Matter of Liberty Mut. Ins. Co. v Interboro Mut. Ins. Co.
2019 NY Slip Op 32501(U)
July 13, 2005
Supreme Court, New York County
Docket Number: 114623/04
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN PART 11
Justice

IN THE MATTER OF THE APPLICATION OF LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner,

For an Order Staying the Arbitration Demanded by BRUCE L. HORNBECK FOR THE ESTATE OF PETER HORNBECK,

-against-

INTERBORO MUTUAL INSURANCE CO., GURCHANAN SINGH, and GURPHEET OBEROI,

Proposed Additional Respondents.

INDEX NO. : 114623/04
MOTION SEQ. NO.:002

MOTION DATE: 4/14/05

FILED
JUL 25 2005
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to ____ were read on this petition to stay arbitration

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ____	
Answering Affidavits — Exhibits ____	
Replying Affidavits ____	

Cross-Motion: [ ] Yes [x] No

Petitioner moves for renewal and reargument of this court's decision, order and judgment dated February 7, 2005 ("the original decision"), which denied and dismissed its application to stay the arbitration demanded by respondent for uninsured motorist benefits, and directed the parties to

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proceed to arbitration. Respondent opposes the motion.

Background

This proceeding arises out of a fatal accident that occurred on January 10, 2004, when respondent's adult son Peter Hornbeck (hereinafter "the P. Hornbeck") was hit by a vehicle ("the adverse vehicle") while crossing the street at the intersection of Park Avenue and 96th Street in Manhattan.

Petitioner sought to stay the uninsured motorist arbitration commenced by respondent arguing, inter alia, that the subject policy did not cover P. Hornbeck, who is an adult and not a member of respondent's household or a named insured under the policy. Respondent countered that P. Hornbeck was named, along with his parents, as an operator of the insured vehicle on the declaration page, and was therefore covered under the policy. In addition, respondent submitted proof in the form of a "rate quote document" dated January 27, 2000, which purportedly indicated that petitioner charged respondent an additional $1,160.00 in annual premiums to cover P. Hornbeck.[1]

Under the relevant uninsured motorist endorsement, respondent agreed to:

> A. ... pay compensatory damages which an "insured" is legally entitled to recover from the owner or operated of an "uninsured motor vehicle" because of "bodily injury"
> 1. Sustained by an "insured;" and
> 2. Caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle."

[1] The original decision erroneously indicated that this figure included $420.00 for uninsured motorist coverage when, in fact, the $420.00 was for liability coverage in general and $28.00 was for uninsured motorist coverage.

The term "Insured" is defined under Part B of the uninsured motorist endorsement to mean:

> 1. You or any "family member"
> 2. Any other person "occupying" "your covered vehicle"
> 3. Any person for damages that person is entitled to recover because of "bodily injury"to which this coverage applies sustained by a person described in 1. Or 2. above.

The definition section of the policy, provides that "throughout the policy, 'you' and 'your' refer to 1. The 'named insured' shown in the Declarations. The policy defines a "Family member" as "a person related to you by blood, marriage or adoption who is a resident of your household."

It is not disputed that P. Hornbeck was not a family member as defined by the policy as he did not reside in his parents' household, and was not listed as a named insured. However, P. Hornbeck was a named operator under the policy. Thus, the issue before the court was whether P. Hornbeck, as a named operator, was covered under the policy, even though he was not listed as a named insured and was not a family member of a named insured. In the original decision, the court concluded that as the policy failed to define the term operator or to exclude operator from coverage, and, since additional premiums were paid to for coverage, an ambiguity existed that was to be construed against the insurer and in favor of finding coverage.

Specifically the court wrote that:

> ...[P. Hornbeck], along with his parents, [is] named as an operator of the covered vehicle under the policy endorsements, and ... additional premiums were paid to insure the decedent. Furthermore, that the top left side of this policy lists respondent and his wife under "named insured" together with their mailing address, and fails to list the decedent under "named insured" is not dispositive as to who is insured. Since the policy names [P. Hornbeck] and his parents as operators of the covered vehicle and does not define the term operator, or exclude a person named as an operator of the vehicle

> from coverage as an insured, the failure to include decedent's name [under] the heading "named insured," at most, creates an ambiguity as to who is insured under the policy. In fact, if the court were to accept petitioner's argument, someone named as an operator under the policy would appear to obtain no benefit from this status, nor would any benefit result from the payment of additional premiums.

In reaching this conclusion, the court relied on the well settled principle that when "the meaning of a policy of insurance is in doubt or is subject to more than one reasonable interpretation, all ambiguity must be resolved in favor of the policyholder and against the company which issued the policy." See Boggs v Commercial Mutual Ins. Co., 220 AD2d 973, 974 (3d Dept 1995) (citation omitted). It also relied on Kennedy v. Valley Forge Ins. Co. 203 AD2d 930 (4th Dept), aff'd, 84 NY2d 963 (1994), which involved an issue similar to the one in the instant case. In Kennedy, the automobile liability policy listed the insured's son as a named driver, along with his parents, but did not name him as an insured under the policy. As the policy did not define the "named driver" or exclude the term from coverage, the Appellate Division, Fourth Department found an ambiguity which it construed against the insurance company. Accordingly, the Fourth Department held that the son should be afforded the same coverage as his parents, and the Court of Appeals affirmed this holding. Kennedy v. Valley Forge Ins. Co., 84 NY2d 963.

The Motion

Petitioner now seeks renewal on the grounds that respondent submitted the rate quote document without permission from the court, which was relied on in denying the petition, and that the meaning of the rate quote document was mischaracterized by respondent.

In support of its motion, petitioner submits the affidavit of Denise O'Connor-Sanford, who is a sales representative with petitioner. According to Ms. O'Connor-Sanford, she was contacted by

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respondent in January 2000, to prepare a quote for a possible new automobile liability policy for P. Hornbeck based on information provided to her by the respondent. Ms. O'Connor-Sanford states that she "sent the quote to [respondent] for review and he decided not purchase a policy for his son. I was informed that [P. Hornbeck] had insurance with another carrier and he decided to keep that insurance. While the quote was genuine, no auto policy with [petitioner] was ever written, for [P. Hornbeck]."

Petitioner also submits the affidavit of David A. Busch an underwriter for its New York Region. Mr. Busch states that:

> Our records show that Bruce Hornbeck [respondent] and Nancy Hornbeck have a valid automobile policy ... with [petitioner] since 1/27/00 [and that] petitioner never issued an automobile policy to Peter Hornbeck. Our records show that effective 1/27/02, Peter Hornbeck was added as a principal operator under the above stated policy. Also included in this endorsement was a change in classification to the 1989 Ford Bronco. These changes resulted in an increase in annual premium of $234. As Peter Hornbeck did not provide documentation that he had an insurable interest in all the vehicles of the policy, he was not eligible to be a named insured on the policy. As such, he was a principal operator of the 1989 Ford Bronco. A copy of this endorsement was issued to the Hornbecks in the form of a declaration page stating the changes to the endorsement and the premium adjustment associated with this change.[2]

Mr. Busch also states that:

> Our records show that, effective 03/03/04 (i.e. about a month after P. Hornbeck's death), Peter Hornbeck was removed as an operator from this policy. Included in this endorsement was a change in classification to the 1989 Ford Bronco , a change in defensive driver credit for the Ford Nissan Pathfinder, and an addition of APC

[2]Petitioner fails to submit a copy of the page from the declaration referred to by Mr. Busch. In fact, the only copy of the declaration included in petitioner's submission, is the copy relied on in connection with its petition which omits the page indicating that P. Hornbeck is an named operator under petitioner's policy.

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(accident prevention course) to the Ford Bronco. These resulted in a decrease in annual premium of $329.

In opposition, respondent notes that Mr. Busch admits that petitioner accepted premiums to add P. Hornbeck as an operator under the policy and that after his death, P. Hornbeck was removed from the policy and a decrease in premiums resulted.

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted). At the same time, however, a court, in its discretion, may grant renewal "in the interest of justice," even when the facts on which the renewal motion is based were known to the party at the time of the original motion. Id.

Here, although petitioner would have known about the facts contained in the affidavits submitted in support of its renewal motion at the time of the previous submissions, renewal should nonetheless be granted as the petitioner apparently did not have an opportunity to respond after respondent submitted the rate quote document. Moreover, based on the affidavit of Ms. O'Connor-Sanford, it appears that the original decision was incorrect insofar as it indicated, based on the rate quote document, that petitioner charged respondent an additional $1,160.00 in annual premiums to cover P. Hornbeck since the rate quote document related to a separate policy that was never purchased. Significantly, however, petitioner submits no proof controverting that P. Hornbeck was named as an operator under the policy at issue, or that respondents paid additional premiums to have him named an operator under the policy.

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In fact, Mr. Busch confirms that in January 2002, P. Hornbeck was added as a principal operator under the policy, that additional premiums were paid as a result, and that after his death the amount of premiums were reduced. And, while Mr. Busch states that since P. Hornbeck did not provide documentation that he had an insurable interest in all the vehicles of the policy, he was not eligible to be a named insured under the policy, Mr. Busch does not specify the relevancy or materiality of an insurable interest in all the vehicles of the policy in determining whether an individual is covered under the policy. Nor does Mr. Busch specify any rights arising out of P. Hornbeck's status as a named operator under the policy. Thus, his affidavit is insufficient to resolve the ambiguities in the policy arising from P. Hornbeck's status as an operator.

Accordingly, the new evidence submitted by petitioner does not provide a sufficient basis for altering the court's determination that the policy was ambiguous since it names P. Hornbeck and his parents as operators of the covered vehicles, does not define the term operator, or exclude a person named as an operator of the vehicle from coverage as an insured. Moreover, the record still shows that premiums were paid in to add P. Hornbeck as named operator under the policy, even if they were is less than indicated in the original decision.

Petitioner also moves for reargument on the grounds that contrary to the original decision, Kennedy v. Valley Forge Ins. Co., is irrelevant here, arguing that the instant case involves an unambiguous exclusion from coverage when the claimant is not a member of the household, and in Kennedy, there was no indication that the policy contained such an exclusion.

In contrast to petitioner's characterization, there is no specific exclusion under the subject policy for family members who are not residents of same household as the named insured. Rather, non-resident family members are simply not included in the definition of an "Insured" under the

relevant policy provisions. As petitioner mischaracterizes the provisions of the policy and the basis for the court's decision in stating its grounds for reargument, reargument is denied.

In addition, it is well-settled law that a motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

Under this standard, petitioner fails to demonstrate that the court misapprehend relevant facts or misapplied the law and, on these grounds, reargument is denied. In petitioner's new legal argument in support of reargument, petitioner's attempt to distinguish the instant case from Kennedy v. Valley Forge Ins. Co., CNA is unavailing. As indicated above, Kennedy involved the issue of whether the son of a named insured, who was listed in the policy as a "named driver" along with his parents, was covered under petitioner's insurance policy. As the term "named driver" was not defined under the policy and the policy did not exclude the driver from coverage, the Kennedy court found that an ambiguity was created that should be construed against insurer. The court wrote that "[t]he failure of the policy to define the term 'named driver' or to exclude it from coverage gives rise to an ambiguity that must be construed in favor of the insured....if [the insurers] "wished to exclude 'named driver' from coverage, they were required to do so in clear and unmistakable language." 203 AD2d at 930 (citations omitted).

Thus, Kennedy is directly relevant to the instant case, which concerns whether an insurance

policy covers an individual who is named, along with his parents, as an operator under an insurance policy, which does not define the term operator or specifically exclude the operator from coverage under the policy.[3] Kennedy did not address whether the named driver was also member of his parents' household, and obviously would not have addressed any provision excluding a family member who was not a resident of the household. However, even if such distinction existed, it would be irrelevant, since the Kennedy court found that the son was covered under the policy, based on his status as a named driver. Similarly, here, the fact that P. Hornbeck is not a resident of his parents' household and thus does not qualify as a family member who is insured under the policy does not impact on whether he should be covered as a named operator under the policy. Indeed, had P. Hornbeck been insured as a family member, it would not have been necessary to include him as an operator under the policy and pay an additional premium for this status.

As stated in the original decision, "since the policy names [P. Hornbeck] and his parents as operators of the covered vehicle and does not define the term operator, or exclude a person named as an operator of the vehicle from coverage as an insured, the failure to include decedent's name of the heading 'named insured' creates an ambiguity as to who is insured under the policy." Moreover, such an ambiguity must be construed against petitioner as the insurer, and in favor the insured, particularly when, as here, the ambiguity concerns a purported limitation on insurance coverage. See Chang v. General Accident Ins. Co. of America, 193 AD2d 521 (1st Dept 1993)(holding that ambiguity in proof of loss provision "must be construed most favorably to the insured and strictly against the insurer, thereby placing the burden on the insurer to establish a construction of policy

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[3]In fact, in Kennedy, unlike in the instant case, the policy contained an exclusion, which according to the dissent, indicated that the policy did not provide liability coverage for the car that insured's son was driving.

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language...to prove that coverage does not exist or is limited'); Rocon Mfg., Inc. v. Ferraro, 199 AD2d 999 (4th Dept 1993)(ambiguities in policy of insurance must be resolved in favor of the policy holder and against the insurer especially when the language purports to limit the insurer's liability). Construing this ambiguity against petitioner, the original decision correctly found in favor of coverage based on P. Hornbeck's status as an operator under the policy.

Accordingly, the court adheres to its original decision dismissing the petition and directing that the parties proceed to arbitration.

FILED
JUL 25 2005
NEW YORK
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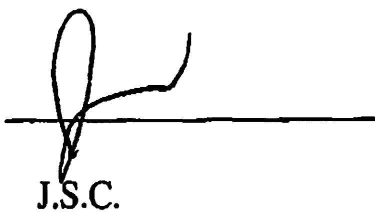
Conclusion

In view of the above, it is

ORDERED petitioner's motion to renew and to reargue is granted and, upon renewal and reargument, the court adheres to its original decision, order and judgment dismissing the petition and directed the parties to proceed to arbitration.

DATED: July 18 2005



J.S.C.

Check one: [x] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION