

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

**In the Matter of the application for a Stay of all
Arbitration Proceedings Attempted to be had
between ELRAC INC. d/b/a ENTERPRISE
RENT-A-CAR, and ELCO ADMINISTRATIVE
SERVICES,**

**Decision and Order
After Hearing**

Petitioner,

-against-

INDEX NO. 024771-09

JOHN WODZENSKI,

Respondent,

-and-

**GEICO INSURANCE, GEORGE X. NUNEZ,
JOSE A. NUNEZ, VLADIMIR Z. GOLUBAREV,
and NEW JERSEY MANUFACTURERS
INSURANCE COMPANY,**

Proposed Additional Respondents.

Petitioner, Elrac Inc. d/b/a Enterprise Rent-A-Car, and Elco Administrative Services (collectively referred to as "Elrac") commenced this proceeding, pursuant to CPLR Article 75 to permanently stay arbitration of John Wodzenski's ("Respondent") claim for uninsured motorist benefits. Pursuant to the decision and order of the Honorable Karen Murphy, dated March 23, 2010, Geico Insurance ("Geico"), George X. Nunez (the "Driver"), Jose A. Nunez (the

“Insured”), Vladimir Z. Golubarev and New Jersey Manufacturers Insurance Company were added as party respondents, and the matter was set down for a hearing pursuant to CPLR 409, which was heard before the undersigned on January 5, 2011. Based upon the credible evidence adduced at the hearing, the court makes the following findings of fact and conclusions of law.

On June 12, 2009, Wodzinski, while operating a motor vehicle owned and insured by Elrac, was involved in a three-car motor vehicle accident. Wodzinski was the driver of car one, Golubarev was the driver of car two, and George Nunez was the driver of car three. Car three, which is the subject of this hearing, was owned by Jose Nunez and insured by Geico.

On July 20, 2009, Geico received notice of the claim from Elrac. Following the receipt of notice, Geico unsuccessfully attempted phone contact with the Insured on four occasions, to wit: July 21, July 28, July 30 and August 6. A Geico claims representative left messages following each of these calls.

On September 3, 2009, the file was transferred to Stephanie Burns, the claims representative who testified at the hearing (the “claims representative”). Notably, Ms. Burns was not the claims representative who had tried contacting the insured in July and August 2009. Ms. Burns testified at the hearing that on the same day she received the file, she called the Insured at the phone number listed on the policy application. Ms. Burns asked for Jose Nunez (the Insured) but was told she had the wrong number. At that time, Ms. Burns did not ascertain who it was that she had spoken to. An unsuccessful attempt was also made to contact the driver of the insured vehicle, George Nunez, with directory assistance.

Thereafter, Ms. Burns sent five letters to both the Insured as well as the Driver of the vehicle to their respective addresses listed in the police report. All ten letters were sent by regular mail and none were returned as undeliverable. The letters were not produced at the hearing as they were computer generated form letters and, thus, were not contained within the file.

Having received no response to the letters, Geico sent Roger Aldridge, a field representative (“field representative”) to the address listed for the Driver. The field representative testified at the hearing that he visited the address of the Driver on three different occasions, each time leaving correspondence thereat. Mr. Aldridge’s attempted contacts were not answered. He did not visit the address of the Insured.

On November 4, 2009, Geico sent, via regular mail, disclaimer letters to both the Insured and the Driver.

The disclaimer letter to the Insured read, in pertinent part, as follows:

We acknowledge receipt of a claim concerning an automobile accident which occurred on 06/12/2009.

The Geico Indemnity Insurance Company hereby disclaims any and all liability or obligation to you and to others under policy 4116426232.

This disclaimer is made because of your failure to cooperate with Geico Indemnity Insurance Company in the investigation and subsequent handling of this loss.

....

With regard to this matter, we received a first notice of this claim from Enterprise Rent-A-Car, the owner of the Nissan Sentra involved in the loss on 07/20/2009. We attempted to call you on 07/21/2009, 07/28/2009, 07/30/2009, 08/06/2009 and 09/03/2009 with no response to our contact attempts. Letters asking you to contact us were sent on 09/03/2009, 09/10/2009, 09/21/2009, 10/02/2009 and 10/13/2009. A field representative was assigned to locate you and obtain a information from you and the driver in regards to this accident. On 09/10/2009 and 09/14/2009 the representative went to your residence and left a contact card requesting that you contact us to discuss the claim. To date we have had no response from you regarding this claim.

We are disclaiming coverage in this matter to you because you failed to respond to all of our numerous efforts, as enumerated above, to make contact with you to gain your cooperation and assistance in investigating this claim, which is your obligation in accordance with the policy contract.

At the hearing, the parties stipulated that the only issue to be resolved is whether Geico properly disclaimed coverage.

The Law

The law is well settled that in denying coverage based upon a failure to cooperate, the insurer bears the heavy burden of demonstrating: 1) that it acted diligently in seeking to bring about the insured's cooperation; 2) that the efforts employed by the carrier were reasonably calculated to obtain the insured's cooperation; and 3) that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction (*Thrasher v United States Liability Insurance Co.*, 19 NY2d 159 [1967]; *Johnson v Geico*, 72 AD3d 900 [2d Dept 2010]; *Baghaloo-White v Allstate Insurance Co.*, 270 AD2d 296 [2d Dept 2000]).

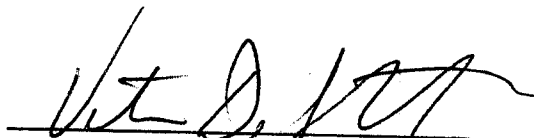
Here, while Geico's efforts in attempting to locate the Insured and sending correspondence to him demonstrated that it acted diligently in trying to secure the cooperation of the Insured, Geico nevertheless failed to demonstrate that its efforts were reasonably calculated to bring about his cooperation. First, none of Geico's letters were sent via certified or registered mail. In addition, the claims representative never ascertained the identity of the person with whom she was speaking when she called the phone number that was listed on the policy application and discovered it was the wrong number. Also, other than doing a directory assistance search, the claims representative testified that she did not take additional measures to ascertain any other addresses of the Insured or the Driver. Lastly, the field representative testified that he attempted numerous visits to the house of the *driver* but made no visits to the house of the *insured* (see *Thrasher v United States Liability Insurance Co.*, 19 NY2d at 169, *supra*; *Country-Wide Insurance Co. v Henderson*, 50 AD3d 789 [2d Dept 2008]).

The evidence is also insufficient to support the inference that the Insured's failure to cooperate was deliberate and willful under the particular circumstances of this case where Geico's efforts to locate the Insured were, for the most part, limited to sending letters (see, *Thrasher v United States Liability Insurance Co.*, 19 NY2d at 169-70, *supra*). Even assuming that the Insured had received the letters, mere inaction by him is not enough to establish noncooperation inasmuch as the inference of noncooperation "must be practically compelling" (*Country-Wide Insurance Co. v Henderson*, 50 AD3d 789 [2d Dept 2008]; see also, *Empire Mutual Ins. Co. v Stroud*, 36 NY2d 719 [1975] [nonaction on the part of the insured did not escalate to noncooperation even where underlying facts suggest insured received letter from insurer]; *New York State Insurance Fund v Merchants Insurance Co of New Hampshire, Inc.*, 5 AD3d 449 [2d Dept 2004]; *New York Central Mutual Fire Insurance Company v Salomon*, 11 AD3d 315 [1st Dept 2004]; *Pawtucket Mutual Insurance Co. v Soler*, 184 AD2d 498 [2d Dept 1992]).

Because Geico has failed to establish a right to disclaim coverage on the ground of lack of cooperation, the petition to permanently stay the uninsured motorist arbitration is granted.

This constitutes the decision and order of the court.

Dated: March 11, 2011


Hon. Vito M. DeStefano, J.S.C.

ENTERED
MAR 15 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE