

Matter of American Trans. Ins. Co. v Akram
2020 NY Slip Op 30852(U)
March 9, 2020
Supreme Court, Kings County
Docket Number: 519189/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th March, 2020.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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In the Matter of the Application of the AMERICAN
TRANSIT INSURANCE COMPANY,
Petitioner,

Index No.: 519189/2018

- against -

DECISION AND ORDER

To Stay the Arbitration sought to be held by
WAQAS AKRAM,

Motion Sequence #1

Respondent,
and

KEYSTONE INSURANCE COMPANY, JOHN DOE
INSURANCE, JASMINE A. VIERA

Additional Co-Respondants.

-----X¹
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, _____
Opposing Affidavits (Affirmations).....	3 _____
Reply Affidavit	4 _____
Respondent Waqas Akram's Sur Reply	5 _____

Upon the foregoing papers in this CPLR Article 7 5 proceeding, the Petitioner, American

¹ This Court's March 20, 2019 Order herein (hereinafter referred to as the "March 2019 Order") added Keystone Insurance Company (hereinafter referred to as "Keystone"), John Doe insurance (hereinafter referred to as "JDI"), and Jasmine A. Viera (hereinafter referred to as "Viera") as Additional Co-Respondents.

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Transit Insurance Company (hereinafter referred to as “American”) moves (motion sequence #1) for an order, pursuant to CPLR 7503, granting its petition for (1) a permanent stay of arbitration sought by the Respondent, Waqas Akram (hereinafter referred to as “Akram”) on the ground that there is available insurance for the offending vehicle with Keystone or JDI; or alternatively, (2) granting a temporary stay of such arbitration pending a framed-issue hearing as to whether the alleged offending vehicle was “under insured;” granting leave to join the proposed additional respondents, Keystone, Viera, and JDI to this proceeding; and directing that Akram produce authorizations for all diagnostic films and medical records and submit to an examination under oath and physical examinations if, after a framed-issue hearing, it is determined that Akram is entitled to proceed to arbitration.

Background

Akram, on September 14, 2017, was operating a livery vehicle, purportedly owned by Neptune Taxi, Inc., which was allegedly hit in the rear, at the intersection of West 58th Street and 8th Avenue in Manhattan, by a 2015 Nissan vehicle, purportedly owned and operated by Viera. The Akram-operated livery vehicle, at the time of the accident, was insured by American (policy No. MPH400079) with third-party liability coverage of \$100,000/\$3000,000 and supplemental uninsured/ under insured motorist coverage of \$25,000/\$50,000. Akram commenced an action against Viera, on or about May 20, 2018, for personal injuries he allegedly sustained in the accident.²

Akram’s counsel first notified American by a June 18, 2018 letter that Keystone insured Viera’s vehicle; further notified American by an August 7, 2018 letter that Viera’s insurance carrier (i.e. Keystone) paid the policy amount; and requested, in the second letter, that American

² See *Akram v. Viera*, Kings’ County, Index No. 511097/2018 (hereinafter referred to as the “Related Personal Injury Action”).

“open a supplemental coverage file for [an] uninsured/ under insured claim.” Akram filed a demand for an under insured motorist arbitration on September 7, 2018 with the American Arbitration Association under claim number 1030913-01, and represented therein that the Tortfeasor’s Policy Limit is \$25,000 and the amount of his claim is \$100,000.

Akram filed a stipulation of discontinuance in the Related Personal Injury Action on September 19, 2018, and his counsel’s opposing affirmation herein states (at ¶ 6) that Keystone “paid the New York State Insurance minimum of \$25,000 to settle [the Related Personal Injury Action].

American, in response to Akram’s demand for arbitration, commenced this CPLR Article 75 proceeding to, as mentioned above, permanently stay arbitration of Akram’s claim on the ground that available insurance exists for Viera’s vehicle with Keystone or JDI, or, alternatively, to temporarily stay arbitration pending a framed-issue hearing to determine whether the Viera vehicle was “under insured,” and, if so determined, then to allow discovery from Akram. A March 2019 Order (*see n 1*) issued a temporary stay of arbitration and set the matter down for a framed-issue hearing to report on whether the Viera vehicle was “under insured” within the meaning of Akram’s policy with American at the time of the accident. A framed issue hearing was held on June 17, 2019, and the matter was resolved to the extent that both parties agreed that at the time of the accident American provided \$25,000 supplemental insurance coverage.

Discussion

The party seeking a stay of arbitration, as noted in the March 2019 Order, bears the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay (*see Matter of Merchants Preferred Ins. Co. v. Waldo*, 125 A.D.3d 864, 865 [2d Dept 2015]). “Thereafter, the burden shifts to the party opposing the stay to rebut the *prima facie* showing” (*id.*). “Where a triable issue of fact is raised, the Supreme Court, not the arbitrator,

must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue” (*Matter of Government Empls. Ins. Co. V. Tucci*, 157 A.D.3d 679, 680 [2d Dept 2018]).

“SUM [Supplementary Uninsured/Under insured Motorist] coverage in New York is a converse application of the golden rule; its purpose is ‘to provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident’ (*Weiss v. Tri-State Consumer Ins. Co.*, 98 A.D.3d 1107, 1110 [2d Dept 2012], quoting *Matter of Prudential Prop. & Cas. Co. v. Szeli*, 83 NY2d 681, 687 [Ct App 1994]). “When a policyholder purchases [SUM] coverage in new York, he or she is insuring against the risk that a tortfeasor’s underinsurance... will provide less protection for the policyholder than the policyholder provides to others when at fault in causing bodily injury” (*Matter of Unitrin Auto & Home Ins. Co. V. Gelbstein*, 109 A.D.3d 663, 663 [2d Dept 2013] [internal citations omitted]). Whether an individual is entitled to SOM benefits first requires determining whether the tortfeasor is an uninsured or underinsured motorist. That determination requires examining the insurance policies of the tortfeasor and party seeking SUM benefits (see *Matter of Allstate Ins. Co. v. Rivera*, 12 NY3d 602, 607-608 [Ct App 2009]). “SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor’s vehicle are less than the third-party liability limits of the policy under which a party is seeking SUM benefits” (*id.*).

Here, the temporary stay of arbitration is warranted and must be continued until the matter is fully resolved. A hearing was held, pursuant to the Order of the Honorable Lawrence Knipel, after referral by the undersigned, dated March 21, 2019, to hear and report “with recommendations with respect to the issue of whether the Viera vehicle was underinsured within the meaning of Akram’s policy with American Transit.” At that hearing, the parties agreed, before Special Referee Miriam Sunshine, that “there is \$25,000 supplementary coverage on the host vehicle by

Am. Transit.” The previous framed-issue hearing resolved the potential SUM coverage that Akram may be entitled to receive. However, there remains a triable factual issue as to whether Viera’s vehicle was “under insured” within the meaning of Akram’s policy with American at the time of the accident (*see Matter of Atlantic Mut. Ins. Co. v. Matera*, 304 A.D.2d 572, 573 [2d Dept 2003]; *Matter of New York Cent. Mut. Fire Ins. Co. v. Paillant*, 269 A.D.2d 451 [2d Dept 2000]).³ Accordingly, it is

ORDERED, that the Petition to stay arbitration is continued and a framed-issue hearing is directed before a Judicial Hearing Officer or Special Referee to hear and report regarding whether the Viera vehicle was “under insured” within the meaning of Akram’s policy with American at the time of the accident; and it is further

ORDERED that American shall serve a copy of this order and the March 2019 Order on all Additional Co-Respondents within 30 days of entry of this decision and order.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino
J.S.C.

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³American’s policy provides that an underinsured motor vehicle means:
“[A] motor vehicle that, through its ownership, maintenance or use, results in bodily injury to an insured, and for which... There is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident, but: (a) The amount of such coverage or bond is less than the third-party bodily injury liability of this policy; or (b) The amount of such insurance coverage or bond has been reduced, by payments to other persons injured in the accident, to an amount less than the third-party bodily injury liability limit of this policy; or, (c) The insurer writing such insurance coverage or bond denies coverage, or such insurer is or becomes insolvent” (petition, exhibit D at 1-2 [emphasis added]),