

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

2008 NY Slip Op 33169(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 104471/2008

Judge: Shirley Werner Kornreich

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 104471/2008

AMERICAN TRANSIT INS.

vs
LUKE, FLOYD

Sequence Number : 001

COMPEL OR STAY ARBITRATION

INDEX NO. _____

MOTION DATE 8/7/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

7-9

10-12 (letters
w/ attachments dated
11/19/08
& 11/20/08)

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

UNENFORCEABLE
This judgment has not been entered by the County Clerk and notice of entry cannot be based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

11/25/08

HON. SHIRLEY WERNER KORNREICH

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Arbitration Attempted to be had
between AMERICAN TRANSIT INSURANCE
COMPANY,

Index No.: 104471/2008

**DECISION, ORDER
and JUDGMENT**

Petitioner,

-against-

FLOYD LUKE,

Respondent,

ARLENE DEMPSEY and PHOENIX INS. CO.,

Proposed Additional Respondents.

-----X
KORNREICH, SHIRLEY WERNER, J.

UNFILED JUDGMENT
*This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).*

Petitioner American Transit Insurance Company (ATIC) seeks to stay arbitration demanded by Floyd Luke (Claimant) under an uninsured motorist endorsement to a policy issued to Moussa Dombia. The ground for the petition is that arbitration is barred by the statute of limitations. Alternatively, ATIC requests a framed issue hearing to determine whether additional proposed respondent, Phoenix Insurance Co. (Phoenix) insured a vehicle operated by the other proposed additional respondent, Arlene Dempsey (Dempsey). The Dempsey vehicle allegedly injured the Claimant's vehicle. Additionally, ATIC asks the court to direct Claimant to submit to an examination under oath and an independent medical examination and to provide authorizations for diagnostic films and medical records.

Phoenix agrees that arbitration is barred by the statute of limitations, but opposes the petition on the ground that it cancelled the Dempsey policy prior to the accident.

3]

Claimant cross-moves for statutory costs of the motion on the ground that the ATIC's application is frivolous and the request for disclosure was served without an affirmation of a good faith attempt to secure the disclosure without intervention of the court.

Factual Background

Claimant allegedly was injured while operating a motor vehicle insured by ATIC and owned by Moussa Doumbia. The uninsured motorist endorsement in the ATIC policy provides that an "uninsured motor vehicle" includes a vehicle that has no insurance for personal injury, including one that is unregistered at the time of the accident. Claimant's demand for arbitration was mailed on March 10, 2008.

The police accident report states that while Claimant was stopped at a red light on March 9, 2002, his car was struck in the rear by a 2000 blue jaguar, license plate FH664M, being operated by Dempsey, who resided at 775 6th Avenue, Apt. 3, New York, NY 10001. In support of the petition, ATIC attaches a computer printout, dated March 18, 2002, which reflects that a 2000 blue jaguar, bearing the plate number in the police report, was registered to Eileen Dempsey (not Arlene), residing at the same address on 6th Avenue. The printout further states that the insurer of the Dempsey vehicle was Phoenix, but that the vehicle's registration was suspended for lack of insurance on September 22, 2001, prior to the accident.

In opposition, Phoenix has submitted proof that the Dempsey policy was terminated for nonpayment of premiums, effective July 8, 2001.¹ Notice of cancellation was mailed to Dempsey by certified mail on June 13, 2001, more than fifteen days in advance of cancellation, as prescribed by Vehicle & Traffic Law §313.

¹The Phoenix policy was issued by its affiliate The Travelers Indemnity Company.

Claimant submits a September 2003 printout from the Department of Motor Vehicles, which shows that Dempsey's registration was suspended on September 22, 2001 for lapse of insurance and a letter from the Department of Motor Vehicles, dated May 24, 2007, stating that Dempsey's driver's licence was revoked for operating an uninsured vehicle that was involved in an accident on March 9, 2002.²

Discussion

The demand for arbitration is not barred by the statute of limitations. The statute of limitations for a demand for arbitration of an uninsured motorist claim is six years from the date of the accident. *Allstate Ins. Co. v. Morrison*, 267 A.D.2d 381 (2d Dep't 1999). The statute begins to run when the demand is posted. *Allied Wholesale v. Asia N. Am. Eastbound Rate Agreement*, 212 A.D.2d 472 (1st Dep't 1995).

The arbitration sought by Claimant is not barred by the statute of limitations. Six years from the date of the accident would have been March 9, 2008. The court takes judicial notice that March 9, 2008 was a Sunday, which extended the time to serve the demand until Monday, March 10, 2008. General Construction Law §25-a. Hence, the demand was timely mailed on that date.

Nor is ATIC entitled to a framed issue hearing. "On an application to stay arbitration, petitioner has the burden of establishing the existence of evidentiary facts sufficient to conclude

² Claimant's attorney, Barry Siskin, submitted an unsigned affirmation in opposition, dated June 16, 2008, with proof of service, and a reply affirmation, dated August 6, 2008, which was missing from the file. The attorneys for both other parties confirmed orally and by letter from counsel for Phoenix, dated November 19, 2008, that they were served with signed copies of the affirmation in opposition and the reply affirmation. Mr. Siskin provided an affidavit of service of the reply affirmation by letter dated November 20, 2008.

5]

that there is a genuine preliminary issue, which requires a trial and justifies a stay.” *National Grange Mut. Ins. Co. v. Diaz*, 111 A.D.2d 700 (1st Dep’t 1985). The party seeking the stay must initially present proof of the issuance of an insurance policy with an expiration date beyond the date of the accident. *American Sec. Ins. Co. v. Ferrier*, 110 A.D.2d 503, 504 (1st Dep’t 1985). The burden then shifts to the respondents to rebut this prima facie case by establishing affirmative defenses of nonrenewal or cancellation. *Id.*

Here, there is no evidentiary issue for a framed issue hearing. ATIC’s initial proof demonstrated that Dempsey’s registration was cancelled due to lack of insurance. Moreover, Phoenix has come forward with additional evidence that Dempsey’s insurance was cancelled properly prior to the accident.

Further, ATIC’s application for discovery must be denied. Failure to submit an affirmation stating that the movant has attempted in good faith to resolve the discovery issue without intervention of the court is grounds for denial of a discovery motion. *Vasquez v. G.A.P.L.W. Realty*, 236 A.D.2d 311 (1st Dep’t 1997); 22 NYCRR 202.7. Moreover, where an insurer fails to obtain discovery as permitted under the policy within a reasonable time after notice of the claim, discovery should not be granted. *Allstate Ins. Co. v. Faulk*, 250 A.D.2d 674 (2d Dep’t 1998). Here, Claimant has submitted proof that ATIC was notified of the accident in April 2002, almost six years ago.

Lastly, the court agrees that Claimant is entitled to statutory costs of the motion in the amount of \$100.00 due to the lack of merit to the petition and the discovery application. CPLR 8202. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the petition of ATIC to stay arbitration

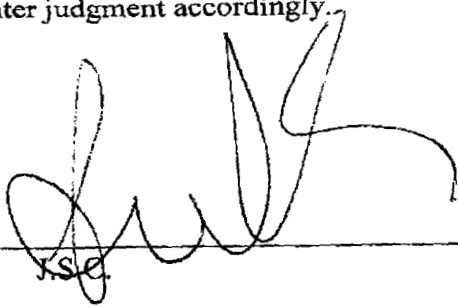
demanded by Floyd Luke is denied in all respects and dismissed with prejudice; and it is further

ORDERED that petitioner's motion for pre-arbitration discovery is denied; and it is further

ORDERED that the cross-motion of Floyd Luke for costs of the motion is granted and petitioner American Transit Insurance Company is directed to pay costs of the motion in the amount of \$100.00 to Claimant Floyd Luke; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 25, 2008



A handwritten signature in black ink, appearing to be 'J.S.C.', is written over a horizontal line.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).