

**National Liab. & Fire Ins. Co. v Croxton**

2013 NY Slip Op 34249(U)

June 13, 2013

Supreme Court, Bronx County

Docket Number: 22986/12E

Judge: Alexander W. Hunter, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 23A**

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National Liability & Fire Insurance Company,

Index No.: 22986/12E

Petitioner,

Decision and Order

-against-

Harold Croxton

Respondent,

Ricky Watson, Salanr Trucking Corp., Gramercy Produce, Allstate Insurance Company, OneBeacon America Insurance Company, Utica National Assurance Company, John Doe 1-10 and/or Jane Doe 1-10 and XYZ Insurance Corporations 1-10 (said names being fictitious and used to designate person(s) or entity(ies) whose real identities are as yet unknown.

Proposed Additional Respondents.

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**HON. ALEXANDER W. HUNTER, JR.**

The application by petitioner for an order pursuant to C.P.L.R. 7503 permanently staying the arbitration attempted to be had by respondent or in the alternative, temporarily staying the arbitration pending a framed issue hearing, is granted to the extent that a framed issue hearing will be held. Proposed additional respondents Ricky Watson, Salanar Trucking Corp., s/h/a Salanr Trucking Corp. ("Salanar"), Gramercy Produce, and Allstate Insurance Company ("Allstate") are hereby added to this proceeding for purposes of the framed issue hearing. Petitioner's application for an order directing respondent to provide pre-arbitration discovery is reserved pending the outcome of the framed issue hearing.

Pursuant to a Request for Uninsured Motorist Arbitration, dated November 8, 2012, respondent demands arbitration under a policy of insurance issued to Mansour Al-Kabyalee under policy number 521 29981 (the "subject policy"). Respondent alleges that he sustained personal injuries in a motor vehicle accident that occurred at or near the intersection of Faile Street and Spofford Avenue in Bronx County on July 13, 2012.

Petitioner asserts that the arbitration sought to be had by respondent should be permanently stayed because 1) respondent fails to identify a correct policy number in his demand for arbitration and 2) the offending vehicle was insured on the date of the accident. Petitioner refers to the police accident report which indicates that the offending vehicle was registered to Salanar and insured by OneBeacon America Insurance Company ("OneBeacon"), as denoted by insurance code 089. (amended petition exhibit B). A Department of Motor Vehicles ("DMV")

registration record expansion indicates that the offending vehicle was insured from February 22, 2010 through at least August 20, 2012 by OneBeacon. (amended petition exhibit E). Petitioner notes that there is no cancellation of the OneBeacon policy listed in the DMV registration record. The DMV registration record further indicates that there may be insurance available from Utica National Assurance Company ("Utica"). (amended petition exhibit E).

Petitioner filed an amended petition on January 9, 2013. In the amended petition, petitioner's counsel asserts that he recently spoke with Joseph Alfassa, Sr., an insurance broker for Allstate. Mr. Alfassa advised that Salanar was insured by Allstate on the date of the accident under policy number 048287426 (the "Allstate policy"). Mr. Alfassa further reported that the Allstate policy had not been cancelled and that Allstate would investigate the details of the accident.

Based on the foregoing, petitioner requests that the arbitration sought by respondent be permanently stayed since there is available coverage for the offending vehicle. In the alternative, petitioner requests an order temporarily staying the arbitration pending a framed issue hearing to determine the issue of coverage with the addition of proposed additional respondents. Should this court determine that respondent is entitled to proceed to arbitration, petitioner seeks an order directing respondent to supply discovery pursuant to the subject policy.

Respondent does not oppose temporarily staying the arbitration pending a framed issue hearing. Respondent's counsel asserts that he received correspondence from OneBeacon, Utica, and Allstate informing him that all three insurance carriers were disclaiming coverage. (respondent's exhibit B, C, and D).

With respect to petitioner's demand for discovery, respondent submitted authorizations to obtain copies of respondent's medical records, no-fault records, diagnostic records, and films. Respondent notes that he has already appeared for an independent medical examination ("IME") on or about December 19, 2012. The IME was conducted by Dr. Janice Salayka, a physician of petitioner's choosing. Due to limited resources, respondent requests that this court deny petitioner's application for additional IMEs. In addition, respondent is willing to submit to an examination under oath.

Utica asserts that none of the evidence submitted by petitioner indicates that Utica insured the offending vehicle. However, Utica admits that it did issue a commercial automobile liability policy to Salanar under policy number 4237839 for the period August 15, 2009 through August 15, 2010 (the "Utica policy"). The Utica policy was cancelled due to non-payment on January 25, 2010, effective February 10, 2010. Utica avers that its cancellation of the liability policy was in full compliance with Vehicle and Traffic Law § 313. Therefore, Utica properly disclaimed coverage for the offending vehicle. In support, Utica submits copies of the Notice of Cancellation and the Certificate of Mailing. (Utica's exhibits A and B). Although the DMV registration record indicates that Utica's initial attempts to file the Cancellation Notice was rejected, Utica surmises that this was due in part to the fact that there are two named insureds on the Utica policy. The DMV registration record also indicates that the Utica policy was replaced by a policy issued by OneBeacon. As such, there is no issue with respect to Utica that it insured the offending vehicle on the date of the accident.

OneBeacon opposes petitioner's application in its entirety on the ground that OneBeacon did not insure the offending vehicle on the date of the accident. The Hanover Insurance Group ("Hanover"), the claim administrator for OneBeacon, issued a commercial automobile policy under policy number 713-00-93-56-0000 to Salanar for the period February 22, 2010 to February 22, 2011 (the "OneBeacon policy"). (OneBeacon's exhibit A). On November 24, 2010, Hanover sent Salanar a non-renewal notice indicating that OneBeacon would no longer provide coverage for non-specialty commercial lines businesses, including the policy held by Salanar. On February 22, 2011, the OneBeacon policy was not renewed and therefore coverage lapsed. OneBeacon avers that it was not required to report a non-renewal to the DMV.

OneBeacon further asserts that based upon the conversation between petitioner's counsel and Joseph Alfassa, Sr., Allstate has confirmed that it insured the offending vehicle on the date of the accident. In addition, on March 15, 2013, David L. Holmes, Esq., of the Law Offices of Karen L. Lawrence filed a Notice of Appearance as attorneys for Salanar and Allstate. Therefore, OneBeacon argues that it should not be added to this proceeding as an additional respondent.

This court did not receive any papers in opposition from Ricky Watson, Salanar, Gramercy Produce, or Allstate.

Petitioner bears the initial burden of making a prima facie showing of coverage for the offending vehicle. Matter of State Farm Mut. Auto Ins. Co. v. Mazyck, 48 A.D.3d 580 (2<sup>nd</sup> Dept. 2008); Matter of Eagle Ins. v. Rodriguez, 15 A.D.3d 399 (2<sup>nd</sup> Dept. 2005); Matter of Allstate Ins. Co. v. Frederick, 266 A.D.2d 283 (2<sup>nd</sup> Dept. 1999). Here, petitioner has made a prima facie showing of coverage for the offending vehicle by the submission of the DMV registration record. The burden then shifted to the party disputing coverage to present evidence to show a lack of coverage or a valid disclaimer. See, Matter of Mercury Ins. Group v. Ocana, 46 A.D.3d 561 (2<sup>nd</sup> Dept. 2007); Matter of Liberty Mut. Ins. Co. v. McDonald, 6 A.D.3d 614 (2<sup>nd</sup> Dept. 2004).

Cancellation of policies are ineffective against third parties unless there is strict compliance with Vehicle and Traffic Law § 313. See, Vehicle and Traffic Law § 313(3); Progressive Northeastern Ins. Co. v. Barnes, 30 A.D.3d 523 (2<sup>nd</sup> Dept. 2006); Matter of Progressive Northeastern Ins. Co. v. White, 23 A.D.3d 477 (2<sup>nd</sup> Dept. 2005). This court finds that Utica has made a prima facie showing that it validly canceled the Utica policy pursuant to Vehicle and Traffic Law § 313. Thereafter, it was incumbent upon the party disputing coverage to present evidence of noncompliance. See, Matter of Auto One Ins. v. Forrester, 78 A.D.3d 1174 (2<sup>nd</sup> Dept. 2010); Matter of State Farm Mut. Auto Ins. v. Cherian, 202 A.D.2d 434 (2<sup>nd</sup> Dept. 1994). No evidence was submitted to demonstrate noncompliance. Therefore, Utica validly disclaimed coverage of the offending vehicle.

This court also finds that OneBeacon properly disclaimed coverage of the offending vehicle. As the OneBeacon policy was in effect for more than six months, OneBeacon was not required to notify the DMV of non-renewal of the OneBeacon policy. Matter of Eveready Ins. Co. v. Smith, 79 A.D.3d 1040 (2<sup>nd</sup> Dept. 2010); Matter of Allstate Ins. Co. v. Hernandez, 282

A.D.2d 451 (2<sup>nd</sup> Dept. 2001). The OneBeacon policy was not renewed and coverage simply lapsed.

Respondent submitted a letter from Allstate dated February 20, 2013, indicating that Allstate was denying coverage on the ground that its insureds' vehicle was incorrectly identified as being involved in the accident. The letter provides no details surrounding Allstate's disclaimer. The letter from Allstate merely raises an issue of fact as to whether Allstate timely and validly disclaimed coverage for the accident. See, Matter of Mercury Ins. Group, 46 A.D.3d 561 (2<sup>nd</sup> Dept. 2007); Matter of Allstate Ins. Co. v. Anderson, 303 A.D.2d 496 (2<sup>nd</sup> Dept. 2003); Matter of Lumbermen's Mut. Cas. Co. v. Beliard, 256 A.D.2d 579 (2<sup>nd</sup> Dept. 1998). As such, a framed issue hearing will be held in order to determine whether or not there was a valid disclaimer by Allstate. Proposed additional respondents Ricky Watson, Salanar, Gramercy Produce, and Allstate are hereby added to this proceeding for purposes of the framed issue hearing. The hearing will be held on Tuesday, August 20, 2013 at 9:30 A.M. in room 408, 851 Grand Concourse, Bronx, New York.

Accordingly, petitioner's application to permanently stay the arbitration sought to be had by respondent is denied. Petitioner's application to temporarily stay the arbitration pending a framed issue hearing is granted. Petitioner's application for pre-arbitration discovery is reserved pending the outcome of the framed issue hearing.

Petitioner is directed to serve a copy of this order with notice of entry upon all parties and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: June 13, 2013

ENTER:



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J.S.C.

**ALEXANDER W. HUNTER**