

Matter of Progressive Northeastern Ins. Co. v Dillinger
2007 NY Slip Op 30587(U)
April 3, 2007
Supreme Court, New York County
Docket Number: 0113406/2006
Judge: Nicholas Figueroa
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGLIERNA
Justice

PART 46

- Index Number : 113406/2006
PROGRESSIVE NORTHEASTERN
vs
DILLINGER, MICHAEL
Sequence Number : 001
STAY PROCEEDINGS

INDEX NO. 113406/06
MOTION DATE 12/5/06
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered _____

motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Be accompanying decision and order

FILED
APR 06 2007
COUNTY CLERK'S OFFICE
NEW YORK

WJ

Dated: April 3, 2007

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
PROGRESSIVE NORTHEASTERN
INSURANCE COMPANY,

Index No.
113406/06

Petitioner,

**DECISION
AND ORDER**

- against -

To Stay the Arbitration sought to be had by
MICHAEL DILLINGER,

Respondents.

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NEW YORK

Nicholas Figueroa, Justice:

Petitioner seeks a permanent stay of the arbitration of respondent's underinsured motorist claim. Alternatively, it requests a temporary stay of arbitration pending receipt of various items of discovery from respondent.

Petitioner alleges that the underinsured motorist claim was untimely under its insurance policy provision requiring a notice of claim as soon as practicable. The accident in which respondent was injured occurred on December 27, 2005; respondent alleges that it did not receive the notice of claim until August 9, 2006, some eight months later.

Respondent asserts that he first obtained medical care on January 28, 2006 and that his physician did not discover a serious injury. A February 25, 2006 MRI was inconclusive, leading respondent to still think that he was not seriously injured.

However, on April 17, 2006, petitioner learned that he had a torn medical meniscus. He underwent surgery on June 17, 2006 and retained an attorney the next day. He retained his present attorney two weeks later and commenced an action on June 30, 2006.

On July 24, 2006, respondent learned that the defendant in his civil action was insured for \$25,000 by Government Employees Insurance Corporation (GEICO). GEICO informed respondent that it did not provide excess insured coverage. GEICO tendered its policy in settlement of the action.

When GEICO disclosed its policy limitations on July 24, 2006 respondent sent his underinsurance claim to petitioner. Respondent alleges that petitioner received the claim on July 31, 2006.

Respondent alleges that he gave notice as soon as practicable, as GEICO failed to disclose its policy limitation until July 24, 2006, despite what respondent characterizes as “numerous demands”. Additionally, respondent alleges that his notice was timely because he did not know of the seriousness of his injury until April 17, 2006, when he was advised that surgery might be indicated.

While there was a delay in submitting a claim, it was not of such length that it was untimely as a matter of law (cf. *Matter of Metropolitan Property and Casualty Insurance Company v. Mancuso*, 93 NY2d 487). A framed issue hearing is necessary to determine whether, under the circumstances of this case, respondent gave notice as soon as practicable (*id.* at 497).

Respondent does not oppose that part of the motion in which petitioner seeks discovery.

Although petitioner complains that the amount demanded exceeds the policy limitation, the arbitrator will limit the amount awarded, if any, to conform to the policy limits.

Accordingly, it is

ORDERED that the petition to stay arbitration is granted to the extent that a trial is directed on the preliminary issue of whether respondent gave notice of intention to make a claim as soon as reasonably practicable and the arbitration is stayed pending such trial, and it is further

ORDERED that, within sixty days of the date of this order, petitioner shall file with the Clerk of the Trial Support Office (Room 158) 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 said Clerk is directed to assign this matter to an appropriate part for trial, and it is further

ORDERED that the proceeding shall be dismissed if petitioner does not comply with the immediately preceding paragraph, and it is further

ORDERED that a copy of this order with notice of entry shall be served on the attorney for respondent and the arbitrator within twenty days of entry, and it is further

ORDERED that in the event it is determined that petitioner must provide underinsured motorist coverage to respondent, then within twenty days of such determination, respondent shall provide petitioner with medical authorizations, submit to an examination under oath and shall submit to medical examinations by physicians petitioner designates on dates petitioner selects.

This constitutes the decision and order of the court.

Dated: April 3, 2007

ENTER

NO

J.S.C.

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