

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

D36618  
O/kmb

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Argued - October 22, 2012

PETER B. SKELOS, J.P.  
DANIEL D. ANGIOLILLO  
THOMAS A. DICKERSON  
L. PRISCILLA HALL, JJ.

2012-03876  
2012-06362

DECISION & ORDER

In the Matter of Liberty Mutual Fire Insurance Company,  
appellant, v Debre M. Rothfeld, respondent.

(Index No. 126/12)

Jaffe & Asher, LLP, New York, N.Y. (Marshall T. Potashner of counsel), for  
appellant.

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

In a proceeding pursuant to CPLR article 75 to compel arbitration of Debre M. Rothfeld's claim for supplementary uninsured/underinsured motorist benefits, the petitioner appeals from (1) an order of the Supreme Court, Nassau County (Diamond, J.), dated March 19, 2012, which denied its petition to compel arbitration on the issue of whether Debre M. Rothfeld's claim was barred by a policy exclusion, and (2) a judgment of the same court dated May 7, 2012, which, upon the order, directed the arbitration to proceed only as to the issues of Debre M. Rothfeld's right to recover from the uninsured/underinsured tortfeasor and the amount of her alleged damages recoverable under the supplementary uninsured/underinsured endorsement.

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 Debre M. Rothfeld.

The appeal from the intermediate order dated March 19, 2012, must be dismissed

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

Debre M. Rothfeld made a claim under a supplementary uninsured/underinsured motorist (hereinafter SUM) endorsement issued to her parents by the petitioner, Liberty Mutual Fire Insurance Company (hereinafter Liberty Mutual). Liberty Mutual thereafter filed a petition to compel arbitration of the issue of whether Rothfeld's claim was barred by a policy exclusion. The Supreme Court determined that Liberty Mutual was not entitled to arbitrate that issue, and directed that arbitration proceed only as to the issues of Rothfeld's right to recover from the uninsured/underinsured tortfeasor and the amount of her alleged damages recoverable under the SUM endorsements.

The SUM endorsement at issue in this case provided for arbitration of disagreements as to whether the insured was "legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, or . . . as to the amount of the payment that may be owing under this SUM coverage." Contrary to Liberty Mutual's contention, the portion of this clause requiring arbitration "as to the amount of the payment that may be owing under this SUM coverage" cannot be read to cover questions of whether a claim is excluded from coverage. Rather, the subject arbitration clause was "particular, not general," and "made arbitrable to fact issues only," that is, whether Rothfeld was entitled to recover from the uninsured/underinsured motorist, and the amount of damages recoverable under the SUM endorsement (*Matter of Rosenbaum [American Sur. Co. of N.Y.]*, 11 NY2d 310, 314; *see Matter of Travelers Indem. Co. [Levy]*, 195 AD2d 35, 39-40; *cf. Matter of Prudential Prop. & Cas. Ins. Co. [Hidalgo]*, 133 AD2d 87, 87 [involving a broad arbitration clause, which provided for arbitration of disputes as to: "whether or not a claim [under the underinsured motorist endorsement] *is payable* and the actual amount we'll pay" (emphasis added)]). Accordingly, the Supreme Court properly denied the petition to compel arbitration on the issue of whether Rothfeld's claim was barred by a policy exclusion and properly directed arbitration to proceed only as to the issues of Rothfeld's right to recover from the uninsured/underinsured tortfeasor and the amount of her alleged damages recoverable under the SUM endorsement.

SKELOS, J.P., ANGIOLILLO, DICKERSON and HALL, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court