

**General Motors Corp. v Clarendon Natl.
Ins. Co.**

2007 NY Slip Op 31731(U)

June 15, 2007

Supreme Court, New York County

Docket Number: 0104680/2007

Judge: Marcy L. Kahn

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

PRESENT: Hon. Marcy L. Kahn PART 50K
Justice

GENERAL MOTORS CORPORATION

INDEX NO. 104680/07

- v -

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

CLARENDON NATIONAL INSURANCE COMPANY
a/s/o SUSAN BORST

The following papers, numbered 1 to _____ were read on this motion to/for _____

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____	<u>1</u>
Answering Affidavits - Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: JUL 18 2007

ENTER: *[Signature]*
J.S.C.
JUL. MANDY KANE

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM: IAS PART 50-K

-----X
GENERAL MOTORS CORPORATION,
Petitioner,

DECISION AND ORDER

-against-

Index No. 104680/07

CLARENDON NATIONAL INSURANCE COMPANY,
a/s/o SUSAN BORST,
Respondent.

-----X
MARCY L. KAHN, J.:

Petitioner General Motors Corporation ("petitioner" or "GMC") has moved pursuant to Civil Practice Law and Rules (CPLR) §7503 for a permanent stay of arbitration proceedings commenced by respondent Clarendon National Insurance Company ("respondent" or "Clarendon"). Respondent has failed to appear in this proceeding. For the reasons stated below, petitioner's application is granted on default.

The undisputed factual allegations establish that respondent provided insurance coverage for an automobile belonging to Howard Borst which was being driven by Susan Borst on October 31, 2003 when the airbags deployed, striking her right arm and causing a hairline fracture to her wrist. Respondent paid medical bills totaling \$5,172.11 and thereafter filed for arbitration with Arbitration Forums, Inc., requesting reimbursement from petitioner under New York Insurance Law §§5105 and 5221.

New York's comprehensive no-fault motor vehicle recovery

scheme provides in Insurance Law §5105 for the settlement of claims between insurers by mandatory arbitration in cases in which one insurer seeks to recover from another insurer benefits paid to or on behalf of a covered person for damages for which the other insurer's covered person would be liable at law.

Specifically, that section states:

(a) Any insurer liable for the payment of first party benefits to or on behalf of a covered person . . . has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. . . .

(b) The sole remedy of any insurer. . . . to recover on a claim arising pursuant to subsection (a) hereof, shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent. Such procedures shall also be utilized to resolve all disputes between insurers concerning their responsibility for the payment of first party benefits.

(Ins. L. §5105) (emphasis added).

Petitioner argues that it is neither an "insurer" nor a "covered person" within the terms of §5105, and thus the mandatory arbitration provision of that section is inapplicable to it.

An "insurer" for purposes of §5105 is defined by Insurance Law §5102(g) as:

the insurance company or self-insurer, as the case may be, which provides the financial security required by article six or eight of the vehicle and traffic law.

Petitioner is neither an insurance company nor a self-

insurer, and, accordingly, has no obligation as an "insurer" to provide insurance under said provisions of the Vehicle and Traffic law. Accordingly, it is not subject to the mandatory arbitration provisions of Insurance Law §5105 respecting disputes between insurers in cases involving responsibility for the payment of first-party insurance benefits. (See American Mutual Insurance Co. v. Merchants Insurance Group, 123 Misc.2d 331 [Sup. Ct. Onondaga Co. 1984]).

Moreover, the right to recover under Insurance Law §5105 exists only if at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire. (Ins. L. §5105[a]). As there is no evidence that either of these pre-conditions to recovery was present here, section 5105 is inapplicable for this reason as well. (See National Union Fire Insurance Co. v. Farmers New Century Insurance Co., 8 Misc.3d 1004[A] [Sup. Ct. NY Co. 2005]).

Insurance Law §5221, cited by respondent in its filing for arbitration, requires that any controversies arising between the Motor Vehicle Accident Indemnification Corporation ("MVAIC") and an insurer concerning the obligation to pay first-party benefits under New York's no-fault insurance scheme be resolved by arbitration. MVAIC is not involved in this case, however, and

for that additional reason, the provisions of Insurance Law §5221 do not apply. Furthermore, the same definition of "insurer" from section 5102(g) applies to the no-fault provisions of §5221, rendering them inapplicable to petitioner for the reasons previously stated.

Therefore, upon the affirmation of Timothy J. McHugh, Esq., dated April 5, 2007, in support of the application by petitioner GMC for a permanent stay pursuant to CPLR §7503 of arbitration proceedings filed by respondent Clarendon, and the exhibits annexed thereto, and the affidavits of service of such papers upon respondent and Arbitration Forums, Inc., and in the absence of opposition from respondent, it is hereby:

ORDERED and ADJUDGED, that the petition is granted without opposition upon petitioner's unchallenged representation that it is not subject to mandatory arbitration under New York Insurance Law §5105 because it is not an insurer; and upon petitioner's further representation that the mandatory arbitration provisions of Insurance Law §5221 do not apply because that section governs disputes involving MVAIC, and MVAIC is not here involved; and because petitioner is not an insurer under that section; and it is further

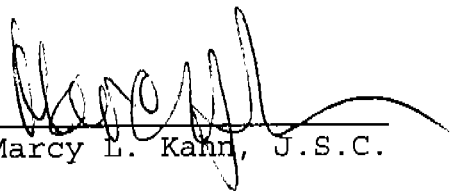
ORDERED, that pursuant to CPLR §7503, the intercompany arbitration demanded by respondent on February 8, 2007, before Arbitration Forums, Inc. is hereby stayed permanently; and it is

further

ORDERED that a copy of this decision is to be served upon respondent and upon the arbitral tribunal, Arbitration Forums, Inc., Atlanta Data Center, 50 Glenlake Parkway, Suite 650, Atlanta, Georgia 30328-3473, within 20 days of entry of this order.¹

The foregoing constitutes the decision, order and judgment of this court.

ENTER:



Marcy L. Kahn, J.S.C.

DATED: New York, New York
June 15, 2007

¹ In view of this court's resolution of the matter, it is unnecessary for it to reach petitioner's additional argument that certain claims paid by respondent are barred by the applicable statute of limitations.