

**Matter of State Farm Mut. Auto. Ins. Co. v Apple of Westchester Corp.**

2011 NY Slip Op 31639(U)

June 15, 2011

Supreme Court, New York County

Docket Number: 102569/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
Justice

PART 58

*In the Matter of the Petition of*  
STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY,

Petitioner,

-v-

APPLE OF WESTCHESTER CORP., et al.,  
Respondents.

INDEX No. 102569/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 001

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion Stay Arbitration.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1

Answering Affidavits- Exhibits \_\_\_\_\_

2+3

Replying Affidavits \_\_\_\_\_

4+5

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 6/15/11

Donna M. Mills  
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**

JUN 20 2011

COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
In the Matter of the Petition of  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Petitioner,

Index No.  
102569/11

-against-

For an Order staying the arbitration attempted to be had by

ANTHONY J. CRAWFORD,

Respondent,

-and-

APPLE OF WESTCHESTER CORP., LAWRENCE K.  
JOHNSON, NATIONAL FIRE INSURANCE COMPANY  
OF HARTFORD and PROPERTY & CASUALTY  
COMPANY OF HARTFORD,

Proposed Additional Respondent(s).

-----X  
DONNA MILLS, J. :

Petitioner moves to stay arbitration of an uninsured motorist claim. Proposed additional respondents appear to oppose the petition.

This case involves an automobile accident. Respondent is an operator of a vehicle insured by petitioner. In December 5, 2008, respondent was involved in the accident in Queens, New York when his vehicle collided with another vehicle owned by proposed additional respondent Apple of Westchester Corp. (Apple). Claiming that the vehicle owned by Apple was uninsured at the time of the accident, respondent seeks uninsured motorist arbitration under petitioner's insurance policy.

Petitioner moves for an order staying arbitration on the ground that the Apple vehicle was insured at the time of the accident. Petitioner provides as proof a copy of the Police Accident Report, which shows the vehicle at bar as having an insurance code of "224" assigned to it. That code corresponds to proposed additional respondent National Fire Insurance Company of Hartford (National), and to an insurance policy number of B1V73931.

As evidenced by an Insurance Activity Expansion report of the Department of Motor Vehicles, the vehicle was registered prior to the date of the accident with proof of insurance by proposed additional respondent Property and Casualty Company of Hartford (Property). Petitioner asserts that the submission of these records indicates that the Apple vehicle was insured and that arbitration should be dismissed. Respondent states that the Property policy with Apple was properly terminated prior to the accident. Petitioner contends that respondent has not demonstrated that the alleged termination was conducted in an appropriate and legal manner.

Petitioner argues that this court should stay arbitration because respondent or the aforesaid insurers have failed to prove that the Apple vehicle was uninsured. Petitioner alternatively suggests that a hearing should be conducted on the issue of whether the Property policy held by Apple was properly terminated. In addition, petitioner argues that arbitration should be stayed pending certain discovery to be conducted by petitioner, including physical examinations, the service of medical records authorizations and depositions. Petitioner claims that it would be prejudiced if discovery were denied, due to the failure to ascertain the nature and extent of damages sustained by respondent.

National opposes the petition to add itself as a respondent to this proceeding. National provides an affidavit from John Shumway, a claims examiner assigned to represent National in

this litigation. He states that National has no record of insuring the Apple vehicle or of issuing a policy to Apple. His search indicates that Hartford Financial Services Group is the listed insurer for the vehicle.

Property opposes the petition, claiming that it mailed a Notice of Non-renewal to Apple on April 15, 2008, several months before the accident. Accordingly, Property claims to have complied with Section 313 (1) of the Vehicle and Traffic Law, which provides that an insurer may choose not to renew a policy in which the named insured is not a natural person, by mailing a Notice of Non-renewal to the insured at least 20 days in advance of the renewal date.

Allegedly, the notice was sent by regular mail with a certificate of mailing, properly endorsed by the postal service being obtained. A copy of the notice is provided by Property.

In reply, petitioner asserts that National's affidavit is insufficient because it was not properly sworn, and does not specify the terms of the name search. Petitioner considers the search conducted on National's behalf to be incomplete.

Petitioner argues that Property failed to provide proof that it timely filed its notice with the New York State Department of Motor Vehicles as required by Section 313. Petitioner states that failure to notify that Department renders the cancellation invalid.

In a proceeding to determine an uninsured motorist claim, "proof of insurance offered by a claimant's insurer in the form of a Department of Motor Vehicles DP-37 form ("DMV DP-37") is sufficient *prima facie* evidence of coverage to shift the burden of going forward with proof to the company disclaiming coverage." *See Matter of American Transit Insurance Company (Glaude State Farm Mutual Automobile Insurance Co.)*, 208 AD2d 376, 376-377 (1<sup>st</sup> Dept 1994); *Matter of Allstate Insurance Company (Holmes Atlantic Mutual Insurance Co.)*, 173

AD2d 260 (1<sup>st</sup> Dept 1991). Where the disclaiming company comes forward with sufficient proof, which may consist of testimony that no record of any policy of insurance issued could be located (*Holmes* 173 AD2d 260, *supra.*), or that an exhaustive search of company files disclosed that no policy of insurance was ever issued to the offending vehicle (*Matter of Nationwide Insurance Company [Dye Metropolitan Property & Liability Insurance Co.]*, 170 AD2d 683 [2d Dept 1991], or as to the list of insureds (*Matter of General Accident Insurance Company [LaMotta City Insurance Co.]*, 149 AD2d 322 [1<sup>st</sup> Dept 1989]), the burden of proof shifts back to the claimant's insurer to come forward with additional evidence of coverage. *Holmes*, 173 AD2d 260, *supra.*

In this case, petitioner has provided admissible evidence that the Apple vehicle was insured at the time of the accident by virtue of the Police Accident Report and the Insurance Activity Report. While there has been an effort on the part of National and Property to rebut petitioner's assertions, there remains a problem. National has failed to disclose an exhaustive search to confirm that Apple never had a policy with National. Property has not offered sufficient proof that it served a notice of non-renewal of Apple's policy to the Department of Motor Vehicles.

For the purpose of resolving this matter and in the interest of justice, this court shall stay the arbitration proceeding and allow an uninsured motorist hearing in this court.

Accordingly, it is

ORDERED that the petition to stay arbitration is granted to the extent that a trial is directed of the preliminary issue as to the coverage or the proper cancellation of coverage of Apple of Westchester Corporation's vehicle, and the arbitration is stayed pending such trial; and it is further

ORDERED that the Clerk of the Trial Support Office (Room 158) is directed to assign this matter to an appropriate Part for trial upon receipt of a copy of the order with notice of entry, the filing of a note of issue and a statement of readiness, and the payment of appropriate fees, if any; and it is further

ORDERED that petitioner is directed to serve a copy of the order with notice of entry within 20 days of entry upon the attorneys for the respondent, the arbitrator, the County Clerk, and the Clerk of the Trial Support Office (Room 158); and it is further

ORDERED that petitioner is directed to serve a copy of this order with notice of entry, together with copies of all papers previously served in the proceeding, upon Apple of Westchester Corporation, National Fire Insurance Company of Hartford, and Property and Casualty Company of Hartford, who upon such service shall be added as party respondents; and it is further

ORDERED that the caption of this proceeding is amended to reflect the inclusion of said additional party respondents and the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), upon service by petitioner on each of them of a copy of this order with notice of entry, shall mark their records to reflect the amendment.

DATED: 6/15/11

ENTER: *Donna M. Williams*

DONNA M. WILLIAMS, CLERK  
J.S.C.

**FILED**  
JUN 20 2011

COUNTY CLERK'S OFFICE  
NEW YORK