

Matter of ARI Ins. Co. v Adelman

2007 NY Slip Op 30018(U)

March 5, 2007

Supreme Court, New York County

Docket Number: 0116915

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LEON HILCHMAN, Esq. Justice

PART 40

Index Number : 116915/2006

ARI INSURANCE

INDEX NO. 11 6915/2006

vs

ADELMAN, ERIKA

MOTION DATE 12/17/07

Sequence Number : 001

MOTION SEQ. NO. 001

STAY PROCEEDINGS

MOTION CAL. NO. _____

his motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1, 2, 3
4, 5
6

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is respectfully denied and stayed

NOTICE TO APPEAR
This notice is hereby given to the Deputy Clerk and notice of this court to be filed with the clerk. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 3. 5. 07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In the Matter of the Application for an Order Staying
Staying the Arbitration Between ARI INSURANCE
COMPANY,

Index No. 116915/06

Petitioner,

**DECISION AND
JUDGMENT**

- against -

ERIKA ADELMAN,

Respondent.

Nicholas Figueroa, J.:

Petitioner moves to stay respondent's demand for arbitration under the Supplementary Uninsured Motorist provisions of the policy between petitioner and its insured. Petitioner's insured's vehicle struck respondent on October 4, 2003. Respondent's demand for arbitration is dated May 24, 2006.

Petitioner seeks a stay of the arbitration on the ground that respondent has refused to submit to an independent medical examination and an examination under oath. Petitioner argues that compliance with the demand is mandated by the policy terms; however, petitioner does not attach a copy of the policy. Petitioner also alleges that it is entitled to the examinations by New York State Insurance Department regulation, 11 NYCRR 60-2.3.

Petitioner orally requested respondent's attendance at the examinations in October, 2006. Respondent provided petitioner authorizations for her medical records, but refused to attend the examinations. Petitioner made a written demand on November 3, 2006.

Respondent refused to attend the examinations. In a letter dated November 13, 2006, her attorney stated that the demand was untimely, as it was made five months after petitioner received

the arbitration demand.

Petitioner now argues that the instant petition is untimely, as petitioner commenced it more than twenty days after receiving the arbitration demand on June 1, 2006. The court's file indicates that petitioner filed its notice of petition and petition on November 16, 2006.

Respondent submits the affidavit of service of her arbitration demand. The affidavit does not recite the precise date of mailing; rather, it recites that it was served, by certified mail, return receipt requested, on an unspecified date in April, 2006. However, the affidavit contains the certified mail number and was notarized on May 24, 2006. Respondent also submits the United States Postal Service document showing that petitioner received and signed for the papers on June 1, 2006.

Petitioner submits a response to respondent's opposition papers that it styles as a "Reply Petition In Support Of A Temporary Stay Of Arbitration", signed by petitioner's attorney. This is defective for several reasons. There is no such document recognized by the Civil Practice Law and Rules. Moreover, the court cannot treat this document as a reply affirmation as it does not contain language indicating that it is an affirmation made under penalty of perjury. Nor is the document an affidavit, as it is not sworn to and is not notarized.

Even if the purported reply were in proper form, it does not defeat respondent's contention that the petition was untimely. The reply alleges that the affidavit of service of the arbitration demand is "facially defective" because the service date is blank; and, because the affidavit says "this demand" was served, but does not say what "this demand" refers to. Next, the reply asserts that the return receipt is dated June 1, 2006, two months after the purported service of a demand." Finally, the reply states that the affidavit of service is "incredulously notarized on May 24, 2006" and that this date was "approximately two months after 'this Demand' was served in [sic] an unspecified day in April 2006."

The allegations in the reply document are meritless.

The Postal Service document respondent submits shows that petitioner received the arbitration demand on June 1, 2006. Even if the affidavit of service were defective, petitioner's receipt of the arbitration demand cured any defect.

In any event, the affidavit of service was not defective. The recitation that "this demand" was served is sufficient. The court cannot imagine any language that could be more specific. The fact that the affidavit omitted the date of service is of no consequence, as it recites the certified mail number and the delivery acknowledgment, signed by petitioner's agent, shows that the document sent under that number was received. Similarly, the fact that the affidavit of service was notarized in May, 2006 is inconsequential, as there is no time limit within which an affidavit must be notarized.

The fact that petitioner did not receive the demand until June 1, 2006 is of no moment. The crucial fact is that it received the document.

Because the papers establish that petitioner received the arbitration demand on June 1, 2006, its request for a stay of arbitration is time barred (CPLR 7503(c); see *Matter of Steck v. State Farm Insurance Company*, 89 NY2d 1082). The court has no jurisdiction to entertain a late application (see *Matter of Metropolitan Property and Liability Insurance Company v. Hancock*, 183 AD2d 831).

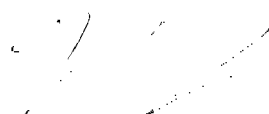
Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: March 5, 2007

ENTER



J.S.C.