

Country-Wide Ins. Co., v Bhaisham
2021 NY Slip Op 31078(U)
April 5, 2021
Supreme Court, New York County
Docket Number: 654396/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY,

Plaintiff,

- v -

ARVIN BHAISHAM, JOHN DOE, JOHN DOE INSURANCE COMPANY,

Defendant.

-----X

INDEX NO. 654396/2020
MOTION DATE 09/14/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for STAY

Upon the foregoing documents, it is

ORDERED that the application of Petitioner Country-Wide Insurance Company for a stay of arbitration (Mot. Seq. 001), including its request to add Auto Driveway Franchise Systems LLC as co-respondent, is denied in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent Arvin Bhaisham shall serve a copy of this order, along with notice of entry, on all parties within 20 days of entry.

MEMORANDUM DECISION

Petitioner Country-Wide Insurance Company seeks, pursuant to CPLR 7503 (c), to stay the arbitration of Respondent Arvin Bhaisham's claim for uninsured motorist benefits either permanently or pending a Framed Issue Hearing or pre-arbitration discovery. Through an amended petition, Petitioner seeks to add Auto Driveway Franchise Systems LLC ("Proposed Respondent") as co-respondent. Both Respondent and Proposed Respondent oppose the petition.

For the reasons below, this Court denies Petitioner's application for a stay of arbitration, including its request to add Proposed Respondent as a party to this proceeding.

BACKGROUND FACTS

The Accident

On August 19, 2017, Respondent sustained personal injuries due to a motor vehicle accident which occurred in Queens County, New York. Based on the Police Accident Report (the "Police Report"; see NYSCEF doc No. 5), Respondent was driving in the right lane when another vehicle ("Vehicle 2") attempted to switch lanes without signaling and hit Respondent's vehicle. The Police Report does not contain any information as to Vehicle 2 or its operator as Vehicle 2 was allegedly towed even prior to police's arrival. At the time of the accident, Respondent's vehicle was covered by an insurance policy issued by Petitioner, which included an uninsured motorist endorsement (NYSCEF doc No. 3).

Respondent's Uninsured Motorist Claim

On September 15, 2017, Respondent, through counsel, put Petitioner on notice of his intention to pursue an uninsured motorist claim (the "Notice"; see NYSCEF doc No. 8, p. 10). In a letter dated August 30, 2018, Petitioner acknowledged receipt of the Notice and requested that Respondent provide certain authorizations and other documentations (*Id.*, p. 15). In another letter

dated September 01, 2020, Petitioner wrote Respondent's counsel, demanding various documents and requiring Respondent to undergo physical examination and an examination under oath upon receipt of the requested documents (*Id.*, p. 19). Respondent alleges that "[he] provided every item requested to [P]etitioner [but] never heard from [Petitioner] regarding settlement or investigation." (*Id.*, ¶ 7, p. 3).

The Demand for Arbitration

On July 23, 2020, Respondent served Petitioner by mail a demand to arbitrate his claims (the "Demand for Arbitration") before the American Arbitration Association (*Id.*, p. 5-7). A copy thereof was also faxed by Respondent to Petitioner on August 19, 2020 (*see* NYSCEF doc No. 4).

This Proceeding

On September 11, 2020, Petitioner commenced this proceeding seeking that arbitration of Respondent's claim be stayed, either permanently or temporarily pending a Framed Issue Hearing or pre-arbitration discovery. According to Petitioner, a Framed Issue Hearing is necessary to bring in the insurance company of Vehicle 2, which Petitioner later claims to be Proposed Respondent. Petitioner maintains that, in the alternative, a temporary stay should be issued pending pre-arbitration discovery.

Respondent opposes on grounds that the petition was untimely, the venue was incorrect and that Petitioner is guilty of laches (NYSCEF doc Nos. 8, 17 and 21). Proposed Respondent Auto Drive opposes Petitioner's proposal to add it as co-respondent, arguing that at the time of the accident, it did not own, lease, operate, insure, maintain or possess Vehicle 2; it merely transported Vehicle 2 from New Jersey to New York on July 12, 2017 or thirty-seven days prior to the accident.

DISCUSSION

Timeliness of the Petition

CPLR 7503 (c) provides that "[a]n 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." "This statutory time period is to be strictly construed" (*Matter of GEICO Gen. Ins. Co. v Glazer*, 173 AD3d 499 [1st Dept 2019], citing *Gold Mills v Pleasure Sports*, 85 AD2d 527 [1st Dept 1981]).

Petitioner argues that it is not bound by the 20-day rule under CPLR 7503 (c) as Respondent's Demand for Arbitration was invalid in that it was merely faxed and the affidavit of service attached thereto was not completed.

Contrary to Petitioner's assertions, this Court finds that the Demand for Arbitration was valid and properly served. CPLR 7503 (c) provides that a demand for arbitration "shall be served in the same manner as summons or by registered or certified mail, return receipt requested."

Based on the record, the Demand for Arbitration was mailed by Petitioner to Respondent on July 23, 2020. Respondent submitted a completed and notarized affidavit of service indicating that the deponent served the Demand for Arbitration "by registered or certified mail-return receipt requested" on July 23, 2020 (see NYSCEF doc No. 8, p. 7). Thus, the fact that a copy thereof was subsequently faxed to Petitioner, and such copy did not include a completed affidavit of service, is of no moment.

Following CPLR 7503 (c), therefore, an application to stay arbitration should have been filed on or before August 12, 2020. Accordingly, Petitioner's application was untimely.

Discovery under CPLR 3102 (c)

Petitioner argues that even if the Demand for Arbitration is considered valid, it has a right to a pre-arbitration discovery under CPLR 3102 (c). In support, Petitioner cites to Second Department cases, *State Farm Mut. Auto Ins. Co. v Wernick* (455 NYS2d 30 [2d Dept 1982]), *Peerless Ins. Co. v McDonough* (269 AD2d 398 [2d Dept 2000]) and *Allstate Ins. Co. v Baez*, 269 AD2d 392 [2d Dept 2000]), which allowed discovery under CPLR 3102 (c) even after a demand for arbitration has already been served.

This Court finds that Petitioner's reliance on these cases is misplaced. While in all three cases, the Second Department upheld the lower court's issuance of a stay of arbitration pending compliance with discovery demands under CPLR 3102 (c), the facts of these cases do not say whether the applications for stay were timely filed.

This Court rather finds the recent First Department case, *Matter of GEICO Gen. Ins. Co. v Glazer* (173 AD3d 499 [1st Dept 2019]), to be on point. In *GEICO*, petitioner Geico belatedly sought a stay of arbitration until respondent complied with discovery demands. Similar to this case, Geico was seeking to have respondent submit to an independent medical examination or examination under oath. The First Department denied Geico's application for a stay, holding that "GEICO's reliance on CPLR 3102 (c), which expressly empowers the court to direct disclosure in aid of arbitration, is misplaced in light of the untimely petition under CPLR 7503 (c)."

In any event, even if this Court considers Petitioner's application timely, this Court finds no extraordinary circumstance to justify this Court's intervention. It is settled that a court's power to direct disclosure in aid of arbitration should not be granted except under extraordinary circumstances; the test is necessity, rather than convenience (*see e.g., International Components*

Corp v Klaiber (54 AD2d 550 [1st Dept, 1976]); *Timeplex Inc. v Racal-Milgo, Ltd* (87 AD2d 753 [1st Dept 1982]); *Jamaica Hospital v Vogel & Strunk* (57 AD2d 843 [2d Dept 1977]).

This Court finds that the facts of this case are similar to *In Motor Vehicle Acci. Indemnification Corp. v McCabe* (19 AD2d 349 [1st Dept 1963]). In *McCabe*, the respondent-insured was also obligated by contract to submit to an examination in order to make a claim under his insurance policy. Thus, the insurer sought a stay of arbitration to seek pre-arbitration discovery in aid of arbitration. The First Department upheld the trial court's denial of the application, holding that the insurer "should be relegated to its rights and remedies in the arbitration forum." The *McCabe* court continued that "...as incidental to an agreement for arbitration, the parties commit to the arbitrators the matter of procedure with reference to the examination of parties and witnesses and the taking and receipt of evidence. The method of assembling the evidence and the effect thereof are to be left entirely to them. Court action, having a tendency to interfere with the prerogatives of the arbitrators or to delay their proceedings is not justified except where shown to be absolutely necessary for the protection of the rights of a party."

Here, Petitioner failed to show that its right to seek production of evidence under the AAA Rules¹ is inadequate to establish its defense (*see e.g., AXA Equit. Life Ins. Co. v Kalina*, 101 AD3d 1655 [4th Dept 2012] [The Court denied an application for stay, holding that applicants "made no showing that the discovery that they are allowed under the FINRA rules would be inadequate for them to establish their case."]). Therefore, this Court denies its application for a stay to conduct pre-arbitration discovery.

¹ This Court notes that Clause 19 of the AAA provides that "[t]he parties may offer such evidence as is relevant and material to the dispute and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently."

Proposed Respondent

As this petition was untimely filed, this Court has no authority to entertain Petitioner's request to add Proposed Respondent as a party to this proceeding. Regardless, there is insufficient evidence in the record to justify adding Proposed Respondent as co-respondent here.

Proposed Respondent alleges that it merely transported Vehicle 2 thirty-seven days before the accident from Gelco Fleet Trust (based in New Jersey) to Mr. Raul Vargas (who lives in New York). Proposed Respondent is engaged in the business of transporting vehicles (NYSCEF doc No. 21, ¶ 5). Petitioner's own evidence reflects that as it indicates that Plate MV61862 is a "transporter plate" (*see* NYSCEF doc No. 15). Proposed Respondent further alleges that the temporary transporter plate should have been replaced by Mr. Vargas with his permanent plate New York HUX 7101 supposedly insured with ACE American Insurance Co. (ISA H09051983).

As Petitioner failed to show that Proposed Respondent had any further control or responsibility over Vehicle 2 at the time of the accident, this Court finds insufficient basis to add Proposed Respondent as party to this proceeding. Of course, this finding is without prejudice to Petitioner's right under the AAA Rules to have the arbitrator determine Proposed Respondent's liability, if any.

Other Issues

For the sake of completeness, this Court will address the other arguments raised by parties in support of their respective positions.

Petitioner argues that it is entitled to a permanent stay of arbitration as Respondent failed to show it exerted reasonable efforts to obtain information about Vehicle 2. This Court disagrees. The record shows that on September 18, 2017, Respondent's counsel sent Petitioner a letter stating that "[it is] attempting to confirm liability coverage for the other vehicles involved in this accident

and if we are unable to do so we will serve you with a demand for arbitration...” The same letter provided Petitioner with information as to Vehicle 2, including its plate, make and plate state. In fact, Petitioner used this information to run an “Insperity” report which associated Proposed Respondent with Vehicle 2. Accordingly, this Court finds Petitioner’s basis for seeking a permanent stay to be without merit.

Finally, this Court addresses Respondent’s argument that venue was improper. This Court finds that the Police Report states Respondent’s address to be in New York county. Furthermore, this Court agrees with Petitioner that the Demand for Arbitration lists the address for Respondent’s counsel in New York County as the address for Respondent. This Court therefore rejects Respondent’s argument that venue was improperly placed.

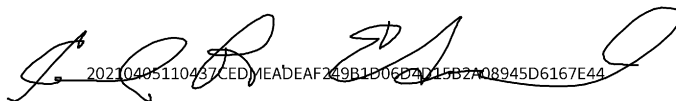
CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Petitioner Country-Wide Insurance Company for a stay of arbitration (Mot. Seq. 001), including its request to add Auto Driveway Franchise Systems LLC as co-respondent, is denied in its entirety; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent Arvin Bhaisham shall serve a copy of this order, along with notice of entry, on all parties within 20 days of entry.


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4/5/2021
DATE

CAROL R. EDM EAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" 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"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE