

Matter of American Mfrs. Mut. Ins. Co. v Belgrave

2005 NY Slip Op 30596(U)

August 17, 2005

Supreme Court, New York County

Docket Number: 104777/04

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

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In the Matter of the Arbitration
Attempted to be had between

AMERICAN MANUFACTURERS MUTUAL
INSURANCE CO.,

Index No.: 104777/04

Petitioner,
- against -

DECISION AND ORDER

MAXINE BELGRAVE,

Respondent,

- and -

SHAMLAL PAWA and ALLSTATE INSURANCE CO.,

Additional Respondents.

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EMILY JANE GOODMAN, J.:

Petitioner American Manufacturers Insurance Co. (American) moves for an order to reject the Referee's recommendation rendered upon conclusion of the framed issue hearing, pursuant to CPLR 4403.

American commenced this action to stay the uninsured motorist arbitration, alleging that the hit-and-run vehicle involved in the underlying accident was insured by respondent Allstate Insurance Co. (Allstate) at the time of the accident. The court granted a temporary stay of the arbitration until two issues were addressed: (1) whether a policy of automobile insurance issued by Allstate to Shamlal Pawa (Pawa), with respect to a certain automobile alleged to have been in the accident

which caused injury to respondent Maxine Belgrave (Belgrave), was in effect at the time of the accident on May 16, 1999; and (2) whether Belgrave had timely reported the accident to the police in conformity with the requirements of Insurance Law § 5208 and the policy of automobile insurance issued by American.

On February 18, 2005, Special Referee Leslie S. Lowenstein issued a report on the two issues referenced to him, finding that American had not carried its burden of demonstrating that the hit-and-run vehicle was insured by Allstate at the time of the accident, and further finding that Belgrave timely reported the accident in conformity with Insurance Law § 5208 and American's insurance policy. Petitioner now moves to reject the Referee's recommendation and to permanently stay the uninsured motorist arbitration.

Facts

This action arises from an accident between two vehicles on May 16, 1999. Belgrave was a passenger in one of the vehicles, a Hyundai Sonata, insured by American. At the time of the accident, the Hyundai was driven by Gregory Burrowes, with his mother Vera Burrowes and Belgrave as passengers. The Hyundai was struck in the rear by an automobile bearing license plate number T52 5UL, claimed by the Burrowes to be a black Maxima driven by a black man with dark skin, who immediately left the scene of the accident. Vera Burrowes recorded the license plate number of the

fleeing vehicle. The license plates were reported stolen on May 12, 1999, four days before the accident.

Belgrave sought to recover damages under the uninsured motorist provisions of American's insurance policy issued to the Hyundai, owned by Vera Burrowes. The matter was noticed for arbitration. American moved to stay the arbitration, contending that the vehicle which struck its insured was owned by Pawa and covered by Allstate. American also contended that uninsured motorist coverage was unavailable to Belgrave because she did not timely report the accident to the police, in conformity with Insurance Law § 5208 and the policy provisions issued by American.

At the framed issue hearing, Pawa and Allstate testified that Pawa's automobile was stolen on May 12, 1999, four days before the accident. However, the Referee noted that documentary evidence, such as a police report from the time of theft, and any report by Allstate detailing the claims and investigation regarding the theft, were not available as evidence. The only documentary evidence submitted was a copy of a check for approximately \$19,000, issued to Pawa for the value of the vehicle, a DMV form indicating that license plates bearing the number T52 5UL were stolen on May 12, 1999, and a police report of the theft made by Allstate on April 15, 2004, five years after the theft.

Discussion

Generally, courts will not disturb findings of the referee to the extent that the record substantiates his findings. *Rezzadeh v Lucas*, 253 AD2d 698 (1st Dept 1998); *Kardanis v Velis*, 90 AD2d 727 (1st Dept 1982). The report of a referee should be confirmed if the findings are supported by the record. *R.V.R. Realty, LLC v Tenants Alliance*, 305 AD2d 289, 290 (1st Dept 2003); *Namer v 152-54-56 West 15th St. Realty Corp.*, 108 AD2d 705 (1st Dept 1985). "[T]he trier of the facts, hearing and seeing the witnesses, is best capable of assaying their veracity and the weight to be attached to their testimony and, for that reason, if there is sufficient evidence in a record to sustain a Referee's findings of fact the reviewing authority hesitates to disturb the result." *In re Machinery Builders*, 47 NYS2d 735, 737 (Sup Ct, Queens County 1944).

The Referee's finding, that the evidence produced did not adequately identify the hit-and-run vehicle as belonging to Pawa, is sufficiently substantiated by the record. The Referee found that "the paucity of records made available by Allstate at the hearing makes it impossible to ascertain the status of the Maxima vehicle owned by respondent Pawa either at the time of the accident or at the present time." Referee's Report, Affirmation in Opposition, Ex. E, at 6. American contends that it is clear that the hit-and-run vehicle was Pawa's Maxima. In addition to

the testimony that the hit-and-run vehicle, bearing Pawa's license plates, was driven by a dark-skinned man, petitioner alludes to the fact that Pawa is also dark skinned and of Indian origin. However, Pawa and Allstate contend that Pawa's vehicle was stolen on May 12, 1999, four days before the accident occurred.

Despite the fact that there was no police report documenting the theft of the car, Pawa's testimony, together with the copy of the check for the value of the car, support Allstate's position that the car was, in fact, stolen. Further, even were the evidence regarding the theft of the car inadequate, the documentary evidence shows that the license plates were reported stolen on May 12, 1999, four days before the accident. This leads to the conclusion that, whether or not the car was also stolen, the plates were no longer on a vehicle that was being driven with the consent of the owner of the plates. Under such circumstances, whether the car that hit the one in which Belgrave was travelling was Pawa's Maxima or some other vehicle, it was not insured by Allstate at the time of the accident. Thus, the record substantiates the Referee's finding that it was "impossible to identify with any real precision the vehicle which struck Petitioner insured's vehicle" (Referee's Report, Affirmation in Opposition, Ex. E., at 6) and, therefore, supports

the conclusion that Belgrave is within the ambit of the uninsured motorist coverage of American's insurance policy.

The Referee's finding on the second issue, that the accident of May 16, 1999 was timely reported to the police by Belgrave within the requirements of Insurance Law § 5208 and the similar provisions of American's insurance policy, is also sufficiently substantiated by the record.

Insurance Law § 5208 (a) (2) (A) and (B) require "[a]ny qualified person having a cause of action because of death or bodily injury, arising out of a motor vehicle accident occurring within this state" to report the accident

within twenty-four hours after the occurrence to a police, peace or judicial officer in the vicinity or to the commissioner. . . .

(B) The fact that the accident was not reported within twenty-four hours after the occurrence. . . shall not prejudice the rights of the person if it is shown that it was not reasonably possible to make such a report or that it was made as soon as was reasonably possible.

Id. American argues that Insurance Law § 5208 requires notification within 24 hours, to the police, in order to prevent the filing of fraudulent claims. See *Matter of Dixon v Motor Vehicle Acc. Indem. Corp.*, 56 AD2d 650 (2d Dept 1977); *Matter of Boxill v Motor Vehicle Acc. Indem. Corp.*, 33 AD2d 13 (1st Dept 1969). However, it must also be noted that the legislative purpose is to afford the injured person the same protection he or she would have if the tortfeasor were covered by insurance, and

the statute should be liberally construed to serve rather than defeat those ends. *Canty v Motor Vehicle Acc. Indem. Corp.*, 95 AD2d 509 (2d Dept 1983); *Matter of Taub (Motor Vehicle Acc. Indem. Corp.)*, 31 AD2d 378, 381 (1st Dept 1969); *Gordon v Motor Vehicle Acc. Indem. Corp.*, 90 Misc 2d 382 (Sup Ct, Bronx County 1976). The court cannot so narrowly construe the statute so as to require written or in personam notice to the police. *Matter of Country Wide Ins. Co. (Russo)*, 201 AD2d 368 (1st Dept 1994); see also *Dixon v Motor Vehicle Acc. Indem. Corp.*, 56 AD2d at 651; *Gordon* at 384. Each application brought pursuant to this statute must depend upon the evidence adduced and the credibility of the witnesses. *Dixon* at 652; *Gordon* at 384.

Here, the Referee found Gregory and Vera Burrowes to be credible with respect to their testimony that they telephoned the police on the day of the accident, and attempted to report it at that time. They filed a report at a Brooklyn police precinct two to three days later, after they ascertained the location of the correct police precinct. The Referee also found that the reason for the delay to file a report was that the Burrowes were confused as to the location of the police precinct where the accident must be reported. Therefore, the Referee's finding that the May 16, 1999 accident was duly and timely reported is supported by the record.

Conclusion

Accordingly, it is hereby

ORDERED that the motion is denied, and the report and recommendation of the Referee is confirmed; and it is further

ORDERED that the stay of arbitration imposed by the decision of this court, dated June 22, 2004, is lifted and the parties are directed to proceed to arbitration; and it is further

ORDERED that respondents Shamlal Pawa and Allstate Insurance Company shall serve a copy of this Decision and Order with notice of entry on the petitioner, respondent Maxine Belgrave and the arbitrator within 30 days from the date hereof.

Dated: August 17, 2005

ENTER:



J. S. C.
EMILY JANE GOODMAN

FILED
AUG 25 2005
NEW YORK
COUNTY CLERK'S OFFICE