

Matter of Travco Ins. Co. v Rustian

2008 NY Slip Op 30008(U)

January 3, 2008

Supreme Court, Suffolk County

Docket Number: 0027047/2007

Judge: Emily Pines

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

Present:

HON. EMILY PINES
Justice Supreme Court

Original Motion Date: 09-27-2007
Motion Submit Date: 10-25-2007
Motion Sequence No.: 001 RRH

_____ X
In the Matter of the Application for an Order
Staying Arbitration Between TRAVCO
INSURANCE COMPANY, incorrectly designated
TRAVELERS INSURANCE COMPANY,

Petitioner,

-and-

CHRISTINA REED,

-against-

MAURICIANO E. RUSTIAN, MORNA
HENRIQUEZ-RUSTIAN, CLARENDON
NATIONAL INSURANCE COMPANY, SHERI
A. WOOD AND ALLSTATE INSURANCE
COMPANY,

Proposed Additional Respondents.
_____ X

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ORDERED, that petitioner's motion to stay respondent's application to proceed to arbitration is granted to the extent that the matter is temporarily stayed pending a framed issue hearing on the issue of whether a hit and run vehicle was involved in the accident.

This proceeding arises out of respondent's Demand for Arbitration dated August 6, 2006¹, which seeks arbitration pursuant to an insurance policy issued by petitioner to non-party Vito Mancini ("Mancini") providing for uninsured motorist benefits. The accident which is the subject of the claim occurred on December 10, 2003, when the vehicle operated by respondent and owned by Mancini was struck in the rear by a vehicle operated by Sheri Wood. The accident allegedly occurred when a hit and run vehicle struck the rear of a vehicle owned by proposed additional respondent Mauriciano E. Rustrian and operated by Morna Henriquez-Rustrian (collectively "Rustrian"), causing it to strike the rear of the vehicle owned and operated by proposed additional respondent Sheri A. Wood ("Wood"). The Wood vehicle then struck respondent Reed's vehicle. The Rustrian vehicle was insured by proposed additional respondent Clarendon National Insurance Company ("Clarendon") and the Wood vehicle was insured by proposed additional respondent Allstate Insurance Company ("Allstate"). Reed had previously commenced a personal injury action (Index no. 22443-2004) against Rustrian and Wood for damages sustained in the subject accident. In that action, on cross-motions for summary judgment by Wood and Rustrian, the Court (DOYLE, J.) granted the motion by Wood for summary judgment and dismissed the complaint against her. The cross-motion by Rustrian was denied as untimely since it was not served within 120 days of filing of the note of issue. Regarding the dismissal against Wood, the Court found there was no negligence on the part of Wood in the happening of the accident and it was undisputed that she was stopped at a red light when struck by the Rustrian vehicle. The Court noted in its recitation of the facts that the fourth vehicle in this chain reaction collision "was an unidentified vehicle which subsequently left the scene."

Petitioner has now commenced this proceeding seeking to permanently stay arbitration on the ground respondent failed to comply with the notice provisions of the insurance policy and additionally respondent failed to demonstrate that the accident involved an uninsured motor vehicle. With regard to notice, petitioner argues that respondent failed to comply with the insurance policy provision which required written notice of an SUM claim "as soon as practicable", and rather respondent waited until August 9, 2007, more than three years after the accident, to provide such notice. Additionally, petitioner argues that the other vehicles involved in the accident, the Rustrian vehicle and Wood vehicle, were insured, and thus SUM coverage is not available. Petitioner claims there is no objective proof that a hit-and-run

¹Although the Demand for Arbitration was dated August 6, 2006, it appears undisputed that it was supposed to be dated August 6, 2007, as evident by the cover letter dated August 6, 2007, prepared by Respondent's counsel and annexed to the Demand.

vehicle came into contact with respondent's vehicle. As required for SUM coverage under the insurance policy. Alternatively, petitioner argues that the Court should temporarily stay the arbitration pending a hearing on the issue of undue delay in notifying petitioner of the intent to pursue a hit-and-run claim and the issue of physical contact with an unidentified vehicle.

Respondent Reed opposes the motion for a permanent stay of arbitration. On the issue of notice, Reed argues that petitioner was afforded timely notice of her intention to pursue SUM benefits via letters dated December 24, 2003, January 9, 2004 and February 24, 2004. Those correspondences, annexed to the opposition papers, clearly evidence her intent to pursue an SUM claim and hit-and-run benefits. Therefore, respondent Reed argues that petitioner was afforded timely notice of the within claim for SUM benefits. Regarding the issue of physical contact, respondent points to the Doyle decision which references an unidentified vehicle which left the scene of the accident and also the New York State Insurance Department regulations which defines an "uninsured motor vehicle" as a motor vehicle for which "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...". Respondent argues that direct contact between the hit-and-run vehicle and the vehicle owned by the injured party is not a prerequisite to a claim for uninsured motorist benefits and that a chain reaction collision, as is the case here, resulting in indirect contact, may suffice for coverage. Additionally, respondent notes that Clarendon has disclaimed coverage for the Rustrian vehicle, providing an additional basis for SUM benefits. Based on the foregoing, respondent Wood argues that the Petition to Stay Arbitration should be denied in its entirety, or in the alternative, that the matter be temporarily stayed pending a framed issue hearing.

Proposed additional respondents Rustrian also submit opposition to the Petition. Rustrian argues that the subject accident was wholly caused by a hit-and-run vehicle and that they have no liability for the happening of the accident. Rustrian annexes excerpts from the testimony of respondent Reed at her examination before trial in the personal injury action in which she stated that she was stopped at a traffic light when she was struck in the rear by the vehicle operated by Wood. Reed testified that she saw the two cars behind the Wood vehicle and that the fourth vehicle in the collision "drove away" from the accident scene. Rustrian also submits the testimony of Morna Rustrian who testified that she was stopped at a traffic light on William Floyd Parkway when her vehicle was struck in the rear by a Cadillac type

automobile. She testified the Cadillac left the scene of the accident and she did not get the license plate number or otherwise learn the name of the driver of that vehicle. Based on this testimony, Rustrian argues that the Petition to Stay Arbitration should be denied in its entirety and the Court should rule that Rustrian had no liability in the happening of the accident.

NOTICE

Petitioner's argument that respondent failed to timely notify of the intention to pursue SUM benefits is without merit. The Second Department has held that where a claimant has given timely notice of an accident, an insured cannot disclaim coverage under a SUM endorsement unless it establishes that it has been prejudiced by late notice of the SUM claim. ***New York Central Mutual Insurance Co., v. Davalos***, 39 A.D.3d 654, 835 N.Y.S.2d 247 (2d Dept. 2007); ***Nationwide Mutual Insurance Co., v. Perlmutter***, 32 A.D.2d 947, 821 N.Y.S.2d 253 (2d Dept. 2006).

Here, respondent Reed timely notified petitioner of both the accident and her intention to pursue SUM benefits by correspondences dated December 24, 2003, January 9, 2004 and February 24, 2004. Thus, respondent notified petitioner initially within two (2) weeks of the accidents of her intention to pursue a claim and the claim of late notice must be rejected.

HIT-AND-RUN VEHICLE

Petitioner argues that respondent has failed to provide any objective proof that a hit-and-run vehicle was involved in the accident and that a hit-and-run vehicle came into contact with respondent Reed's vehicle. Such argument is also without merit. Although physical contact is a condition precedent to an arbitration based upon a hit-and-run accident, direct contact between the unidentified vehicle and the insured's vehicle is not required in an accident involving multiple vehicles. ***Allstate Insurance Co. v. Basdeo***, 273 A.D.2d 466, 710 N.Y.S.2d 111 (2d Dept. 2000). ***See also, State Farm Mutual Auto Ins. Co., v. Johnson***, 287 A.D.2d 640, 732 N.Y.S.2d 21 (2d Dept. 2001). ***Insurance Law §5217.***

Here, the deposition testimony of both Reed and Rustrian sets forth that an unidentified fourth vehicle was the proximate cause of the chain reaction collision that occurred. Additionally, Justice Doyle noted the hit-and-run vehicle in his determination granting summary judgment dismissing the case against Wood, the operator of the vehicle that struck respondent's vehicle.

Based upon the foregoing, a framed issue hearing is required

on the issue of whether a hit-and-run vehicle was involved in the accident; specifically, whether a hit-and-run vehicle struck the Rustrian vehicle, causing it to strike the Wood vehicle which ultimately struck respondent's vehicle. **See, One Beacon Insurance Co., v. Espinoza**, 37 A.D.3d 607, 830 N.Y.S.2d 287 (2d Dept. 2007); **Utica Mutual Insurance Co., v. Leconte**, 3 A.D.3d 534, 770 N.Y.S.2d 750 (2d Dept. 2004); **Nationwide Insurance Co., v. McDonnell**, 272 A.D.2d 547, 708 N.Y.S.2d 146 (2d Dept.2000). Therefore, the petition is granted to the limited extent of temporarily staying arbitration pending the outcome of the framed issue hearing. Proposed additional respondents Mauriciano E. Rustrian, Morna Henriquez Rustrian, Clarendon National Insurance Company, Sheri A. Wood and Allstate Insurance Company shall be added as party respondents.

A framed issue hearing as set forth herein shall be held on February 11, 2008 at 9:30 a.m. before the undersigned.

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

Dated: 1/3/08
 Riverhead, New York

Emily Pines
 EMILY PINES
 J. S. C.