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| <b>Camara v Motor Veh. Indem., Corp.</b>   |
| 2019 NY Slip Op 31925(U)   |
| July 3, 2019   |
| Supreme Court, New York County   |
| Docket Number: 154900/2019   |
| 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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FILY CAMARA,

Index No.  
154900/2019

Petitioner,

- against -

**DECISION  
and ORDER**

MOTOR VEHICLE INDEMNIFICATION,  
CORPORATION,

Mot. Seq. 1

Respondent.

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

Petitioner Fily Camara (“Petitioner”) brings this petition, by Order to Show Cause, for an Order granting her permission to initiate suit as against Respondent the Motor Vehicle Accident Indemnification Corporation (“MVAIC”) pursuant to §5218 of the Insurance Law. MVAIC opposes.

Factual Background

Petitioner claims that she and her son were the passenger in the back seat of a Green Taxi Cab (the “taxi”) on June 16, 2016. Petitioner contends that the driver of the taxi slammed on the brakes resulting in Petitioner hitting her face on the partition and hitting her knees on the front seat of the taxi. Petitioner claims that she cried out in pain immediately after the alleged incident and was driven to the hospital. Petitioner contends that the taxi driver did not provide his information.

On November 7, 2016, Petitioner served a “Notice of Intention to Make Claim on MVAIC”. On February 21, 2017, MVAIC sent a letter denying Petitioner’s claim based on Petitioner’s failure to exercise diligence in identifying the offending vehicle.

Petitioner brings this special proceeding requesting the Court grant an Order permitting Petitioner to bring an action for damages resulting from her personal injuries sustained in the incident against MVAIC. MVAIC filed opposition.

### Parties' Contentions

Petitioner contends that she was not in the position to identify the driver of the taxi. Petitioner asserts that she was taken to the hospital after she sustained personal injuries. Petitioner contends that the police wrote a report when they came to the hospital and were unable to provide any information on the incident or the identity of the taxi driver. Petitioner argues that she has made “[a]ll reasonable efforts” to find the identity of the taxi, and the owner and operator of the taxi.

In opposition, MVAIC argues that Petitioner is not entitled to receive MVAIC benefits because she is not a “qualified person” pursuant to Article 52 of the Insurance Law. MVAIC asserts that a “qualified person” is a resident of New York State who does not own an automobile and at the time of the accident was uninsured. MVAIC contends that to receive benefits as a victim of a hit and run accident, a “qualified person” must file an affidavit stating, “the person has a cause of action for damages arising out of an accident and ... the cause of action is against a person whose identity is unascertainable...”. Insurance Law § 5208(a)(2)(i)(ii). MVAIC contends that once an individual qualifies as a hit and run victim, the “qualified person” can move to commence a lawsuit against MVAIC in Court pursuant to Insurance Law § 5218.

MVAIC argues that Petitioner failed to comply with Insurance Law § 5218(b)(5), which requires that all reasonable efforts have been made to identify the motor vehicle and the owner of the motor vehicle and operator. MVAIC avers that on February 13, 2017, Petitioner had an Examination Under Oath (“EUO”). MVAIC asserts that Petitioner states in her EUO that she had a conversation with the driver and spoke the same language, Wolof. MVAIC contends that Petitioner did not ask the driver’s name at any point after the incident or take a picture of the driver’s name or license plate, even though Petitioner stated in her EUO that the information was on the partition. MVAIC argues that Petitioner did not contact the police but instead called her “uncle”, or the father of one of her children, and her “uncle” called the police. Therefore, MVAIC argues that Petitioner failed to comply with Insurance Law § 5218 and failed to make reasonable efforts to identify the driver.

Moreover, MVAIC argues that Petitioner failed to prove that taxi was uninsured at the time the incident occurred. MVAIC asserts that to qualify for MVAIC benefits, Petitioner must show that there was no other insurance coverage on the day of the incident. MVAIC contends that MVAIC is a “remedy of last resort” and it must be shown that no other source of recovery exists for the victim. MVAIC asserts that on October 6, 2016, October 24, 2016, October 31, 2016, and November 29, 2016, mailed letters to Petitioner advising her that a “written verifiable

confirmation of insurance or lack of insurance” is required to be deemed a “qualified person”, and to date MVAIC has not received a response.

### Legal Standard

Insurance Law § 5218(b) provides that the court may permit an action against MVAIC upon satisfaction of certain enumerated conditions. Specifically, Insurance Law §5218, Procedure for “hit and run” cases, states, in relevant part:

(a) Any qualified person having a cause of action for . . . personal injury arising out of the ownership, maintenance or use of a motor vehicle in this state, when the identity of the motor vehicle and of the operator and owner cannot be ascertained . . . may, upon notice to the corporation, apply to the court for an order permitting an action therefor against the corporation in court.

(b) The court may proceed upon the application in a summary manner and may make an order permitting the action when after a hearing it is satisfied that:

(1) the applicant has complied with the requirements of section [5208] of this article;

(2) the applicant is a qualified person<sup>1</sup>;

(3) the injured or deceased person was not at the time of the accident operating an uninsured motor vehicle or operating a motor vehicle in violation of an order of suspension or revocation;

(4) the applicant has a cause of action against the operator or owner of the motor vehicle;

(5) all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator and either the identity of the motor vehicle and the owner

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<sup>1</sup>Pursuant to Insurance Law Section 601(b) a qualified person is defined as a resident of the state, other than the insured.

and operator cannot be established, or the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established; and  
(6) the application is not made by or on behalf of an insurer or surety . . .

Insurance Law §5208 states, in relevant part:

(a) The protection provided by the corporation on account of motor vehicle accidents caused by financially irresponsible motorists shall be available to:

(2)(A) Any qualified person having cause of action because of death or bodily injury, arising out of a motor vehicle accident occurring within this state and reported within twenty-four hours after the occurrence to a police, peace or judicial officer in the vicinity or to the commissioner, and who files with the corporation within ninety days of the accrual of the cause of action, as a condition precedent to the right to apply for payment from the corporation, an affidavit stating that: (i) the person has the cause of action for damages arising out of the accident and setting forth the supporting facts, (ii) the cause of action is against a person whose identity is unascertainable; and (iii) the person is making a claim for those damages.

Prior to the commencement of an action against MVIAC, the Court must be satisfied that “the identity of the motor vehicle and the owner and the operator thereof is unknown and unascertainable or that the identity of the operator is unknown and it is established that the vehicle was operated without the consent and permission of the owner.” *Simmons v Motor Vehicle Acc. Indemnification Corp.*, 44 AD2d 673 [1st Dept 1974]. All reasonable efforts to obtain such information must be made before resort may be had to the relief provided for in said section. *Id.* (citation omitted). The First Department has held that reasonable efforts include, filing a police report, canvassing the location of the accident and the surrounding area to locate possible eyewitnesses, and attempting to obtain surveillance footage. *Alam v. Motor Vehicle Accident Indemnification Corp.*, 127 A.D.3d 585, 586 [1st Dept. 2015].

Discussion

The Court ordered a hearing for June 26, 2019. Petitioner did not appear but her counsel offered her EUO testimony from February 13, 2017. It was stated on the record that Petitioner's boyfriend had insurance on a household car. The EUO testimony states that at the time of the incident, Petitioner was living with her son and her "uncle", her son's father. To date, Petitioner has not provided MVAIC with a "written verifiable confirmation of insurance or lack of insurance". Additionally, Petitioner failed to show she took reasonable efforts to ascertain the identity of the taxi driver. All reasonable efforts to obtain the identity of the driver must be taken before the Petitioner can commence an action against MVAIC. *Simmons*, 44 AD2d at 673. Petitioner does not state whether she attempted to obtain surveillance videos at the hospital where the taxi driver dropped her off after the incident or to locate possible eyewitnesses at the hospital or at the location of the incident. *Alam*, 127 AD3d at 586. Moreover, Petitioner's son was a passenger in the taxi at the time of the incident and was 16 years old when Petitioner testified in her EUO. There was no mention whether her son was able to give further identifying details. Petitioner therefore has not satisfied her burden and demonstrated that she is a "qualified person" pursuant to Insurance Law § 5218. Therefore, the Petition is denied.

Wherefore, it is hereby

ORDERED that the Petitioner's application for leave to bring an action against MVAIC is denied, and the proceeding is dismissed.

This constitutes the order and decision of the court. All other relief requested is denied.

Dated: JULY 3, 2019

  
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Eileen A. Rakower, J.S.C.