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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

-against-

INDEX NO: 1973/09

For an Order staying the Arbitration Attempted to be had by SANDRA ALCY-CADELY,

Respondent.

MEMORANDUM DECISION AFTER FRAMED ISSUE HEARING

Appearances:

For Petitioners:

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For Respondent:

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By: Stuart Siegel, Esq.
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Introduction

In this petition, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (hereinafter referred to as "STATE FARM"), seeks a permanent stay of arbitration demanded by SANDRA ALCY-CADELY (hereinafter referred to as "ALCY-CADELY"), pursuant to CPLR §7503. As directed by Honorable Vito M. DeStefano, J.S.C., in the order dated May 13, 2009 directing a framed issue hearing, the issue to be resolved is "whether there was physical contact between the respondent's vehicle and the alleged 'hit-and-run' vehicle".

New York State Insurance Law §3420(f)(3) and §5217, relevant to Uninsured Motorist Coverage, provide that, to have a viable claim for uninsured vehicle coverage against that person whose identity is unascertainable, there must have been physical contact between the vehicle causing the injury and the vehicle occupied by the claimant. The petitioner, STATE FARM, seeks to stay the demanded arbitration claiming that there was no physical contact between ALCY-CADELY's vehicle and the alleged hit-and-run vehicle.

The hearing of this issue took place on July 28, 2009.

Background

ALCY-CADELY testified that, on October 7, 2008, while on her way to work at approximately 9:15 A.M.,she was cut off by another vehicle which came into contact with her vehicle causing her to hit a light pole. The driver of the alleged offending vehicle left the scene of the accident. Thereafter, ALCY-CADELY made a claim under the Uninsured Motorist Coverage/SUM Indorsement contained in her policy with STATE FARM.

At the hearing, Police Officer Austin, of the 61st Precinct investigating the accident, testified that he took ALCY-CADELY's statement describing the accident. He testified that she told the police officer, who included the statement in his accident report, that "she was cut off by another vehicle causing her to hit the light pole". Police Officer Austin did not witness the accident. The Police Accident Report was admitted into evidence as Plaintiff's Exhibit "5". Police Officer Austin also testified that the damage he observed on ALCY-CADELY's vehicle was to the front end of her vehicle. He reviewed four (4) photographs in evidence (Plaintiff's Exhibits "1", "2", "3" and "4"), which corroborated the Police Accident Report of front end damage. At trial, there was no evidence presented of any damage to the right front fender of ALCY-CADELY's vehicle, which she claimed was the area allegedly struck by the hit-and-run vehicle to support her claim of a "hit-and-run" accident.

During cross-examination of Police Officer Austin, it was established that he prepared an Amended Accident Report which included language that ALCY-CADELY was "side swiped" by another vehicle causing her to hit the light pole. However, the Amended Accident Report was not admitted into evidence as Police Officer Austin testified that the it was not accurate in that the information regarding physical contact with another vehicle came from a witness to the accident, not ALCY-CADELY. The Amended Police Accident Report was deemed hearsay and not admissible as a business record, as the information Police Officer Austin used in preparing said amended report came from a person "not under the sanction of duty or other obligation" and "not made in pursuance of any duty owing by the person making it". See, *Johnson v Lutz*, 253 NY 124, 170 NE 517 (C.A. 1930).

Counsel for ALCY-CADELY argued that both his client and Police Officer Austin's credibility were in issue, in that their versions of the description of the accident differed. In addition, counsel argued that a witness had given Police Officer Austin information about ALCY-CADELY being "side swiped", which created a credibility problem. That record was never corrected, but addressed only at trial, some ten (10) months later. Counsel for ALCY-CADELY argued that the Amended Police Accident Report should be admitted into evidence, not to establish the truth of the statements in the report, but as relevant to the matter of credibility of the witnesses.

The Court considered the credibility issue regarding the facts surrounding the Amended Police Accident Report. Notwithstanding counsel's argument that the witness who gave a statement was unidentified, the Court took particular note that a witnesses name was included in the Police Accident Report, admitted into evidence as Plaintiff's Exhibit "5". In view of the fact that there was an identified witness who, without explanation, never appeared at trial, the Court concluded that said witness' testimony would not have supported ALCY-CADELY's allegation of physical contact with another vehicle. The Court found her credibility wanting.

Counsel for ALCY-CADELY further argued that his client's description of the accident, found in the first report, should not have been admitted into evidence as an admission by respondent, as the statement did not satisfy the standards of admissibility for a declaration against interest.

As set forth in *Prince - Richardson on Evidence*, Eleventh Edition, §8-201:

> An admission is an act or declaration of a party, or of the representative or predecessor in interest of a party, which constitutes evidence against the party at trial. "[A]dmissions by a party of any fact material to the issue are

> always competent evidence against him, wherever, whenever, or to whomsoever made." *Reed v McCord*, 160 NY 330, 341, 54 NE 737, 740.
>
> An admission must appear to be against the interest of the party at the time of trial, but need not be against interest at the time it was made.

Prince - Richardson on Evidence, *supra*, §8-203

The Court finds that the Police Accident Report was properly admitted into evidence as an admission of the respondent.

The Law and its Application

With respect to uninsured motorist coverage, the Insurance Law of the State of New York §3420(f)(3) provides as follows:

> The protection provided by this subsection shall not apply to any cause of action by an insured person arising out of a motor vehicle accident occurring in this state against a person whose identity is unascertainable, unless the bodily injury to the insured person arose out of physical contact of the motor vehicle causing the injury with the insured person or with a motor vehicle which the insured person was occupying (meaning in or upon or entering into or alighting from) at the time of the accident.

Insurance Law §5217 provides as follows:

> The protection provided by this subsection shall not apply to any cause of action by a qualified person arising out of a motor vehicle accident occurring in this state against a person whose identity is unascertainable, unless the bodily injury to the qualified person arose out of physical contact of the motor vehicle causing the injury with the qualified person or with a motor vehicle which the qualified person was occupying (meaning in or upon or entering into or alighting from) at the time of the accident.

The Insurance Law makes it incumbent upon ALCY-CADELY to prove that there was physical contact between her vehicle and the alleged hit-and-run vehicle. *See, Nova Casualty Company v Musco,* 48 AD3d 572, 852 NYS2d 229 (2nd Dept. 2008). The evidence at trial reflects that there was no mention of the alleged contact with a hit-and-run

vehicle in the Police Accident Report, and the testimony of Police Officer Austin was that he saw no side damage to ALCY-CADELY's vehicle which was corroborated by the photos in evidence. Based on the foregoing, it is the judgment of the Court that a fair interpretation of the credible evidence supports a determination that there was no physical contact between ALCY-CADELY's vehicle and an alleged hit-and-run vehicle.

Conclusion

The Court, as both the trier of the facts and the arbiter of the law, after weighing the evidence in this matter, finds that ALCY-CADELY has not proven, by a fair interpretation of the credible evidence, that her vehicle came into contact with a hit-and-run vehicle. Therefore, the motion of petitioner STATE FARM for a permanent stay of the demanded arbitration is granted.

This constitutes the decision of the Court.

Settle Judgment on Notice.

Dated: December 16, 2009

WILLIAM R. LaMARCA, J.S.C.

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