

**Matter of Progressive Advanced Ins. Co. v
Widdecombe**

2016 NY Slip Op 32908(U)

January 28, 2016

Supreme Court, Sullivan County

Docket Number: 2051-2015

Judge: Michael F. McGuire

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

In the Matter of the Petition of PROGRESSIVE
ADVANCED INSURANCE COMPANY,

Petitioner,

Decision & Order

- against -

MICHAEL WIDDECOMBE,

Respondent,

- and -

ROBERT GERMAIN and HARTFORD UNDERWRITERS
INSURANCE COMPANY,

Proposed Additional Respondents.

Petition Return Date: November 23, 2015

RJI No.: 52-373469-2015

Index No.: 2051-2015

Appearances: ADAMS, HANSON, REGO & KAPLAN, ESQS.
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MCGUIRE, J., Acting J.S.C.:

In this proceeding brought pursuant to CPLR article 75, petitioner Progressive Advanced Insurance Company (Progressive) seeks an order of this Court permanently staying arbitration demanded by respondent Michael Widdecombe (respondent). Progressive also seeks an order adding as additional respondents Hartford Underwriters Insurance Company (Hartford) and Robert Germain (Germain); and that the instant matter involves an intentional

act and therefore would vitiate the uninsured motorist claim. Respondent Michael Widdecombe opposes the petition insofar as it seeks to permanently stay the arbitration. Hartford or Germain have not appeared in the proceeding.

BACKGROUND

This proceeding arises from an incident that occurred February 9, 2015 in the Village of Pelham, Westchester County, New York. On that day, respondent claims that Germain was leaving the Fishermen's Net Bar near 129 Sixth Street when he struck respondent who was attempting to stop Germain from driving from the scene while impaired. According to the police report (Petitioner's Exh. C), the respondent placed his foot inside the car on the driver's side to prevent Germain from driving. Respondent claimed that he had his foot inside the car on the floor board of Germain's vehicle when the latter started to drive, dragging respondent about 20 feet. The accident report states that respondent was able to get his foot out causing him to fall out on the street injuring his right foot and leg.

On the date of the incident, petitioner had in force an automobile insurance policy with Donna M. Widdecombe, under policy number 75187578-0, for the period of October 23, 2014 to April 23, 2015. The policy contained a SUM endorsement providing \$100,000 per person and \$300,000 SUM per accident for protection against bodily injuries arising from accidents with uninsured motorists.

Respondent apparently submitted a claim regarding the incident to Germain's insurance carrier, Hartford. On August 31, 2015, Hartford disclaimed coverage due to the fact that the insurance policy was cancelled on October 23, 2014, prior to the date of the incident, Petitioner asserts that any coverage defenses from Hartford must be demonstrated via admissible evidence in a framed issue hearing. Respondent then submitted a claim regarding the incident to petitioner for uninsured motorist benefits on April 26, 2015. In response, petitioner sent respondent correspondence requesting compliance with conditions precedent under the insurance policy. Thereafter, on August 27, 2015, respondent demanded arbitration for a claim against Progressive for uninsured motorist benefits under respondent's motor vehicle policy. Petitioner commenced this proceeding to permanently stay such arbitration, Petitioner contends that respondent knew that Germain's actions of fleeing the area, while under the influence was not unexpected, unusual or unforeseen, and that, therefore, the occurrence did not constitute an "accident" within the meaning of the SUM-uninsured motorist endorsement of the Progressive policy. Petitioner further claims that since the alleged injuries arose as a result of an intentional act, the intentional act exclusion in the policy vitiates the uninsured

motorist claim.

As to respondent, he contends that for the intentional act doctrine to apply, which it is conceded, is proper grounds for disclaimer, the collision would need to be proven to have been intentional. Respondent argues that the question of whether an occurrence is an accident is whether it can be characterized as “unexpected, unusual and unforeseen” from the insured’s perspective. Respondent contends that inasmuch as he did not expect Germain to strike his body with his vehicle, despite the fact that Widdecombe was attempting Germain from leaving the premises in an intoxicated state, the act cannot be defined as intentional.

DISCUSSION

“In a proceeding to stay arbitration of a claim for uninsured motorist benefits, the claimant’s insurer has the initial burden of proving that the offending vehicle was insured at the time of the accident and thereafter the burden is on the party opposing the stay to rebut that prima facie showing” (*Matter of American Intl. Ins. Co. v Giovanielli*, 72 AD3d 948, 949 [2nd Dept 2010]).

Here, Progressive has not met its prima facie burden by demonstrating that the vehicle involved in the incident was insured at the time of the incident by Hartford. The police incident report annexed to petitioner’s papers is devoid of any reference to the offending vehicle’s insurance code designation. Nor has respondent provided any documentary evidence that Germain’s policy of insurance with the Hartford was cancelled at the time of the incident. Indeed, the letter from the hartford proffered by both petitioner and respondent concerning the purported disclaimer merely raises an issue of fact as to whether the offending vehicle was covered by a policy of insurance from Hartford at the time of the incident. Furthermore, as the Appellate Division, Third Department noted in *Progressive No. Ins. Co. v Rafferty*, 17 AD3d 888, 889 [2005],

“It is now well settled that there exists ‘a narrow class of cases in which the intentional act exclusion applies regardless of the insured’s subjective intent’. In such cases, ‘the intentional act exclusion applies if the injury is inherent in the nature of the wrongful act’. An injury is held to be ‘inherent in the nature’ of an act when the act is so exceptional that ‘cause and effect cannot be separated; that to do the act is necessarily to do the harm which is its consequences and that since unquestionably the act is intended, so also is the harm’” (17 AD3d at 889).

Here, without an affidavit from respondent, the person with knowledge of the factual

allegations, the Court cannot determine whether the intentional act exclusion applies. Based on the sparse factual record compiled on the instant application, the Court is unable to determine whether the Hartford disclaimed coverage. Moreover, the record presents a factual question as to whether petitioner's disclaimer based on an intentional act exclusion is proper, warranting a framed-issue hearing (*see Matter of Victoria Secret Ins. Co. v Munar*, 80 AD3d 707, 708 [2nd Dept 2011]). Given the need for a hearing, Progressive's application to add the Hartford and Germain as additional respondents is granted (*see e.g. Matter of Lumbermens Mut. Cas. Co. v Bellard*, 256 AD2d 579, 580 [2nd Dept 1998]). Further, pending the addition of these parties and the hearing, the pending arbitration is temporarily stayed.

Therefore, it is

ORDERED that the branch of the petition seeking to add proposed additional respondents Hartford Underwriters Insurance Company and Robert Germain is granted; and it is further

ORDERED that petitioner is directed to serve the petition and all other submissions in this matter on Hartford Underwriters Insurance Company and Robert Germain within 30 days of this Court's Decision and Order; and it is further

ORDERED that the arbitration as demanded by respondent Michael Widdecombe is temporarily stayed pending further proceedings in this matter; and finally it is

ORDERED that petitioner's counsel shall serve copies of this Decision and Order upon respondent and the proposed additional respondents within 20 days of the date hereof.

This shall constitute the Decision and Order of this Court. The Court is retaining the papers for further proceedings. The original copy of this Decision and Order are being filed with the office of the Sullivan County Clerk. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

Dated: Monticello, New York
January 28, 2016

ENTER



HON. MICHAEL F. MCGUIRE, AJSC