

Matter of Government Empls. Ins. Co. v Curtis

2010 NY Slip Op 32005(U)

July 22, 2010

Supreme Court, New York County

Docket Number: 101135/10

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

12/28/08

Index Number : 101135/2010
GOVERNMENT EMPLOYEES
 vs.
CURTIS, PAUL
 SEQUENCE NUMBER : 001
 COMPEL OR STAY ARBITRATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

FILED

JUL 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

JUL 22 2010

Dated: 7/22/10

HON. JUDITH J. GISCHE 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 STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 10

----- X

In the Matter of the Application of
GOVERNMENT EMPLOYEES INSURANCE
COMPANY to Stay Arbitration,

Petitioner,

against-

PAUL CURTIS, TONI FAILLE-CURTIS, and
KENNETT CURTIS,

Respondents.

-and-

UTICA NATIONAL INSURANCE COMPANY OF
TEXAS, ALI D. BEST and ANDERSON BEST,

Proposed Additional Respondents.

----- X

Decision and Order
Index No.: 101135/10
Seq No.: 001

Present:
Hon. Judith J. Gische, JSC

FILED
JUL 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
GEICO Notice of Pet, Pet to stay arb w/exhs	1
Utica opp w/AM affirm, ST, DF, JY, VG affids, exhs	2
KC, PC, TFC opp w/exh	3
GEICO reply	4
Stip dated 6/17/10 re: referee hearing	5

Upon the foregoing papers, the court's decision and order is as follows:

JUDITH J. GISCHE, J.:

This petition concerns claims for uninsured benefits arising from a motor vehicle accident. Although petitioner, Government Employees Insurance Company ("GEICO") contends that the respondents are not entitled to recover uninsured motorist benefits under the GEICO

policy, respondents seek arbitration of those claims. Respondent Toni Failla-Curtis is GEICO's insured.

The petition is for an order pursuant to CPLR 7503(c) granting a permanent stay of arbitration. Alternatively, GEICO seeks a temporary stay of arbitration pending a hearing on the issue of whether the offending vehicle was in fact, "uninsured." In the event the arbitration is stayed, petitioner seeks an order joining Utica National Insurance Company of Texas ("Utica"), Ali D. Best and Anderson Best to this proceeding as named respondents and ordering them to provide certain discovery.

The petition is opposed by the named respondents and the proposed respondents who are separately represented.

Arguments

This proceeding arises out of a two-car accident which occurred on April 26, 2009, between: [1] an automobile owned by proposed respondent Ali D. Best and operated by proposed respondent Anderson Best and [2] an automobile owned by respondent Toni Failla-Curtis and operated by Paul Curtis in which Kenneth Curtis was a passenger. At the time of the accident, Ali D. Best's vehicle was insured by proposed respondent Utica and Toni Failla-Curtis' vehicle was insured by GEICO.

On or about January 11, 2010 the Curtis respondents served a Demand for Arbitration on GEICO, under the uninsured motorist provision in Toni Failla-Curtis' GEICO policy. They alleged that they sustained personal injuries in the April 26, 2009 collision and that the Best automobile was uninsured. GEICO now seeks to permanently stay arbitration on the ground that respondents have failed to adequately demonstrate that the Best automobile was uninsured. In

support of its petition, GEICO has furnished a copy of the police accident report showing that the Best automobile was insured by Utica (petition, exhibit B).

In opposition, respondents argue that the petition should be dismissed because they have submitted proof that they were involved in a collision with an uninsured motorist. The proof respondents rely on includes a letter from Utica to respondents' attorney dated November 4, 2009. In that later letter, Utica acknowledges that Ali Best was its insured on the date of the accident but coverage was declined because Ali and Anderson Best willfully failed to cooperate with its investigation (see respondents' exhibit A). Based on that letter, both GEICO and the respondents alternatively request a hearing on the issue of coverage.

Utica, who is not currently a named respondent, argues that it properly disclaimed coverage because Ali Best willfully refused to cooperate with its investigation of the accident and Anderson Best could not be located. These claims are supported by a report made by one of Utica's Special Investigators, Utica's Supervising Litigation Specialist, a private detective, and a secretary in its law firm.

According to Utica, it was first notified about the accident on May 6, 2009 (it doesn't say how). It then retained two law firms, one to contact each Best.¹ By letter dated June 2, 2009 Utica's Syracuse law firm advised Ali Best to appear for an examination under oath on June 29. When Ali Best failed to appear, the firm sent a second letter dated July 2, 2009 (which was unclaimed and returned to sender) rescheduling his examination to July 20, 2009. Ali Best again failed to appear.

Meanwhile, Utica's "local" law firm (in Suffolk County) sent similar letters to Anderson

¹According to Utica, Ali Best resided in Syracuse and Anderson Best resided in Brooklyn.

Best on June 6, July 7, and July 31, 2009. Anderson Best, likewise, never appeared for any examination under oath. On August 13, 2009 a private investigator retained by Utica went to Anderson Best's Brooklyn apartment, received no response when he knocked on the door of the apartment, which appeared to be occupied, and slipped his business card under the door. On August 17 the investigator returned to the apartment, again received no response, and left his business card along with "a copy of the Examination Under Oath notice." This was followed on August 18 by two unsuccessful attempts to reach Anderson Best by phone. On August 20, 2009, when Anderson Best failed to appear for his examination under oath for the third time, it became clear to Utica that the Bests were not going to cooperate with its investigation of the accident.

By letter dated September 3, 2009, addressed to both Ali and Anderson Best, Utica disclaimed coverage on the stated ground that they willfully failed to cooperate with Utica's investigation of the accident. By letter dated September 30, 2009, Utica advised respondents' carrier, GEICO, that it disclaimed coverage under its policy with Ali Best on the ground that Ali and Anderson Best willfully obstructed Utica's investigation of the accident.

On October 22, 2009 Utica received a copy of the summons and complaint in a personal injury action brought by respondents Paul Curtis and Toni Faille-Curtis against Ali and Anderson Best stemming from the April 26, 2009 accident (index no. 112102/09). By letter dated November 4, 2009 Utica advised respondents' attorneys that it would not be providing coverage under Ali Best's policy because Ali and Anderson Best willfully failed to cooperate with Utica's investigation.

Utica concludes that the attitude of "both insureds" was one of "willful and avowed obstruction" and that its September 3, 2009 disclaimer notice to the Bests, sent within two weeks

after Anderson Best failed to appear for his August 20 examination, was timely.

In reply, GEICO argues that “Utica’s time to disclaim began to run on 8/20/09” (see Lauzon reply affirmation, ¶ 7) and that Utica’s disclaimer was untimely, as a matter of law, and otherwise defective because it was not issued to the injured claimant as required by Insurance Law § 3420(d)(2). GEICO adds that Utica failed to adequately demonstrate that it used diligent efforts to secure the Bests’ cooperation and that the Bests’ failure to respond to Utica’s communications is an insufficient ground to establish a willful lack of cooperation.

The issues presented by the papers before the court are whether Utica’s disclaimer was properly grounded and whether Utica’s disclaimer was timely.

GEICO has established a *prima facie* case that Ali Best’s vehicle was insured by producing a police accident report containing Utica’s insurance code designation (see *Centennial Ins. Co. v Capehart*, 220 AD2d 499 [2d Dept 1995], appeal withdrawn 87 NY2d 1016 [1996]). Furthermore, Utica does not dispute that it insured Ali Best’s automobile on the date of the accident. The burden of proof is now upon Utica to demonstrate that it effectively disclaimed coverage (*cf.*, *Matter of American International Ins. Co. v Giovanielli*, 72 AD3d 948 [2d Dept 2010]).

The court will first address the issue of the timeliness of Utica’s disclaimer. Insurance Law § 3420(d)(2) provides in pertinent part that “[an insurer] shall give written notice as soon as is reasonably possible of [a] disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.” “Normally the question whether a notice of disclaimer of liability or denial of coverage has been sent ‘as soon as is reasonably possible’ is a question of fact which depends on all the facts and circumstances, especially the length of and reason for the

delay [citation omitted]" (*Hartford Ins. Co. v Nassau County*, 46 NY2d 1028, 1030 [1979]).

According to both GEICO and Utica, Utica's time to disclaim began to run on August 20, 2009.

Based on the foregoing, the court finds that Utica's September 3, 2009 disclaimer letter to the Bests was timely.

Finally, respondents do not claim that they were prejudiced by the fact that Utica's November 4, 2009 disclaimer letter concerning respondents was mailed to their attorney, rather than to them. Timely or not, Utica's disclaimer was ineffective.

In order to effectively disclaim coverage on the ground of non-cooperation, an insurer must demonstrate that (1) it acted diligently in seeking to obtain the insured's cooperation, (2) its efforts were reasonably calculated to obtain that cooperation and, (3) the attitude of the insured, after his or her cooperation was sought, was one of "willful and avowed obstruction" (see *Thrasher v United States Liability Ins. Co.*, 19 NY2d 159, 168-169 [1967]). Given these criteria, the burden placed upon the insurer is a "very heavy" one (see *Allstate Ins. Co. v United Intl. Ins. Co.*, 16 AD3d 605, 606 [2d Dept 2005]; see also *Thrasher, supra*, at 168).

The court finds that Utica has, at least, raised an issue of fact regarding whether it appropriately disclaimed coverage for non-cooperation. The Court, therefore, refers this matter to a Special Referee to hear and report back to the Court on the framed issue of whether Utica properly disclaimed coverage based upon non-cooperation.

Accordingly, it is hereby

ORDERED that the petition is granted only to the extent that the arbitration sought by respondents is temporarily stayed pending final determination of the issue concerning whether Utica properly disclaimed coverage based upon non-cooperation, and it is further

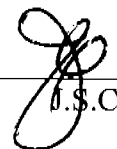
ORDERED that Utica national Insurance Company of Texas, Ali D. Best and Anderson Best are hereby joined as respondents and that they shall be servei with process within 30 days of the date of this decision, and it is further

ORDERED that the framed issue of whether Utica properly disclaimed insurance coverage based upon ono-cooperation of its insureds is referred to a Special Referee to hear and report back tot he Court; Petitioner shall file a copy of this decision upon the office of the Special Referee within 60 days of the date of this order so that the matter may be calendared, and it is further

ORDERED that and requested relief not expressly granted herein is denied and that this constitutes the decision and judgment of the court.

DATED: July 22, 2010
New York, New York

SO ORDERED:



J.S.C.
FILED
JUL 29 2010
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