

<b>Matter of Travelers Indem. Co. of Conn. v McLeod</b>
2017 NY Slip Op 31234(U)
June 5, 2017
Supreme Court, Kings County
Docket Number: 520103/16
Judge: Wavny Toussaint
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At an IAS Term, Part 70 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 5<sup>th</sup> day of June, 2017.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

-----X  
Matter of Petition of TRAVELERS INDEMNITY CO.  
OF CONNECTICUT for an Order Staying Arbitration,

Petitioner,

- against -

BRENDA MCLEOD,  
Respondent.

-----X

**DECISION AND JUDGMENT**

Index No. 520103/16

Mot. Seq. #1

The following e-filed papers read herein:

NYSCEF #:

Notice of Petition, Petition, Supporting Affirmations (Affidavits), and Exhibits Annexed _____	<u>1-8</u> _____
Opposing Affirmation and Exhibits Annexed _____	<u>11</u> _____
Reply Affirmation _____	<u>12</u> _____

Respondent Brenda McLeod (respondent) seeks uninsured motorist benefits, under a policy of insurance issued by petitioner Travelers Indemnity Co. of Connecticut (petitioner), for physical injuries she allegedly sustained, when an unknown hit-and-run driver rear-ended an Access-A-Ride (AAR) vehicle in which she was a passenger. The petitioner commenced this proceeding to permanently stay the arbitration of the respondent's claim on the ground that she failed to report the accident to the police, a peace or judicial officer, or the Commissioner of Motor Vehicles within 24 hours of the accident or as soon as reasonably possible thereafter, as required by the uninsured motorist endorsement of the subject policy.

In opposition, respondent alleges that the driver of the insured's vehicle failed to follow proper protocol, in that she did not obtain any identifying information from the

offending vehicle and did not report the accident to the police. Additionally, respondent alleges that when she requested that a police report be made, she was advised by a supervisor of the insured's driver that a police report was not necessary. Respondent did however, call the Access-A-Ride program while at the scene and reported the accident; a handwritten statement was taken from respondent by Access- A-Ride supervisor, Emanuel Spence.

### ***Discussion***

“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 [2d Dept 2010]). “Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing” (*Matter of Merchants Preferred Ins. Co. v Waldo*, 125 AD3d 864, 865 [2d Dept 2015]).

Although the petition is unverified, the lack of verification does not invalidate it. CPLR 3022 provides that “[w]here a pleading is served without a sufficient verification in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice with due diligence to the attorney of the adverse party that he elects so to do.” The respondent failed to give notice to the petitioner pursuant to CPLR 3022. Further, the respondent has suffered no prejudice. Accordingly, the Court ignores the lack of verification of the petition (*see Gaffey v Shah*, 131 AD3d 1006, 1007 [2d Dept 2015]).

Petitioner has shown prima facie that the respondent failed to report the alleged hit-and-run accident to the police or to the Commissioner of Motor Vehicles within 24 hours of the accident or as soon as reasonably possible thereafter, as required under the policy. Respondent testified at her 50H statutory hearing that she did not report the subject accident to the police and never received a police report. Her testimony was as follows:

“Q. [D]o you know if you even actually called the precinct?”

- A. I may have, but I don't remember. I don't want to say yes.
- Q. And did you get any information? Do you recall getting any information from the precinct as to how to report the accident?
- A. Yeah, kind of, if I remember, because I got this in my mind, so I must have definitely called them. It was about how do I go about filing, that I had to go to some other insurance, something to call, some kind of claim, come down and fill out a paper or I don't know what they call it, a hit and run or something, some kind of, and you got to retrieve information. It was something, but I didn't follow up with it.
- Q. So you never did what they told you to do regarding the filing of a claim?
- A. Right.
- Q. Why didn't you follow through with that?
- A. I don't know why I didn't follow through with it. I don't remember, I don't. I was in a state of shock when this all happened.
- Q. Did you ever go down to the precinct or the station house or was it only by a phone call?
- A. No.
- Q. Did you ever fill out the forms they told you about?
- A. No.
- Q. Did you ever file a claim with the police?
- A. No.
- Q. Did you ever report the actual accident to the police?
- A. No, because – can I say something?  
[The respondent's counsel, interrupting]: No.  
[The respondent]: Oh, don't? Okay.

(Respondent's 50-H testimony at page 91, line 7 to line 22 ).

It is well established that evidence of compliance with the notice provision is a requirement preliminary to the arbitration process (see Matter of Government Empls. Ins. Co. v Bartlett, 112 AD3d 826, 827 [2d Dept 2013]; Matter of Government Empls. Ins. Co. v Snell, 286 AD2d 682, 683 [2d Dept 2001]; Matter of United States Fire Ins. Co. v Williams, 166 AD2d 538, 538-539 [2d Dept 1990]; Matter of Aetna Cas. & Sur. Co. v Loy, 108 AD2d 709, 710 [1<sup>st</sup> Dept 1985]).

In opposition to the petitioner's prima facie showing, the respondent has failed to raise a triable issue of fact. The respondent's sworn testimony at a hearing under General Municipal Law § 50-h (the GML hearing) reveals that she is a fairly sophisticated individual in her early 50s, having worked in the Office of the United States Attorney for the Southern District of New York and in the Internal Revenue Service for decades as a secretary/paralegal. Her testimony at the 50H hearing that she was "shocked" by the accident is undercut by her refusal to seek medical attention at the scene and, more so, by her shopping at a nearby supermarket during the time it took for a replacement Access-A-Ride car to arrive at the scene of the accident. She was unable to explain at her 50H why she failed to file an accident report with the police. The respondent's testimony that an Access-A-Ride road supervisor told her that *generally* there was no need for her to call the police about the accident does not negate her *specific* legal obligation to notify them in order to obtain the uninsured motorist coverage for her claimed injuries.

Respondent's reliance on Matter of American Transit Ins. Co. v Golden (2016 NY Slip Op 31515[U] [Sup Ct, NY County 2016]) is misplaced. There, the IAS court temporarily stayed the arbitration pending determination at a framed-issue hearing as to whether there was an underlying accident. In *American Transit*, as was the case here, no police report of

the accident was ever filed. However, the similarities end there. That is, while in *American Transit* the occurrence of the accident was a matter in dispute, here it is undisputed that the accident did occur.

Accordingly, it is hereby

**ORDERED** that the petition is granted; and it is further

**ORDERED** that, pursuant to CPLR 7503, arbitration of the respondent's claim for uninsured motorist benefits is permanently stayed.

The foregoing constitutes the Decision and Judgment of the Court.

E N T E R,



J. S. C.

**HON. WAVNY TOUSSAINT**  
**J. S. C.**

*Nancy T. Sunshine*

**NANCY T. SUNSHINE**  
Clerk

2017 JUN -8 AM 9:41  
FILED  
KINGS COUNTY CLERK