE COMPANY,

Plaintiff,

- v -

RAMON BERROA, JOHN DOE, EHILENY REYES GARCIA,
GEICO INSURANCE COMPANY

Defendant.

-----X

INDEX NO. 657079/2020
MOTION DATE 12/16/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 11

were read on this motion to/for STAY

Upon the foregoing documents, it is

ORDERED that the application of Petitioner Nationwide General Insurance Company (Motion Seq. 001) is granted to the extent that the arbitration sought by Respondent Ramon Berroa is temporarily stayed pending a Framed Issue Hearing, and otherwise denied; and it is further

ORDERED that the issues of whether Respondent is entitled to uninsured motorist coverage, the obligations, if any, of Proposed Additional Respondents, and all other issues raised in the petition and in the answering papers, are hereby referred to a Special Referee to Hear and Determine. It is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part

(which are posted on the website of this court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Respondent shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the ‘References’ link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within twenty (20) days.

### MEMORANDUM DECISION

In this Article 75 proceeding, Petitioner Nationwide General Insurance Company moves for a permanent stay of the arbitration demanded by Respondent Ramon Berroa on the grounds that Respondent has failed to comply with conditions precedent to arbitration, that other collectible insurance is available to Respondent, and that joinder of Proposed Additional Respondents “John Doe,” Ehilheny Reyes Garcia and GEICO Insurance Company is necessary (Motion Seq. 001). Alternatively, Petitioner requests an order temporarily staying the arbitration so that Petitioner can obtain discovery.

Respondent opposes the motion in its entirety and requests that a Framed Issue Hearing be scheduled in order to ascertain the obligations of the Proposed Additional Respondents.

### **BACKGROUND FACTS**

This action arises out of a car accident that occurred on July 22, 2019 when Respondent sustained injuries in a collision involving a motorist that collided into Respondent’s vehicle. The adverse driver fled the scene, but according to the police report of the accident, Respondent was able to note the license plate number before the driver fled (NYSCEF doc No. 3). The vehicle was eventually identified as a Mercedes registered and owned by Proposed Additional Respondent Ehilheny Reyes Garcia and operated by Proposed Additional Respondent “John Doe” (NYSCEF doc No. 1, ¶ 13).

Respondent’s counsel conducted an investigation and found that Mr. Garcia’s vehicle was insured by Proposed Additional Respondent GEICO Insurance Company (“GEICO”) at the time of the accident. On September 4, 2019, Respondent’s counsel contacted GEICO by letter to attempt to set up a claim (NYSCEF doc No. 8).

By letter addressed to Mr. Garcia dated March 6, 2020, GEICO advised that it was disclaiming coverage for this occurrence on the ground that “the vehicle alleged to have been involved in this loss is not insured under this policy and does not meet the policy definition of an owned, non-owned or temporary substitute auto” (NYSCEF doc No. 9). GEICO proceeded to cite a section of its insurance policy but provided no other context or explanation for its disclaimer of coverage.

At the time of the accident, Respondent’s vehicle was insured by Petitioner and included Uninsured Motorist Coverage. After determining that Mr. Garcia’s vehicle appeared to be uninsured, Respondent’s counsel filed a demand for arbitration with the American Arbitration Association on November 23, 2020 (NYSCEF doc No. 3).

On December 16, 2020, Petitioner commenced the instant motion, seeking a permanent stay of the arbitration demanded by Respondent on the grounds that Petitioner’s uninsured coverage has not been triggered as Respondent’s counsel has failed to demonstrate that sufficient insurance coverage did not exist for the adverse vehicle at the time and place of the accident (NYSCEF doc No. 1, ¶ 14). Petitioner also requests that Proposed Additional Respondents be added to this proceeding as necessary parties. Should the Court decline to grant a permanent stay, Petitioner requests that a temporary stay so that Respondent can comply with pre-arbitration discovery, including an examination under oath, independent medical examination, and medical authorizations (*id.* at ¶ 17).

In opposition, Respondent argues that he properly filed for uninsured motorist coverage and contends that Petitioner has failed to put forth evidence that the adverse vehicle was insured on the date of the accident. Respondent requests that this matter be scheduled for a Framed Issue

Hearing in order to ascertain the obligations of the respective Proposed Additional Respondents (NYSCEF doc No. 7, ¶ 11).

### DISCUSSION

A party seeking a stay of arbitration pursuant to Article 75 has the burden of establishing a “genuine triable issue” that justifies the relief (*Matter of Empire Mut. Ins. Co. [Zelin]*, 120 AD2d 365 [1st Dept 1986]). When such an issue exists, “the appropriate procedure is to stay the arbitration pending a trial of the threshold issue” (*id.*). If the moving party cannot establish any preliminary triable matter, the stay will not be granted. It is also well established that an insurer is entitled to obtain all relevant information to evaluate claims prior to an arbitration hearing. (*Progressive Ne. Ins. Co. v Vandusen*, 22 Misc. 3d 1128[A] [Sup. Ct. 2009]).

The issue of whether the loss sustained by the party seeking coverage was caused by an uninsured vehicle is a circumstance that warrants an evidentiary hearing (*see Hanover Ins. Co. v Lewis*, 57 AD3d 221, 868 NYS2d 640 [1st Dept 2008]). It is undisputed that “Physical contact [with an uninsured vehicle] is a condition precedent to the arbitration of this uninsured motorist claim” (*Hanover Ins. Co. v Lewis*, 57 AD3d 221, 868 NYS2d 640 [1st Dept 2008] *citing Matter of Empire Mut. Ins. Co. [Zelin]*, 120 AD2d 365, 502 NYS2d 20 [1986]). Thus, an issue of fact regarding whether the adverse motorist was uninsured at the time of the accident generally warrants a hearing before the matter can proceed to arbitration.

Here, a Framed Issue Hearing with all parties, including Proposed Additional Respondents, is a necessary precondition as there is a question of fact regarding what insurance coverage, if any, is available to Respondent as a result of his accident and must be exhausted before he can pursue coverage under Petitioner’s policy. While Petitioner has not established that the owner or driver of the adverse vehicle was insured on the date of the accident, Respondent

has not established that there is no insurance coverage available from any of his tortfeasors. Notwithstanding GEICO's letter of denial, Respondent must also demonstrate there is no ascertainable insurance available for either Mr. Garcia or the unidentified driver of the adverse vehicle from any carrier. These matters must be adjudicated before this action can proceed to arbitration.

Regarding Petitioner's contentions that Respondent has not complied with necessary conditions precedent to the arbitration, the Court notes these concerns are moot as Respondent has affirmed that he will comply with all required discovery once this matter proceeds to arbitration (NYSCEF doc No. 7, ¶ 12). The Court therefore sees no reason to further delay the arbitration beyond the time necessitated for the Framed Issue Hearing.

### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Petitioner Nationwide General Insurance Company (Motion Seq. 001) is granted to the extent that the arbitration sought by Respondent Ramon Berroa is temporarily stayed pending a Framed Issue Hearing, and otherwise denied; and it is further

ORDERED that the issues of whether Respondent is entitled to uninsured motorist coverage, the obligations, if any, of Proposed Additional Respondents, and all other issues raised in the petition and in the answering papers, are hereby referred to a Special Referee to Hear and Determine. It is further

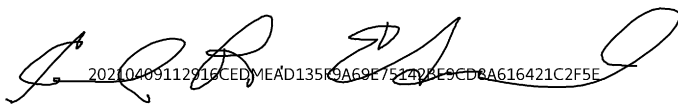
ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)), for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the

“References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Respondent shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the ‘References’ link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within twenty (20) days.



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<u>4/9/2021</u> DATE					<u>CAROL R. EDMED, J.S.C.</u>	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input checked="" type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT