

Matter of Progressive, Cas. Ins. Co. v Milter
2017 NY Slip Op 32234(U)
October 19, 2017
Supreme Court, New York County
Docket Number: 654885/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of PROGRESSIVE,
CASUALTY INSURANCE COMPANY,

Petitioner,

Index No. 654885/16
Motion Seq. Nos. 003

-against-

DECISION AND ORDER

To Stay the Arbitration sought to be had by YEFIM
MILTER,

Respondent,

-against-

STATE FARM MUTUAL INSURANCE
COMPANY and MICHAÏ RENE MAGLOIRE,

Additional Respondents.

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CAROL R. EDMEAD, J.S.C.:

In a petition seeking a permanent stay of arbitration, respondent State Farm Mutual Insurance Company (State Farm) moves, pursuant to CPLR 4403, to confirm the report of JHO Gammerman. Following a hearing held on April 27, 2017, JHO Gammerman’s found that State Farm properly disclaimed coverage to their insured Michai Rene Magloire (Magloire). Petitioner Progressive Casualty Insurance Company (Progressive) cross-moves for an order rejecting JHO Gammerman’s report and granting it a permanent stay of arbitration under CPLR 7503.

BACKGROUND

This petition arises from a car accident that took place on the morning of September 17, 2014. A vehicle owned by Magloire, State Farm’s insured, struck a vehicle driven by respondent Yefim Milter (Milter). The driver of Magloire’s vehicle, as well as a passenger, fled from the

scene of the accident. Subsequent to the accident, Magloire filed a police report claiming that his car had been stolen.

On September 29, 2014, Milter, or, more specifically, a member of Milter's family, notified Magloire's insurer, State Farm, of the accident. State Farm, on October 8, 2014, paid \$3,718.42 on Milter's property damage claim. However, following an investigation of the accident, State Farm determined that it was not obligated to compensate Milter for his bodily injury claims because Magloire violated the terms of his car insurance by failing to cooperate with the investigation into the accident.

Milter, denied by State Farm, turned to his own insurer, Progressive, on whom he served a demand for arbitration on his claim for uninsured benefits. Progressive responded, on September 15, 2016, by filing this petition to stay arbitration. By order dated January 13, 2017, the court temporarily stayed the arbitration pending a framed issue hearing on the issue of whether the offending vehicle is insured. The court referred the framed issue hearing to JHO Gammerman and joined State Farm and Magloire for purposes of the framed hearing.

Magloire failed to appear at the framed issue hearing, but State Farm produced Graham Willoughby (Willoughby), a claims specialist with State Farm's Special Investigative Unit. Willoughby testified that Magloire did not contact State Farm about the accident until October 21, 2014, when he called to seek payment for repairs to his vehicle (Framed Issue Hearing tr at 9). At that time, Willoughby testified, Magloire reiterated his claim that the vehicle was stolen at the time of the accident (*id.*).

However, when State Farm attempted to investigate Magloire's claims, Magloire began dodging State Farm. Willoughby testified as to the numerous times when State Farm tried to contact Magloire, by mail, phone, and in person (*see id.* at 10-16). Willoughby testified that, on

several occasions, he called Magloire’s cell phone, on which Magloire had initially called State Farm, only to have the person answering the call claim to not be Magloire and arrange a subsequent call with Magloire that would not, ultimately, take place (*id.* at 14).

Following cross-examination of Willoughby by Progressive’s counsel, JHO Gammerman found “that there’s sufficient lack of cooperation to justify the disclaimer” (*id.* at 28). While reserving the issue of waiver for this court, JHO Gammerman concluded:

“My recommendation is that the petition be dismissed and that the parties proceed to arbitration, and that the claimant for the uninsured benefits provide whatever he . . . is obligated to provide in connection with that claim, that is . . . medical exam and statements, whatever is appropriate, and then -- so . . . the recommendation would be that [this court] issue a judgment dismissing the petition”

(*id.* at 29).

In its motion to confirm, State Farm argues that JHO Gammerman properly determined the issue after hearing Willoughby’s uncontested testimony. Progressive, in its cross motion to reject the JHO Gammerman’s report, argues that: (1) State Farm waived its coverage defense for bodily injuries when it paid on Milter’s property damages claim; (2) JHO Gammerman wrongly determined the issue of non-cooperation; and (3) State Farm’s disclaimer was untimely.

DISCUSSION

CPLR 4403, entitled “Motion for new trial or to confirm or reject or grant other relief after reference to report or verdict of advisory jury,” provides:

“Upon the motion of any party or on [her] own initiative, the judge required to decide the issue may confirm or reject in whole or in part, the verdict of an advisory jury or the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing. The motion shall be made within fifteen days after the verdict or the filing of the report and prior to further trial in the action. Where no issues remain to be tried the court shall render decision directing judgment in the action.”

The First Department has long held that “[t]he report of a referee should be confirmed if the findings therein are supported by the record” (*Halpern v Halpern*, 264 AD2d 630, 630 [1st Dept 1999] [internal quotation marks and citation omitted]).

Waiver/Estoppel

Progressive argues that State Farm waived its non-cooperation defense by paying Milter on his property claim. For the same reason, Progressive argues that State Farm should be estopped from using the defense.

The doctrine of waiver refers to “a voluntary and intentional relinquishment of a known right” (*Albert J. Schiff Associates, Inc. v Flack*, 51 NY2d 692, 698 [1980]). Here, Magliore’s actions constituting non-cooperation took place after State Farm paid on the property claim. It would be illogical to say that it voluntarily waived rights arising from that conduct before it happened. Thus, State Farm has not waived its non-cooperation defense against Milter’s bodily harm claims.¹

The weakness of Progressive’s argument is evident from its citation to *Matter of Progressive Northeastern Ins. Co. (Heath)* (41 AD3d 1321 [4th Dept 2007]), which held that “[c]ontrary to the contention of respondent, the fact that Progressive paid no-fault benefits does not establish that Progressive waived the right to disclaim coverage on the UM claim” (*id.* at 32). Similarly, here the fact that State Farm paid on a property claim does not mean that it waived any objections to Milter’s bodily harm claim, even if those provisions for such payments are in the same section of the subject policy.

¹ This makes sense from a policy point of view because insurance companies should be free to pay relatively small property claims without forfeiting the right to do a larger investigation if there should be higher claims for bodily harm. This encourages the prompt payment of relatively small property claims.

Estoppel is also inapplicable here. Progressive cites to *Burt Rigid Box, Inc. v Traveler's Prop. Cas. Corp.* (302 F3d 83 [2d Cir 2002]), which noted:

“[c]ourts may hold that an insurer is estopped from asserting a defense of lack of coverage where, for example, an insurer, though not in fact obligated to provide coverage, defends the case without asserting any policy defenses, and as a consequence the insured reasonably suffers the detriment of losing control over its defense”

(*id.* at 95).

The circumstances described by the court in *Burt Rigid Box* plainly do not resemble the ones here, where State Farm's insured, Magloire, has declined to participate in either State Farm's investigation into the accident or this proceeding. More generally, estoppel as applied in the insurance context is an equitable doctrine that protects insureds, not other insurance companies. Thus, State Farm has not forfeited its non-cooperation defense by waiver or estoppel.

Non-Cooperation

Progressive argues that JHO Gammerman wrongly decided the issue of non-cooperation. Progressive cites to *Thrasher v United States Liability Ins. Co.*, 19 NY2d 159 [1967]), which held that, in order to show non-cooperation establishing a valid defense against coverage, “insurer must demonstrate that it acted diligently in seeking to bring about the insured's co-operation; that the efforts employed by the insurer were reasonably calculated to obtain the insurer's co-operation; and that the attitude of the insured, after his co-operation was sought, was one of willful and avowed obstruction” (*id.* at 168 [internal quotation marks and citation omitted]). This sufficiently describes Willoughby's uncontested testimony at the hearing before JHO Gammerman.

For whatever reason, Magloire repeatedly demonstrated a willful obstruction of the investigation into his accident. Thus, as JHO Gammerman's finding on non-cooperation is fully supported by the record, the court affirms that finding.

Timeliness

State Farm disclaimed coverage by letter dated June 17, 2015. Insurance Law § 3420 (d) requires that such disclaimers be made "as soon as is reasonably possible." Progressive briefly argues that this delay from Magloire's first refusal to provide a recorded statement, on October 29, 2014, was unreasonable. However, the record makes clear that State Farm's good faith efforts to continue to attain Magloire's cooperation were not unreasonable.

Discovery

As the court is confirming JHO Gammerman's recommendation that the petition be dismissed, the arbitrator and not this court, has jurisdiction over any discovery, if any, that should be exchanged between the parties.

CONCLUSION

Accordingly, it is

ORDERED that respondent State Farm Mutual Insurance Company's (State Farm's) motion to confirm the report of JHO Gammerman is granted; and it is further

ORDERED that petitioner's cross motion to reject the JHO Gammerman's report is denied; and it is further

ORDERED that the petition is dismissed; and it is further

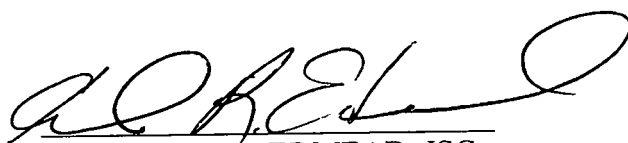
ORDERED that the Clerk is directed to enter judgment accordingly.

ORDERED that counsel for respondent State Farm Mutual Insurance Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the court.

Dated: October 19, 2017

ENTER:



Hon. CAROL R. EDMEAD, JSC

**HON. CAROL R. EDMEAD
J.S.C.**