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

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

**In the Matter of the Application of
GOVERNMENT EMPLOYEES INSURANCE
COMPANY, to Stay Arbitration,**

Petitioner,

-against-

**INDEX NO: 6622/07
Action #1**

GEORGE DELYANIS,

Respondent.

**In the Matter of the Application of AIG
CENTENNIAL INSURANCE COMPANY,**

Petitioner,

-against-

**INDEX NO: 6716/07
Action #2**

**For an Order Staying Arbitration by
GEORGE DELYANIS,**

Respondent.

MEMORANDUM DECISION AFTER FRAMED ISSUE HEARING

Appearances:

For Petitioners:

Gail S. Lauzon, Esq.
By: Joseph Candela, Esq.
Attorney for Petitioner GEICO
875 Merrick Avenue
Westbury, NY 11590

Bryan M. Rothenberg, Esq.
By: Alan M. Shushan, Esq.
Attorney for Petitioner AIG
100 Duffy Avenue, Suite 500
Hicksville, NY 11801

For Respondent:

Purcell & Ingrao, PC
By: Ralph P. Franco, Jr., Esq.
Attorneys for Respondent
204 Willis Avenue
Mineola, NY 11501

Introduction

In this consolidated proceeding, two (2) insurance companies, petitioners AIG CENTENNIAL INSURANCE COMPANY (hereinafter referred to as "AIG") and GOVERNMENT EMPLOYEES INSURANCE COMPANY ("hereinafter referred to as "GEICO"), seek to stay the arbitration demanded by respondent, GEORGE DELYANIS, on an uninsured motorist claim in which he was the driver, but not the owner, of a vehicle insured by AIG that was allegedly involved in a hit-and-run accident with an unidentified vehicle which he claims made physical contact with the vehicle he was driving. GEICO is the carrier of a policy issued to GEORGE DELYANIS' wife, which provides coverage to him as a member of the household.

The Insurance Law of the State of New York that deals with uninsured motorist coverage, §3420(f)(3) and §5217, provides that, to have a viable claim against that person whose identity is unascertainable, there must have been physical contact between the vehicle causing the injury and the vehicle occupied by the claimant. The petitioners herein seek to stay the demanded arbitration and claim that there was no physical contact

between DELYANIS' vehicle and the alleged hit-and-run vehicle.

A framed issue hearing was held on June 10, 2008.

Background

DELYANIS testified that, on October 12, 2006 at approximately 10:30 PM, he was involved in a three (3) vehicle accident at the intersection of Lakeview Avenue and Hempstead Avenue in Rockville Centre, New York, while driving in a easterly direction. He claimed that, after passing through the intersection, he was struck in the left rear of his vehicle by another vehicle which left the scene of the accident. DELYANIS testified that the collision caused him to collide with an unoccupied parked vehicle owned by Paul Roth. Police Officer Christopher O'Connor, of the Rockville Centre Police Department, responded to the call of an accident. DELYANIS acknowledged talking with Police Officer O'Connor, but it appears that he never told the police officer that there was a third hit-and-run vehicle involved in the accident.

The Police Accident Report, plaintiff's Exhibit "3" in evidence, reflects that DELYANIS did not recall anything concerning the accident with the parked vehicle. Police Officer O'Connor testified that he inspected the DELYANIS' vehicle after the accident and found no damage to the left rear of the car that DELYANIS was driving.. Police Officer O'Connor filed the accident report.

DELYANIS testified that approximately two (2) weeks after he left the hospital, he inspected the car he was driving at the collision yard and found damage to the left rear of the limousine, including yellow paint which had not been there before the accident. He stated that he had not seen nor controlled the vehicle for some two (2) weeks.

In addition to the Police Report, DELYANIS filed an MV104 Accident Report (Plaintiff's Exhibit "1") and an application to AIG for no fault benefits dated October 30, 2006 (Plaintiff's Exhibit "2"), both of which he signed making no mention of any third vehicle contributing to the accident. DELYANIS denied any medical condition causing blackouts.

DELYANIS sought benefits for the alleged hit-and-run claim several weeks after the accident, and never amended the Police Accident Report, the MV104 or the application for no fault benefits. Nor did he take any photographs of the vehicle. DELYANIS explained that the MV104 and the application for no fault benefits were completed for him and he signed the documents without reading their contents. Furthermore, he claimed that the application for benefits was filled out before he viewed the vehicle at the collision yard.

With regard to his recollection as to what caused the accident, he testified that his physical condition at the time of the accident was such that he had no recollection of speaking to the police officer or calling his wife.

DELYANIS' attorney argued that Police Officer O'Connor believed the accident to be one involving two (2) vehicles and therefore did not inspect DELYANIS' automobile beyond noting right front damage; that he did not inspect the vehicle with a hit-and-run scenario in mind.

The Law and its Application

The Insurance Law of the State of New York §3420(f)(3) provides as follows::

The protection provided by this subsection shall not apply to any cause of action by an insured person arising out of a motor vehicle accident occurring in this state against a person whose identity is unascertainable, unless the bodily injury to the insured person arose out of physical contact of the motor vehicle causing the injury with the insured person or with a motor vehicle

which the insured person was occupying (meaning in or upon or entering into or alighting from) at the time of the accident.

§5217 provides as follows:

The protection provided by this subsection shall not apply to any cause of action by a qualified person arising out of a motor vehicle accident occurring in this state against a person whose identity is unascertainable, unless the bodily injury to the qualified person arose out of physical contact of the motor vehicle causing the injury with the qualified person or with a motor vehicle which the qualified person was occupying (meaning in or upon or entering into or alighting from) at the time of the accident.

The Insurance Law makes it incumbent upon DELYANIS to prove that there was physical contact between his vehicle and the alleged hit-and-run vehicle. See, *Newark Insurance Company v Caruso*, 14 AD3d 613, 787 NYS2d 892 (2nd Dept. 2005); *Utica Mutual Insurance Company v Leconte*, 3 AD3d 534, 770 NYS2d 750 (2nd Dept. 2004); *Eveready Insurance Company v Scott*, 1 AD3d 436, 767 NYS2d 31 (2nd Dept. 2003); *American Security Insurance Company v Calarco*, 85 AD2d 693, 445 NYS2d 488 (2nd Dept. 1981). The fact that there was no mention of the alleged contact with a hit-and-run vehicle in the Police Report and in the other documents prepared by DELYANIS raised a factual issue as to whether there was actual physical contact with another vehicle. It is the judgment of the Court that a fair interpretation of the credible evidence supports a determination that DELYANIS has not carried his burden of proof that there was physical contact between his vehicle and an alleged hit-and-run vehicle.

AIG and GEICO raised an issue of DELYANIS' physical condition, alleging that he suffered from a condition identified as Syncobe, which causes a loss of consciousness due to inadequate blood flow to the brain. They allege that he fell asleep at the wheel causing the collision with the parked vehicle. The condition is referred to in the hospital records,

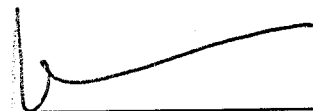
the information having been supplied by a member of the family. There was an evidentiary question as to whether that part of the hospital record was admissible in evidence. However, the Court does not reach that issue having found that DELYANIS has not carried his burden of proof on the physical contact question.

Conclusion

The Court, as both the trier of the facts and the arbiter of the law, after weighing the evidence in this matter finds that DELYANIS has not proven, by a fair interpretation of the credible evidence that his vehicle came into contact with a hit-and-run vehicle. Therefore, the motions of petitioners AIG and GEICO for a permanent stay of the demanded arbitration are granted.

This constitutes the decision of the Court. Submit Judgment on Notice.

Dated: November 20, 2008



WILLIAM R. LaMARCA, J.S.C.

TO: Gail S. Lauzon, Esq.
By: Joseph Candela, Esq.
Attorney for Petitioner GEICO
875 Merrick Avenue
Westbury, NY 11590

Bryan M. Rothenberg, Esq.
By: Alan M. Shushan, Esq.
Attorney for Petitioner AIG
100 Duffy Avenue, Suite 500
Hicksville, NY 11801

Purcell & Ingrao, PC
By: Ralph P. Franco, Jr., Esq.
Attorneys for Respondent
204 Willis Avenue
Mineola, NY 11501