

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAIME A. RIOS  
Justice

IA PART 8

\_\_\_\_\_  
ALLSTATE INSURANCE COMPANY, X

Petitioner,

\_\_\_\_\_ - against -

IAN DAWKINS,

Respondent,

\_\_\_\_\_  
\_\_\_\_\_ X

Index

Number: 18118/07

Motion

Date: October 10, 2007

Motion

Cal. Number: 8

The following papers numbered 1 to 7 were read on this petition by Allstate Insurance Company (Allstate) seeking to stay the arbitration for uninsured/underinsured motorist (UM) benefits sought by respondent, Ian Dawkins (Dawkins) or in the alternative, seeking a temporary stay of arbitration, adding AIG Indemnity Insurance Company (AIG) and Shamel D. King (King) as additional respondents and directing a framed issue hearing.

Papers  
Numbered

Notice of Petition-Petition-Affidavits-Exhibits.....	1-3
Affirmation in Opposition-Affidavits-Exhibits.....	4-5
Affirmation in Reply-Affidavits-Exhibits.....	6-7

The subject proceeding brings up for review the question of whether uninsured motorist benefits are available to an insured when the tortfeasor's insurance policy limits are exhausted by multiple claims. The underlying facts are as follows:

On December 9, 2006, a vehicle owned and operated by Dawkins and insured by Allstate was involved in an accident with a vehicle owned and operated by King and insured by AIG and a third vehicle owned by M.S. Applewhaite (M.S.) and operated by Lionel C. Applewhaite (Lionel).

According to the police accident report, the collision was caused by King's ill advised entry into the path of Lionel's automobile.

As a result of the occurrence, Dawkins and his passenger Cynthia Clark (Clark), allegedly sustained personal injuries and made a liability claim against King's insurance carrier. Lionel also filed a claim with AIG. On the date of the occurrence, King's AIG automobile policy had limits of \$25,000.00 per person and \$50,000.00 per occurrence.

By correspondence dated June 5, 2007, AIG offered \$25,000.00 of its \$50,000.00 policy limit to settle the claim brought by Clark; \$12,500.00 to settle the claim brought by Lionel and \$12,500.00 to settle the claim brought by Dawkins arising out of the December 9, 2006 accident.

By demand dated June 26, 2007, Dawkins sought arbitration of his claim for UM benefits on the basis that the King vehicle was underinsured pursuant to his insurance policy with Allstate which provided for bodily injury liability insurance in the amount of \$25,000.00 per person and \$50,000.00 per occurrence.

Allstate commenced this CPLR 7503 proceeding seeking to stay Hawkins' demand for UM benefits contending that since the bodily injury policy limits of the AIG policy are the same as the Allstate policy, Hawkins is not entitled to UM coverage from Allstate and in any event, there is an offset precluding his recovery.

In opposition to Allstate's petition, Hawkins contends that although the bodily injury limits of the Allstate and AIG policy are facially the same, since only \$12,500.00 remained from the AIG policy to compensate Hawkins, he is entitled to make a claim for uninsured benefits pursuant to the applicable UM or Supplemental Uninsured/Underinsured Motorist (SUM) endorsement of the Allstate policy.

In reply, Allstate submits a copy of the declaration page of its policy establishing that the subject policy provided for SUM coverage in the same amount as its bodily injury liability limits. Additionally, Allstate contends that Dawkins does not have a valid UM claim since he has not established that AIG's policy or any portion thereof has been paid.

New York Insurance Department Regulation 35-D (11 NYCRR 60-2.3 (c) (3) (ii)) provides that an uninsured motor vehicle includes a vehicle for which there is bodily injury liability insurance coverage applicable at the time of the accident, but the amount of the insurance coverage has been reduced by payments to other persons injured in the accident to an amount less than the third party bodily injury liability limits of the insured's

policy (see New York Cent. Mut. Fire Ins. Co. v White, 262 AD2d 415 [1999]).

Here, although the bodily injury liability limits of the Allstate and AIG policy are the same, as only \$12,500.00 in coverage remains from the AIG policy after paying the claims of Clarke and Lionel, the AIG vehicle qualifies as uninsured pursuant to 11 NYCRR 60-2.3(c)(3)(ii). As such, Hawkins has a valid SUM claim subject to the offset provisions of 11 NYCRR 60-2.1(c), which in this case would be established before the arbitrator (see Liberty Mut. Ins. Co. v Tetteh, 277 AD2d 239 [2000]).

Allstate's argument that Dawkins has not established that AIG's policy has been paid was raised for the first time in their reply papers and will thus, not be addressed since Hawkins did not have an opportunity to respond to it (see Guterrez v Iannacci, 2007 NY Slip Op 6634 [2007]; Johnston v Cont. Broker Dealer Corp., 287 AD2d 546 [2001]; TIG Ins. Co. v Pellegrini, 258 AD2d 658 [1999]).

Accordingly, Allstate's petition is denied, the proceeding is dismissed and Dawkins may proceed to arbitration upon compliance with any remaining discovery requested in the petition.

Dated: October 23, 2007

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J.S.C.