At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 8th day of Sept 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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In the matter of The Application of LM GENERAL INSURANCE COMPANY,

Petitioner(s)

-against-

For an Order Staying the Arbitration Demanded by JALIL W. FLEMING

Defendant(s)

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Index No: 527223/2021

ORDER

The following e-filed papers considered herein:	**NYSCEF E-filed docs**
Petition/Notice of Petition/Exhibits Annexed/Reply.....	1-8; 21-22
Affirmation in Opposition/Exhibits Annexed.....	12-20

In this matter, LM General Insurance Company ("Petitioner") moves pursuant to CPLR § 7503 to permanently stay arbitration between Petitioner and Jalil W. Fleming ("Respondent") on the grounds that Respondent's Demand for Arbitration was not served properly or that the agreement providing uninsured motorist coverage was voided. Petitioner alternatively seeks to temporarily stay arbitration and to direct a framed-issue hearing to determine whether there was an accident and the issue of coverage for the alleged loss as well as to direct Respondent to provide all relevant discovery prior to the uninsured motorist arbitration being held. Petitioner also moves to compel Respondent to appear for an Examination Under Oath and submit to an Independent Medical Exam as required by the insurance policy.

Respondent has opposed the motion on the grounds that Petitioner's motion is frivolous and without legal basis since Respondent has complied with the relevant insurance policy requirements by providing all necessary documents to Petitioner. Respondent additionally argues that Petitioner's Petition to stay arbitration was filed untimely.

This action arises out of Respondent's claims of injuries sustained as a result of a hit-and-run motor vehicle collision that occurred on November 10, 2020, on the West Bound Belt Parkway near 134th Street in Queens, New York. Petitioner is a foreign corporation duly

authorized to carry out insurance business in the State of New York with a place of business in New York. At the time of the accident, Respondent was operating a vehicle insured with the Petitioner. Respondent demands a claim under the Underinsured Motorist Clause of the liability insurance policy issued to Respondent by Petitioner.

In support of its Petition, Petitioner argues that Respondent has failed to demonstrate physical "contact" with an uninsured vehicle, which is required to recover benefits under the Underinsured Motorist Endorsement policy. Petitioner asserts that it accessed and analyzed the data from Respondent's vehicle's Event Data Recorder ("the Black Box") which indicated that the vehicle was traveling at 103 MPH at the time of the accident, however it failed to demonstrate a collision with another vehicle. Petitioner requests that in the event a permanent stay of arbitration is not ordered, then a framed-issue hearing on the issue of contact and fraud should be scheduled.

Additionally, Petitioner argues that Respondent's Demand for Arbitration should be vacated since Respondent has failed to comply with the provisions of the insurance policy by failing to provide the necessary medical care and employment authorizations demanded of them, nor has Respondent appeared for an Examination Under Oath regarding claimed damages or an Independent Medical Examinations as required under the express terms of the policy. Petitioner asserts that it is entitled to the discovery sought before arbitration is held and without such discovery, Petitioner will be severely prejudiced. Moreover, Petitioner argues that Respondent would not be burdened by Petitioner's demands as the demands are reasonable and necessary to present a case to the arbitrator. Petitioner's demands include:

- Written statement as to the full particulars of the nature and extent of the injuries, treatment, and other necessary details, and the factual basis for alleging the other vehicle was uninsured.
- Examination Under Oath by a medical professional other than a chiropractor and licensed acupuncturist.
- Physical examinations.
- Duly executed and acknowledged authorizations permitting Petitioner to obtain copies of the reports and records of all treating physicians, hospitals, medical care providers, and diagnostic tests and films, who provided medical treatment to Respondent/claimant for the subject accident.

In opposition, Respondent argues that Petitioner's motion should be denied in all respects since Respondent has provided all medical records in his possession and has complied with all requirements of the insurance policy. Respondent asserts that at the time of the accident, Respondent was injured at the scene and transferred via ambulance to Jamaica Hospital. In support of his opposition, Respondent submits the police report taken at the scene of the accident, his Examination Under Oath[1], an Independent Chiropractic/Acupuncture Medical Examination, and his Emergency Room record where Respondent claims "he was driving on the Parkway when his car was clipped by another car." Respondent claims that he was unemployed at the time of the accident and thus has no employment records to submit.

In reply, Petitioner contends that the documents provided by Respondent are insufficient since Respondent has failed to provide copies of all medical records and reports of the treatment received for the accident including HIPAA authorization forms. Petitioner also argues that the provided Independent Medical Examination was conducted by a chiropractor and licensed acupuncturist, however the report lists several additional medical care providers that treated Respondent and Respondent has failed to provide the necessary HIPAA forms or medical records for those providers and thus Petitioner is entitled to complete a further independent medical examination. Additionally, Petitioner claims that Respondent disclosed that he was in a prior accident in 2018 but has not provided any documentation or medical records pertaining to that accident. Regarding Respondent's Examination Under Oath, Petitioner argues that Respondent did not provide any testimony as to any additional medical treatment received including a surgical procedure to Respondent's right shoulder, thus Petitioner is entitled to a further Examination Under Oath.

Pursuant to CPLR 7503(c), a party served with a demand or notice of intention to arbitrate has 20 days to apply for a stay after such service, otherwise, he forfeits the opportunity for a judicial determination of the threshold questions as to whether the dispute is arbitrable or barred by the statute of limitations. Courts treat the 20-day time limit to apply for a stay under CPLR 7503(c) as a statute of limitations, meaning that they are generally powerless to entertain a late application addressed to the threshold questions (see *Aetna Life & Casualty Co. v Stekardis,*

[1] Respondent has attached the first and last page of his Evaluation Under Oath – no transcript of the testimony taken is included.

34 NY2d 182 [1974]; *Metropolitan Property and Liability Insurance Co. v Hancock,* 584 NYS2d 74 [2nd Dept. 1992]).

If the demand or notice was served by certified mail, the 20-day period begins to run upon the party's receipt of the document (*Knickerbocker Insurance Co. v Gilbert,* 28 NY2d 57 [1971]; see also *Prudential Securities Incorporated v Warsh,* 214 AD2d 739 [2nd Dept. 1995]). On January 4, 2021, and January 8, 2021, Respondent notified Petitioner of the accident via certified mail and thereafter served Petitioner with a demand to arbitrate on October 5, 2021, which Petitioner received on October 7, 2021.[2] Petitioner filed the Petition to stay arbitration on October 27, 2021. Thus, Petitioner filed within the 20- day period and its motion is timely.

The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay (*Merchants Preferred Ins. Co. v Waldo*, 125 AD3d 864 [2nd Dept. 2015]; *Matter of Hertz Corp. v Holmes,* 106 AD3d 1001 [2nd Dept. 2013]; *Nationwide Mut. Ins. Co. v Sparacino,* 191 AD2d 635 [2nd Dept. 1993]). Thereafter, the burden is on the party opposing the stay to rebut the prima facie showing (*Merchants Preferred Ins. Co* at 865; *see Matter of Hertz Corp* at 1003; *Matter of Metropolitan Prop. & Cas. Ins. Co v Singh,* 98 AD3d 580 [2nd Dept. 2012]). Where a triable issue of fact is raised, including whether there was physical contact with the insured's vehicle and an alleged hit-and-run vehicle, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue (*Government Employees Insurance Company v Tucci,* 157AD3d 679 [2nd Dept. 2018]; see *Matter of Allstate Ins. Co. v Aizin,* 102AD3d 679, 681 [2nd Dept. 2013]; *Matter of Bisignano v Interboro Mut. Indem. Ins. Co.,* 235AD2d 419 [2nd Dept. 1997]).

The Court finds that triable issues of fact exist as to whether an accident occurred and whether the driver's vehicle was uninsured since Petitioner has not satisfied its burden to establish a preliminary issue which would justify a permanent stay of arbitration. Petitioner has submitted a letter sent from the insurance company to Respondent stating in a conclusory manner that Respondent's vehicle's Event Data Recorder did not demonstrate contact between

[2] Petitioner has attached a copy of the USPS Tracking information indicating that the package was received on October 7, 2021.

Respondent's vehicle and another vehicle. Respondent in opposition did not submit an affidavit, and the Examination Under Oath submitted is incomplete as it does not contain any of the testimony taken. Additionally, the submitted emergency room report and police report made by officials who were not an eyewitness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question (*Murray v Donlan,* 77AD2d 337 [2nd Dept. 1980]; *Aetna Cas. & Sur. Co. v Island Transp. Corp.,* 233 AD2d 157 [1st Dept. 1996]; *DeJesus v Paulino,* 61AD3d 605 [1st Dept. 2009]).

Accordingly, Petitioner's motion to permanently stay arbitration is denied and it is hereby,

ORDERED, that this matter is temporarily stayed pending a framed-issue hearing to determine whether an accident occurred and the issue of coverage; and it is further

ORDERED, that Respondent provide written statements responding to Petitioner's request for the full particulars of the nature and extent of the injuries, treatment, and other necessary details, and the factual basis for alleging the other vehicle was uninsured, and it is further

ORDERED, that Respondent submit to an Examination Under Oath, covering questions not addressed in the February 26, 2021, Evaluation Under Oath, and it is further

ORDERED, that Respondent provide an Independent Medical Examination by a medical professional other than a chiropractor and licensed acupuncturist; and it is further

ORDERED, that Respondent provide duly executed and acknowledged authorizations permitting Petitioner to obtain copies of records of all treating physicians, hospitals, medical care providers, and diagnostic tests and films, that provided medical treatment to Respondent/claimant for the subject accident and the 2018 accident.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice