

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**In the Mater of the Application for a stay of
Arbitration of AUTOONE INSURANCE
COMPANY,**

SCAN

Petitioner,

INDEX NO: 418/07

-against-

ANNE K. BERNARD,

Respondent,

-and-

**PUGLIESE MOTOR SPORTS, INC., JIMMY
PUGLIESE, LANCER INSURANCE COMPANY
and GEICO INDEMNITY COMPANY,**

Proposed Additional Respondents,

MEMORANDUM DECISION AFTER FRAMED ISSUE HEARING

Appearances:

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Introduction

The Court conducted a framed issue hearing over a period of three (3) day on February 14th, 15th and 19th, 2008. The issues to be decided were set forth in the order of Hon. Ute Wolff Lally, dated September 19, 2007, in response to petitioner, AUTOONE INSURANCE COMPANY's application to permanently stay arbitration demanded by respondent, ANNE K. BERNARD, under the Supplementary Uninsured/Underinsured Motorist Endorsement of her AUTOONE policy. Justice Lally directed that the issues included, but were not limited to the following:

- (1) whether the respondent exhausted the limits of an insurance policy issued to PUGLIESE MOTOR SPORTS, INC., by LANCER INSURANCE COMPANY;
- (2) whether the disclaimer to JIMMY PUGLIESE issued by GEICO INDEMNITY COMPANY (hereinafter referred to as "GEICO") was proper;
- (3) whether the vehicle being driven by JIMMY PUGLIESE at the time of the occurrence was a "non-owned auto" covered under the GEICO policy or was available to him for regular use and, therefore, not covered by the policy;

- (4) whether JIMMY PUGLIESE was operating the automobile in the scope of his employment or for his own personal use and;
- (5) whether the vehicle involved in the accident could be defined as a "temporary substitute auto."

The order of Justice Lally stayed the demanded arbitration pending a resolution of the issues raised in the aforementioned order.

Background

This matter arises from an accident that occurred on April 8, 2005 when a 2003 BMW, operated by JIMMY PUGLIESE (hereinafter referred to as "PUGLIESE") and owned by PUGLIESE MOTOR SPORTS, INC. (hereinafter referred to as "MOTOR SPORTS") came in contact with a pedestrian, ANNE K. BERNARD (hereinafter referred to as "BERNARD"). The BMW was insured by LANCER INSURANCE COMPANY (hereinafter referred to as "LANCER") with bodily injury liability limits of \$25,000.00. At the hearing, counsel for LANCER, on the record, offered the full policy coverage in the sum of \$25,000.00 to BERNARD.

At the time of the accident, PUGLIESE had three (3) policies of insurance issued by GEICO. Testimony established that, prior to the accident, PUGLIESE's wife purchased a family automobile insurance policy (hereinafter referred to as the "Family Policy") from GEICO, with bodily injury limits of \$300,000.00, which is the family's primary policy. In addition, a Personal Umbrella Policy (hereafter referred to as the "Umbrella Policy") was also purchased from GEICO with additional coverage of one (1) million dollars. The Declaration Pages of the two (2) policies list two (2) vehicles: 1) a 2005 Landrover and 2) a 2005 Bentley. PUGLIESE also maintained another policy with GEICO covering a motorcycle and, when he reported the accident to GEICO, on August 1, 2005, he

erroneously referenced the policy covering the motorcycle. On August 3, 2005, it was determined that the proper policy was the Family Policy and the matter was investigated.

By letter dated August 16, 2005, GEICO disclaimed coverage (Respondent's Exhibit "B") and stated that there was no coverage under the terms of the policy as the BMW did not qualify as an owned, non-owned, or temporary substitute vehicle. GEICO also disclaimed under the auto business exclusion.

At the hearing, GEICO argued that the disclaimer was timely as it was mailed within fourteen (14) days of the first notice of claim. Additionally GEICO argued that the umbrella policy cannot be accessed because the BMW did not qualify as a "covered vehicle" under the primary Family Policy.

The Insurance Policies

The Court analyzed the insurance policies in place at the time of the accident. The Family Policy (Petitioner's Exhibit "1") provided as follows:

Section 1 - Liability Coverages

Definitions:

"Non-owned auto" means an automobile or **trailer** not owned by or furnished for the regular use of either **you** or a **relative**, other than a **temporary substitute auto**. Except for a **temporary substitute auto**, an auto rented or leased for more than 30 days will be considered as furnished for regular use. Page 4, ¶ 5.

"Owned auto" means:

- (a) a vehicle described in this policy for which a premium charge is shown for these coverages;
- (b) a **trailer** owned by **you**;
- (c) a **private passenger, farm or utility auto**, ownership of which **you** acquire during the policy period if
 - (i) it replaces an **owned auto** as defined in

- (a) above; or
- (ii) we insure all **private passenger, farm and utility autos** owned by **you** on the date of the acquisition, and you ask us to add it to the policy no more than 30 days later;

(d) a **temporary substitute auto**. Page 4, ¶6.

“Temporary substitute auto” means an automobile or **trailer**, not owned by **you**, temporarily used with the permission of the owner. This vehicle must be used as a substitute for the **owned auto** or **trailer** when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. Page 4, ¶ 10.

At the hearing, PUGLIESE testified that, on the day of the accident, he was operating the BMW, owned by MOTOR SPORTS, with dealer plates. He also testified that he had access to the entire inventory of vehicles at MOTOR SPORTS which he could use at his discretion. In view of that testimony, the Court finds that the BMW was furnished for PUGLIESE’s regular use and is, therefore, not a “non-owned” vehicle as defined in the policy. Moreover, it is clear that the BMW is not an “owned auto” as the Declaration page of the family policy (Respondent’s Exhibit “A”) lists the vehicles that were covered at the time of the accident and does not include the BMW. PUGLIESE testified that he periodically substituted vehicles covered by the family policy, but that he did not list the BMW.

PUGLIESE further testified that his wife drove the 2005 Landrover and that the 2005 Bentley was an investment vehicle and not used. He stated that both owned vehicles were mechanically operational at the time of the accident and, therefore, the Court finds that the BMW was not a “temporary substitute auto” as defined in the policy.

With respect to the GEICO Umbrella Policy (Petitioner's Exhibit "2"), the Senior Claims Manager for GEICO testified that a disclaimer letter was sent, however, she could find no copy of the disclaimer letter or any other evidence to indicate that GEICO had disclaimed coverage under the umbrella policy. As such, the petitioner argued that the umbrella policy was in full force and effect on the date of the accident.

The Umbrellas Policy (Petitioner's Exhibit "2"), provided as follows:

Part 1 Definitions:

"Insured" means:

- (a) You and **your** spouse if a resident of **your** household; but with respect to an **auto** you do not own or lease which is furnished for regular use by **you** or **your** spouse, coverage applies only if the **auto** is insured by a primary auto policy. Page 1, ¶ 7.

Part IV Limits Of Liability:

Regardless of the number of **insureds**, claims or injured persons, the most **we** pay as **damages** resulting from one **occurrence**, including **damages** for care and loss of services, shall not exceed the amount in Item 1, of the **declarations**, subject to the following:

1. If both **primary insurance** and this policy cover an occurrence, we pay only those **damages** which exceed the liability limits in Item V of the **declarations**, or any applicable primary policy, whichever is greater. Page 3, ¶ 1.
2. If **primary insurance** is not in force at the time of the loss, or its liability limits are less than shown in Item V of the **declarations**, we pay only those damages which exceed the liability limits in Item V of the **declarations**. Page 3, ¶2.

Item V of the declarations in the Umbrella Policy required a minimum of \$300,000.00 of primary insurance. The Senior Claims Examiner from GEICO testified that PUGLIESE's coverage under the LANCER policy would be considered a primary auto policy. However,

since the coverage was only for \$25,000.00, the policy did not meet the minimum required for primary insurance and that this represents a gap in coverage.

On review, notwithstanding the fact that the Court finds the Umbrella Policy to be in full force and effect and that the coverage afforded PUGLIESE by LANCER is deemed to be a primary policy, there can be no coverage under the GEICO policies because the LANCER policy does not carry the required minimum liability limits. Further, under the primary Family Policy, the BMW is not an "owned auto" or a "non-owned auto" or a "temporary substitute auto" and therefore does not qualify as a "covered vehicle" and there can be no coverage under the umbrella policy. The automobile insurance provided under the Umbrella Policy cannot be broader than the coverage provided by the primary policy and since there was no coverage, the issue of a timely disclaimer under the Umbrella Policy is moot.

Conclusion

With respect to the issues raised in this framed issue hearing, the Court finds as follows:

As to question (1), whether the respondent exhausted the limits of an insurance policy issued to PUGLIESE MOTOR SPORTS by LANCER INSURANCE COMPANY, the Court answers in the affirmative. Counsel for LANCER, on the record, during the hearing offered the \$25,000.00 limit of liability coverage to BERNARD pursuant to that policy.

As to question (2), whether the disclaimer to JIMMY PUGLIESE issued by GEICO was proper, the Court answers in the affirmative with respect to the Family Policy. As discussed above, notice was given to GEICO on August 3, 2005 and a disclaimer letter was sent out on August 16, 2005, within the fourteen (14) days of the claim. The original

claim sent to GEICO by PUGLIESE was misidentified as being made pursuant to his motorcycle policy, however, GEICO resolved the error within two (2) days. As to the Umbrella Policy, the Court finds that no disclaimer notice was sent regarding the coverage under the Umbrella Policy but, for reasons set forth above, there is no coverage afforded under that policy.

As to question (3), whether the vehicle being driven by JIMMY PUGLIESE at the time of the occurrence was a "non-owned auto" covered under the GEICO policy or was a vehicle available to him for regular use and, therefore, not covered by the policy, the Court finds that the BMW was available to him for regular use and was, therefore, not a "non-owned auto" or an "owned auto" covered under the policy.

As to question (4), whether JIMMY PUGLIESE was operating the automobile in the scope of his employment or for his own personal use, the Court finds that he was operating the vehicle in the scope of his employment. The Claim Activity Log (Respondent's Exhibit "C"), on a note contained therein dated August 4, 2005, indicates that, on the date of the accident, PUGLIESE, was on his way to have the BMW inspected so the business could sell it. In view of the Court's finding, that the BMW is not a "non-owned auto", it is not necessary to address the auto business exclusion mentioned in the disclaimer letter.

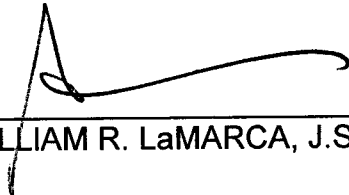
As to question, (5) whether the vehicle involved in the accident could be defined as a "temporary substitute auto", the Court answers in the negative. To qualify, the vehicle must be used as a substitute for an owned vehicle which was not operational. Neither of the owned vehicles, the Landrover and the Bentley, were in need of repairs and, as both were operational, the BMW does not qualify as a substitute vehicle.

Based on the foregoing, the Court denies AUTOONE's petition for a permanent stay of the arbitration demanded by BERNARD. The Court concludes that no insurance is available from GEICO and that since LANCER has tendered its full policy of only \$25,000.00, BERNARD is entitled to seek arbitration on her claim for uninsured/underinsured coverage under the SUM endorsement of her AUTOONE policy. The Court directs that the arbitration be temporarily stayed for a period of ninety (90) days from the date of this order, to permit the parties to complete all necessary discovery herein.

This constitutes the decision of the Court.

Submit judgment on notice.

Dated: May 27, 2008



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