Global Liberty Ins. Co. v Cobo
2023 NY Slip Op 34279(U)
November 21, 2023
Supreme Court, Kings County
Docket Number: Index No. 520612/2022
Judge: Ingrid Joseph

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 21st day of November, 2023.

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

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GLOBAL LIBERTY INSURANCE COMPANY,

Petitioner,

-against-

JOHNNY COBO,

Respondent,

PAMELYS AQUINO and JOHN DOE INSURANCE COMPANY (A-S) (1-10),

Proposed Additional Respondents.

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Index No.: 520612/2022

DECISION AND ORDER

The following e-filed papers considered herein:

	NYSCEF Doc. Nos.
Notice of Petition/Petition/Exhibits Annexed.....	1-7
Affirmation in Opposition/Exhibit Annexed.....	12-13
Affirmation in Reply/Exhibits Annexed.....	21-30

Petitioner Global Liberty Insurance Company ("Petitioner") moves for an order, pursuant to CPLR 7503: (1) permanently staying the arbitration between Petitioner and Respondent Johnny Cobo ("Respondent"), (2) vacating the Demand for Arbitration against Petitioner due to Respondent being an impermissible user and the other motor vehicle involved potentially having insurance, or, alternatively, (3) granting a framed issue hearing to determine all remaining issues as to insurance coverage of all involved vehicles and adding Pamelys Aquino and John Doe Insurance Company as additional respondents (Mot. Seq. No. 1). Respondent opposes the petition, arguing, *inter alia*, that it fails on the grounds that the petition is untimely and a copy of the insurance policy was not attached.

This action arises out of an accident that occurred on December 5, 2020, involving a livery vehicle operated by Respondent and owned by American United Transportation ("AUT"). At the time of the accident, AUT was insured by Petitioner. The livery vehicle was leased by EZ Livery Leasing LLC ("EZ Livery"), an affiliate of AUT, to Alfonso Carlos Cobo-Salavarria ("Cobo-Salavarria") pursuant to a lease agreement (the "Agreement"). The Agreement contained two relevant provisions, per Petitioner: (1)

"Renter will not permit any other individual to operate said vehicle without the written consent of EZ" and (2) "No insurance coverage is provided under this agreement if, when the claim arises, the vehicle is being operated by an unauthorized driver." Petitioner contends that the Agreement did not authorize Respondent as a permissible user of the vehicle he was operating. In addition, EZ Livery never gave written or any other consent for anyone other than Cobo-Salavarria to operate the vehicle. Thus, Petitioner argues that arbitration should be stayed because Respondent was not a party to the Agreement, was never authorized to use the vehicle, and the Agreement explicitly provided that no insurance coverage would apply if the vehicle was operated by an unauthorized user. Moreover, Petitioner contends that another potential insurance company is involved for the owner of the second vehicle identified in the police report. Using information from the police report, Petitioner contends that the second vehicle was registered in Texas to Pamelys Aquino. According to Petitioner, Respondent has not shown any effort to locate insurance information of the other driver involved in the accident.

In opposition, Respondent asserts that the petition must be dismissed as untimely. Since the request for uninsured motorist arbitration was served on June 22, 2022, Petitioner was required to commence this matter within 20 days. However, Respondent argues that Petitioner's filing was eight days late on July 20, 2022. Though Petitioner contends that Respondent was an impermissible user, Respondent claims that Petitioner cannot meet its burden because it failed to attach a copy of the insurance policy at issue. Even if the policy was attached, Respondent alleges that since the policy was issued to a corporation, it covers anyone that was occupying the vehicle. Moreover, under Vehicle and Traffic Law ("VTL") § 388 (1),[1] there is constructive consent.

Petitioner contends in its reply that its petition is timely because of an apparent error with the courts' electronic filing system—NYSCEF.[2] Petitioner argues that the issue is a mere irregularity, which does not prejudice the Respondent. Petitioner further argues that there is evidence that the other vehicle involved was insured at the time of the accident. According to Petitioner, the second vehicle was issued a temporary tag and under Texas law, proof of insurance coverage was first required to obtain such tag. In addition, Petitioner claims that Respondent failed to demonstrate that it attempted to identify the vehicle or its registered owner to confirm whether alternate insurance existed. Petitioner also asserts that Cabo-Salavarria's affidavit contains a misstatement of fact as to his ownership of the vehicle and his affiliation with AUT. Through its representative's affidavit, EZ swore that Respondent was not a permissible user.

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[1] The statute reads: "Every owner of a vehicle used or operated in [New York] shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner (Vehicle and Traffic Law § 388 [1])."

[2] Petitioner asserts that the petition was initially filed on July 11, 2022 and received by NYSCEF the next day and assigned the index number 519697/2022. Thereafter, Petitioner alleges that the same petition was received by NYSCEF on July 20, 2022 and assigned this instant index number, under which this action has proceeded.

As a preliminary manner, the Court addresses the issue of timeliness. CPLR 7503 (c) provides that "unless the party served [with a demand for arbitration or notice of intention to arbitrate] applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time." Thus, a party seeking a stay must first commence a special proceeding pursuant to CPLR 7502 (a) by filing a petition no later than the twentieth day.[3] Here, Petitioner admits that the arbitration demand was served on June 22, 2022. The Court verified that the same petition was inexplicably filed under two separate index numbers. Since the initial petition was timely filed and the duplicate was refiled or re-received shortly thereafter, the Court will proceed with the merits of the petition (*see Batra v Elec. Land Servs., Inc.*, 41 Misc. 3d 1211 [A] [Sup Ct, Westchester County 2013], *affd* 136 AD3d 723 [2d Dept 2016] [denying motion for default judgment where defendants' attorneys denied receiving notice from NYSCEF of the e-filing of complaint]).

The Court next addresses Petitioner's claim that a stay should be issued because the other vehicle involved may have insurance coverage. The Second Department has previously determined that an insurance policy's uninsured motorist endorsement will not kick in "unless and until it has been established that there was no insurance coverage on the offending vehicle on the date of the accident" (*Matter of New York Cent. Mut. Fire Ins. Co. v Julien*, 298 AD2d 587, 587 [2d Dept 2002] [internal citations omitted]). The initial burden rests with the insurance carrier seeking a stay to establish that the other vehicle was insured (*USAA Gen. Indem. Co. v McQueen*, 207 AD3d 641, 642 [2d Dept 2022] [internal citations omitted]) with sufficient evidence, such as a police report containing the other vehicle's insurance code or proof from the Department of Motor Vehicles (*Progressive Cas. Ins. Co. v Persaud*, 216 AD3d 642, 643 [2d Dept 2023] [internal citations omitted]; *see also Gov't Emps. Ins. Co. v Escoto*, 178 AD3d 1040, 1042 [2d Dept 2019]). Upon the carrier's prima facie showing, the burden shifts to the opposing party to produce evidence that the other vehicle was never insured or that the insurance had been cancelled (*Centennial Ins. Co. v Capehart*, 220 AD2d 499, 499 [2d Dept 1995]). If there is triable issue of fact, then a temporary stay should be issued to allow the Supreme Court, not the arbitrator, to determine it at a framed issue hearing (*Hertz Corp. v Holmes*, 106 AD3d 1001, 1003 [2d Dept 2013] [internal citation omitted]).

Petitioner's contention that the other vehicle "potentially" has its own insurance coverage is wholly insufficient. Here, the police report does not identify any insurance company for the second vehicle. Without more, Petitioner fails to meet its burden (*see Gov't Emps. Ins. Co. v Williams-Staley*, 288 AD2d 471, 472 [2d Dept 2001] [insurance carrier could meet its burden if the police report recited insurance code]; *Nationwide Ins. Co. v Sillman*, 266 AD2d 551, 552 [2d Dept 1999] [police report with insurance code

[3] Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C7503:8.

establishes "prima facie case with respect to the existence of insurance coverage"]). However, in support of its petition, Petitioner also produced search results from the Texas Department of Motor Vehicles ("DMV"), reflecting the same license plate number, year and make as the second vehicle in the police report and identifying Pamelys Aquino as the buyer of the temporary tag. Petitioner's assertion that it is "reasonable to presume" that the other vehicle was insured because Texas required proof of insurance to obtain a temporary tag unsupported by any case law. In *Country-Wide Insurance Company v. Huang*, the petitioner alleged that the second vehicle was insured because it was registered in Michigan, a state that requires insurance (*Country-Wide Ins. Co. v Huang*, Sup Ct, NY County, May 9, 2008, Solomon, J., index No. 600921/2008). Unlike here, the police report in *Huang* indicated that the other vehicle was insured and included an insurance policy number (*id.*). Assuming arguendo that the Texas DMV search results are admissible, the Court finds that Petitioner has still not met its burden because not only is the insurance company unidentified, but even if it was, there is no evidence that the vehicle was in fact insured at the time of the accident (*but see Allstate Ins. Co. v Robinson*, 188 AD3d 1186, 1189 [2d Dept 2020] [police report and results of license plate search established that vehicle was insured by carrier at the time of the accident]). Therefore, it is irrelevant whether Respondent made any efforts to ascertain the insurance status of the other vehicle (*see Eagle Ins. Co. v Rodriguez*, 15 AD3d 399, 400 [2d Dept 2005] [burden shifts to respondent to establish lack of coverage only when petitioner makes prima face case]). Accordingly, a framed issue hearing is not warranted where the Petitioner has not met its burden (*see Progressive Cas. Ins. Co. v Persaud*, 216 AD3d 642 [2d Dept 2023] [affirming denial of petition seeking temporary stay pending framed issue hearing where petitioner did not make prima facie showing that other vehicle was insured at the time of the accident; *see also In re Country-Wide Ins. Co. v Lian*, Sup Ct, Kings County, June 28, 2022, Sweeney, J., index No. 523187/2021). Thus, the Court declines to grant Petitioner's request for a stay on the grounds that it failed to establish that the other vehicle was insured.

The Court then turns to Petitioner's request for a stay because Respondent was not a permissible user. Petitioner argues that the cases concerning commercial lessors cited by Respondent are distinguishable because they did not involve leases that restricted the use to the renter alone. However, *Roger M. v. American United Transportation, Inc.* does involve a lease restricting the use to a single person (78 Misc 3d 1201[A] [Sup Ct, Bronx County 2023]). As in this instant action, in *Roger* AUT argued that the vehicle was financed to a non-party by EZ Livery and pursuant to the finance agreement,[4] the non-party could not permit another individual to operate the vehicle without EZ Livery's written consent (*id.*). AUT argued that through the affidavit of its chief operating officer, the finance agreement, and New York State

[4] The finance agreement in *Roger* contained the same provision in the lease agreement as to the use of the vehicles by others: the renter or signor "will not permit any other individual to operate said vehicle without the written consent of EZ."

vehicle registration listing AUT as the owner, it rebutted VTL § 388 (1)'s presumption of permissive use. The court, however, found that AUT's vicarious liability under this statute "depend[ed] entirely on constructive consent, which in turn "depend[ed] on whether [the lessee] permitted [the driver] to drive the vehicle at issue" (*id.*). Though the issue in *Roger* related to vicarious liability, this Court finds that the same rationale should apply to the question of insurance coverage. In fact, the Court of Appeals previously found that where an individual drives a vehicle with the consent of its lessee, the lessor is deemed to have constructively consented to such use, even where the rental agreement was violated by the lessee permitting another's use without first obtaining the lessor's consent (*Motor Veh. Acc. Indem. Corp. v Cont'l Nat. Am. Grp. Co.*, 35 NY2d 260 [1974]; *see also Lancer Ins. Co. v Republic Franklin Ins. Co.*, 304 AD2d 794 [2d Dept 2003]).[5] Here, pursuant to the lease agreement, the lessee is Cobo-Salavarria. Both Respondent and Cobo-Salavarria assert that Cobo-Salavarria gave Respondent permission to use the vehicle. The only issue Petitioner raises is that *it* did not give Respondent permission, which is not dispositive.

Accordingly, it is hereby

ORDERED, that the petition (Mot. Seq. No. 1) is denied in its entirety.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[5] "The linchpin to our finding of constructive consent in [*Motor Veh. Acc. Indem. Corp. v Continental Natl. Am. Group Co.*, 35 NY2d 260 [1974]], was the third-party driver's permissive use vis-à-vis the lessee. Only because the lessee gave his consent to [the third-party driver] to operate the rental vehicle [did] we find that he was operating it with the constructive consent of [the lessor] and, perforce, with the 'permission' envisioned by the provisions of section 388" (*Murdza v Zimmerman*, 99 NY.2d 375, 381 [2003] [internal citation and quotation marks omitted]).