

Matter of Government Empls. Ins. Co. v Shower

2020 NY Slip Op 31360(U)

May 11, 2020

Supreme Court, Kings County

Docket Number: 526062/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 526062/2019
Motion Date:
Mot. Cal. No.:

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In the Matter of the Application of

GOVERNMENT EMPLOYEES INSURANCE
COMPANY to Stay Arbitration,

Petitioner,

-against-

DECISION/ORDER

MYRNA SHAWER,

Respondent.

-----X

The following papers numbered 1 to 3 were read on this petition:

Papers:	Numbered:
Notice of Petition//Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of aw.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the petition is decided as follows:

The petitioner brought this proceeding for an Order pursuant to CPLR 7503(c) granting a permanent stay of arbitration of respondent’s claim from Supplementary Uninsured Motorist (SUM) benefits under a policy of insurance issued by the petitioner. Alternatively, petitioner seeks an order setting this matter down for a hearing to determine whether respondent failed to comply with several conditions precedent to coverage, directing respondent to comply with the discovery provisions of the petitioner's policy in the event it is ultimately determined after a hearing that the respondent is entitled to proceed to arbitration, and for such other and further relief as the Court deems just and proper.

This proceeding arises out of a motor vehicle accident that occurred on December 2,

2016, allegedly involving an underinsured motorist. On October 25, 2019, the respondent MYRNA SHAWER settled her bodily injury claim against the tortfeasors, ELRAC LLC. and Hazel Salinas for \$25,000 which was the limits of their liability coverage by executing a general release.

In support of the petition, petitioner established by admissible proof that prior to settling with the tortfeasors for their available policy limits, neither MYRNA SHAWER nor her representatives put the petitioner on notice of the tender offer and failed to receive GEICO's consent to accept said offer. The policy of insurance pursuant to which respondent is seeking SUM benefits was issued by the petitioner and contains the following provisions:

EXCLUSIONS: This SUM Coverage does not apply 1. to bodily injury to an insured, including care or loss of services recoverable by an insured, if such insured, such insured's legal representatives, or any person entitled to payment under this coverage, with or without our written consent, settles any lawsuit against any person or organization that may be legally liable for such injury, care or loss of services, but this provision shall be subject to Condition 10.

CONDITIONS:

10. Release of Advance: In accidents involving the insured and one or more negligent parties, if such insured settles with any such party for the available limit of the motor vehicle bodily injury liability coverage of such party, release may be executed with such party after thirty calendar days actual written notice to us, unless within this time period we agree to advance such settlement amounts to the insured in return for the cooperation of the insured in our lawsuit on behalf of the insured.

We shall have a right to proceed of any such lawsuit equal to the amount advanced to the insured and any additional amounts paid under the SUM coverage. Any excess above those amounts shall be paid to the insured.

An insured shall not otherwise settle with any negligent party, without our written consent, such that our rights would be impaired.

In support of its petition, petitioner submitted admissible proof that respondent never notified the petitioner of her intent to settle her bodily injury claim with ELRAC LLC and Hazel Salinas. For this reason, petitioner claims that the respondent is not entitled to arbitrate her claim for SUM benefits.

Where, as here, an insured fails to preserve its insurer's subrogation rights, the insured is precluded from asserting an underinsured motorist claim (*Weinberg v. Trans American Insurance Co.*, 62 N.Y.2d 379, 465 N.E.2d 819, 477 N.Y.S.2d 99; *State Farm Mutual Automobile Insurance Company v. Taglianetti*, 122 A.D.2d 40, 504 N.Y.S.2d 476). In other words, the issuance of a general release by the insured which fails to protect the subrogation rights of his or her own insurer will result in a forfeiture of coverage (*Weinberg, supra.*, *State Farm Ins. Co. v. Taglianetti*, 122 A.D.2d 40, 504 N.Y.S.2d 476). For these reasons, the petitioner has demonstrated its right to judgment staying arbitration.

In opposition, the respondent failed to raise a triable issue of fact. Contrary to respondent's contention, she was an insured under petitioner's policy and was therefore bound by the conditions to coverage pursuant to the policy. Respondent's contention the petitioner was not prejudiced by respondent's failure to preserve petitioner's subrogation rights is also without merit. In *Travelers Home & Marine Ins. Co. v. Kanner*, 103 A.D.3d 736, 738, 962 N.Y.S.2d 153, 156, the Court stated: When an insured settles with a tortfeasor in violation of a condition requiring his or her insurer's written consent to settle, and fails to preserve the insurer's subrogation rights, the insurer is prejudiced, and the insured is precluded from asserting a claim for underinsured motorist benefits (*citing State Farm Mut. Auto. Ins. Co. v. Lucano*, 11 A.D.3d

548, 783 N.Y.S.2d 618; *Morrison by Morrison v. Worldwide Ins. Group*, 212 A.D.2d 518, 622 N.Y.S.2d 120; *State Farm Mut. Ins. Co. v. Donath*, 164 A.D.2d 889, 559 N.Y.S.2d 567; *State Farm Mut. Auto. Ins. Co. v. Taglianetti*, 122 A.D.2d 40, 504 N.Y.S.2d 476). The Court went on to state that once the existence of a release in settlement of the relevant tort claim is established, the burden is on the insured to establish, by virtue of an express limitation in the release, or of a necessary implication arising from the circumstances of its execution, that the release did not operate to prejudice the subrogation rights of the insurer (*id.*, citing *Weinberg v. Transamerica Ins. Co.*, 62 N.Y.2d 379, 382B83, 477 N.Y.S.2d 99, 465 N.E.2d 819; *Matter of Prudential Prop. & Cas. Ins. Co.*, 226 A.D.2d 384, 640 N.Y.S.2d 237). Here, the respondent failed to establish that there is any express limitation in the release she executed in favor of ELRAC LLC and Hazel Salinas that preserved petitioner's subrogation rights and there is no evidence in the record of any circumstances surrounding the execution of the release that would give rise to a necessary implication that the release did not operate to prejudice petitioner's subrogation rights. The fact that petitioner's policy did not require written consent to settle is irrelevant.

Respondent's reliance on CPLR 3420(d)(2) is misplaced. The respondent contends that pursuant to CPLR 3420(d)(2)(A), in any action in which an insurer alleges that it was prejudiced as a result of a failure to provide timely notice, the burden of proof shall be on: (i) the insurer to prove that it has been prejudiced, if the notice was provided within two years of the time required under the policy; or (ii) the insured, injured person or other claimant to prove that the insurer has not been prejudiced, if the notice was provided more than two years after the time required under the policy. The insurer's rights shall not be deemed prejudiced unless the failure to timely provide notice materially impairs the ability of the insurer to investigate or defend the claim. CPLR 3420(d)(2) does not apply to the present circumstances since the petitioner did not

disclaim for late notice of the claim. The disclaimer was based on the respondent's failure to preserve its subornation rights, which was a violation of one of the specific conditions to coverage. For these reasons, respondent's reliance on *Slocum v. Progressive Nw. Ins. Co.*, 137 A.D.3d 1634, 28 N.Y.S.3d 181 is misplaced.

The Court has considered respondent's remaining argument in opposition to the petition and find them to be without merit.

Accordingly, it is hereby

ORDERED and **ADJUDGED** that the petition to permanently stay arbitration is **GRANTED**.

This constitutes the decision, order and judgment of the Court.

Dated: May 11, 2020



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020