

**Matter of American Tr. Ins. Co. v
Maryasin**

2007 NY Slip Op 33076(U)

September 19, 2007

Supreme Court, New York County

Docket Number: 0110539/2007

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER

PART 5

Index Number : 110539/2007

Justice _____

AMERICAN TRANSIT INSURANCE COMPANY

INDEX NO. 110539-07

vs.

MARYASIAN, ALEX

MOTION DATE _____

SEQUENCE NUMBER : # 001

MOTION SEQ. NO. #001

SPS (PERMANENT STAY OF ARBITRATION)

MOTION CAL. NO. _____

re read on this motion to/for _____

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
SEP 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/19/07

[Signature]

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT, STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

In the matter of the application of
AMERICAN TRANSIT INSURANCE COMPANY
to stay arbitration,

Petitioner,

Index No.
110539/07

- against -

Decision and
Order

ALEX MARYASIN,

Respondent.

-----X

HON. EILEEN A. RAKOWER:

Petitioner, American Transit Insurance Company (“ATIC”) brings this petition seeking (1) a permanent stay of arbitration; or, in the alternative; (2) a temporary stay of arbitration until such time as a preliminary hearing may be held on the issue of insurance coverage, or, in the further alternative ;(3) if the court finds that an accident did occur, and that arbitration is necessary that respondent be ordered to undergo an Independent Medical Examination and to produce authorizations for all diagnostic films and medical records. Respondent Alex Maryasin opposes the motion.

This action arises out of a car accident that allegedly occurred on July 29, 2003. Respondent was a passenger in a vehicle owned and operated by petitioner’s insured (“vehicle 1”) which collided with a Mazda delivery truck bearing the name “Richmond Discount Appliance Sales Corp” (“vehicle 2”). ATIC, in support of its petition, submits a copy of the “New York Supplementary Uninsured/Under insured Motorists Endorsement”; A demand for arbitration dated July 9, 2007; and a “Declaration Automobile Insurance” with the issue date of January 6, 2003. Respondent, in opposition, submits a letter mailed to ATIC dated August 27, 2003, advising it of his intention to pursue an uninsured motorist claim; an affidavit by respondent describing the accident; a letter from St Paul Travelers Insurance Company (“Travelers”) disclaiming coverage for vehicle 2., and a “denial of claim” form from ATIC.

ATIC, in support of its motion, argues that respondent has failed to show that the accident occurred because he did not report it within 24 hours as is required by its policy for uninsured motorist claims. ATIC asserts that even if the accident did occur, respondent has not proved that vehicle 2 was uninsured at the time of the accident. Further, respondent has failed to attend two scheduled medical appointments which precludes him from receiving coverage under its policy.

Respondent claims that no one left the scene of the accident so 1(c)(1) of the New York Supplementary Uninsured/Underinsured Motorists Endorsement ("SUM") rather than 1(c)(2)(a) is applicable to its claim. Respondent, who was a passenger and witnessed the accident affirms that "vehicle 2 was readily identifiable and did not flee the scene of the accident."

The relevant portions of the policy are as follows:

Section 1(c):

The term "uninsured motor vehicle" means a motor vehicle that, through its ownership, maintenance or use, results in bodily injury to an insured, and for which:

(1) No bodily injury liability insurance policy or bond applies to such vehicle (including a vehicle that was stolen, operated without the owners permission, or unregistered) at the time of the accident; or

(2) Neither owner nor driver can be identified (including a hit-and-run vehicle), and which causes bodily injury to an insured by physical contact with the insured or with a motor vehicle occupied by the insured at the time of the accident, provided that:

(a) The insured or someone on the insured's behalf shall have reported the accident within 24 hours or as soon as reasonably possible to a police, peace or judicial officer or to the Commissioner of Motor Vehicles. . .

Respondent also submits a letter from Travelers which states, in relevant portion:

Our investigation indicates that the Mazda is not owned by Richmond Discount, as alleged, but is in fact, owned by Eugene Thomas . . .the Mazda allegedly owned by Richmond Discount does not qualify as a covered "auto" . . . the Mazda was not leased, hired, rented or borrowed by Richmond Discount. Therefore, the Mazda does not constitute a hired "auto." Finally, while the Mazda might constitute a non-owned auto, it was not used in connection with Richmond Discount. Therefore it does not constitute a non-owned "auto" . . . Therefore, coverage is precluded . . . St. Paul Travelers has no duty to defend and/or any obligation to indemnify Richmond Discount . . .

The driver of vehicle 2 was not unidentified nor was the accident a hit-and-run. Thus, respondent's claim does indeed fall under 1(c)(1), not 1(c)(2)(a) of ATIC's policy and the 24 hour notice requirement does not apply. Respondent submits a letter from vehicle 2's insurance company which states that vehicle 2 was not a "covered auto" because it was not owned, leased, rented, borrowed or used in connection with their policyholder, Richmond Discount Appliances. ATIC does not submit evidence contradicting Travelers claim. Such uncontradicted evidence is sufficient to warrant a finding of non-insurance. (Empire Mutual Insurance Co. v. Mahmud, 114 A.D.2d 324[1st Dept. 1985]).

Wherefore it is hereby

ORDERED that petitioner American Transit Insurance Company's petition to stay arbitration is denied, and it is further

ORDERED that respondent Alex Maryasin shall submit to an Independent Medical Examination prior to the commencement of arbitration proceedings, and it is further

ORDERED that respondent Alex Maryasin shall provide American Transit Insurance Company with all relevant medical records and authorizations prior to the commencement of arbitration proceedings.

This constitutes the decision and order of the court. All other relief requested is denied.

SEPTEMBER 19, 2007


EILEEN A. RAKOWER, J.S.C.

FILED
SEP 24 2007
NEW YORK
COUNTY CLERK'S OFFICE