

Matter of Travelers Home & Mar. Ins. Co. v Barowitz
2021 NY Slip Op 30798(U)
March 11, 2021
Supreme Court, New York County
Docket Number: 650092/2020
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 650092/2020
MOTION DATE 08/28/2020
MOTION SEQ. NO. 001

IN THE MATTER OF THE APPLICATION OF THE
TRAVELERS HOME AND MARINE INSURANCE
COMPANY S/H/A TRAVELERS INSURANCE COMPANY,

Petitioner,

- v -

FOR AN ORDER STAYING THE SUPPLEMENTARY
UNDERINSURED MOTORISTS ARBITRATION
DEMANDED BY ELLIOTT BAROWITZ,

Respondent,

DECISION + ORDER ON
MOTION

and

ZACHARY BAROWITZ,

Proposed Additional Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 18, 19, 20, 21,
22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for STAY

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition to stay the subject arbitration is
denied in all respects; and it is further

ADJUDGED that the parties shall proceed to arbitration
forthwith and respondent's counsel shall serve a copy of this
judgment upon the arbitral tribunal; and it is further

ORDERED that to the extent that petitioner seeks a declaratory judgment that petitioner is not obliged to provide coverage under Maine automobile liability insurance policy number 990503156 for respondent Elliot Barowitz on his claim with respect to his having sustained injuries in a pedestrian accident when on May 22, 2019, he was struck by an automobile insured by State Farm Insurance Company (claim), such application is denied, and a declaratory judgment shall be rendered in favor of respondent Elliott Barowitz (See D. Siegel, New York Practice § 440 (5th ed. Jan. 2017)); and it is further

ADJUDGED and DECLARED that petitioner herein is obliged to provide coverage to respondent Elliott Barowitz for the aforesaid claim under Maine automobile liability insurance policy number 990503156; and it is further

ORDERED that petitioner shall, within fourteen days hereof, serve a copy of this order with notice of entry, together with copies of all papers previously served in the proceeding, upon Zachary Barowitz, who upon such service shall be added as a party respondent, and it is further

ORDERED that the caption of this proceeding is amended to reflect inclusion of such additional party respondent and the Clerk of the Court (Room 141B) and the Clerk of the General Clerk's Office (Room 119), upon service by respondent on each of them of

a copy of this order with notice of entry, shall mark their records to reflect the amendment; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ADJUDGED that respondent Elliott Barkowitz, having an address at _____, do recover from petitioner, having an address at _____, costs and disbursements in the amount of \$ _____ as taxed by the Clerk, and that respondent have execution therefor.

DECISION

In Kennedy v Valley Forge Insurance Company, (203 AD2d 930 [4th Dept. 1994], aff'd 84 NY2d 963 [1994]), a unanimous Court of Appeals upheld the opinion of a split Fourth Department that the language of the policy before that court, in neither defining the term "named driver" nor excluding the "named driver" from coverage gave rise to an ambiguity that "must be construed in favor of the insured". The 3-2 ruling of the intermediate appellate court, as unanimously affirmed by the Court of Appeals, which has not been disturbed, is controlling on this court.

Here, as in Kennedy, supra, there are no provisions in the policy that either define "driver" or exclude a person listed as "driver" on the declaration page from coverage thereunder. Upon the reasoning of the decision in Kennedy, since the policy names respondent Elliott Barowitz and his son Zachary Barowitz, as drivers of the covered vehicles, but neither defines "driver", nor excludes "driver" from coverage, there is an ambiguity as to who is the insured under the policy. "[S]uch ambiguity must be construed against petitioner, as insurer, and in favor of the insured, particularly when, as here, the ambiguity constitutes a purported limitation on insurance coverage" (citations omitted), (In the Matter of the Application of Liberty Mutual Insurance Company v Hornbeck, 2019 NY Slip Op 32501(U) (Sup Ct, NY Co, 2005, Madden, J.)

Whether or not respondent Elliott Barowitz resides in the household of his son Zachary Barowitz, the expressly named insured, is of no moment. Compounding the ambiguity, no policy provision excludes from coverage, a family member, such as the father Elliott Barowitz, who is also added as a driver, and for the sake of argument, does not reside with such named insured. Indeed, as observed by the court in Hornbeck, supra, assuming arguendo, that respondent Elliott Barowitz was, at all pertinent times, a member of his son's household, "it would not have been

necessary to include him as an operator under the policy and pay an additional premium for this status".

Petitioner's argument that the modest increase in premium relates to the enhanced risks posed by the addition of a driver begs the question, since that proposition does not refute that the policy provides coverage to such named driver for such increased risk.

Debra A. James

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3/11/2021

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE