

**Matter of Hartford Ins. Co. of Illinois v Gencarelli**

2017 NY Slip Op 32201(U)

October 17, 2017

Supreme Court, Tioga County

Docket Number: 47644

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 18th day of August, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN  
Justice Presiding

STATE OF NEW YORK  
SUPREME COURT : TIOGA COUNTY

In the Matter of the Application for an Order  
Staying Arbitration between  
HARTFORD INSURANCE CO. OF ILLINOIS,

Petitioner,

-against-

GUIDO GENCARELLI and DONNA GENCARELLI

Respondents,

-against-

ZAKARIYA M. SHAKHBAZOV,  
ZAKS TRANSPORTATION GROUP LLC, and  
PILGRIM INSURANCE,

Proposed Additional-Respondents,

DECISION AND ORDER

Index No. 47644

RJI No.

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**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court on the application of Hartford Insurance Co. of Illinois (“Hartford”), seeking a permanent stay of arbitration pursuant to CPLR §7503, and adding proposed additional Respondents. Hartford filed a Notice of Petition and Petition on July 7, 2017 (with exhibits). Respondents Guido Gencarelli and Donna Gencarelli (Gencarellis) filed opposition papers to the Petition, requesting that the petition to stay arbitration be denied, and that Gencarellis be allowed to pursue the uninsured motorist claim. This matter was returnable on August 18, 2017.

**BACKGROUND FACTS**

On March 31, 2017, Guido Gencarelli was involved in a motor vehicle accident on Interstate 80 in New Jersey. The police accident report indicates that the Gencarelli vehicle was traveling in the middle lane and lost control causing it to turn clockwise and into the right lane, where it was struck by a truck owned by Zaks Transportation Group LLC (“Zaks”) and being driven by Zakariya Shakhbazov (“Shakhbazov”). Gencarelli was insured by Hartford, and Pilgrim Insurance provided insurance coverage to Zaks and Shakhbazov. Following the accident, Mr. Gencarelli was taken to the hospital for his injuries and has had ongoing medical complaints. The police report listed no witnesses to the accident. The accident report makes no mention of another striking Gencarelli from behind, causing him to fishtail and go into the right lane.

Hartford conducted a telephone interview of Mr. Gencarelli on April 4, 2017, and at that time Mr. Gencarelli recounted that he felt his car fishtail suddenly, which caused him to swerve into the right lane. He stated that he did not know if he may have been bumped from behind by another vehicle. He submitted pictures in opposition to this Petition which purports to show damage to the rear of the vehicle which he contends is consistent with being struck from behind.

Mr. Gencarelli filed a Demand for UM/SUM Arbitration with Hartford on or about June 19, 2017. He alleges that he was struck by a hit and run driver, and therefore is pursuing an uninsured motorist claim.

#### LEGAL ANALYSIS/DISCUSSION

“CPLR 7503 (c) provides that a party upon whom a proper notice of intention to arbitrate has been served must apply to stay arbitration within 20 days of service of the notice.” *Matter of Giamo (Visscher)*, 94 AD3d 1395, 1396 (3<sup>rd</sup> Dept. 2012). Gencarelli’s demand for arbitration was served on Hartford on June 19, 2017, and Hartford filed this Petition eighteen days later, on July 7, 2017. Therefore, Hartford’s Petition is timely.

The party seeking a stay of arbitration for uninsured motorist benefits has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay. *Matter of Government Employees Ins. Co. v. Hua Huang*, 139 AD3d 950 (2<sup>nd</sup> Dept. 2016). Thereafter, the burden is on the party opposing the stay to rebut the prima facie showing. *Matter of Merchants Preferred Ins. Co. v. Waldo*, 125 AD3d 864 (2<sup>nd</sup> Dept. 2015). If a triable issue of fact is raised with respect to whether there was a hit and run, “the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue.” *Matter of Hertz Corp. v. Holmes*, 106 AD3d 1001 (2<sup>nd</sup> Dept. 2013), citing *Matter of Allstate Inc. Co. v. Aizin*, 102 AD3d 679, 681 (2<sup>nd</sup> Dept. 2013).

Here, Hartford has submitted the police accident report in support of its request to stay the uninsured motorist arbitration. The report only makes mention of the Gencarelli vehicle and the Zaks vehicle. The officer's report states that Gencarelli reported that his vehicle spun out in front of the Zaks vehicle and then he was struck by the Zaks vehicle. In light of the foregoing, Hartford has shown the existence of evidentiary facts that would justify the stay.

In response, Gencarelli has submitted an attorney affirmation attaching photographs of Gencarelli's vehicle after the accident. The photographs purport to show damage to the back of Gencarelli's vehicle, allegedly caused by the car that bumped him from behind. Gencarelli also submitted his own affidavit which states that it was his belief that he was hit from behind because he felt a bump to the back of his car before he lost control.

With respect to the photographs submitted in opposition, a photograph is generally only admissible if it is authenticated by the photographer or upon testimony of someone with personal knowledge that it accurately represents what it purports to depict. See CPLR 4518. A proper foundation must be provided by the party offering it. Here, there is no statement as to the authenticity of the photographs and therefore, no proper foundation for the photographs.

Even if the Court were to consider the photographs, there has been no admissible evidence submitted tying the damage to an alleged hit and run accident. While the attorney affirmation alleges that the photographs "show damages to the passenger side of his vehicle caused by the tractor trailer as well as damage to his rear bumper below the license plate caused by the car that bumped him from behind", the affirmation is not based on personal knowledge of the attorney. Therefore, it is not legally sufficient. Mr. Gencarelli's affidavit makes no mention of the photographs, and certainly does not indicate it was due to a hit and run incident. The damage could have pre-existed this accident.

Nor do the statements in Mr. Gencarelli's affidavit satisfy his burden. His affidavit simply states that it is his belief that he was bumped from behind. However, he provides no

details regarding that, such as whether he observed any vehicles behind him prior to the accident, or any other circumstances that would corroborate a hit and run situation. In addition, the police accident report made no mention of an alleged hit and run, from either Gencarelli or Zaks. This case is different from most hit and run cases, where the only witness is the injured party-because the hit and run driver has fled the scene. Here, however, there is an additional witness, Zaks, who made no mention of another vehicle.

Nor is the Court persuaded by the telephone interview statement provided by Mr. Gencarelli to Hartford. At that time, all Gencarelli could say was that he did not know what caused him to fishtail, and that he did not know if he got bumped from behind. There is nothing in his recorded statement, or affidavit, that provides any basis to substantiate a claim that he was struck from behind by another vehicle, which then fled the scene. Therefore, the Court concludes that Gencarelli has failed to rebut the prima facie showing made by Hartford.

Accordingly, it is hereby

ORDERED, that the Petition is GRANTED, and it is further

ORDERED, that pursuant to CPLR 7503, arbitration of Respondents claim for uninsured motorist benefits is permanently stayed.

**This constitutes the Decision and Order of the Court.**

Dated:           October 17, 2017  
                    Owego, New York

  
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HON. EUGENE D. FAUGHNAN  
Supreme Court Justice