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

PRESENT: CAROL E. HUFF PART 32

Index Number : 116282/2010
FIRST ACCEPTANCE INS.
VS.
MARK, ODEN
SEQUENCE NUMBER : 001
COMPEL OR STAY ARBITRATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
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 motion

motion is decided in accordance with accompanying memorandum decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: MAY 27 2011

CAROL E. HUFF 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
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application for an Order Staying Arbitration Between FIRST ACCEPTANCE INSURANCE COMPANY, INC., : Index No. 116282/10

Petitioner, :

- against - :

ODEN MARK and DAKARI SPALDING, :

Respondents. :

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CAROL E. HUFF, J.:

Pursuant to CPLR 7503, petitioner First Acceptance Insurance Co., Inc., a Pennsylvania insurance company, seeks to permanently stay uninsured motorist arbitration demanded by respondents Oden Mark and Dakari Spalding. In the alternative, First Acceptance seeks an order directing that the arbitration be held in accordance with Pennsylvania law, and that the arbitration be temporarily stayed pending pre-arbitration discovery.

Mark and Spalding were passengers in a vehicle insured by First Acceptance when it was involved in an accident in New York City on January 29, 2010. The second vehicle left the scene before the driver could be identified. Respondents allege that they sustained personal injuries as a result of the accident. In depositions conducted by petitioner, both stated that the insured vehicle, a van, was being used as a taxi to transport them for hire. See Oden S. Mark Deposition, 7/28/2010, Ex. D to Petition, at 6-7; and Dakari O. Spalding Deposition, 7/28/2010, Ex. E to Petition, at 7-10.

First Acceptance denied coverage based on the policy's following exclusion:

> A. We do not provide Uninsured or Underinsured Motorist Coverage under this Part C for bodily injury sustained by any person:
> 1. While using or occupying your covered auto while it is being used to carry persons or property for compensation or fee, including, but not limited to, delivery of magazines, newspapers, food or any other products. This exclusion does not apply to a share-the-expense car pool.

Petition Ex. C, at 18.

Respondents argue that, under New York law, a "livery exclusion" is unenforceable under Liberty Mut. Ins. Co. v Hogan, 82 NY2d 57 (1993). Petitioner contends that Pennsylvania law applies to this case, and that livery exclusions are enforceable in that state.

In Liberty Surplus Ins. Corp. v Nation Union Fire Ins. of Pittsburgh, 67 AD3d 420, 421 (1st Dept 2009), the First Department addressed choice of law in an insurance context:

> A contract of liability insurance is governed by "the local law of the state which the parties understood was to be the principal location of the insured risk" (Zurich Ins. Co. v Shearson Lehman Hutton, 84 NY2d 309, 318, [1994], quoting Restatement [Second] of Conflict of Laws § 193). Where the covered risks are spread over multiple states, courts will generally locate the risk in one state, namely, "the state of the insured's domicile at the time the policy was issued," and a "corporate insured's domicile is the state of its principal place of business" (Certain Underwriters at Lloyd's, London v Foster Wheeler Corp., 36 AD3d 17, 24-25 [1st Dept 2006], affd. 9 NY3d 928 [2007]).

Here, it is undisputed that petitioner is a Pennsylvania company that does not do business in New York; that the insured owner of the vehicle, Gabriel Jimenez (who was not in the vehicle at the time of the accident) is a resident of Easton, Pennsylvania; and that the vehicle was registered in Pennsylvania with Pennsylvania license plates. Undisputedly, then, it can be concluded that Pennsylvania "was to be the principal location of the insured risk," and that Pennsylvania law should apply. This would also be the result if the grouping of contacts analysis were applied. See Matter of Allstate Ins. Co. (Stolarz), 91 NY2d 219 (1993).

The livery exclusion is enforceable in Pennsylvania. In Marino v General Accident Ins. Co., 610 A.2d 477 (1992) the Superior Court held, with regard to a nearly identical exclusion:

> The exclusion in question provides for an exclusion when the insured vehicle is operated to transport persons or goods for a fee. Since insurance rates vary from passenger to commercial use, we find that it is within public policy to allow such a limited exclusion. To invalidate such an exclusion would result in an increase in automobile rates across the board for private operators. It is within the public policy of the Commonwealth of Pennsylvania to assign costs to those who have created the need for the cost. In this case increased risk and, therefore, cost is created by commercial operators. This cost should not be passed on to persons who only use a vehicle for personal use. Clearly the increased risk related to commercial operators should be borne by those who utilize vehicles for commercial purposes. The private individual who utilizes a vehicle strictly for personal use should pay a premium based on the risk associated with that use and not for the greater risk associated with a commercial use. We believe it was the Legislature's intent . . . to control rising insurance costs. We believe that to invalidate this exclusion would work the opposite effect.

Since Pennsylvania law applies, and it is undisputed that respondents were in the van while it was being used to carry persons "for compensation or fee," the exclusion is enforceable.

Accordingly, it is

ADJUDGED that the petition is granted and the uninsured motorist arbitration demanded by respondents is hereby permanently stayed.

Dated: MAY 27 2011

CAROL E. HUFF
J.S.C.