

Matter of Great Am. Ins. Co. v DeLeon

2023 NY Slip Op 31053(U)

March 31, 2023

Supreme Court, New York County

Docket Number: Index No. 654235/2022

Judge: John J. Kelley

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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. JOHN J. KELLEY **PART** **56M**

Justice

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In the Matter of

GREAT AMERICAN INSURANCE COMPANY,

Petitioner,

- v -

CESAR J. DELEON and CITY OF NEW YORK,

Respondents.

-----X

INDEX NO. 654235/2022

MOTION DATE 01/09/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

were read on this motion to/for STAY OF ARBITRATION/ARTICLE 75.

This is a proceeding pursuant to CPLR 7503, pursuant to which the petitioner seeks either (a) a temporary stay of an uninsured (UI)/supplemental underinsured motorist (SUM) arbitration demanded by the respondent Cesar J. DeLeon, along with a framed-issue hearing to determine the issue of coverage, or (b) a permanent stay of the UI/SUM arbitration. DeLeon opposes the petition to the extent of asserting that venue was mislaid in New York County, but otherwise agrees that a framed-issue hearing would be appropriate. The court thus grants the petition to the extent of directing a framed-issue hearing on the issue of whether the petitioner provided, or was obligated to provide, UI/SUM coverage for DeLeon's injuries.

On September 12, 2021, DeLeon was the operator of a 2019 Kia Sedona automobile owned by Vehicle Leasing Associates, LLC (VLA), and leased to the City of New York for use by the New York City Police Department (NYPD). On that date, DeLeon, an NYPD officer, was involved in a collision with a 2003 Acura automobile owned by Rama K. Chinnam and operated by Haxhi Demaj at the intersection of Sedgwick Avenue and Stevenson Place in the Bronx.

Shortly thereafter, DeLeon made a demand for SUM benefits to Stillwater Property and

Casualty Insurance Company (Stillwater), which insured a vehicle that he personally owned. When Stillwater declined to pay the SUM benefits, DeLeon, on October 13, 2022, served a notice of intention to arbitrate upon Stillwater. In a letter dated October 18, 2022, Stillwater disclaimed the obligation to pay SUM benefits. On November 4, 2022, Stillwater commenced a proceeding in the Supreme Court, Nassau County, against DeLeon, seeking a permanent stay of arbitration (*see Matter of Stillwater Prop. & Cas. Ins. Co. v DeLeon*, Sup Ct, Nassau County, Index No. 615482/2022). It argued that, although DeLeon personally owned a vehicle that was insured by its predecessor-in-interest, Tri State Consumer Insurance Company (Tri State), and that the Tri State/Stillwater policy provided liability limits of \$25,000 per person/\$50,000 per incident, the car that DeLeon operated at the time was neither uninsured nor underinsured, inasmuch as it was insured by the City of New York and necessarily had liability coverage limits of at least \$25,000 per person/\$50,000 per incident. It further contended that the Tri-State/Stillwater policy provided that Stillwater would not be obligated to pay any SUM benefits until DeLeon exhausted any tort recovery from Demaj and Chinnam and UI/SUM benefits from the City of New York. The petition and a related motion in the Nassau County proceeding are returnable on April 4, 2023.

With respect to the instant proceeding, on October 13, 2022, DeLeon served demand for arbitration of a claim for UI/SUM benefits upon the petitioner, Great American Insurance Company (Great American), which had provided insurance to several automobiles owned by VLA. DeLeon asserted that a Great American policy covered the vehicle that he was operating at the time of the accident. Great American commenced the instant proceeding to stay arbitration on November 7, 2022, contending that Great American did not provide coverage to VLA in connection with the subject Kia Sedona, inasmuch as VLA's lease with the City obligated the City to obtain automobile insurance for that automobile, with coverage for "[l]iability for bodily injury or death (each person) One Million Dollars (\$1,000.000) [and] "[l]iability for bodily injury or

death (per accident) One Million Dollars (\$1,000,000),” as well as mandatory UI coverage, among other things. DeLeon was served with the notice of petition, petition, and supporting papers on December 14, 2022.

CPLR 503(a) provides, in relevant part, that, “[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; [or] the county in which a substantial part of the events or omissions giving rise to the claim occurred.” CPLR 7502(a)(i) prescribes otherwise, providing that, when an agreement to arbitrate does not state the county in which a proceeding is to be commenced, “proceedings to stay or bar arbitration shall be brought in the county where the party seeking arbitration resides or is doing business” (*see Matter of Travelers Indem. Co. of Ill. v Nnamani*, 286 AD2d 769, 770 [2d Dept 2001]). DeLeon asserted, in his opposition papers, that venue was improper in New York County because the arbitration clause in the Great American policy does not specify a county, he is the party seeking arbitration, and he resides and does business in Bronx County, which is the only proper county. CPLR 511 provides, however, that in order to move for a change of venue on the ground of improper venue, the party seeking transfer must have (1) served a demand for change of venue on the ground of improper venue prior to serving his or her answer (*see* CPLR 511[a]), (2) moved to transfer venue within 15 days of serving the demand (*see* CPLR 511[b]), and (3) where the opponent timely served a response to the demand, to make the motion returnable in the original county. Inasmuch as DeLeon never served a formal demand to change venue or made a timely motion for that relief, the court cannot entertain his request, as set forth in his opposition papers, to change venue based upon a claim of improper venue (*see Allen v Morningside Acquisition I, LLC*, 205 AD3d 861, 863-864 [2d Dept 2022]; *Schwartz v Yellowbook, Inc.*, 118 AD3d 691, 692-693 [2d Dept 2014]).

With respect to Great American’s substantive request for relief, where, as here, “both parties have proposed that it would be reasonable to hold a framed issue hearing,” and there

are sufficient facts in dispute to warrant one (*Matter of Travelers Home & Mar. Ins. Co. v. Barowitz*, 208 AD3d 1074, 1075 [1st Dept 2022]), the court agrees that a framed issue hearing on the issue of coverage would be appropriate.

Accordingly, it is

ORDERED that the petition is granted to the extent that the arbitration of Cesar J. DeLeon's claim for payment of uninsured/supplemental underinsured motorist benefits be, and hereby is, temporarily stayed, pending a framed-issue hearing on the issue of whether the petitioner had issued an insurance policy that covered that claim; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: whether the petitioner provided uninsured/supplemental underinsured motorist coverage in connection with any policy applicable to the 2019 Kia Sedona that is the subject of this dispute; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and counsel for petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date

fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

This constitutes the Decision and Order of the court.

3/31/2023
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE