

<b>Matter of Progressive Specialty Ins. Co. v Stephens</b>
2007 NY Slip Op 33713(U)
November 15, 2007
Supreme Court, Suffolk County
Docket Number: 0004586/2007
Judge: Emily Pines
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Short Form Order

Index Number: 4586-2007

**Supreme Court - State of New York**  
**I.A.S. Term, Part 23, Suffolk County**

*Present:***HON. EMILY PINES**

Justice Supreme Court

Original Motion Date: 03-08-2007

Motion Submit Date: 09-27-2007

Motion Sequence No.: 001 RRH

JAN. 28, 2008

\_\_\_\_\_ X  
**In the Matter of the Application of the**  
**PROGRESSIVE SPECIALTY INSURANCE**  
**COMPANY,**

Law Offices of Teresa Girolamo  
 248 Middle Country Road, Suite 9B  
 Selden, New York 11784

**Petitioner,**

Russo, Darnell & Lodato, LLP  
 1975 Hempstead Turnpike - Suite 401  
 East Meadow, New York 11554

**-against-**

**To Stay the Arbitration sought to be had by**  
**TINA STEPHENS,**

**Respondent.**

\_\_\_\_\_ X

**ORDERED**, that the Amended Petition (motion sequence number 001) to permanently Stay arbitration is determined to the extent that the matter is set down for a framed issue Hearing as set forth below on January 28, 2008 at 9:30 a.m. before the undersigned.

Petitioner commenced this proceeding by filing of a Notice of Petition and Petition to stay arbitration on February 1, 2007. Thereafter, Petitioner filed an Amended Notice of Petition and Petition on June 5, 2007, adding an additional ground for seeking the stay of arbitration. This proceeding arises out of a motor vehicle accident that occurred on November 23, 2006 on Spur Drive South, Islip, New York. Respondent filed a Demand for Arbitration with the American Arbitration Association on or about January 22, 2007, seeking benefits as a result of a purported hit-and-run accident. Petitioner thereafter commenced this proceeding to stay the arbitration on the following three grounds: 1) that the American Arbitration Association lacks jurisdiction over Petitioner's Pennsylvania policy of insurance; 2) that Respondent was involved in a single vehicle accident and thus uninsured motorist benefits are not warranted; and 3) that Respondent has failed to submit to an Examination Under Oath, has failed to submit to physical examinations and has failed to provide all medical authorizations.

Petitioner subsequently filed an Amended Notice of Petition in which it set forth a fourth

additional ground for seeking a stay of the arbitration. Now, Petitioner argues that respondent breached the insurance policy by engaging in fraudulent conduct in connection with the instant accident or claim and is not entitled to coverage or benefits under the policy. Here, Petitioner argues that Respondent knowingly concealed or misrepresented material facts or circumstances or engaged in fraudulent conduct in connection with the claim. Specifically, Petitioner points to a purported inconsistency between respondent's testimony and the statements she allegedly made at the accident scene. Respondent testified at an Examination Under Oath on February 5, 2007 that she had only one glass of sherry with her grandfather at dinner. However, in the ambulance call sheet, in the "Objective Physical Assessment" section, it states "PT ADMITTED DRINKING TWO DRINKS AND SMOKING POT EARLIER IN THE DAY". Petitioner deposed James Hood, a volunteer with the Islip Terrace Fire Department on May 14, 2007. Hood testified that he was the individual who completed the call sheet and that he wrote the information indicated above. He stated that he got this information from Respondent, who gave this information in response to a question by someone who was in the ambulance with Respondent. Hood testified that he heard the information and wrote it down. Based upon the foregoing, Petitioner claims that Respondent made intentional misstatements of a material fact in violation of the contract of automobile insurance and the demand for arbitration should be permanently stayed.

Without citing any legal authority, Petitioner first claims that the demand for arbitration should be permanently stayed on the ground that the American Arbitration Association lacks jurisdiction to adjudicate this claim. Petitioner states that according to the Pennsylvania Auto Policy issued to Respondent, the arbitration shall be conducted in accordance with the provisions of the Pennsylvania Arbitration Act of 1927. That Act provides that each party will select an arbitrator and the two arbitrators will select a third arbitrator. Therefore, Petitioner argues that because the matter does not involve a New York automobile policy of insurance, the American Arbitration Association lacks jurisdiction to oversee this case and there was no agreement between the parties to have the matter heard by them.

With regard to its second argument, Petitioner asserts that this matter does not warrant uninsured motorist benefits because it was a single vehicle accident. Petitioner refers to the police report, attached to the moving papers, which indicates that contributing factors in the accident were that the roadway was curvy, the pavement was slippery and "unsafe speed". Moreover, the report indicates that this was a single vehicle accident and a collision with a fixed object, to wit, a tree. Therefore, Petitioner argues that Respondent is not entitled to uninsured motorist benefits.

In opposition to the Petition, Respondent argues that the American Arbitration Association does have jurisdiction over this matter because it provides arbitration nationwide, including Pennsylvania and that there is nothing precluding arbitration from proceeding there pursuant to the

Pennsylvania Arbitration Act of 1927. Respondent also notes that Petitioner has not produced the actual insurance policy but only a sample of said Pennsylvania policy.

Regarding the claim by Petitioners of fraudulent conduct, Respondent argues that the issue of her alleged intoxication was already adjudicated in arbitration of Respondent's claim for no-fault benefits. The submissions reflect that Petitioner had denied no-fault benefits to respondents based upon an allegation that she was intoxicated at the time of the accident. The matter proceeded to arbitration and the arbitrator ruled in Respondent's favor. There, the arbitrator found that:

As to Applicant's testimony, the issue of whether she had one or two drinks does not really matter, since there were no blood tests to establish that her blood alcohol level met the standard of **Section 1192 of the Vehicle and Traffic Law**. As to the pot smoking issue, I accept her testimony that she did not smoke pot that day. I also find that the Respondent did not prove that the Applicant's drinking was the proximate cause of the accident. Based on all these considerations, I find that the Respondent has not met their burden of proof regarding the exclusion; therefore, the denials cannot be sustained.

Respondent thus argues that the doctrine of *res judicata* bars Petitioner from relitigating the issue of possible alcohol and/or drug use in the proceeding.

On the issue of this being a single vehicle accident, respondent points to the disparity between her testimony that the accident was the result of being struck by a hit and run vehicle and the police report which states that it was a single vehicle collision. She argues that such disparity mandates a hearing on the factual question of whether there was contact by a hit and run vehicle.

In reply, Petitioner argues that the facts demonstrate that Respondent made false statements in presentation of the claim and lied under oath regarding her alcohol consumption, warranting denial of the uninsured motorist claim. Moreover, Petitioner argues that *res judicata* does not apply because the only issue before the arbitrator was Respondent's unpaid hospital bills based upon her alleged operation of a motor vehicle while impaired by the use of a drug; whereas in this proceeding, the issue is whether Respondent made a material misrepresentation and fraudulently presented a claim. Therefore, Petitioner argues that the issues are not the same and collateral estoppel does not apply.

Lastly, Petitioner reiterates that the American Arbitration Association does not have jurisdiction over this case because the insurance policy is not a New York State Contract and since there is no provision in the contract for Petitioner to proceed with the American Arbitration Association, it can not be compelled to do so.

### COLLATERAL ESTOPPEL

The law is well settled that the doctrine of collateral estoppel applies when the issues necessarily decided in a prior action and the issues in the present action are identical, and were fully and fairly litigated. *Glenriver, Inc., v. Winchester Global Trust Co.*, 28 A.D.3d 517, 813 N.Y.S.2d 488 (2d Dept. 2006); *QDR Consultants & Development Corp., v. Colonia Insurance Co.*, 251 A.D.2d 641, 675 N.Y.S.2d 117 (2d Dept. 1998). Collateral estoppel applies to arbitration awards with the same force and effect as it applies to judgments of courts. *Luppo v. Waldbaum, Inc.*, 131 A.D.2d 443, 515 N.Y.S.2d 871 (2d Dept. 1987).

In the case at bar, the Court finds that the doctrine of collateral estoppel bars Petitioner from relitigating the issue of Respondent's drug or alcohol consumption on the date of the accident. In the arbitration proceeding regarding denial of Respondent's no-fault benefits, the issue was whether respondent was intoxicated at the time of the accident, thus warranting denial of the benefits. Here, despite Petitioner's claim that the issue is one of fraud or misrepresentation, in effect, the issue is identical to that previously litigated in the no-fault arbitration. Petitioner claims that Respondent is not entitled to uninsured motorist benefits because she was intoxicated and used marijuana prior to the accident and that respondent fraudulently misrepresented this fact during her examination under oath. Although couched in terms of fraudulent misrepresentation, this issue is identical to that litigated before the arbitrator. Petitioner had the opportunity to fully and fairly litigate the issue and the issue was decided in Respondent's favor. *Allstate Insurance Co., v. Toussaint*, 163 A.D.2d 444, 558 N.Y.S.2d 579 (2d Dept. 1990). Thus, Petitioner is collaterally estopped from raising this issue as a ground to deny uninsured motorist benefits. *See, e.g., Guarantee Insurance Co., v. D'Allewa*, 113 A.D.2d 941, 493 N.Y.S.2d 632 (2d Dept. 1985); *Greenspan v. Doldorf*, 87 A.D.2d 834, 449 N.Y.S.2d 535 (2d Dept. 1982);

### JURISDICTION

It is undisputed that the insurance policy at issue provided that each party was to select one arbitrator and those two arbitrators would select a third arbitrator. It is also undisputed that the Demand for Arbitration was timely filed, albeit in an improper forum. Therefore, in the event the Court determines, after the hearing, that Respondent is entitled to arbitration, she is required to

follow the arbitration procedures set forth in the policy. The American Arbitration Association is not the proper forum for the arbitration. *Aetna Casualty and Surety Co., v. Cinisomo*, 197 A.D.2d 683, 602 N.Y.S.2d 902 (2d Dept. 1993). *See also, Great American Insurance Co., v. Garcia*, 250 A.D.2d 850, 673 N.Y.S.2d 710 (2d Dept. 1998). In *Aetna Casualty, supra*, the Appellate Court reversed a Trial Court's grant of a stay of Arbitration on precisely the same issue - i.e., that the AAA was the improper forum to carry on the arbitration. The improper choice of forum did not rob the Respondent of the right to arbitrate his Underinsured Motorist Claim. *Id.* Accordingly, it will not so operate in the case at bar.

#### SINGLE VEHICLE ACCIDENT

Petitioner's claim that Respondent is not entitled to uninsured motorist benefits because this was a single vehicle accident must be referred to a hearing. Here, there is a disparity between Respondent's testimony that she was struck by a hit-and-run vehicle and the police report which indicates this was a single car accident. Thus, there is a factual question as to whether there was physical contact between Respondent's vehicle and an alleged hit-and-run vehicle, requiring a hearing on this issue. *Allstate Insurance Co., v. Hayes*, 17 A.D.3d 669, 794 N.Y.S.2d 85 (2d Dept. 2005); *Everyready Insurance Co., v. Scott*, 1 A.D.3d 436, 767 N.Y.S.2d 31 (2d Dept. 2003); *Lumbermens Mutual Casualty Co., v. Nespolini*, 281 A.D.2d 365, 722 N.Y.S.2d 166 (2d Dept. 2001).

A hearing on this issue will be held on January 28, 2008 at 9:30 a.m. before the undersigned.

The foregoing constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 15, 2007  
Riverhead, New York

  
EMILY PINES  
J. S. C.