

<b>Matter of Country-Wide Ins. Co. v Price</b>
2020 NY Slip Op 33797(U)
November 12, 2020
Supreme Court, Kings County
Docket Number: 506572/20
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: TRIAL TERM PART 35 x

In the Matter of the Application of  
COUNTRY-WIDE INSURANCE COMPANY,

Petitioner,

Index No: 506572/20

-against-

For an Order Staying the Arbitration Demanded by  
THOMASINE PRICE,

DECISION AND ORDER

Respondent

-and-

CARL MERCHARLES and SAFE AUTO  
INSURANCE and SAFE AUTO INSURANCE CO.,

Proposed Additional Respondents.

x

Recitation as required by CPLR 2219(a), of the papers considered in this petition,  
inter alia, to permanently stay arbitration of an underinsured motorist claim.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1-7
Cross-motion and supporting papers.....	
Answering Affidavits.....	8-10
Reply Papers.....	

Upon the foregoing cited papers, the Decision/Order on this petition is as follows:

In this proceeding pursuant to CPLR article 75, petitioner Country-Wide Insurance Company [Country-Wide] seeks an order (1) permanently staying arbitration on the ground that Country-Wide’s underinsured motorist policy has not been triggered, or (2) temporarily staying arbitration pending a framed issue hearing, with all proposed additional respondents added to the proceeding, to determine all issues preliminary to arbitration, including issue of notice of an underinsured motorist claim and whether the respondent Thomasine Price [Price] qualifies for underinsured motorist benefits, or (3) temporarily staying such arbitration pending submission by Price to (a) an examination under oath, (b) physical examination by physicians selected by petitioner, and (c) duly

executed authorizations for respondent's no-fault file, employment records and medical records.

On June 27, 2018, Price was a passenger in a vehicle owned by Country-Wide's insured, non-party Deborah Valentine [Valentine], when it was involved in a collision with a vehicle owned by proposed additional respondent Carl Mercharles [Mercharles] and insured by proposed additional respondent Safe Auto Insurance Co. [Safe Auto].

Safe Auto, an out-of-state insurer, issued a policy to Mercharles which provides bodily injury limits in the amount of \$15,000 per person and \$30,000 per accident. The Country-Wide policy issued to Valentine provides bodily injury limits in the amount of \$25,000 per person and \$50,000 per accident. In addition, the Country-Wide policy contains a supplementary uninsured/underinsured motorist [SUM] coverage provision that is subject to the same liability limit of \$25,000 per person and \$50,000 per accident.

As a result of this accident, Safe Auto tendered its full \$15,000/ \$30,000 policy, which was divided in varying amounts to four claimants including Price who received \$5000. Price then made a demand for arbitration under the SUM provisions of Valentine's Country-Wide policy on the basis that the liability coverage afforded under Mercharles' Safe Auto policy is less than the liability coverage afforded under Valentine's Country-Wide policy. Thereafter, Country-Wide commenced the instant proceeding pursuant to CPLR article 75, inter alia, to permanently stay arbitration, contending that the Valentine policy only contains uninsured motorist coverage and not underinsured motorist coverage, and therefore, Price does not qualify for underinsured motorist benefits. Country-Wide further contends that the Safe Auto policy must be construed to provide New York's minimum liability coverage (\$25,000/\$50,000), and therefore, even if underinsured coverage exists under Valentine's policy, the coverage limits are equal, and, so, the SUM provisions of Valentine's policy are not triggered.

Firstly, although Country-Wide contends that the Valentine policy only provides for uninsured motorist benefits and not underinsured motorist benefits, the policy's Uninsured Motorist's Endorsement clearly contemplates coverage for both. Under the definition section of the policy's Uninsured Motorist Endorsement, paragraph 2 provides as follows:

- “(b) Uninsured Motor Vehicle. The term “uninsured motor vehicle” means a motor vehicle that through its ownership, maintenance or use, results in bodily injury to an insured and for which:
- (1) No bodily injury liability insurance policy or bond applies to such vehicle (including a vehicle that was stolen, operated without the owner's permission, or unregistered) at the time of the accident; or
  - (2) Neither the owner nor driver can be identified, including a hit-and-run vehicle, and which causes bodily injury to an insured by physical contact with the insured or with a motor vehicle occupied by the insured at the time of the accident, ...; or

- (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 UM limit of this policy”**

Thus, while the term “underinsured” is not specifically used, the endorsement’s definition of “uninsured vehicle” necessarily encompasses such an event. The plain meaning of the endorsement is to afford SUM coverage both when an offending vehicle has no policy of insurance and where, as here, an offending vehicle’s insurance coverage is less than the uninsured motorist limit of the policy. Country-Wide, therefore, fails to establish that Valentine’s policy has no SUM coverage available in this matter.

Moreover, Country-Wide fails to establish that the Valentine policy’s SUM coverage was not triggered. Under Insurance Law §3420(f)(2), an insured’s SUM coverage is triggered when the limit of the insured’s bodily injury coverage is greater than the same coverage in the alleged tortfeasor’s policy (*see Prudential Property and Cas. Co. v Szeli*, 83 NY2d 681 [1994]). Here, Safe Auto’s policy limit was \$15,000/\$30,000, which it tendered in full. Although Country-Wide argues that the Safe Auto policy was required to meet New York’s minimum liability coverages (\$25,000/\$50,000), Country-Wide does not demonstrate that Safe Auto was an “insurer authorized to transact or transacting business in this state” subject to New York’s financial security requirements (*see Insurance Law §5107*). Therefore, the Safe Auto policy remained at \$15,000/\$30,000. Accordingly, since the per-person bodily injury liability insurance limits of coverage provided by the Safe Auto policy are a lesser amount than the per-person bodily injury liability insurance limits of coverage provided by the Country-Wide policy, the SUM endorsement provision was triggered (*see Government Employees Ins. Co. v Lee*, 120 AD3d 497 [2d Dept 2014]).

As alternative relief, Country-Wide seeks “a temporary stay of arbitration pending a framed issue hearing, with all proposed additional respondents added to the proceeding, to determine all issues preliminary to arbitration, including issue of notice of an underinsured motorist claim and whether the respondent Thomasine Price [Price] qualifies for underinsured motorist benefits.” In the body of the petition, however, Country-Wide merely requests that if Safe Auto contends that their policy is not exhausted or that they properly cancelled the insurance, then the proposed additional respondents be added so that a framed issue hearing can be held to determine whether or not the cancellations were proper. Here, there is no indication that Safe Auto’s policy was cancelled or that its policy was not exhausted. In the opposition papers, Price’s counsel, Scott Inwald, Esq., avers that Safe Auto tendered its full policy of \$30,000, and that he sought and obtained Country-Wide’s consent to settle Prices’ bodily injury claim for \$5000. Subsequent to the filing of Price’s opposition papers, Country-Wide filed a stipulation of partial discontinuance, which discontinued this proceeding against the proposed additional respondents. In light thereof, the request for a framed issue hearing is deemed moot.

Finally, as Country-Wide's Uninsured Motorist Endorsement entitles it to an examination under oath, physical examinations, and medical authorization from Price, discovery shall proceed in this matter.

Accordingly, Country-Wide's petition for a permanent stay of arbitration of Price's claim for underinsured motorist benefits is denied. However, Country-Wide is granted a 90-day temporary stay of arbitration so that the discovery permitted under the Uninsured Motorist Endorsement is completed.

This constitutes the decision/order of the Court

Dated: November 12, 2020

Enter,



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Karen B. Rothenberg  
J.S.C.