

SUPREME COURT - STATE OF NEW YORK

SCAN

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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In the Matter of the Application of

ALLSTATE INSURANCE COMPANY

Petitioner,

-against-

To Stay the Uninsured Motorist Arbitration of

VITALIY LYUTYK,

Respondent.

and

NEW YORK CENTRAL MUTUAL
FIRE INSURANCE COMPANY
YNOEL A. AMARANTE
YOVANNY VASQUEZ,

Proposed Additional Respondents.
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TRIAL PART: 35

NASSAU COUNTY

INDEX NO: 017434-02

MOTION DATE: 12-4-02

MOTION SEQ. NO: 001

The following papers having been read on this motion:

Notice of Petition, dated 10-25-02..... 1
Affirmation in Opposition, dated 11-26-02 2
Affirmation In Reply, dated 12-3-02 3

Upon the foregoing papers, it is ordered that this application by petitioner for an order staying arbitration is granted pending a trial as to whether the vehicle allegedly responsible for the accident was an "uninsured automobile" under the provisions of the insurance policy.

YNOEL A. AMARANTE, the owner, and YOVANNY VASQUEZ, the operator of the vehicle allegedly responsible for the accident and NEW YORK CENTRAL MUTUAL, the alleged insurer of said vehicle, shall be added as parties to this proceeding. CPLR 1003; see, *Matter of Country-Wide Insurance v. Leff*, 78 AD2d 830 (1st Dept., 1980).

On or about February 20, 2002, respondent LYUTYK was insured under a liability policy issued by petitioner. On that date he was involved in an automobile accident with a

vehicle identified as a 1991 Honda allegedly owned by AMARANTE, driven by VASQUEZ and insured by NEW YORK CENTRAL MUTUAL, all proposed additional respondents.

Petitioner has met its initial burden of presenting some evidence to establish that the allegedly offending vehicle was insured on the date of the accident by submission of a police accident report and Motor Vehicle Department search showing that the vehicle was insured by NEW YORK CENTRAL MUTUAL on the day of the accident. Having done so, the burden shifts to respondent to show that no such policy was in effect at the time of the occurrence. *Matter of Wausau Insurance Company v. Predestin*, 114 AD2d 900, (2nd Dept., 1985).

Respondent has submitted a disclaimer letter from NEW YORK CENTRAL MUTUAL under File Number 2002-301205-3 to AMARANTE disclaiming coverage on the ground that the vehicle was being operated without a reasonable belief that the person was entitled to do so. *Matter of Eagle Insurance Company v. State Farm Mutual Insurance Company*, 81 AD2d 886, (2nd Dept., 1981). There has been no evidence offered by the respondent that the vehicle was stolen or used without consent other than the letter of disclaimer, hence a question of fact exists as to whether there is insurance coverage as to the AMARANTE vehicle thereby requiring that the above named additional respondents shall be added as additional parties to this proceeding. (CPLR 1003; see, *Matter of Country-Wide Insurance v. Leff*, *supra*).

Thus arbitration is stayed pending a hearing as to whether there was permissive use of the AMARANTE car. If found to have been used with permission, then the parties are directed to continue the hearing to determine whether the vehicle allegedly responsible for the accident was an "uninsured automobile" under the provisions of the insurance policy.

The non-permissive use exclusion has been held to be valid and discovery may be

permitted on that issue. *Graphic Arts Mutual Insurance Company v. Leno*, 257 AD2d 981 (4th Dept. 1998). Document exchange relative to the issues shall be provided to all other parties at least 10 days prior to the scheduled trial or risk preclusion in the discretion of the Justice, Judicial Hearing Officer or Referee presiding thereat.

Petitioner is directed to file a Note of Issue, together with the required fee, at the office of the County Clerk of Nassau County forthwith upon receipt of a copy of this order. Thereafter, this action shall be added to the TAP calendar for **February 13, 2003** at 9:30 A.M.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

The directive with respect to a hearing is subject to the right of the Justice presiding in TAP II to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney/Referee as he or she deems appropriate.


Petitioner is also directed to serve a copy of this order upon the respondent's counsel pursuant to CPLR 2103 and a copy of this order and a copy of all the papers upon which the within order was decided on the above named additional respondents, personally or by registered mail, return receipt requested. Such service shall be made within twenty days after receipt by movant of a copy of this order from any source.

That branch of the within petition which seeks various items of pre-arbitration disclosure is granted without objection. Such disclosure shall proceed with dispatch should petitioner be found not entitled to a permanent stay of arbitration.

This constitutes the Decision and Order of this Court.

ENTER

DATED: December 10, 2002


HON. DANIEL PALMIERI
Acting J.S.C.

TO: **LAW OFFICES OF ROBERT P. TUSA**
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NEW YORK CENTRAL MUTUAL
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ENTERED

DEC 16 2002

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**