

**Matter of The Travelers Indem. Co. v Snoop
Radiology, P.C.**

2007 NY Slip Op 32642(U)

August 4, 2007

Supreme Court, New York County

Docket Number: 0107718/2007

Judge: Marcy L. Kahn

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

PRESENT: HON. MARCY KAHN
Justice

PART 50X

Travelers Indemnity Co.

INDEX NO. 10718/07

MOTION DATE _____

SNOOP RADIOLOGY P.C.,
ET AL.

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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).

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

AUG 14 2007

Dated: _____

Marcy Kahn
J.S.C.

HON. MARCY KAHN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

-----X
 In the Matter of the Application of :
 THE TRAVELERS INDEMNITY COMPANY, :
 :
 Petitioner, :
 : JOINT
 : DECISION
 : AND ORDER ON
 For an Order Staying the Arbitration : MOTIONS TO STAY
 Demanded by SNOOP RADIOLOGY, P.C., a/a/o : ARBITRATION
 SANTOS SANTANA, : Index Nos.
 : 107718/07
 Respondents. : 107719/07
 -----X

In the Matter of the Application of :
 THE TRAVELERS INDEMNITY COMPANY, :
 :
 Petitioner, :
 :
 For an Order Staying the Arbitration :
 Demanded by SNOOP RADIOLOGY, P.C., a/a/o :
 JOSE VASQUEZ, :
 :
 Respondents. :
 -----X

MARCY L. KAHN, J.:

These two proceedings have been joined for disposition by the court sua sponte pursuant to CPLR §602(a) due to their common questions of fact and law, as well as the identity of the parties. By order to show cause issued June 4, 2007, The Travelers Indemnity Company ("Travelers" or "petitioner") moves this court in each of the above-referenced proceedings for an order pursuant to CPLR §7503 permanently staying the arbitration proceedings between petitioner and respondent, Snoop Radiology, P.C. ("respondent Snoop" or "Snoop") filed with the American

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Arbitration Association on April 13, 2007 on behalf of its assignees, Santos Santana and Jose Vasquez.¹ Travelers also seeks costs of the instant proceedings. Respondent Snoop has failed to appear. For the reasons stated, the petitions are granted on default.

I. FACTUAL BACKGROUND

Petitioner Travelers issues automobile insurance policies providing "no-fault" benefits promulgated under the New York State Insurance Law. (Ins. Law §§ 5101-5103). Respondent Snoop is a health service provider licensed to practice in the state of New York. It is alleged that as a result of an automobile accident which occurred on May 18, 2002 and involved petitioner's insured, Rodriguez Lino, Snoop provided health services to respondent's assignors, Santos Santana and Jose Vasquez, at the respondent's facility. Claiming that their assignors were entitled to reimbursement from Travelers for the cost of such services, and having been assigned by their assignors to do so, respondent Snoop billed petitioner for the cost of the services provided. Snoop claims that petitioner failed to pay the billed amounts, and currently owes an outstanding balance of \$1813.42 for the care of Santos Santana, and

¹ Petitioner also sought a temporary stay of each arbitration proceeding pending this court's disposition of the petitions, which the court granted on June 4, 2007.

\$901.42 for the care of Jose Vasquez. (Petition, Matter of the Application of The Travelers Indemnity Company [Snoop Radiology, P.C., a/a/o Santos Santana], Index No. 107718/07, filed June 4, 2007 ["Santana Pet."], Exh. B [Verified Complaint of Snoop Radiology Imaging, Snoop Radiology Imaging, P.C. v. Travelers Indemnity Insurance Company, Index No. 32778/04 (Civ. Ct. N.Y. Co.), dated June 8, 2004 ("Civ. Action Complaint")], ¶84; Petition, Matter of the Application of The Travelers Indemnity Company [Snoop Radiology, P.C., a/a/o Jose Vasquez], Index No. 107719/07, filed June 4, 2007 ["Vasquez Pet."], Exh. B [Civ. Action Complaint], ¶57). Respondent disputes its liability for these obligations.

On June 8, 2004, respondent commenced an action against petitioner (Snoop Radiology Imaging, P.C. v. Travelers Indemnity Insurance Company, Index No. 32778/04 [Civ. Ct. N.Y. Co.] ["the civil action"]), as assignee of Santana and Vasquez, seeking reimbursement from petitioner for said amounts, together with statutory interest and statutory attorneys' fees, in each instance. (Civ. Action Complaint, ¶¶57, 84). The civil action also sought recovery of various amounts from Travelers on behalf of seven other patients whom Snoop had treated following other automobile accidents

allegedly involving Travelers' insureds.² (Civ. Action Complaint, passim).

On or about August 2, 2004, Travelers filed an answer in the civil action, asserting general denials and raising various affirmative defenses, and also filed several demands for discovery in the action. (Santana Pet., Exh. C [Verified Answer of Travelers Insurance Company, Snoop Radiology Imaging, P.C. v. Travelers Indemnity Insurance Company, Index No. 32778/04 (Civ. Ct. N.Y. Co.), dated August 2, 2004] ["Civ. Action Answer"]; Vasquez Pet., Exh. C [Civ. Action Answer]). The action has apparently not progressed since that time.

On April 13, 2007, respondent, utilizing the services of a different law firm³, filed demands for arbitration as to both the Santana and Vasquez claims (Santana Pet., Exh. A; Vasquez Pet., Exh. A), seeking recovery of no-fault benefits. (See Ins. Law §5106[b]). The instant proceedings followed.

² The reimbursement claims of the other eight patients, including Joyce Ochoa, David Concepcion, Filiberto Contreras, Ingrid Arias, Marcos Velazquez, Candida Valerio and Maria Ulloa, are not the subject of any proceedings before this court.

³ In the civil action, Snoop had been represented by David Katz & Associates, LLP, while the demands for arbitration were filed on its behalf by Matthew Abramowitz, Esq.

II. CONTENTIONS

Petitioner Travelers contends that it is entitled to an order of this court mandating a permanent stay in each of the arbitration proceedings on the ground that respondent Snoop is barred from pursuing these claims through arbitration, having previously "elected the courts as the forum within which to prosecute its claims." (Santana Pet. ¶¶6, 8; Vasquez Pet. ¶¶6, 8). Petitioner asserts that since choosing to litigate the dispute in court, respondent cannot now demand arbitration.

As noted, respondent has failed to answer.

III. DISCUSSION

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 or has not been complied with" If there is no agreement to arbitrate between the petitioner and the respondents, a motion to stay arbitration is properly granted. (Aetna Casualty & Surety Co. v. Cochrane, 64 NY2d 796, 797 [1985]; Matter of Matarasso [Continental Cas. Co.], 56 NY2d 264, 268 [1982]; Marben Realty Co. v. Sweeney, 87 AD2d 561, 562 [1st Dept. 1982]). The burden of establishing an agreement to arbitrate a dispute which would justify a court's direction to the

parties to proceed to arbitration rests with the party seeking arbitration. (Allstate Ins. Co. v. Roseboro, 247 AD2d 379, 380 [2nd Sept. 1998]; Marben Realty Co. v. Sweeney, 87 AD2d at 562; see Seneca Ins. Co. v. Secure-Southwest Brokerage Ltd., 294 AD2d 211 [1st Dept. 2002]).

The Court of Appeals has consistently held that a party may not alternate between forums, "creat[ing] its own unique structure combining litigation and arbitration," whether it has initially commenced the proceedings in court or through arbitration. (Sherrill v. Grayco Builders, 64 NY2d 261, 274 [1985] [citation omitted]; Roggio v. Nationwide Mut. Ins. Co., 66 NY2d 260, 261 [1985] [party denied remedy in arbitration cannot then turn to the courts for relief]). By electing to resolve a dispute through litigation, the party has "manifested a preference clearly inconsistent with" any later claim of agreement to arbitration, and "[o]nce the right to arbitrate a particular dispute has been lost by an election to litigate it cannot be recaptured." (Sherrill v. Grayco Builders, 64 NY2d at 272, 274). Such "flitting between forums" creates "an intolerable drain on our resources for dispute resolution, senselessly prolonging controversies and inviting inconsistent adjudications." (Roggio v. Nationwide Mut. Ins. Co., supra, 66 NY2d at 263).

Where a party affirmatively chooses to litigate a controversy and maintains an active role in the court proceedings, it has waived any right which might otherwise exist to arbitrate the controversy. (See Meisel v. Grunberg, 169 AD2d 675, 676 [1st Dept. 1991]). As the Appellate Division, First Department has observed:

[W]here the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory.

(Stark v. Molod Spitz DeSantis & Stark, P.C., 29 AD3d 481, 484 [1st Dept. 2006][citations omitted]).

Here, respondent Snoop has chosen to resolve the underlying dispute with petitioner Travelers by filing the civil action, which remains ongoing. Snoop's commencement of the litigation constituted a waiver of any right it had to arbitrate these controversies. (See Stark v. Molod Spitz DeSantis & Stark, P.C., supra Meisel v. Grunberg, supra).

Having elected to pursue the claims in court, it cannot now force petitioner into the arbitral forum.

Accordingly, respondent has failed to demonstrate its right to arbitration of these matters. Petitioner is therefore entitled to a permanent stay of the arbitration proceedings.

IV. CONCLUSION

For all the foregoing reasons, it is hereby ordered and adjudged that the petition for a permanent stay of arbitration proceedings in each of the above-captioned matters is granted, and the arbitrations filed on behalf of respondents' assignors on April 13, 2007 are hereby permanently stayed. It is further ordered and adjudged that the costs of each of the instant proceedings, in the amount of \$_____ in Index No. 107718/07 and in the amount of \$_____ in Index No. 107719/07, as taxed by the Clerk are awarded to petitioner, The Travelers Indemnity Company, who shall have execution therefor.

The foregoing constitutes the decision, orders and judgments of this court in each of the above-captioned proceedings.

E N T E R:


Marcy L. Kahn, J.S.C.

Dated: New York, New York
August 14, 2007

UNFILED JUDGMENT
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