

Matter of American Tr. Ins. Co. v Diba

2011 NY Slip Op 31689(U)

June 21, 2011

Supreme Court, New York County

Docket Number: 100220/11

Judge: Anil C. Singh

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

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PART 67

Index Number : 100220/2011
AMERICAN TRANSIT INSURANCE
vs.
LOPEZ, SIGREDO
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

FILED

Upon the foregoing papers, it is ordered that this motion

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 6/22/2011

[Signature]
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

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
COUNTY OF NEW YORK: PART 61

-----X

In the Matter of Arbitration Attempted to be had
between AMERICAN TRANSIT INSURANCE
COMPANY,

Petitioner,

-against-

SIGFREDO LOPEZ

Respondent,

KHADIM DIBA, MALICK WADE and STATE
FARM FIRE AND CASUALTY COMPANY,

Proposed Additional Respondents.
-----X

DECISION AND
ORDER

Index No.
100220/11

FILED

JUN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. ANIL C. SINGH, J.:

Petitioner American Transit Insurance Company ("ATIC") moves to permanently stay the arbitration sought to be had by respondent or, in the alternative, to temporarily stay the arbitration until a preliminary hearing may be held on the issue of the validity of State Farm's disclaimer, and ordering that the proposed additional respondents be joined as necessary parties. In the alternative, if the Court finds that the disclaimer is proper and valid, and that arbitration is necessary, petitioner requests that respondent be directed to appear for an EUO and for an IME conducted by a physician designated by the office of petitioner, to be completed prior to arbitration,

and to produce authorizations for all diagnostic films and medical records. The respondent and proposed additional respondents oppose the petition to stay arbitration.

Khadim Diba was the owner of a 2006 Chrysler 300 automobile. He had an automobile liability insurance policy with State Farm Fire and Casualty Company ("State Farm"). At some point prior to May 14, 2010, Diba brought his car to EKG Car Care to be repaired.

Malick Wade, an employee of EKG Car Care, was allegedly driving the vehicle in the Bronx on May 14, 2010. Wade allegedly rear-ended a vehicle owned by Dito Limo Corp. Respondent Sigfredo Lopez, who was a passenger in the Dito vehicle, claims he was injured. According to the police accident report, Wade was cited for driving without a license. On the date of the accident, Dito Limo Corp. was insured by ATIC.

By letter dated September 2, 2010, State Farm notified Malik Wade that it was in receipt of a bodily injury claim being presented by Sigfredo Lopez as a result of the accident. The letter stated that State Farm's investigation revealed that Wade was operating State Farm's insured's vehicle while Wade was in the course of his employment in a "car business." Based on the "car business" exclusion in the policy, State Farm informed Wade that there was no coverage for him under the liability portion of the State Farm auto policy issued to Khadim Diba. Accordingly, State Farm would not defend or indemnify Wade with regard to any claims arising from the

accident and was withdrawing from the matter entirely.

Subsequently, in a letter dated October 8, 2010, Maria A. Vollaro, a Claim Representative employed by State Farm, notified the Subrogation Manager at ATIC, as follows:

We acknowledge receipt of your subrogation claim.

Our insured's vehicle was being operated by a non-permissive, unlicensed operator of a repair garage. There is also no coverage under the liability policy for an insured while maintaining or using a vehicle in connection or engagement of any kind in a car business.

This matter has been investigated[,] and we must decline to make any voluntary payment.

(Petition, exhibit E).

Petitioner received an uninsured motorist Demand for Arbitration on December 20, 2010 (Petition, exhibit B). In response, ATIC filed the instant petition for a stay of the arbitration. Petitioner contends that respondent has failed to furnish sufficient evidence to support his allegations that the offending vehicle was uninsured on the date of loss. Petitioner asserts, therefore, that the uninsured motorist arbitration in this matter should be permanently stayed.

In opposition to the petition, counsel for respondent Sigfredo Lopez, exhibits a copy of the disclaimer letter that he received from Terence McLaughlin, an employee of State Farm. The letter dated December 17, 2010, states in pertinent part:

We are in receipt of a bodily injury claim being presented by Sigfredo

Lopez as a result of the above referenced accident. Our investigation has revealed that Malik Wade was operating our insured's 2006 Chrysler 300 while you [sic.] were in the course of his employment in a *car business*.

The State Farm policy issued to our insured, Khadim Diba, under policy number, 1159-570-32 states as follows:

Section 1 -LIABILITY-COVERAGE A

Exclusions

THERE IS NO COVERAGE FOR AN *INSURED*:

7. WHILE MAINTAINING OR USING A VEHICLE IN CONNECTION WITH THAT *INSURED'S* EMPLOYMENT IN OR ENGAGEMENT OF ANY KIND IN A *CAR BUSINESS*.

The policy also defines *Car Business* as a business or job where the purpose is to sell, lease, rent, repair, service, modify, transport, store, or park land motor vehicles or any type of trailer.

As such, there is no coverage for Malik Wade under the liability portion of the State Farm Auto Policy issued to Mr. Khadim Diba.

(Affirmation in Opposition of Warreen Zwirn, Esq., exhibit A) (boldface and italics in original).

Counsel for respondent argues that the above letter "definitively proves that State Farm has disclaimed coverage and thus, the offending vehicle is uninsured."

State Farm also exhibits the sworn affidavit of its claim representative Maria Vollaro. Ms. Vollaro states that subsequent to receipt of the claim, she contacted Mr. Diba. According to Ms. Vollaro, Diba had no knowledge of the fact that his car had been involved in the accident and only learned about the accident from Ms. Vollaro's

telephone call to him. Ms. Vollaro contends that Diba advised her that he had left his car with EKG Car Care for repairs but had since picked up his car and was never informed that it had been involved in an accident. He advised that his car was at EKG Car Care on the date of the accident.

Ms. Vollaro states that she then contacted James Pelle, the owner of EKG Car Care. According to Ms. Vollaro, Pelle confirmed that Diba's car was at his shop for repairs and was being operated by his employee Malick Wade when the accident occurred. She states that Mr. Pelle indicated that he again repaired Diba's vehicle after he learned of the accident and the damage sustained to the vehicle.

In light of the conflict regarding coverage, it is hereby

ORDERED that the petition to stay arbitration is granted to the extent that a trial is directed of the preliminary issue as to coverage [whether State Farm properly disclaimed coverage based on the insurance policy's "Car Business exclusion"], 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 this 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 this 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 Khadim Diba, Malick Wade and State Farm Fire and Casualty Company, 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 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; and it is further

ORDERED that respondent is directed to provide medical records and authorizations, and to submit to an examination under oath and physical examinations, if after a hearing it is determined that respondent is entitled to proceed to arbitration.

The foregoing constitutes the decision and order of the court.

Date: June 21, 2011
New York, New York


Anil C. Singh
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

FILED

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