

Travelers Cas. Ins. Co. of Am. v Abreu
2017 NY Slip Op 33242(U)
July 18, 2017
Supreme Court, Bronx County
Docket Number: 22504/2016E
Judge: Mary Ann Brigantti
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PART 15

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

TRAVELERS CASUALTY INSURANCE
COMPANY OF AMERICA,

Index No. 22504/2016E

-against-

Hon. MARY ANN BRIGANTTI

MYRA QUEVEDO ABREU

The following papers numbered 1 to 7 Read on this motion, STAY ARBITRATION
Noticed on May 4, 2016 and duly submitted on the Motion Calendar of April 17, 2017:

	PAPERS NUMBERED	
Notice of Motion- Exhibits and Affidavits Annexed	1,2	
Answering Affidavit and Exhibits	3,4	
Replying Affidavit and Exhibits	5	
_____ Affidavits and Exhibits	6,7	

Upon the foregoing papers, petitioner Travelers Casualty Insurance Company of America ("Petitioner") moves for an order permanently staying the arbitration demanded by respondent Myra Quevedo Abreu ("Respondent"), on the grounds of policy violations, or in the alternative, for an order directing Respondent to provide authorizations for all medical treatment and to appear for an examination under oath and a physical examination, together with such other and further relief as the Court may deem just and proper under the circumstances. Respondent opposes the petition and cross-moves for an order deeming the examination under oath and physical examination waived due to Petitioner's failure to pursue the same in a timely fashion, and for such other or different relief as this Court may deem justified. Petitioner opposes the cross-motion.

Background

On November 6, 2014, Respondent was involved in a motor vehicle accident while driving a vehicle owned by her employer and insured by Petitioner. The other vehicle involved in this accident was operated by Justice Opoku-Yeboah and insured by Progressive Insurance Company ("Progressive") with policy limits of \$25,000/\$50,000. Respondent thereafter commenced a lawsuit against the Progressive vehicle. Petitioner states that on February 26, 2016, Progressive tendered the full amount of its policy to

Respectfully Referred to: _____

Dated: _____

2 of 4 2

her insurer's consent to settle, thus prejudicing the insurer's subrogation rights, is precluded from asserting a claim for underinsured motorist benefits under the policy (*see Government Employees Ins. Co. v. Arciello*, 129 A.D.3d 1083, 1084 [2nd Dept. 2015]). An exception exists in situations where the insured advises the insurer of an offer to settle for the full amount of the tortfeasor's policy, which obligates the insurer either to consent to the settlement or advance the settlement amount to the insured and assume the prosecution of the tort action within thirty days (*id.*; 11 NYCRR 60-2.3[f]). If the insurer does not timely respond in accordance with this condition, the insured may settle with the tortfeasor without the insured's consent and without forfeiting his or her right to SUM benefits (*id.*, citing *Matter of Central Mut. Ins. Co. [Bemiss]*, 12 N.Y.3d 648, 659 [2009]). In other words, where, as here, an automobile insurance policy expressly requires the insurer's prior written consent to any settlement by the insured with a tortfeasor, the failure of the insured to obtain that prior consent constitutes a breach of condition of the insurance contract, and disqualifies the insured from obtaining benefits of the policy (*Matter of Metlife Auto & Home v. Zampino*, 65 A.D.3d 1151, 1153 [2nd Dept. 2009], quoting *Matter of State Farm Auto Ins. Co. v. Blanco*, 208 A.D.2d 933, 934 [2nd Dept. 1994]). The insured can nonetheless obtain benefits in this situation where he or she can demonstrate that "the insurer, either by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced in the settlement" (*id.*).

In this case, there is no dispute that Petitioner did not provide written consent to Respondent's settlement, as required by the SUM endorsement. Respondent, however, has submitted correspondence that she alleges indicates that Petitioner either waived the consent requirement or acquiesced to the settlement by its conduct (*see, e.g., Travelers Home and Marine Ins. Co. v. Kanner*, 103 A.D.3d 736, 738 [2nd Dept. 2013]). The August 20, 2015 letter advises of Respondent's intention to make a claim against the uninsured motorist coverage provisions of Petitioner's insurance policy and notes, in a preliminary fashion, the extent of Respondent's injuries. The August 25, 2015 letter includes documentation from Respondent's treating physician, establishes that Respondent has scheduled her cervical spine fusion surgery, and further notes that Respondent's potential damages are well in excess of the tortfeasor's available insurance coverage. Respondent therefore sought "permission and your consent to permit us to accept the forthcoming tendering of the primary defendant's policy" (Resp. Ex. B). Attached to this correspondence was Respondent's summons and complaint in her action commenced against the tortfeasor. Notably, this letter also referenced a conversation that Respondent counsel's office had with a representative of petitioner. On October 19, 2015, Respondent sent Petitioner yet another letter, stating that the tortfeasor's counsel indicated Progressive's "intention to tender the policy limits, of \$25,000 in light of the operative fusion undergone by the plaintiff" at a court appearance (Resp. Ex. C). This correspondence again requests permission "within the next thirty days" to resolve and settle the matter with the primary defendant. Finally, on January 14, 2016, Respondent "cc'd" Petitioner on correspondence she sent to the tortfeasor's counsel, noting issues of liability and damages, and requesting tendering of the full policy, as well as an affidavit that there is no

2015, wherein Petitioner acknowledges Respondent's intention to pursue an uninsured/underinsured motorist claim, acknowledges the policy limits of the adverse driver, confirming their insured's SUM limits, and requesting a copy of Respondent's MV-104 and any witnesses to the accident. The letter concludes "[w]e reserve our rights to request and [sic] examination under oath and independent medical exams." This letter did not address Respondent's request for consent to settle the matter with the tortfeasor.

In light of the parties' submissions and contentions, this Court determines that a framed issue hearing is necessary to resolve the issue of whether or not Petitioner either waived the written consent-to-settle requirement in its policy, or acquiesced to Respondent's settlement of her action against the tortfeasor through its own conduct, silence, or unreasonable delay. Notably, Respondent's opposing papers contained two exhibits that were not properly e-filed (Exhibits "B" and "I"), and therefore Petitioner had no full opportunity to respond to those documents. Furthermore, Petitioner has denied receipt of Respondent's August 25 and October 19, 2015 letters, thus requiring a hearing to resolve this issue. The Court notes that Respondent's counsel's affirmation in support of his cross-motion did not establish a presumption of proper mailing, because counsel did not allege that he personally mailed the letters until he filed his reply affirmation (*see generally Government Employees Ins. Co. v. Morris*, 95 A.D.3d 887 [2nd Dept. 2012]). At the hearing, the court will entertain further argument as to whether the letters - even if they were indeed sent - constitute proper written notice of a pending settlement offer in compliance with the controlling insurance policy provisions. Following the hearing, Petitioner's request for certain pre-arbitration discovery will be addressed, if necessary.

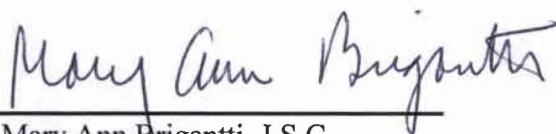
Conclusion

Accordingly, it is hereby

ORDERED, that the petition is granted only to the extent of temporarily staying arbitration and directing a framed issue hearing to be held on October 2nd, 2017, at 9:30AM, at Part 15, Room 702.

This constitutes the Decision and Order of this Court.

Dated: JULY 18, 2017


Hon. Mary Ann Brigantti, J.S.C.