

<b>Matter of Esurance v Paulino</b>
2007 NY Slip Op 32781(U)
September 4, 2007
Supreme Court, New York County
Docket Number: 0106235/2007
Judge: Marcy L. Kahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARCY KAHN

PART 50K

Index Number : 106235/2007

ESURANCE

vs

PAULINO, LUZ

Sequence Number : 001

ART75

INDEX NO. 106235/07

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

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to 2 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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

*and Fraud Issue hearing is ordered.*

**FILED**  
SEP 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: PLK SEP 4 2007

*Marcel*

**HON. MARCY KAHN**

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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 :  
ESURANCE,

Petitioner, :

-against-

LUZ PAULINO, HUDSON INSURANCE COMPANY,  
and AIU INSURANCE COMPANY,

Respondents. :

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MARCY L. KAHN, J.:

By notice of petition and verified petition filed May 8, 2007, petitioner Esurance seeks an order and judgment pursuant to section 7503(b) of the Civil Practice Law and Rules ("CPLR") temporarily staying the uninsured motorist arbitration sought by respondent Luz Paulino ("respondent" or "Paulino"); scheduling an evidentiary hearing to determine the validity of respondent's uninsured motorist claim; and, should the claim be found valid, directing Paulino to submit to a deposition and physical examinations and to provide requested authorizations. Paulino opposes a stay of the arbitration and scheduling of an evidentiary hearing on the ground that respondent Hudson Insurance Company ("Hudson") is disclaiming coverage and that she should, therefore, be allowed to proceed to uninsured motorist arbitration with petitioner.

This proceeding arises from an accident which occurred on

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NEW YORK  
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DECISION AND  
ORDER ON MOTION  
TO STAY ARBITRATION

Index No. 106505/07

April 25, 2006<sup>1</sup> at West 161<sup>th</sup> Street and Broadway in New York County involving a taxi owned by Arias Car Corporation ("Arias") which was operated by Juan Martinez ("Martinez"), in which respondent Paulino was a passenger. The taxi collided with a New York City Fire Department vehicle, with injuries resulting to respondent Paulino. At the time of the accident, respondent Paulino was insured under an automobile insurance policy issued by petitioner which included an uninsured motorist endorsement. (Petition of Richard C. Mullé, Esq., filed May 9, 2007 ["Pet."] ¶2; Pet. Exh. A). That endorsement includes a clause providing for arbitration of claims made by an insured for "damages from the owner or operator of an uninsured motor vehicle because of bodily injury . . . ." (Pet. Exh. A, ¶12). It is uncontroverted that the police accident report indicates that on the date of the accident, the taxi was insured by an insurance company using the insurance code designation "222."<sup>2</sup> (Pet. Exh. C).

#### Parties' Contentions

On or about April 20, 2007, respondent filed a demand for

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<sup>1</sup> That date appears in the police report, although the Petition indicates a date of April 26, 2006 (Pet. ¶3), while the demand for uninsured motorist arbitration lists the date of the accident as May 25, 2006 (Pet. Exh. B).

<sup>2</sup> The designation probably should have indicated "322," which is the code used by the Department of Motor Vehicles for Hudson Insurance Company, which is the entity whose policy both parties agree is at issue here. (Pet. Exh. D; Affirm. In Opposition of Anthony J. Cugini, Jr., Esq., dated June 21, 2007 ["Resp."], Exh. A; see note 3, infra).

[\* 4 ]

uninsured motorist arbitration of her claim of bodily injury allegedly sustained by her as a result of the accident. (Pet. ¶3; Pet. Exh. B). The insurance activity expansion records of the New York State Department of Motor Vehicles ("DMV records") indicate that the taxicab in question was insured by Hudson under its policy number 1417375 with "EFF DATE: 3/1/2006." (Pet. Exh. D; Resp. Exh. A). The DMV records further indicate that the taxicab in question had previously been insured by respondent AIU Insurance Company ("AIU") under the same policy number, but that that coverage had been cancelled, effective March 1, 2006. (Id.). There is a further entry in the record as to the AIU policy indicating "REG REVOCATION" followed by "EFF DATE: 03/09/2006." (Id.). Finally, the records list with respect to the Hudson policy "REG REVOCATION-RESC" and "EFF DATE: 03/09/2006." (Id.). Petitioner maintains that the DMV insurance activity expansion records are insufficient to prove effective cancellation of either the Hudson or AIU policy in accordance with statutory requirements, and that copies of the notices of cancellation or cancellation documents would be needed in order to determine whether cancellation was effective. (Pet. ¶¶ 5 and 6). Petitioner contends that a framed issue hearing is necessary to determine whether the Hudson and AIU policies were effectively cancelled.

In opposition, Paulino responds that Hudson has disclaimed

coverage with respect to the subject accident, and provides a letter dated June 2, 2006, from The Robert Plan of New York Corporation, as authorized representative of Hudson, addressed to Arias and Martinez, stating that the taxicab in question was not on Arias' policy of insurance with Hudson on the date of the accident due to its having been replaced on March 9, 2006 at the request of Arias. (Resp. Exh. A). Paulino also proffers a copy of a "Commercial Policy Change Request" form prepared on March 6, 2006, which reflects the replacement of a 1998 Ford sedan bearing vehicle identification number 2FAFP71WXWX137500 (the same year, make and vehicle identification number appearing on the DMV records) by another 1998 Ford sedan.

#### Discussion

While an insurance carrier seeking to stay arbitration of an uninsured motorist claim bears the burden of going forward with some proof that the offending vehicle was covered by insurance at the time of the accident, once it has done so, the burden shifts to the party seeking arbitration to produce evidence to the contrary. (Eagle Ins. Co. v. Patrik, 233 AD2d 327, 328 [2<sup>nd</sup> Dept. 1996]). Where a triable issue of fact is raised, the court should stay the arbitration and order a hearing on the question of insurance coverage, with joinder of any appropriate additional parties. (Matter of Country-Wide Ins. Co. [Leff], 78 AD2d 830 [1<sup>st</sup> Dept. 1980]).

In this case, petitioner proffers a copy of the police accident report, which report includes an insurance code for the taxicab owned by Arias. In addition, the DMV records are at least suggestive of the presence of coverage under Hudson's policy. The references for March 9, 2006, which appear to reflect a registration revocation followed by a rescinding of a registration revocation, leaving in place Hudson's coverage under the March 1, 2006 policy, together with the police report, suffice to satisfy petitioner's burden of going forward with a prima facie case demonstrating that the taxicab was covered by insurance at the time of the accident. The burden thus shifts to respondent Paulino to produce evidence that the taxicab was not insured. (See Eagle v. Patrik, 233 AD2d at 328). In any event, even if the DMV records may be read to reflect the cancellation of coverage, such evidence merely raises a factual issue, since such proof is not dispositive of the issue. (Allcity Ins. Co. v. Iglesias, 264 AD2d 580 [1<sup>st</sup> Dept. 1999], citing Hanmer v. Tofany, 34 AD2d 383 [4<sup>th</sup> Dept. 1970]).<sup>3</sup>

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<sup>3</sup> The insurance code indicated on the police accident report, "222," is, as noted, inconsistent with the codes listed on the DMV insurance expansion records with respect to the taxicab, i.e. "322" (Hudson) and "267" (AIU). Nevertheless, under these circumstances the court may appropriately grant petitioner the opportunity, at an evidentiary hearing, to explain the record in evidence. (See Liberty Mut. Ins. Co. v. Perez, 119 AD2d 637, 639 [2d Dept. 1986], citing Matter of State Wide Ins. Co. [Libeccci], 104 AD2d 893 [2d Dept. 1984] [new evidentiary hearing ordered to allow petitioner to present proof from DMV interpreting the record in evidence]; Matter of

The evidence proffered by respondent Paulino that Hudson, by way of its authorized representatives, has disclaimed coverage of the Arias taxicab, does not end the inquiry. Such a disclaimer is not necessarily dispositive of the issue of coverage, but merely raises factual issues as to whether the underlying insurance policy continued in effect notwithstanding the disclaimer, and whether the purported disclaimer was proper. (See, e.g., Eagle Ins. Co. v. Villegas, 307 AD2d 879, 880 [1<sup>st</sup> Dept. 2003]; Allstate Ins. Co. v. Anderson, 303 AD2d 496, 497 [2d Dept. 2003]; Lumbermens Mut. Ins. Co. v. Beliard, 256 AD2d 579, 580 [2d Dept. 1998]).

Furthermore, where it is possible that coverage was not properly terminated, it is improper to resolve the issue of coverage in the absence of a hearing. (See Matter of National Gen. Ins. Co. [Makofskel], 100 AD2d 905 [2d Dept. 1984]).<sup>4</sup>

For the reasons stated above, the court finds that an

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Country-Wide Ins. Co. [Leff], 78 AD2d at 831 [DMV statement proffered by petitioner is some proof of insurance coverage, notwithstanding apparent contradiction in the model year of the vehicle involved]).

<sup>4</sup> Vehicle and Traffic Law section 313 (1)(a) provides, inter alia, that, in order for an insurance policy to be effectively cancelled, a notice of cancellation of insurance must be sent by regular mail by the insurer to the insured at least 20 days prior the date of cancellation and must include a statement that proof of financial security is to be maintained continuously throughout the registration period of the vehicle, which statement must not be smaller than 12 point print. (See Aetna Cas. & Sur. Co. v. Morales, 70 AD2d 833, 834 [2d Dept. 1979]).

evidentiary hearing on the issue of whether the taxicab owned by Arias had insurance coverage on the date of the accident in question is appropriate and necessary.

Therefore, after due deliberation and upon all of the pleadings and proceedings, it is hereby

ORDERED, that the petition to stay arbitration is granted, to the extent that a framed issue hearing is directed on the preliminary issue of the insurance coverage existing on April 25, 2006 on the 1998 Ford taxicab owned by Arias Car Corporation bearing VIN 2FAFP71WXWX137500, and accordingly, whether respondent Luz Paulino may compel petitioner to participate in arbitration for uninsured motorist benefits; and it is further

ORDERED, that the uninsured motorist arbitration noticed on April 20, 2006 by respondent Luz Paulino with petitioner Esurance is hereby stayed pending such hearing; and it is further

ORDERED, that petitioner serve a copy of this order with notice of entry upon the attorneys for the respondents and the arbitrator within 20 days of entry hereof; and it is further

ORDERED that, within 60 days from 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 thereupon

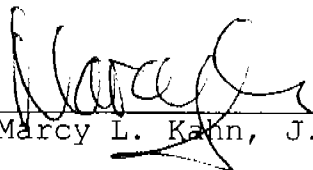
to assign this matter to an appropriate part for trial; and it is further

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

ORDERED, that if uninsured motorist arbitration is necessary, respondent Luz Paulino shall within sixty days after such determination is made, forward to petitioner duly executed authorizations to obtain all diagnostic films and medical records, and shall submit to an examination under oath and an independent medical examination by a doctor designated by petitioner, to be completed prior to arbitration.

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  
September 4, 2007

HON. MARCY KAHN  
**FILED**  
SEP 06 2007  
NEW YORK  
COUNTY CLERKS OFFICE