

Short Form Order

Index No. 620838/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

TRAVELERS PERSONAL INSURANCE
COMPANY, x

Petitioner,

-against-

DOROTHY FORSTELL, INTEGON
CASUALTY INSURANCE COMPANY,
REGINA SANTOS MALDONADO, BESSI
MALDONADO,

Respondents. x

Mot. Seq. No. 001 - MG
Orig. Return Date: 11/29/2017
Mot. Submit Date: 01/09/2018

PETITIONER'S ATTORNEY

Vincent L. Pirro, Esq.
Law Offices of Aloy Ibuzor
P.O. Box 2904
Hartford, CT 06104-2904

RESPONDENT'S ATTORNEY

Rappaport, Glass, Levine & Zullo
Attorneys for Respondent Dorothy Forstell
1355 Motor Parkway
Islandia, NY 11749

ADDITIONAL RESPONDENTS

Integon Casualty Insurance Company
P.O Box 1623
Winston Salem, N.C. 27102-1623

Regina Santos Maldonado
122 Green Street
Warrenton, VA 20186

Bessi Maldonado
104 Irving Avenue
Wyandanch, NY 11798

AMERICAN ARBITRATION
ASSOCIATION

120 Broadway, 11th Floor
New York, NY 10271

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Upon the e-filed documents numbered 1 through 16, it is hereby

ORDERED, that petitioner's application for an order staying the arbitration demanded by respondent, Dorothy Forstell, under petitioner's uninsured motorist endorsement is granted insofar as petitioner's request for a temporary stay of arbitration pending a hearing to determine whether additional respondents Bessi Maldonado and Regina Santos Maldonado were uninsured is hereby granted; and it is further

ORDERED, that Integon Casualty Insurance Company, Regina Santos Maldonado and Bessi Maldonado are hereby named additional respondents and petitioner is directed to serve a copy of this order with notice of entry, together with copies of all papers previously served in this proceeding upon them within twenty (20) days of such entry; and it is further

ORDERED, that petitioner is hereby directed to serve a copy of this order with notice of entry upon both the clerk of the court to note the amendment of the caption to include the additional respondents and upon the calendar clerk of this court within twenty (20) days of such entry; and it is further

ORDERED, that the parties shall appear for a conference at 9:30 am on **July 5, 2018** in Part 50 Supreme Court Suffolk County, 1 Court Street, Riverhead, NY to schedule limited discovery and a hearing in accordance herewith; and it is further

ORDERED, that at least ten days prior to the above scheduled conference date the parties shall mutually exchange copies of the motor vehicle liability policies in effect on the date of the subject accident, including all endorsements and all documents and communications concerning the cancellation of such policies, if any.

This is a proceeding pursuant to CPLR article 75 in which the petitioner, Travelers Personal Insurance Company ("Travelers"), seeks an order pursuant to CPLR §7503 staying the uninsured motorist arbitration demanded by respondent Dorothy Forstell ("Forstell"). This proceeding arises from a motor vehicle accident in which Forstell alleges she was seriously injured as the result of the negligent operation of a vehicle operated by additional respondent, Bessi Maldonado, an unlicensed sixteen-year old driver, and owned by additional respondent, Regina Santos Maldonado. Travelers contends that Forstell's uninsured motorist coverage was not triggered because the Maldonado vehicle was insured. More specifically, Travelers contends that the cancellation of the Maldonado policy by additional respondent Integon Casualty Insurance Company ("Integon") was ineffective under Virginia law.

As the party seeking to stay arbitration pursuant to the uninsured motorist endorsement of its insured's policy, petitioner bore the burden of coming forward with evidence establishing that the alleged offending vehicle was insured by another insurance carrier at the time of the accident. See *Allstate Ins. Co. v Esposito*, 15 AD3d 648, 791 NYS2d 125 (2d Dept 2005). The Second Department has very recently reiterated this well-established principle by holding that the

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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. (*citations omitted*).” **Government Employees Insur. Co. v Tucci**, 157 AD3d 679, 69 NYS3d 330 (2d Dept. 2018). Upon such a showing, the burden then shifts to the party opposing the application to rebut the *prima facie* showing. If a triable issue of fact is raised, it is then determined by the court in a framed issue hearing, and a temporary stay pending such hearing is appropriate. *Id.*

In many cases, the petitioner meets its burden of coming forward with evidence that the vehicle in question was insured by producing a Department of Motor Vehicles FS-25 form or a Motor Vehicle 104A Form that indicates the code of an insurance company. **State Wide Ins. Co. v Libeccci**, 104 AD2d 893, 895, 480 NYS2d 510, 511 (2d Dept. 1984); *see, e.g., Lumbermen’s Mut. Cas. Co. v Beliard*, 256 AD2d 579, 682 NYS2d 430 (2d Dept. 1998); **Eagle Ins. Co. v Sadiq**, 237 AD2d 605, 655 NYS2d 601 (2d Dept. 1997); **Eagle Insur. Co. V Patrik**, 233 AD2d 327, 649 NYS2d 189 (2d Dept. 1996); *cf. Government Empls. Ins. Co. v Williams-Staly*, 288 AD2d 471, 733 NYS2d 74 (2d Dept. 2001) (petitioner could have met its burden by proffering a copy of the police accident report reciting the insurance code). In the present case, the police accident report indicates the insurance code of the Maldonado vehicle as “000.”

However, through Forstell’s efforts, in the course of pursuing a lawsuit for damages she allegedly suffered as a result of the accident in question, information came to light concerning an insurance policy for the Maldonado vehicle through Integon. Integon provided a copy of a cancellation notice based upon nonpayment of the premium, which resulted in Integon canceling the policy effective November 4, 2016, approximately seven months before the date of the accident on June 1, 2017.

Petitioner asserts that Integon’s notice of cancellation was invalid in that it failed to comply with the notice provision of the governing statute. Because the vehicle in question was registered in the Commonwealth of Virginia, the Virginia statute applies. The Code of Virginia §38.2-2212 E provides, in pertinent part:

No cancellation or refusal to renew by an insurer of a policy of motor vehicle insurance shall be effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew, or the insurer delivers such notice electronically to the address provided by the named insured. The notice shall:

.....

2. State the effective date of the cancellation or refusal to renew. The effective date of cancellation or refusal to renew shall be at least 45 days after mailing or delivering to the insured the notice of cancellation or notice of refusal to renew. However, when the

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policy is being canceled or not renewed for the reason set forth in subdivision 2 of subsection D of this section the effective date may be less than 45 days but at least 15 days from the date of mailing or delivery.

Subsection 2 of Subsection D of that above-cited section refers to nonpayment of premiums.

Petitioner asserts that the required fifteen days' notice was not provided, in that the notice of cancellation is dated fourteen days prior to the cancellation date. The date of the notice is "10/11/2016" and the cancellation date is "10/26/2016." Certainly October 26 is exactly fifteen days after October 11. However, upon more careful examination, and, as noted in the October 2, 2017 letter from Travelers to Forstell's attorney, annexed as Exhibit "D" to Forstell's opposition papers, the cancellation was to take place at "12:01 AM on 10/26/2016," meaning one minute after midnight on 10/25/2016. Thus, the notice provided was fourteen days and one minute of the fifteenth day, rather than a full fifteen days, as required by the statute.

In contrast to the situation in *Allstate Ins. Co. v Esposito*, 15 AD3d 648, 791 NYS2d 125 (2d Dept. 2005), relied upon by respondent, petitioner has presented some proof undermining the validity of Integon's disclaimer of coverage. Thus, a triable issue of fact as to whether the Maldonado vehicle was insured at the time of the accident has been raised, which will be determined by this court in a framed issue hearing.

ENTER

Date: May 23, 2018
Riverhead, New York


MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION