

Matter of Nationwide Ins. Co. of Am. v Arriaza

2015 NY Slip Op 30906(U)

May 19, 2015

Supreme Court, Suffolk County

Docket Number: 10788/2013

Judge: Joseph Farneti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 10788/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

NATIONWIDE INSURANCE COMPANY OF
 AMERICA,

Petitioner,

-against-

To Stay the Arbitration Demanded by

JOSE RAMIREZ ARRIAZA,

Respondent,

-and-

AMICA MUTUAL INSURANCE COMPANY,
 CLAUDIA C. PINEDA and JENNIFER D.
 CARBALLO,

Proposed Additional Respondents.

ORIG. RETURN DATE: MAY 30, 2013
 FINAL SUBMISSION DATE: MAY 30, 2013
 MTN. SEQ. #: 001
 MOTION: MOT D RRH

PLTF'S/PET'S ATTORNEY:
 EPSTEIN GIALLEONARDO
 & FRANKINI
 330 OLD COUNTRY ROAD - SUITE 200
 MINEOLA, NEW YORK 11501
 516-493-4500

ATTORNEY FOR RESPONDENT
JOSE RAMIREZ ARRIAZA:
 CANNON & COSTA, LLP
 1923 NEW YORK AVENUE
 HUNTINGTON STATION, NEW YORK 11746
 631-271-6363

**ATTORNEY FOR PROPOSED ADDITIONAL
 RESPONDENT AMICA MUTUAL
 INSURANCE COMPANY:**
 BEE READY FISHBEIN HATTER
 & DONOVAN, LLP
 170 OLD COUNTRY ROAD - SUITE 200
 MINEOLA, NEW YORK 11501
 516-746-5599

PROPOSED ADDITIONAL RESPONDENTS:
 CLAUDIA C. PINEDA
 146 BERGOLD STREET
 BRENTWOOD, NEW YORK 11717

JENNIFER D. CARBALLO
 125 ORIOLE PLACE
 BRENTWOOD, NEW YORK 11717

AMERICAN ARBITRATION ASSOCIATION
65 BROADWAY - 15TH FLOOR
NEW YORK, NEW YORK 10019

Upon the following papers numbered 1 to 8 read on this petition _____
TO STAY ARBITRATION

Notice of Petition and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in Opposition and supporting papers 6, 7; Reply Affirmation 8; it is,

ORDERED that this motion by petitioner NATIONWIDE INSURANCE COMPANY OF AMERICA for an Order:

(1) pursuant to CPLR 7503, permanently staying respondent JOSE RAMIREZ ARRIAZA's application to proceed to arbitration under the Supplementary Uninsured/ Underinsured Motorist Endorsement, on the basis that: (a) respondent has failed to prove that the alleged offending vehicle was "uninsured"; and (b) that respondent has failed to meet the conditions precedent to coverage under the applicable UM/SUM policy provisions; or in the alternative

(2) granting a temporary stay of arbitration pending a hearing on the issue of whether the offending vehicle was, in fact, "uninsured";

(3) joining AMICA MUTUAL INSURANCE COMPANY, CLAUDIA C. PINEDA and JENNIFER D. CARBALLO to this proceeding as additional respondents; and

(4) temporarily staying respondent from proceeding to arbitration at the American Arbitration Association against petitioner, pursuant to CPLR 7503 (c) and 3402, and requiring respondent to provide the discovery outlined herein,

is hereby **GRANTED** to the extent provided hereinafter. The Court has received opposition hereto from respondent JOSE RAMIREZ ARRIAZA and from proposed additional respondent AMICA MUTUAL INSURANCE COMPANY, as well as a reply thereto from petitioner.

CPLR 7503 (c) provides in pertinent part that "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded" (CPLR 7503 [c]).

In the instant matter, petitioner was served with a demand for arbitration on or about April 1, 2013, and filed the instant petition on April 18, 2013, within the 20-day period provided by statute. As such, the Court finds this petition to be timely.

Petitioner indicates that at the time of the alleged accident, petitioner issued to respondent JOSE RAMIREZ ARRIAZA an automobile insurance policy, bearing policy number 6631 F 110513 01, in which petitioner provided uninsured motorist coverage pursuant to Insurance Law § 3420 (f).

Petitioner further indicates that respondent allegedly sustained personal injuries on December 27, 2012, when he was involved in a motor vehicle accident on Second Avenue at or near its intersection with Claywood Drive, in the Town of Islip, State of New York. Respondent's vehicle came into contact with a vehicle operated by proposed additional respondent JENNIFER D. CARBALLO and owned by proposed additional respondent CLAUDIA C. PINEDA ("offending vehicle"). According to a copy of the certified police accident report, the offending vehicle was insured on the date of the accident by proposed additional respondent AMICA MUTUAL INSURANCE COMPANY ("Amica"). Petitioner has submitted a letter, dated March 13, 2013, from Amica, which indicates that the "operator of our Policyholder's vehicle, Jennifer Carballo, was using the [offending] vehicle without a reasonable belief that she was entitled to do so. We have confirmed that the [offending] vehicle was, in fact, stolen." Therefore, Amica denied coverage. However, petitioner contends that Amica has not supplied proof of the alleged non-permissive use. Petitioner alleges, upon information and belief, that Ms. Carballo was the girlfriend of Ms. Pineda's son. Based upon the foregoing, petitioner alleges that there is insurance coverage available through Amica. Accordingly, petitioner argues that the uninsured provisions of respondent's policy have not been triggered, and therefore respondent's demand for arbitration should be permanently stayed. In the alternative, petitioner seeks a framed issue hearing on whether the offending vehicle was in fact in a state of theft at the time of the accident, with Amica, Ms. Pineda and Ms. Carballo being added as additional respondents herein as necessary parties.

In response to the petition, respondent indicates that he has no objection to this matter being set down for a framed issue hearing to determine whether the offending vehicle was being used without permission and, further, that he would provide petitioner with appropriate discovery in the event the Court does not permanently stay arbitration. Similarly, Amica indicates that the permissive use issue must "necessarily be sorted out" at a framed issue hearing.

It is well-settled that in a proceeding to stay the arbitration of an uninsured motorist claim, the claimant's insurer, as the petitioner, bears the initial burden of proving that the offending vehicle was insured at the time of the accident (see *Interboro Mut. Indem. Ins. Co. v Quichiz*, 238 AD2d 421 [1997]; *Eagle Ins. Co. v Tichman*, 185 AD2d 884 [1992]; *Aetna Casualty and Surety Co. v McMichael*, 176 AD2d 315 [1991]). Such burden may be sustained by the petitioner's submission of a certified copy of the police accident report (MV-104A) which contains the offending vehicle's insurance code designation (see *Nationwide Ins. Co. v Sillman*, 266 AD2d 551 [1999]; *Lumbermens Mutual Cas. Co. v Beliard*, 256 AD2d 579 [1998]), thereby shifting the burden to the offending vehicle's purported insurer, making it incumbent upon said insurer to either prove that it had never insured the subject vehicle or that the insurance had been cancelled or the coverage disclaimed (see *Allstate Ins. Co. v Rivera*, 148 AD2d 393, *supra*; *Insurance Co. of North America v Kaplum*, 274 AD2d 293 [2000]).

Moreover, Vehicle and Traffic Law § 388 (1) creates a presumption that a driver uses a vehicle with the owner's express or implied permission (see *Murdza v Zimmerman*, 99 NY2d 375 [2003]), which may be rebutted only by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent (see *Murdza*, 99 NY2d 375; *Matter of New York Cent. Mut. Fire Ins. Co. v Dukes*, 14 AD3d 704 [2005]).

The record before the Court at this time does not contain "substantial evidence" showing that the offending vehicle was not operated with Ms. Pineda's permission. Thus, the Court finds that it must conduct a Framed Issue Hearing with the participation of all necessary parties on the issue of whether the offending vehicle was operated with or without the permission of Ms. Pineda on the date of the accident, which would be determinative of whether the disclaimer of Amica was proper under the circumstances.

In view of the foregoing, a Framed Issue Hearing shall be held on **July 9, 2015, at 10:00 a.m., in Part 37, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York**. Petitioner is directed to serve an Amended Petition, pursuant to CPLR 403 (c), joining AMICA MUTUAL INSURANCE COMPANY, CLAUDIA C. PINEDA and JENNIFER D. CARBALLO as additional respondents, at least thirty (30) days prior to the scheduled date of the Framed Issue Hearing. Petitioner's request that the Court order discovery in accordance with the Supplemental Uninsured Motorists provisions of its policy is

conditionally granted such that respondent shall provide the requested discovery in the event that arbitration is not permanently stayed at the conclusion of the Framed Issue Hearing.

The foregoing constitutes the decision and Order of the Court.

Dated: May 19, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION