

**Matter of New York Cent. Mut. Fire Ins.  
Co. v Quadrino**

2008 NY Slip Op 31782(U)

April 29, 2008

Supreme Court, Nassau County

Docket Number: 4315-06/

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 22 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**In the Matter of the Application for an Order  
Staying the Arbitration between,  
NEW YORK CENTRAL MUTUAL FIRE  
INSURANCE COMPANY,**

**Index No. 14315/06**

**Motion Submitted: 2/29/08  
Motion Sequence: 002, 003**

**Petitioner(s),**

**-against-**

**JOHN QUADRINO,**

**Respondent(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....X
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Respondent moves this Court for an order dismissing the Petition and awarding him costs and sanctions. Petitioner opposes the requested relief and cross moves for an order permanently staying arbitration sought by Respondent.

Seeking Supplemental Under-insured Medical ("SUM") benefits under his insurance policy, Respondent filed a Demand for Arbitration against Petitioner on August 17, 2006. A Petition to stay arbitration and compel discovery was timely filed on September 6, 2006. By order dated December 29, 2006, arbitration was temporarily stayed and Respondent was directed "to provide pre-arbitration discovery as provided for in the parties' automobile

insurance policy." This court noted that the policy at issue provided that a person seeking coverage must submit to physical exams as reasonably required, an Examination Under Oath and to provide authorizations for medical and other pertinent records.

There are two applications before the Court: Respondent seeks an order dismissing the Petition and sanctioning Petitioner for refusing to proceed to arbitration. He alleges that he has supplied all of the discovery yet Petitioner has refused to proceed to arbitration. Thus, he seeks dismissal of the Petition and sanctions. Petitioner seeks to stay arbitration permanently on two grounds: (1) that Respondent failed to cooperate and provide discovery, more specifically, to appear for Independent Medical Examinations; and (2) that Respondent made fraudulent statements at his Examination Under Oath when he denied injuring his neck and/or back in a subsequent accident.

"An insurer may obtain a permanent stay of arbitration where it demonstrates that the claimant violated a condition precedent to coverage." (*New York Central Mutual Fire Insurance Company v. Rafailova*, 41 A.D.3d 603, 604, 840 N.Y.S.2d 358 (2d Dept., 2007) citing *Matter of County of Rockland [Primiano Constr. Co.]*, 51 N.Y.2d 1, 409 N.E.2d 951, 431 N.Y.S.2d 478 (1980); *Matter of 3202 Owners Corp. [Billy Contrs., Inc.]*, 25 A.D.3d 715, 811 N.Y.S.2d 727 (2006); *Matter of Travelers Ins. Co. [Magyar]*, 217 A.D.2d 954, 629 N.Y.S.2d 900 [1995]). "An unexcused and willful refusal to comply with disclosure requirements in an insurance policy is a material breach of the cooperation clause and precludes recovery on a claim." (*New York Central Mutual Fire Insurance Company v. Rafailova, supra*, at p. 604, citing *Lentini Bros. v. New York Prop. Ins. Underwriting Assn.*, 53 N.Y.2d 835, 837, 422 N.E.2d 819, 440 N.Y.S.2d 174 (1981); *Baerga v. Transtate Ins. Co.*, 213 A.D.2d 217 (1995); *2423 Mermaid Realty Corp. v. New York Prop. Ins. Underwriting Assn.*, 142 A.D.2d 124, 130-132, 534 N.Y.S.2d 999 (2d Dept., 1988); *Ausch v. St. Paul Fire & Mar. Ins. Co.*, 125 A.D.2d 43, 50, 511 N.Y.S.2d 919 [1987]). "Compliance with such a clause is a condition precedent to coverage, properly addressed by the court." (*New York Central Mutual Fire Insurance Company v. Rafailova, supra*, at p. 604 citing *Matter of County of Rockland [Primiano Constr. Co.]*, *supra*; compare, *Great Canal Realty Corp. v. Seneca Ins. Co., Inc.*, 5 N.Y.3d 742, 833 N.E.2d 1196, 800 N.Y.S.2d 521 [2005]). To vitiate coverage based upon a lack of cooperation, "the insurer must show that the insured 'engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents.'" (*New York Central Mutual Fire Insurance Company v. Rafailova, supra*, at p. 604, quoting *James & Charles Dimino Wholesale Seafood v. Royal Ins. Co.*, 238 A.D.2d 379, 656 N.Y.S.2d 325 (1997), quoting *Avarello v. State Farm Fire & Cas. Co.*, 208 A.D.2d 483, 616 N.Y.S.2d 796 [1994]). "An insured's duty to cooperate is satisfied by substantial compliance, and where a delay in compliance is neither lengthy nor willful, and is accompanied by a satisfactory explanation, preclusion of a claim is inappropriate." (*New York Central Mutual Fire*

*Insurance Company v. Rafailova, supra*, at p. 604-605 citing *V.M.V. Mgt. Co., Inc. v. Peerless Ins.*, 15 A.D.3d 647, 791 N.Y.S.2d 136 (2005); *Avarello v. State Farm Fire & Cas. Co.*, 208 A.D.2d 483, 616 N.Y.S.2d 796 [1994]). In fact, "[a]n insurer who seeks to disclaim coverage on the ground of non-co-operation 'must demonstrate that it acted diligently in seeking to bring about the insured's co-operation, \* \* \* that the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation \* \* \*, and that the attitude of the insured, after his cooperation was sought, was one of 'willful and avowed obstruction.'" (*Metlife Auto & Home v. Burgos*, 4 A.D.3d 477, 772 N.Y.S.2d 357 (2d Dept., 2004) quoting *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 168-169, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967), and *Coleman v New Amsterdam Cas. Co.*, 247 N.Y. 271, 276, 160 N.E. 367 (1928); citing *State Farm Fire & Cas. Co. v. Imeri*, 182 A.D.2d 683, 582 N.Y.S.2d 463 (2d Dept., 1992); see also, *State Farm Mut. Auto Ins. Co. v. Campbell*, 44 A.D.3d 1059, 845 N.Y.S.2d 88 (2d Dept., 2007); *Allstate Ins. Co. v. Guillaume*, 23 A.D.3d 379, 804 N.Y.S.2d 761 (2d Dept., 2005), lv den. 6 N.Y.3d 705 [2006]).

Petitioner has established that discovery and Independent Medical Examinations were sought prior to its filing of the Petition to temporarily stay arbitration. Further, following this court's order, it repeatedly sought authorizations and documents from Respondent. Moreover, Respondent failed to appear or notify Petitioner or its attorney that he would not or could not appear or that he objected to the Independent Medical Examinations. Respondent's counsel believed that he had fulfilled his duties by Respondent appearing for an Independent Medical Examination by Dr. Russo on March 6, 2007. However, no explanation has been offered for not voicing an objection on this basis. The letters sent to counsel on August 29, 2007 and September 12, 2007, clearly state that IMEs had been scheduled with two doctors, other than Dr. Russo. The letters also stated instructions in the event the scheduled appointments were inconvenient. Respondent failed to appear for or cancel the examinations. No explanation was offered at the time. Further, Petitioner's correspondence to Respondent's counsel from January 24, 2007, February 1, 2007, March 2, 2007, April 5, 2007 and May 16, 2007 documents Respondent's chronic failure to provide discovery.

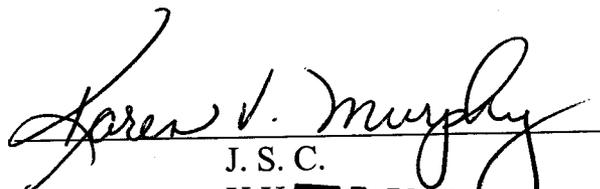
Petitioner has established its diligence in procuring Respondent's appearance for additional Independent Medical Examinations, and other discovery items, that its efforts truly sought his cooperation, and that Respondent's failure to appear and provide discovery amounted to "willful and avowed obstruction." (See, *State Farm Mut. Auto Ins. Co. v. Campbell, supra*; *Continental Ins. Co. v Bautz*, 29 A.D.3d 989, 815 N.Y.S.2d 718 (2d Dept., 2006); *Eagle Ins. Co. v. Sanchez*, 23 A.D.3d 655, 805 N.Y.S.2d 103 (2d Dept., 2005); *Eveready Ins. Co. v. Mack*, 15 A.D.3d 400, 790 N.Y.S.2d 48 [2d Dept., 2005]).

Petitioner has also established that at his Examination Under Oath, Respondent repeatedly denied injuring his neck and back in a subsequent motor vehicle accident despite stating in his applications for no-fault benefits that he had in fact received such injuries. In fact, Petitioner has procured a treating chiropractor's report indicating that Respondent received treatment for injuries to his neck and back as a result of that accident.

Respondent's motion to dismiss the petition and for the imposition of sanctions is denied. Petitioner's cross motion to permanently stay arbitration is granted.

The foregoing constitutes the Order of this Court.

Dated: April 29, 2008  
Mineola, N.Y.

  
J. S. C.  
X X **ENTERED**

JUN 19 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE