

<b>Matter of Unitrin Preferred Ins. Co. v Dinkel</b>
2015 NY Slip Op 31014(U)
June 1, 2015
Supreme Court, Suffolk County
Docket Number: 24816/2013
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**

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In the Matter of the Application of

UNITRIN PREFERRED INSURANCE  
COMPANY,

Petitioner,

-against-

For an Order Staying the Arbitration of  
GEORGETTE DINKEL,

Respondent,

-and-

GEICO GENERAL INSURANCE COMPANY,  
DEMETRIUS STRONG and LANESHA  
STRONG,

Proposed Additional Respondents.

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**ORIG. RETURN DATE:** OCTOBER 15, 2013  
**FINAL SUBMISSION DATE:** DECEMBER 12, 2013  
**MTN. SEQ. #:** 002(001)  
**MOTION:** MG RRH

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**RESPONDENT GEICO:**  
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**RESPONDENTS:**  
DEMETRIUS STRONG  
725 12<sup>TH</sup> STREET  
WEST BABYLON, NEW YORK 11704

LANESHA STRONG  
114-07 AUGUSTA COURT  
JAMAICA, NEW YORK

AMERICAN ARBITRATION ASSOCIATION  
65 BROADWAY - 15<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10006

Upon the following papers numbered 1 to 9 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; Reply Affirmation 9; it is,

**ORDERED** that this motion by petitioner, UNITRIN PREFERRED INSURANCE COMPANY ("petitioner") 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 GEICO GENERAL INSURANCE COMPANY ("GEICO");

(2) determining the amount of SUM coverage as the Demand for Arbitration is silent;

(3) dismissing the Arbitration Demand as it does not provide a forum for the arbitration;

(4) compelling respondent GEORGETTE DINKEL ("respondent") to appear for an Examination or Examinations Under Oath, as are necessary;

(5) compelling respondent to appear for physical examinations as are necessary based on the medical claims;

(6) compelling respondent to provide petitioner with all pleadings, discovery, deposition transcripts and settlement documents in the underlying case;

(7) compelling respondent to provide petitioner with medical reports and HIAA-compliant authorizations to obtain the medical records for injuries alleged in this incident including any prior or subsequent injuries; and

(8) adding GEICO, DEMETRIUS STRONG and LANESHA STRONG as additional party respondents,

is hereby **GRANTED** solely to the extent provided hereinafter. The Court has received opposition hereto from respondent and from proposed additional respondent GEICO.

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 August 27, 2013, and filed the instant petition on September 13, 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 Preferred.”

Petitioner indicates that on or prior to January 1, 2012, 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 her or by a member of her household as a result of the liability of an uninsured motorist.

Respondent claims that she was injured on December 14, 2012, on 11<sup>th</sup> Street at its intersection with 8<sup>th</sup> Avenue, in the Town of Babylon, State of New York, as a result of a motor vehicle accident between her vehicle and that of an uninsured motorist. Petitioner alleges that the offending vehicle was owned by proposed additional respondent LANESHA STRONG, and operated by proposed additional respondent DEMETRIUS STRONG (“offending vehicle”).

Respondent has sought arbitration of the matter with petitioner. In support of the instant application, petitioner has submitted, among other things, an uncertified copy of the subject police accident report containing an insurance code for the offending vehicle, as well as a Department of Motor Vehicles printout indicating that GEICO insured the offending vehicle effective September 5, 2012, and that the license plates were not surrendered until January 11, 2013. However, petitioner has also submitted a copy of a letter from GEICO to Ms. Strong, dated February 13, 2013, disclaiming coverage for the subject accident. The disclaimer was made because “as per your request the 2004 Nissan Altima and driver Demetrius Strong were removed from the Policy as of 10-29-12.” As such, “the [offending vehicle] does not qualify as an Owned, Non Owned or Temporary Substitute Auto on this policy.”

Petitioner argues that respondent has not definitively proven that the offending vehicle was uninsured on the date of the accident. Petitioner notes that GEICO has not produced the "ACCORD Form" or the "Change Endorsement Form" by the insured requesting the offending vehicle's removal. Thus, petitioner argues that the uninsured provisions of respondent's policy have not been triggered, and 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 GEICO on the date of loss, with GEICO, Mr. Strong and Ms. Strong being added as additional respondents herein as necessary parties.

In opposition hereto, respondent indicates that she takes no position as to whether GEICO must provide coverage for the offending vehicle, as the GEICO policy only provides \$25,000.00 coverage, while respondent's SUM coverage from petitioner is \$100,000.00. Accordingly, respondent opposes a permanent stay of arbitration, as she argues that petitioner must indemnify her for any injuries she sustained beyond the \$25,000.00 coverage provided by GEICO.

Also in opposition hereto, GEICO alleges that the offending vehicle was deleted from the GEICO policy effective October 29, 2012, prior to the date of loss. Therefore, GEICO opposes the instant petition insofar as it seeks to add GEICO as a respondent herein.

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 30, 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 GEICO, DEMETRIUS STRONG and LANESHA STRONG 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 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 arbitration sought by respondent is temporarily stayed pending the Framed Issue Hearing.

The foregoing constitutes the decision and Order of the Court.

Dated: June 1, 2015

  
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HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION