Matter of Progressive Cas. Ins. Co. (Tanon)
2017 NY Slip Op 31054(U)
April 4, 2017
Supreme Court, Suffolk County
Docket Number: 10458/2016
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 10458/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 01/19/17
Motion Seq #: 001 Mot D

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In the Matter of the Application of

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Petitioner,

To Stay the Arbitration sought to be had by

EDWARD SAEZ TANON, KATHERINE SAEZ & LIZAIDA SOSA,

Respondents,

-&-

GOVERNMENT EMPLOYEES INSURANCE COMPANY & STEPHEN FLORIO,

Proposed Additional Respondents.

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Concerning Petitioner's application pursuant to CPLR 7503 to stay pending insurance arbitration, the Court has considered the following papers in reaching its determination as follows:

1. Petitioner's Notice of Petition pursuant to CPLR 7503(c) dated November 15, 2016, 2016; Verified Petition of Michael A. Zarkower, Esq. dated November 15, 2016; Exhibits A – E;
2. Proposed Additional Respondents' Affirmation in Opposition of Sharon T. Feller, Esq. dated December 6, 2016; Exhibits A;
3. Respondent's Affirmation in Opposition of Peter R. Garcia, Esq. dated December 21, 2016; Exhibit A;
4. Reply Affirmation in Further Support dated January 16, 2017; it is

ORDERED that the Verified Petition brought before this Court pursuant to CPLR 7503(c) seeking to permanently stay a pending liability automobile insurance arbitration, or in the alternative for an order temporarily staying the same and an order compelling respondent to comply with pre-arbitration discovery is determined as follows.

This matter is pending before this Court on the Petition brought by petitioner Progressive Casualty Insurance Company ("petitioner" or "Progressive") pursuant to CPLR 7503(c) to stay pending insurance arbitration before the American Arbitration Association ("AAA") concerning respondents Edward Saez Tanon, Katherine Saez and Lizaida Sosa ("respondents" or collectively "Saez") demand for underinsured motorist or "UM" arbitration.

This special proceeding arises out of a motor vehicle accident which occurred on August 17, 2016 on the New Jersey Turnpike in the township of Woodbridge, County of Middlesex in the state of New Jersey. Saez, a Progressive insured was rear-ended by a 2014 Dodge Ram pickup truck operated by proposed additional respondent Stephen Florio ("Florio"), insured by proposed additional respondent Government Employees Insurance Company ("GEICO"). Saez and the occupants of his motor vehicle, nominal petitioners herein, all allege that they sustained injuries at the accident scene. A New Jersey state trooper responded to the accident scene and conducted an investigation which produced an accident investigation report which the parties herein rely upon for various contentions discussed below.

The accident report in sum and substance provides that Saez was slowing down to a stop due to a buildup of traffic ahead when Florio collided with the rear-end of his vehicle. Florio gave a statement to the state trooper that he observed Saez's vehicle slowing down to a stop but was unable to avoid colliding with him. The report makes no mention of any other vehicle in any regard.

This notwithstanding, Florio and GEICO contend that Florio was also rear-ended by an as of yet unidentified tractor trailer which fled the scene of the accident, which propelled Florio into Saez's vehicle; thus being the primary cause or contribution to Saez's accident and resulting alleged injuries. Therefore, Florio and GEICO allege that Florio, and somewhat derivately, Saez are the victims of a "hit and run" accident.

Subsequent to his accident, Saez made a demand for UM arbitration dated October 28, 2016 seeking to arbitrate and resolve his claim. This was apparently premised upon a denial of coverage or disclaimer issued by written correspondence from GEICO to Saez on October 26, 2016 wherein GEICO took a no pay position vis-à-vis Saez's accident contending relying upon Florio's description of the accident as a "hit and run" incident. Petitioner for its part also issued a denial of coverage or disclaimer letter to Saez on October 28, 2016 taking the position that Saez's accident involved Florio, who was insured by GEICO, and therefore was not a "hit and run" incident.

The present record assembled before the Court reflects that Saez is a Progressive insured under Policy Number 909651149, which was effective from April 9, 2016 to October 9, 2016 and thus was also in effect at the time of the incident referenced above. Saez's automobile liability insurance policy also included a UM policy endorsement for coverage.

Progressive has brought the instant application before this Court seeking to stay Saez's UM arbitration on the theory that Saez has failed to satisfy conditions precedent prior to proceeding to arbitration. First, petitioner argues that a temporary stay should be imposed to the extent that Saez has failed to comply with his policies terms and conditions requiring the

cooperation and compliance with the insurer's pre-arbitration discovery demands. Progressive seeks to avoid claimed significant and undue prejudice of evaluating Saez's claim without the benefit of having an examination before trial or other statements or testimony given under oath, an independent medical examination, and the review of relevant medical records.

Additionally, part and parcel of its pre-arbitration demands for discovery, Progressive separately seeks nonparty disclosure and requests an order of this court for the issuance of a commission pursuant to CPLR 3108 for an examination before trial of the New Jersey State trooper that responded to and investigated the accident scene, on the theory that since he resides out of forum and is beyond the court's jurisdiction, he is unlikely to cooperate absent court order.

Petitioner further argues that Saez has failed to carry his burden of establishing direct physical contact with an unidentified or "hit and run" vehicle necessary to proceed to UM arbitration. To support this contention, Progressive has submitted and relies upon a New Jersey State Police accident investigation report dated August 31, 2016 involving the subject accident between Saez and Florio (operating a 2014 Dodge Ram, bearing plate number GSS-8963), which it notes makes no mention of any third party, fleeing or unidentified vehicle.

Lastly, Progressive seeks leave of Court to join as additional respondents GEICO and Florio on the strength of the police accident investigation and their involvement in the subject incident. Petitioner argues that the absence of any mention of a "hit and run" or fleeing vehicle on the accident investigation report alone raises the existence of a triable issue of material fact on this question necessitating a framed issue hearing for resolution of the matter.

In response, GEICO and Florio argue that they have indeed carried their burden of demonstrating that Florio was involved in a "hit and run" accident, and thus the scheduled arbitration should proceed absent their participation. In support of this argument, counsel represents, in absence of any sworn affidavit or testimony by Florio, that Florio was rear-ended and pushed into Saez by a tractor trailer which subsequently fled the scene. Compounding the matter, GEICO and Florio have submitted what purports to be accident scene property damage photographs of Florio's vehicle. They argue that since these photos purport to depict both front and rear-end damage, that this Court should draw the inference that Florio was rear-ended, consistent with their position.

Saez in opposition to the Petition, argues that this matter is ripe for imposition of a temporary stay and that the issues should be determined after a framed issue hearing. Saez in sum argues that GEICO and Florio have not sustained their burden to raise a triable issue of fact on the question of "hit and run" contact with the submission of competent evidence in admissible form. Stated differently, Saez challenges the admissibility of the purported property damage photos arguing that without proper authentication or any sworn testimony by Florio, the putative person with direct firsthand knowledge of the facts and circumstances underlying the "hit and run" allegation. Thus, Saez argues this matter must proceed to a framed issue hearing. Otherwise Saez opposes petitioner's application in all other respects.

"CPLR 7503(c) requires that an application to stay arbitration be made within 20 days after service of a notice of intention to arbitrate" (***Matter of Liberty Mut. Ins. Co. v. Zacharoudis***, 65 AD3d 1353, 1353–1354, 885 NYS2d 610 [2d Dept 2009]; *see* ***Matter of Fiveco, Inc. v. Haber***, 11 NY3d 140, 144 [2008]; ***Matter of Land of the Free v. Unique Sanitation***, 93 NY2d 942, 943 [1999]; ***Matter of Steck [State Farm Ins. Co.]***, 89 NY2d 1082, 1084 [1996]). To be considered a valid notice of the intention to arbitrate, the notice must

identify the agreement under which arbitration is sought and the name and address of the person serving the notice in addition to containing the statutory 20–day warning that failure to commence a proceeding to stay arbitration will preclude an objection to arbitration (*see* CPLR 7503[c]; ***Matter of Blamowski [Munson Transp.]***, 91 NY2d 190, 195 [1997]; ***State Farm Mut. Auto. Ins. Co. v. Szwec***, 36 AD2d 863, 321 NYS2d 800 [1971]; ***State Farm Mut. Auto. Ins. Co. v Urban***, 78 AD3d 1064, 1065, 912 NYS2d 586, 587 [2d Dept 2010]). Unless a party makes an application for a stay of arbitration within the statutory 20–day period, CPLR 7503(c) generally precludes the party from objecting to the arbitration thereafter (*see* ***Hermitage Ins. Co. v Escobar***, 61 AD3d 869, 869, 877 NYS2d 413, 414 [2d Dept 2009][internal citations omitted]). Here, it is undisputed that Progressive noticed its Petition within 20 days of Saez's demand for arbitration, on November 15, 2017, two days before the expiration of the statute of limitations on November 17, 2017, measured from the October 28, 2016 demand for arbitration.

The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay" (***Matter of AutoOne Ins. Co. v. Umanzor***, 74 AD3d 1335, 1336, 903 NYS2d 253; ***see Matter of Metropolitan Prop. & Cas. Ins. Co. v. Singh***, 98 AD3d 580, 581, 949 NYS2d 638). Thereafter, the burden is on the party opposing the stay to rebut the prima facie showing (***see Matter of Metropolitan Prop. & Cas. Ins. Co. v. Singh***, 98 AD3d at 581, 949 NYS2d 638; ***Matter of American Intl. Ins. Co. v. Giovanielli***, 72 AD3d 948, 949, 900 NYS2d 108).

The uninsured motorist indorsement of an insurance policy does not operate unless and until it has been established that there was no insurance coverage on the offending vehicle on the date of the accident (*see* ***Matter of Nationwide Ins. Co. v. Sillman***, 266 AD2d 551, 552, 699 NYS2d 98; ***Matter of State Farm Mut. Ins. Co. v. Vazquez***, 249 AD2d 312, 670 NYS2d 901; ***Matter of Eagle Ins. Co. v. Sadiq***, 237 AD2d 605, 655 NYS2d 601; ***New York Cent. Mut. Fire Ins. Co. v Julien***, 298 AD2d 587, 587, 749 NYS2d 73, 74 [2d Dept 2002]). Insurance Law § 3420(f)(2) provides for supplementary underinsured motorist benefits "if the limits of liability under all bodily injury liability insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by such policy" (*see also,* 11 NYCRR 60–2.1[a]). The definition of an underinsured motor vehicle in the petitioner's insurance policy, which reflects the language of the Insurance Law, provides that the supplementary underinsured motorist coverage applies only when another, offending vehicle is inadequately insured to cover an injured claimant's loss (***Kemper Ins. Companies v Azayeva***, 291 AD2d 406, 736 NYS2d 893, (Mem)–894 [2d Dept 2002]).

An unexcused and willful refusal to comply with disclosure requirements in an insurance policy is a material breach of the cooperation clause and precludes recovery on a claim (***see Lentini Bros. Moving & Stor. Co. v. New York Prop. Ins. Underwriting Assn.***, 53 NY2d 835, 837, 440 NYS2d 174; ***Baerga v. Transtate Ins. Co.***, 213 AD2d 217, 623 NYS2d 587; ***2423 Mermaid Realty Corp. v. New York Prop. Ins. Underwriting Assn.***, 142 AD2d 124, 130–132, 534 NYS2d 999; ***Ausch v. St. Paul Fire & Mar. Ins. Co.***, 125 AD2d 43, 50, 511 NYS2d 919). Compliance with such a clause is a condition precedent to coverage, properly addressed by the court (***see Matter of County of Rockland [Primiano Constr. Co.]***, *supra; compare* ***Great Canal Realty Corp. v. Seneca Ins. Co., Inc.***, 5 NY3d 742, 800 NYS2d 521).

It is well settled that CPLR 3102(c) permits the Court to order discovery in aid of Arbitration. Second Department precedent acknowledges that an insurer is entitled to have a physical examination in situations similar to the case before the Court. ***See State Farm Mutual Automobile Ins. Co. v. Wernick***, 90 AD2d 519, 455 NYS2d 30 (1982). Additionally, it is indeed a provident exercise of discretion for the Court to order a deposition and physical

examination in aid of Arbitration. ***See State Farm Insurance Co. v. McManus***, 249 AD2d 311, 670 NYS2d 599 (1998).

A court may properly exercise its discretion in temporarily staying arbitration and ordering medical authorizations, discovery of medical records and reports, depositions and physical examination in aid of arbitration. ***Progressive Casualty Ins. v. Jackson***, 49 AD3d 748 (2d Dept. 2008); ***Matter of State-Wide Insurance Company v. Womble***, 25 AD3d 713 (2d Dept. 2006).

The Second Department has clearly held that "physical contact is a condition precedent to an arbitration based upon a hit and run accident involving an unidentified vehicle" (***Matter of Great N. Ins. Co. v. Ballinger***, 303 AD2d 503, 504, 757 NYS2d 309; *see* Insurance Law § 5217; ***Matter of Allstate Ins. Co. v. Moshevev***, 291 AD2d 401, 402, 737 NYS2d 118; ***Matter of State Farm Mut. Auto. Ins. Co. v. Johnson***, 287 AD2d 640, 732 NYS2d 21). "The failure of the police accident report to mention contact with another vehicle raises a factual issue as to whether there actually was physical contact between insured's vehicle and a 'hit and run' vehicle" (***Matter of Midwest Mut. Ins. Co.***, 64 AD2d 985, 408 NYS2d 822; *see* ***Matter of Bisignano v. Interboro Mut. Indem. Ins. Co.***, 235 AD2d 419, 420, 652 NYS2d 546; ***Matter of Allstate Ins. Co. v. Weiss***, 178 AD2d 529, 577 NYS2d 319).

The question of whether there was physical contact with the insured's vehicle and an alleged hit-and-run vehicle is to be determined by the Supreme Court, and not an arbitrator. Where a triable issue of fact regarding the existence of physical contact with a hit-and-run vehicle has been properly raised, "the appropriate procedure is to stay arbitration pending a determination on that issue" (***Matter of Utica Mut. Ins. Co. v. Leconte***, 3 AD3d 534, 535, 770 NYS2d 750; *see* ***Matter of Nationwide Mut. Fire Ins. Co. v. Thomas***, 47 AD3d 934, 935, 851 NYS2d 604; ***Allstate Ins. Co. v Aizin***, 102 AD3d 679, 681, 958 NYS2d 706, 707–08 [2d Dept 2013]). Therefore, a framed issue hearing is necessitated to resolve such a material issue of fact (***Eveready Ins. Co. v Scott***, 1 AD3d 436, 437–38, 767 NYS2d 31, 32–33 [2d Dept 2003]; *see also* ***New York Cent. Mut. Fire Ins. Co. v Vento***, 63 AD3d 841, 843–44, 882 NYS2d 126, 128 [2d Dept 2009]["[p]hysical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle" thus "[w]hen there is an issue of fact as to whether physical contact occurred, a hearing on the issue must be conducted"]).

Production of a police accident report containing the vehicle's insurance code satisfies petitioner's *prima facie* burden of production that the proposed additional respondent insured the offending vehicle *(see* ***Matter of Eagle Ins. Co. v. Rodriguez***, 15 AD3d 399, 790 NYS2d 167; ***Matter of Liberty Mut. Ins. Co. v. McDonald***, 6 AD3d 614, 615, 775 NYS2d 83; ***Matter of Eagle Ins. Co. v. Beauvil***, 297 AD2d 736, 747 NYS2d 774; ***Utica Mut. Ins. Co. v Colon***, 25 AD3d 617, 618, 807 NYS2d 634, 635 [2d Dept 2006]; ***New York Cent. Mut. Fire Ins. Co. v Licata***, 24 AD3d 450, 451, 807 NYS2d 380, 381 [2d Dept 2005]).

The determination as to whether a vehicle is underinsured is made by comparing the bodily injury limits of the claimant's insurance policy with the bodily injury limits of the tortfeasor's policy (***Allstate Ins. Co. v DeMorato,*** 262 AD2d 557, 694 NYS2d 67 [2d Dept 1999]), and coverage is available only when the bodily injury limits of liability of the tortfeasor's insurance policy are less than the bodily injury limits of liability of the insured's policy (*see* ***Matter of State Farm Mutual Auto. Ins. Co. v Roth,*** 206 AD2d 376, 613 NYS2d 713 [2d Dept 1994]).

The law governing CPLR 3108 in the Second Department clearly provides that a commission may be issued where "necessary or convenient" for the taking of a deposition outside of the State. However, under circumstances where the defendant fails to adequately demonstrate that the identified witness would not cooperate with a notice of deposition pursuant to CPLR 3109 or will not voluntarily come within this State or that "the judicial imprimatur accompanying a commission will be necessary or helpful when the [designee] seeks the assistance of the foreign court in compelling the witness to attend the examination" such an application should be denied without prejudice to a renewal of the motion upon the requisite showing that a commission is necessary or convenient (***Sorrentino v Fedorczuk***, 85 AD3d 759, 760–61, 925 NYS2d 150, 151 [2d Dept 2011]).

As regards the introduction or admission of photographs into evidence under the business record exception of CPLR 4518, a photograph is generally admissible as a depiction of a fact in issue upon proof of its accuracy by the photographer or upon testimony of one with personal knowledge that the photograph accurately represents that which it purports to depict (*see* ***People v. Patterson***, 93 NY2d 80, 84; ***People v. Byrnes***, 33 NY2d 343, 347; ***Corsi v Town of Bedford***, 58 AD3d 225, 228–29, 868 NYS2d 258, 261 [2d Dept 2008]). A proper foundation must be laid where at a minimum the proponent must establish for the court's consideration the photograph's authentication, relevance, and prejudicial impact on the proceedings (*see e.g.* ***People v Marra***, 21 NY3d 979, 981, 994 NE2d 387, 388 [2013]).

In view of all of the above, this Court will grant the petition in part solely to the extent that pursuant to CPLR 3102(c) this Court hereby issues an order compelling respondent to comply with petitioner's outstanding pre-arbitration requests to produce, namely, to comply with Progressive's demands and that Saez will produce, cooperate, comply or submit to an IME and EBT, and provide authorizations for his medical records, and thus the pending UM arbitration before AAA is hereby temporarily stayed. Respondent Saez is thus hereby directed to comply with these requests and requirements by September 18, 2017(*see* (*see* ***Matter of State Farm Mut. Automobile Ins. Co. v Wernick,*** 90 AD2d 519, 455 NYS2d 30 [2d Dept 1982]; ***Allstate Ins. Co. v Baez,*** 269 AD2d 392, 702 NYS2d 878 [2d Dept 2000]).

Further, since this Court finds that the absence of any mention of a third unidentified "hit and run" or fleeing vehicle on the NJ accident report suffices to raise the existence of a triable issue of material fact concerning involvement of a hit and run component underlying Saez's motor vehicle accident. This Court further determines that it will not consider the putative property damage photos offered by GEICO and Florio as they are not inadmissible form. Thus, GEICO and Florio have failed to carry their burden of establishing that the subject incident was of a "hit and run" nature. Additionally, this Court finds that given Florio's nature of involvement indicated on the accident investigation report, GEICO and Florio shall be joined as necessary respondents to this proceeding.

Given the existence of a triable issue of material fact as concerns whether Saez's accident was caused by a "hit and run" regarding Florio, the Court holds that this matter shall be set down for a framed issue hearing where the parties shall submit proof, argument or evidence in competent or admissible form bearing on this issue.

Lastly, Progressive's request for the issuance of CPLR 3108 commission for deposition of the unidentified New Jersey State police trooper, author of the accident investigation report, is hereby denied without prejudice with leave to renew as premature. The record in its infant state does not support that Progressive has been rebuffed in attempts to secure the trooper's

attendance or cooperation with a pre-arbitration deposition, and based upon this the application is premature at this juncture.

Accordingly, it is

ORDERED that the parties appear before this Court on **September 18, 2017 at 10:30 a.m.,** for the purposes of holding a **framed issue hearing**; and it is further

ORDERED that the Verified Petition is hereby amended to add as additional proposed respondents Stephen Florio and Government Employees Insurance Company; and it is further

ORDERED that petitioner serve a copy of this order with notice of entry on respondent and additional respondents no later than May 15, 2017; and it is further

ORDERED that respondent Saez comply with any and all outstanding pre-arbitration requests to produce discovery as outlined above no later than September 18, 2017.

The foregoing constitutes the decision and order of this Court.

Dated: April 4, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**