

Decided on June 23, 2008

Supreme Court, Queens County

Edison Montoya and Eider Perez, Petitioners,

against

**Lumbermens Mutual Casualty Company/Kemper
Insurance Company, Respondent.**

16187/05

Jaime A. Rios, J.

On January 3, 2001, Edison Montoya and Eider Perez (petitioners) were passengers in a vehicle owned and operated by Antonio Calvi and insured by Kemper, which was involved in an accident with an uninsured motor vehicle. As a result of the occurrence, the petitioners allegedly sustained personal injuries and demanded arbitration for uninsured motorist (UM) benefits with Kemper.

Kemper commenced a CPLR 7503 proceeding seeking to stay the UM arbitration demanded by petitioners under (Queens county) index number 403/2002 entitled *Lumbermens Mut. Cas. Co. v Candado, Montoya & Perez*. Following a framed issue hearing on April 12, 2004, this court (Rios, J.) rendered a decision in favor of petitioners, denying Kemper's application for a stay of arbitration as to Montoya and Perez.

The arbitration in this matter was held on April 4, 2005. By decision, dated April 29, 2005, the arbitrator found that petitioners "failed to establish a prima facie case of negligence against the operator of an uninsured motor vehicle", dismissing their claims against Kemper.

By order to show cause submitted on October 26, 2005, petitioners sought to vacate the April 29, 2005 arbitration [*2]award contending that the arbitrator's finding of no liability was inconsistent with the parties concession of liability. Kemper did not oppose the order to show

cause. By memorandum, dated October 31, 2005, this court (Rios, J.) granted the petitioners' motion to vacate the arbitration award, directing the submission of an order. By order and judgment dated July 31, 2006, this court (Rios, J.) vacated the arbitration award of April 29, 2005 and directed American Arbitration Association to schedule a new arbitration before a new arbitrator.

Kemper now seeks to vacate the July 31, 2006 order of this court on the basis that it has a reasonable excuse and meritorious defense as to its default in opposing the order to show cause. Kemper contends that its prior counsel's lack of permission to enter into an agreement conceding liability, which it first learned of after the order to show cause was granted, constituted a reasonable excuse for its default. In addition, Kemper claims that the arbitrator's finding that petitioners "failed to establish a prima facie case of negligence against the operator of an uninsured motor vehicle" constitutes a meritorious defense.

Montoya and Perez oppose Kemper's application contending that: (1)Kemper's prior counsel acted within its capacity as legal counsel when it conceded liability; (2)Kemper delayed in taking any action, thereby surrendering any right it may have had to the requested relief, and (3)Kemper's argument that the arbitrator's finding that petitioners failed to establish a prima facie case of liability against the operator of an uninsured motor vehicle constitutes a meritorious defense lacks merit in light of the concession of coverage.

Pursuant to CPLR 5015: Relief from judgment or order

"(a)On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry".

It is well settled that to vacate an order entered upon default, the moving party is obligated to establish both a reasonable excuse for the default and the existence of a meritorious cause of action (*see Travelers Prop. Cas. Corp. v Bocharova*, 2 AD3d 533 [2003]; *C.N.A. v [*3]Shim*, 290 AD2d 438 [2002]; *AIU Ins. Co. v Fernandez*, 281 AD2d 542 [2001]; *Aetna Life & Cas. Co. v Walker*, 255 AD2d 381 [1998]; *Empire Ins. Co. v Zamiaty*, 161 AD2d 178 [1990]). The determination of what constitutes a reasonable excuse lies within the court's discretion (*see Hageman v Home Depot U.S.A., Inc.*, 25 AD3d 760 [2006]).

Here, Kemper's excuse that it first learned about its prior counsel's agreement to concede liability and the underlying order to show cause to vacate the arbitration award upon receipt of the court's order, is devoid of any detail. The date and circumstances of its alleged receipt of the July 31, 2006 order is unspecified. Despite the passage of almost two years, Kemper fails to explain its delay in making this motion. Moreover, there is no affidavit of merit from the attorney

who allegedly exceeded his authority in support of the motion.

Accordingly, Kemper's motion seeking vacatur of the July 31, 2006 order is denied.

Dated: June 23, 2008 _____

J.S.C.