

Matter of Progressive Ins. Co. v Herschberg
2011 NY Slip Op 31288(U)
March 30, 2011
Sup Ct, Nassau County
Docket Number: 000014/10
Judge: F. Dana Winslow
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 4
NASSAU COUNTY**

**In the matter of the Application of
PROGRESSIVE INSURANCE COMPANY,**

**RETURN DATE: 12/14/10
SEQUENCE NO.: 002**

Petitioner,

- against -

INDEX NO.: 000014/10

MARC HERSCHBERG,

Respondent.

-
- The following papers read on this petition (numbered 1-3)**
 - Petition to Stay Arbitration.....1**
 - Affirmation in Opposition.....2**
 - Reply Affirmation.....3**

Petitioner PROGRESSIVE INSURANCE COMPANY (“Petitioner”) seeks an order pursuant to CPLR §7503 staying the underinsured motorist arbitration brought by respondent MARC HERSCHBERG (“Respondent”). The arbitration had been temporarily stayed by prior order of the Court to allow for discovery in accordance with the applicable policy of insurance. Petitioner now seeks a permanent stay of arbitration, or, in the alternative, a second temporary stay pending additional discovery and a framed issue hearing on the question of coverage.

Respondent’s claim for underinsured motorist (“UIM”) benefits arises out of a motor vehicle accident that occurred on October 20, 2008 in Nassau County, New York. Respondent brought a personal injury action against the owner and driver of the adverse vehicle, which resulted in a settlement in the amount of \$25,000 (the adverse vehicle’s policy limit), to which Petitioner consented. Respondent then demanded an underinsured motorist arbitration on or about December 17, 2009.

The original petition to stay arbitration was timely filed on January 4, 2010. By Short Form Order dated March 31, 2010 and entered on May 11, 2010, this Court granted a temporary stay of arbitration pending the completion of discovery. Respondent submitted to an examination under oath (“EUO”) on May 12, 2010 and a medical examination by Petitioner’s designated physician on September 21, 2010.

By letter dated August 4, 2010, Respondent's counsel informed petitioner that he had contacted the American Arbitration Association and requested a new hearing date. On or about August 12, 2010, Petitioner issued a letter disclaiming coverage of the UIM claim on the ground that Respondent, at his EUO, had testified falsely under oath as to his physical disabilities, and thereby breached the policy of insurance.

On or about August 19, 2010, the American Arbitration Association issued a letter notifying the parties of the appointment of an arbitrator and of the scheduling of a pre-hearing telephone conference regarding the UIM arbitration. Both parties participated in the telephone conference, held on September 13, 2010. By letter dated October 7, 2010, the American Arbitration Association notified the parties that the hearing was scheduled for January 12, 2011. The instant petition was filed on November 18, 2010.

The instant petition is based upon Petitioner's assertion that coverage of the subject UIM claim was vitiated by Respondent's breach of the insurance contract. Petitioner alleges that Respondent misrepresented material facts at his EUO in violation of Part VII (General Provisions) of the insurance policy, which provides:

FRAUD OR MISREPRESENTATION

This policy was issued in reliance upon the information provided on your insurance application. We may cancel this policy and deny coverage under this policy at any time, including after the occurrence of an accident or loss, if you:

1. made incorrect statements or representations to us with regard to any material fact or circumstance;
 2. concealed or misrepresented any material fact or circumstance; or
 3. engaged in fraudulent conduct;
- at the time of application, or in connection with the presentation or settlement of a claim.

Specifically, Petitioner alleges that Respondent testified falsely regarding his physical disabilities arising from the subject accident and consequent knee surgery. Respondent claimed that, among other things, he was unable to work, had difficulty walking, and was unable to lift heavy objects, run, ski, dance or walk up stairs. He also claimed a limited ability to bend his knee. [Motion, Exh. C pp. 70-73.] Petitioner alleges that such claims are belied by photographs posted in the spring and early summer of 2010 on the publicly available portions of Respondent's online social network ("Facebook") account. The photographs depicted Respondent engaged in various activities, including, among other things, standing on top of a pool slide, climbing the ladder to the pool slide, and bending over a boat trailer. Some of the photographs were posted in an album entitled "Another day of play... I gotta get a job!" Petitioner also attaches textual statements appearing on Respondent's Facebook page, that, according to Petitioner, further contradict Respondent's EUO testimony. [See Motion, Exh. D]

Petitioner seeks a permanent stay of arbitration, based upon its disclaimer of coverage. In the alternative, Petitioner seeks a temporary stay pending a framed issue hearing on the question of coverage; particularly, whether or not coverage was vitiated by Respondent's breach of the policy. Toward that end, Petitioner seeks additional discovery, including a further EUO and an Order compelling Respondent to provide unlimited access to his Facebook account.

Respondent opposes the petition on the grounds that (among others): (i) the petition is untimely; (ii) the issues raised in this petition should be resolved in arbitration; (iii) there were no misrepresentations, insofar as Respondent made corrections on his sworn errata sheet. Respondent also objects to any additional discovery.

Respondent asserts that the instant petition is untimely because it was filed (on November 18, 2011) more than twenty days after the demand for arbitration (received on December 22, 2010). *See CPLR §7503(c)*. Petitioner argues that the original petition was timely filed on January 4, 2011, and that the instant petition is merely "an extension" or "refiling" of the original petition, warranted by the discovery of new evidence.

The Court finds that the instant petition is not time-barred. The instant application is characterized as a second petition but it is more aptly a motion within a special proceeding. The proceeding itself was timely commenced and never marked disposed or reduced to judgment. Further motions in the context of an ongoing proceeding are not precluded. Petitioner would not have been barred from amending the original petition to add the new allegations regarding breach of contract. *See Allcity Ins. Co. v. Russo*, 199 AD2d 88. Casting the application in the form of a second petition instead of an amendment does not alter the result.

Moreover, the twenty-day bar found in *CPLR §7503(c)* operates only in connection with a proper demand for arbitration in the form prescribed by statute. *Matter of Blamowski (Munson Transp., Inc.)*; 91 NY2d 190; *Cooper v. Bruckner*, 21 AD3d 758; *Allstate Ins. Co. v. Sideridis*, 248 AD2d 611; *State Farm Mut. Automobile Ins. Co. v. Szwec*, 36 AD2d 863. In the case at bar, there was only one proper demand for arbitration, which was timely stayed. Presumably, the second application for a stay was triggered by the rescheduling of the arbitration hearing. No new demand in proper form was issued which would have supplanted the original demand, and thus, no twenty-day limitation took effect.

The Court notes that Petitioner cannot be said to have participated in the arbitration by virtue of its participation in the September 13, 2010 telephone conference. *See Matter of Blamowski*, 91 NY2d at 195 (and cases cited therein). Accordingly, the present application is not barred on that basis. *See CPLR §7503(b)*.

The issue raised in this petition is properly determined by the Court, rather than the arbitrator. The applicable supplementary uninsured/underinsured motorists endorsement provides for arbitration of only two issues: (i) whether the insured “is legally entitled to recover damages from the owner or operator of an uninsured/underinsured motor vehicle” (fault), and (ii) the “amount of payment that may be owing” (damages). [Petition Exhibit B, p.33, s.12.] Coverage issues, including the question of whether or not Respondent breached the policy, are for the Court to resolve. *See Matter of Government Employees Ins. Co. (DePietto)*, 226 AD2d 723. *See also Rosenbaum v. American Surety Co.*, 11 NY2d 310; *Travelers Property Casualty Corp. v. Saraniti*, 286 AD2d 256.

The seeming discrepancy between Respondent’s EUO testimony and the postings found in Respondent’s Facebook account raise an issue of fact warranting a framed issue hearing. Respondent’s corrections to his deposition testimony do not extinguish the issue of fact, particularly in the absence of any explanation for the substantive changes. *See CPLR §3116(a), Dima v. Morrow Street Assoc., LLC*, 31 AD3d 697. The Court finds that further discovery, including an additional EUO and “unlimited access” to Respondent’s private Facebook account, is unwarranted at this time, insofar as the demand is overly broad, and there is no showing that the material sought is necessary and not cumulative. *See McCann v. Harleysville Ins. Co.*, 78 AD3d 1524.

The Court has considered the remaining contentions of the parties and finds them lacking in merit. Based upon the foregoing, it is

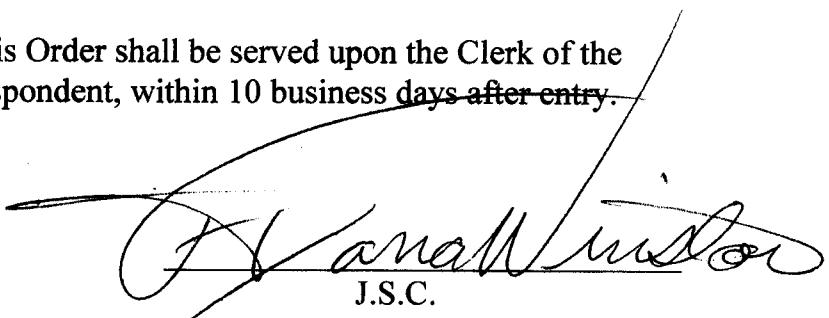
ORDERED, that instant application is **granted** to the extent that the arbitration of Respondent’s UIM claim is **stayed temporarily**, pending a framed issue hearing on the issue of whether or not Respondent breached the policy by providing false testimony at his EUO; and it is further

ORDERED, that Petitioner shall serve and file a Note of Issue placing the matter on the Calendar of the Calendar Control Part for a framed issue hearing in accordance with the above. The Note of Issue shall be filed no later than 90 days after entry of this Order, in default of which the action shall be deemed abandoned (see **CPLR §3216**). The Note of Issue shall be accompanied by a copy of this Order and a statement that a copy of this Order has been mailed to Respondent within 10 business days after entry.

ORDERED, that the instant application is **denied, without prejudice**, to the extent that it seeks an Order compelling further discovery prior to the framed issue hearing; and it is further

ORDERED, that a copy of this Order shall be served upon the Clerk of the Calendar Control Part, and upon Respondent, within 10 business days after entry.

Dated: March 30, 2011


J.S.C.

ENTERED
MAY 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE