

Matter of Response Worldwide Ins. Co. v McCrone

2015 NY Slip Op 30919(U)

May 21, 2015

Supreme Court, Suffolk County

Docket Number: 9418/2013

Judge: Joseph Farneti

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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

RESPONSE WORLDWIDE INSURANCE
COMPANY,

Petitioner,

-against-

For an Order Staying the Arbitration of

THOMAS McCRONE,

Respondent,

-and-

ANNA BOURNE, AMENDI INC., and
HARTFORD INSURANCE COMPANY,

Proposed Additional Respondents.

ORIG. RETURN DATE: MAY 17, 2013
FINAL SUBMISSION DATE: JULY 11, 2013
MTN. SEQ. #: 001
MOTION: MOT D RRH

ORIG. RETURN DATE: JULY 11, 2013
FINAL SUBMISSION DATE: JULY 11, 2013
MTN. SEQ. #: 002
MOTION: MG

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PROPOSED ADDITIONAL RESPONDENT:

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COMPANY
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Upon the following papers numbered 1 to 10 read on this petition _____
TO STAY ARBITRATION AND MOTION TO AMEND PETITION _____.

Notice of Petition and supporting papers 1-3; Affirmation in Partial Opposition and supporting papers 4, 5; Affirmation in Opposition and supporting papers 6, 7; Notice of Motion and supporting papers 8-10; it is,

ORDERED that this motion (seq. #001) by petitioner, RESPONSE WORLDWIDE INSURANCE COMPANY, for an Order:

(1) permanently staying arbitration, or in the alternative, temporarily staying the arbitration and referring the instant matter for a preliminary trial before this Court on the issue of insurance coverage by proposed additional respondent HARTFORD INSURANCE COMPANY ("Hartford");

(2) adding ANNA BOURNE ("Ms. Bourne"), AMENDI, INC. ("Amendi"), and Hartford, as additional party respondents;

(3) reflecting the proper uninsured motorist coverage afforded to respondent THOMAS McCRONE ("respondent") at \$25,000.00 per person and \$50,000.00 per occurrence; and

(4) permitting petitioner to conduct discovery including examinations under oath, physicals and to obtain all relevant medical information,

is hereby **GRANTED** to the extent provided hereinafter. The Court has received partial opposition to this application from respondent, as well as opposition from proposed additional respondent Hartford; and it is further

ORDERED that this motion (seq. #002) by petitioner, RESPONSE WORLDWIDE INSURANCE COMPANY, for an Order granting petitioner leave to amend the petition herein to add PHILADELPHIA INDEMNITY INSURANCE COMPANY ("Philadelphia") as an additional party respondent, is hereby **GRANTED**, without opposition.

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 dated March 15, 2013, and filed the instant petition on April 3, 2013, within the 20-day period provided by statute. As such, the Court finds this petition to be timely. However, the Court notes that the demand for arbitration was directed to “Kemper Direct Insurance Company.”

Petitioner indicates that on or prior to August 3, 2010, petitioner issued to respondent a certain motor vehicle liability policy which contained therein an uninsured motorist endorsement. Pursuant to said endorsement, petitioner agreed to pay respondent for injuries sustained by him or by a member of his household as a result of the liability of an uninsured motorist.

Respondent claims that he was injured on August 3, 2010, on Sound Avenue and Northville Turnpike, in Riverhead, New York, as a result of a motor vehicle accident between his vehicle and that of an uninsured motorist. Petitioner alleges that the offending vehicle was owned by proposed additional respondent Amendi, registered in the State of New Jersey, and operated by proposed additional respondent Ms. Bourne.

Respondent has made a claim under the uninsured endorsement of the liability policy issued by petitioner, and seeks arbitration of the matter. However, in support of the instant application, petitioner has submitted, among other things, a copy of the “ISO report” allegedly showing that Amendi was insured by Hartford on March 10, 2012. Petitioner acknowledges that this is after the date of the subject accident, but alleges that this report shows “that Amendi did maintain insurance coverage for its rental vehicles.” The Court notes that the uncertified copy of the subject police accident report submitted does not contain an insurance code for the offending vehicle.

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 insured by Hartford on the date of loss, with Hartford, Ms. Bourne and Amendi being added as additional respondents herein as necessary parties.

In partial opposition hereto, respondent indicates that he has no objection to this matter being set down for a framed issue hearing to determine the issue of coverage with all necessary parties and, further, that he would provide petitioner with any outstanding discovery in the event the Court does not permanently stay arbitration.

Also in opposition hereto, Hartford argues that petitioner has failed, in the first instance, to prove that the offending vehicle was insured by Hartford at the time of the accident, as petitioner failed to submit a police accident report or DMV abstract showing coverage by Hartford on the date of loss. Moreover, Hartford has submitted an affidavit of a claim consultant employed by Hartford who avers that Hartford did not insure the offending vehicle on the date of the accident. Rather, Hartford issued a policy of insurance to Amendi covering the time period from August 25, 2011 to August 25, 2012, over one year after the accident. Notably, Hartford informs the Court that this was a new policy, not a renewal. Therefore, Hartford opposes the instant petition insofar as it seeks to add Hartford as a respondent herein.

In response thereto, petitioner has filed the a motion to amend its petition to add Philadelphia as an additional party respondent. Petitioner claims that it subsequently learned that Philadelphia provided insurance coverage to the offending vehicle on the date of the accident, not Hartford. In support thereof, petitioner has submitted a certified copy of the Motor Vehicle Registration Information from the Motor Vehicles Commission of New Jersey, dated June 17, 2013, which shows that Amendi indicated that Philadelphia provided insurance coverage to the offending vehicle when it was registered in 2010. As noted, Philadelphia has not interposed opposition to this motion.

The absence of insurance is the essential prerequisite for the existence of coverage under an uninsured motorist indorsement (*Allstate Ins. Co. v Giordano*, 108 AD2d 910 [1985], *affd for reasons stated below* 66 NY2d 810 [1985]; *Aetna Casualty & Surety Co. v Hines*, 102 AD2d 725 [1984]). 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, among other things, 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 *Insurance Co. of North America v Kaplum*, 274 AD2d 293 [2000]; *Allstate Ins. Co. v Rivera*, 148 AD2d 393 [1989]).

In light of the uncertainty of the insurance status of the offending vehicle on this record, the Court finds that it must conduct a Framed Issue Hearing on the issue of whether the offending vehicle was in fact uninsured on the date of loss. Accordingly, a Framed Issue Hearing shall be held on **July 16, 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 only Ms. Bourne, Amendi, and Philadelphia 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 uninsured motorist arbitration sought by respondent is temporarily stayed pending the Framed Issue Hearing.

The foregoing constitutes the decision and Order of the Court.

Dated: May 21, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION