

**Matter of National Liab. & Fire Ins. Co. v Elkadri**

2015 NY Slip Op 30124(U)

January 23, 2015

Supreme Court, New York County

Docket Number: 156963/2012

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

NATIONAL LIABILITY & FIRE INSURANCE  
COMPANY,

Petitioner,

Index No. 156963/2012

-against-

**DECISION/ORDER**

MOHAMMED D. ELKADRI,

Respondent,

-and-

LATOYA DAVIS, FRANKLIN RIVERS and  
AVIS RENT A CAR SYSTEMS, LLC d/b/a  
PV HOLDING CORP.,

Proposed Additional Respondents.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	2

Petitioner moves for an order pursuant to CPLR § 7503 (b) permanently staying the uninsured arbitration initiated by respondent, or, in the alternative, a temporary stay of arbitration pending a preliminary hearing to determine whether respondent was involved in an accident with an uninsured motor vehicle. The petitioner also seeks to add the proposed additional respondents

as named above. Finally, in the event a stay is not otherwise granted, petitioner seeks to temporarily stay the arbitration so that it may obtain discovery from respondent. The petition is granted to the extent described below.

The relevant facts are as follows. The subject petition arises out of motor vehicle accident that occurred on November 10, 2010, on West 144th Street and 7<sup>th</sup> Avenue in New York, New York. During the accident, respondent Mohammed D. Elkadri (“Elkadri”) was allegedly caused to sustain serious personal injuries when the motor vehicle he was a passenger in was struck by a vehicle owned by proposed additional respondent Avis Rent A Car Systems, LLC d/b/a PV Holding Corp. (“Avis”). After the accident, Elkadri contacted Avis to determine whether the vehicle had available insurance coverage for the accident. Elkadri was informed that Avis had denied all claims arising from the subject accident on the ground that the vehicle was in a state of theft at the time of the accident. Specifically, Avis disclaimed coverage based on the statement of proposed additional respondent Franklin Rivers who asserted that he was operating the vehicle on the day of the accident and had left the car running with the keys in the ignition and his brother sleeping in the backseat while he ran to cash a check and it was at this time the car was stolen and shortly thereafter caused the subject accident.

Thereafter, Elkadri sought uninsured motorist benefits under his policy issued by the petitioner. Petitioner would not validate Elkadri’s claim. Thus, Elkadri sent a demand for uninsured motorist arbitration. Petitioner now seeks to stay the arbitration on the ground that the Avis vehicle was insured at the time of the accident.

“On an application to stay arbitration, petitioner has the burden of establishing the existence of evidentiary facts sufficient to conclude that there is a genuine preliminary issue,

which requires a trial and justifies a stay.” *National Grange Mutual Ins. Co. v. Diaz*, 111 A.D.2d 700 (1<sup>st</sup> Dept 1985). If issues of fact exist, the court must hold a hearing before it can decide whether the arbitration should proceed or be stayed. *Country-Wide Ins. Co. v. Leff*, 78 A.D.2d 830 (1<sup>st</sup> Dept 1980).

In the present case, petitioner’s application for a temporary stay of the arbitration pending a framed issue hearing is granted as there is a genuine preliminary factual issue as to whether the car was being driving by a permissive user at the time of the subject accident. Vehicle and Traffic Law § 388 provides that the owner of a motor vehicle shall be liable for the negligence of one who operates the vehicle with the owner’s express or implied consent. This statute creates a presumption that a vehicle is operated with the consent of the owner, which may be rebutted by substantial evidence to show that the vehicle was not being operated with the owner’s consent. *State Farm Mut. Auto. Ins. Co. V. Fernandez*, 23 A.D.3d 480, 481 (2<sup>nd</sup> Dept 2005). Generally, evidence that the vehicle was stolen at the time of the accident will rebut the presumption of permissive use. *Id.* However, [t]he uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use.” *State Farm Ins. Co. v. Walker-Pinckney*, 118 A.D.3d 712, 713 (2<sup>nd</sup> Dept 2014) (internal quotations and citations omitted). Here, Avis concedes that there was an insurance policy in place but maintains that the car was in a state of theft at the time of the accident. Thus, a hearing is necessary to determine whether there is substantial evidence to overcome the presumption that the Avis vehicle was being operated by a permissive user.

Further, if this court finds that there is substantial evidence sufficient to rebut the presumption of permissive use, the court will then address the legal issues raised by petitioner

and Avis. As an initial matter, the court will determine whether Avis is otherwise responsible to cover the loss based on a violation of Vehicle and Traffic Law § 1201(a), which provides in pertinent part that “[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake thereon.” Under New York law, “[w]hen a violation of Vehicle and Traffic Law § 1210(a) is established, the victim of a vehicular theft can be held liable to those who suffer injury as a result of the thief’s negligence.” *Merchants Ins. Group v. Haskins*, 11 A.D.3d 694, 695 (2<sup>nd</sup> Dept 2004); *see also State Farm Mut. Auto. Ins. Co. v. Fernandez*, 23 A.D.3d 480 (2<sup>nd</sup> Dept 2005). Additionally, if this court determines there was a violation of § 1201(a), the court will then determine whether Avis may still disclaim coverage based on the Graves Amendment, which bars vicarious liability actions against professional lessors and renters of vehicles as would otherwise be permitted under Vehicle and Traffic Law § 388. *See Graham v. Dunkley*, 50 A.D.3d 55, 58 (2<sup>nd</sup> Dept 2008).

Finally, in the event this court determines that this is a valid uninsured motorist claim, the petitioner is entitled to have the respondent submit to a physical examination and an examination under oath at that time. Accordingly, it is hereby

ORDERED that the arbitration herein be temporarily stayed pending the outcome of a framed issue hearing; and it is further

ORDERED that petitioner is hereby granted leave to add the proposed additional respondents to this action; and it is further

ORDERED that this matter be set down for a framed issue hearing before this court at 60 Centre Street, Rm 432 on February 10, 2015 at 11:00 a.m. to determine whether the Avis vehicle

was insured at the time of the accident. This constitutes the decision and order of the court.

Dated: 1/23/15

Enter: PK

J.S.C.

**CYNTHIA S. KERN**  
J.S.C.