

Matter of American Access Cas. Ins. Co. v B and H Pharm.

2019 NY Slip Op 30655(U)

March 15, 2019

Supreme Court, New York County

Docket Number: 650065/2019

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of American Access
Casualty Insurance Company,

Petitioner,

- v -

Index No.
650065/2019

**DECISION
and ORDER**

Mot. Seq. 1

For an Order Permanently Staying the Arbitration
Demanded by B and H Pharmacy d/b/a Chelsea
Mobility As the Assignee of Alirio De Jesus
Martinez Cuellar,

Respondent,

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Respondent B and H Pharmacy d/b/a Chelsea Mobility As the Assignee of Alirio De Jesus Martinez Cuellar (“Respondent”), filed a Demand for Arbitration, dated October 24, 2018, seeking \$1,887.56 for treatment allegedly rendered to Alirio De Jesus Martinez Cuellar (“Cuellar”) on September 24, 2018.

Petitioner, American Access Casualty (“Petitioner” or “American Access”), submits this petition for an Order pursuant to CPLR §7503 permanently staying the Arbitration on the grounds that (1) the matter is not subject to Arbitration; (2) there is no personal jurisdiction over American Access; (3) there has been no agreement between the parties to arbitrate this claim; (4) no fault benefits are not covered by the applicable policy; and (5) for costs and sanctions against Respondent for commencement of a frivolous Arbitration. In the alternative, American Access seeks a temporary stay of the Arbitration pending a Framed Issue Hearing on the issues of insurance coverage and service.

American Access submits the supporting Affidavit of Tim Penchar, a Senior Litigation Specialist. Penchar avers that American Access is an Illinois insurance company and is not authorized to conduct business in the State of New York.

Penchar states that American Access has no employees in New York, does not issue or deliver contracts to New York state residents or corporations, does not solicit business in the State of New York, does not have a Power of Attorney on file with the State of New York, and does not control or own insurances companies that issue policies in the State of New York.

Penchar avers that on March 17, 2017, American Access issued a motor vehicle insurance policy (“the Policy”) to Cuellar for a 2001 Toyota Corolla. The Policy was issued to Cuellar, who represented that his primary residence was located in Illinois. Penchar avers that Illinois is not one of the thirteen states where no-fault is provided, and therefore the Policy does not provide for No-Fault and/or Personal Injury Protection Coverage. Penchar avers that the Policy also does not contain an out of state insurance provision which would provide the minimum statutory coverage for any state in which the automobile is located.

Respondent does not oppose the Petition for a permanent stay of the Arbitration.

Legal Standard

CPLR §7503(b) states, in relevant part:

Application to stay arbitration. 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 . . .

“The party seeking a stay of arbitration has the burden of showing sufficient facts to establish justification for the stay.” *AIU Ins. Co. v. Cabreja*, 301 A.D.2d 448, 449 (1st Dept 2003). “[O]ne opposing a [petition to stay arbitration] must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 509 (1980).

In *American Transit Ins. Co. v. Hoque, et. at.*, 45 A.D.3d 329 [1st Dept 2007], 45 A.D. 3d 329, the First Department granted an out-of-state insurer a Petition to Stay Arbitration and vacated a prior related arbitration award based on lack of personal jurisdiction. The Court held that jurisdiction cannot be established over a Pennsylvania insurer that is not doing business in New York. *See Hereford Ins. Co. v. Am. Indep. Ins.*, 24 N.Y.S.3d 909, 909-910 (1st Dept 2016). That a driver “of the offending vehicle ... drove in this state is not ‘purposeful activity’ on the part of” the out of state insurer for purposes of personal jurisdiction. *Hoque*, 45 A.D. 3d at 329.

Discussion

American Access has demonstrated that it is not subject to personal jurisdiction in New York because it is an out of state insurer that is not doing business in New York. “[T]he mere unilateral act of [an automobile insurer's] alleged insured in driving into New York State, without more, is insufficient to permit the court to exercise long-arm jurisdiction over [the out-of-state insurer] under the CPLR.” *Matter of Eagle Ins. Co. v. Gutierrez-Guzman*, 21 A.D.3d 489, 491 (2d Dept 2005). American Access has also shown that there has been no underlying agreement between the parties to arbitrate this claim and no fault benefits are not covered by the Policy. Accordingly, American Access is entitled to a permanent stay of the Arbitration demanded by Respondent in New York. The portion of American Access’ motion which seeks costs and sanctions against Respondent is denied.

Wherefore it is hereby

ORDERED that the application to permanently stay the Arbitration demanded by Respondent B and H Pharmacy d/b/a Chelsea Mobility As the Assignee of Alirio De Jesus Martinez Cuellar, by Demand for Arbitration dated October 24, 2018 is granted without opposition; and it is further

ORDERED that Petitioner’s request for costs and sanctions against Respondent is denied; and it is further

ORDERED that Petitioner's counsel is directed to serve a copy of this order with notice of entry upon Respondent and the American Arbitration Association within 20 days of entry hereof.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: MARCH 15, 2019


EILEEN A. RAKOWER, J.S.C.