At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the MADISON County Courthouse, WAMPSVILLE, New York, on the 24th day of October, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT :

In the Matter of the Application of
NATIONAL GENERAL ASSURANCE COMPANY,

Petitioner,

-vs-

NANCY A. CURTIS and CARL G. CURTIS,

Respondents.

DECISION AND ORDER

Index No. 2014-1477
RJI No.

APPEARANCES:

COUNSEL FOR PETITIONER,

PATRICK FINNEGAN, ESQ.
McCABE, COLLINS, MCGEOUGH & FOWLER, LLP
346 Westbury Ave, PO Box 9000
Carle Place, NY 11514

COUNSEL FOR RESPONDENTS,

SAMANTH HOLBROOK, ESQ
JOYCE AND HOLBROOK LAW FIRM
26 North Main St. PO Box 705
Sherburne, NY 13460

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on National General Assurance Company's ("Petitioner's") Notice of Petition seeking to stay arbitration pursuant to CPLR §7503. Nancy Curtis and Carl Curtis ("Respondents") oppose the petition.

The facts are not in dispute. On April 1, 2013, Respondents were traveling east on Interstate Route 40 (I-40) in Torrance County, New Mexico, with Respondent, Carl Curtis, driving and Respondent, Nancy Curtis, in the front passenger seat. Respondents began to pass another, unknown, vehicle when the vehicle began to move into their lane. Respondents continued to move left to avoid contact and ultimately lost control of their vehicle, leaving the roadway and resulting in a "roll over" accident. The other vehicle did not stop and the driver is unknown.

Respondents submitted a claim against Petitioner for Uninsured Motorist Coverage under their New York motor vehicle insurance. Petitioner denied coverage arguing that since there was no physical contact between the Respondent and unidentified motor vehicle, there is no coverage pursuant to Insurance Law §3420. Respondents argue that in the case of out of state accidents, Insurance Law §5103 (e) requires New York coverage to provide at least the amount and kind of coverage required by the law of the state where the accident occurred. Respondents assert that "contact" is not required under New Mexico Law in uninsured motorist claims and therefore, is not required in the present case.

There appears to be no disagreement that the law of the state in which the accident occurred is

controlling in an accident such as this. *American Transit v Abdelghany*, 80 NY2d 162 (1992). In *American Transit*, the Court of Appeals held that when an insured New York driver is involved in an accident in another state, the uninsured motorist provisions of that state are incorporated into their New York insurance contract. *Id.* at 167. The sole issue for the Court to determine is whether Respondents would be covered under New Mexico law under the circumstances presented.

Under the New Mexico Administrative Code §13.12.3.14,

> D. Hit-and-run motor vehicle means a motor vehicle which causes bodily injury to an insured or property damage arising out of physical contact or attempted physical contact of the motor vehicle with: 1) the insured; 2) a vehicle which the insured is occupying at the time of the accident; or 3) property of the insured, provided:
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> (1) there cannot be ascertained the identity of either the operator or the owner of such "hit-and-run motor vehicle";
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> (2) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the director of the motor vehicle division, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and
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> (3) at the company's request, the insured or his legal representative makes available for inspection the motor vehicle which the insured was occupying at the time of the accident.

Petitioner has not disagreed that the other driver cannot be identified, nor contended that the accident was not timely reported. Likewise, no claim has been made that the vehicle was unavailable for inspection. Rather, the Petitioner argues that there is no evidence that the unknown driver "attempted physical contact" with Respondent's vehicle implying the need to prove that the unknown driver intended to cause physical contact but merely failed.

The Court has reviewed relevant New Mexico case law and found no controlling authority on this issue. As with all statutory construction, the Court must then look to the plain language of the provision to divine its meaning.

The Merriam-Webster Dictionary defines the word "attempt" as "to make an effort to do, accomplish, solve, or effect". It could be argued that such a definition would tend to imply "intent". However, the word "attempt" also implies a failure to achieve. In the context of a definition of a "hit and run" accident the Court finds that the word "attempt" is utilized to distinguish actual contact from near contact. This is particularly true since in a "hit and run" accident that would give rise to an uninsured motorist claim, there would be no way to establish the other driver's motivation, since that person cannot be ascertained. To give the provision any meaning, one must conclude that "attempt" is utilized to signify near contact causing another driver to react resulting in an accident. The Court is further persuaded by lack of any similar cases in New Mexico wherein a driver failed to prove the element of "intent" or that intent was even an issue.

Therefore, The Court finds that there is sufficient evidence in admissable form to conclude that Respondents are covered individuals for Uninsured Motorist Coverage under New Mexico Law and, hence, are covered under their New York insurance contract. As such, the Petitioners Motion for a Permanent Stay of Arbitration is **DENIED**.

The Petitioners also seek to stay arbitration pending further discovery including, but not limited to, medical examinations of the Respondents. The Respondents submitted to an Examination Before Trial on May 6, 2014. The demand for arbitration was filed on May 15, 2014. This dispositive motion was filed on June 5, 2014. Although Petitioner's motion, had it been granted, would have rendered moot the issue of discovery, nothing prevented the Petitioner from pursuing discovery while it was pending. However, pursuant to CPLR 3101 and CPLR 3102, the Court will grant Petitioner an additional 60 days to complete any outstanding discovery. Therefore, Motion for a Temporary Stay of Arbitration is **Granted**, and the subject Arbitration is hereby stayed 60 days from the entry of this decision.

Dated: November 12, 2014
Wampsville, New York

Hon. Eugene D. Faughnan
Supreme Court Justice