

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

2009 NY Slip Op 30331(U)

January 30, 2009

Supreme Court, Nassau County

Docket Number: 18870-08

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,

TRIAL / IAS PART 32  
NASSAU COUNTY

Index No. 18870/08

Petitioner,

Motion Sequence No. 001

- against -

For an Order staying the arbitration attempted to be  
had by

JOSE A. MORALES,

Respondent,

- and -

TUSCAN LEHIGH DAIRIES, L.P. and ACE  
AMERICAN INSURANCE COMPANY

Proposed Additional Respondents.

The following papers having been read on this motion:

Notice of Petition, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2, 3</u>
Replying Affidavits .....	<u>4, 5</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The petitioner seeks an order pursuant to CPLR 7503 [c] staying the arbitration attempted by the respondent Jose A. Morales pursuant to his demand for such dated September 17, 2008. The respondent Jose A. Morales and the proposed additional respondents Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company oppose the

petition. The petitioner seeks, in a supplemental petition to stay arbitration, an order temporarily staying the demanded arbitration, adding Action Transport, Inc. as an additional respondent to this action along with all other proposed additional respondents and setting this matter down for a framed issue hearing on the issue of insurance coverage on the offending vehicle.

The petition alleged the respondent Jose A. Morales claims he was an operator and owner of a vehicle insured by State Farm Insurance Company when that vehicle was involved in a collision with an uninsured vehicle, to a 2000 Mack trailer with New Jersey license plate number TCS11H owned by Tuscan Lehigh Dairies, L.P. The petitioner's attorney points, in the petition dated October 15, 2008, to the police accident report for the subject accident, the supplementary uninsured/under insured motorists insurance endorsement, and report of the New Jersey Motor Vehicle Commission's motor vehicle services registration inquiry. The petitioner's attorney submits the respondent Jose A. Morales does not have, and has not established the offending vehicle was uninsured, and the petitioner has shown Ace American Insurance Company insured the subject vehicle under policy number 15AH8011203. The petitioner's attorney contends the arbitration should also be temporarily stayed by reason of the fact that certain discovery, to wit physical examinations, medical record authorizations, examinations before trial, and medical records, which the petitioner is entitled under its policy has not been done. The petitioner's attorney opines these discovery demands are a good faith effort by the petitioner to obtain necessary items regarding the underlying facts and circumstances of the subject motor vehicle accident. The petitioner's attorney avers the petitioner would be greatly prejudiced if such

discovery rights were denied because the petitioner would be unable to ascertain, *inter alia*, the nature and extent of the damages sustained by the respondent Jose A. Morales, and CPLR 3102 authorizes such discovery in aid of arbitration.

Once a prima facie case is made out, normally by the submission of a Department of Motor Vehicles FS-25 form or similar document, the burden shifts to the offending vehicle's purported insurer (or where the insurer is not made a party, the claimant), to prove that the vehicle in question was never insured (*see Nassau Ins. Co. v Minor*, 72 AD2d 576) or that the insurance had been canceled (*see Matter of Safeco Ins. Co. [Testagrossa]*, 67 AD2d 979). Where sufficient evidence is introduced to rebut the prima facie case, the claimant's insurer must present additional proof of insurance in order to prevail  
*State Farm Mut. Auto. Ins. Co. v. Yeglinski*, 79 A.D.2d 1029, 1029-1030, 435 N.Y.S.2d 47 [2<sup>nd</sup> Dept., 1981].

a denial of cancellation by the named insured is not a condition precedent to putting the insurer to its proof, and to whatever extent our prior determinations may be read to the contrary, we now explicitly overrule them (*see, e.g., Manning v Boston Old Colony Ins. Co.*, 48 AD2d 838; *Matter of Empire Mut. Ins. Co. v Sash*, 53 AD2d 614, 59 AD2d 533, *affd on other grounds* 46 NY2d 828; *Banner Cas. Co. v De La Torre*, 65 AD2d 586). The insurer, of course, remains free to call upon its insured to admit cancellation as an aid to its defense, but we do not believe that the failure or inability to locate the named insured can be permitted to alter the burden of proof to the detriment of third parties, e.g., by according an insurer's self-serving declaration of cancellation conclusive effect in the absence of any meaningful denial thereof by the named insured  
*Viuker v. Allstate Ins. Co.*, 70 A.D.2d 295, 420 N.Y.S.2d 926 [2<sup>nd</sup> Dept., 1979].

The attorney for the respondent Jose A. Morales avers, in an opposing affirmation dated October 20, 2008, contrary to the petitioner's assertions, Tuscan Lehigh Dairies, L.P. does not own the tractor, but instead owns the trailer, and Tuscan Lehigh Dairies, L.P. was insured by Ace American Insurance Company. The attorney for the respondent Jose A. Morales asserts the tractor was owned and operated by Jose Luis Sanchez, and Action Transport, Inc., as indicated in the police accident report, and that tractor left the accident

scene. The attorney for the respondent Jose A. Morales notes neither Jose Luis Sanchez, nor Action Transport, Inc. have made an appearance. The attorney for the respondent Jose A. Morales found no insurance company that issued an insurance policy to Action Transport, Inc. which was in effect at the time of the accident. The attorney for the respondent Jose A. Morales asserts the fact that the trailer was insured by Ace American Insurance Company does not affect the respondent Jose A. Morales' right to arbitrate a supplementary uninsured/under insured motorists insurance claim.

The attorney for the proposed additional respondents Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company point out, in an opposing affirmation dated November 12, 2008, the petitioner fails and neglects to show that Tuscan Lehigh Dairies, L.P. was the owner of the trailer, and not the owner of the cab which was owned by Action Transport, Inc. and driven by Jose Luis Sanchez. The attorney for the proposed additional respondents Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company notes the plaintiff allege various Vehicle and Traffic Law violations and negligence for improperly maintaining and controlling the tractor in question. The attorney for the proposed additional respondents Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company asserts there is no claim the trailer was involved in nor a cause of the accident. The attorney for the proposed additional respondents Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company points to an unsworn affidavit dated November 25, 2008, by Kathy Weaver, Human Resources Manager of Dean NE, LLC, to show Tuscan Lehigh Dairies, L.P., a business renting and leasing out trailers to haulers, had an agreement with Action Transport, Inc. for purposes of hauling their product. The attorney for the proposed additional

respondents Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company states, based upon the Graves Amendment, U.S.C.A. § 30106, there can be no claim made against the renter or lessor of a vehicle, to wit federal law preempts the vicarious liability imposed on commercial lessors by state law. The attorney for the proposed additional respondents Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company contends the Court must deny the petition to add Tuscan Lehigh Dairies, L.P. and Ace American Insurance Company as additional respondents, and deny the petition to stay arbitration.

The petitioner's attorney states, in a reply affirmation dated January 5, 2009, Tuscan Lehigh Dairies, L.P. admits owning the trailer which was attached to the cab, and involvement in the subject accident. The petitioner's attorney points out, while Tuscan Lehigh Dairies, L.P. seeks to absolve itself of liability based upon federal law, the purported affidavit of Kathy Weaver is not notarized nor properly attested to under the penalties of perjury. The petitioner's attorney notes Weaver provides only a vague statement of the association with Tuscan Lehigh Dairies, L.P. and Garelick Farms. The petitioner's attorney submits it appears Tuscan Lehigh Dairies, L.P. is in the dairy business, and not the leasing business, and Weaver does not provide any evidence Tuscan Lehigh Dairies, L.P. is actually engaged in the trade or business of renting or leasing motor vehicles as required by the Graves Amendment, U.S.C.A. § 30106. The petitioner's attorney states Tuscan Lehigh Dairies, L.P. has raised triable issues of fact requiring a framed issue hearing. The petitioner's attorney asserts the opposing affirmation submitted by Tuscan Lehigh Dairies, L.P. includes an allegation the cab attached to their trailer and involved in the subject accident was owned by Action Transport, Inc., and this is the first time this affirment

learned the identity of the cab owner. The petitioner's attorney contends Action Transport, Inc. is a necessary party to this action, so the petitioner served a supplemental petition dated January 5, 2009, seeking to add Action Transport, Inc. as an additional respondent to this action, and to set the matter down for a framed issue hearing.

This Court has reviewed and considered all of the papers submitted with respect to this motion. This Court finds a framed issue hearing is necessary to determine the issue of insurance coverage on the offending vehicle, and whether the offending vehicle was in fact, uninsured. This Court also directs joining the proposed additional respondents to this proceeding, and directs the respondent to produce a copy of all relevant medical records and authorizations; and to submit to an examination under oath and physical examination, if, after a hearing, it is determined the respondent is entitled to proceed to arbitration.

Accordingly, pursuant to CPLR 7503 [c], the petition to temporarily stay arbitration and conduct a framed issue hearing on the issue of insurance coverage on the offending vehicle, and whether the offending vehicle was in fact, uninsured. Regarding discovery, the Court directs the respondent Jose A. Morales to comply with all conditions precedent to arbitration set forth in the subject policy of insurance, and also in accord with this Court's directives. Within forty-five (45) days after service of a copy of this order upon the respondent Jose A. Morales and the named proposed respondents, the petitioner shall serve and file a note of issue with a copy of this order to add this matter to the Calendar Control Part of this Court for that framed issue hearing. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the rights of the Justice presiding

in the Calendar Control Part to refer the matter to a Justice, Judicial Hearing Officer to a Court Attorney/Referee as that Justice deems appropriate.

So ordered.

Dated: **January 30, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION

**ENTERED**

FEB 05 2009

NASSAU COUNTY  
COUNTY CLERK'S OFFICE