

**Travelers Cas. Ins. Co. of Am. v Abreu**

2018 NY Slip Op 33869(U)

April 19, 2018

Supreme Court, Bronx County

Docket Number: 22504/2016E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

PART 15

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

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

TRAVELERS CASUALTY INSURANCE  
COMPANY OF AMERICA,

Index No. 22504/2016E

-against-

Hon. MARY ANN BRIGANTTI

MYRA QUEVEDO ABREU

The following papers numbered 1 to 10 Read on this motion, STAY ARBITRATION  
Noticed on May 4, 2016 and duly submitted on the Motion Calendar of February 5, 2018:

	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 (Additional submissions)	6,7	8,9,10

By Decision and Order dated July 18, 2017, this Court granted the petitioner Travelers Casualty Insurance Company of America (“Petitioner”)’s petition to stay the arbitration demanded by the respondent Myra Quevedo Abreu (“Respondent”) to the extent of setting this matter down for a framed issue hearing to resolve the issues raised in the petition and Respondent’s cross-motion for an order deeming the examination under oath and physical examination waived. At the hearing date, the parties agreed to provide additional memoranda of law and allow this Court to make a decision solely on those papers submitted.

In the original decision, this Court found Respondent failed to establish a presumption of proper mailing of the August 25 and October 19, 2015 letters because Respondent’s counsel only averred that he personally mailed those letters for the first time in a reply affirmation (citing *Government Employees Ins. Co. v. Morris*, 95 A.D.3d 887 [2<sup>nd</sup> Dept. 2012]). Since Petitioner has now had the opportunity to respond<sup>1</sup> to Respondent’s reply contentions, the Court reviews the parties’ complete submissions to address the issue of mailing.

Respondent’s counsel’s reply affirmation satisfactorily established that the August 25 and October 19, 2015 letters were mailed to Petitioner. Respondent’s counsel asserted under penalty of

Respectfully Referred to: \_\_\_\_\_  
Dated: \_\_\_\_\_

<sup>1</sup>Petitioner’s affidavit and exhibits are considered over Respondent’s objection.

perjury that he “personally mailed both letters – to Ms. Roseanne Hanson on August 25, 2015 and then to Travelers Claims Manager, Bill Hoscher on October 19, 2015, in accordance with my customary business practice” constituted an affidavit of service which raised the presumption that these mailings occurred (*see Kihl v. Pfeffer*, 94 N.Y.2d 118, 122 [1999]; *Engel by Engel v. Lichterman*, 62 N.Y.2d 943 [1984]; *see also Delta Diagnostic Radiology P.C. v. Chubb Group of Ins.*, 17 Misc.3d 16, 18 [2<sup>nd</sup> and 11<sup>th</sup> Jud. Distr. 2007]. [affiant’s personal knowledge that a mailing occurred is sufficient]; 58 N.Y.Jur. 2d §550). The materials submitted by Petitioner fail to rebut this presumption. Petitioner submits a two-page affidavit from an employee - allegedly the Claims Litigation Representative assigned to this matter – which appears to be cut off and fails to set forth evidence of Petitioner’s “regular practices and procedures in retrieving, opening, and indexing its mailing and in maintaining its files on existing claims” (*compare Gov’t Employees Ins. Co. v. Morris*, 95 A.D.3d 887, 888-89 [2<sup>nd</sup> Dept. 2012]). Additionally, the employee relays conversations she allegedly had with other people, which constitutes inadmissible hearsay, and Petitioner does not submit any affidavits from the intended recipients of Respondent’s mailings. Accordingly, Petitioner’s submissions amount at best to a mere “denial of receipt” of the August 25 and October 19, 2015 letters, which is insufficient to rebut the presumption of proper service (*see Badio v. Liberty Mut. Fire Ins. Co.*, 12 A.D.3d 229, 230 [1st Dept. 2004]).

The next issue is whether those letters constitute proper notice of a pending settlement offer in compliance with the controlling insurance policy provision, and whether Petitioner by its conduct waived the “consent-to-settle” requirement or acquiesced to Respondent’s settlement of her action against the underlying tortfeasor. This Court answers both of those questions in the affirmative.

As stated in the prior decision and order, an insured who settles with a tortfeasor in violation of a policy condition requiring his or 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 [2<sup>nd</sup> 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, even where, as here, the insured settles with a tortfeasor without obtaining the insurer’s prior written consent, the insured can nonetheless obtain underinsurance benefits where he or she can demonstrate that “the insurer, either by its conduct, silence, or unreasonable delay, waived the requirement of consent or acquiesced to the settlement” (*Matter of Metlife Auto & Home v. Zampino*, 65 A.D.3d 1151, 1153 [2<sup>nd</sup> Dept. 2009], quoting

Under the specific circumstances of this case, Respondent's counsel gave petitioner adequate notice of an impending, likely offer to settle from the tortfeasor vehicle in the full amount of the policy limits and explicitly requested Petitioners' consent to do so, which required some response from Petitioner. Having received none, Respondent was entitled to proceed as if the written consent requirement was waived and that Petitioner acquiesced to the February 2016 settlement.

An August 20, 2015 correspondence, admittedly received by Petitioner, advises that Respondent will undergo a "fusion" due to the accident and that the tortfeasor's insurance policy has limits of only \$25,000, thus Respondent advises that she intends to make a claim against a "U coverage provisions" of her insurance policy. The August 25, 2015 letter, *inter alia*, notes that Respondent has "catastrophic" injuries and in light of prior correspondence indicating that the tortfeasor had limited insurance coverage, "it is apparent that [the tortfeasor] will imminently be tendering its minimal policy limits of \$25,000.00." The letter goes on to request Petitioner's "permission and your consent to permit us to accept the forthcoming tendering of the primary defendant's policy." Respondent's counsel states in his affirmation that on August 26, 2015, he had a conversation with adjustor Roseanne Hanson who related, *inter alia*, that subject to receiving documentation concerning the injuries she was prepared to submit this matter to her superiors for approval. The October 19, 2015 correspondence advises Petitioner that, at a Court appearance before the Honorable Elizabeth Taylor, the tortfeasor's counsel indicated "their intention to tender the policy limits, of \$25,000 in light of the operative fusion undergone by the [Respondent]." The letter states "...kindly advise us within the next thirty days whether we have your permission to resolve and settle the limited limits of the primary defendant." This letter also included a courtesy copy of the summons and complaint. According to Respondent's counsel, the only response he received regarding the requested consent to settle was a December 2, 2015 letter from Petitioner. That letter only acknowledged Respondent's counsel's representation of the insured, noted the policy limits of the adverse vehicle and the SUM limits, requested Respondent's workers' compensation file, if any, and reserved Petitioner's rights to request an examination under oath and independent physical examination. This letter made no mention of Respondent's prior correspondence or prior communication with adjustor Roseanne Hanson.

Respondent's communications collectively constitute a sufficient conveyance of an anticipated settlement offer from the underlying tortfeasor, and it was incumbent upon Petitioner to respond to these communications to either accept or reject the anticipated offer. Prior to the torfeasor's formal tender on February 29, 2016, Petitioner was made well aware of the nature of Respondent's injuries, the circumstances surrounding the accident, and the limited insurance coverage of the tortfeasor vehicle. Respondent's letters indicate that a settlement is very likely and notably, at an October court appearance, the torfeasor's counsel specifically conveyed an intention to settle the matter for the policy limits.

Respondent's counsel on two occasions specifically requested that Petitioner consent to settle this matter for the policy limits, but Petitioner did not respond to those requests. Considering the totality of these circumstances, it was incumbent upon Petitioner to provide some response to Respondent's counsel regarding this issue. By not doing so, Petitioner acquiesced to the anticipated settlement, and Petitioner cannot now allege that Respondent has prejudiced Petitioner's rights. Given the communications from Respondent as well as the realities surrounding this litigation, Petitioner was clearly apprised of the likelihood of settlement offer and it was given opportunities to either consent or reject to such an anticipated settlement.

The subject provision states in pertinent part that “[a]n insured shall not otherwise settle with any negligent party, without *our* written consent, such that *our* rights would be impaired” (Conditions, at Par. 10) (emphasis in original); *see* 11 NYCRR 60-2.3[f]. There is nothing in case law interpreting the subject SUM policy provision or the associated regulation indicating that a “formal” offer of the underlying matter must be reported to the insurer, before an insurer is obligated to respond to an insured's request for consent to settle, or before an insured can begin to deem the insurer's conduct as an acquiescence to an impending settlement. “[T]he insurer's continuing actions, with knowledge of the insured's suit or *settlement negotiations* will constitute a waiver where the insured might reasonably conclude that he or she is proceeding with the consent of the insurer” (70 N.Y. Jur.2d Insurance §1857. Effect of clause requiring insurer's consent to action or settlement [emphasis added]; citing *Merchants Mut. Cas. Co. v. Wildman*, 21 Misc.2d 1073 [Sup. 1960], *judgment aff'd* 12 A.D.2d 664 [2<sup>nd</sup> Dept. 1960], *judgment aff'd*, 9 N.Y.2d 985 [1961]). While merely informing an insurer of the intention to make an underinsurance claim is not enough, an insured's written notice advising of the “pendency and settlement of the action” may be sufficient to trigger an insurer's obligation to provide a response (*see Matter of Transportation Ins. Co. (Pecoraro)*, 270 A.D.2d 851, 852 [4<sup>th</sup> Dept. 2000]).

In this case, Respondent sufficiently apprised Petitioner that a settlement was imminent in light of the alleged injuries, the facts of the case, the inadequate coverage for the tortfeasor vehicle, and the assurances from the tortfeasor's counsel at a Court appearance. Respondent's counsel specifically requested consent to settle and received no response. The record indicates that Respondent's counsel nevertheless had at least one substantive conversation with Petitioner's adjustor and that Petitioner acknowledged the circumstances of this matter in writing in a letter dated December 2, 2015, but it did not address the anticipated offer. Respondent again “cc'd” Petitioner in a January 2016 e-mail to the tortfeasor's counsel, indicating the circumstances surrounding this matter, the injuries, and requesting information from the tortfeasor to allow Respondent to proceed to underinsured motorist arbitration. Under these specific circumstances, Respondent was entitled to proceed with the understanding that she had Petitioner's consent to settle once the tortfeasor formally tendered the \$25,000 policy in February 2016.

Accordingly, that branch of the petition seeking a permanent stay of arbitration is denied.

The alternative relief sought in the petition, a temporary stay of arbitration and an order directing Respondent to provide medical authorizations and to appear for Examination Under Oath and physical examination, is granted. Contrary to Respondent's contention, Petitioner's conduct did not constitute a wilful waiver of its right to compel pre-arbitration discovery as contemplated by 11 NYCRR 60-2.3(e)(iii).

Accordingly, it is hereby

ORDERED, that the petition to permanently stay the arbitration demanded by Respondent is denied, and it is further,

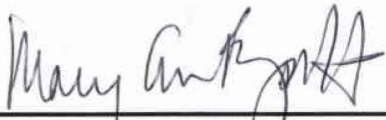
ORDERED, that the petition to temporarily stay the arbitration demanded by Respondent is granted to the extent that Respondent is directed to comply with all policy-required disclosure not previously complied with within sixty (60) days after service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that Respondent's cross-motion is denied.

The above constitutes the Decision and Order of this Court.

Dated:

4 | 19, 2018

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