

American Tr. Ins. Co. v Thompson

2015 NY Slip Op 32597(U)

October 9, 2015

Supreme Court, Kings County

Docket Number: 501716/2014

Judge: Kathy J. King

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.

FILED
KINGS COUNTY CLERK
2015 OCT 16 AM 7:49

l

At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of October, 2015.

P R E S E N T:

HON. KATHY J. KING,

Justice.

-----X
AMERICAN TRANSIT INSURANCE
COMPANY,

Petitioner

- against -

Index No. 501716/2014

KENYA THOMPSON and NELSON L. GIBSON, JR.,

Respondents,

-and-

U-HAUL ATLANTIC PRODUCTS, ESTHENIO A.E.
NEWTON, and REPWEST INSURANCE COMPANY

Proposed Additional Respondents
-----X

The following papers numbered 1 to 3 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross-Motion and Affidavits
(Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavit (Affirmations) _____
Memoranda of Law _____

Papers Numbered

1

2, 3

4

5

Upon the foregoing papers, petitioner American Transit Insurance Company (ATIC) moves for an order, pursuant to CPLR 7503(b): (1) permanently staying the uninsured motorist arbitration between petitioner and respondents; or (2) temporarily staying the uninsured motorist arbitration between petitioner and respondents; (3) joining the proposed additional respondents as named herein; and (4) ordering the respondents to comply with the uninsured motorist claim

preliminary requirements of a framed issue hearing on the issue of insurance coverage, as well as various alternative relief.

Respondents oppose petitioners request to permanently stay arbitration, but consent to depositions, physical examinations and to provide necessary authorizations upon validation of their uninsured motorist claims, in the event that the court finds that arbitration is necessary. Proposed additional respondent, U-Haul Atlantic Products (U-Haul) partially oppose the instant petition on the grounds that it is self-insured and properly disclaimed coverage. Repwest Insurance Company (Repwest) partially oppose the instant petition on the ground that it did not provide insurance applicable to the subject U-Haul vehicle or the underlying collision.

It is undisputed that ATIC issued an insurance policy to its insured Jose E. Bourdierd (Bourdierd) which contained a New York Accident Indemnification Endorsement. Pursuant to said Endorsement, petitioner agreed to pay claims arising from injuries sustained by its insured, an insured spouse, relatives, or passengers in its insured's vehicle caused by an accident arising out of the ownership, maintenance or use of its insured's vehicle.

On September 18, 2012, Jasmine Sosa (Sosa) rented a U-Haul vehicle from an authorized U-Haul dealership known as "Atlantic Products" located at 351 Essex Street, Brooklyn, New York 11208 pursuant to a rental contract. The rental contract executed by Sosa provided that U-Haul would provide insurance coverage containing the minimum financial responsibility (MFR) limits required pursuant to New York Vehicle and Traffic Law §370-1(a) and New York Insurance Law §3420(f). The terms under which the MFR would be provided to Sosa were set forth on the Rental Contract Addendum Document Holder provided to her at the time of her rental.

The next day, on September 19, 2012, Sosa entrusted the U-Haul vehicle that she rented to proposed additional respondent, Esthenio A. E. Newton (Newton). While operating the U-Haul vehicle, Newton was involved in a collision with a livery cab owned and operated by Bourdiero wherein respondents, Kenya Thompson and Nelson L. Gibson, Jr. (respondents) were passengers. Pursuant to the police report, dated September 14, 2012, Sosa was not in either vehicle at the time of the collision.

The subject U-Haul vehicle was returned to the U-Haul dealership hours after the collision on September 19, 2012.

By letters dated October 14, 2013 and October 15, 2013, U-Haul denied “coverage/protection for any and all claims arising out of [the subject] accident” to Newton on the grounds that the “incident was not accidental in nature but intentionally created and caused”. U-Haul also denied coverage to Sosa by letter dated October 14, 2013. Additionally, notice of coverage denial was sent to its insured, Bourdierd, and respondents, each dated October 15, 2013. Subsequently, on February 7, 2014, respondents made a demand for arbitration for uninsured motorist benefits under Bourdierd’s insurance policy.

Upon receipt of respondents demand for arbitration on February 10, 2014, Repwest conducted an investigation into the September 14, 2012 collision. On March 23, 2014, Newton confessed to Bernard Moran, a private investigator retained by Repwest, that the subject “accident” was intentionally staged. The confession was professionally transcribed and certified by LEX Reporting Service, Inc. (U-Haul and Repwest’s Response to Petition to Stay Arbitration, Exhibit 1; Affidavit of Bernard Moran, November 25, 2014).

A party who has grounds to oppose arbitration may preserve the right to litigate the underlying dispute in court by timely applying for a stay of arbitration pursuant to CPLR §

7503(b). On such application, the “threshold” defenses to arbitration can be raised. A court will not stay arbitration, however, unless the entire controversy is non-arbitrable. If there is a least one arbitrable issue, arbitration should proceed (*Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 302 [1984]).

It is well settled that a party seeking insurance benefits must prove that a loss occurred and that the loss was covered by the insurance policy (*Vasile v Hartford Accident & Indemnity Company*, 213 AD2d 541 [2nd Dept. 1995]). When loss is the result of an intentional act, there is no coverage (*Metro Medical Diagnostics, P.C. v Eagle Insurance Company*, 293 AD2d 751 [2nd Dept. 2002]) and any resulting claim is non-arbitrable.

Petitioners have presented Newton’s confession as proof that the subject “accident” was an intentionally staged collision. This showing is sufficient to shift the burden to the respondents to dispute the allegation of fraud, whose opposition papers, upon review, fail to proffer any facts which dispute petitioner’s allegation that the collision was intentional (*State Farm Mutual Automobile Insurance Company v Laguerre*, 305 AD2d 490 [2nd Dept. 2003]). Since the respondents have not met their burden to dispute the allegation of fraud, coverage was properly disclaimed and a framed issue hearing is unnecessary. Petitioner cannot be compelled to arbitrate a claim which results from an intentional collision (*Matter of Worcester Insurance Company v Bettenhauser*, 95 NY2d 185 [2000]) nor provide insurance benefits when a collision is a result of an intentional act (*see State Farm Mutual Automobile Insurance Company v Laguerre*, 305 AD2d 490 [2nd Dept. 2003]).

Moreover, an intentional act may void coverage even if not committed by the claimant (*Progressive Northwestern Insurance Company v Van Dina*, 282 AD2d 680 [2nd Dept. 2001]). Here, based on the respondents’ failure to rebut petitioner’s allegation of fraud, the Court finds

that respondents' injuries were as a result of an intentional act and not the result of an accident. As such, respondents are not entitled to uninsured motorist benefits under the subject insurance policy (see *Progressive Northwestern Insurance Company v Van Dina*, supra, 282 AD2d at 680; *In the Matter of Metlife Auto & Home v Kalanderev*, 54 AD3d 830, 831 [2008]; *In the Matter of Liberty Mut. Ins. Co. v Goddard*, 29 AD3d 698, 698 [2006]; *Matter of Aetna Cas. & Sur. Co. v Perry*, 220 AD2d 497 [2nd Dept. 1995]).

Based on the foregoing, petitioner's motion is granted to the extent that arbitration is permanently stayed. Although respondents consent to all other relief requested by the petitioner, those matters are rendered moot by this decision and order.

The foregoing constitutes the decision and order of the court.

ENTER



 HON. KATHY J. KING
 J.S.C.
 HON. KATHY J. KING
 JSC


 FILED
 KINGS COUNTY CLERK
 2015 OCT 16 AM 7:49