

**Government Empls. Ins. Co. v Shayayev**

2012 NY Slip Op 30906(U)

April 5, 2012

Supreme Court, New York County

Docket Number: 0107274/2011

Judge: Doris Ling-Cohan

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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Doris Ling-Cohan, Justice** **Part 36**

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**GOVERNMENT EMPLOYEES INSURANCE COMPANY,**

**Petitioner,**

**TATIANA GOROBETZ,**

**Respondent,**

**ELDAR A. SHAYAYEV, WESTFALL AUTO SALES, ACCEPTANCE INDEMNITY INSURANCE COMPANY, SHIMTU L. AGHABABAYEV and LIBERTY MUTUAL FIRE INSURANCE COMPANY,**

**Proposed Additional Respondents.**

**INDEX NO. 107274/11**

**MOTION SEQ. NO. 001**

**FILED**

**APR 09 2012**

**NEW YORK COUNTY CLERK'S OFFICE**

The following papers, numbered 1-7 were considered on this motion to stay arbitration:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3, 4, 5</u>
Replying Affidavits _____	<u>6, 7</u>

Cross-Motion:     Yes     No

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

BACKGROUND

Petitioner Government Employees Insurance Company (GEICO) commenced this special proceeding against respondent Tatiana Gorobetz (Gorobetz) to stay an arbitration. Respondent Gorobetz filed a Demand for Arbitration dated May 27, 2011 (Arbitration Demand), based on injuries allegedly sustained by Gorobetz in an accident on November 24, 2010 (Subject Accident) involving an allegedly uninsured motorist. The Arbitration Demand was based on an insurance policy issued by GEICO to Gorobetz, providing uninsured motorist benefits.

Petitioner moves to: (i) permanently stay arbitration; (ii) stay arbitration pending a hearing on the

issue of whether the offending vehicle was uninsured; (iii) join Eldar A. Shayayev, Westfall Auto Sales, Acceptance Indemnity Insurance Company, Shimtu L. Aghababayev, and Liberty Mutual Fire Insurance Company, to this proceeding as additional respondents; and (iv) direct respondent Gorobetz to produce relevant medical records and authorizations, and submit to an examination under oath and physical examination.

The Subject Accident involved a 2002 Infiniti (Infiniti), operated by proposed additional respondent Edgar A. Shayayev (Shayayev) and owned by proposed additional respondent Westfall Auto Sales (Westfall Auto), and a 2008 Honda (Honda), operated by respondent Gorobetz. A responding police officer, Officer Mendez, filled out a police accident report (Police Report) on the date of the Subject Accident.

Thereafter, respondent Gorobetz filed the Arbitration Demand. GEICO, alleging that the Infiniti was insured at the time of the Subject Accident, commenced this proceeding arguing that a permanent stay of the arbitration is necessary given that respondent Gorobetz failed to proffer sufficient proof that the Infiniti is uninsured. Alternatively, GEICO contends that a temporary stay of the arbitration is necessary to determine, at a framed issue hearing, whether the Infiniti was, in fact, insured.

#### DISCUSSION

GEICO contends that Acceptance Indemnity Insurance Company (Acceptance) was the alleged insurance carrier for proposed additional respondents Shayayev and Westfall Auto. However, proposed additional respondent Acceptance sent a letter, dated April 18, 2011, (Acceptance Disclaimer Letter) disclaiming coverage of the Infiniti. The Acceptance Disclaimer Letter states that “[t]he 2002 Infiniti does not qualify as a covered auto...[and proposed additional respondent Shayayev] does not qualify as an insured under the policy issued to Westfall Auto Sales.” Petition, Exh. C.

In opposition, respondent Gorobetz argues that the arbitration should not be permanently stayed.

However, respondent Gorobetz consents to, and joins, GEICO's request for a temporary stay, pending a framed issue hearing on the issue of coverage, and to join proposed additional respondents Shayayev, Westfall Auto, Acceptance, Shimtu L. Aghababayev (Aghababayev), and Liberty Mutual Fire Insurance Company (Liberty Mutual). Additionally, respondent Gorobetz agreed to the production of medical authorizations, copies of which are attached to her opposition papers as exhibit E. Respondent Gorobetz also consents to submit to an independent medical examination and an examination under oath.

While not parties to this proceeding, Acceptance and Westfall Auto jointly oppose GEICO's motion on the grounds that: (1) GEICO's petition is untimely; (2) GEICO failed to obtain jurisdiction over Acceptance; and (3) Acceptance has no coverage for the Infiniti, as a result of the Acceptance Disclaimer Letter. Likewise, non-party Liberty Mutual opposes GEICO's motion on the grounds that GEICO has failed to present a prima facie case of issuance of a valid insurance policy, by Liberty Mutual, covering the date of the Subject Accident. Acceptance, Westfall Auto, and Liberty Mutual ask that the court deny GEICO's request to add them as additional respondents.

As a preliminary matter, the within petition is timely in that it was filed within 20 days after service of the Arbitration Demand as required. *See* CPLR §7503. Acceptance and Westfall Auto argue that the 20 days to bring a petition to stay arbitration begins to run with service of the demand to arbitrate, here, May 27, 2011. However, "[t]he law is well settled that the 20-day period provided in CPLR 7503(c) is to be computed from the time the demand for arbitration is received, not from the time it is mailed." *Allstate Ins. Co. v Metayer*, 137 AD2d 454, 455 (1<sup>st</sup> Dep't 1988). Furthermore, "[i]n calculating the time in which a stay application is to be made, the day on which the demand is received is not included." *Id.* Here, GEICO states that the Arbitration Demand was received on June 9, 2011 and the petition filed on June 22, 2011. The proof submitted by GEICO includes an envelope and the Arbitration Demand, date stamped upon receipt, indicating that it was received on June 2, 2011. *See*

Reply Affirmation, Exh. A. Whether the Arbitration Demand was received on June 9, 2011 or June 2, 2011, the petition, being filed on June 22, 2011, was within the requisite 20 day period. Accordingly, denial on such basis is not warranted.

As to GEICO's motion, under the within circumstances, an evidentiary hearing is appropriate on the issue of whether the offending vehicle was insured at the time of the accident. *See Motor Vehicle Accident Indemnification Corp. v Linder*, 17 AD2d 610 (1<sup>st</sup> Dept 1962); *Allstate Ins. Co. v Casanova*, 145 AD2d 630 (2<sup>nd</sup> Dept 1988). "Where, as here, there is a question raised as to whether or not the alleged responsible motorist was in fact insured, the issues with relation to such question must be determined by a preliminary trial." *Motor Vehicle Accident Indemnification Corp. v Linder*, 17 AD2d at 610. Once plaintiff has established proof of insurance of the offending vehicle, plaintiff has made out his prima facie case, and the insurer must then provide proof that the insurance policy had been canceled prior to the date of the accident. *See Viuker v Allstate Ins. Co.*, 70 AD2d 295, 298-299 (2<sup>nd</sup> Dep't 1979).

Here, GEICO alleges that the Infiniti was insured by Acceptance on the date of the Subject Accident, and was, at some point prior to the Subject Accident, insured by Liberty Mutual. In support of its motion, GEICO proffers, *inter alia*, a copy of the Arbitration Demand, the Police Report, the Acceptance Disclaimer Letter, and a vehicle identification number search with the Department of Motor Vehicles, which GEICO claims establishes that the Infiniti was insured by Acceptance on the date of the Subject Accident and, at some point, by Liberty Mutual. GEICO further claims that Acceptance and Liberty Mutual have failed to proffer evidence to establish that their respective insurance policies were canceled, or properly disclaimed, prior to the Subject Accident.

Acceptance and Westfall Auto claim that GEICO failed to obtain jurisdiction over Acceptance. However, GEICO correctly argues that no jurisdiction is needed over Acceptance and Westfall Auto as they are not yet parties to this proceeding. *See American Transit Ins. Co. v Carillo*, 307 AD2d 220, 220

(1<sup>st</sup> Dep't 2003). Jurisdiction over Acceptance and Westfall Auto is not necessary until they are added to this proceeding by the court. *Id.*

Acceptance and Westfall Auto do not contest that the Infiniti was insured by Acceptance. However, they assert that coverage was disclaimed for the Infiniti. In support of their assertion, Acceptance and Westfall Auto rely solely on the Acceptance Disclaimer Letter. However, “[m]ore than a bare assertion in a self-serving letter is required to rebut the presumption of continuance.” *Sanchez v Maryland Casualty Co.*, 67 AD2d 681, 681 (2<sup>nd</sup> Dep't 1979). Once GEICO established that Acceptance insured the Infiniti, “it became incumbent upon the insurer...to go forward with proof of its affirmative defense that the policy had been canceled prior to the date of the occurrence”. *Viuiker v Allstate Ins. Co.*, 70 AD2d 295, 299 (2<sup>nd</sup> Dep't 1979). Here, Acceptance and Westfall Auto merely state that Acceptance disclaimed coverage for the Subject Accident. *See* Acceptance and Westfall Auto Affirmation in Opposition, ¶¶ 4 and 12. Aside from Acceptance's self-serving letter, no evidence was provided to conclusively establish that Acceptance properly disclaimed coverage. Since there is reason to believe that Acceptance insured the Infiniti and that Westfall Auto owned it at the time of the Subject Accident, both should be made a party to this proceeding.

Likewise, non-party Shayayev, should be made a party to this proceeding as GEICO has established, through the Police Report, that Shayayev was driving the Infiniti at the time of the Subject Accident. Shayayev has not opposed GEICO's motion.

Liberty Mutual also opposes GEICO's motion, claiming that the auto insurance policy issued by Liberty Mutual, covering the Infiniti, was cancelled prior to the Subject Accident. In support of its opposition, Liberty Mutual proffers, *inter alia*, a copy of the LibertyGuard Auto Policy Declarations, one effective January 8, 2010, showing coverage for a 2001 Dodge Caravan as well as the Infiniti, and one effective May 14, 2010, showing coverage only for a 2001 Dodge Caravan and eliminating coverage for

the Infiniti. GEICO alleges that the documents proffered by Liberty Mutual are in inadmissible form and would need to be corroborated by an underwriter employed by Liberty Mutual. See Reply Affirmation to Liberty Mutual Fire Insurance Company's Affirmation in Opposition, ¶ 3. Ironically, GEICO provides a Vehicle Identification Number search conducted of the Department of Motor Vehicle records, attached as Exhibit D to its petition, in inadmissible form, allegedly establishing that Liberty Mutual insured the Infiniti. To establish that Liberty Mutual insured the Infiniti, GEICO must provide proof in admissible form. See *Atlantic Mutual Ins. Co. v Cooper*, 247 AD2d 209 (1<sup>st</sup> Dep't 1998). Thus, GEICO has failed to establish that Liberty Mutual should be joined as a party to this proceeding.

GEICO mistakenly alleges that "[t]he New York DMV Registration/Expansion Record confirms that the Vehicle Identification Number...for the 2002 Infiniti was registered to Liberty Mutual Fire Insurance Company...prior to the date of the accident...[thus] warranting a trial." Reply Affirmation to Liberty Mutual Fire Insurance Company's Affirmation in Opposition, ¶ 4. GEICO relies on *Viniker v Allstate Ins. Co.*, 70 AD2d 295 (2<sup>nd</sup> Dep't 1979), for the proposition that the burden shifts to Liberty Mutual once GEICO has established that Liberty Mutual insured the Infiniti at some point prior to the Subject Accident. However, even taking GEICO's inadmissible documentation into consideration, this court notes that the records proffered by GEICO, in Exhibit D of its petition, states that the Liberty Mutual auto insurance policy covering the Infiniti was cancelled effective May 14, 2010, six months prior to the Subject Accident. Notably, GEICO's own Petition admits that the Infiniti "was insured with Liberty Mutual Fire Insurance Company [which] was cancelled effective 5/14/10." Petition, ¶ 8. Even if GEICO's proof was in admissible form, this court must take the document in its entirety. As a whole, the documentation proffered by GEICO establishes that Liberty Mutual did not insure the Infiniti at the time of the Subject Accident. As such, GEICO's petition, to the extent that it seeks to join Liberty Mutual as a party to this proceeding, is denied.

Similarly, Aghababayev should not be joined as a party, as GEICO has not established that he owned the Infiniti at the time of the Subject Accident. GEICO merely claims that Aghababayev previously owned the vehicle. In fact, GEICO admits that Westfall Auto owned the Infiniti at the time of the Subject Accident. *See* Petition, ¶ 5. While Aghababayev does not oppose GEICO's motion, GEICO has not established that Aghababayev either owned or had the Infiniti insured at the time of the Subject Accident. Thus, the portion of GEICO's petition seeking to join Aghababayev is denied.

Here, respondent Gorobetz consents to a temporary stay of the arbitration pending a framed issue hearing. As there remains a question of whether Acceptance effectively disclaimed coverage, the Infiniti may have been insured by Acceptance at the time of the Subject Accident, and thus, a framed issue hearing is appropriate. GEICO's motion, to the extent that it seeks a temporary stay of arbitration, is granted.

Accordingly, it is ORDERED that the petition is granted to the extent as follows:

ORDERED that respondent Tatiana Gorobetz shall to submit to an examination under oath and an independent medical examination, to be scheduled with petitioner Government Employees Insurance Company within 60 days of service hereof; and it is further

ORDERED that, upon compliance of the below by petitioner, that this matter is assigned to the Office of the Supervising Referee for designation of a Special Referee to hear and report with recommendation, or if the parties agree by stipulation to hear and determine, the issue of whether the offending vehicle was insured at the time of the accident; it is further

ORDERED that arbitration is stayed pending such hearing and final determination on the above issue; it is further

ORDERED that within 45 days from the date of this order, the petitioner is directed to

file with the Clerk of the Office of Supervising Referee a copy of this order with notice of entry and proof of service upon all parties, and shall pay the appropriate fees, if any, and said Clerk is directed to assign and schedule this matter for a hearing before a Special Referee in accordance with this decision and order; it is further

ORDERED that this proceeding shall be dismissed if the petitioner does not comply with the above paragraph with respect to service of a copy of this order; it is further

ORDERED that petitioner shall serve a copy of this order, with notice of entry, upon all parties and the arbitrator within 30 days of entry hereof; and it is further

ORDERED that Acceptance Indemnity Insurance Company, Westfall Auto Sales, and Eldar A. Shayayev shall be added as party respondents upon proper service on said party respondents of a copy of this order with notice of entry together with copies of all papers previously served in the proceeding, it is further

ORDERED that the caption of this proceeding is amended to reflect the inclusion of said additional party respondents, which shall read as follows:

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**GOVERNMENT EMPLOYEES INSURANCE COMPANY,**

**Petitioner,**

**TATIANA GOROBETZ, ELDAR A. SHAYAYEV, WESTFALL AUTO SALES, and ACCEPTANCE INDEMNITY INSURANCE COMPANY,**

**Respondents.**

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and the Clerk of the Court and the Clerk of the Trial Support Office, upon service on each of them of a copy of this order with notice of entry and proof of service thereof, shall mark their records to reflect the

amendment;; and it is further

ORDERED that within 45 days from the date of this order, petitioner shall serve a copy of this decision and order upon the Clerk of the Court and the Clerk of the Trial Support Office, with proof of service upon all parties with notice of entry.

This constitutes the decision and order of this Court.

Dated: 4/3/12

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

NON-FINAL DISPOSITION

JA Arbitration-ADR\GEICO v Gorobetz - stay arb, SOL, join parties.wpd

LX] REFERENCE

**FILED**

APR 09 2012

NEW YORK  
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