

Matter of Progressive Cas. Ins. Co. v Jackson
2023 NY Slip Op 35195(U)
February 6, 2023
Supreme Court, Westchester County
Docket Number: Index No. 64100/2022
Judge: James L. Hyer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

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

-----X
In the Matter of the Application of the

PROGRESSIVE CASUALTY INSURANCE COMPANY,

DECISION & ORDER

Petitioner,

Index No. 64100/2022

-against -

Sequence No. 1
Motion Date: 12/5/2022

To Stay the Arbitration sought to be had by

LINDA JACKSON,

Respondent.

-----X
HYER, J.S.C.

The following documents, numbered 1 to 15, were considered with Petitioners' Notice of Petition, dated August 26, 2022, seeking an Order, *inter alia*, permanently staying Respondent from proceeding with a Supplementary Uninsured/Underinsured Motorist Arbitration.

PAPERS

NUMBERED

Notice of Petition/Petition/Exhs. A-J

1-12

Affirmation in Opposition/Jackson Affidavit

13-14

Reply Affirmation

15

By way of background, Respondent was driving her car on January 10, 2022 at approximately 1:00 a.m. when she was approached by another vehicle from behind at a high rate of speed. The other car overtook her car, making contact with the rear driver's side of her vehicle. As a result, Respondent lost control of her car, which then jumped the curb, causing damage to the front of her car.

On August 15, 2022, Petitioner received a Demand for Arbitration (Petition at ¶4; Exh. A) and commenced this action to stay it (Petition at ¶6).

Petitioner asserts that based on the photographs and repair estimate submitted (Petition; Exhs. H-J), there is no evidence that Respondent was rear-ended as she claimed and therefore, there is no evidence of physical contact between the uninsured hit-and-run vehicle and Respondent's vehicle. As such, Petitioner argues, Respondent is not entitled to coverage pursuant to the Supplementary Uninsured/Underinsured Motorists provision of the policy, New York Insurance Law § 3420, New York Insurance Law § 5217, and New York Insurance Regulation 35-D (11 NYCRR 60-2.3).

"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" (*Matter of Global Liberty Ins. Co. of N.Y. v Kaler*, 195 AD3d 826, 829 [2d Dept 2021] [internal quotation marks and citations omitted]). "Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing" (*id.*; see *Matter of Merchants Preferred Ins. Co. v Waldo*, 125 AD3d 864, 865 [2d Dept 2015]). "Where a triable issue of fact is raised, 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 on the issue" (*Matter of Global Liberty Ins. Co. of N.Y. v Kaler*, 195 AD3d at 829, quoting *Matter of Hertz Corp. v Holmes*, 106 AD3d 1001, 1003 [2d Dept 2013]).

"Physical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle" (*Matter of Allstate Ins. Co. v Deleon*, 159 AD3d 895, 896 [2d Dept 2018], quoting *Matter of Progressive Northwestern Ins. Co. v Scott*, 123 AD3d 932 [2d Dept 2014]). "The insured has the burden of establishing that the loss sustained was caused

by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable" (*Matter of Nova Cas. Co. v Musco*, 48 AD3d 572, 573 [2d Dept 2008]).

Here, Petitioner submitted evidence to establish a preliminary issue as to whether there was physical contact between Respondent's vehicle and the hit-and-run vehicle. It submitted the police report in which Respondent stated she was rear ended by the offending vehicle, as well as photographs and a repair estimate that did not reflect any damage to the rear of the vehicle. In response, Respondent proffered her affidavit in which she described the hit as not being dead-on, but as "contact" presenting as a scuff mark. Whether this "contact" and/or scuff mark constitutes physical contact, or is the same as being rear-ended, are questions to be resolved at a framed-issue hearing (*see Matter of Allstate Ins. Co. v Deleon*, 159 AD3d at 897 [court properly directed a framed-issue hearing to determine whether a hit-and-run vehicle was involved in the accident]; *see generally New York Cent. Mut. Fire Ins. Co. v Paredes*, 289 AD2d 495, 496 [2d Dept 2001] [framed issue hearing warranted where insured claimed in police report that unidentified vehicle "cut her off" but later stated at 50-h hearing that she was struck by the other car]).

As such, it is hereby

ORDERED that for the reasons stated herein, the Petition is granted to the extent a framed-issue hearing is required; and it is further

ORDERED that the arbitration is temporarily stayed pending the resolution of the framed-issue hearing; and it is further

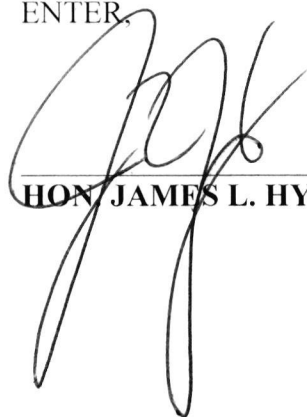
ORDERED that any issue not directly addressed herein is denied; and it is further

ORDERED that the matter is transferred to the TAP part for scheduling of the framed-issue hearing. Any questions related to that hearing and its scheduling shall be directed to the TAP Part at TAPWestchester@nycourts.gov.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
February 6, 2023

ENTER,

A handwritten signature in black ink, appearing to be 'JL Hyer', is written over a horizontal line.

HON. JAMES L. HYER, J.S.C.

To: Counsel of Record via NYSCEF