

**SHORT FORM ORDER**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. EDWARD G. MC CABE**  
Justice

TRIAL/IAS PART 2  
NASSAU COUNTY

In the Matter of the Application of  
ENCOMPASS INSURANCE COMPANY,

INDEX NO. 14341/03

Petitioner,

-against-

To Stay the Uninsured Motorist  
Arbitration of JONATHAN HERRERA,

Respondent

X

The following papers were read on this motion:

- Order With Notice of Entry.....1
- Discovery Response.....2

Pursuant to an order of the Hon. Geoffrey J. O'Connell, this matter was set down for a hearing as to whether or not the Respondent driver of the vehicle, owned by an Arthur T. Monsees and insured by Encompass Insurance Company, was side-swiped by an unidentified vehicle which allegedly left the scene of the accident.

Police Officer Joseph Chiafari was on motor patrol in the Village of Malverne on the morning of April 4, 2003. At about 4:10 a.m. he responded to an accident that had occurred on Franklin Avenue. When he arrived at the scene, he found a black 1997 Volkswagen, two-door sedan on the southeast side of Franklin Avenue, just south of Legion Place. The vehicle struck a tree resulting in severe damage to the front and driver's side of the vehicle. The driver, Jonathan Herrera, was not in the vehicle. Officer Chiafari questioned Herrera who reportedly told him, he swerved to avoid an oncoming vehicle and ran off the road and hit a tree. He inspected the scene and the vehicle. He found no evidence of contact with another car. Chiafari indicated that Herrera said he was tired at the time. The owner of the car, Arthur T. Monsees was removed from the rear of the car and both he and Herrera were taken to the hospital by ambulance.

Jonathan Herrera testified that he worked all day and when he got home he and his friend Monsees went out for the night. First with friends and then to a dance club called "Rumba's" in the Bronx. At about 3:30 a.m. they left Rumba's to go home, but since Monsees was too drunk to drive, he got in the car and let Herrera drive. Herrera says that Monsees was asleep at the time of the incident.

Herrera testified that while driving on Franklin Avenue, southbound, he observed a small white vehicle moving in a northerly direction about 450 feet away. He testified the car moved from one lane to another, but he did not think it was erratic, nor did the car come into the southbound lane. Herrera continued in the lane closest to the center lane. He then testified that the white car crossed into his lane striking the Volkswagen on the left front side by the wheel well causing him to lose control of the vehicle, go off the road and hit a tree. He did not observe the damage to the vehicle he was driving, except that the damage was substantial to the front and left side of the vehicle.

Exhibit 2 in evidence, a motor vehicle no-fault application signed by Herrera on April 21, 2003, describes the accident "avoided hitting on-coming car and hit a tree."

Exhibit A in evidence, shows the vehicle in question in an impound yard. All of the damage to the front end is consistent with hitting a tree. No paint marks from another vehicle are present, which is consistent with Officer Chiafari's testimony that he saw no paint marks or other evidence of a white car strike the Volkswagen.

I find by a preponderance of the credible evidence that Jonathan Herrera, after being awake for almost 24 hours without sleep, went driving home at 4 a.m. on Franklin Avenue in Malverne, when he swerved off the road and struck a tree. There may have been a white car headed northbound, but at no time did the white car strike the Volkswagen. The Court further finds that the accident was caused by either Herrera falling asleep, or he crossed into the on-coming lane of traffic causing him to lose control trying to correct the path of the car.

In any event, the Court finds no contact between the Volkswagen and any other vehicle.

Therefore, the petition is granted and the arbitration is stayed.

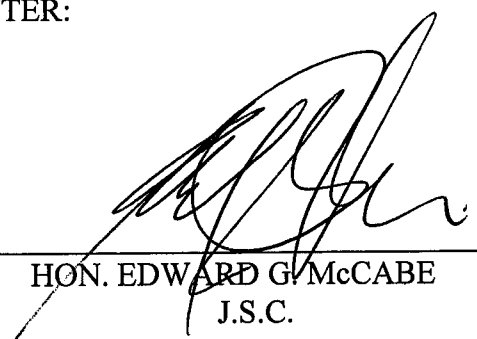
ENTER:

Dated: March 29, 2004  
Mineola, New York

**ENTERED**

APR 01 2004

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

  
HON. EDWARD G. McCABE  
J.S.C.