

**Matter of Mitchell v Motor Veh. Acc.
Indem. Corp.**

2007 NY Slip Op 32396(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0105639/2007

Judge: Marcy L. Kahn

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

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 In the Matter of the Application of :
 GARY MITCHELL, :
 : DECISION AND
 Petitioner, : ORDER ON MOTION
 : PURSUANT TO
 for leave to commence an action : INSURANCE LAW §5218
 pursuant to Section 5218 of the :
 Insurance Law, :
 : Index No. 105639/07
 -against- :
 THE MOTOR VEHICLE ACCIDENT :
 INDEMNIFICATION CORPORATION, :
 :
 Respondent. :
 -----X

MARCY L. KAHN, J.S.C.

By order to show cause and verified petition dated May 2, 2007, petitioner Gary Mitchell seeks an order pursuant to section 5218 of the Insurance Law permitting him to commence an action against respondent Motor Vehicle Accident Indemnification Corporation ("MVAIC" or "respondent corporation"). Upon review of the petition and the papers and exhibits submitted in support thereof, and no opposition thereto having been received from MVAIC, the application is granted on default.

I. FACTUAL BACKGROUND

On March 12, 2006, petitioner Gary Mitchell was in a wheelchair crossing West 132nd Street at Lenox Avenue in the Borough of Manhattan, County, City and State of New York

when he was struck by an unidentified motor vehicle which stopped briefly and then fled the scene of the accident. (Petition ["Pet."], ¶2). Despite their efforts to do so, neither petitioner nor his attorney has been able to ascertain the identity of the operator of the "hit-and-run" motor vehicle. (Pet., ¶5; Attorney's Affirmation of Michael M. Goldberg, Esquire, dated April 9, 2007 ["Goldberg Affirm."], ¶7). Emergency Medical Services workers brought petitioner to Harlem Hospital, where he was treated and released. (Pet. Exh. 5). Subsequently, petitioner received follow-up treatment from a number of physicians, for allegedly serious injuries to his head, body and limbs. (Pet., ¶9). As evidence of said injuries and treatment, petitioner annexes a series of medical reports from radiologists, orthopedists and neurologists attesting to the nature of the injuries petitioner alleges were proximately caused by the accident in question. (Pet., Exh. 5).

On April 18, 2006, petitioner's counsel filed a notice of petitioner's claim with MVAIC, which notice included a no-fault application and a copy of the police accident report. Although petitioner's claim was validated and certified by respondent, it was denied for adjustment, on the ground that petitioner did not sustain a "serious injury" within the meaning of Insurance Law Section 5102(d).

(Goldberg Affirm., ¶3).

II. APPLICABLE LAW

The pertinent portion of Insurance Law Section 5218 provides as follows with respect to the commencement of actions against respondent corporation:

Any qualified person having a cause of action for death or personal injury arising out of the ownership, maintenance or use of a motor vehicle in this state, when the identity of the motor vehicle and of the operator and owner cannot be ascertained or it is established that the motor vehicle was at the time of the accident, in the possession of a person without the owner's consent and that the identity of such person cannot be ascertained may, upon notice to the corporation, apply to a court for an order permitting an action therefor against the corporation in that court.

(Ins. L. §5218[a]).

To the extent relevant here, Insurance Law Section 5202[b] defines "qualified person" as:

a resident of this state, other than an insured or the owner of an uninsured motor vehicle and his spouse when a passenger in such vehicle, or his legal representative

(Ins. L. §5202[b][i]).

Section 5218[b] sets forth the criteria that the court must consider in determining whether to permit an action against MVAIC. The first of these criteria is that the applicant has complied with the requirements of Section 5208 of the Insurance Law. (Ins. L. §5218[b][i]).

Section 5208 sets forth the notice of claim

requirements of the no-fault insurance law with respect to the filing of claims involving uninsured motor vehicles with MVAIC. Section 5208[2][A] requires that anyone who is the victim of a hit-and-run accident and seeks to assert a claim for damages against respondent corporation be a qualified person, as that term is defined in section 5202; that the claimant notify the police within 24 hours of the accident; and that the claimant file with MVAIC, within 90 days of the accrual of the cause of action, as a condition precedent to the right to seek benefits from MVAIC, an affidavit stating that:

[i] the person has the cause of action for damages arising out of the accident and setting forth the supporting facts,

[ii] the cause of action is against a person whose identity is unascertainable, and

[iii] the person is making a claim for those damages.

(Ins. L. §5208[a][2][A][i], [ii], [iii]).

Section 5218 also requires that the applicant for leave to bring an action against MVAIC be a qualified person (Ins. L. §5218[b][2]); that at the time of the accident, the person not have been operating an insured motor vehicle or motor vehicle in violation of an order of suspension or revocation (Ins. L. §5218[b][3]); that the applicant have a cause of action against the owner or operator of the motor vehicle (Ins. L. §5218[b][4]); that all reasonable efforts

have been made to ascertain the identity of the motor vehicle owner and operator in question, without success (Ins. L. §5218 [b] [5]); and that the application not be made on behalf of an insurer or surety under certain statutorily defined circumstances, which are inapplicable here. (Ins. L. §5218 [b] [6]).

III. ANALYSIS

In the instant case, upon examination of petitioner's papers and exhibits, the court finds that, as petitioner is a resident of New York State who, as a pedestrian at the time of the occurrence in question, is neither an insured nor the owner of a motor vehicle involved in the subject accident, he is a "qualified person" within the meaning of Sections 5218 [a] and 5202 [b] [1]. Petitioner's New York residence is evidenced by the address indicated in both the police accident report and petitioner's notice of intention to make claim (Pet., Exhs. 3 and 4).

The court further finds that petitioner has complied with the notice requirements of Section 5208 [2] [a]. Specifically, petitioner notified the police of the subject accident within the required 24-hour period, as evidenced by the police report (Pet., Exh. 3). He also sent MVAIC a notice of intention to make a claim (Pet., Exh. 4), attaching a copy of the police report, on April 18, 2006,

well within the required 90-day period following the accident. Further, petitioner has satisfied the requirements of Section 5208[a][2][A][i] that he have a cause of action and state its facts by annexing to his notice of intention a copy of the police accident report, which states the supporting facts concerning the accident from which his claim for damages arises. (Pet., Exhs. 3,4). As the operator of the motor vehicle fled the scene shortly after the accident occurred, the identity of the operator of the vehicle is unascertainable, thereby satisfying the requirement of Section 5208[a][2][A][ii]. Finally, petitioner's notice of intention to make claim is evidence that petitioner is now making a claim for damages, thereby satisfying the requirement of Section 5208[a][2][A][iii]. Accordingly, the court finds that petitioner has met all of the requirements of Section 5208[a].

In addition to the requirements discussed above, petitioner also meets the further requirements of Section 5218. First, as a pedestrian at the time of the accident in question, petitioner was neither operating any motor vehicle nor driving in violation of any revocation or suspension of a driver's license, thereby satisfying the condition set forth in Section 5218[b][3].

With respect to the requirement imposed by Section

5128 [b] [4] that the applicant have a cause of action against the owner or operator of the motor vehicle, petitioner has submitted both the police report and reports of various medical experts, including radiologists, neurologists and orthopedists, who provided treatment to him as a result of the accident, as well as the post-accident hospital record. (Pet., Exh. 5). The court finds that these documents sufficiently establish that Mitchell suffered various injuries when the hit-and-run driver's vehicle hit him as he was crossing the street in a lawful manner in his wheelchair, thereby demonstrating the existence of a cause of action against the owner or operator of the vehicle.¹

As discussed above, the vehicle operator fled the scene of the accident and no witnesses are available to identify the operator of the vehicle, the court finds that the vehicle operator's identity cannot be ascertained by petitioner, thereby satisfying the requirement of Section

¹In finding the medical reports and hospital record sufficient for purposes of the instant application, the court need not address whether any of the injuries allegedly sustained by petitioner constitute a "serious injury" within the meaning of Insurance Law Section 5102(d), as neither Section 5208 nor Section 5218 require that petitioner make such a showing in order to demonstrate entitlement to bring a cause of action against respondent. Rather, the issue of whether petitioner's alleged injuries meet any of the threshold criteria set forth in Section 5102(d) is to be addressed only by the trier of fact in the action petitioner, by this order, is being granted leave to commence, either when considering a dispositive motion or at the time of trial.

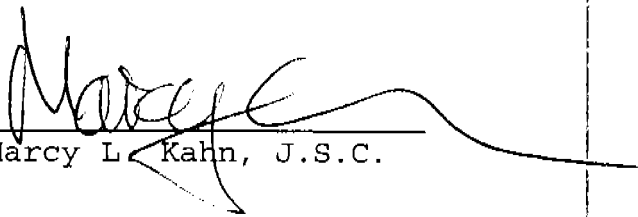
5218[b][5]. Finally, the court finds that the instant application has not been made on behalf of an insurer or surety. Thus, Section 5218[b][6] is satisfied.

IV. CONCLUSION

Accordingly, petitioner's application pursuant to Insurance Law §5218 is granted, and petitioner is hereby granted leave to commence an action against MVAIC to recover damages for personal injuries allegedly sustained in the subject accident.

The foregoing constitutes the decision and order of this court.

E N T E R:



Marcy L. Kahn, J.S.C.

DATED: New York, New York
July 27, 2007

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COUNTY CLERK'S OFFICE