

Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAIME A. RIOS
Justice

IA PART 8

	X	Index
LIBERTY MUTUAL INSURANCE COMPANY,		Number <u>14682/04</u>
Petitioner,		Motion
_____ - against -		Date <u>September 1, 2004</u>
FANNY TIGRE and TERESA HERNANDEZ,		Motion
_____ Respondents,		Cal. Number <u>20</u>
- and -		
JOHANNA MARTINEZ,		
Proposed Add'l. Respondent.		
	X	

The following papers numbered 1 to 7 were read on this amended notice of petition and petition by the petitioner, pursuant to CPLR article 75, seeking to permanently stay the arbitration demanded by the respondents or alternative relief.

	<u>Papers Numbered</u>
Notice of Petition - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7

Upon the foregoing papers it is ordered that the amended notice of petition and petition are determined as follows:

The threshold issue presented in this proceeding to permanently stay an arbitration for uninsured motorist insurance benefits is whether service of the original petition and amended notice of petition and petition were jurisdictionally defective.

The genesis of the controversy was a letter dated October 4, 2002, wherein the attorney for the respondents Fanny Tigre and Teresa Hernandez (the respondents), advised the petitioner Liberty Mutual Insurance Company (Liberty Mutual), of the respondents' notice of intention to make a claim for

uninsured/underinsured benefits based upon an accident that occurred on September 4, 2002.

By demand dated June 1, 2004 and received by Liberty Mutual on June 7, 2004, the respondents, through their attorney, sought arbitration of their claim for such benefits.

Court records disclose that Liberty Mutual filed a notice of petition and petition to permanently stay the arbitration on June 25, 2004; however, the notice of petition bore a return date of June 27, 2004, a period of two days, and there is no affidavit of service in the record. In any event, on June 30, 2004, Liberty Mutual served an amended notice of petition bearing a return date of July 27, 2004.

Annexed to the amended notice of petition is an affidavit of service which initially states that service was made by certified mail, return receipt requested; however, Liberty Mutual has not produced the return receipt or other evidence of such mailing. Moreover, the affidavit of service also states that service was accomplished by regular mail, and the respondents' attorney has produced an envelope demonstrating that the amended notice was served on him by regular mail.

In its petition Liberty Mutual seeks, inter alia, a permanent stay on the ground that the adverse vehicle had insurance coverage. In the alternative, it seeks leave to join the driver of the offending vehicle, and a temporary stay pending a hearing on the issue of coverage. In addition, Liberty Mutual seeks an order directing the respondents' compliancy with the insurance policy provisions mandating discovery.

The respondents oppose the petition contending, inter alia, that: (1) the original notice of petition was a nullity as it bore an incorrect return date; (2) the amended notice of petition was a nullity as it was served by regular mail rather than in a manner required by CPLR 7503; (3) Liberty Mutual failed to demonstrate that the offending vehicle was insured; and, (4) Liberty Mutual waived its right to discovery.

Pursuant to CPLR 304, a special proceeding is commenced by the delivery of a notice of petition and petition to the clerk of the court in the county in which the special proceeding is brought, and the payment of the filing fee (see Matter of One Beacon Ins. Co./CGU Ins. Co. v Daly, 7 AD3d 717 [2004]; Matter of Allstate Indem. Co. v Martinez, 4 AD3d 422 [2004]; CPLR 304).

With respect to service, CPLR 7503[c] provides that notice of an application to stay arbitration shall be served in the same

manner as a summons or by registered or certified mail, return receipt requested (see CPLR 7503[c]). The service requirements of CPLR 7503 have been strictly construed, and it has been held repeatedly that service by ordinary mail renders the application jurisdictionally defective (see Matter of Yak Taxi v Teke, 41 NY2d 1020 [1977]; Matter of N.Y. Cent. Mut. Fire Ins. Co. v Czumaj, 9 AD3d 833 [2004]; Matter of Cartier v County of Nassau, 281 AD2d 477 [2001]; Matter of Progressive Ins. Co., 235 AD2d 704 [1997]).

Although CPLR 7503[c] permits service of an application to stay arbitration upon a claimant's attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate, at all times service must be made in the same manner as a summons or by registered or certified mail, return receipt requested (see Matter of Yak Taxi, Inc. v Teke, supra; CPLR 7503[c]).

Here, with respect to the original notice of petition and petition, Liberty failed to demonstrate proper service. Moreover, it was jurisdictionally defective as it failed to give adequate notice of the return date to the respondents (see Matter of Cartier v County of Nassau, supra; Matter of Hawkins v McCall, 278 AD2d 638 [2000], lv denied, 96 NY2d 713 [2001]; CPLR 403[b], [c]).

With respect to the amended notice of petition, Liberty failed to produce any proof of service upon the respondents in accordance with CPLR 7503[c], and the respondents demonstrated that the amended notice of petition was served on their attorney only by regular mail.

As a result, the amended notice of petition and petition are also jurisdictionally defective (see Matter of Yak Taxi v Teke, supra; Matter of N.Y. Cent. Mut. Fire Ins. Co. v Czumaj, supra; Matter of Cartier v County of Nassau, supra; Matter of Progressive Ins. Co., supra).

Accordingly, it is ORDERED and ADJUDGED that the proceeding is dismissed.

Dated: December 10, 2004

J.S.C.