Matter of IDS Prop. Cas. Ins. Co. v Jagsarran
2014 NY Slip Op 32122(U)
August 13, 2014
Sup Ct, New York County
Docket Number: 650747/14
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of IDS PROPERTY CASUALTY INSURANCE COMPANY,

Index No.: 650747/14

Petitioner,

Motion Seq. No. 001

-against-

DAVE JAGSARRAN, SR.,

Respondent.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

By this petition arising out of a motor vehicle accident, IDS Property Casualty Insurance Company ("petitioner") moves for an order to permanently stay a hit-and-run uninsured motorist arbitration (the "Arbitration") between petitioner and respondent Dave Jagsarran, Sr. ("respondent"), or to temporarily stay the Arbitration should the court direct that the matter proceed to the Arbitration pending the examination under oath and independent medical examinations of respondent and disclosure of HIPAA-compliant authorizations.

Relevant Factual Background

On February 18, 2014, respondent forwarded a demand to petitioner for the Arbitration. The demand is based on an insurance policy providing applicable policy limits of $100,000/$300,000, which allegedly was in effect on the date of the reported loss of March 16, 2012 (the "Policy").

Petitioner contends that the subject motor vehicle accident underlying the demand (the "Accident"), which occurred while respondent was traveling northbound on 150th Street near 130th Avenue in Queens, was not a hit-and-run, and thus, a permanent stay of the Arbitration is

warranted.

After receiving notification of the Accident, petitioner investigated the claim to verify the legitimacy and facts thereof. Petitioner claims that according to its investigation, respondent's post-Accident hospital records from Mount Sinai Hospital confirm that he underwent dialysis three days before the incident, that the Accident occurred when he lost consciousness. The records further indicate that respondent has a past medical history of hypertension, coronary artery disease, diabetes, and end stage renal disease. The records do not refer to a hit-and-run vehicle. Petitioner also submits a police accident report of the Accident, which fails to mention any indication of a hit-and-run vehicle. Therefore, the Accident occurred based on respondent's physical condition, which caused him to lose consciousness and strike multiple parked vehicles.

Petitioner also arranged for a peer review of the hospital records in furtherance of the investigation. The reviewing physician determined that the Accident and hospitalization was causally related to respondent's loss of consciousness, which was related to his dialysis.

Petitioner argues that the determination of questions of fact with respect to conditions precedent to arbitration is for the Court, and not arbitrators. Only two issues in uninsured motorist cases are arbitrable: fault and damages, while issues involving the applicability of insurance coverage must be left to the courts' purview. Here, this court must determine whether the Accident was actually the product of a hit-and-run, and there is nothing to indicate that a hit and run vehicle was involved in this loss.

Further, respondent is not entitled to proceed to arbitration as discovery is outstanding. Petitioner requires an Examination Under Oath and independent medical examination of respondent, HIPAA-compliant authorizations for all treating and/or examining physicians/health

care providers, all diagnostic tests, no-fault and/or Workers' Compensation files, employment, prior losses involving respondent, and any other relevant information. The requested discovery is proper pursuant to the terms and conditions of the applicable insurance policy, and thus, respondent has a contractual obligation to provide this discovery.

In opposition, respondent contends that petitioner's claim that his medical conditions caused him to lose consciousness and collide with parked vehicles is speculative. At most, petitioner raises a question of fact about how the Accident occurred, which should result in a temporary stay and a hearing to resolve this issue. Further, the court's determination as to whether there was a collision with a hit-and-run vehicle should collaterally estop both parties from re-litigating the issue in another forum.

Respondent attests that he remembers feeling an impact to the rear of his vehicle before he lost control of his vehicle and collided with the parked vehicles, and that he did not get a good look at the vehicle that collided with the rear of his vehicle. He further states that he has never lost consciousness following dialysis or experienced any syncopal type episodes, and that he did not make any such complaints to his doctors. He had a catheter replaced and dialysis procedure the Tuesday and Friday before the accident, and both procedures were routine, and without incident and unremarkable. Also, he does not recall making a statement to any police officer at the Accident scene.

Moreover, petitioner's reliance on hospital records is improper. Statements in a hospital record concerning the cause of an accident are not admissible unless germane to diagnosis or treatment, and neither doctor's statement about the cause of the Accident was relevant to respondent's diagnosis and treatment. And, petitioner fails to demonstrate that respondent was

the source of the information, which is required to introduce statements in a hospital record which are not germane to diagnosis or treatment. Neither treating physician of plaintiff witnessed the Accident, or had firsthand knowledge of how it occurred. Since the only medically relevant fact was that respondent was in a heavy, head-on collision, it is unsurprising that one of his doctors incorrectly states that the Accident occurred on the Belt Parkway when it really occurred on 150th Street.

The doctors' reports are also inconsistent in that one states that respondent lost consciousness only once while driving, while the another states that he passed out following dialysis three days prior, and then passed out again while driving. Further, the doctors did not articulate any basis for reaching their conclusions, and did not state the source of the facts on which their conclusions were based. The peer review is similarly flawed, as, *inter alia*, the physician who performed same never examined respondent or otherwise treated him.[1]

In reply, petitioner argues that respondent concedes there was no hit-and-run vehicle, as he states he merely "felt an impact to the driver side rear of my vehicle." Respondent goes on to state that he did not see the alleged vehicle strike his automobile, and that he was dazed and in pain. Thus, his affidavit lacks the requisite personal knowledge to raise an issue of fact as to the existence of a hit-and-run vehicle. Respondent's affidavit is also self-serving, as he benefits from a "hit-and-run" vehicle having been involved so his uninsured motorist coverage is available and applicable.

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[1] Also, respondent attaches photographs which purport to show damage to the driver's side rear of his vehicle. However, the photographs attached do not show such damage, and Exhibit "C," which was submitted in specific regard to depict the rear of the vehicle after the Accident, is not a photograph, but rather a copy of an "affirmation of mail service." Thus, the court declines to further discuss these exhibits.

As to the police accident report, respondent's affidavit does not refute making a statement to the responding officer, but states that he does not "recall" giving a statement to the officer. And, as the police accident report does not include a hit-and-run vehicle, respondent failed to meet the Policy's requirement that he report the hit-and-run within 24 hours. This failure to timely report the alleged hit-and-run vehicle has prejudiced petitioner's ability to identify the ownership and insurance coverage of the alleged hit-and-run vehicle. Thus, respondent must be estopped from now alleging such vehicle.[2]

Respondent's statements in the hospital records regarding his losses of consciousness and blood loss are germane to his diagnosis and therefore admissible. Counsel's arguments that respondent's statements to his physicians concerning his recent losses of consciousness, end stage renal disease, and blood loss following his surgery were not germane to his diagnosis and treatment, and that the only medically relevant fact was that he was in a head-on collision are absurd. And, the medical records are from two days after the subject incident and not the emergency room where he was treated following the incident.[3]

Respondent provides no medical support or affidavit from an additional person to support his statements regarding his dialysis treatment prior to the accident, and he contradicts his own medical records. Thus, his self-serving affidavit is insufficient to defeat the motion.

And, damage to the driver's side of the vehicle does not indicate two collisions. Further, respondent does not indicate who took the photographs or when the photographs were taken.

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[2] Petitioner's arguments that respondent should be estopped from alleging the existence of a hit-and-run vehicle based on an untimely reporting of same are improperly before the court, as they were raised in reply for the first time (*see McDonald v. Edelman & Edelman, P.C.*, 118 A.D.3d 562, 988 N.Y.S.2d 591 [1st Dept 2014]).

[3] Respondent attested that after his overnight stay for treatment after the accident, respondent sought additional treatment at Mount Sinai for chest pains several days after the accident.

And, the photographs do not depict a specific point of impact so as to show a rear end impact.

Discussion

With respect to uninsured motorist cases, arbitration is generally appropriate to determine only the insurer's liability or the amount of damages sustained (*see Hanover Ins. Co. v. Squarzini*, 96 A.D.2d 471, 464 N.Y.S.2d 785 [1st Dept 1983]).

However, "[p]hysical contact is a condition precedent to the arbitration of this uninsured motorist claim, and whether or not there was physical contact between the insured vehicle and an alleged "hit and run" vehicle is an issue of fact to be decided by the court" (*Hanover Ins. Co. v. Lewis*, 57 A.D.3d 221, 868 N.Y.S.2d 640 [1st Dept 2008]; *see Rockland County v. Primiano Const. Co., Inc.*, 51 N.Y.2d 1 [1980]; *Ambassador Const. Co., Inc. v. 40 Wall Street Development Assoc., LLC*, 264 A.D.2d 317, 693 N.Y.S.2d 137 [1st Dept 1999]; *Smith v. Great Am. Ins. Co.*, 29 N.Y.2d 116 [1971] (physical contact is a condition precedent to an arbitration that is based on a hit-and-run accident); *Countrywide Ins. Co. v. Colon*, 279 A.D.2d 427, 720 N.Y.S.2d 71 [1st Dept 2001] ("Physical contact is a condition precedent to an arbitration based on a "hit and run" accident and the burden of proof to demonstrate physical contact is upon the insured")).

Part III of the Policy defines a "Hit-And-Run Motor Vehicle" as a vehicle "which causes bodily injury to an insured arising out of physical contact of such motor vehicle with the insured or with a motor vehicle which the insured is occupying at the time of the accident, provided: that there cannot be ascertained the identity of either the operator or the owner of such hit-and-run vehicle."

Part VIII of the Policy provides, in pertinent part, that the insured making a claim under

the uninsured motorist coverage must provide written notice of the claim "as soon as practicable." Upon petitioner's request, the insured must give written proof of the claim to respondent. Also, the insured shall, "as may reasonably be required, submit to examinations under oath by any person [respondent] name and subscribe the same." Further, the insured "shall submit to physical examinations by physicians [respondent selects] when and as often as [respondent] may reasonably require." The insured shall also, "upon each request from [respondent] authorize [respondent] to obtain relevant medical reports and copies of relevant records."

A party seeking a stay of arbitration has the burden of showing sufficient facts to establish justification for the stay; *i.e.*, to show the existence of sufficient evidentiary facts to establish a genuine preliminary issue (*see AIU Ins. Co. v. Cabreja*, 301 A.D.2d 448, 449, 754 N.Y.S.2d 252 [1st Dept 2003]; *Empire Mut. Ins. Co. v. Zelin*, 120 A.D.2d 365, 502 N.Y.S.2d 20 [1st Dept 1986]). Where there is a genuine triable issue with regard to whether the claimant's vehicle actually came into contact with a hit-and-run vehicle, the appropriate procedure is to stay arbitration pending a hearing of the threshold issue (*see Empire*, 120 A.D.2d at 366; *see also Allstate Ins. Co. v. Jacobs*, 85 A.D.2d 542, 444 N.Y.S.2d 665 [1st Dept 1981]).

The police accident report states that according to respondent, he "was traveling n/b on 150th st when he doesn't remember what happened then all of the sudden he collided with the 5 parked cars . . . ."

Hospital records fall within the business records exception to the hearsay rule as long as the information relates to diagnosis, prognosis or treatment (*see Williams v. Alexander*, 309 N.Y. 283 [1955]; *Rivera v. City of New York*, 293 A.D.2d 383, 741 N.Y.S.2d 30 [1st Dept 2002])).

Here, the Mount Sinai Hospital records submitted by petitioner as Exhibit "D" indicate respondent's past medical history (including hypertension, coronary artery disease, high cholesterol, diabetes and end stage renal disease). They go on to state that respondent underwent dialysis three days before the Accident, and that he "did not feel well afterward" and "passed out." Respondent then was "driving and passed out again, leading to [the Accident] - he has little recollection of this." Respondent came to Mount Sinai after the Accident based on complaints of "feeling dizzy"; "chest pain"; "shortness of breath"; and "feeling very weak." Attending notes read as follows: "Syncope >> MVC [the Accident] . . . *To rule out* dangerous effects of trauma and admit for syncope workup, analgesia, incentive spirometry, fever . . . Pt in significant pain" (emphasis added). Undoubtedly, such information related to the cause of the Accident is also related to respondent's diagnosis and treatment, as it is clear that the reference to loss of consciousness during and/or before the Accident was related to respondent's then-current symptoms and complaints.

Such hospital records and the police accident report do not contain any reference to a hit-and-run vehicle. As such, petitioner's submissions indicate that the Accident was not caused by a hit-and-run vehicle (*see Matter of Universal Underwriters Group (Zeitlin)*, 157 A.D.2d 544, 550 N.Y.S.2d 12 [1st Dept 1990] (citing to police accident report and insurer interview of detective who stated that respondent advised him that there was no physical contact between the subject vehicles)).

However, respondent provides an affidavit in which he attests that he "felt an impact to driver's side rear of my vehicle and lost control of my vehicle. As a result my vehicle was thrown across the double yellow line . . . where my vehicle collided with several stopped cars. I

did not get a good look at the vehicle that hit me, but I felt an impact from behind." Thus, contrary to petitioner's contentions in reply, respondent did not "concede" that there was no hit-and-run vehicle," but indicates that he was struck from behind by another vehicle. Respondent further denies that he has experienced a loss of consciousness as a result of or following dialysis, and avers that he did not tell any physician at Mount Sinai that he had ever lost consciousness following dialysis.

Thus, respondent's affidavit, which contains the only sworn statements from him at this juncture, respondent has raised a material issue of fact as to whether a hit-and-run vehicle caused the Accident (*see Matter of Universal Underwriters Group (Zeitlin)*, 157 A.D.2d at 545-546, *supra* (affidavit contradicting and denying information purportedly provided to police sufficient to raise a triable issue of fact); *Atlantic Mut. Ins. Co. v. Shaw*, 222 A.D.2d 581, 635 N.Y.S.2d 297 [2d Dept 1995] (insured's affidavit created an issue of fact with regard to physical contact which must be resolved at a hearing)).[4]

As such, the court orders that Arbitration is temporarily stayed, pending a hearing on the threshold issue of whether there was physical contact between the respondent's vehicle and a hit-and-run vehicle (*see Matter of Universal Underwriters Group (Zeitlin), supra*, 157 A.D.2d at 546). And, petitioner's alternative request to temporarily stay the Arbitration should the court direct that the matter proceed to the Arbitration pending the examination under oath and independent medical examinations of respondent and disclosure of HIPAA-compliant authorizations is held in abeyance pending such hearing.

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[4] The court does not further discuss the peer review and statements contained therein. Even assuming such statements are admissible and support petitioner's position, they go only to the weight of the evidence, and do not dispose of the statements in respondent's affidavit, which, as noted above, raise a material issue of fact.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the subject Arbitration is temporarily stayed, pending a hearing on the threshold issue of whether there was physical contact between the respondent's vehicle and a hit-and-run vehicle; and it is further

ORDERED that petitioner's motion is held in abeyance pending such hearing; and it is further

ORDERED that the issue of whether there was physical contact between the respondent's vehicle and a hit-and-run vehicle presented in the instant motion and motion papers is hereby referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for respondent shall serve a copy of this interim order with notice of entry on petitioner and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to JHO Gammerman.

This constitutes the interim decision and order of the Court.

Dated: August 8, 2014

Hon. Carol R. Edmead