

Nationwide Affinity Ins. Co. of Am. v Cruz

2021 NY Slip Op 30181(U)

January 21, 2021

Supreme Court, New York County

Docket Number: 160438/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

INDEX NO. 160438/2020

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA

MOTION DATE 12/02/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

STEVEN CRUZ,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of petitioner Nationwide Affinity Insurance Company of America (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.

In this CPLR Article 75 proceeding, petitioner Nationwide Affinity Insurance Company of America (Nationwide) seeks a judgment to stay the arbitration of the claim which was demanded by respondent Steven Cruz (Cruz; motion sequence number 001). For the following reasons, the petition is denied.

FACTS

While driving in the City of Yonkers on February 24, 2020, Cruz was involved in a four-car collision. *See* petition, ¶¶ 10-11. Cruz asserts that the driver of the vehicle which struck his automobile was an underinsured driver. *See* Jaffe affirmation in opposition, ¶ 3. Nationwide avers that it is Cruz's insurer, having issued his father, non-party vehicle owner Jose Cruz, the policy bearing Policy Number 6631J 039118 that was in effect at the time of the collision. *See* petition, ¶ 8. Nationwide further avers that Cruz's policy provides supplementary underinsured motorist (SUM) coverage. *Id.* Cruz notes that Nationwide failed to attach a copy of the insurance policy to its moving papers. *See* Jaffe affirmation in opposition, ¶¶ 29-32.

Cruz served notice of his SUM claim on Nationwide in a letter dated March 5, 2020 and sent via certified mail, which Nationwide acknowledged by signing and returning the mail receipt on March 9, 2020. *See* Jaffe affirmation in opposition, ¶ 3; exhibits A, B. Cruz also thereafter served Nationwide with a demand to arbitrate his SUM claim in a letter dated September 25, 2020, which Nationwide acknowledged by signing and returning the mail receipt on October 1, 2020. *Id.*, ¶ 12; exhibit C. Nationwide thereafter commenced this proceeding to stay Cruz's arbitration demand on December 2, 2020. *Id.*, exhibit D; petition. Cruz submitted opposition to Nationwide's petition on December 18, 2020. *See* Jaffe affirmation in opposition. Nationwide replied on December 22, 2020, and this matter is now fully submitted (motion sequence number 001).

DISCUSSION

Applications to stay arbitration are governed by CPLR 7503, the relevant portions of which provide as follows:

“(b). Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

“(c). Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. *An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested.* Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. *Service of the application by mail shall be timely if such application is posted within the prescribed period.* Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void.”

CPLR 7503 (b), (c) (emphasis added). Here, Nationwide served its application to stay Cruz’s arbitration demand on December 2, 2020. *See* Jaffe affirmation in opposition, exhibit D.

However, Cruz objects to Nationwide’s application on several grounds.

First, Cruz asserts that he had served his demand to arbitrate on September 25, 2020 (with service being completed on October 1, 2020), but that Nationwide did not submit its stay application until two months later, in violation of the 20-day time limit imposed by CPLR 7503 (c). *Id.*, Jaffe affirmation in opposition, ¶¶ 11-14, 22-24; exhibits C, D. Cruz argues that this violation requires that Nationwide’s application be dismissed. *Id.* Cruz is correct. The Appellate Divisions for the First and Second Departments both hold that the 20-day limitation in

CPLR 7503 (c) must be “strictly enforced, and a court has no jurisdiction to entertain an untimely application.” See e.g., *Matter of State Farm Ins. Co. v Reid*, 184 AD3d 840, 841 (2d Dept 2020), quoting *Matter of Metropolitan Prop. & Liab. Ins. Co. v Hancock*, 183 AD2d 831, 832 (2d Dept 1992); *Matter of Metropolitan Prop. & Cas. Ins. Co. v Anthony*, 172 AD3d 474 (1st Dept 2019). Nationwide nevertheless asserts that its stay petition was timely as a result of the tolling Executive Order 202.72, which tolled the statute’s limitations period until December 3, 2020. See petition, ¶ 7. Cruz replies by presenting a copy of Executive Order 202.72, and noting that it only tolled the period for commencing proceedings pursuant to the CPLR until November 4, 2020. See Jaffe affirmation in opposition, ¶ 14; exhibit E. Cruz then argues that Nationwide’s December 2, 2020 stay application is still untimely, since that date fell after November 24, 2020; i.e., 20 days after the Executive Order’s toll expired on November 4, 2020. *Id.*, ¶ 14. Cruz is again correct. The provisions of Executive Order 202.72 speak for themselves. Nationwide’s reply papers argue that Cruz would suffer “no prejudice” if the court accepted its late stay application. See Milton reply affirmation, ¶ 10. However, this argument ignores the court’s statutory obligation to strictly enforce the 20-day time period specified in CPLR 7503 (c). Therefore, the court rejects Nationwide’s argument, and concludes that its petition should be dismissed as untimely.

As was noted earlier, Cruz raised several other arguments as to why the court should not consider Nationwide’s stay application, including that: 1) the petition and notice of petition were improperly served; 2) Nationwide is not entitled to discovery; 3) Nationwide failed to present a copy of Cruz’s insurance policy to establish the terms of the purported SUM coverage; 4) Cruz already complied with his disclosure obligations; and 5) Nationwide is not permitted to assert new grounds to support its stay petition in its reply papers. See Jaffe affirmation in opposition,

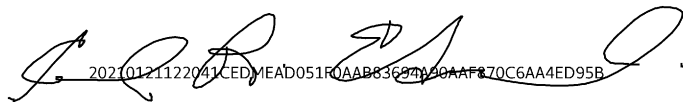
¶¶ 15-21, 25-40. However, the court need not reach any of these arguments as a result of its decision to dismiss Nationwide's petition as untimely.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 75, of petitioner Nationwide Affinity Insurance Company of America (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this order, along with Notice of Entry, on all parties within twenty (20) days.


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<u>1/21/2021</u> DATE					<u>CAROL R. EDMED, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>			<input type="checkbox"/>	
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