

Matter of Liberty Mut. Ins. Co. v Walker

2011 NY Slip Op 32257(U)

August 11, 2011

Sup Ct, Nassau County

Docket Number: 2745/11

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of

TRIAL/IAS PART 32
NASSAU COUNTY

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

Index No.: 2745/11
Motion Seq. No.: 01
Motion Date: 04/06/11

- against -

JACQUELINE WALKER and SHANTEL BULLOCK,

Respondents.

The following papers have been read on this application:

	Papers Numbered
<u>Notice of Petition, Verified Petition and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioner, by Notice of Petition, moves, pursuant to CPLR § 7503, for an order permanently staying the arbitration between petitioner and respondents, or, in the alternative, temporarily staying the arbitration in this matter and setting the action down for a preliminary hearing on the issue of whether or not there is a valid Supplemental Underinsured Motorist claim by respondents and for an order directing respondents to comply with the discovery items as set forth in the Verified Petition. Respondents oppose petitioner's application. The Verified Petition is granted to the extent set forth below.

Based upon the papers submitted for the Court's consideration, the Court makes the following findings of fact:

1. Prior to October 13, 2008, petitioner issued to respondent Jacqueline Walker ("Walker") a personal insurance policy issued pursuant to the laws of the State of New York and approved by the Superintendent of Insurance, in which petitioner provided, as mandated by Section 3420(2)(A) of the Insurance Law, supplementary uninsured/underinsured motorist coverage.

2. The herein above described insurance policy was in effect on October 13, 2008.

3. On October 13, 2008, at approximately 8:14 p.m., respondent Walker and respondent Shantel Bullock ("Bullock") allegedly received personal injuries due to a motor vehicle accident that took place at the intersection of Broadway and Cedarhurst Avenue, Cedarhurst, Nassau County, New York. On that date and at that time, respondent Walker was the operator and owner of a 2003 Kia Sedona that was insured by petitioner.

Respondent Bullock was a passenger in respondent Walker's vehicle. It was alleged that the accident occurred when respondents' vehicle was stopped at a red light while it was traveling in the westbound direction on Broadway and a 2004 Honda motor vehicle, owned and operated by an individual named Dionne C. Marshall, struck respondents' vehicle in the rear.

4. On February 3, 2011, petitioner received a Demand for Arbitration for Supplemental Underinsured Motorist ("SUM") benefits prepared on February 1, 2011, by respondents' counsel, in connection with the October 13, 2008 accident.

Petitioner first requests a permanent stay of all arbitration hearings between itself and respondents due to the fact that respondents vitiated any right to SUM benefits under the Liberty Mutual policy as a result of their failure to comply with the express terms of the insuring

agreement. Petitioner submits that respondents, in direct contravention of the terms of the Liberty Mutual policy, failed to obtain petitioner's consent to settle their matter with Dionne C. Marshall, pertaining to the subject accident, prior to executing a release. As a result, petitioner claims that respondents have forfeited any right to seek SUM benefits under the Liberty Mutual policy for the accident in question. Petitioner submits the affidavit of Christopher Herbert, Claim Specialist with Liberty Mutual Insurance Company, to establish that respondents failed to comply with the terms of the insuring agreement in that they failed to advise petitioner that the underlying policy had been tendered and never forwarded a request to settle the underlying action prior to receipt of the Arbitration Demand. As a result, petitioner argues that respondents' claim for SUM benefits under the Liberty Mutual policy is not valid and the arbitration being sought by respondents should be permanently stayed on these grounds.

Petitioner also argues, in the alternative, if the Court denies petitioner's application for a permanent stay of the arbitration in this matter, that the matter be set down for a preliminary hearing to determine whether or not respondents properly and fully complied with the terms of the Liberty Mutual policy such that they would be entitled to SUM benefits under the insuring agreement.

Petitioner further requests that the Court issue a temporary stay of arbitration so its discovery demands can be complied with by respondents.

Respondents oppose petitioner's application for an order permanently staying the uninsured motorist arbitration. Counsel for respondents submits that his law firm was retained to represent respondents on March 5, 2009, and, on that date, counsel for respondents sent a letter to petitioner advising it of its representation of respondents and putting petitioner on notice of an uninsured motorist claim. Respondents contend that, on March 31, 2009, petitioner sent a letter which acknowledged receipt of the letter of representation and admitted that, upon investigation,

the claim was a valid Underinsured Motorist claim. *See* Respondents' Affirmation in Opposition Exhibit C. In that same letter, petitioner requested various documents and information, all which, respondents claim, were provided and supplied to petitioner by them. Respondents submit that, on May 20, 2009, supplemental underinsured motorist packages were forwarded to petitioner on behalf of respondents in connection with respondents' supplemental motorist insurance claim. Respondents state that said packages included the factual background concerning the happening of the accident, a complete list of respondents' medical providers with dates of treatment, a synopsis of each respondents' treatment, a summary of each of respondents' injuries, respondents' disability status, respondents' no-fault provider, a copy of the police report, the MV-104 report of respondent Walker, respondents' medical records and bills, duly executed HIPAA compliant authorizations to obtain respondents' hospital, medical and diagnostic records, reports and bills and respondents' complete no-fault files. *See* Respondents' Affirmation in Opposition Exhibit D.

Respondents contend that, on June 20, 2010, after months of contact and negotiation with the claim representative from Allstate Insurance Company (Dionne C. Marshall's insurance carrier), an offer of \$18,500.00 was made by Allstate to settle the claim of respondent Walker and an offer of \$18,500.00 was made by Allstate to settle the claim of respondent Bullock. Respondents' counsel submits that, during the negotiating process with Allstate, he engaged in several telephone conversations with petitioner's claim representative, Robert Marino, updating Mr. Marino as to the progress of said negotiations. Respondents' counsel further submits that, "[o]n approximately 10 separate occasions, beginning on July 30, 2010, the date of the offer by Allstate, and ending on August 15, 2010, I called Mr. Marino, each time leaving him a message on his voicemail, regarding the maximum available offers of \$18,500.00 per Respondent. On July 30, 2010, I also faxed a letter to Mr. Marino at Liberty Mutual Insurance Company advising that the maximum available offers of \$18,500.00 per Respondent had been made by Allstate. Annexed hereto, marked Exhibit 'E' is a copy of the faxed correspondence. To my knowledge,

Mr. Marino did not attempt to contact my office in response to any of the messages I had left for him or in response to the aforementioned faxed correspondence. On September 2, 2010, **34 days** after initial verbal and written notice via fax of the maximum available settlement offers made by Allstate, the Respondents were awarded release of their settlement checks by my office.” The Court notes that the faxed correspondence provided by respondents as Exhibit E in their opposition papers did not contain a confirmation sheet for said fax.

Respondents’ counsel contends that he then waited several months from the date of the settlement with Allstate to serve a Demand for Supplemental Underinsured Motorist Arbitration with petitioner on February 1, 2011.

Respondents argue that petitioner’s demand for a permanent stay must be denied based upon respondents’ compliance with the governing SUM endorsement. Respondents submit that based upon respondents’ settlement with Allstate for the maximum available policy limit, petitioner being put on written notice of said offer by fax on July 30, 2010 and the release of respondents’ settlement checks thirty-four days later on September 2, 2010, respondents complied with the governing SUM endorsement and petitioner’s demand for permanent stay of arbitration must be denied.

Respondents further argue that petitioner’s demand for a temporary stay pending a Framed Issue Hearing must be denied based upon petitioner’s admission of the SUM claim being valid. Respondents claim that petitioner conducted its own investigation and found this to be a valid uninsured motorist claim. *See* Respondents’ Affirmation in Opposition Exhibit D. Respondents additionally contend that they previously supplied petitioner with any and all items petitioner requested as discovery and that they do not object to providing petitioner with the additional discovery requested, including Examinations Under Oath and physical examinations, as conditions precedent to arbitration.

Under the circumstances alleged by petitioner and the opposition submitted by respondents, the Verified Petition is hereby **GRANTED to the sole extent** that a Framed Issue

Hearing shall be held to determine whether or not respondents complied with the SUM requirements of the subject insurance policy. See *Allstate Insurance Co. v. Anderson*, 303 A.D.2d 496, 755 N.Y.S.2d 724 (2d Dept.2003).

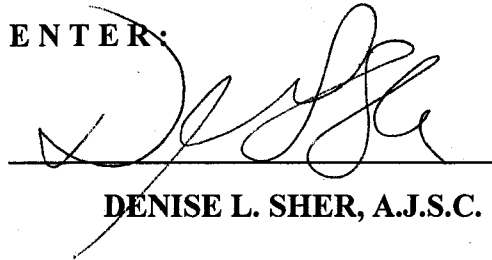
Petitioner shall serve a Note of Issue no later than sixty (60) days after entry of this Order. The Note of Issue shall be accompanied by a copy of this Order. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claim giving rise to the hearing.

All parties are hereby ordered to comply with the applicable discovery demands; the Court noting that petitioner's demands for discovery were unopposed by respondents.

Accordingly, as previously stated, petitioner's application is **GRANTED to the sole extent** that a Framed Issue Hearing shall be had to determine whether or not respondents complied with the SUM requirements of the subject insurance policy. To that end, the matter is hereby set down for a hearing to be held before the Calendar Control Part (CCP) on October 11, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 11, 2011

ENTERED
AUG 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE