

**Electric Ins. Co. v Graham**

2010 NY Slip Op 32688(U)

September 23, 2010

Supreme Court, New York County

Docket Number: 101621/2010

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA  
*Justice*

PART 19

Index Number : 101621/2010  
**ELECTRIC INS. COMPANY**  
VS.  
**GRAHAM, RUPERT**  
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 and cross-motion are decided in accordance with accompanying memorandum decision.

**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).

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

Dated: Sept 23, 2010

Saliann Scarpulla  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION.  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
ELECTRIC INSURANCE COMPANY,

Petitioner,

Index No.: 101621/2010

Submission Date: 7/7/2010

- against-

RUPERT GRAHAM,

**DECISION AND ORDER**

Respondent.

-----X

For Petitioner:  
Law Offices of Cheng & Associates PLLC  
27-28 Thomson Avenue, Suite 447  
Long Island City, NY 11101

For Respondent:  
Julian Bailey & associates  
111 Village Road  
Manhasset, NY 11030

Papers considered in review of petition to stay arbitration.

- Notice of Petition . . . . . 1
- Petition . . . . . 2
- Answer in Opp . . . . . 3
- Reply Aff . . . . . 4

**UNFILED JUDGMENT**  
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HON. SALIANN SCARPULLA, J.:

In this special proceeding, petitioner Electric Insurance Company (“EIC”) seeks an order pursuant to CPLR 7503(b) permanently staying respondent Rupert Graham (“Graham”) from proceeding to an uninsured motorist arbitration at the American Arbitration Association (“AAA”), on the grounds that Graham submitted incorrect information on his EIC insurance application, and that Graham has not met the “conditions precedent to arbitration.”

According to EIC’s petition, it first issued an automobile insurance policy to Graham in 2006, which was in effect on January 30, 2010. In support of its petition, EIC submitted a copy of the policy Renewal Certificate, which indicates that the most recent policy period

was January 24, 2009 to January 24, 2010. EIC did not submit either Graham's application for automobile insurance or the initial insurance policy.

EIC alleges that when applying for insurance, "it would appear" that Graham made incorrect statement about his state of residency and where his car was "garaged." EIC alleges that Graham stated he was a resident of Pennsylvania, although "it would appear" that Graham lived and garaged his car in New York. In support of these allegations, EIC states that during the course of his policy, Graham made six (6) claims, five (5) of which occurred in New York. Because EIC believed Graham provided incorrect information on his application, it cancelled his insurance policy.

In addition, EIC argues that pursuant to Graham's insurance policy, there were certain conditions precedent to arbitration which Graham has not complied with. In particular, EIC states that a claimant is required to give written proof of the claim and also "submit to an examination under oath, physical examination, provide medical reports, copies of medical records and authorizations." EIC states that Graham has not provided these items, although EIC has requested them. EIC fails to provide the language of the arbitration provision or the conditions.

In opposition, Graham argues that he has enough evidence to show "sufficient involvement" with both New York and Pennsylvania. Graham claims that he is a resident of both Pennsylvania and New York, and that he disclosed this information to EIC in his application. Graham also states that he complied with EIC's requests to attend physical

examinations, and has provided medical records and authorizations. Graham also does not submit a copy of the insurance policy which contains the arbitration provision at issue.

In reply, EIC asserts that the documents submitted by Graham fail to establish he is a resident of Pennsylvania, and that EIC's investigation shows that Graham lives in New York and not Pennsylvania.

### **Discussion**

"A threshold question to be determined by a court before compelling or staying arbitration is whether a valid agreement was made." *Marben Realty Co. v. Sweeney*, 87 A.D.2d 561, 562 (1<sup>st</sup> Dep't 1982). "A stay of arbitration will only be granted when (1) it is shown that there is no valid arbitration agreement; (2) it has not been complied with; (3) the proceeding is barred by the Statute of Limitations; or (4) it is against public policy to arbitrate the issue." *Prudential Sec. Inc. v. Pesce*, 168 Misc. 2d 699, 702 (Sup. Ct. N.Y. Co. 1996). *See also City of New York v. Uniformed Fire Officers Ass'n, Local 854*, 263 A.D.2d 3, 7 (1st Dep't 1999) ("the courts must be able to examine an arbitration agreement or an award on its face, without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement") (citing *Sprinzen v. Nomberg*, 46 N.Y.2d 623, 631 (1979)).

EIC's first argues that the pending AAA arbitration should be permanently stayed because, as a result of intentionally incorrect and misleading statement by Graham about his residency and the garaging of his vehicle made in his application for insurance, Graham's insurance policy has been cancelled. Without explicitly making the argument, EIC is deemed

to be arguing that as there is no longer an insurance policy in effect, there is no valid arbitration provision governing this dispute. However, Vehicle and Traffic Law §313 prohibits an insurer from canceling an automobile insurance policy retroactively on the grounds of fraud or misrepresentation. *See AA Acupuncture Service, P.C. v. Safeco Ins. Co. of America*, 2009 NY Slip Op 29311 (1<sup>st</sup> Dep't 2009). Accordingly, any fraud or misrepresentation which EIC alleges occurred as part of the application process cannot be a basis to stay an arbitration, but rather may be asserted by EIC as an affirmative defense. *In re Insurance Co. of North America v. Kaplun*, 274 A.D.2d 293, 298 (2d Dep't 2000).

Second, EIC argues that the arbitration provision is not valid or unenforceable as certain discovery related conditions precedent have not been met. EIC fails to provide the insurance policy containing the language with which it claims Graham has not complied. EIC also submits only an attorney affirmation "upon information and belief," and did not submit an affidavit of someone with knowledge.

Accordingly, EIC has failed to show either that there is not a valid arbitration agreement, or that a valid arbitration agreement has not been complied with by Graham.

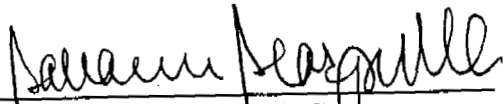
In accordance with the foregoing, it is hereby

ORDERED that the petition by petitioner Electric Insurance Company seeking a permanent stay of the arbitration brought by respondent Rupert Graham is denied.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York  
September 23, 2010

ENTER:

  
Saliann Scarpulla, J.S.C.

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