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| <b>Matter of Progressive Direct Ins. Co. v Manzolillo</b>                                                                                                                                                                      |
| 2024 NY Slip Op 35261(U)                                                                                                                                                                                                       |
| May 2, 2024                                                                                                                                                                                                                    |
| Supreme Court, Suffolk County                                                                                                                                                                                                  |
| Docket Number: Index No. 607690/2023                                                                                                                                                                                           |
| Judge: Maureen T. Liccione                                                                                                                                                                                                     |
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Short Form Order

Index No. 607690/2023

SUPREME COURT – STATE OF NEW YORK  
PART 78 – SUFFOLK COUNTY**P R E S E N T:****Hon. Maureen T. Liccione**

Justice Supreme Court

-----X  
In the Matter of the Application of thePROGRESSIVE DIRECT INSURANCE  
COMPANY,

Petitioner,

-against-

To Stay the Arbitration sought to be had by

MARK J. MANZOLILLO,

Respondent.  
-----X**ORDER****PETITIONER'S ATTORNEY**LAW OFFICES OF  
JENNIFER S. ADAMS  
20 Lawrence Bell Drive, Suite 300  
Williamsville, NY 14221**RESPONDENT'S ATTORNEY**RAPPAPORT GLASS LEVINE &  
ZULLO, LLP  
1355 Motor Parkway  
Islandia, NY 11749

Upon the testimony and evidence presented at a framed issue hearing held on January 17 and 23, 2024 and all the proceedings herein, it is:

**ORDERED** that the petition for a permanent stay of arbitration is denied; and it is further

**ORDERED** that the temporary stay of arbitration issued by order dated August 15, 2023 (St. George, AJSC) is vacated; and it is further

**ORDERED** that outstanding pre-arbitration discovery shall be completed within 60 days of the posting of this order with notice of entry on NYSCEF.

This is a petition pursuant to CPLR 7503 in which petitioner Progressive Direct Insurance Company (Petitioner or Progressive) seeks a permanent stay of the uninsured motorist arbitration demanded by respondent Mark J. Manzolillo (Respondent or Mr. Manzolillo). Mr. Manzolillo is seeking coverage under the supplemental uninsured motorist (SUM) portion of his automobile insurance policy for bodily injuries he suffered from an alleged hit and run while he was riding his motorcycle. Petitioner declined coverage and sought the stay alleging that Mr. Manzolillo failed to establish that his motorcycle was contacted by another vehicle as is required pursuant to Insurance Law § 5217. Alternatively, Petitioner seeks a temporary stay of arbitration pending the

outcome of a framed issue hearing to determine whether there had been physical contact. Respondent opposed the application for a permanent stay and crossed moved for an order requiring a framed issue hearing on the question of whether there had been physical contact. Respondent's motion also requested that in the event the Court were to find that Respondent had a valid uninsured motorist claim, that an order requiring pre-arbitration discovery be issued.

It is uncontroverted that at the time of the accident in question Mr. Manzolillo had in place an automobile insurance policy with a policy limit of \$25,000 per each person and \$50,000 per each accident under a SUM endorsement for protection against bodily injuries arising from accidents with uninsured motorists. By decision and order dated August 15, 2023 (St. George, AJSC) a temporary stay of the arbitration was imposed, and the parties were directed to appear for a framed issue hearing. This matter subsequently was transferred to this part and a hearing was held on January 17 and 23, 2024. Transcripts of the proceeding were then provided by counsel.

#### **Evidence Presented at the Hearing**

Mr. Manzolillo testified that on October 4, 2022 he was heading to work by proceeding northbound on Mastic Road on his bright orange motorcycle. He described the motorcycle as having been in mint condition. He was wearing a helmet. Visibility was good, and it was raining lightly. He was experienced riding motorcycles and had been doing so for approximately ten years. His speed was between 20 and 30 miles per hour in heavy traffic.

He testified that a blue hatchback, which he believed was a Hyundai, made a left turn onto Mastic Road, came into his lane, and bumped his motorcycle. He testified that he used his horn which was knocked off during the contact. He tried to bang on the passenger side window of the blue hatchback and wound up holding on to the vehicle. He testified that there were two points of contact with the blue hatchback on the left side of his motorcycle. The first was near the clutch and handlebars of his motorcycle. The second was on the motorcycle's body. During the second contact the front end of the motorcycle was "pushed out" and he was thrown off. He estimated that he was ejected fifty feet into a fence and landed on the nearby grass.

Suffolk County Police Department (SCPD) officers responded to the grassy area near the fence. Mr. Manzanillo stated that he was transported by ambulance to Long Island Community Hospital (also referred to as Brookhaven Hospital) with an officer accompanying him. He testified that he asked the police officers at the scene whether the blue hatchback had stopped. He testified that he mentioned to police officers, EMS workers and hospital staff that his motorcycle had been



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hit. Mr. Manzanillo testified that he spent four days in the hospital and suffered a broken back in 13 places, broken ribs, and punctured lung and a heart attack.

Mr. Manzanillo testified that upon his release from the hospital he was able to inspect his motorcycle. He noticed damage on the left side which he stated was from the two incidents of contact and damage on the right side which he said was from the motorcycle's eventual fall. He pointed to photographs in evidence showing streaks of blue which he said were on the left side of the orange motorcycle and on the left front fairing near the headlight. He also pointed to a broken left fairing "from when the wheel (of the motorcycle) went under the car a little." Mr. Manzanillo also pointed to damage on the left of the front steering rack that he testified was a result of the second hit or contact with the blue hatchback and which caused the motorcycle "to collapse and throw me." He did not give a statement to the police.

**Officer Kostof**

The next witness to testify was SCPD Officer Kostof who indicated that he responded to the scene on the date of the accident. Although the subpoena pursuant to which he testified commanded him to bring his memo book and notes, he came without them. He testified that an MV-104 A accident report was not prepared because the property damage was believed to be less than \$1000.00 and because no other vehicle was involved. On direct he stated that Mr. Manzanillo had no visible injuries. The officer first testified that he was called to the scene of a bicycle accident. He did not recall the color of the motorcycle until he was shown the photographs in evidence.

Officer Kostof stated that he spoke with an unidentified driver of a maroon SUV who saw someone operating a motorcycle behind him and who he "believed" fell off and who "may or may not have put his hand on his car for balance." He stated on direct examination that he did not ask this witness "directly what had happened." When a portion of Officer Kostof's memo book was produced at the second day of the hearing it contained no information about this purported witness.

On cross examination Officer Kostof stated that he hadn't witnessed the accident and that the "bike wasn't looked at." He indicated that a field or aided report was generated regarding the incident but that it was prepared by his partner.

**Officer Laine**

The final witness was Officer Laine, Officer Kostof's partner, who responded to the scene in the same sector car. Officer Kostof was the driver and Officer Laine was the recorder. Officer

Laine had recently graduated from the police academy and had been a patrol officer in the precinct for approximately three months.

He testified that on the date of the accident the weather was clear, and visibility was good. When he came upon the scene there was a motorcycle on the ground and a man laying or sitting next to it. Mr. Manzollilo was not responsive to Officer Laine's inquiries asking for his name and driver's license.

He was shown the photographs in which Mr. Manzollilo had identified the damage to the left and front of his motorcycle and indicated that he did not recall observing that damage on the date of the accident when he had picked up the motorcycle to examine it. On cross examination he could not recall how much time he had spent examining the motorcycle. Although Officer Laine produced his memo book, there was no entry regarding the accident other than the time he arrived at the scene. Although he testified that he had spoken with an unidentified driver of a black SUV who said that the motorcycle driver lost control, there is no notation of that conversation. Officer Laine testified that it was his conclusion that there was no other vehicle involved in the accident and that there was no contact with any such vehicle.

Officer Laine prepared a handwritten field or aided report of the incident which states "caller reports aided fell off his motorcycle." Later, on cross examination Officer Laine reviewed the SCPD typed incident report in evidence which indicated that a call came from an unidentified passing motorist and that the incident was described as VEH VS MC or as "vehicle versus motorcycle."

#### **Governing Law**

"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] [internal quotations omitted]). "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" (*id.*, [internal quotations omitted]). "When an insured meets [his] burden, the burden of proof flips, and the insurer must prove that the hit-and-run accident did not occur" (*American Transit Ins. Co. v Bencosme*, 2022 WL 1540179, at \*4 [Sup Ct, New York County, May 13, 2022, No. 652207/2020]).

**Findings of Fact**

Mr. Manzollilo testified credibly. The police officers' testimony, however, lacked clear recollections and accuracy. Moreover, the lack of notes confirming the observations and conversations with witnesses detracted from the credibility of their testimony. Finally, while some testimony regarding hearsay statements was permitted for the fact that such statements were made, they were afforded no weight on the issue of whether there was contact with the motorcycle.

The blue streaks on the bright orange motorcycle demonstrated that the motorcycle was hit on the left side by a blue vehicle. The damage to the fairing also was consistent with contact by another vehicle on the left side. There was no evidence of prior damage to the left side or the fairings. There was no evidence of damage to the motorcycle by any cause during Mr. Manzollilo's four day hospital stay.

**Conclusions of Law**

The Court finds that the preponderance of the credible evidence establishes that Mr. Manzollilo's motorcycle made contact with another vehicle which fled the scene. The insurer did not meet its burden to prove that a hit-and-run accident did not occur.

The foregoing constitutes the Order of the Court.

ENTER

DATE: May 2, 2024  
Riverhead, NY

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