

Matter of Long Is. Ins. Co. v Garrison

2010 NY Slip Op 30499(U)

March 1, 2010

Supreme Court, Nassau County

Docket Number: 20715/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of
LONG ISLAND INSURANCE COMPANY

TRIAL/IAS PART 32
NASSAU COUNTY

Petitioner,

Index No.: 20715/09
Motion Seq. Nos.: 01, 02
Motion Dates: 11/20/09
11/20/09

- against -

RONNIE GARRISON

XXX

Respondent,

UNITED STATES LIABILITY INSURANCE COMPANY
and AUTO PALACE TRUCK RENTAL AND LEASING INC.
and NIKOLAY SEMENKOV,

Proposed Additional Respondents,

for an Order permanently staying an uninsured motorist
arbitration.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Petition and Petition</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Notice of Cross-Motion. Affidavit, Exhibits and Memorandum of Law</u>	<u>3</u>
<u>Affirmation in Opposition to Cross-Motion</u>	<u>4</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>5</u>
<u>Reply Affirmation</u>	<u>6</u>
<u>Reply Affirmation, Affidavit and Exhibits</u>	<u>7</u>

Upon the foregoing papers, it is ordered that the application is decided as follows:

The petition by Long Island Insurance Company ("Long Island") for an order pursuant to CPLR 7503(a) staying arbitration is denied for the reasons set forth herein.

The cross-motion of proposed additional respondent U.S. Underwriters Insurance Company s/h/a United States Liability Insurance Group ("U.S.U.") to dismiss the petition as to it and to have a declaration that U.S.U. is not obligated to defend or indemnify proposed additional respondents Auto Place Truck Rental and Leasing Inc. and Nikolay Semenkov is granted for the reasons set forth herein.

The herein motion involves a pedestrian/automobile collision that occurred at or near 39th Street and 4th Avenue, Brooklyn, New York, on July 29, 2009. The pedestrian was respondent Ronnie Garrison ("Garrison"). Petitioner Long Island had issued an automobile liability policy to Garrison which included an uninsured motorist endorsement. Garrison had been struck by a vehicle owned by proposed additional respondent Auto Palace Truck Rental and Leasing Inc. ("Auto Palace") and driven by proposed additional respondent Nikolay Semenkov on September 19, 2009. Long Island received a demand for arbitration as per the uninsured motorist endorsement for Garrison as a result of the incident of July 29, 2009. See Exhibit B annexed to Garrison's affirmation in opposition. Long Island contends that Auto Palace was insured by a policy with U.S.U. Long Island seeks a stay so that a framed issue hearing can be held to determine whether the alleged offending vehicle of Auto Palace was insured at the time of the incident as well as to add the proposed additional respondents.

A *prima facie* case as to the existence of insurance coverage for its subject vehicle is established by providing the police accident report which contained the offending vehicle's insurance code designation. See *Eagle Insurance Co. v. Sadiq*, 237 A.D.2d 605, 655 N.Y.S.2d 601 (2d Dept. 1997).

The number of the U.S.U. policy as set forth in the police report of the accident was CL 3053349D with an expiration date of July 2, 2010. See Exhibit A, Garrison's affirmation in opposition

This, states Long Island, is *prima facie* evidence that the Auto Palace vehicle was insured at the time of the collision.

U.S.U. contends its policy to Auto Palace expired or was cancelled in January, 2007,

some two and one-half years before the incident and was a general commercial liability policy for certain premises, not an automobile liability policy. *See* Exhibit A annexed to U.S.U.'s cross-motion; U.S.U.'s reply affirmation dated 12/11/09; the reply affirmation of Dolores Garrison.

Garrison has suggested (with no formal motion made; see Garrison's affirmation in opposition dated 11/9/09, para. 3-5) that the proper venue for the proceeding is Kings County.

A court is afforded considerable discretion in addressing venue issues and its decision generally will not be disrupted in the absence of an abuse of discretion. *See Association of Cable Access Producers v. Public Service Com'n of the State of New York*, 1 A.D.3d 761, 767 N.Y.S.2d 166 (3d Dept. 2003).

Here, Garrison is a resident of Kings County, Auto Palace has its establishment in Kings County, Semenkov resides in New Jersey and petitioner Long Island has its home office in Wayne, Pennsylvania with its New York State headquarters on the Nassau County/Suffolk County border. Long Island's counsel's office is in Nassau County.

Initial choice of venue does belong to the plaintiff/petitioner and, clearly, venue for the limited purposes of entertaining this petition in Nassau County does not afford the ends of justice. *See Johanson v. J.B. Hunt Transport, Inc.*, 15 A.D.3d 268, 790 N.Y.S.2d 17 (1st Dept. 2005).

Enough of a nexus exists for this Court to entertain Long Island's petition.

U.S.U.'s initial commercial policy with Auto Palace for its truck rental office or business was policy number CL3053349 with a policy period from June 6, 2002 to June 6, 2003. *See* Exhibit A annexed to U.S.U.'s reply affirmation. Under policy number CL3053349A, it was renewed from July 2, 2003 to July 2, 2004. *See* Exhibit B annexed to U.S.U.'s reply affirmation. Policy number CL3053349B requested renewal from July 2, 2004 to July 5, 2005. *See* Exhibit C annexed to U.S.U.'s reply affirmation. The policy number for CL3053349C was effective from July 2, 2005 to July 2, 2006. *See* Exhibit D annexed to U.S.U.'s reply. The last policy number was CL3053349D and scheduled policy period was from July 2, 2006 to July 2, 2007. *See* Exhibit E annexed to U.S.U.'s reply. The last policy renewal was policy was amended on January 7, 2007. *See* U.S.U.'s reply Exhibit E, the sworn certificate of policy by Alison Macias,

Assistant Vice President of U.S.U's cross-motion.

Here, the proper policy numbers are set forth with dates, a sworn certificate of policy, and coverage which clearly demonstrates that the policy in issue for commercial liability at Auto Palace's facilities at 1138 36th Street and 1260 36th Street, Brooklyn, N.Y. The policy was not for auto liability of Auto Palace's vehicles and drivers.

The problem with the varying policy initials is thus explained by U.S. Underwriters' exhibits as noted and the affidavit of Dolores Garrison. *See New York City Housing Authority v. U.S. Underwriters Ins. Co.*, 7 A.D.3d 393, 776 N.Y.S.2d 468 (1st Dept. 2004).

It is clear the insurance provided by U. S. Underwriters did not cover the automobile collision/pedestrian collision in which Garrison was involved.

As noted by U.S.U., no affidavit is offered by anyone with knowledge of Auto Palace's policy and no one for Auto Palace has offered a policy from U.S.U. that would show liability for an automobile collision at the time of the incident in July, 2009.

Courts bear the responsibility of determining the rights and obligations of parties under insurance contracts based on the specific language of the policy. *See Hartford Accident and Indemnity Co. v. Wesolowski*, 33 N.Y.2d 169, 350 N.Y.S.2d 895 (1973).

Where provisions of a policy are clear and unambiguous, they must be given their plain and ordinary meaning and courts should refrain from rewriting the agreement. *See U.S. Fidelity & Guarantee Co. v. Annunziata*, 67 N.Y.2d 229, 492 N.E.2d 1206 (1986).

There is no doubt that the policies offered by U.S.U. herein were for commercial liability on and in certain premises. There was no automobile liability in those policies at all.

An insurance policy is, in issuance, a contract, and it must be construed in accordance with the intent of the parties as expressed in the clear language of the policy. *See Zappone v. Home Ins. Co.*, 55 N.Y.2d 131, 447 N.Y.S.2d 911 (1982).

Here, the policy clearly states it was bodily injury at the Auto Palace's offices on 1260 36th Street, Brooklyn, N.Y. and 1138 36th Street, Brooklyn, N.Y.

With respect to the timeliness of Long Island's petition, an insurer was precluded from seeking a judicial stay of arbitration when its application was not properly served within the twenty (20) days provided by statute. *See Spsychalski v. Continental Insurance Companies*, 45 N.Y.2d 847, 382 N.E.2d 765 (1978).

As noted by Garrison, this demand for arbitration was reviewed by Long Island on

September 18, 2009. *See* Exhibit B annexed to the Garrison affirmation in opposition dated November 9, 2009. The time to apply for a stay was twenty (20) days hence or October 8, 2009. Garrison notes the Request for Judicial Intervention by Long Island's counsel is stamped October 9, 2009. *See* Exhibit C annexed to Garrison's affirmation in opposition. Thus, Garrison argues Long Island's petition was filed and served in a timely manner.

Assuming, *arguendo*, Long Island's stay application was timely, this Court has determined that the Auto Palace vehicle driven by Semenkov that allegedly struck Garrison had no viable auto liability from U.S.U. at the time of the July 29, 2009 incident. This forces Garrison to rely on the Long Island policy which has coverage for an uninsured motorist and, as such the dispute must be resolved by arbitration. The issue of Long Island's timeliness to bring the petition is moot.

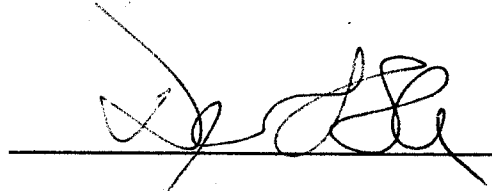
As to arbitration, a long and strong public policy favors arbitration. *See Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 666 N.Y.S.2d 990 (1997). Arbitration is a favored method of dispute resolution as a means of conserving scarce judicial resources. *See 166 Mamaroneck Ave. Corp. v. 151 East Pond Road Corp.*, 78 N.Y.2d 88, 571 N.Y.S.2d 686 (1991); *Bank of Tokyo-Mitsubishi, Ltd., New York Branch v. Kvaerner a.s.*, 243 A.D.2d 1, 671 N.Y.S.2d 905 (1st Dept. 1998). Arbitration is essentially a creature of a contract in which parties themselves charter a private tribunal for resolution of their disputes. *See Instituto De Resseguros Do Brasil v. First State Ins. Co.*, 221 A.D.2d 266, 634 N.Y.S.2d 79 (1st Dept. 1995).

Any problems with Long Island's policy with Garrison as to the uninsured motorist endorsement can be solved before an arbitration. Such arbitration will be able to determine the proper parties necessary for the resolution of the issues thereto.

Accordingly, Long Island's motion is denied and the petition is dismissed. The cross-motion by U.S.U. is granted.

This constitutes the Decision and Order of this Court.

ENTER:

A handwritten signature in black ink, appearing to read 'Denise L. Sher', is written over a horizontal line.

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
March 1, 2010

ENTERED

MAR 08 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE