

**Matter of State Farm Mut. Auto. Ins.  
Co. v Capalbi**

2007 NY Slip Op 33381(U)

October 11, 2007

Supreme Court, Nassau County

Docket Number: 2046-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

In the Matter of the Petition of  
  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,  
  
Petitioner,  
  
- against -

TRIAL / IAS PART 32  
NASSAU COUNTY  
  
Index No. 2046/07  
  
Motion Sequence No. 002

For an Order staying the Arbitration attempted to  
be had by  
RENATO CAPALBI,  
  
Respondent,  
  
- and -  
MARIA P. LAZZARO and PROGRESSIVE  
NORTHEASTERN INSURANCE COMPANY,

Proposed Additional Respondents.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The proposed additional respondents move for an order pursuant to CPLR 7503 and CPLR 2221 (d) granting them reargument of the petition to stay the uninsured motorist arbitration, vacating the court order of May 17, 2007, and scheduling an evidentiary hearing on the issue of whether there should be a hearing on the issue of whether the Lazzarro vehicle was in a state of theft at the time of loss. The petitioner

opposes the motion.

The attorney for the proposed additional respondents states, in a supporting affirmation dated June 29, 2007, the instant motion is authorized pursuant to CPLR 2221 (d), and asserts the Court overlooked and misapprehended the facts, to wit the necessity to schedule the matter for an evidentiary hearing on the issue of whether the Lazzarro vehicle was in a state of theft at the time of loss. The attorney for the proposed additional respondents states the proposed additional respondents asserted in their previous papers, since the Lazzarro vehicle was in a state of theft at the time of loss, they should not be deemed responsible for this loss under Vehicle and Traffic Law § 388, but the Court overlooked and misapprehended the facts. The attorney for the proposed additional respondents contends the petitioner's argument the Lazzarro vehicle was not stolen simply because it was reported stolen to the police to the police the day after the loss.

The petitioner's attorney states, in an opposing affirmation dated July 6, 2007, the Court did not overlook or misapprehend any of the facts nor the law in reaching the decision on May 17, 2007. The petitioner's attorney asserts the petitioner, in its petition, made out a prima facie case of insurance coverage on the offending vehicle owned by Lazzarro, and insured by the proposed additional respondent Progressive Northeastern Insurance Company, and once that burden was met, the burden shifted to the proposed additional respondent Progressive Northeastern Insurance Company to establish it did not insure the other vehicle at the time of the accident. The petitioner's attorney points out

the only item offered in response to the petition was a form entitled New York Affidavit of Vehicle Theft which specifically stated on its face, the date of theft was August 11, 2006, at 9 a.m., and the bold faced type indicated a handwritten portion purportedly completed by Lazzarro. The petitioner's attorney notes there are no other affidavits submitted by Lazzarro, and the subject accident took place on August 10, 2006, at 11:18 p.m., according to the police report, so there is no evidence presented by Lazzarro that indicated the subject vehicle was stolen prior to the accident. The petitioner's attorney asserts the affidavit present by Lazzarro appears to indicate another person, Jose Lopez, had access to the subject vehicle, and no affidavits were submitted by Lopez. The petitioner's attorney avers the affidavit present by Lazzarro admits the ignition keys were left in the vehicle which implicates Vehicle and Traffic Law § 1210 (a) which holds the owner liable when the keys to the vehicle are left in the vehicle.

The attorney for the proposed additional respondents states, in a reply affirmation dated August 7, 2007, the Court overlooked a hearing should be held to address the issue of whether the Lazzarro vehicle was in a state of theft at the time of loss. The attorney for the proposed additional respondents states the petitioner's opposition papers are without merit. The attorney for the proposed additional respondents points out, according to the Lazzarro affidavit, the vehicle was last seen in the evening of August 10, 2006, and was discovered the next morning as stolen on August 11, 2006, at approximately 9:00 a.m., so it is reasonable for the person to discover the vehicle stolen at that time. The

attorney for the proposed additional respondents contends the petitioner's argument that since the accident took place before the vehicle was discovered stolen, the vehicle was not stolen. The attorney for the proposed additional respondents argues a hearing is required so Lazzarro and the individual identified as Jose Lopez can appear before the Court to provide testimony to address the issues. The attorney for the proposed additional respondents states any implications with respect to the Vehicle and Traffic Law are unsubstantiated because the petitioner has not demonstrated the vehicle was on a public roadway at the time of loss, and a hearing is necessary to ascertain the location of the vehicle and location of the keys within the vehicle at the time of the theft.

The party seeking a stay of arbitration has the burden of showing sufficient facts to establish justification for the stay (*see Matter of Empire Mut. Ins. Co. [Zelin]*, 120 AD2d 365, 366). Where, however, "there is a genuine triable issue ... the appropriate procedure is to stay arbitration pending a trial of the threshold issue" [citation omitted] (*AIU Ins. Co. v. Cabrera*, 301 A.D.2d 448, 449, 754 N.Y.S.2d 253 [2d Dept., 2003]). The Court has carefully reviewed and considered all of the parties's submissions. The Court finds the proposed additional respondents have met their burden under CPLR 7503 and CPLR 2221 (d).

Accordingly, the motion is granted to the extent of granting reargument, and upon reargument the Court vacates its prior order of May 17, 2007, and set the matter down for a framed issue hearing on the issues of whether the Lazzarro vehicle was in a state of theft

at the time of the loss. A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Calendar Control Part of this court for a framed issue hearing. Arbitration is stayed pending the hearing.

So ordered.

Dated: **October 11, 2007**

ENTER:



J. S. C.

**TONY ANTONIO I. BRANDVEEN**

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

**ENTERED**

**OCT 18 2007**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**