

**Matter of Nationwide Infinity Ins. Co. v Perez**

2013 NY Slip Op 33747(U)

August 22, 2013

Supreme Court, Westchester County

Docket Number: 55248/2013

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

FILED & ENTERED  
8/22/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH  
Supreme Court Justice

-----X Motion Date: 8/9/13  
IN THE MATTER OF THE APPLICATION FOR AN Index No.: 55248/13  
ORDER STAYING ARBITRATION BETWEEN NATIONWIDE  
INFINITY INSURANCE COMPANY,

Petitioner,  
-against-

MANUEL PEREZ,  
Respondent,

-and-

GEICO INSURANCE COMPANY, XIANG TUO DONG and  
ELIZABETH C. KAY, FREDRICK DELGADO,

Proposed Additional Respondents.  
-----X

The following papers numbered 1 to 6 were read on this motion by respondent Perez for an Order vacating her default and/or for reargument of this Court's Decision and Order, dated June 18, 2013, granting petitioner's amended petition permanently staying uninsured motorist arbitration, etc.<sup>1</sup>

Papers Numbered

<sup>1</sup>The Court notes that it inadvertently had omitted in the caption of its earlier Decision and Order Delgado's name as an additional proposed insured.

[\*2]

Notice of Motion - Affirmation (Schwartberg) - Exhs. (A-I) ...	1-3
Answering Affirmation (Queenan) - Exh. ....	4-5
Replying Affirmation (Schwartzberg) .....	6

Upon the foregoing papers, it is Ordered that this motion by respondent Perez for an Order vacating her default and/or for reargument of this Court's Decision and Order, dated June 18, 2013, granting petitioner's amended petition permanently staying uninsured motorist arbitration, and upon the granting of said relief for an Order denying the amended petition or temporarily denying the amended petition pending the holding of a framed issue hearing to determine the issue of insurance coverage in this multi-vehicle accident is disposed of as follows:

This Court, in rendering its June 18, 2013, Decision and Order granting the amended petition seeking an Order permanently staying uninsured motorist arbitration, expressly had noted that GEICO's counsel had admitted that, on the accident date, November 14, 2012, GEICO had maintained a policy of insurance with Elizabeth C. Kay insuring a 2008 Nissan which had been driven by Xiang Tuo Dong, and that GEICO will provide coverage and defend Kay and Dong in any lawsuit arising out of the November 14, 2012, accident. Further, the record at bar establishes that GEICO also insures Delgado and that, at the time that the instant petition had been filed, GEICO already had "accepted liability and opened a claim for their (sic)

insured, Fredrick Delgado."

Respondent Perez now brings this motion seeking to have the Court vacate its earlier Decision and to reconsider same, Perez's counsel firstly claiming that she timely had submitted opposition papers to this motion, which this Court had failed to consider.

The facts reveal that this action is an e-file case and that the original petition had been timely filed within twenty days after respondent Perez's March 28, 2013, filing of her Demand for Arbitration, and made returnable on June 7, 2013, and that an amended petition had been filed, on May 14, 2013, and also made returnable on June 7, 2013. This Court had rendered its Decision and Order, on June 18, 2013, having considered additionally only the received responsive papers of GEICO, which had supported the relief requested in the amended petition.

This Court's published Part Rules long have required submission to Chambers of hard copies of all motion papers within three days after e-filing of same. Moving respondent Perez did not comply therewith, and admittedly only first had attempted to respond to this Part's Clerk's telephone call to his counsel requesting submission to Chambers of a hard copy of respondent's papers, which counsel allegedly had attempted to do on June 11, 2013. Accordingly to moving counsel, "[d]ue to an error by the individual assigned to deliver the set of hard copies to Judge

Smith, the hard copies were not delivered correctly." No further specifics pertaining to the failed delivery have been set forth.

Subsequently, upon moving counsel's having learned of the "failed" submission, counsel had Perez's papers re-delivered, on June 18, 2013, 9 days after the motion's return date (and certainly not within the required 3 days after the paper's e-filing on May 10 and May 30, 2013), and coincidentally on the same date that this Court had rendered and entered its Decision and Order on the amended petition. In response to moving counsel's inquiry at bar, "no," this Court did not "refuse" to consider Perez's submission. Rather, said moving counsel's papers had appeared in Chambers after the Court already had signed the Decision and Order.

Movant also argues entitlement to relief herein based upon a myriad of other reasons, including petitioner's alleged failure to have complied with CPLR 7503, subdivision (c), and to timely and properly have named Fredrick Delgado as a respondent in its original notice of petition, Perez's counsel noting that petitioner had named Delgado in the amended petition only after being alerted by movant's original answering papers to the petition arguing the necessity of naming Delgado, and that the petition and the amended petition both improperly had been served, neither in the manner acceptable for a summons and complaint, nor by registered or

certified mail, as statutorily required.<sup>2</sup>

Notably absent from Perez's submissions at bar, however, are copies of any of the filed affidavits of service supporting Perez's claim of improper service of the petition and/or amended petition. At this point and based upon the foregoing omission, the Court will not enter any Order deeming this special proceeding procedurally defective based upon service.

Nor, given GEICO's admission to petitioner that it also insured Delgado on the subject accident date (see letter from GEICO, dated May 15, 2013), and that it already had an open claim for Perez's underlying claims, will this Court find this proceeding untimely based upon Delgado's name originally having been omitted as a named proposed respondent and that he only had been added as a party subsequent to the twenty (20) day statutory time period for the commencement of this proceeding.

Finally, with respect to the real substance of Perez's opposition, the Court hereby holds its June 18, 2013, Decision and Order permanently staying arbitration in abeyance pending a Decision after the conducting of a framed issue hearing on the

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<sup>2</sup>Movant also asserts that, based upon the filed affidavits of service, "it appears that service was similarly not effectuated properly on any of the parties, including the undersigned, as service is noted to have been performed by either electronic filing or regular Post Office mail." Emphasis in original.

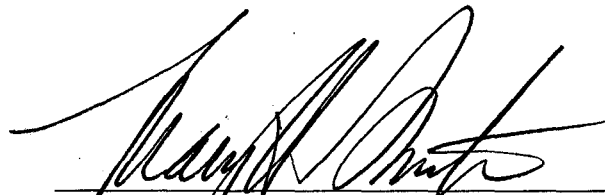
issues of whether a fifth unknown vehicle referred to in the police accident report had been involved in the subject accident and is at least partially responsible for the subject accident, or whether said fifth vehicle is a phantom and instead refers to either the Dong or Delgado vehicles. The Court observes that petitioner has failed to address this issue of the supposedly involved fifth vehicle.

In the event that the Hearing Court determines that there was no fifth vehicle involved, then this Court's prior Decision and Order permanently staying Perez's arbitration is reinstated.

The Court parenthetically notes that this framed issue hearing can be obviated by an admission by GEICO that its insureds, Dong and Delgado, are the only two potentially offending vehicles involved in this accident and together solely compose 100 percent of the liability, if any, for this accident's occurrence.

The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30 a.m., on October 7, 2013, for the scheduling of the framed issue hearing.

Dated: August 22, 2013  
White Plains, New York



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