

Matter of Allstate Fire & Cas. Ins. Co. v Ardon

2024 NY Slip Op 34821(U)

July 9, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 603537/2024

Judge: Maureen T. Liccione

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Short Form Order

Index No. 603537/2024

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:

Hon. Maureen T. Liccione

Justice Supreme Court

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In the Matter of the Application of
ALLSTATE FIRE AND CASUALTY INSURANCE
COMPANY to Stay Arbitration,

Petitioner,
-against-

NESTOR BUSTILLO ARDON,

Respondent,
-and-

IVIS HERNANDEZ, ISABEL BIELER and STATE
FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY,

Proposed Additional Respondents.
-----x

Mot. Seq. No. 001– MD/CaseDisp
Orig. Return Date: 04/04/2024
Mot. Submit Date: 04/10/2024

PETITIONER’S ATTORNEY

MARSHALL & MARSHALL
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Jericho, NY 11753

RESPONDENT’S ATTORNEY

CANNON & ACOSTA, LLP
1923 New York Avenue
Huntington Station, NY 11746

Upon the e-filed documents numbered 1 through 19 and upon due deliberation, it is hereby:
ORDERED that the petition of Allstate Fire and Casualty Insurance Company is denied
in its entirety; and it is further

ORDERED and ADJUDICATED that the petition is dismissed.

On February 8, 2024, petitioner Allstate Fire and Casualty Insurance Company (Allstate) filed a petition pursuant to CPLR 7503 (c) requesting a permanent stay of the uninsured motorist arbitration it asserted had been demanded by respondent Nestor Bustillo Ardon (Bustillo). The petition alleges that there is a threshold question as to whether the Bustillo is entitled to uninsured motorist coverage for the subject occurrence. In the alternative, Allstate requests that the Court issue an order: (1) temporarily staying the arbitration pending an evidentiary hearing; (2) directing the addition and joinder of Ivis Hernandez, Isabel Bieler, and State Farm Mutual Automobile

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Insurance Company (State Farm) as necessary parties-respondents to the within proceeding; and (3) directing that Bustillo forward medical, hospital and no-fault authorizations, appear for physical examinations, and a further examination under oath.

Bustillo was involved in a motor vehicle accident on June 14, 2023 while he was operating a 2015 Nissan Rogue insured by Allstate. Pursuant to the police accident report the vehicle Bustillo was driving was struck by a vehicle operated and owned by Isabel Bieler. The police accident report lists insurance code "328" for Ms. Bieler's vehicle, which the New York State Department of Motor Vehicles Insurance Codes and Company Contacts Directory designates as State Farm Mutual Automobile Insurance Company (State Farm).

On the date of the collision, Allstate had an automobile insurance policy in effect with Ivis Hernandez for the 2015 Nissan Rogue Bustillo was driving. The policy contained the usual liability coverages for personal injuries and property damage and, in addition thereto, contained uninsured/underinsured motorist coverage in the amounts of \$100,000 each person and \$300,000 each occurrence. Bustillo served Allstate with a Demand for Arbitration claiming that he was entitled to supplementary **underinsured** motorist coverage. Allstate denied Bustillo's demand by stating:

Bustillo admitted in the examination under oath that he was not a listed driver on the policy to save money on the insurance premium. Allstate determined that it would not have issued and renewed the policy at the same rate had the driver of the insured vehicle been disclosed in the insurance application and policy renewal. Allstate's investigation and the examination under oath testimony demonstrated material misrepresentations were made in the insurance application and policy renewal regarding who the driver was of the insured vehicle.

In its petition, Allstate claims that Bustillo's vehicle was not **uninsured** and produced a police report containing her vehicle's insurance code designation establishes a prima facie case as to the existence of insurance coverage for that vehicle. Allstate also contends that at the time he procured the subject policy with Allstate, proposed additional respondent Ivis Hernandez represented that he was the sole driver for all three vehicles on the subject Allstate policy, and by doing so, misrepresented by omission the fact that Bustillo was and would be a regular driver of the Allstate insured vehicle. Allstate served the instant petition on Bustillo, and the proposed additional respondents Ivis Hernandez, Isabel Bieler, and State Farm. Bustillo opposed the petition, but no opposition was filed by the proposed additional respondents Ivis Hernandez, Isabel Bieler, and State Farm.

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Permanent Stay of the Uninsured Motorist Arbitration

As noted above, Allstate's petition seeks, inter alia, a permanent stay of the "uninsured motorist arbitration at the American Arbitration Association against [Allstate] on the ground that there is a threshold question as to whether the [Bustillo] is entitled to uninsured motorist coverage for the subject occurrence" (NYSCEF Doc No. 1). However, there is nothing in the record to indicate that Bustillo was making an uninsured motorist claim. There is no dispute that Isabel Bieler was insured. Bustillo did not demand arbitration for an uninsured motorist claim. Rather, he petitioned for arbitration of an underinsured motorist claim. Moreover, Allstate denied the demand for arbitration not because Isabel Bieler was insured but, rather, by asserting that it would not have issued the policy in question at the same rate had Mr. Bustillo been listed as a driver on the policy application. Accordingly, the branch of Allstate's petition for a permanent stay of arbitration of an uninsured motorist claim is denied.

Framed Issue Hearing and Temporary Stay of Arbitration

Allstate also requests that this matter be set down for a framed issue hearing with regard to whether the proposed additional respondent Ivis Hernandez materially misrepresented at the time the subject policy was procured and/or renewed, that he would be the primary driver of the insured 2015 Nissan Rogue, and/or knowingly failed to add Bustillo as an additional listed driver, despite the fact that Mr. Hernandez knew, or should have known, that Bustillo would be the primary driver of the insured 2015 Nissan Rogue. Allstate requests a stay of the arbitration pending the framed issue hearing.

"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" (*Govt. Emps. Ins. Co. v Escoto*, 178 AD3d 1040, 1042 [2d Dept 2019], quoting *AutoOne Ins. Co. v Umanzor*, 74 AD3d 1335, 1336 [2d Dept 2010]). "Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing" (*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 that issue in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination (*Govt. Emps. Ins. Co.*, 178 AD3d at 1042; *Hertz Corp. v Holmes*, 106 AD3d 1001, 1003 [2d Dept 2013]).

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Here, Allstate failed to meet its prima facie burden of showing “sufficient evidentiary facts to establish a preliminary issue that would justify the stay” of the arbitration (*Gov’t Emps. Ins. Co.*, at 1042). Notably, Allstate relies on the examination under oath testimony of Bustillo to support its assertion that at the time the subject policy was procured and/or renewed, Ivis Hernandez materially misrepresented that he would be the primary driver and/or knowingly failed to add Bustillo as an additional listed driver. However, Allstate did not submit a copy of the application for the insurance policy or the renewal documentation reflecting what representations were made by Mr. Hernandez to Allstate and what Mr. Hernandez attested to, or a transcript of the examination under oath of Mr. Hernandez. “A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof” (*Morales v Castlepoint Ins. Co.*, 125 AD3d 947, 948 [2d Dept 2015], quoting Insurance Law § 3105 [a]). In the absence of any evidence of what representations the insured, Mr. Hernandez, made on the policy application there can be no finding that any misrepresentation was made and that any of such misrepresentation met the materiality threshold. While Allstate claims that its “investigation and the examination under oath testimony [of Bustillo] demonstrated material misrepresentations were made in the insurance application and policy renewal regarding who the driver was of the insured vehicle,” Mr. Hernandez is the insured, so any material misrepresentations on the application would have been made by him, not Bustillo.

Furthermore, Allstate’s petition has not “show[n] the existence of sufficient evidentiary facts” as to the materiality of accepted the misrepresentation “which would justify a stay” (*Govt. Emps. Ins. Co.*, at 1042). Allstate has not met its burden to show that there are underwriting manuals, rules or bulletins indicating that the premiums have been higher had Mr. Bustillo been listed as the primary driver (*Liberty Mut. Ins. Co. v Valera*, 208 AD3d 1104 [1st Dept 2022]). Therefore that branch of the petition requesting a framed issue hearing and a temporary stay of the arbitration is denied.

Allstate’s request for an order that Bustillo provide medical, hospital and no-fault authorizations, and appear for physical examinations and further examination under oath, is denied as moot as Bustillo has already provided Allstate with the authorizations and has represented he agrees to appear for a physical examination and a further examination under oath. Allstate’s

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remaining contentions are either without merit or are unnecessary to this determination. Accordingly, the petition is denied in its entirety.

The foregoing constitutes the judgment, decision and order of the Court.

ENTER

DATE: July 9, 2024
Riverhead, NY



HON. MAUREEN T. LICCIONE, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION