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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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In the Matter of the Application for an Order Staying Arbitration Between,

INTEGON NATIONAL INSURANCE COMPANY,

Petitioner,

-against-

INDEX NO.: 022085/07

MOTION DATE:1-10-08
SUBMIT DATE:5-5-08
SEQ. NUMBER - 001

CRAIG URQUHART,

Respondent.

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The following papers have been read on this motion:

Notice of Motion, dated 12-10-07.....1
Affirmation in Opposition, dated 2-28-08.....2
Reply Affirmation, dated 5-2-08.....3

This application by petitioner to permanently stay the arbitration of an underinsured motorist claim pursuant to CPLR §7503 (c) is denied. The alternative request for a temporary stay for the purpose of allowing disclosure to be obtained from respondent prior to arbitration is also denied.

On August 31, 2007, respondent was involved in an accident while driving a vehicle registered to a friend and insured by petitioner pursuant to a commercial insurance policy issued to respondent's employer. Respondent demanded arbitration of a claim for underinsured (SUM) benefits 88 days after the accident by serving a completed Arbitration Association form. Petitioner responded with a letter disclaiming coverage, the timeliness of which is not in dispute.

Petitioner seeks the within stay on the grounds that respondent is not covered by the policy, that the first and only notice of the claim was the demand to arbitrate and that such notice was not timely. Two versions of the policy are submitted. One version provides "within 90 days or as soon as practicable the insured or other person making claim shall give the company written notice of claim under this coverage". It has been held that this wording should be construed to permit a claim to be filed within 90 days or as soon as practicable, whichever is longer, from the date the claimant knew or should have known of the under insurance. *Metro Prop. Ins. Co., v. Mancuso*, 93 NY2d 487 (1999). The second version, called the SUM endorsement, provides that the insured or other person making a claim shall give written notice "as soon as practicable". This phrase has been held to mean that an insured must give notice with reasonable promptness after the insured knew or should reasonably have known that the tortfeasor was underinsured. *Id* at 495.

By either standard, notice here was not untimely and petitioner has failed to make a prima facie showing of lack of timeliness.

The requirements of the policy have been met because the demand for arbitration was made within 90 days as required and there is no allegation that respondent failed to comply

with any requests or demands for information. The record indicates that petitioner's immediate response was to disclaim on the basis of timeliness and lack of coverage. Nor has the petitioner alleged that application of the language set forth in the regulations of the insurance department has not been met. The petitioner has made no effort to show that the respondent knew or should have known that the tortfeasor was underinsured in less than the 88 days after the accident. The petitioner has not offered any authority to support the contention that it is not necessary to offer any evidence of lack of due diligence by an insured for the purpose of establishing a prima facie showing of entitlement to relief from arbitration, a proposition which seems to be supported by applicable case law, despite its invitation at speculation. *Matter of Eagle Ins. Co., v. Bernardine*, 266 AD2d 543 (2d Dept. 1999); *Eagle Ins. Co., v. Battershield*, 225 AD2d 545 (2d Dept. 1996). Thus, there is no merit to petitioner's claim of late notice. *Cf State Farm Mutual Automobile Insurance Company v. Adams*, 259 AD2d 551 (2d Dept. 1999) and construing the arbitration notice liberally in petitioner's favor sufficient notice of the claim was present here. *Merchants Mutual Insurance Company v. Falisi*, 99 NY2d 568 (2003).

If it can be said that petitioner has sustained its burden of establishing a prima facie basis for relief by merely showing notice 88 days post accident, then respondent has in any event, as a matter of law, sustained his burden of demonstrating that he acted with due diligence in ascertaining the insurance status of the vehicle involved in the accident. *Continental Ins. Co., v. Boyar*, 284 AD2d 332 (2d Dept. 2001).

Due diligence is present here by showing that respondent spent 16 days after the accident in the hospital recovering from his injuries, he changed attorneys within the 88 day

period preceding notice, and did not learn of the limits of the tortfeasor's policy until on or about November 14, 2007, when the entire policy was offered in settlement, following which notice was then given. Based on these facts, respondent has sustained his burden of demonstrating due diligence. *State farm Mutual Automobile Insurance Company v. Linero, 13 AD3d 546 (2d Dept. 2004); Cf Interboro Mutual Indemnity Ins. Co. v. Sarno*, 277 AD2d 454 (2d Dept. 2000).

Petitioner next argues that by its terms, the policy does not provide under insurance coverage to respondent. The SUM endorsement, which is the only part of the policy submitted on this issue, defines an "insured" insofar as is relevant here as "any other person while occupying; (i) a motor vehicle insured for SUM under this policy."

Respondent is undoubtedly an insured under this definition.

Petitioner also relies on an exclusion insofar as is applicable here, for "bodily injury... incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made". Here respondent is not excluded because he is not the owner of the vehicle and, if he is the owner, the vehicle is SUM covered.

On an application to stay arbitration, petitioner has the burden of establishing evidentiary facts sufficient to conclude that a genuine preliminary issue exists. (*Matter of Hanavan [MVAIC]*, 33 AD2d 1100 (1st Dept. 1970). The burden of proof then shifts to the party opposing the stay to rebut a "prima facie case by establishing affirmative defenses of nonrenewal or cancellation". *Matter of Country-Wide Ins. Co. Leff*, 78 AD2d 830 (1st Dept. 1980). (*Matter of American Security Insurance Company v. Ferrer*, 110 AD2d 503 504, (1st Dept. 1985).

Upon consideration of the record submitted, this Court finds that petitioner has not satisfied its burden of establishing that a genuine preliminary issue exists whereas respondent has come forward with evidence of SUM coverage. *See Matter of Eagle Insurance Company v. Battershield*, 225 AD2d 545 (2nd Dept. 1996); *Matter of Prudential Property & Casualty Insurance Company v. Campbell*, 227 AD2d 628, (2d Dept. 1996) and has demonstrated that he should not have been required to give notice any sooner than he did.

Petitioner's additional request that respondent provide various disclosure prior to arbitration is also denied. Petitoner has not submitted any evidence that discovery has been requested, that any claim forms have been tendered to respondent or that he has in any way refused to provide any requested information.

"Where an insurer has ample time to seek discovery of its insured ... but unjustifiably fails to do so, it is not entitled to a stay of arbitration. In contrast, where an insurer presents a justifiable excuse of its failure to seek such discovery, a temporary stay of arbitration will be granted to allow the insurer to obtain discovery." *Liberty Mutual Insurance Company v. Ubirajar*, 266 AD2d 547 (2d Dept. 1999), citations omitted. Here petitioner has not presented any credible explanation, in evidentiary form, for its failure to seek discovery and thus the request for a stay of arbitration on that ground is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 8, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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