

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18  
Justice

MATTER OF COUNTRY-WIDE INSURANCE COMPANY	x	Index Number <u>11740</u> 2003
- against -		Motion Date <u>April 7,</u> 2004
TREVOR L. MARCANO, et al.		Motion Cal. Number <u>16</u>
	x	

The following papers numbered 1 to 9 were read on this motion for an order, in effect: (1) vacating a prior order of this court (Hart, J.), dated August 13, 2003, which temporarily stayed any arbitration and granted the petitioner other relief; and, (2) denying the petition and dismissing the proceeding to allow an arbitrator (Vernon J. Welsh), to render a final award based upon the proof submitted at an arbitration proceeding held on July 17, 2003.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits .....	1-4
Answering Affidavit - Exhibits .....	5-7
Reply Affidavit .....	8-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

**I. The Relevant Facts**

The respondent Trevor L. Marcano (Marcano), served a demand for arbitration upon the petitioner Country-Wide Insurance Company (Countrywide), seeking uninsured motorist benefits. On May 12, 2003, Countrywide filed a petition seeking to permanently stay arbitration and other relief. While the petition was pending, on July 17, 2003, the parties appeared at an arbitration before the American Arbitration Association (AAA). It is undisputed that at that hearing, Countrywide asserted that its petition seeking to stay arbitration was pending before this court. In addition, Marcano alleges, and Countrywide does not refute that at that

hearing, Countrywide made an opening and closing statement, contended that Marcano failed to meet the threshold requirements of Insurance Law § 5102[d], and submitted documents into evidence.

On July 18, 2003, Justice Frederick Schmidt, who was presiding over Part 8 and all CPLR article 75 proceedings died, and the proceedings were reassigned to a different Justice.

By letter dated July 30, 2003, the AAA informed the parties that by direction of the arbitrator (Vernon J. Welsh), the hearing was declared closed on July 22, 2003. The letter further advised that pursuant to AAA rules, the arbitrator had 30 days within which to render an award.

By order dated August 13, 2003, this court (Hart, J.), granted Countrywide's petition to stay arbitration to the extent, inter alia, that it: (1) granted Countrywide leave to add proposed additional respondents and directed that a hearing be held on November 5, 2003; (2) temporarily stayed any arbitration pending a final determination of the petition; and, (3) directed Countrywide to serve a copy of the order on all parties and the AAA (court order).

By letter dated September 19, 2003, the AAA acknowledged receipt of the court order, and advised the parties that pending further advice or an order vacating the stay or making the stay permanent, the AAA would suspend the arbitration and hold it in abeyance.

On October 8, 2003, Countrywide served and filed a copy of the court order with notice of entry. On October 9, 2003, Countrywide filed a note of issue and certificate of readiness.

## **II. Motion**

Marcano now moves for an order, in effect, vacating the court order and dismissing this proceeding, contending, inter alia, that by proceeding to arbitration, Countrywide waived its right to continue this proceeding.

Countrywide opposes the motion contending, inter alia, that: (1) the issuance of the court order embodying a temporary stay was delayed when Justice Schmidt died; and, (2) at the commencement of the arbitration held on July 17, 2003, it explained that the arbitration was erroneously scheduled, but the arbitration proceeded only because no temporary stay was in effect.

### III. Decision

CPLR 7503[b][2] provides that an application to stay arbitration may only be brought by a party "who has not participated in the arbitration . . . ." (see, CPLR 7503[b]; Matter of North River Ins. Co. v Morgan, 291 AD2d 230 [2002]). CPLR 7503[c] provides, in relevant part, that unless a party served with a demand to arbitrate applies to stay the arbitration within twenty (20) days after such service, he shall thereafter be precluded from objecting that a valid agreement to arbitrate was not made or has not been complied with and, hence, will terminate any right to contest the obligation to arbitrate (see, Matter of Blamowski v Munson Transp., 91 NY2d 190, 195 [1997]).

A party seeking to stay arbitration in favor of litigation cannot appear and participate in the arbitration on the merits (see, Sherrill v Grayco Builders, Inc., 64 NY2d 261, 273 at n3 [1985], citing Matter of Beagle v Motor Vehicle Acci. Indem. Corp., 19 NY2d 834, 835 [1967]; CPLR 7503[b]). If a party does participate in an arbitration proceeding by responding to claims and appearing without any reservation of rights and without availing itself of all its reasonable judicial remedies, that party will waive its right to a stay of arbitration and will not be allowed to thereafter upset the remedy emanating from the alternative dispute resolution forum (see, Matter of Commerce & Indus. Ins. Co. v Nester, 90 NY2d 255, 262 [1997]; Matter of Ohio Cas. Ins. Co. v Arbitration Forums, Inc., 303 AD2d 936 [2003]; One Beacon Ins. Co. v Bloch, 298 AD2d 522 [2002]).

Here, although Countrywide filed its petition seeking to permanently stay the arbitration demanded by Marcano, an arbitration was scheduled for July 17, 2003, which was one day prior to Justice Schmidt's death. As the arbitration hearing date loomed and its petition remained sub judice, Countrywide failed to seek any other judicial assistance, such as making an emergency application for a temporary stay by order to show cause. Instead, Countrywide appeared at the arbitration hearing, informed the arbitrator of its pending petition seeking a stay, and then proceeded to participate in the hearing on the merits. The only reason a determination on the merits was not rendered by the AAA was because of this court's intervening order which, apparently, was issued without knowledge of the concluded AAA hearing.

By proceeding to arbitration without seeking emergency temporary judicial relief pending the determination of the petition, and by participating in the arbitration hearing, Countrywide forfeited its right to proceed in this judicial forum (see, Matter of Commerce & Indus. Ins. Co. v Nester, supra at 264;

One Beacon Ins. Co. v Bloch, supra; cf., Matter of Blamowski v Munson Transp., supra at 195-196).

Accordingly, Marcano's motion seeking, in effect, an order vacating the court order dated August 13, 2003, denying the petition and dismissing this proceeding is granted. The court order dated August 13, 2003 is vacated, the petition is denied, the proceeding is dismissed, and the parties are directed to continue the arbitration before the AAA.

Dated: June 7, 2004

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J.S.C.