

Matter of USAA Gen. Indemn. Co. v Jackson

2023 NY Slip Op 33518(U)

October 5, 2023

Supreme Court, New York County

Docket Number: Index No. 651026/2022

Judge: William Franc Perry

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. WILLIAM FFRANC PERRY</u></p> <p style="text-align: right; margin-right: 100px;"><i>Justice</i></p> <p>-----X</p> <p>IN THE MATTER OF THE APPLICATION OF USAA GENERAL INDEMNITY COMPANY</p> <p style="text-align: center;">Plaintiff,</p>	<p>PART</p>	<p>INDEX NO. <u>651026/2022</u></p> <p>MOTION DATE <u>11/12/2022</u></p> <p>MOTION SEQ. NO. <u>002</u></p>
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- v -

TO STAY THE ARBITRATION SOUGHT TO BE HAD BY
TROY C. JACKSON,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46
were read on this motion to/for RENEWAL.

The respondent filed this CPLR § 2221(d) and (e) motion on November 11, 2022 requesting leave to renew and reargue this Court’s October 3, 2022 order granting the petitioner’s request for a permanent stay of arbitration finding at that time that the respondent had not provided sufficient evidence that he had complied with a condition precedent that had to be met in order for the respondent to qualify for uninsured motorist benefits under his policy with the petitioner. In the instant motion, the respondent now provides additional evidence that the condition precedent was met, namely a call log from the New York Police Department (“NYPD”) showing a call reporting on the date of the alleged accident and containing the alleged facts of the accident and a subpoena to his cell phone provider for his call records. (See NYSCEF Doc. No. 40 and 39).

A CPLR § 2221(e) motion for leave to renew is based on new facts not included in the underlying motion and such motion must include reasonable justification for not including such

facts in the underlying motion. *See* CPLR § 2221(e). Renewal is granted sparingly, “it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” *See Beiny v. Wynyard* (In re Beiny), 132 A.D.2d 190 (1987). However, a trial court does have discretion to grant such relief in the interest of justice even though all the requirements of renewal are not met. *See Strong v. Brookhaven Memorial Hospital Medical Center*, 240 A.D.2d (2nd Dept. 1997); *see also U.S. Reinsurance Corp. v. Humphreys*, 205 A.D.2d 187 at 192 (1st Dept. 1994) (ruling that [u]nder appropriate circumstances, a court has discretion to grant renewal even upon facts known to the movant at the time of the original motion and citing *Pinto v Pinto*, 120 AD2d 337, 338 (1st Dept. 1986); *Karlin v. Bridges*, 172 A.D.2d 644 (2nd Dept. 1991) (providing that “[t]he requirement that a motion for renewal be based upon newly discovered facts is a flexible one, and the court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion.”)

Here the respondent now provides a 911 call log he secured after the underlying petition. The call log lists a 911 call made on November 21, 2021, the date the accident is alleged to have occurred. The respondent argues that such log cannot be the basis of leave to renew as the petitioner has not provided a reasonable justification for the failure to present such call log at time of the prior motion. The respondent cites his affidavit on the underlying petition for proof that he had made prior attempts to obtain such records from the NYPD. (*See* NYSCEF Doc. No. 17). The respondent also has filed an additional affidavit dated July 22, 2022 providing that he had made what he refers to as diligent efforts to secure proof of the call on the underlying motion showing that he had made attempts to obtain the 911 call record from both his cell phone provider and the NYPD and that he was unable to get such proof from either entity. (*See* NYSCEF Doc. No. 24.)

The 911 NYPD call log is newly provided evidence that the Court did not have before it on the underlying petition. While the Court would have preferred this record at the time of the underlying motion it will not ignore its existence now. “While it is generally true that a motion to renew must be based on newly-discovered facts, courts have discretion to grant this relief in the interest of justice, although not all the requirements for renewal are met.” *Strong v. Brookhaven Mem. Hosp. Med. Ctr.*, 240 A.D.2d at 726-27 (citing *Liberty Mut. Ins. Co. v Allstate Ins. Co.*, 237 AD2d 260; *Vayser v Waldbaum, Inc.*, 225 AD2d 760; *Friedman v U-Haul Truck Rental*, 216 AD2d 266; *Karlin v Bridges*, 172 AD2d 644; *Pietrowski v City of New York*, 166 AD2d 423). In addition, it is important to note here that other than pointing to the absence of a police report, there is no additional evidence here that the petitioner attempted further discovery or investigation to see if the disputed condition precedent was met. *See Matter of Gov't Empls. Ins. Co. v. Pellet*, 187 A.D.3d 620 at 620-21 (1st Dept. 2020) (finding that there was “no evidence that [the insurer] had attempted in good faith to resolve the discovery issue without intervention of the court or made any requests for Pellet to submit to a deposition and physical examination at any point before or after it instituted the CPLR article 75 proceeding”).

The Court will use its discretion and grant leave for renew in light of the facts: (1) that the respondent had made efforts to secure such evidence on the underlying motion (*See* NYSCEF Doc. No.); (2) has sworn to having reported the incident to law enforcement (*See* NYSCEF Doc No.); and (3) having now successfully secured a 911 call log reflecting that a call was made to law enforcement on the date of the alleged accident reporting the same facts alleged in the petition. (*See* NYSCEF Doc. No. 40.)

The petitioner argues that there is not currently proof that the respondent is the one who made the call and points out a location discrepancy between the arbitration demand which lists


Queens County as the accident location and the respondent's affidavits and 911 call log both of which list the Bruckner Service Road/Bruckner Blvd in the Bronx as the location of the accident. (See NYSCEF Doc. No. 41 at pg. 2.) These factual disputes between the parties need to be resolved through further fact finding¹, but based on the current factual record before me and for purposes of this motion, the Court grants leave to renew finding that the respondent has met his burden of showing an issue of material fact regarding whether the condition precedent to coverage under the insurance policy between the parties was met. *See Hertz Corp. v Holmes*, 106 AD3d 1001, 1002 [2d Dept 2013] (ruling that [t]he 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. Thereafter, the burden is on the party opposing the stay to rebut the prima facie showing.”)

Thus, after granting leave to renew, the Court now amends its October 3, 2022 order in so far as it granted a permanent stay of arbitration and determines that the newly provided 911 call log creates an issue of material fact whether or not the condition precedent was met, and thus this Court's October 3, 2022 order is amended to instead grant a temporary stay of arbitration. The purpose of such temporary stay is for the resolution of this factual dispute regarding whether the condition precedent to coverage was met. In light of the fact, that there is a genuine triable issue of fact regarding a condition precedent, the arbitration shall be temporarily stayed until such time a judicial determination can be made regarding this threshold issue. (See *Empire Mut. Ins. Co. v. Zelin*, 120 A.D.2d 365 at 365-66 (1st. Dept. 1985) (staying arbitration temporarily for a factual determination to determine whether a condition to precedent to coverage was met, finding that “[w]here there is a genuine triable issue with regard to whether the claimant's vehicle actually

¹ This record reflects a pending subpoena for the respondent's call records from his cell phone provider. See NYSCEF Doc. No. 39.

came into contact with a hit-and-run vehicle, the appropriate procedure is to stay arbitration pending a trial of the threshold issue” and noting “[t]he insurance policy clearly provides that there must be ‘physical contact’ before ‘hit-and-run’ coverage attaches. Thus, physical contact with the alleged offending vehicle is a condition precedent to arbitration under an uninsured motorist indorsement”).

This constitutes the decision and order of this Court.

<u>10/05/2023</u> DATE		 WILLIAM FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE