SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. JEFFREY S. BROWN
JUSTICE

TRIAL/IAS PART 21

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In the Matter of the Application for an
Order Staying Arbitration between
NEW SOUTH INSURANCE COMPANY,

Petitioner,

-against-

INDEX NO. 013290/10

DECISION AFTER
HEARING

YVETTE HYMAN and LAMEEK EDWARDS,

Respondents,

-and-

NATIONWIDE INSURANCE COMPANY OF
AMERICA, JOSE RIVERA and JUAN RIVERA,

Additional Respondents.

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A framed issue hearing was directed by order of this court (Palmeri, J., August 27, 2010) to determine the issues of whether additional respondent, Juan Rivera, who was 15 years of age and unlicensed at the time of the accident, was operating the vehicle with permission of the owner and whether the insured had cooperated with his insurance carrier, Nationwide Insurance Company. The court makes the following findings of fact and conclusions of law.

Petitioner made a prima facie showing that the Rivera vehicle was insured by the Nationwide Insurance Company on the date of the accident, November 11, 2009 (Palmieri, J., August 27, 2010).

Debra Donegan, the only witness who testified at this hearing, has been employed for 36 years by additional respondent, Nationwide. She currently works as a Special Claims Rep. 2. Her duties consist of investigating, negotiating and evaluating claims once an attorney has commenced an action. On or about November 24, 2009 she was asked to investigate an accident involving Juan Rivera. She learned of the accident from the insured's agent, an employee of the Nationwide Insurance Company named "Birdie," who wrote policies exclusively for Nationwide. According to her notes, the driver (Juan Rivera) and his mother came into the agent's office to report the accident. Her notes also state that he did not have permission to operate the vehicle. The agent also told Ms. Donegan that Juan stated he was practicing for his permit test. However, Ms. Donegan did not speak to the driver or his mother.

Ms. Donegan testified she obtained a police report and learned that the operator of the motor vehicle, Juan Rivera, was 15 years of age and unlicensed on the date of the accident. The registrant of the vehicle, and Nationwide's insured, was Jose Rivera. According to her records, Ms. Donegan made several phone calls to Jose Rivera on November 25, December 10 and December 15, 2009, and the calls went unanswered. There was no answering machine so she was unable to leave a message. On November 24th , Ms. Donegan asked the agent of record to see if they had a different contact number for Mr. Jose Rivera. The number they had was not in service. She failed to verify this number with the Nationwide agent when she spoke to her while Juan Rivera and his mother were in the office. Ms. Donegan found an online listing under the

insured's name and attempted to call that number, but there was no answer and no answering machine. However, in her notes there is indication of the online listing but no record of any of the numbers that she called.

On December 10, 2009 Ms. Donegan sent a letter to Jose Rivera. There was no response, and the letter did not come back to her. Ms. Donegan then asked permission to send out a field adjuster to make an outside personal visit to the insured's premises. That request was denied by her manager.

At that point a determination was made to deny coverage due to non-permissive use and non-cooperation. On December 22, 2009, Ms. Donegan sent Jose Rivera a letter via regular mail and possibly sent a second letter by certified mail indicating the insurance carrier's determination. She used the address that was on both the policy and the police report. However, the police report in evidence lists an address in New Castle, while the letter in evidence indicates an address in Westbury. Ms. Donegan never heard from the insured after the letter was mailed. Both respondents, as well as their counsel, were copied with the December 22nd letter. She testified that normally a separate letter with redacted portions is sent to the claimants. However, she was unable to testify to whether such a redacted letter was sent.

Apparently, a letter was also sent to Jose Rivera at 66 Maplewood Drive, Westbury, New York, by certified and regular mail on December 28, 2009. Ms . Donegan did not receive a response, nor did she have any recollection of receiving a return receipt card. There was no evidence that these letters were sent from Ms. Donegan's office in Syracuse, New York.

Ms. Donegan testified on cross-examination that she failed to verify the phone numbers through either the Insurance Services Organization check or NCIB check, nor did she conduct a

Lexis Nexis search. Ms. Donegan was familiar with those search vehicles and had sufficient information to do a search. Further, Ms. Donegan's records did not contain a return receipt card from any of the certified mailings.

There is also a note from Ms. Donegan's manager dated December 15, 2009 which states, in sum and substance, that there was an alleged non-permissive use claim but that they had not confirmed this with the insured or driver. As a result, they could not deny coverage for that reason. The manager stated further that the insurance company should contact the agent to assist in locating the insured. However, Ms. Donegan does not believe the agent was ever subsequently contacted.

The evidence also reveals that the Nationwide agents are employees of the Nationwide Insurance Company. Further, other than the agent, nobody had any contact with the Rivera family after the accident.

Vehicle and Traffic Law § 388 creates a "strong presumption" of permissive use which can only be rebutted with substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's express or implied permission (*see Matter of State Farm Mut. Auto. Ins. Co. v Ellington,* 27 AD3d 567, 568 [2006]); *Matter of New York Cent. Mut. Fire Ins. Co. v Dukes,* 14 AD3d 704 [2005]). Once plaintiff meets its intial burden of establishing ownership, "[a] logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator" (*Murdza v Zimmerman*, 99 NY2d 375). "The uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her

permission, does not, by itself, overcome the presumption of permissive use" (*Talat v Thompson,* 47 AD3d 705; *Matter of State Farm Mut. Auto. Ins. Co. v Ellington,* 27 AD3d 567, 568 [2006]; *see Matter of General Acc. Ins. Co. v Bonefont,* 277 AD2d 379 [2000]).

The facts before this court are insufficient to rebut the presumption of permissive use. The evidence does not rise to the level of the facts in *Talat, supra,* which the appellate court found to be insufficient to rebut the strong presumption of permissive use. In *Talat, supra*, the Appellate Division found the uncontradicted testimony of a vehicle owner that the vehicle was operated without the owner's consent does not, by itself, overcome the presumption of permissive use (*see Matter of State Farm Mut. Ins. Co. v Ellington, supra*). In the instant case, the only evidence of non-permissive use is a note in the adjuster's file detailing a conversation she had with another employee of Nationwide who allegedly had a conversation with the driver of the motor vehicle and his mother. Such evidence is insufficient.

With respect to the issue of lack of cooperation,

> ". . .the burden of proving lack of co-operation of the insured is placed upon the insurer (Insurance Law § 167 subd. 5). Since the defense of lack of co-operation penalizes the plaintiff for the action of the insured over whom he has no control, and since the defense frustrates the policy of this State that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them (*Wallace v. Universal Ins. Co.*, 18 A.D. 2d 121, affd. 13 N.Y.2d 978; *Kehoe v. Motorists Mut. Ins. Co.*, 20 A.D.2d 308, 310; Vehicle and Traffic Law, § 310, subd. [2]), the courts have consistently held that the burden of proving the lack of co-operation is a heavy one indeed. Thus, the insurer must demonstrate that it acted diligently in seeking to bring about the insured's co-operation (*Amatucci v. Maryland Cas. Co.*, 25 A.D.2d 583; *Rosen v. United States Fid. & Guar. Co.*, 23 A.D.2d 335 [overruled on other grounds by *Matter of Vanguard Ins. Co. (Polchlopek)*, 18 N.Y.2d 376]; *National Grange Mut. Ins. Co. v.*

> *Lococo*, 20 A.D. 2d 785, aff'd. 16 N.Y 2d 585; *Kehoe v. Motorists Mut. Ins. Co.*, supra); that the efforts employed by the insurer were reasonably calculated to obtain the insurer's co-operation (*National Grange Mut. Ins. Co. v. Lococo, supra.*; *Wallace v. Universal Ins. Co., supra.*); and that the attitude of the insured, after his co-operation was sought, was one of 'willful and avowed obstruction' (*Coleman v. New Amsterdam Cas. Co.*, 247 N. Y. 271, 276; *American Sur. Co. v. Diamond*, 1 N.Y.2d 594" (*Thrasher v United States Liability Ins. Co.*, 19 NY2d 159, 168; see also *Matter of Countrywide Insurance Co. v. Henderson,* 50 AD3d 789).

The evidence before this court is insufficient to sustain the heavy burden of lack of cooperation. Even if Jose Rivera had received notice, mere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation as "the inference of non-co-operation must be practically compelling" (*Matter of Empire Mut. Ins. Co.* [*Stroud—Boston Old Colony Ins. Co.*], 36 N.Y.2d 719, 721, ; *see Countrywide Insurance Co. v. Henderson, supra; Matter of New York Cent. Mut. Fire Ins. Co. v. Bresil,* 7 A.D.3d 716, 717). The court can only speculate as to whether Mr. Rivera received notice from his insurance company. This record only shows possible inaction by the insured and does not rise to the level of non-cooperation as laid out in *Thrasher, supra,* or *Matter of Empire Mutual Insurance Co., supra*. Three telephone calls and one letter under these factual circumstances are insufficient to meet such a burden. Further, there is no proof that Jose Rivera received the certified letter, nor did Nationwide attempt to locate its insured by sending out an investigator. Nationwide failed to act diligently and failed to use reasonable efforts under these circumstances to locate its insured.

Therefore, the arbitration is permanently stayed and additional respondent Nationwide is directed to defend and indemnify the additional respondents, Jose Rivera and Juan Rivera, in the underlying action.

Dated: December 2, 2011

ENTER:

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