

SCAD

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

In the Matter of the Application of METLIFE AUTO
AND HOME,

Plaintiff(s),

- against -

JOSEPH H. AULISIO, HANINE AULISIO,
WASHINGTON INTERNATIONAL INSURANCE CO.,
GERBER & GERBER, PLLC, DANI TAXI, INC and
GURPREET SINGH,

Defendant(s).

TRIAL/IAS PART 11

INDEX NO. 2091/07

MOTION SEQUENCE
NO. 2

MOTION SUBMISSION
DATE: May 7, 2007

The following papers read on this motion:

Amended Notice of Petition

X

Upon the foregoing papers, the Amended Notice of Petition for an Order pursuant to CPLR 7503(c), staying Respondents Joseph H. Aulisio and Hanine Aulisio, from proceeding to underinsured motorist arbitration and joining Washington International Insurance Co., Gerber & Gerber, PLLC, Dani Taxi, Inc. and Gurpreet Singh as additional Respondents and in the alternative setting the matter down for a Framed Issue Hearing, is determined as hereinafter provided:

The Court initially observes that the Petitioner has served an Amended Notice of Petition. As such the Petitioner's Petition has been superceded and the Petition with motion sequence No. 1 is hereby determined to be moot.

The Respondent Janine Aulisio was a passenger in a taxi cab owned by the proposed Respondent Dani Taxi and operated by the proposed Respondent Gurpreet Singh. Said vehicle was involved in a motor vehicle accident with a vehicle driven by a non-party to this action that was allegedly making a U-turn on Park Avenue at its intersection with East 17 Street in Manhattan. The Proposed Respondents Janine Aulisio and Joseph Aulisio set forth that the non-party's vehicle was insured by Interboro Mutual Insurance Company and that said non-party has tendered their insurance policy with a policy limit of \$25,000.00 in settlement of the claim of Janine Aulisio as to a serious injury. The Respondent Janine Aulisio thereafter sought permission from the Petitioner to settle the claim. Ms. Aulisio has a policy with the Petitioner that provides supplementary uninsured/underinsured coverage in the sum of \$100,000.00. The Respondent sets

forth that said request was denied by the Petitioner on the ground that all available insurance was not exhausted as there was an issue as to the insurance coverage of the taxi owned by Dani Taxi Inc. that was allegedly insured by Gerber and Gerber PLCC. Respondent Janine Aulisio has filed a claim for underinsured insurance coverage with the Petitioner.

In opposition to the requested relief, the Respondent Janine Aulisio cites to the case of **Polesky v Geico Insurance Company**, 241 AD2d 551, 661 NYS2d 639 (Second Dept., 1997) which in pertinent part sets forth:

"Contrary to GEICO's contentions, the petitioners were not required to first exhaust the aggregate of the liability policies covering all three of the offending vehicles before proceeding with their underinsurance claim (see *S'Dao v National Grange Mut. Inc. Co.*, 87 NY2d 853, 638 NYS2d 597,, 661 NE2d 1378). However, pursuant to Insurance Law §3420(f)(2), as well as the policy GEICO issued to the petitioners, the petitioners were required to "exhaust by payment: the limits of the particular tortfeasor's policy that they were using as a comparison in support of their claim of underinsurance (see, *Matter of Federal Ins. Co. v Watnick*, 80 NY2d 539, 546, 592 NYS2d 624, 607 NE2d 771; *Andriaccio v Borg & Borg*, 198 AD2d 253, 603 NYS2d 528). Having failed to accept the other insurer's settlement offer, the petitioner's underinsurance claim was premature and the cross petition should have been granted to the extent of saying arbitration until such time as the petitioners accept payment from the primary insurer."

Polesky v Geico Insurance Company, supra at 640

Based upon an application of the rationale set forth in **Polesky v Geico Insurance Company, supra**, the Petitioner's Amended Petition for an Order pursuant to CPLR 7503(c), staying Respondents Joseph H. Aulisio and Hanine Aulisio, from proceeding to underinsured motorist arbitration and joining Washington International Insurance Co., Gerber & Gerber, PLLC, Dani Taxi, Inc. and Gurpreet Singh as additional Respondents and in the alternative setting the matter down for a Framed Issue Hearing, is denied.

SO ORDERED.

DATED: 7/17/2007

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Ray S. DeKoran
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J.S.C.

ENTERED
JUL 19 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE