

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

D29104
C/hu

_____AD3d_____

Argued - November 1, 2010

PETER B. SKELOS, J.P.
RUTH C. BALKIN
RANDALL T. ENG
LEONARD B. AUSTIN, JJ.

2009-11752

DECISION & ORDER

In the Matter of State Farm Fire & Casualty Company,
petitioner-respondent, v John Hayes, appellant,
Leslie B. Hodelin, et al., respondents-respondents.

(Index No. 33309/08)

Gellman & Mandell, Lynbrook, N.Y. (Irving Mandell of counsel), for appellant.

Gail S. Lauzon (Montfort, Healy, McGuire & Salley, Garden City, N.Y. [Donald S. Neumann, Jr.], of counsel), for respondents-respondents.

In a proceeding pursuant to CPLR article 75 to stay arbitration of an uninsured motorist claim, the appeal, as limited by the appellant's brief, is from so much of a judgment of the Supreme Court, Kings County (Kurtz, Ct. Atty. Ref.), dated November 18, 2009, as, after a hearing, determined that the subject vehicle was stolen and being operated without permission at the time of the accident and, in effect, denied the petition and dismissed the proceeding.

ORDERED that the judgment is affirmed insofar as appealed from, with costs.

“The strong presumption of permissive use afforded by Vehicle and Traffic Law § 388, can only be rebutted by substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's consent” (*Matter of State Farm Mut. Auto. Ins. Co. v Ellington*, 27 AD3d 567, 568; *see Murdza v Zimmerman*, 99 NY2d 375, 378; *Matter of New York Cent. Mut. Fire Ins. Co. v Dukes*, 14 AD3d 704). “The determination of the fact-finding court should not be disturbed on appeal unless its conclusions could not be reached on any fair interpretation of the evidence, especially where, as here, the determination turns largely upon the credibility” of

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witnesses (*Matter of New York Cent. Mut. Fire Ins. Co. v Accardo*, 298 AD2d 459, 459; *see Sargeant v Village Bindery*, 296 AD2d 395, 396; *Matter of CGU Ins. Co. v Velez*, 287 AD2d 624).

Here, the Supreme Court's resolution of the issues of the vehicle owner's credibility, and the weight to be given the evidence, is supported by the record and will not be disturbed on appeal (*see Amex Assur. Co. v Kulka*, 67 AD3d 614, 615; *McDonald v Rose*, 37 AD3d 781, 783; *Matter of Allstate Indem. Co. v Nelson*, 285 AD2d 545). Accordingly, the Supreme Court properly, in effect, denied the petition and dismissed the proceeding, finding that the presumption of permissive use was overcome (*see Matter of New York Cent. Mut. Fire Ins. Co. v Accardo*, 298 AD2d at 459; *Matter of Allstate Indem. Co. v Nelson*, 285 AD2d at 545; *Headley v Tessler*, 267 AD2d 428, 428-429).

SKELOS, J.P., BALKIN, ENG and AUSTIN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court