

**Matter of State Farm Fire & Cas. Co. v Cangelosi**

2020 NY Slip Op 33457(U)

October 13, 2020

Supreme Court, Kings County

Docket Number: 511156/20

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS, PART 73

Index No.: 511156/20  
Motion Date: 9-14-20  
Mot. Seq. No.: 1

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In the Matter of the Petition of

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

-against-

**DECISION/ORDER**

GIUSEPPINA CANGELOSI,

Respondent,

-and-

GEICO GENERAL INSURANCE COMPANY, MICHELE  
AVARINO, BASEM ABDELQUADER ABDEL-HAMID and  
RAED ABDEL HAMID,

Proposed Additional Respondents.

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The following papers numbered 1 to 5 were read on this petition:

<b>Papers:</b>	<b>Numbered:</b>
Notice of Petition/Petition	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2-4
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	5
Other.....	

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

Petitioner, STATE FARM FIRE AND CASUALTY COMPANY, commenced this proceeding seeking:

- (a) an Order pursuant to CPLR 7503(c), permanently staying the underinsured motorist arbitration between petitioner and respondent due to the fact that the bodily injury liability policy limits under the policy of insurance covering the vehicle in which respondent was an occupant are the same as the bodily injury liability limits of the policy of insurance covering the other vehicle involved in the loss that gave rise to the above-captioned proceeding, which was insured by proposed additional respondent, GEICO GENERAL INSURANCE COMPANY (hereinafter referred to as "GEICO"); or in the alternative,

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(b) an Order pursuant to CPLR 7503(c), adding the proposed additional respondents as parties to the above-captioned action and temporarily staying the underinsured motorist hearing between petitioner and respondent pending a Framed Issue Hearing to determine the underinsured policy limits of the STATE FARM policy of insurance covering the vehicle in which respondent was an occupant at the time of the loss that gave rise to the above-captioned proceeding and the bodily injury liability limits of the other vehicle involved in the loss, which was insured by proposed additional respondent, GEICO; or in the alternative,

(c) an Order directing that respondent appear for independent medical examinations, appear for an examination under oath and provide HIPAA compliant authorizations permitting petitioner to obtain respondent's medical and employment records should the above-captioned matter be directed to proceed to an underinsured motorist hearing following the aforementioned Framed Issue Hearing; and

(d) ordering such other and further relief as this Court may deem just and proper.

**Background:**

Respondent Giuseppina Cangelosi was involved in a two-car accident on April 7, 2013. She was a passenger in a motor vehicle owned and operated by her brother, Michele Avarino. Antoinette Avarino a/k/a Antoinette Milito ("Ms. Avarino"), her sister-in-law, was also a passenger in the vehicle. The owner and operator of the other vehicle involved in the accident are Basem Abdelquder Abdel-Hamid and Raed Abdel Hamid, who are insureds of GEICO General Insurance Company ("GEICO"). As indicated in the declarations page of the GEICO policy, the maximum amount recoverable under the bodily injury liability coverage is \$25,000.00 per person/\$50,000.00 per accident.

Ms. Cangelosi, Mr. Avarino and Ms. Avarino all made claims for personal injuries against the GEICO insureds. GEICO settled the claims of Mr. Avarino and Ms. Avarino for \$25,000 each thus exhausting the coverage available under the policy. Ms. Cangelosi then filed a demand to arbitrate her claim for SUM benefits under a policy of insurance issued by STATE FARM FIRE AND CASUALTY COMPANY ("State Farm") to her brother. As indicated in the declarations page of the State Farm policy, the maximum amount recoverable under the bodily injury liability coverage is \$25,000.00 per person/\$50,000.00 per accident, the same amount of coverage for bodily injury provided by the GEICO policy. The SUM endorsement of State Farm policy defines an "insured," in relevant part, as

- (1) you, as the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse;
- (2) any other person while occupying:
  - (i) a motor vehicle insured for SUM under this policy;

The SUM endorsement defines an "uninsured motor vehicle," in relevant part, as:

A motor vehicle that, through its ownership, maintenance or use, results in bodily injury to an insured, and for which:

- (3) there is a bodily injury liability insurance coverage or bond applicable to such motor vehicle at the time of the accident, but:

- (i) The amount of such insurance coverage or bond is less than the third-party bodily injury liability limit of this policy; or
- (ii) 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
- (iii) The insurer writing such insurance coverage or bond denies coverage, or such insurer is or becomes insolvent (*emphasis added*).

State Farm maintains that since the amount of coverage for bodily injury under the GEICO policy is the same as the coverage for bodily injury under the State Farm policy, Ms. Cangelosi is not entitled to SUM benefits. Ms. Cangelosi maintains that since the amount of coverage under the GEICO policy was exhausted "by payments to **other persons injured in the accident**, to an amount less than the bodily injury liability limit of the GEICO policy, she is entitled to SUM benefits under the State Farm policy. For the following reasons, the Court holds that Ms. Cangelosi is not entitled to SUM coverage and accordingly, State Farm's petition to permanently stay the arbitration of Ms. Cangelosi's claim for SUM benefits must be granted.

#### Discussion:

Insurance Law § 3420 provides, in pertinent part:

"Any [automobile insurance] policy shall, at the option of the insured, also provide supplementary uninsured/underinsured motorists [SUM] insurance for bodily injury, in an amount up to

the bodily injury liability insurance limits of coverage provided under such policy ... [SUM] insurance shall provide coverage ... if the limits of liability under all ... insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage provided by such policy .... As a condition precedent to the obligation of the insurer to pay under the [SUM] insurance coverage, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements” (Insurance Law § 3420[f] [2] [A] [emphasis added] ).

As the Court of Appeals held in *Allstate Ins. Co. v. Rivera*, 12 N.Y.3d 602, 607, 911 N.E.2d 817, 820 (2009), “[t]he plain language of Insurance Law § 3420 . . . provides that 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. Here, the SUM coverage was not triggered because the bodily injury liability insurance limits of the GEICO insureds is the same as the policy bodily injury liability insurance limits under the State Farm policy.

Respondent Cangelosi contends that she should be allowed to deduct the payments made to co-occupants of the vehicle she was in thereby reducing the bodily injury liability coverage of the GEICO insureds to zero, an amount less than the coverage limits of the State Farm policy. Stated somewhat differently, she argues that Mr. Avarino and Ms. Avarino constitute “other persons” under the SUM endorsement. This very argument was rejected in *Allstate Ins. Co. v. Rivera, supra.*, where the Court stated:

The “payments to other persons” that may be deducted from the tortfeasor's coverage limits for purposes of rendering the tortfeasor “uninsured” under a SUM endorsement do not encompass payments made to anyone who is an insured under the endorsement. It is important to note that the phrase “other persons” is used elsewhere in the endorsement to denote persons other than those insured under the policy. The notice and proof of claim condition directs that “the insured or other person making claim” shall give written notice of claim “under this SUM coverage” (11 NYCRR 60–2.3[f] [CONDITIONS] [2]). It is evident that, in the phrase “the insured *or* other person,” the reference to “other person” means someone who is not “the insured.” As each claimant here falls within the endorsement's definition of an “insured,” which encompasses all passengers in the covered vehicle, claimants are not “other person[s].” Insureds are therefore able to reduce the coverage limits of the tortfeasor's policy only when payments made under the tortfeasor's policy are to individuals—such as occupants of the tortfeasor's vehicle,

injured pedestrians or those operating a third vehicle—not covered under the SUM endorsement. This guarantees that those who have purchased SUM coverage will receive the same recovery they have made available to third parties they injure—but no more.

(12 N.Y.3d at 610, 911 N.E.2d at 821–22). Since Ms. Cangelosi, Mr. Avarino and Ms. Avarino are all insureds for purposes of SUM coverage under the State Farm Policy, the monies paid to Mr. Avarino and Ms. Avarino by GEICO to settle their claims do not constitute an offset for purposes determining whether Ms. Cangelosi is entitled to SUM benefits.

For all of the above reasons, it is hereby

**ORDRED and ADJUDGED** that the petition insofar as it seeks to permanently stay the SUM arbitration between petitioner and respondent Cangelosi is **GRANTED**. The remainder of the petition is denied as moot.

This constitutes the decision and order of the Court.

Dated: October 13, 2020

**PPS**

**PETER P. SWEENEY, J.S.C.**

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

KINGS COUNTY CLERK  
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