

**Matter of Encompass Indem. Co. v Rich**

2013 NY Slip Op 34007(U)

January 17, 2013

Supreme Court, Nassau County

Docket Number: 10702-2012

Judge: James P. McCormack

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**SUPREME COURT - STATE OF NEW YORK  
TRIAL/IAS TERM, PART 42 NASSAU COUNTY**

**PRESENT:**

**Honorable James P. McCormack  
Acting Justice of the Supreme Court**

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**In the Matter of the Application for an Order  
Vacating all Arbitration Proceedings attempted  
to be had between ENCOMPASS INDEMNITY  
COMPANY,**

**Index No. 10702-2012**

**Plaintiff(s),**

**Motion Seq. No.: 002  
Motion Submitted: 10/25/12**

**-against-**

**KEVIN RICH,**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

The Petition brought in the above captioned Special Proceeding seeks an order of this Court, pursuant to CPLR Section 7503(b), permanently staying the Supplemental Uninsured/Underinsured Motorist Insurance Arbitration (SUM) demanded between the parties herein by the Respondent, Kevin Rich.

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

The Petitioner, Encompass Indemnity Company, issued a policy of automobile liability insurance to Anna Rich and Kevin Rich, under policy number 2628411734, with effective dates of October 10, 2009 to October 10, 2010.

The aforesaid Encompass policy contained Supplementary Uninsured/Underinsured Motorist Endorsement (SUM) under endorsement No.: G-20623-B(07-98). This endorsement governs the Supplementary Uninsured/Underinsured Motorist (SUM) coverage which is the subject matter of the instant proceeding.

The said endorsement, in pertinent part, provides:

**“SUPPLEMENTARY UNINSURED MOTORISTS ENDORSEMENT - NEW YORK G-20623-b (7-98)**

We, the company agree with you, as the named insured, in return for payment of the premium for this coverage, to provide Supplementary Uninsured Motorists (SUM) coverage, subject to the following terms and conditions:

**INSURING AGREEMENTS**

\* \* \*

**II. Damages for Bodily Injury Caused by Uninsured Motor Vehicles:**

We will pay all sums that the insured or the insured's legal representative shall be legally entitled to recover as

[\* 3]

damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by an accident arising out of such uninsured motor vehicle's ownership, maintenance or use, subject to the Exclusions, Conditions, Limits and other provisions of this SUM endorsement."

On January 11, 2010 between 9:00 AM and 10:00 AM, Kenneth B.

Goodman was operating a motor vehicle southbound on Francis Lewis Boulevard in Queens County, New York, approaching 73<sup>rd</sup> Avenue when he lost control of his motor vehicle and struck a utility pole at or near the intersection of Francis Lewis Boulevard and 73<sup>rd</sup> Avenue.

On the date and at the time of the aforesaid motor vehicle accident, the Respondent herein, Kevin Rich, was employed as a New York City Firefighter assigned to Engine Company 236.

Engine Company 236, with Firefighter Kevin Rich, was the first engine company to respond to the scene of the said motor vehicle accident.

Firefighter Rich observed that the motor vehicle was wrapped around a utility pole and found that the doors on the car could not be opened because of the damage.

Working with Ladder Company 160, the first ladder company on the scene, Firefighter Rich effected the extraction of Kenneth B. Goodman from his car.

In order to effectuate the said extraction, Ladder Company 160 implemented the "Jaws of Life" to cut the roof off of Mr. Goodman's motor vehicle.

Firefighter Rich, together with three (3) other New York City Firefighters, lifted the roof from Mr. Goodman's motor vehicle.

In maneuvering the removal of the roof, Firefighter Rich tore his labrum in his right shoulder, requiring surgery, and ending his career as a New York City Firefighter.

On July 14, 2011, Firefighter Rich commenced a lawsuit against Kenneth B. Goodman, alleging claims pursuant to General Municipal Law Section 205-a and for common law negligence, alleging violations of New York Vehicle and Traffic Law Sections 1140, 1146, 1180(a) and 1212.

On or about June 18, 2012, Statewide Insurance Company, the automobile liability carrier for Mr. Goodman, offered to settle the aforesaid lawsuit for \$25,000 which represented their insurance policy limits for their insured, Kenneth B. Goodman.

In the demanded arbitration, which is the subject matter of the instant Special Proceeding, Kevin Rich, the Respondent herein, claims that as a result of Mr. Goodman's insurance carrier's tender of its policy limits, he is entitled to insurance coverage under the hereinabove described Supplemental Uninsured/Underinsured Endorsement provisions of his insurance policy issued to him by the Petitioner herein, Encompass Indemnity Company.

Initially, the Court finds that the determination of the instant Special Proceeding is predicated on whether the injuries sustained by Kevin Rich were

“ . . . caused by an accident arising out of such uninsured motor vehicle’s . . . use. . . .”

The seminal determination of whether an accident has resulted from the use of a covered automobile is found in *U.S. Oil Refining and Marketing Corp. v Aetna Casualty and Surety Co.*, 181 AD2d 768 (2<sup>nd</sup> Dept 1992) wherein the Court stated:

“Determination of whether an accident has resulted from the use or operation of a covered automobile requires consideration of a three-part test: ‘1. The accident must have arisen out of the inherent nature of the automobile, as such; 2. The accident must have arisen within the natural territorial limits of an automobile, and the actual use, loading, or unloading must not have terminated; 3. The automobile must not merely contribute to cause the condition which produces the injury but must, itself produce the injury.’” (6B Appleman, Insurance Law and Practice Section 4317, at 367-369).

Applying this test, this Court finds and determines that the injuries suffered by Firefighter Kevin Rich did not result from the “use” of the Kenneth A. Goodman automobile. See, *Zaccari v Progressive Northwestern Ins. Co.*, 35 AD3d 597 (2<sup>nd</sup> Dept 2006); and *Empire Ins. Co. v Schliessman*, 306 AD2d 512 (2<sup>nd</sup> Dept 2003).

Accordingly, the prayed for permanent stay of the demanded arbitration, which is the subject matter of the instant Special Proceeding, is granted in all respects.

In reaching this determination, the Court is not unmindful and, in fact, has specifically considered New York General Municipal Law Section 205-a and New

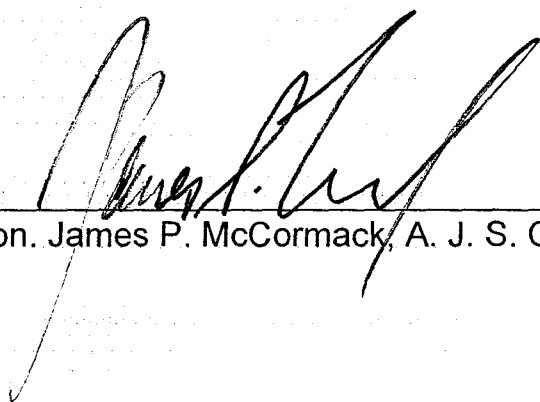
York General Obligations Law Section 11-106.

While GML Section 205-a and GOL 11-106 provide additional causes of action for firefighters, these statutes do not circumvent the contractual requirement of the Petitioner's hereinabove set forth Supplementary Uninsured Motorists Endorsement (SUM) that requires claimed injuries to be "... caused by an accident arising out of such uninsured motor vehicle's ... use ..."

Settle judgment.

This constitutes the Decision and Order of the Court.

Dated: January 17, 2013  
Mineola, N.Y.



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Hon. James P. McCormack, A. J. S. C.