

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D14836
X/hu

_____AD3d_____

Argued - March 13, 2007

HOWARD MILLER, J.P.
FRED T. SANTUCCI
ANITA R. FLORIO
ROBERT A. LIFSON, JJ.

2005-05715
2006-00068

DECISION & ORDER

In the Matter of Merchants Insurance Group, et al.,
petitioners-respondents, v Estate of Stephanie
Geralis, et al., respondents, State Farm Mutual
Automobile Insurance Company, appellant,
Progressive Insurance Company, respondent-
respondent.

(Index No. 1892/03)

Martin, Fallon & Mullé, Huntington, N.Y. (Richard C. Mullé and Stephen Burke of
counsel), for appellant.

Goldberg Segalla LLP, Buffalo, N.Y. (Sarah J. Delaney and Robert Varga of
counsel), for petitioners-respondents.

Shayne, Dachs, Stanisci, Corker & Sauer, Mineola, N.Y. (Jonathan A. Dachs of
counsel), for respondent-respondent.

In a proceeding pursuant to CPLR article 75 to stay arbitration of a supplementary
underinsured motorist claim, State Farm Mutual Automobile Insurance Company appeals (1) from
an order of the Supreme Court, Suffolk County (Molia, J.), dated May 10, 2005, which granted the
petition and granted that branch of the cross motion of Progressive Insurance Company which was
for summary judgment declaring that State Farm Mutual Automobile Insurance Company is obligated
to reimburse Progressive Insurance Company for all sums it had paid and would pay as a result of the
underlying automobile accident, and (2) from a judgment of the same court entered December 8,
2005, which, upon the order, granted the petition, stayed arbitration of the supplementary
underinsured motorist claim, and is in favor of Progressive Insurance Company and against State
Farm Mutual Automobile Insurance Company in the total sum of \$82,617.63.

April 24, 2007

Page 1.

MATTER OF MERCHANTS INSURANCE GROUP v ESTATE OF STEPHANIE GERALIS

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

The Plymouth Voyager in which the deceased was a passenger was insured by the appellant State Farm Mutual Automobile Insurance Company (hereinafter State Farm) on the date of the accident. The record contains a police accident report with the Plymouth Voyager's insurance code. The registration record from the New York State Department of Motor Vehicles also showed State Farm as the insurer of the Plymouth Voyager. Thus, Progressive Insurance Company (hereinafter Progressive) established, prima facie, its entitlement to judgment as a matter of law (*see Matter of State Farm Mut. Auto. Ins. Co. v Youngblood*, 270 AD2d 493; *Matter of Nationwide Ins. Co. v Sillman*, 266 AD2d 551; *Matter of Lumbermens Mut. Cas. Co. v Beliard*, 256 AD2d 579; *Matter of Eagle Ins. Co. v Sadiq*, 237 AD2d 605). In opposition, State Farm failed to offer sufficient probative evidence to raise an issue of fact as to whether the Plymouth Voyager was not owned by State Farm's insured at the time of the accident, or alternatively, was not insured by State Farm. Moreover, State Farm failed to submit probative evidence demonstrating facts upon which one could reasonably infer that possession of the Plymouth Voyager by the petitioners' insured was consistent with an intent of an actual transfer of ownership from State Farm's insured to the petitioners' insured (*see Dorizas v Island Insulation Corp.*, 254 AD2d 246). Therefore, the Supreme Court properly granted that branch of Progressive's cross motion which was for summary judgment declaring that State Farm is obligated to reimburse Progressive for all sums it had paid and would pay as a result of the underlying automobile accident (*see Matter of Eagle Ins. Co. v Pierre-Louis*, 306 AD2d 344).

State Farm's remaining contention is without merit.

MILLER, J.P., SANTUCCI, FLORIO and LIFSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court