

**Matter of Government Empls. Ins. v Figueroa**

2011 NY Slip Op 30672(U)

March 16, 2011

Supreme Court, New York County

Docket Number: 111784/10

Judge: Joan B. Lobis

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

PRESENT: Sean B. Lolis  
*Justice*

PART 6

Index Number : 111784/2010

GOVERNMENT EMPLOYEES INSURANCE

vs.

FIGUEROA, ALISA

SEQUENCE NUMBER : 001

COMPEL OR STAY ARBITRATION

INDEX NO. \_\_\_\_\_

MOTION DATE 1/17/11

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-5

6-11

12

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 <sup>petition</sup> ~~motion~~

**MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER**

**FILED**

MAR 22 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/16/11

JSh  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6

**FILED**

MAR 22 2011

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

GOVERNMENT EMPLOYEES INSURANCE  
COMPANY to Stay Arbitration,

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioner,

Index No. 111784/10

-against-

Decision and Order

ALISA FIGUEROA,

Respondents.

-----X  
JOAN B. LOBIS, J.S.C.:

Petitioner Government Employees Insurance Company ("GEICO"), brings this petition seeking an order: (1) pursuant to C.P.L.R. § 7503(c), staying arbitration permanently or, in the alternative, temporarily staying arbitration and ordering a hearing on the issue of whether a vehicle made physical contact with respondent and (2) directing respondent to produce a copy of her medical records, provide authorizations for such, and submit to a deposition and a physical examination. For the reasons discussed below, the petition is granted to the extent of ordering a hearing to determine whether a vehicle made physical contact with respondent.

According to a police report dated March 22, 2010, respondent was crossing the street at Leonard Street and Church Street in Manhattan "when a vehicle cut in front of her causing her to jump back." She experienced pain in her back and ribs. On August 17, 2010, respondent filed a demand for arbitration under an insurance policy issued by GEICO to Jose Figueroa, respondent's husband, claiming that she was the victim of a hit and run. As is relevant herein, the policy with GEICO covers personal injury caused by an uninsured vehicle and defines an uninsured vehicle as a vehicle for which

neither owner nor driver can be identified which causes bodily injury to an insured by physical contact with the insured. GEICO brought this petition shortly after receiving respondent's demand.

Respondent appeared for an examination before trial ("EBT") on November 15, 2010. She testified that on the morning of March 22, 2010, she was in the middle of a crosswalk at an intersection between Leonard and Church Streets on her way to work, when a vehicle turned into the crosswalk. Respondent testified that she "stopped, stunned . . . and the next thing that [she knew she] was back and turned left - turned right." Immediately after testifying that she "guess[ed]" she was hit by the vehicle, she maintained that she "was sure [she] was pushed by the car." At first she testified that she did not feel contact because she was numb from shock, but after counsel for GEICO sought to confirm that she did not recall contact to her person, respondent testified that the vehicle made contact with the side of her body. Respondent testified that as the vehicle passed her, the driver waved to her in an apparent apology and drove off. She then continued on her way to work.

Respondent testified that when she arrived at work, she was "hysterical and hyperventilating." She called her husband to tell him that she had "almost got hit by a car." A co-worker called an ambulance. The emergency medical technicians took her vital signs but did not take her to a hospital.

After work, respondent presented to her orthopedist, Silvester Lango, M.D., complaining of back pain that she was experiencing since the afternoon. Respondent testified that Dr. Lango took back x-ray, after reading the x-rays, diagnosed her with a rib fracture. Respondent underwent MRIs thereafter. She set forth that they revealed a herniated disc and bulging disc in the middle of her back.

Respondent testified that she experiences pain throughout her back, neck pain, arm and wrist pain, and a pinched nerve in her rib cage. Counsel for GEICO asked respondent if she was also alleging that she had fractured ribs, to which she replied "Yes, I forgot that."

Three MRI reports pursuant to MRIs taken in March and April of 2010 indicate that respondent has disc bulges at the C3/4, C4/5, C5/6, L2/3, L4/5, and L5/S1 levels of the spine and disc herniation at the L3/4 and T12/L1 levels. Among the other medical records is a letter from Dr. Lango, dated April 9, 2010, setting forth the MRI findings and that respondent has a "fracture of ribs."

In this petition, GEICO argues that its motion to permanently stay arbitration must be granted because there was no "physical contact" with a uninsured or unidentifiable vehicle. GEICO asserts that the police report does not mention physical contact between respondent and a vehicle. In the alternative, GEICO requests a hearing on the issue. GEICO also seeks medical records and a physical examination of respondent.<sup>1</sup>

In opposition, respondent argues that the petition is moot. She sets forth that she has provided medical records and submitted to an EBT and physical examination at GEICO's request. Respondent points to several areas in her EBT testimony where she testified to "physical contact" with the vehicle. Respondent further argues that she has established a casual connection between her injuries

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<sup>1</sup> As stated earlier, GEICO initially requested an EBT of respondent, which has since occurred. GEICO also initially set forth that respondent supplied it with a possible license plate number for the vehicle, which was apparently registered in New Jersey, and that it was currently searching for the New Jersey State Department of Vehicles for a record. GEICO maintained that it "reserves the right to amend the petition" if it ascertains the identity of the driver, but no such amendment was made.

and the contact with the vehicle. She points to the physical examination report, created for GEICO and dated July 28, 2010, that sets forth that if respondent's reported injuries were true, "the signs and symptoms noted would be considered causally related to the accident[.]" The court notes that the report goes on to state that the relationship cannot be "definitely determined, due to the lack of records confirming the diagnoses."

In reply, GEICO again points to the police report as evidence that no physical contact occurred. GEICO also maintains that respondent's EBT testimony was unclear as to physical contact. GEICO argues that respondent's medical records fail to shed any light on the issue. GEICO also seeks another physical examination, setting forth that the first physical examination was conducted for the no-fault portions of the policy and did not address serious injury or permanency. GEICO also contends that it still needs medical records but fails to identify the records it seeks.

The court cannot determine from the evidence submitted on this petition whether physical contact occurred. Respondent's EBT is contradictory and vague as to physical contact. Furthermore, neither the police report nor the medical records provide a definitive answer. A hearing is required to resolve the issue of whether physical contact occurred. In re New York Cent. Mut. Fire Ins. Co. v. Vento, 63 A.D.3d 841, 843 (2d Dep't 2009); see also In re Allstate Ins. Co. v. Hayes, 17 A.D.3d 669, 671-72 (2d Dep't 2005). As to the discovery sought by GEICO, GEICO has not identified the medical records that it still needs nor has it set forth clinical reasons for the court to order a second physical examination of respondent. There is no basis to grant that branch of the petition seeking disclosure in aid of arbitration. See In re National Grange Mut. Ins. Co. v. Louie, 39 A.D.3d 293, 293-94 (1st Dep't 2007). Accordingly, it is hereby

ORDERED that the application to stay arbitration is granted to the extent that the

preliminary issue of whether respondent was physically contacted by an unidentified or uninsured vehicle is referred to a special referee to hear and report, or hear and determine, if the parties so stipulate in writing, pursuant to C.P.L.R. § 4317; and it is further

ORDERED the arbitration is stayed temporarily pending such hearing; and it is further

ORDERED that a decision on the petition shall be held in abeyance pending receipt of the report and recommendations of the special referee and a motion pursuant to C.P.L.R. Rule 4403 or receipt of the determination of the special referee or the designated referee; and it is further

ORDERED that within fifteen (15) days of the date of notice of entry of this order, petitioner is to serve a copy of this order with notice of entry, together with the Special Referee Information Sheet, on the Special Referee Clerk (Room 119) to arrange a date for the reference to a special referee; and it is further

ORDERED that in the event the parties do not agree to hear and determine, following the filing of the report and notice to each party of the filing of the report, petitioner shall move to confirm or reject all or part of the report within fifteen (15) days after notice of the filing of the report. If petitioner fails to do so, then respondent shall so move within thirty (30) days after notice of the filing is given; and it is further

ORDERED that GEICO's request for a second order requiring respondent to appear for a second physical examination and produce medical records is denied.

Dated: March /6 , 2011

**FILED**  
MAR 22 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

  
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JOAN B. LOBIS, J.S.C.