

Matter of Encompass Indem. Co. v Coles

2009 NY Slip Op 32338(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 402474/2008

Judge: Paul Wooten

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 — NEW YORK COUNTY

Paul Wooten
J.S.C.

PRESENT: _____

PART 22

Justice

Index Number : 402474/2008

ENCOMPASS INDEMNITY COMPANY

VS.

COLES, VERNON B.

SEQUENCE NUMBER : # 001

VACATE

CALIF 5

INDEX NO. 402474-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. 5

were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is resolved as per attached decision.

FILED
OCT 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9-30-09

Paul Wooten
Paul Wooten
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

----- X
In the matter of the Application for a
Order Vacating the Arbitration
Proceedings attempted to be had between Index No. 402474/2008
ENCOMPASS INDEMNITY COMPANY,

Petitioner, DECTSTON AND ORDER

- against -

VERNON B. and ANITA COLES,

Respondents.

----- X

PAUL WOOTEN, J.S.C.:

This proceeding pursuant to CPLR Article 75 arises from an automobile accident that occurred on November 21, 2006, on the Henry Hudson Parkway in Manhattan. Respondent Vernon B. Coles (Vernon) was alone in his car on the way to work when he was struck by a drunk driver. His car overturned. It exploded just after he was rescued from it. Vernon suffered permanent personal injuries. His wife, Anita Coles (Anita), asserts a claim for loss of consortium.

Respondents filed a demand before the American Arbitration Association in New York County for arbitration of their claim for underinsured motorist coverage (ex. A to petition). Petitioner Encompass Indemnity Company (Encompass) brings this petition seeking a permanent stay of arbitration (CPLR 7503 [c]). The petition also seeks a framed issue hearing to determine whether respondents are entitled to underinsured benefits pursuant to

their policy with Encompass.

The drunk driver, Michael Rush (Rush), carried a \$25,000 policy that was tendered to respondents. A passenger in Rush's vehicle died as a result of the accident. Respondents obtained a judgment against Rush after inquest in the amount of \$3 million in favor of Vernon, and \$500,000 for Anita. The judgment debtor is incarcerated.

According to the petition, Encompass issued a "Deluxe-Package Policy" (ex. B) to respondents, covering their automobiles, including the Ford Explorer involved in the accident. The underinsured motorist limits in the Encompass policy are \$250,000 per individual and \$500,000 per occurrence.

Encompass paid the \$50,000 first-party no fault benefits that it is required to offer as an out-of-state carrier authorized to do business in New York.

Encompass has offered to settle respondents' claim for underinsured motorist coverage for \$175,000, which is \$75,000 less than the per-individual limit. The \$75,000 setoff is comprised of the \$50,000 that respondents received from Encompass for New York no-fault benefits, plus the \$25,000 that respondents received from the Rush policy.

The petition seeks an order (i) permanently staying the arbitration; and/or (ii) directing that a framed issue hearing be held to determine whether respondents are entitled to receive

underinsured motorist benefits from Encompass.

The petition is granted to the extent of ordering a permanent stay of the arbitration, and is otherwise denied.

Respondents cross-move for a declaration that they are entitled to the full amount of the policy limits for underinsured motorist coverage without deduction, and to dismiss the petition, with costs and attorneys' fees. The cross motion is denied.

The substantive issue cannot be determined in the context of an Article 75 proceeding. This proceeding only presents the issue of whether an enforceable agreement to arbitrate exists. I therefore convert this proceeding into a declaratory judgment action (CPLR 103 [c]; *Cologne Life Reinsurance Co. v Zurich Reinsurance [North America], Inc.*, 286 AD2d 118, 123 [1st Dept 2001]).

Respondents are directed to file a summons and complaint seeking a declaration of their rights under the policy.

The Encompass policy provides that both parties may agree to arbitrate, but it does not make arbitration mandatory. No agreement to arbitrate is alleged.

Respondents argue that Encompass has a duty to arbitrate pursuant to New York law. Respondents' reliance upon *National Grange Mut. Ins. Co. v Hing Wa Louie* (39 AD3d 293 [1st Dept 2007]) is misplaced. *National Grange* involved a duty implied by New York law to arbitrate a claim involving uninsured motorist

coverage. Insurance Law § 5106 (b) requires carriers charged with providing first-party benefits to arbitrate first-party claims, including those involving a policy endorsement for uninsured motorist coverage. The holding of *National Grange* applies only to first-party benefits, and only involves an uninsured motorist endorsement triggered under no-fault. Encompass has already paid plaintiffs the full amount of first-party benefits.

"[T]he mandatory coverage afforded under an uninsured motorist endorsement is meant to be coextensive with, and therefore no greater than, the standard coverage that would ordinarily be available to the uninsured motorist had he or she been insured" (*State Farm Mut. Auto. Ins. Co. v Langan*, 55 AD3d 281, 284 [2d Dept 2008]).

There are numerous reported cases involving arbitration of a claim for first-party benefits under an uninsured motorist endorsement. Respondents have cited no case in which New York law required arbitration of a claim under an underinsured motorist endorsement in a policy issued out of state.

Because Encompass has paid the full amount of first-party no-fault benefits, any duty to arbitrate must be found in the terms of the policy.

"There is no requirement under the New York no-fault ... statutes and regulations that mandates arbitration where, as

here, a policy issued out of State meets the minimum financial security requirements of Insurance Law § 5107" (*Matter of United Services Auto. Ass'n v Melendez*, 27 AD3d 296, 297 [1st Dept 2006]).

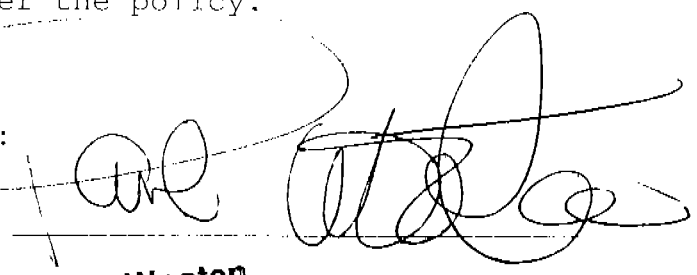
Accordingly, it is

ORDERED that the petition is granted to the extent of permanently staying arbitration, and is otherwise denied; and it is further

ORDERED that this Article 75 proceeding is converted into a declaratory judgment action pursuant to CPLR 103 (c), and respondents are directed to file a summons and complaint seeking a declaration of their rights under the policy.

Dated: 9-30-09

ENTER:



Paul Wooten
J.S.C. S. C.

SEP 30 2009

FILED
OCT 13 2009
COUNTY CLERK'S OFFICE
NEW YORK