

Silva v Motor Veh. Acc. Indem. Corp.
2009 NY Slip Op 30961(U)
April 24, 2009
Supreme Court, Richmond County
Docket Number: 80402/07
Judge: Joseph J. Maltese
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:80402/07
Motion No.:001**

MATTHEW SILVA,

Plaintiff

against

AMENDED DECISION & ORDER

**THE MOTOR VEHICLE ACCIDENT
INDEMNIFICATION CORPORATION,**

HON. JOSEPH J. MALTESE

Defendants

The following items were considered in the review of this motion for leave to commence an action against the respondent

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

The petitioner Matthew Silva seeks leave to commence an action against the Motor Vehicle Accident Indemnification Corporation (“MVAIC”) pursuant to *New York Insurance Law* § 5218.

Facts

On December 14, 2006, at approximately 1:05 a.m., the petitioner was allegedly struck by a hit and run motorist near the intersection of Vanderbilt Ave. and Park Hill Ct in Staten Island, N.Y. The petitioner claims to have seen the tortfeasor’s license plate number as it left the scene of the accident. The Police Accident Report issued in connection with this matter does not indicate whether other witnesses saw the accident or the license plate. After the petitioner provided the license plate number to the police officer, Benjamin Amarfio (“Amarfio”) was identified as the owner of the vehicle. A Department of Motor Vehicle search revealed that the offending vehicle was insured under a policy with Hartford Insurance Company (“Hartford”). In its reply to the petitioner’s inquiry, Hartford denied its insured’s involvement in the accident, consequently

refusing responsibility and coverage.

Discussion

Article 52 of the *New York State Insurance Law* created the Motor Vehicle Accident Indemnification Corporation (“MVAIC”). The legislature stated that this Act:

. . . is intended to provide no-fault benefits for qualified persons for basic economic loss arising out of the use and operation in this state of an uninsured motor vehicle, as provided herein and in the comprehensive motor vehicle insurance reparations act. The legislature determines that it is a matter of grave concern that those persons are not recompensed for their injury and financial loss inflicted upon them and that the public interest can best be served by closing such gaps in the motor vehicle financial security act and the comprehensive motor vehicle insurance reparations act through the continued operation of the motor vehicle accident indemnification corporation.¹

Through its effort to protect the victims of hit and run accidents, the Act allows them to bring an action against MVAIC to obtain compensation for their injuries. In interpreting the legislature’s intent, the Second Department, Appellate Division has declared that the *Insurance Law* should be liberally construed for the benefit of these victims.²

This Court is well aware of the holding in *Hauswirth v. American Home Assur. Co*, which dismissed the petitioner’s complaint against MVAIC because a witness had attested to the identity of the owner of the offending vehicle.³ Significant differences exist between the facts in *Hauswirth* with the facts of the present action. Here, only the petitioner was able to see, after being run over and at 1:05 a.m., the tortfeasor’s license plate. In contrast to *Hauswirth*, no other witnesses here can corroborate to the petitioner’s perception. Furthermore, Hartford denied its insured’s involvement in the accident. The Appellate Division, Second Department has suggested that when there is a lack of substantial evidence, and the suspect vehicle and its operator cannot be

¹ *Ins. Law* § 5201.

² *Byrd v. Johnson*, 60 AD2d 900 [2d Dept 1978].

³ *Hauswirth v. American Home Assur. Co.*, 244 AD2d 528 [2d Dept 1997].

identified, MVAIC can be properly joined.⁴ In the instant action, there is no substantial evidence that determines the tortfeasor's identity and the court reserves its discretion to include MVAIC as a party.

Although the *Hauswirth* court established that the plaintiff must first exhaust his or her remedies against the insurer before seeking relief from MVAIC, the Second Department has declared that MVAIC should be joined as a party defendant whenever there is a significant possibility that the suspect vehicle and its operator have not been, or cannot be, properly identified.⁵ The Court has recognized that when there is a possibility that a suspect vehicle was not properly identified, separate trials may result in inconsistent determinations to the detriment of an innocent victim.⁶

To proceed against the MVAIC, section 5218(5) of the *Insurance Law* provides:

[A]ll *reasonable efforts* have been made to ascertain the identity of the motor vehicle and of the owner and operator and either the identity of the motor vehicle and the owner and operator cannot be established, or the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established [emphasis added].

MVAIC may be joined in so far as the petitioner has made all reasonable efforts to ascertain the identity of the vehicle's owner and operator. Based on Hartford's letter and the fact that the petitioner's identification is uncorroborated, this Court concludes that respondent cannot be dismissed from the case at this juncture.⁷ While the petitioner claimed that he saw the offending vehicle's license plate, the identity of such tortfeasor is under dispute. This Court finds that a frame issue hearing is the next best step to determine whether reasonable efforts were undertaken,

⁴ *Byrd v. Johnson*, 60 AD2d 900 [2d Dept 1978], *supra*

⁵ *Id.*

⁶ *Id.*

⁷ *In the matter of Jean Sonny VIL*, 304 AD2d 588 [2003].

and to consequently find whether MVAIC can still be named as one of the defendants.

Conclusion

In the interest of judicial economy, justice and the spirit of Article 52 of the Insurance Law, this court cannot yet dismiss MVAIC as a defendant. The parties should be afforded the opportunity of a hearing to determine upon the issue of whether the plaintiff undertook reasonable efforts to ascertain the identity of the motorist.

This amended order is being issued to correct the previous order dated April 16, 2009 to include the following edited instructions:

Accordingly it is hereby:

ORDERED, that this case be referred to a Judicial Hearing Officer to hear and determine upon the issues of whether the petitioner made all reasonable efforts to ascertain the identity of the hit and run vehicle's owner and operator; it is further

ORDERED, that a copy of this order with notice of entry shall be served upon the attorneys for the respondent and the Judicial Hearing Officer within 20 days of entry hereof; and it is further

ORDERED, that Hartford Insurance Company and Benjamin Amarfio be added as additional respondents in this action upon service of a copy of this order with notice of entry, together with copies of all papers; it is further

ORDERED, that the caption of this proceeding is amended to reflect inclusion of said additional party respondents and the Clerk shall mark their records accordingly; it is further

ORDERED, that Hartford Insurance Company and Benjamin Amarfio shall appear at the framed issue hearing; and it is further

ORDERED, that the granting of permission to bring an action against MVAIC is conditioned upon the hearing and determination of the applications and that the applicant has made such efforts.

ENTER,

DATED: April 24,2009

Joseph J. Maltese
Justice of the Supreme Court