

<b>Matter of Country-Wide Ins. Co. v Suarez &amp; Suarez</b>
2014 NY Slip Op 31299(U)
January 2, 2014
Supreme Court, New York County
Docket Number: 151985/2012
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN Justice

PART 11

IN THE APPLICATION OF COUNTRY-WIDE INSURANCE COMPANY,

INDEX NO. : 151985/12 MOTION SEQ. NO.: 0024

-against- Petitioner,

MOTION DATE: 10-31-13

To Stay the Arbitration sought by JESUS ESPINO SUAREZ & GUILLERMINA SUAREZ,

-and- Respondents,

DWIGHT D. DELIZ, CAMDEN FIRE INSURANCE ASSOCIATION, AUTO ONE INSURANCE COMPANY, NJ PROPERTY & LIABILITY INSURANCE GUARANTY ASSOCIATION, Proposed Additional Respondents.

The following papers, numbered 1 to were read on this petition to stay arbitration

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [ x ] Yes [ ] No Respondents Guillermina Suarez ("G. Suarez") and Jesus Espino Suarez ("J. Suarez")(together "the Suarez respondents") move pursuant to CPLR 4403 for an order confirming in part and rejecting in part the Report of Special Referee Lance Hewitt, dated June 27, 2013 (hereinafter "the Report"). Petitioner opposes the motion and cross moves for an order confirming the Report. For the reasons below, the motion is granted, and the cross motion is

denied.

Petitioner commenced this proceeding to stay the uninsured motorist arbitration sought by Suarez respondents in connection with injuries they suffered in a hit and run accident that occurred on October 8, 2011, when G. Suarez and her son, J. Suarez were struck by a motor vehicle owned and operated by proposed additional respondent Dwight D. Deliz (“Deliz”) at the intersection of Magnolia Avenue and Walnut Street in Elizabeth, New Jersey, near their place of residence at 444 Walnut Street in Elizabeth, New Jersey (“the New Jersey residence”). Non-party Dominigo Espino (“D Espino”), who has a policy with petitioner resides at 758 Woodward Avenue, Apt 3L, Ridgewood, Queens, NY (“the Queens residence”). D. Espino is G. Suarez’s husband and J. Suarez’s father.

It is undisputed that at the time of the accident additional respondent Auto One Insurance Company (Auto One”) insured the Deliz vehicle; however, the record contains proof that Auto One denied coverage based on New Jersey law and the applicable policy. Moreover, the record indicates additional respondent NJ Property & Liability Insurance Guaranty Association (“PLIGA”) also denied coverage on the ground that respondents’ relative, D. Espino was covered by petitioner on the date of the accident.

On April 5, 2012, the Suarez respondents served petitioner with a demand for arbitration. On or about April 19, 2012, petitioner made this application to stay the arbitration on various grounds, including that Suarez respondents were not members of the household of the insured, D. Espino at the time of the accident.

By decision and order dated February 28, 2013, the court granted the petition to stay arbitration only to the extent of referring the issue of whether Suarez respondents were covered as members of D. Espino’s household at the time of the accident to a Special Referee to hear and report with recommendations. After considering the evidence and hearing testimony from the parties, the Special Referee issued the Report which found that G. Suarez and D. Espino together with J. Suarez and their three other children, resided in the Queens residence from May 1, 2010 until August 1, 2011, when G. Suarez left with the four children and moved to the New Jersey residence. The Report also found that D. Espino filled out an application for automobile insurance with the petitioner on January 8, 2011, and listed his address as the Queens residence,

and that on January 9, 2011, petitioner issued to D. Espino a policy effective for the period from January 8, 2011 through January 8, 2012. The Special Referee also concluded that neither of the Suarez respondents were members of D. Espino's household at the time of the accident and therefore found that they were not entitled to uninsured motorist benefits under the policy.

The Suarez respondents now move (1) to confirm the Report to the extent that the Special Referee found that they resided with D. Espino at the Queens residence from May 1, 2010 to August 1, 2011, and (2) to reject the Report to the extent that the Referee concluded that they were not part of D. Espino's household under the policy. Specifically, the Suarez respondents argue that although they did not live with D. Espino on the date of the accident, they are nonetheless covered insureds under the uninsured policy endorsement, which included a 90 day grace period provision for family members no longer living with the insured.<sup>1</sup> As the Report did not take this 90 day period into consideration, the Suarez respondents argue that the Report's conclusion that they are not members of the household as defined by the policy must be rejected.

In opposition, petitioner does not deny that the 90 day period applies, but points out that D. Espino stated on his application for insurance that he was "single" and "unemployed" and did not provide information about another driver. Petitioner also argues that there is no basis to disturb the Special Referee's findings as to credibility.

A court has the authority to "confirm or reject, in whole or in part" the findings of a referee ordered to hear and report. CPLR §4403. The report of a referee should be confirmed if the findings therein are supported by the record." Namer v. 152-54-56 West 15<sup>th</sup> Street Realty Corp., 108 AD2d 705, 706 (1<sup>st</sup> Dept 1985). At the same time, however, where the court finds

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<sup>1</sup>Specifically, the policy states in its definition section that "[t]hroughout this policy, 'you' and 'your' refer to: 1. The 'named insured' shown in the Declarations; and 2. The spouse if a resident of the household." It further states, in relevant part, that the "[s]pouse ceases to be a member of the household during the policy period ...the spouse will be consider you and your under the policy but only the earlier of "1. The end of 90 days following the spouse residency... In addition a "family member" is defined as "a person related to you by marriage blood or adoption who is a resident of your household." Under Part C of the policy relating to uninsured motorist coverage, an Insured is defined as "you or your family member" and an uninsured motor vehicle covered under this section includes a hit and run vehicle which hits "you or your family member."

that the Referee's findings are lacking in support, the court may make new findings. Kipper v. Kipper, 151 AD2d 377, 378-379 (1<sup>st</sup> Dept 1989).

Here, the Report must be rejected to the extent that it did not take into consideration the 90-day grace period provided on the policy and, upon such consideration, this court finds that the Suarez respondents were entitled to coverage under the policy's uninsured motorist endorsement. Moreover, insofar as there is ambiguity with respect to coverage in this regard, the policy must be interpreted against petitioner as the insurer. U.S. Fidelity & Guaranty Co. v. Annunziata, 67 NY2d 229, 232 (1986). In any event, petitioner does not deny that the Suarez respondents are covered under the 90-day grace period of policy and while petitioner asserts that their insured, D. Espino, indicated that he was single on his policy application and did not indicate that there was a second driver, petitioner does not explain how these facts would preclude coverage for the hit and run accident under the relevant policy.

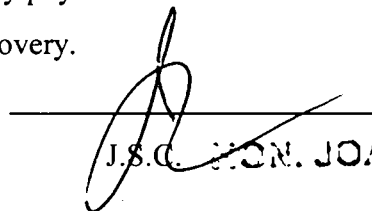
In view of the above, it is

ORDERED that the Suarez respondents' motion is granted, and the Referee's report is rejected to the extent it found that the Suarez defendants were not members of the household under the relevant policy at the time of the hit-and-run accident; and it is further

ORDERED and ADJUDGED that the petition to stay arbitration is denied; and it is further

ORDERED and ADJUDGED that the parties shall proceed to arbitration conditioned on Suarez respondents providing petitioner with any outstanding discovery required under the policy including, medical authorizations, medical records and to submit to a physical examination and examination under oath; however, petitioner's failure to proceed expeditiously upon receiving authorizations and in connection with scheduling any physical examination and examination under oath may be considered a waiver of such discovery.

DATED: January 2, 2014

  
J.S.C. HON. JOAN A. MADDEN  
J.S.C.

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION