Matter of American Tr. Ins. Co. v Singh
2014 NY Slip Op 32707(U)
October 3, 2014
Supreme Court, Kings County
Docket Number: 500711/14
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9
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DECISION/ORDER

In the Matter of the Arbitration to be had
Between AMERICAN TRANSIT INSURANCE COMPANY,

Index No. 500711/14

Submitted: 5/29/14
Motion Sequence #1

Petitioner,

-against-

STEFAN B. SINGH and DERRON K. A. FRASER,

Respondents,

U-HAUL, MANFRED BOAZ CADET and
REPWEST INSURANCE COMPANY,

Proposed Additional Respondents,
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HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the Petition to Stay arbitration and related relief.

Papers	Numbered
Petition and Exhibits.....	1-6
Opposition and Exhibits.....	7-10, 11-16

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Petitioner American Transit Insurance company moves for an order permanently staying arbitration, or joining the proposed additional respondents and attendant relief. Respondents Singh and Fraser oppose the petition. Proposed additional respondents Repwest Insurance Company and U-Haul oppose the petition in part.

Following an automobile accident on February 16, 2013, which took place between a U-Haul and a taxi in Brooklyn, New York, two allegedly injured taxi

passengers, Singh and Fraser, served a Demand for Arbitration on petitioner American Transit, the insurance company for the livery taxi that was rear-ended, after U-Haul's insurance company Repwest disclaimed coverage on the grounds that it was a staged accident, both wilful and intentional.

Petitioner argues that the arbitration must be stayed, as the U-Haul vehicle was insured, and contact between the vehicles is not denied. Petitioner argues that respondents have failed to furnish evidence to support the allegation that the adverse vehicle was uninsured. In the alternative, they request that, if the arbitration goes forward, U-Haul, Cadet and Repwest be added as additional respondents and that respondents abide by the contractual obligations regarding discovery, including EUOs, IMEs and authorizations.

Petitioner makes a prima facie case for the stay of arbitration requested. The other vehicle was insured, contact is not denied, and the police prepared a timely report.

In opposition, respondents Singh and Fraser note that the Repwest letter denying coverage is sufficient proof that the adverse vehicle is uninsured. They also indicate their willingness to comply with all required discovery. Certainly, the letter denying coverage is sufficient to create an issue of fact which overcomes the motion to permanently stay the arbitration. An insurer's failure to defend and indemnify its insured ordinarily requires a framed issue hearing to determine whether the offending vehicle is uninsured within the meaning of the Insurance Law. *Matter of New York City Tr. Auth. v Hill*, 107 AD3d 897 [2nd Dept 2012].

Proposed additional respondents Repwest and U-Haul argue that the arbitration

should be permanently stayed because Singh and Fraser have waived their right to proceed to uninsured motorist arbitration by commencing and prosecuting a bodily injury action against Cadet (the driver of the U-Haul) and petitioner's insured (the taxi owner and driver).[1] They aver that when a party affirmatively seeks the benefits of litigation, in a manner clearly inconsistent with its claim that the parties are obligated to settle their differences by arbitration, they have waived the right to arbitrate, citing *Waldman v Mosdos Bovov, Inc.,* 72 AD3d 983 [2nd Dept 2010]. The court notes that *Waldman* does not involve an uninsured motorist arbitration. The court further notes that, although the doctrine of judicial estoppel precludes a party from framing his or her pleadings in a manner inconsistent with a position taken in a prior judicial proceeding, the doctrine will be applied only "where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his or her interests have changed." *Matter of One Beacon Ins. Co. v Espinoza*, 37 AD3d 607 [2nd Dept 2007] *Bono v Cucinella*, 298 AD2d 483, 484 [2nd Dept 2002], *Kimco of N.Y. v Devon*, 163 AD2d 573, 574 [2nd Dept 1990]. Since Singh and Fraser have not, at this juncture, obtained a favorable (or indeed any) judgment as a result of their "contrary position" in the personal injury action, the doctrine of judicial estoppel does not apply. Therefore, the petition to permanently stay the arbitration is premature at this time. See, e.g., *Matter of One Beacon Ins. Co. v Espinoza*, 37 AD3d 607.

Repwest also argues that their insured cannot be covered because they do not insure U-Haul vehicles driven in New York State. This statement appears to be an

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[1] Ind. 505077/13. U-Haul was dismissed on Graves Amendment grounds.

error. In addition, Repwest repeats that the U-Haul was rented by an individual, respondent Cadet, who "confessed" it was a staged collision. They oppose being joined as additional respondents.

In its papers in partial opposition to the petition, U-Haul and Repwest provide a copy of the U-Haul lease, which indicates it was leased to Mr. Cadet a few hours before the accident, at a U-Haul on Flatbush Avenue in Brooklyn. They also provide an affidavit from Jennifer Settles, Secretary of U-Haul Titling LLC (sued as U-Haul), which says that the insurance "does not apply to any false or fraudulent claims." Next Repwest provides an affidavit from Barbara West, Manager Claims Support, who states that Repwest doesn't provide insurance for U-Haul vehicles operated anywhere in the Continental United States. She then says they wouldn't cover this incident, as it wasn't an accident but a fraud. She refers to Mr. Cadet's written confession, which she attaches.

The alleged "confession" was tape-recorded by an investigator in the investigator's car which was parked in front of Mr. Cadet's home. Mr. Cadet was not sworn and the transcription is certified by the interviewer, not the transcriber. There is no indication that Mr. Cadet was given an opportunity to make corrections or to sign it and have it notarized. As such, it is not admissible evidence for the motion. Without it, respondents fail to overcome the motion.

As such, Repwest and U-Haul, as well as Cadet, are joined as additional respondents. It is hereby ordered that the arbitration is temporarily stayed, and the matter is hereby referred to a special referee to conduct a framed-issue hearing to determine whether Mr. Cadet, the person who rented the U-Haul, was insured by Repwest or U-Haul at the time of the accident, or if he had his own vehicle insurance

policy for the rental period. See, *Matter of New York Cent. Mut. Fire Ins. Co. v Ramirez*, 76 AD3d 1078 [2nd Dept 2009]. A Referral Order which refers the framed issue hearing to a referee to hear and report is issued simultaneously herewith. Prior to the commencement of the hearing, counsel may stipulate that the Referee hear and determine, if they so agree. The name of U-Haul in the caption is also hereby corrected to "U-Haul Titling LLC."

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
October 3, 2014

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court