

**Matter of Govt. Empls. Ins. Co. v
Integon Natl. Ins. Co.**

2008 NY Slip Op 32316(U)

August 12, 2008

Supreme Court, Richmond County

Docket Number: 0080137/2008

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 80137/08
Motion No.:001**

**In the Matter of the Application of
GOVERNMENT EMPLOYEES INSURANCE COMPANY,
to Stay Arbitration**

Petitioner

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

NADIRAH SHAKOOR,

Respondent

and

**INTEGON NATIONAL INSURANCE COMPANY, and
JOSE MANUEL SALAS OLEDO**

Proposed Additional Respondents

The following items were considered in the review of this motion to permanently stay arbitration.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2, 4
Replying Affidavits	3, 5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Petitioner, Government Employees Insurance Company, (“GEICO”) moves this court pursuant to CPLR § 7503(c) for an order granting a permanent stay of arbitration; or in the alternative a temporary stay pending a framed issue hearing to determine whether the offending vehicle was uninsured at the time of the alleged accident. Petitioner’s motion is granted in part.

The respondent Nadirah Shakoor, (“Shakoor”) alleges that she sustained injuries as a result of a rear end collision on November 4, 2006. The police report annexed to petitioner’s

moving papers as Exhibit “B” indicates that the other driver was Jose Manuel Salas Oleda (“Oleda”) of 207 Vance Street Wilson, North Carolina 27093. At the scene of the accident Oleda presented an insurance identification card bearing policy number SAN3796887. According to Exhibit “C”, a letter dated January 29, 2007 to petitioner’s moving papers Oledo’s insurance company, Integon National Insurance Company (“Integon”) received knowledge that an accident occurred on November 17, 2006. That same letter informed Oledo that Integon’s position was that there was no coverage for this accident due to his breach of the terms of the insurance policy for failure to cooperate in the accident investigation.

GEICO argues that arbitration for uninsured motorist benefits is improper as the driver of the offending vehicle had an insurance policy with Integon. Respondent Shakoor opposes this motion arguing that GEICO’s petition is defective as a matter of law, as it failed to properly seek a stay of arbitration in accordance with the CPLR. Integon opposes GEICO’s motion arguing that its rejection of coverage of Oledo is lawful and that arbitration is appropriate.

This court finds, Shakoor’s opposition to GEICO’s motion is without merit. The CPLR states in pertinent part that, “An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded.”¹ The Court of Appeals interpreted this language in *Matter of Knickerbocker Insurance Company*.² That case held that where service of a demand for arbitration is deemed served on the day the defendant receives said demand.³ In this instance, petitioner received the demand for arbitration on April 7, 2008 and served its notice of motion on April 28, 2008. While twenty-days from April 7th is April 27th, this year April 27th fell on a Sunday. As such, petitioner’s application to stay arbitration was timely served on Monday, April 28, 2008.⁴

¹ CPLR § 7503(c).

² *Matter of Knickerbocker Ins. Co.*, 28 NY2d 57, [1971]

³ *See also*, Siegel, NY Prac. § 593, at 1003 [3d ed].

⁴ NY GCL § 25-a(1).

The court now turns its attention to Integon's contention that its rejection of coverage for Oledo on grounds that he failed to cooperate is lawful; and as such GEICO is not entitled to a stay of arbitration. Integon supports its contention by arguing that because Oledo purchased his insurance policy in North Carolina for an automobile registered in North Carolina; that North Carolina law should apply in this matter. The Appellate Division, Second Department held in *Matter of Eagle Insurance Company v. Singletary* that insurance contracts are governed by the law of the state where the principal parties understood to be the ". . . principal location of the insured risk . . ." ⁵

It is the finding of this court that North Carolina law must be applied in this case in the evaluation of the disclaiming of coverage based on non-cooperation of the insured. GEICO and Integon both cite the leading North Carolina concern an insurer's disclaiming of coverage - *Henderson v Rochester American Insurance Company*.⁶ The Supreme Court of North Carolina held that, "[a]n insurer will not be relieved of its obligation because of an immaterial or mere technical failure to comply with the policy provisions. The failure must be material and prejudicial."⁷

Counsel for Integon directs this court's attention to another decision of the North Carolina Supreme Court in *MacClure v. Accident & Casualty Insurance Company*.⁸ In that case the Supreme Court evaluated breach of the cooperation clause in insurance policies in the context of a nonsuit based upon an affirmative defense of an insurance company that there was a breach of the policy's cooperation clause by the insured. In that case, North Carolina's Supreme Court reversed the trial court's judgment of nonsuit and remanded the case for a trial. In so concluding the Supreme Court held

⁵ *Matter of Eagle Ins. Co. v. Singletary*, 279 AD2d 56,59 [2d Dep't 2000].

⁶ *Henderson v. Rochester Am. Ins. Co.*, 254 NC 329, [NC 1961].

⁷ *Id.*

⁸ *MacClure v. Accident & Casualty Ins. Co.*, 229 NC 305, [NC 1948].

If the insurer relies on a substantive defense reserved in the policy, the defense becomes an affirmative one and the case is for the jury. ‘Whether or not in any particular instance the insured has so far failed to give the cooperation in and about the defense of the action which is contemplated by the cooperation clause in the policy will ordinarily be a question of fact determinable by the jury.’⁹

Based on the factual landscape currently before this court, it is impossible to hold as a matter of law that Integon’s disclaimer of coverage based breach of the cooperation clause is lawful under the laws of the state of North Carolina.

The petitioner’s motion is granted to the extent of directing that a hearing be held to determine insurance coverage. Accordingly, it is hereby:

ORDERED, that the petition to stay arbitration is granted to the extent that a trial is directed of the preliminary issues as to coverage, and the arbitration is stayed pending such trial in accordance with the laws of the state of North Carolina; and it is further

ORDERED, that within sixty (60) days from the date of this order, the petitioner shall file with the Clerk of Civil Term, 130 Stuyvesant Place, Room 302, Staten Island, New York, a copy of this order with notice of entry, a note of issue and a statement of readiness, and shall pay the appropriate fees, if any; and it is further

ORDERED, that the case is referred to Judicial Hearing Officer Michael Ajello to hear and determine the issue of insurance coverage; and it is further

ORDERED, that the proceeding shall be dismissed if the petitioner does not comply with the above paragraphs; and it is further

ORDERED, that a copy of this order with notice of entry shall be served upon the

⁹ Id. (internal citations omitted)

attorneys for the respondent and the arbitrator within 20 days of entry hereof; and it is further

ORDERED, that Integon and Jose Manuel Salas Oledo shall be added as party respondents upon service upon them of a copy of this order with notice of entry, together with copies of all papers previously served in the proceedings; and it is further

ORDERED, that the caption of this proceeding is amended to reflect inclusion of said additional party respondents and the Clerk shall mark their records accordingly.

ENTER,

DATED: August 12, 2008

Joseph J. Maltese
Justice of the Supreme Court