

<b>Matter of Liberty Mut. Ins. Co. v Luna</b>
2007 NY Slip Op 32528(U)
August 13, 2007
Supreme Court, New York County
Docket Number: 0104068/2007
Judge: Marcy L. Kahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. MARCY KAHN

PRESENT: \_\_\_\_\_

PART 50K

Index Number : 104068/2007

LIBERTY MUTUAL INSURANCE

vs

LUNA, LUISA

Sequence Number : 001

STAY PROCEEDINGS

INDEX NO. 104068/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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 141B).

Dated: 8/13/07

*[Signature]*  
HON. MARCY KAHN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
 In the Matter of the Application of :  
 LIBERTY MUTUAL INSURANCE COMPANY :  
 to Stay Arbitration, :  
  
 Petitioner, : DECISION AND  
  
 LUISA LUNA, CARIDAD MIRANDA, ANDREA : ORDER ON MOTION  
 VICTORIANO, MARIA MARTINEZ and : TO STAY ARBITRATION  
 ELIZABETH HERNANDEZ, : PURSUANT TO CPLR  
 : \$7503(b) AND ON  
 : CROSS-MOTION TO  
 Respondents, : COMPEL ARBITRATION  
 : PURSUANT TO  
 : CPLR \$7503(a)

NEW JERSEY CITIZENS UNITED :  
 RECIPROCAL EXCHANGE (NJ CU) :  
 and MARIA ROGERS, :  
  
 Proposed Additional :  
 Respondents. :  
 -----X

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk  
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 obtain entry, counsel or authorized representative must  
 appear in person at the Judgment Clerk's Desk (Room 141B)  
 Index No. 104068/07

MARCY L. KAHN, J.:

By notice of petition and verified petition filed March 26,  
 2007, petitioner Liberty Mutual Insurance Company ("petitioner"  
 or "Liberty") seeks an order and judgment pursuant to §7503(b)  
 of the Civil Practice Law and Rules ("CPLR") permanently staying  
 the uninsured motorist arbitration sought by respondents or, in  
 the alternative, for an order joining the proposed additional  
 respondents as party respondents and directing a framed issue  
 hearing on the issues of insurance coverage and policy  
 compliance, and, should the court direct the arbitration to  
 proceed, compelling respondents to appear for examinations under  
 oath and independent medical examinations. They also seek  
 costs, disbursements and attorneys' fees. Respondents cross-  
 move for an order pursuant to CPLR §7503(a) compelling

arbitration, or in the alternative, for a framed issue hearing on the issues of insurance coverage involved in this proceeding. For the reasons stated, the petition is granted, the cross-motion is denied and the arbitration is permanently stayed. The alternative relief sought by each party is denied as unnecessary.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondents Luisa Luna, Caridad Miranda, Andrea Victoriano, Maria Martinez and Elizabeth Hernandez (collectively, "respondents") have alleged that on April 22, 2006, they sustained injuries while passengers in a bus owned by Academy Express LLC ("Academy") which was involved in a motor vehicle accident with a third-party's vehicle in New Jersey. (Verified Petition dated March 26, 2007 ["Pet."], ¶8; Affirmation in Opposition of Tara Ulezalka, Esq., dated May 22, 2007 ["Affirm. in Opp."], ¶¶ 3,4). According to the police report, while traveling northbound on the Garden State Parkway, mile post 126, New Jersey, a motor vehicle owned by Melvin C. Rogers (the "Rogers vehicle") and operated by proposed additional respondent Maria Rogers, while being operated at an unsafe speed, struck a guardrail and then collided with the side of the bus. (Pet., ¶8, Exh. B.; Affirm. in Opp., ¶4). The police report listed the insurance code for the Rogers vehicle as "946," which corresponds to proposed additional respondent New Jersey

Citizens United Reciprocal Exchange ("NJ Cure"), and the policy number as "J000350000091." (Pet., ¶17, Exh. B). The report indicated that the insurance code for the Academy bus was "183," and the policy number was "EU1-741-005229-015," apparently referring to an excess automobile liability indemnity policy of insurance (the "policy" or "excess policy") issued by Liberty in New Jersey to Academy for a one-year period commencing October 31, 2005. (Id.; see Declarations Page of excess policy, attached as Exhibit B to Reply Affirmation of Lauren M. Mazzara, Esq., dated June 4, 2007 ["Reply Affirm."]).

On August 9, 2006, counsel for respondents sent a letter notifying NJ Cure that counsel represented respondents, who were pursuing a claim for personal injuries sustained in the subject accident and requesting the name of the claims adjuster and file number assigned to this matter. (Affirm. in Opp., ¶ 5, Exh. A). In a letter dated August 10, 2006, NJ Cure responded that its policy of insurance issued to Mr. Rogers had been voided as of January 21, 2006. (Affirm. in Opp., ¶ 6, Exh. B).

On March 5, 2007, respondents through their counsel issued a demand for arbitration, seeking uninsured motorist benefits from petitioner as insurance carrier for the Academy bus in question. (Pet. ¶7). On March 26, 2007, petitioner commenced the instant proceeding.

## II. PARTIES' CONTENTIONS

Petitioner seeks to stay the arbitration on two grounds, namely that respondents improperly named Liberty in the demand for arbitration, and second, that the Rogers vehicle was covered by the NJ Cure policy of insurance on the date of the accident, rendering an uninsured motorist claim unavailable.

With respect to the first ground, petitioner contends that Academy is self-insured and retains New Jersey's minimum uninsured motorist ("UM") coverage. (Pet., ¶9). In support of this contention, petitioner proffers the affidavit of Daniel Black, a risk manager for Academy, who attests to the above and further states that: 1) petitioner is its excess liability carrier; 2) petitioner's policy does not contain a provision regarding UM coverage; and 3) petitioner's insurance policy does not include any agreement to arbitrate UM claims. (Affidavit of Daniel Black, sworn March 26, 2007 ["Black Affid."], attached as Pet., Exh. C, ¶¶10,11). As its second argument, petitioner maintains that the listing of the insurance code for NJ Cure on the police accident report establishes prima facie the Rogers vehicle was covered by insurance and was not, in fact, uninsured on the date of the accident.

In opposition, respondents contend that Liberty was not simply an excess insurance carrier in the case, but has continuously represented itself as the primary insurance carrier

for Academy with respect to this accident, advising respondents that Liberty would handle all of the bodily injury claims on behalf of Academy, requesting and receiving all medical records related to respondents' treatment (Affirm. in Opp., ¶¶ 14, 15; Exh. F), issuing independent medical examination ("IME") notices (Affirm. in Opp., ¶ 12, Exh. D), paying medical claims (Affirm. in Opp., ¶ 13), and issuing no-fault denials with respect to certain of respondents' claims. (Affirm. in Opp., ¶ 13, Exh. E).

With respect to the third-party coverage issue, respondents state that on February 21, 2007, Liberty's adjuster advised counsel for respondents that the Rogers vehicle was uninsured at the time of the accident and that a UM claim against petitioner would have to proceed. (Affirm. in Opp., ¶ 16). Respondents cite the August 10, 2007 letter from NJ Cure (Affirm. In Opp., Exh. B) disclaiming coverage on the Rogers vehicle, and maintain that petitioner has the burden, in the first instance, of demonstrating that the Rogers vehicle maintained a policy of insurance with an initial expiration date beyond the date of the accident. Respondents seek an order compelling arbitration or, in the alternative, ordering a framed issue hearing on the issues of insurance coverage for the Rogers vehicle and the identity of the primary carrier for Academy.

In reply, petitioner proffers the affidavit of Mallory Gass, a case manager for Liberty, who states that Academy is

self-insured for its primary vehicle coverage, that Liberty is an excess carrier for Academy and that Liberty acts as a third-party administrator pursuant to its policy with Academy.

(Affidavit of Mallory Gass, sworn June 4, 2007 ["Gass Affid."], attached as Reply Affirm., Exh. A, ¶¶4,5). Petitioner also submits a copy of the declarations page of its excess policy with Academy, and maintains that Academy is self-insured up to \$250,000 per accident. (Reply Affirm., ¶ 6, Exh. B). Liberty states that it was acting in the capacity of a third-party administrator when it scheduled the IMEs and issued no-fault denials. (Reply Affirm., ¶ 7).

Petitioner further contends that its policy with Academy contains no provision regarding UM coverage or agreement to arbitrate a UM dispute. (Reply Affirm., ¶8; Exh. A, ¶¶ 6,7). Petitioner argues that in the absence of an agreement to arbitrate a UM dispute, it cannot be compelled to do so and that the burden of proof that such an agreement exists is on the respondents. Petitioner concludes on this point by stating that since respondents cannot demonstrate the existence of a policy of insurance binding it to arbitrate this dispute, the subject arbitration should be stayed.

With respect to the issue as to whether the Rogers vehicle was insured on the date of the accident, petitioner claims that the letter from NJ Cure is insufficient to establish that the

policy was not in effect at the time of the accident.

Alternatively, petitioners seek a framed issue hearing on the issue of insurance coverage for the vehicles in question.

### III. DISCUSSION

#### A. Requirement of Uninsured Motorist Endorsement

Under the provisions of New York Insurance Law §3420(f)(1), a policy of insurance for a motor vehicle "principally garaged or principally used in this state" must include a provision under which the insured may recover "damages from an owner or operator of an uninsured motor vehicle." (Ins. Law §3420[f][1]). New York's requirement of an uninsured motorist endorsement, of course, does not apply to policies of liability insurance for vehicles which are principally garaged or used elsewhere.

It is uncontested that Liberty's policy was issued by its Wayne, New Jersey office to Academy at its principal offices in Hoboken, New Jersey, and that it provided coverage for a bus which was registered in New Jersey and which was in an accident which occurred in New Jersey during the policy term. (Pet., Exh. B; Reply Affirm., Exh. B). There being no showing, on this record, that the Academy bus was principally garaged or used in New York (nor was it in an accident in New York), there was no requirement pursuant to New York Insurance Law §3420(f)(1) that a provision for uninsured motorist coverage be included in the

excess policy. Unless Liberty's policy included an endorsement for uninsured motorist coverage, therefore, it cannot be held responsible for the payment of such claims to respondents.

B. Coverage For and Arbitrability of UM Claims

Section 7503(b) of the CPLR provides in pertinent part that "a party who has not participated in the arbitration . . . may apply to stay arbitration on the ground that a valid agreement was not made . . . ." If there is no agreement to arbitrate between the petitioner and the respondents, a motion to stay arbitration is properly granted. (Matter of Matarasso (Continental Cas. Co.), 56 NY2d 264, 269 [1982]). Thus, the threshold issue for the court to decide on a motion to stay arbitration is whether a valid agreement to arbitrate was made. (Aetna Casualty & Surety Co. v. Cochrane, 64 NY2d 796, 797 [1985][uninsured motorist claim]; Marben Realty Co. v. Sweeney, 87 AD2d 561, 562 [1<sup>st</sup> Dept. 1982]). "Only persons who expressly agree to arbitrate can be compelled to do so . . . ." (Marben Realty Co. v. Sweeney, 87 AD2d at 562 [citations omitted]).

Accordingly, in order for respondents uninsured motorist claims in the instant case to be arbitrable, petitioner's excess insurance policy with Academy would have to include both a provision for uninsured motorist coverage and an agreement to arbitrate claims for such coverage. The burden of establishing the existence of those provisions is on respondents. (Allstate

Ins. Co. v. Roseboro, 247 AD2d 379, 380 [2<sup>nd</sup> Sept. 1998]; Marben Realty Co. v. Sweeney, 87 AD2d at 562; see Seneca Ins. Co. v. Secure-Southwest Brokerage Ltd., 294 AD2d 211 [1<sup>st</sup> Dept. 2002]).

Here, respondents have not met their burden of demonstrating the existence of an uninsured motorist coverage provision in the Liberty policy, nor have they shown an agreement by Liberty to arbitrate third-party claims for uninsured motorist coverage for bodily injury. Moreover, petitioner has proffered evidence that its policy contains no such coverage, and that it has not entered into any agreement to arbitrate uninsured motorist claims. The affidavits of Daniel Black, risk manager for Academy, and Mallory Gass, case manager for Liberty, each attest that no such provisions exist in the excess automobile liability insurance policy through which Liberty has provided coverage for the bus in question. (Black Affid., ¶¶6,7; Gass Affid., ¶¶6,7). Where, as here, the insurance policy in question provides coverage in excess of the policyholder's primary automobile liability insurance coverage, it does not extend the provision for UM coverage in the underlying primary coverage to the excess policy, especially where the excess policy covers solely the liability of the policyholder for damages owing to third parties. (Matter of Matarasso (Continental Cas. Co.), supra, 56 NY2d at 268).

Petitioner has demonstrated that it is an excess liability

insurance carrier whose policy includes neither a UM endorsement nor a provision including an agreement to arbitrate UM claims. Respondents have not overcome this showing, nor have they provided any factual showing which would entitle them to a hearing on the scope of coverage of the Liberty policy. In the absence of proof of a policy provision affording coverage for uninsured motorist claims, as well as an agreement by Liberty to arbitrate them, respondents cannot compel petitioner to participate in the pending arbitration and a permanent stay of arbitration is warranted. (See Matter of Matarasso (Continental Cas. Co.), supra).

Respondents' argument that Liberty has implicitly agreed to arbitrate and pay their UM bodily injury claims is unavailing. The record reveals that Liberty's insured, Academy, is self-insured for the first \$250,000 of each accident, and Liberty assumes the risk thereafter. (Reply Affirm., Exh. B). Academy, through its self-insurance, provides the minimum New Jersey uninsured motorist coverage. (Black Affid., ¶4; Gass Affid., ¶4). Liberty has participated in arranging independent medical examinations and in the management, payment and denial of claims from the accident in its capacity as third-party administrator for its insured, whose primary coverage is self-insurance. (See Black Affid., ¶5; Gass Affid., ¶5). Such actions are not unusual in situations involving a carrier's provision of an

insurance policy in excess of self-insured coverage, and do not transform the terms of the excess policy of insurance between Liberty and Academy into one casting Liberty as Academy's primary carrier.

The focus in this proceeding on the existence, or absence, of insurance coverage for the Rogers vehicle misses the mark. Although respondents correctly state that the burden of proving that an offending vehicle is uninsured is on the party seeking to stay arbitration of such a claim (Eagle Ins. Co. v. Patrik, 233 AD2d 327, 328 [2d Dept. 1996]; American Sec. Ins. Co. v. Ferrer, 110 AD2d 503, 504 [1<sup>st</sup> Dept. 1985]), that issue is secondary to the threshold issue of whether or not there exists an agreement between the parties to arbitrate such claims. In both Patrik and Ferrer, the insurance company had a policy provision requiring it to arbitrate appropriate claims: the dispute in each case was whether the matter in question was an appropriate claim. Here, by contrast, there is no arbitration agreement. In the absence of an agreement by Liberty to cover UM claims and to arbitrate issues involving them, this court need not address the questions of the existence of coverage for the Rogers vehicle or the propriety here of a claim for uninsured motorist coverage. Accordingly, there is no need for a framed issue hearing on that issue.

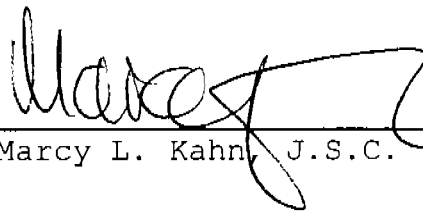
IV. CONCLUSION

Accordingly, the motion of petitioner Liberty Mutual Insurance Company for an order permanently staying the arbitration demanded by respondents on March 5, 2007 is granted. Petitioner's alternative applications to join additional respondents and for a framed issue hearing are denied as unnecessary. Petitioner shall recover from respondents costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the clerk, and have execution therefor. Petitioner's request for attorneys' fees is denied, as without basis.

Respondents' cross-motion for an order directing arbitration or, in the alternative, for a framed issue hearing is denied.

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

E N T E R :

  
\_\_\_\_\_  
Marcy L. Kahn, J.S.C.

DATED: New York, New York  
August 13, 2007

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be given until the County Clerk obtains entry; counsel or authorized representative must appear in person at the Judgment Clerk's Desk at the County Clerk's Office, 100 West Street, New York, NY 10038.