

Matter of Progressive Ins. Co. v Bartner
2018 NY Slip Op 32814(U)
November 1, 2018
Supreme Court, New York County
Docket Number: 652286/18
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
In the Matter of the Application for a stay of Arbitration of
PROGRESSIVE INSURANCE COMPANY,

DECISION AND ORDER
Index No. 652286/18
Motion Seq. No. 001

Petitioner,

-against-

FERN BARTNER and CLAYTON BARTNER,

Respondent.

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

Petitioner Progressive Insurance Company (Progressive) seeks an order, pursuant to CPLR 7503, permanently staying an arbitration initiated by Respondents Fern Bartner and Clayton Bartner. Alternatively, if the Court denies the application for a permanent stay, Progressive seeks an order temporarily staying arbitration to allow for the parties to conduct discovery under the auspices of the Court, rather than those of the American Arbitration Association (AAA). In opposition, the Respondents argue that the Petition should be denied in all respects.

BACKGROUND

On April 24, 2018 Respondents made an arbitration demand to Petitioner through AAA's New York State SUM/UM Arbitration Tribunals. The basis for the demanded arbitration in Progressive's insurance policy No. 02838457-0 with Josef Traffic Consulting, the owner of a van involved in an accident that injured Respondents. The policy was effective from January 18, 2016 until January 18, 2017 and it has \$100,000 limit (NYSCEF doc No. 2). The tenth Condition of the subject policy provides, in relevant part, that "upon written demand of either the claimant

or us, the matter or matters upon which we do not agree with such person shall be settled by arbitration in accordance with the rules and procedures of the [AAA]" (NYSCEF doc No. 2 at 51-52).

The underlying accident took place on November 17, 2016. On that day three siblings, Respondents and their brother, nonparty Lloyd Bartner, were working together for their family's business, Josef Traffic Consulting, the insured on the subject policy. More specifically, they were transporting boxes and bags from an apartment in Manhattan to a warehouse in the Bronx. Lloyd Bartner sat in the driver's seat of the van insured by the subject policy while his brother and sister, Respondents, did five or six trips in which they deposited boxes and bags into the van. On their final load before leaving for the Bronx, Respondents were walking toward the van with boxes and bags when another car struck the van and propelled onto the sidewalk and into them. While Respondent Fern Bartner lost consciousness, she

"later learned that I had been thrown against the wall of the apartment building. As a result of the accident ... [m]y right leg was amputated, my hip and pelvis were fractured, my lower back was fractured, my jaw was fractured, my left leg was shattered, and the flesh and skin were ripped from it. I have undergone multiple surgeries ... I am now confined to a wheelchair in my home."

(Fern Bartner affidavit, ¶ 4, NYSCEF doc No. 15).

Respondent Clayton Bartner also alleges that he suffered serious injuries from the accident, including fractures in his foot, a skull hematoma, a scalp laceration, hearing loss and several damaged discs in his spine (Clayton Bartner affidavit, ¶ 4, NYSCEF doc No. 16).

Respondents allege that the car that struck the van was carried a liability limit of \$25,000/\$50,000 (*id.* at ¶ 5, NYSCEF doc No. 15 at ¶ 5).

Progressive argues that the Court should stay arbitration, pursuant to CPLR 7503, as Respondents were not "occupying" the van at the time of the accident. Respondents argue that

they should be covered, as they were vehicle oriented in that they were continually returning to the van prior and were doing so at the time of the accident.

DISCUSSION

New York's statutory framework around arbitration, embodied in CPLR Article 75, largely overlaps with and echoes the Federal Arbitration Act (the FAA). CPLR 7501, entitled "Effect of arbitration agreement," provides:

"A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute"

Generally, the Court of Appeals has made clear that the New York Legislature, like Congress, has shown a policy preference for arbitration: "The CPLR arbitration provisions (CPLR 7501 *et seq*) evidence a legislative intent to encourage arbitration" (*Weinrott v. Carp*, 32 NY2d 190, 199 [1973]).

Progressive brings its Petition to stay under CPLR 7503. CPLR 7503 is entitled "Application to compel or stay arbitration; stay of action; notice of intention to arbitrate." Its subsection (b) refers to applications to stay arbitrations and provides:

"Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502"

Progressive does not argue that a valid agreement to arbitrate has not been made or complied with; nor does it argue that Respondents failed to comply with the notice requirements of CPLR 7503 (c). Instead, Progressive jumps into the substantive question of whether

Respondents occupied the vehicle for purposes of coverage under the subject policy. Where there is a valid arbitration agreement that has been complied with, such a question is best left, in the first instance, for the arbitrator (*see Matter of Monarch Consulting v National Union Fire Ins. Co. Pittsburgh, PA*, 26 NY3d 659, 675-6766 [2016]). Accordingly, Progressive's application for a permanent stay of arbitration pursuant to CPLR 7503 must be denied.

Progressive's alternative application for a temporary stay of arbitration--to allow for discovery here in state court before shifting to arbitrator's jurisdiction--is also denied. Granting this relief would contravene New York's preference for arbitration. The AAA arbitrator is competent to order any discovery she deems fit in analyzing the issues presented by this arbitration.

CONCLUSION

Accordingly, it is

ORDERED that Petitioner Progressive Insurance Company's (Progressive) Petition to stay arbitration is denied; and it is further


ORDERED that the Petition is dismissed; and it further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that counsel for Progressive shall serve a copy of this order, along with notice entry, on all parties within 15 days of entry.

Dated: November 1, 2018

ENTER:



Hon. CAROL R. EDMED, J.S.C.

HON. CAROL R. EDMED

J.S.C.