

Matter of Progressive Speciality Ins. Co. v Alexis

2010 NY Slip Op 33963(U)

September 3, 2010

Supreme Court, Orange County

Docket Number: 1583/10

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ORANGE

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In the Matter of the Application of
PROGRESSIVE SPECIALITY INSURANCE COMPANY
Petitioner,

To commence the statutory time
period for appeals as of right
(CPLR 5513[a]), you are advised
to serve a copy of this order,
with notice of entry, upon all
parties.

-against-

DECISION AND ORDER

To Stay the Arbitration sought to be had
by
STEPHEN ALEXIS and GWEN ALEXIS,

Index No: 1583/10

Motion Date: April 29, 2010

Respondents,

-and-

NEW YORK CENTRAL MUTUAL FIRE INSURANCE
COMPANY and SO MI KO,

Proposed Additional Respondents.

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The following papers listed below, numbered 1 to 9, together with the exhibits annexed thereto, were read and considered by the Court in this proceeding brought by Progressive Speciality Insurance Company (hereinafter "Progressive") for an Order: (a) pursuant to CPLR §7503, permanently staying the Respondents from proceeding to Arbitration against Petitioner on the grounds that there is available insurance for the offending vehicle with New York Central Mutual Fire Insurance Company; (b) that Respondents have not complied with the requisite conditions precedent entitling them to Arbitration; (c) adding New York Central Mutual Fire Insurance Company and So Mi Ko as additional party Respondents; and (d) permanently staying, pursuant to CPLR §§7503 and 3211, Respondent Gwen Alexis from proceeding to Arbitration against Petitioner:

Notice of Petition-Petition-Exhibits A-H.....	1-3
Affirmation in Partial Opposition -Exhibits 1-7.....	4-5
Affirmation in Opposition-Exhibits A-J.....	6-7
Reply Affirmation-Exhibit A-B.....	8-9

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Upon the foregoing papers it is hereby ORDERED that Petitioner's application is granted only insofar as it seeks to add New York Central Mutual Fire Insurance Company and So Mi Ko as additional Respondents for the purpose of conducting a hearing on the limited framed issue of whether So Mi Ko's insurance policy with New York Central Mutual Fire Insurance Company was properly terminated or whether she was in fact an insured at the time of the accident. The remainder of Petitioner's application is denied.

Procedural History/Factual Background

This action arises from a motor vehicle accident which occurred on September 1, 2009 on 10th Avenue and West 39th Street in the City, County and State of New York, between a vehicle owned and operated by Respondent Stephen Alexis and a vehicle owned and operated by Proposed Additional Respondent So Mi Ko. Respondent, Stephen Alexis, claims to have suffered serious physical injuries as a result of this accident and seeks compensation pursuant to SUM endorsement contained in his insurance policy. It is undisputed that at the time of the accident, Petitioner had in full force and effect a policy of automobile insurance with Respondent Stephen Alexis under policy number 46103655-0; a policy containing the applicable SUM endorsement providing coverage of \$50,000 per person/\$100,000 per accident, and protection against bodily injury arising from accidents with uninsured motorists. One of the underlying issues presented is whether the vehicle owned and operated by So Mi Ko, at the time of the accident, was insured with New York Central Mutual Fire Insurance

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Company thus invoking their coverage. The police report generated subsequent to the accident references an Assigned Risk Code of "999" to So Mi Ko. However a report generated by the New York State Department of Motor Vehicles lists the proposed additional Respondent, New York Central Mutual Fire Insurance Company, as the carrier for So Mi Ko's vehicle. The record further reflects that New York Central has asserted that the purported policy was cancelled and/or rescinded prior to the loss. Due to New York Central's position regarding the cancelled insurance, Respondent Stephen Alexis has filed a demand for arbitration, seeking compensation pursuant to the SUM coverage provided for in his policy, for the injuries suffered due to the motor vehicle accident, together with a derivative claim for loss of services asserted by Respondent Gwen Alexis, Stephen's wife.

Legal Analysis / Discussion

The Court will first address that portion of Petitioners' motion which seeks a permanent stay of Arbitration with respect to the derivative claim of Gwen Alexis. In its reply submissions, Petitioners now concede that Respondent Gwen Alexis is entitled to pursue her claim for loss of services subject to the policies limitations of coverage. As such, that portion of Petitioner's original motion would now appear to be deemed moot. Notwithstanding Petitioner's reply, the Court nevertheless concludes that such

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dismissal would not be warranted in any event. See, *Redcross v. Aetna Casualty & Surety*, 146 A.D.2d 125, 538 N.Y.S.2d 146 [3rd Dept. 1989]; *Ortiz v. New York City Transit Authority*, 267 A.D.2d 33, 699 N.Y.S.2d 370 [1st Dept. 1999].

Petitioners also seek a temporary stay of the arbitration ostensibly to permit discovery, seeking issuance of an Order "to aid in arbitration" pursuant to CPLR § 3102(c). In support of its application, Petitioner asserts that notice was sent to Respondents on December 18, 2009, requesting Respondents' compliance with certain conditions precedent existing under their policy, which conditions required Respondents to provide authorizations for medical, employment and other relevant documents, to submit to an examination under oath and to appear for such medical examinations as the company deems necessary. Petitioner also asserts that it will be severely prejudiced if not given the opportunity to obtain such reports and examinations, prior to arbitration, and to permit such discovery would result in no corresponding prejudice to Respondents.

Petitioner nevertheless concedes that in determining whether a stay of arbitration is warranted the test to be applied is one of "necessity rather than convenience". See *International Components Corp. v. Klaiber*, 54 A.D.2d 550, 387 N.Y.S.2d 253 and *Matter of Katz*, 3 A.D.2d 238; *DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 362 N.Y.S.2d 843 (1974).

Respondents, Stephen and Gwen Alexis, oppose the stay asserting that Petitioner was first put on notice of Respondent's potential

claim as far back as September 23, 2009, by Respondents' letter of that date which explained, in detail, not only the circumstances of the motor vehicle accident but also the uncertainty of the other vehicle's insurance coverage. Petitioner, at the same time, was also provided with a copy of the operative police report as well as their no-fault application. Respondents further supplemented its submission with the service of a Notice of Intention to Make a Claim upon Petitioners on November 13, 2009, after receiving notification from New York Central Mutual of its disclaimer of coverage of So Mi Ko's vehicle. Respondents therefore assert that with this information in hand Petitioner made no demand or request for discovery with the notable exception of a demand for a physical examination with Petitioner's physician, Dr. Robert M. Simon. The record further reflects that on December 18, 2009, Petitioner requested that Respondents execute certain medical authorizations. However, the record also reflects that such authorizations were previously provided to Petitioner as part of Respondent's no-fault application submitted on September 23rd. Respondents further argue that Petitioner, in its capacity as the SUM carrier, had and has full access to Respondent's No-Fault file which contains all necessary authorizations, medical records and reports. As such, Respondents assert that Petitioner is in possession of all required discovery material which would enable it proceed with the arbitration thereby obviating the need for a stay. The Court agrees.

Having considered the respective submissions of the parties, the

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Court is compelled to deny Petitioner's application. The factual record presented simply does not support the requisite factual predicate necessary for a finding of "extraordinary circumstances" sufficient to warrant the imposition of a temporary stay of arbitration. Similarly, Petitioners have had "ample" time to seek such discovery. See, *DeSapio v. Kohlmeyer, supra; Matter of Katz [Burkin]*, 3 A.D.2d 238, 160 N.Y.S.2d 159 [1st Dept.1957]; *Allstate Insurance Company v. Urena*, 208 A.D.2d 623, 618 N.Y.S.2d 219 [2nd Dept.1994]; *Allstate Insurance Company v. Faulk*, 250 A.D.2d 674, 671 N.Y.S.2d 689 [2nd Dept.1998]; *Liberty Mutual Insurance Company v. DeCaro*, 244 A.D.2d 487, 665 N.Y.S.2d 910 [2nd Dept.1997]; *Interboro Mutual Insurance Co. v. Pardon*, 270 A.D.2d 266, 704 N.Y.S.2d 834 [2nd Dept.2000].

The remaining portion of Petitioner's motion seeks the addition of New York Central Mutual and So Mi Ko as additional party Respondents to the pending proceeding in order to adjudicate the issue of whether coverage existed on So Mi Ko's vehicle at the time of the accident. Adjudication of this issue will undoubtedly facilitate, if not insure, a more expeditious resolution of the pending issues embraced within Respondent Alexis' claims. As such, Petitioner's application to include Ko and New York Central Mutual as additional respondents is granted.

Consistent with the foregoing, it is hereby

ORDERED, that petitioner's motion for a stay of arbitration be and the same is hereby denied; and it is further

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ORDERED, that New York Central Mutual Fire Insurance Company and So Mi Ko are hereby added as additional party respondents; and it is further

ORDERED that a hearing shall be conducted on the limited issue of whether So Mi Ko's insurance policy with New York Central Mutual Fire Insurance Company was in full force and effect at the time of the accident and/or properly terminated prior thereto; and it is further

ORDERED that a pre-hearing conference is established for Thursday, October 7, 2010 at the Surrogate's Courthouse, 30 Park Place, Goshen, New York at 10:30 a.m.

This constitutes the decision and Order of this Court.

Dated: Goshen, New York
September 3, 2010

E N T E R


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