

Matter of Hudson Ins. Co. v Castro

2010 NY Slip Op 31442(U)

June 4, 2010

Supreme Court, New York County

Docket Number: 101287/10

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 55

JANE S. SOLOMON *Justice*

HUDSON INS. CO
PETITIONER

INDEX NO. 101287/10

MOTION DATE 5/11/10

- v -

JULIO CASTRO
RESPONDENT

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this ~~motion~~ *petition* to/for stay arbitration

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-7

8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ^{+ adj. dec'd} that this ~~motion~~ *petition*

is decided in accordance with the annexed memorandum decision, order and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1118).

Dated: 6/4/10

JANE S. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x

In The Matter of
HUDSON INSURANCE COMPANY,

Petitioner,

Index No.: 101287/10

-against-

JULIO CASTRO,

DECISION, ORDER and
JUDGMENT

Respondent,

-and-

GEICO GENERAL INSURANCE COMPANY and
AMERICAN ARBITRATION ASSOCIATION,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
Proposed Respondent obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).
-----x

JANE S. SOLOMON, J.:

Petitioner Hudson Insurance Company (Hudson) seeks to stay an arbitration sought in connection with a claim for uninsured motorist benefits. The petition is denied as follows.

Respondent Julio Castro (Castro) claims that he was injured in an automobile accident on December 29, 2006. He claims that the car he was driving was struck by another car when the driver of the other car suddenly attempted to make a u-turn from the right-hand lane while Castro was driving in the left-hand lane. The owner of the other car, George A. Hurt (Hurt), is insured by proposed additional respondent GEICO General Insurance Company. Castro contacted GEICO with a claim for his injuries,

but GEICO declined coverage because, it contended, Hurt had left his car in an automobile repair shop at the time of the accident, and the driver had taken it without authorization.

By a letter dated March 14, 2007, Castro's lawyer contacted Hudson, which insures the owner of the car Castro was driving, stating Castro intended to file a claim for uninsured motorist benefits. The lawyer again wrote to Hudson by a letter dated September 2, 2009 (see Affirmation of Dario Martinez, Esq., in opposition to the petition, Ex. E). The letter states that it is accompanied by a copy of a demand for arbitration made pursuant to the uninsured motorist endorsement of the subject policy (although the demand is not submitted in Castro's opposition), and an affidavit of mailing indicates that a demand and cover letter were sent to petitioner by certified mail, return receipt requested. Hudson responded on September 30, 2009, by its lawyers, demanding discovery and giving notice of its intention to take Castro's examination under oath, all "pursuant to the uninsured motorist endorsement" and bearing the following caption: "In the Matter of the Claim of Julio Castro, Claimant, against Hudson Insurance Company, Respondent". The discovery demands seek "a detailed recital of the injuries and conditions as to which testimony will be offered at arbitration," the identity of witnesses who will testify at the arbitration,

and they make other references to the arbitration. On October 9, 2009, Castro's lawyers responded to the discovery demands, providing medical records and other information.

Hudson commenced this action by filing in this court on January 29, 2010; an order to show cause to stay the arbitration and other relief was signed on February 2, 2010.

"An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded" (CPLR 7503[c]). Hudson claims that this proceeding is timely because Castro never served a demand for arbitration. This argument is without merit. Castro's attorney makes a prima facie showing that a demand was served upon Hudson on September 2, 2009. Hudson's September 30 discovery notices make specific reference to the anticipated arbitration, which are tacit admissions that a demand for arbitration was received and acknowledged. The affidavit of a Hudson employee denying receipt of a demand for arbitration is belied by the September 30 discovery notices.

Since this proceeding was commenced on February 2, 2010, more than twenty days after Castro served his notice or demand for arbitration, the petition is not timely made and is barred under CPLR 7503(c). There is no basis upon which GEICO may be added as an additional respondent where the proceeding is

not timely commenced. Moreover, the affidavits of GEICO's insureds stating that the offending vehicle was left in a repair shop and driven at the time of the accident without their authorization (indeed, Mr. and Mrs. Hurt did not even know the driver) is not refuted, so there is no issue of fact regarding permissive use that would require a trial if this proceeding were timely made. Hudson argues, relying on *Zuckerman v Parton* (260 NY 446 [1932]) that a hearing is required to determine whether the Hurts implied that the service station employees could operate the vehicle based upon the type of service to be performed. This argument is unavailing because, in *Zuckerman*, there was evidence that the vehicle owner had reason to know or believe that the vehicle would be used by service station employees on a public highway. There is no such evidence in the present case. Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is denied, the proceeding is dismissed, and the parties are directed to proceed to arbitration forthwith.

Dated: June 4, 2010

ENTER:

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).
 J.S.C.

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