

Matter of State Farm Mut. Ins. Co. (Blume)
2009 NY Slip Op 31825(U)
August 10, 2009
Supreme Court, Suffolk County
Docket Number: 07-5816
Judge: Ralph F. Costello
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 7-2-07
ADJ. DATE 8-13-08
Mot. Seq. # 001 - MotD; CASEDISP

-----X
 In the Matter of the Petition of STATE FARM :
 MUTUAL INSURANCE COMPANY, :
 :
 Petitioner, :
 :
 For an Order staying the Arbitration attempted to :
 be had by :
 :
 KRISTINE BLUME, :
 :
 Respondent. :
 - and - :
 :
 NATIONAL INTERSTATE INSURANCE :
 COMPANY, INTRUCK LEASING :
 CORP., JOSE ALFREDO GARCIA ORTIZ, NEW :
 BROTHER TRANSPORT CORPORATION, :
 SCOTTSDALE INSURANCE COMPANY and :
 NATIONAL GRANGE MUTUAL INSURANCE :
 COMPANY, :
 Proposed Additional Respondents. :
 -----X

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Upon the following papers numbered 1 to 38 read on this motion to stay arbitration; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 8 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 9-18; 19-20; 21-23; 24-26; 27-28; 29-30 ; Replying Affidavits and supporting papers 34-36; 37-38 ; Other 31; 32; 33 ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (001) by the State Farm Mutual Automobile Insurance Company pursuant to CPLR 7503(c) for an order staying the arbitration on the SUM claim is granted, the arbitration is stayed; and this petition is dismissed; and it is further

ORDERED that the respondent, Kristine Blume is directed to serve a copy of this decision and order together with notice of entry within thirty days of the date of this order upon the petitioner and the proposed additional respondents.

This matter arises out of an automobile accident which occurred on March 15, 2006 on the Long Island Expressway, Village of Old Westbury, County of Nassau, State of New York. Kristine Blume is alleged to have sustained personal injury as a result of that accident and seeks monetary compensation for those claimed injuries.

Pursuant to the MV 104 Police Report, Kristine Blume was a passenger in the vehicle registered to Schoolman Transportation with an address of 1600 Locust Ave, Bohemia, New York, and operated by Thomas P. Zimmardi. Jose Alfredo Garcia Ortiz (Ortiz), from Winston Salem North Carolina, was the operator of a tractor (New Jersey license plate AJ393W) pulling a trailer (New Jersey trailer registration TCB90B). The tractor was registered to Intruck Leasing, Corp. located at Englewood Cliffs, New Jersey, and leased by New Brothers Transportation Corp. (New Brothers). The trailer was owned by EMH Consulting, Inc. (EMH) and was leased by New Brothers. The tractor/trailer was traveling in the left westbound lane of the Long Island Expressway attempting to stop for traffic slowing ahead when it allegedly swerved striking the vehicle operated by Bryan J. Pacelli and registered to Kelly Pacelli, then, continuing to swerve into the HOV lane, struck the bus in which Kristine Blume was a passenger, and crushed the Pacelli vehicle between the tractor trailer and the bus.

State Farm insured Robert W. Blume Jr. and Kristine Blume pursuant to a policy of automobile insurance issued to them which included a Supplementary Uninsured/Under insured Motorists Endorsement-New York. By way of a letter from counsel for Kristine Blume dated January 31, 2007, Robert W. Blume Jr. and Kristine Blume advised State Farm and National Interstate Insurance Company (National Interstate) that a supplemental uninsured motorist claim was being pursued and demands for arbitration concerning the SUM claim were served.

State Farm Mutual Automobile Insurance Company (State Farm) now seeks an order staying arbitration on the uninsured claim relating to the underlying accident. It is claimed by State Farm that National Grange Mutual Insurance Company (National Grange) is the insurer of the trailer involved in the accident and that Scottsdale Insurance Company (Scottsdale) was the insurer for the tractor involved in the accident, and thus there is coverage available to Kristine Blume under those policies and thus Blume has not established a valid claim for uninsured motorist coverage and does not have the right to proceed to uninsured motorist arbitration against State Farm. It is further claimed by State Farm that Blume is seeking uninsured motorist benefits from National Interstate Insurance Company (National Interstate) who is stated to be the insurer for Schoolman Transportation; that the insurer for Schoolman Transportation (Schoolman), National Interstate, has a higher order of priority of coverage for uninsured motorists benefits than State Farm; that the SUM endorsement provides that a "policy covering a motor vehicle occupied by the injured person" ie, National Interstate, has a higher order of priority coverage than "a policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than the named insured" (State Farm policy for Blume); and that Blume has not established that the offending vehicle was in fact uninsured in that although Scottsdale has disclaimed coverage, no independent evidence of the same has been provided.

Scottsdale Insurance Company, by way of a letter dated June 6, 2006, set forth that Scottsdale was the insurer for the tractor registered to New Brothers Transport Corporation and the driver, Jose Alfredo Garcia Ortiz, under policy number CTS0042609 pursuant to a Commercial Automobile Policy, Truckers Form CA0012 (10-01). The letter was sent to Mr. Gagelo and Mr. Chay who were having trash hauled from Westbury Paper Stock to a Virginia landfill for Lusa Trucking. Scottsdale advised Gagelo and Chay that EMH Consulting (EMH) is the owner of the trailer that was being pulled by the tractor driven by Jose Alfredo Garcia Ortiz. The letter also states, that, however, Scottsdale's investigation revealed that although previously listed as an insured vehicle, the tractor involved in the accident was no longer a scheduled vehicle on the policy at the time of the accident, and therefore, there was no coverage afforded as to the tractor under the policy with Scottsdale Insurance Company, and that Scottsdale would not participate in the defense or indemnification of the claim. The Truckers Coverage Form, Section 1-Covered Autos, indicates at the bottom of the page as follows: "The policy originally had six scheduled vehicles, with the 1995 Peterbilt tractor that was involved in the subject accident listed as Covered Auto No. 2. Subsequently, the five Endorsements changing the policy were issued. Endorsement No. 1, effective October 6, 2005, added Vehicle no. 7, a 1999 Freightliner tractor and deleted Vehicle No. 2, the 1995 Peterbilt tractor. That Endorsement also corrected the Peterbilt VIN to the correct VIN ending in 8904. Endorsement No. 2, effective November 15, 2005, added the 1995 Peterbilt tractor with the correct VIN and deleted a 2000 Volvo tractor. Endorsement No. 3 amended the serial number of the 2000 Volvo tractor. Endorsement No. 4 deleted Vehicle No. 4, and unidentified trailer, and added Vehicle No. 9, and East trailer. The last Endorsement change is Endorsement No. 5, effective January 31, 2005, which deleted the 1995 Peterbilt tractor, Serial No. 8904, entirely from the policy."

Thomas Valus has submitted an affidavit dated May 11, 2007, averring that he is a claims representative with Scottsdale Insurance Company and is fully familiar with the policy issued to New Brothers Transportation Corporation. He states that the tractor involved in the accident, a 1995 Peterbilt with VIN # 1XP5D69X)SN378904 was not insured by Scottsdale Insurance Company on the date of the accident on March 15, 2006 as the tractor was deleted from the Scottsdale policy on January 31, 2006 prior to the accident. A copy of the Change Endorsement has been provided to this court.

National Interstate asserts that the police accident report for the subject accident improperly described the offending vehicle as a 2001 MCI, when it was actually a 1995 Peterbilt tractor bearing New Jersey license plate AJ393W. National Interstate argues that the trailer being pulled by the tractor is defined by Vehicle and Traffic Law section 311(2) as a motor vehicle, and was covered by insurance. Therefore, National Interstate argues that coverage for the offending vehicle did and does exist. National Interstate has submitted an attorney's affirmation on its own behalf and on behalf of Schoolman which has been named as proposed additional respondents by State Farm. National Interstate sets forth that Blume, as passenger, must look to her own policy of insurance based upon the language in the bus policy, of which it has submitted only a partial copy; that Blume has not established that the offending vehicle was not insured; and that the trailer did have coverage.

National Grange, it is claimed by National Interstate, is the excess insurer of the trailer involved in the accident and which trailer is owned by EMH Consulting, Inc. (EMH), and also opposes State Farm's application to stay the UM (uninsured motorist) arbitration demanded by Kristine Blume.

National Grange argues that the demand for arbitration filed by Blume seeks to arbitrate against National Interstate and that Blume does not seek to arbitrate a UM (uninsured) claim with State Farm and that State Farm is not listed in the demand as a respondent. Further, it is argued that National Grange, although accurately identified as the insurer of the trailer by State Farm who has proposed National Grange as a proposed additional respondent, is a non-responsible or non-negligent party and argues that the driver of the tractor was an employee of New Brothers. National Grange argues that in New York State, neither the owner of the trailer nor its insurer can be held liable for the negligence of the tractor, citing Aetna Casualty and Surety Company v Merchants Mutual Insurance Company, 180 AD2d 318 [3rd Dept 1983].

However, in reviewing Aetna Casualty and Surety Company v Merchants Mutual Insurance Company, supra, it is determined that in that National Grange's reliance upon that matter is misplaced. In that matter the Appellate Division Third Department determined that Aetna Casualty and Surety Company (Aetna) was not entitled to any right of implied indemnification from Merchants Mutual Insurance Company (Merchants). Merchants was the insurer of a trailer unit and Aetna was the insurer of the tractor unit. The court determined that Merchants was not liable to Aetna for any portion of the amount paid by Aetna to settle the personal injury and property damage claims arising out of an accident involving the tractor trailer rig operated in combination by an employee of the tractor owner. The court stated that the insurance coverage required by section 388 of the Vehicle and Traffic Law for every owner of a vehicle used or operated in this State is for the liability of the owner of each unit of a combined rig, and while the liability of the owners of the units of a combined rig may be joint and several with respect to injured third parties, the statute creates no right of contribution or indemnification on behalf of Aetna against Merchants as the owners' interests are separate and distinct insofar as their rights and their insurers' rights vis-a-vis each other are concerned. Therefore, National Grange's reliance upon that action is misplaced.

Subdivision 1 of Section 388 of the Vehicle and Traffic Law makes the owner of a vehicle operated in this State liable for death or injury resulting from the negligent use or operation of such vehicle by any person who is using or operating the vehicle with the owner's consent. Where, as here, the tractor unit and trailer unit are operated as a combined rig, the statute expressly extends this liability to the owner of each unit, jointly and severally, see, Mount Vernon Fire Ins. Co. v Travelers Ind. Co., 63 AD2d 254, aff'd 47 NY2d 575. The owner of each element is covered by his respective insurance policy against the total liability imposed by statute, see, Travelers Insurance Company et al v General Accident, Fire & Life Assurance Corporation, Ltd., 28 NY2d 458 [1971]. Subdivision 4 of section 388 of the Vehicle and Traffic Law requires that insurance policies issued in this State provide coverage for the liability created by the statute, see, also, Insurance Law, §167, subd 2). In Mount Vernon Fire Insurance Company v Travelers Indemnity Fire Insurance, supra, the plaintiff, Mount Vernon, provided excess insurance for the trailer involved in a motor vehicle accident that occurred when the insured's tractor and trailer, operating in tandem, collided with the vehicle that was driven by the injured party. The insurer that provided the insured with excess coverage on the trailer sought a declaration that there was no coverage for losses arising from the accident because the tractor was not covered under the policy issued by the excess insurer. On appeal, the court affirmed the judgment declaring that the excess insurer was obligated to provide coverage for any judgment that was entered against the insured in the negligence action and held that N.Y. Veh & Traf. Law §388, which required a policy covering only one

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vehicle of a tractor-trailer combination to provide coverage against the joint and several liability that §388 imposed on owners of tractors and trailers that were used in combination applied to both primary and excess insurance policies. Here, National Grange is the excess insurer for the trailer which was used in combination with the tractor, and therefore there is joint and several liability as imposed by N.Y. Veh & Traf. Law §388 as to the injured third party, Kristine Blume, under the policy issued by National Grange. Accordingly, there is no factual issue to warrant a framed-issued hearing, and no basis to conduct an arbitration on the uninsured claim by Kristine Blume.

This court notes, additionally, that in In the Matter of the Application of Government Employees Insurance Company to Stay Arbitration v. Cohen, Respondent and v Intruck Leasing Corp., Jose Alfredo Garcia Ortiz, Schoolman Transportation, Inc. New Bothers Transport Corp, Scottsdale Insurance Co., National Interstate Insurance Co., National Grange Mutual Insurance Co. and EMH Consulting, Inc. as proposed additional respondents, Index No. 07-12917, an order dated July 31, 2007 (Weber, J.) was issued wherein it was determined that the 1995 Peterbilt tractor which was owned by Intruck Leasing Corp and operated by Jose Alfredo Garcia Ortiz was not insured at the time of the accident on March 15, 2006, and therefore there was no question of fact requiring a framed issue hearing with respect to whether the Intruck tractor was insured. Therefore, State Farm is barred by the doctrine of issue preclusion as a matter of law on the issue of whether the Intruck vehicle was insured at the time of this accident, see, Kret et al v Brookdale Hospital Medical Center et al, 93 AD2d 449.

Based upon the foregoing, it is determined as a matter of law that there exists liability insurance coverage with regard to this accident on the basis of the policy issued by National Grange, the excess insurer for the trailer involved in the accident, and that such liability is joint and several with the tractor owner pursuant to Vehicle and Traffic Law §388 as to the injured third party respondent, Kristine Blume.

Accordingly, State Farm's petition for an order staying the arbitration on the SUM claim is granted and the arbitration is stayed.

National Interstate Insurance Company and Schoolman Transportation System, Inc. and State Farm have submitted conclusory and unsupported attorneys' affirmations which set forth that no demand for arbitration was ever served by Kristine Blume on either National Interstate or Schoolman or State Farm. State Farm, however, submitted a copy of the demand for arbitration against National Interstate received by their office with a copy of a cover letter also supposedly sent to National Interstate as well. Counsel for Kristine Blume has served a copy of the demands for arbitration served upon National Interstate Insurance Company, the insurer for Schoolman Transportation in whose bus Kristine Blume was a passenger, and upon State Farm, along with copies of the receipts for certified mailings of the demands for arbitration establishing prima facie that such demand was served upon National Interstate and State Farm. Counsel for Kristine Blume served an Arbitration Demand dated January 26, 2006 upon National Interstate Insurance Company and State Farm by certified mail/return receipt, together with copies of various photos's, medical records and reports, as well advising that they should kindly submit a timely written request for preliminary discovery, physical examinations and examination under oath by notice dated February 16, 2007. Counsel for Kristine Blume also requested a copy of the declaration page and policy of insurance issued to their assured for the period covering the accident. Further, counsel for National Interstate, in the petition pending under Index No. 07-11471, In the Matter of the Petition of National Interstate Insurance Company, Petitioner, For an Order Staying the Arbitration

Attempted to be had by Kristine Blume, Respondent, and State Farm Mutual Automobile Insurance Company et al., has set forth in his attorney's affirmation that National Interstate and counsel for Kristine Blume stipulated to arbitrate the uninsured motorist claim. In light of the stay of the arbitration on the uninsured claim and State Farm's conclusory and unsupported argument, it is determined that State Farm's assertion that it was not served with a demand for the arbitration has been rendered academic.

State Farm sets forth in its attorney's affirmation, that there is insurance covering the involved tractor. Scottsdale Insurance has submitted evidence in support of the affidavit of Thomas Valus that the subject tractor was no longer insured by Scottsdale at the time of the accident. This court notes, additionally, that in In the Matter of the Application of Government Employees Insurance Company to Stay Arbitration v. Cohen, Respondent and v Intruck Leasing Corp., Jose Alfredo Garcia Ortiz, Schoolman Transportation, Inc. New Bothers Transport Corp, Scottsdale Insurance Co., National Interstate Insurance Co., National Grange Mutual Insurance Co. and EMH Consulting, Inc. as proposed additional respondents., Index No. 07-12917, an order dated July 31, 2007 (Weber, J.) was issued wherein it was determined that the 1995 Peterbilt tractor which was owned by Intruck Leasing Corp and operated by Jose Alfredo Garcia Ortiz was not insured at the time of the accident on March 15, 2006, and therefore there was no question of fact requiring a framed issue hearing with respect to whether the Intruck tractor was insured. Therefore, State Farm is barred by the doctrine of issue preclusion as a matter of law on the issue of whether the Intruck vehicle was insured at the time of this accident, see, Kret et al v Brookdale Hospital Medical Center et al, 93 AD2d 449.

Any questions regarding additional coverage to the vehicles or priority of coverage are beyond the scope of this proceeding as the underlying personal injury claim must be resolved prior to there being a justiciable controversy at to those issues.

Accordingly, the petition to stay the arbitration is granted and this petition is dismissed.

Dated: Aug 10, 2009

Ralph J. Bell
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION