

Matter of American Tr. Ins. Co. v Rafailov
2018 NY Slip Op 31078(U)
June 4, 2018
Supreme Court, Kings County
Docket Number: 515211/2017
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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**In the Matter of the Arbitration Attempted to be had
Between AMERICAN TRANSIT INSURANCE COMPANY,**

**DECISION /
ORDER and JUDGMENT**

Petitioner,

-against-

**Index No. 515211/2017
Motion Seq. No. 1
Date Submitted: 3/29/18
Cal No. 1**

IRINA RAFAILOV,

Respondent,

**MOHAMED SAADEE and GEICO INDEMNITY
COMPANY,**

Proposed Additional Respondents.

_____x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Petition to Stay Arbitration.

Papers	NYSCEF Doc.
Notice of Petition, Petition, Affirmation and Exhibits Annexed.....	<u>1-10</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>11, 12-15</u>
Reply Affirmation and Exhibits Annexed.....	<u>17-19</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a proceeding to stay an underinsured motorist arbitration arising out of a two vehicle accident. Petitioner American Transit Insurance Company insured the vehicle owned by Amazing Car & Limo Service Inc. and operated by Vadim Nisan with a \$25,000/\$50,000 policy. Respondent Irina Rafailov and non-party Albana Yaachayeva were passengers in the vehicle insured by American Transit on January

31, 2016 when it was in a accident with a vehicle owned and operated by Mohamed Saadee, in which non-party Malkel Murdakhayev was a passenger. GEICO concedes that Saadee was liable for the accident, and that Saadee's vehicle was insured by GEICO, with a \$25,000/\$50,000 policy, and that GEICO has tendered the full \$50,000 policy, which was divided equally, with \$12,500 paid to Rafailov, Nisam, Yaachayeva and Murdakhayev. Thus, GEICO contends that neither GEICO nor its insured Saadee should be joined as additional respondents. The petition was withdrawn after it was filed, as against GEICO, by a January 18, 2018 stipulation.

Respondent Rafailov, along with Nisan and Yaachayeva, have submitted UM/SUM claims to American Transit, each asserting an entitlement to \$12,500 in under-insurance coverage. Respondent Irina Rafailov contends she is entitled to \$12,500 in UM/SUM coverage as the amount of the GEICO coverage available to her (\$25,000) was reduced by the payment to Murdakhayev.¹ American Transit contends that under the circumstances, the UM/SUM coverage is only \$12,500, that it must be divided among the three claimants, and that SUM arbitration is required to divide the funds, based upon the three claimants' injuries. America Transit cites 11 NYCRR § 60-2.3 (c)(3)(ii) for this conclusion.

Further, as petitioner American Transit concedes, although the policies were of equal coverage limits, Rafailov and the other two claimants are entitled to supplemental underinsurance coverage from American Transit because the tortfeasor's GEICO

¹ Respondent also contends that she forwarded a consent to settle letter to petitioner, to which petitioner failed to respond; that discovery in aid of arbitration is available only in the presence of extraordinary circumstances that are absent here; that discovery was waived by the delay in seeking it; and that petitioner has access to respondent's medical records as the no-fault carrier. Petitioner does not controvert these contentions.

coverage was reduced to an amount less than the American Transit coverage by a payment to claimant Murdakhayev, a passenger, who was not insured by American Transit (see *Allstate Ins. Co. v Rivera*, 12 NY3d 602, 610 [2009]). Thus, American Transit asserts there is only \$12,500 in SUM coverage available. This is the \$12,500 difference between American Transit's coverage of \$50,000 per accident and the GEICO coverage of \$37,500 (\$50,000 per accident less the \$12,500 paid to Murdakhayeva).

American Transit correctly states that the resulting SUM coverage of \$12,500 must be divided among the SUM claimants, rather than providing \$12,500 for each SUM claimant. That is the only result consistent with "the core principle underlying SUM coverage—that insureds can never use a SUM endorsement to obtain a greater recovery for themselves than is provided under the policy for third parties injured by the insureds" (*Allstate Ins. Co. v Rivera*, 12 NY3d at 610). If each of the three claimants received \$12,500 in addition to the \$12,500 they each received from GEICO, the total recovery would exceed the \$50,000 per accident which the policy with American Transit provides for.

Accordingly, it is

ORDERED that the branch of the petition to stay the arbitration is denied, and it is further

ORDERED AND ADJUDGED that respondent Irina Rafailov's underinsurance claim shall be joined into one SUM Arbitration with the claims made by Vadim Nisan and Albana Yaachayeva, and the funds divided according to an assessment of the

respective parties' injuries, unless they stipulate how to divide the funds, and it is further

ORDERED AND ADJUDGED that the total amount of underinsurance coverage available to be paid to all three claimants is \$12,500.

This shall constitute the decision, order and judgment of the court.

Dated: June 4, 2018

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**