

**Matter of New S. Ins. Co. v Schaffer**

2010 NY Slip Op 33271(U)

November 23, 2010

Supreme Court, Wayne County

Docket Number: 68431/2009

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

IN THE MATTER OF THE APPLICATION  
FOR AN ORDER STAYING ARBITRATION  
BETWEEN

NEW SOUTH INSURANCE COMPANY,  
Petitioner,  
  
vs.  
RAFAELA SCHAFFER, MERCURY  
CASUALTY COMPANY AND CAROLINE  
LOPEZ,  
Respondents

DECISION

Index No. 68431

2009

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Attorneys for Rafaela Schaffer

The Petitioner ("New South") has commenced a special proceeding pursuant to CPLR §7503, seeking a permanent stay of arbitration of an uninsured motorist claim brought by Respondent Rafaela Schaffer, arising from injuries she allegedly sustained in a motor vehicle accident which occurred on November 25, 2006 in Sodus, New York. (New South is the

insurance carrier for Schaffer's son, Jesus R. Camacho, with whom Schaffer resided at the time of the accident). Schaffer was the operator of the 1996 Ford Taurus allegedly owned by Respondent Caroline Lopez, and allegedly insured by Respondent Mercury Casualty Company ("Mercury"), as reflected by the police report issued as a result of the accident.

However, Mercury subsequently disclaimed coverage, maintaining that its "former" insured Lopez had sold the vehicle to an individual named Solvin Martinez prior to the accident, for the sum of \$1000.00. Her deposition testimony, taken at two separate examinations, indicates that she signed over the title to the vehicle to Mr. Martinez, but allowed him to keep her plates on the vehicle, so that he could register the vehicle in a different state. It is not disputed that Lopez never notified Mercury or her insurance agent (Nichols) prior to the accident that she had sold the vehicle. Therefore, Mercury maintains that, due to Lopez's failure to advise the company of the sale, together with its inability to consent to such sale as a result of lack of notice, Mercury does not owe either liability coverage to Lopez, or PIP and APIP coverage to Schaffer.

Following a motion made by New South for an order granting the relief requested in its Petition, this Court issued an Order which granted a

temporary stay of arbitration and scheduled the matter for an evidentiary hearing to determine the issue of coverage as to the Lopez vehicle. The temporary stay was based on the Court's finding that New South has made a prima facie showing that Mercury was the insurer of the Lopez vehicle on the date of the accident. New South met its initial burden based on its submission of the police report, which identified Lopez as the owner, and Mercury as the insurer, of the subject vehicle. (See, e.g. Utica Mutual Insurance Co. v Colon, 25 AD3d 617 (2<sup>nd</sup> Dept, 2006)).

An evidentiary hearing was scheduled before this Court on August 6, 2010. However, on the morning of the hearing, counsel advised the Court that they had agreed to submit the matter to the Court on the papers, including the transcripts of the testimony of Lopez at both depositions. The Court proceeded to entertain oral argument from all attorneys, at which time it raised the issue of determining Lopez's credibility as a witness based only upon the transcripts. Nevertheless, counsel stipulated to the introduction of the transcripts as evidence without further testimony, and the Court reserved decision.

"An insurer's coverage of an insured automobile terminates upon the transfer of title by its insured to another unless the insurer is notified and

consents to continued coverage.” Allstate Insurance Co. v Santos, 250 AD2d 634 (2<sup>nd</sup> Dept, 1998), citing Phoenix Insurance Co. v Guthiel, 2 NY2d 584 (1957). New South correctly maintains that this Court has previously found that the insurance company made its prima facie showing of Mercury’s coverage through the submission of the police accident report, thereby shifting the burden to Mercury to establish that its disclaimer of coverage was valid. (The Court here notes that the timeliness of Mercury’s disclaimer has never been an issue.)

The Court acknowledges that Mercury has submitted no documentary evidence corroborating the sale of the vehicle by Lopez to Martinez. Not only were her license plates still on the vehicle at the time of the accident, but the record also shows that her registration was still in the glove compartment. Finally, Lopez’s deposition testimony indicates that she was contacted by a member of the Wayne County Sheriff’s Department regarding the accident, at which time she made equivocal comments to the officer which suggested that the vehicle was still her property.

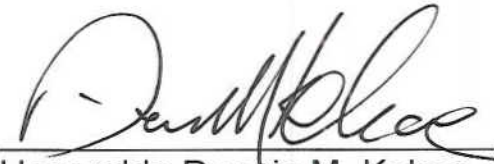
However, despite these allegations, the Court concludes that Mercury has produced sufficient evidence to rebut New South’s prima facia

showing, based on the uncontroverted testimony of Lopez, as set forth in the deposition transcripts presented by stipulation to this Court. In those appellate cases which have held that an insurer failed to rebut a prima facia showing of existing coverage, the insurer has generally offered opposition in the form of attorney affirmations or copies of correspondence, which were rightfully found to be both conclusory and inadmissible. (See, e.g. New York Central Mutual Fire Insurance Co. v Licata, 24 AD3d 380 (2<sup>nd</sup> Dept, 2005)). Here, the Court has the sworn testimony of the alleged seller, which was consistent on two separate occasions. While the absence of corroborating documentation is noted, the fact remains that evidence such as the vehicle title or receipt would probably be unavailable to Lopez, as such documents would likely be in the hands of the buyer. The testimony of the buyer is also unavailable as it appears that Mr. Martinez was subsequently deported.

Therefore, it is the decision of this Court that Mercury is not obligated to defend or indemnify Lopez in any civil action arising from the accident. (Since Lopez allowed her plates to remain on the vehicle, she may be estopped from denying ownership, but Mercury will not be estopped from disclaiming coverage. Matter of Feliciano, 140 AD2d 607 (2<sup>nd</sup> Dept, 1988)).

The temporary stay of arbitration previously issued by the Court is vacated, and the application for a permanent stay of arbitration is denied. Counsel for Mercury is directed to submit the appropriate order to the Court, in accordance with this decision.

Dated: November 23, 2010  
Lyons, New York

  
Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT