

Hussain v Motor Veh. Acc. Indem. Corp.

2023 NY Slip Op 32579(U)

July 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 505582/2023

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

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 7th day of July 2023.

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

Index No: 505582/2023

-----X
MOHAMMED HUSSAIN,

Petitioner(s)

-against-

ORDER

MOTOR VEHICLE ACCIDENT INDEMNIFICATION
CORPORATION,

Respondent(s)

-----X

The following e-filed papers read herein:
Notice of Motion/Petition/Affidavits Annexed
Exhibits Annexed

NYSCEF Nos.:
1-13

In this matter, Petitioner moves pursuant to New York Insurance Law 5208(c) for leave to file a late claim and directing the Motor Vehicle Accident Indemnification Corporation (“MVAIC”) to accept it. Petitioner served the Notice of Petition and Affirmation in Support upon MVAIC via mail on February 21, 2023 and Respondent MVAIC has not answered or appeared in this action.

In his Petition, Petitioner states that on May 7, 2022, he was injured in an accident while he was operating a bicycle in Manhattan when an unidentified individual opened their car door into Petitioner causing the accident and resulting in him sustaining a wrist fracture. On August 30, 2022, Petitioner retained counsel in this action to represent him regarding the accident and on August 31, 2022, he filed his notice of intent to file a claim on MVAIC. Petitioner states that MVAIC acknowledged receipt of the notice of intention to file a late claim on September 8, 2022, and requested medical records from Lennox Hospital on October 11, 2022, which Petitioner provided on October 20, 2022. In early December 2022, Petitioner states that MVAIC requested loss wage information from him as well as an explanation as to why the notice of intent was late. On December 8, 2022, Petitioner states he responded to MVAIC's request explaining that he was unaware that he could file such a claim. Furthermore, Petitioner states that based on his correspondences with MVAIC he assumed that his claim was accepted and when he

contacted MVAIC on January 3, 2023, to confirm whether the late claim had been approved by MVAIC, but he received a denial instead. Petitioner now argues that his request was timely made within one year of the accident pursuant to Insurance Law § 5208(c) and that he had a reasonable excuse for his delay, namely that he was unaware of the existence of MVAIC until meeting with his attorney on August 30, 2022. Additionally, Petitioner argues that MVAIC will not be prejudiced by his failure to timely file the notice because MVAIC is in possession of all documents necessary to evaluate the claim. In support of his application, Petitioner has submitted an affidavit in support, a copy of the police report taken on the date of the accident, his household affidavit with his notice of intention to file a claim against MVAIC, MVAIC's acknowledgement receipt, Petitioner's response to MVAIC, email correspondences between Petitioner and MVAIC, MVAIC's denial, and a copy of an order for a similar petition in which that court granted the application and directed MVAIC to accept the late notice (*Pina v Motor Vehicle Acc. Indemnification Corp.* Index # 51101/2020).

Pursuant to Insurance Law § 5218, a qualified person, upon notice to the corporation, may apply to the court for leave to initiate an action against the corporation upon the satisfaction of specified requirements of the statute, including compliance with Insurance law § 5208. Where a petitioner has a cause of action for damages for bodily injury arising out of the accident, but the cause of action is against a person whose identity is unascertainable, he or she may seek the protection provided by respondent by filing an affidavit with respondent within 90 days of the accrual of the cause of action (see Insurance Law § 5208[a][2][A] [i-iii]). In addition, where a petitioner fails to file such an affidavit prior to the expiration of that period, an application to the court for leave to file must be made within one year of the accrual of the cause of action upon affidavit showing the evidentiary facts which are relied on in support of the proof accompanied by a copy of the proposed affidavit (Insurance Law § 5208[c]). Notice of the return time together with a copy of the application must be served at least eight days before the time named for the hearing upon the corporation by delivery to the person designated by law as a person to whom a summons in an action in the supreme court issued against such party may be delivered (*id.*). Service by mail is sufficient under Insurance Law § 5208[c], (*Matter of Hickman*, 75 N.Y.2d 975 [1990]).

A court may upon proof grant leave to file the affidavit within a reasonable time after the expiration of the specified period (Insurance Law § 5208[b][2]). In making its decision the court

shall consider whether the application was accompanied by satisfactory proof of the facts that caused the delay, proof that it was not reasonably possible to file the affidavit within the applicable period, and proof that it was filed as soon as was reasonably possible (*id.*). The court also must consider, in particular, whether the corporation acquired actual knowledge of the essential facts constituting the claim within the time specified by law or within a reasonable time thereafter, together with all other relevant facts and circumstances, including whether the claimant failed to file a timely affidavit by reason of his justifiable reliance on settlement representations made by a person whom he believed to be the insurance representative of the financially irresponsible motorist, whether the claimant in filing made an excusable error concerning the identity or existence of the corporation against which the claim should or could be filed, and whether the delay in filing substantially prejudiced the corporation in maintaining a defense on the merits (Insurance Law § 5208[b][2][A][B][C]).

In general, an application for late filing against MVAIC, may be granted only where the reason submitted as an excuse for the delay is one of those stated in the statute. Thus, where the record fails to disclose that the applicant is an infant or is mentally or physically incapacitated or is deceased, and that by reason of such disability or death was prevented from filing the affidavit, the court may properly deny the application for a late filing (*Pasternack v Motor Vehicle Acc. Indemnification Corp.*, 48 A.D.2d 837 [2d Dept. 1975]). In *Leonard v Motor Vehicle Acc. Indemnification Corp.*, 175 A.D.3d 1795 (2d Dept. 2019), the court recently held that the lack of understanding that coverage may exist for a hit-and-run accident was “a common and excusable misunderstanding” after Petitioner averred that the delay in filing stemmed from the fact that she did not own, possess, or insure any motor vehicle, and she did not know of respondent or its purpose until she sought legal advice.

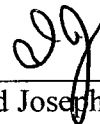
Here, the Court finds that Petitioner’s application for leave to file was timely made within one year of the accrual of the cause of action. Additionally, Petitioner’s service via mail was proper under § 5208(c). Upon review of Petitioner’s submitted documents, the application was accompanied by satisfactory proof of the facts that caused the delay which was filed as soon as was reasonably possible, one day after Petitioner retained counsel and 27 days after the expiration period to file notice of intention to make a claim. Additionally, Respondent acquired actual knowledge of the essential facts constituting the claim when Petitioner filed his

application. In response, Respondent has failed to oppose Petitioner's application or allege that it would suffer any prejudice from the late filing.

Accordingly, it is hereby

ORDERED, that Petitioner's application is granted to the extent that Petitioner's motion for leave to serve a late notice of intention to make a claim with MVAIC is granted and Petitioner is given leave to serve a notice of intention to make a claim accompanied by a copy of this order with notice of entry within 60 days from the date of entry of this order.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**