

**Matter of Country-Wide Ins. Co. v Nelson**

2010 NY Slip Op 31905(U)

July 20, 2010

Supreme Court, New York County

Docket Number: 600799/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
Justice

PART **A** PART 16

Index Number : 600799/2010  
COUNTRY-WIDE INS. CO.  
vs.  
NELSON, CYNTHIA  
SEQUENCE NUMBER : 001  
COMPEL OR STAY ARBITRATION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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~~ petition for a stay of arbitration is granted to the extent of directing a framed issue hearing in accordance with the accompanying memorandum decision.

**FILED**

JUL 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: JUL 20 2010

Alice Schlesinger  
ALICE SCHLESINGER 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 STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
In the Matter of the Application of

COUNTRY-WIDE INSURANCE COMPANY,

Index No. 600799/10

Petitioner,

Mot. Seq. 001

-against-

For an Order Staying the Arbitration Demanded  
by CYNTHIA NELSON,

Respondent,

-and-

SIACA K. AMARA, SALEEN MOTORS, INC., and  
FIDUCIARY INSURANCE COMPANY OF  
AMERICA,

Proposed Additional Co-Respondents.

-----X  
**SCHLESINGER, J.S.C.:**

**FILED**

JUL 22 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner moves this Court for an order pursuant to CPLR §7503(c) permanently staying arbitration of uninsured motorist benefits demanded pursuant to a policy issued to its insured Frank Gary. Respondent Cynthia Nelson (Gary) was allegedly involved as a pedestrian in an accident on September 26, 2008 with a vehicle owned by Saleen Motors, Inc., and negligently operated by Siaka K. Amara.

Petitioner Country-Wide asserts that the demanded arbitration should not proceed because Saleen Motors was insured at the time of the accident by Fiduciary Insurance Company of America, one of the parties named as a proposed additional respondent. It notes that the police report prepared on September 26, 2008, the date of the accident, lists not only an insurance policy number but also the insurance code for Fiduciary Insurance. (See Exhibit C to Petition).

In the event Fiduciary denies coverage, petitioner alternatively seeks to join Siaka K. Amara, Saleen Motors, and Fiduciary Insurance as respondents and to obtain a framed issue hearing on the issue of insurance coverage for the adverse vehicle. Petitioner further seeks an order directing respondents to provide discovery should the arbitration proceed.

Respondent Cynthia Nelson opposes the motion. She asserts that she received notice that respondent Fiduciary Insurance Company of America had cancelled Saleen's policy, and argues that petitioner has failed to prove that any other coverage exists. She adds that she has provided a response to all discovery demanded to date.

Respondent Fiduciary Insurance Company of America agrees with Nelson, insisting that it cancelled the policy for Saleen Motors on August 30, 2008, nearly a month before the accident at issue, due to nonpayment of premiums. In support of that assertion, it includes with its papers an affidavit from Stephen Bilasz, an underwriter assistant for Fiduciary., attesting that he personally mailed out the Notice of Cancellation to Saleen.

In addition, Fiduciary contends that Countrywide's petition to stay arbitration must be denied as untimely. The governing statute CPLR §7503(c) gives the petitioner twenty days to seek a stay, providing in relevant part that:

A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate... stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objection that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. ... 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.

As the Appellate Division made clear in *Matter of Allstate Insurance Company v Metayer*, 137 AD2d 454, 455 (1<sup>st</sup> Dep't 1988), the time begins to run upon receipt of the

demand:

The law is well settled that the 20-day period provided in CPLR 7503(c) is to be computed from the time the demand for arbitration is received, not from the time it is mailed. (*Matter of Knickerbocker Ins. Co. [Gilbert]*, 28 NY2d 57, 64; *cf.*, *Matter of Allstate Ins. Co. v Bonilla*, 116 AD2d 571).

Further, the application is considered "made", within the meaning of 7503(c), when the petitioner applies for the stay by commencing a special proceeding for a stay by filing the papers with the Clerk of the Supreme Court. *McKinney's Practice Commentaries*, Alexander, Vincent C., C7503:8 (1998), citing *Hartford Insurance Co. v Lenkofsy*, 162 Misc.2d 455 (Sup. Ct., Nassau Co. 1994); *see also Timbers v Woicik*, 177 AD2d 433, 434 (1<sup>st</sup> Dep't 1991). The time limitation is strictly enforced, absent special circumstances, and the court has no jurisdiction to consider an untimely application. *State Farm Mutual Automobile Insurance Co. v Cankam*, 3 AD3d 418, 419 (1<sup>st</sup> Dep't 2004); *Allcity Insurance Company v Vitucci*, 151 AD2d 430 (1<sup>st</sup> Dep't 1989).

In this case, the Demand to Arbitrate is dated March 4, 2010. (Exhibit B to Petition). Petitioner's counsel alleges (at ¶4) that the Demand was received on March 10, and court records confirm that this proceeding for a stay was commenced by filing nineteen days later, on March 29, 2010. Respondent Fiduciary alleges (¶17) that Countrywide received the Demand on March 4, making this proceeding commenced on March 29 untimely. However, since the document is dated March 4 and was mailed, it is not reasonable to conclude that Countrywide received it the same day that Fiduciary mailed it; Fiduciary has submitted no documentation to corroborate its unreasonable and illogical claim that the demand was received the day it was prepared. While petitioner should have attached proof of receipt, the burden is on respondent Fiduciary to prove its defense that this proceeding

is time-barred, and it has wholly failed to do so.

Due to the conflicting allegations regarding whether the adverse vehicle owned by Saleen was insured during the relevant time, a framed issue hearing is necessary on the question of insurance coverage for the adverse vehicle on the date of the accident.

Accordingly, it is hereby

ORDERED that the petition to stay arbitration is granted to the extent that a trial is directed of the preliminary issue as to coverage of the adverse vehicle or cancellation of the policy, and the arbitration is stayed pending such trial; and it is further

ORDERED that the Clerk of the Trial Support Office (Room 158) is directed to assign this matter to an appropriate Part for trial upon receipt of a copy of this order with notice of entry, the filing of a note of issue and a statement of readiness, and the payment of appropriate fees, if any; and it is further

ORDERED that petitioner is directed to serve a copy of this order with notice of entry within 20 days of entry upon the attorneys for the respondent, the arbitrator, the County Clerk, and the Clerk of the Trial Support Office (Room 158); and it is further

ORDERED that petitioner is directed to serve a copy of this order with notice of entry, together with copies of all papers previously served in the proceeding, upon Siaka K. Amara, Saleen Motors, Inc., and Fiduciary Insurance Company of America, who upon such service shall be added as a party respondent, and it is further

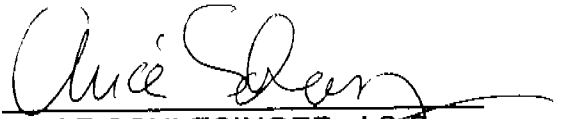
ORDERED that the caption of this proceeding is amended to reflect inclusion of said additional party respondent and the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), upon service by petitioner on each of them of a copy of this order with notice of entry, shall mark their records to reflect the amendment.

ORDERED that the parties shall appear for a status conference on Wednesday, December 8, 2010 at 9:30 a.m. at 60 Centre Street, New York, NY in Room 222.

This constitutes the decision and order of the Court.

Dated: July 20, 2010

**JUL 20 2010**

  
ALICE SCHLESINGER, J.S.C.  
**ALICE SCHLESINGER**

**FILED**  
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