

SHORT FORM ORDER AND JUDGMENT

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

TRIAL TERM PART: 47

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**In the Matter of Application of
NATIONWIDE MUTUAL INSURANCE COMPANY,**

INDEX NO.:017267/09

Petitioner,

**For a Judgment Staying the Arbitration
commenced by SHARON WORLEY**

**MOTION DATE:9-30-09
SUBMIT DATE:10-13-09
SEQ. NUMBER- 001**

Respondent.

-and-

**ERIKA L. CRUZ, JOSE S. CRUZ, ALLSTATE
INSURANCE COMPANY, BRIANNE M.
MARTURELLA, GEICO INDEMNITY COMPANY,**

Proposed Additional Respondents.

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The following papers have been read on this motion:

- Notice of Petition, dated 8-24-09.....1**
- Nationwide Policy, certified 9-2-09.....2**
- Affirmation in Opposition, dated 9-15-09.....3**
- Affirmation in Opposition, dated 9-23-09.....4**
- Reply Affirmation, dated 10-12-09.....5**

The Court's decision dated October 20, 2009, is recalled and vacated because the affirmation in opposition by the respondent, although apparently timely filed, was never submitted to the Court when this motion was submitted for decision. This decision is substituted in lieu of the recalled vacated decision.

The petition to stay arbitration is denied - submit judgment. In the alternative, a temporary stay is granted for the limited purpose of allowing disclosure to be obtained from respondent prior to arbitration.

Respondent Worley, driver of a vehicle owned by another and insured by petitioner, was in an accident on the Southern State Parkway with proposed additional respondents Erika Cruz and Jose S. Cruz, whose vehicle was insured by proposed additional respondent Allstate Insurance Company and proposed additional respondent Marturella whose vehicle was insured by proposed additional respondent GEICO.

Respondent was the lead car in a four vehicle accident on the Southern State Parkway. Proposed additional respondents were in the two vehicles behind her. Allegedly there was a fourth vehicle who started the chain reaction by striking the third vehicle in the rear but who fled the scene.

There is no disputing that the individual proposed additional respondents were insured. GEICO, as insurer of Marturella does not dispute coverage but contends that its insured bears no responsibility because he/she was struck in the rear.

The principal basis for requesting a stay as stated in the petition is that the alleged offending vehicle may have been insured and that alternative coverage exists for the two other vehicles. However, petitioner has not presented any facts to support its position that the two following vehicles, Cruz and Marturella are liable for the accident because they failed to keep a safe distance behind the respondent's vehicle. The police report relied upon by the petitioner points a contrary conclusion that the sole cause of the accident was the striking of the third vehicle by the absent fourth vehicle, thereby setting in motion the events leading to the accident.

A hit and run vehicle is considered an uninsured vehicle covered under an uninsured motorist endorsement and an insurer seeking to stay arbitration must establish that there are threshold issues. *Matter of Allstate Ins. Co. v. Lichtenstein*, 24 AD3d 662 (2d Dept. 2005).

The cornerstone of a claim based on a hit and run accident with an unidentified vehicle and a condition precedent to the right to arbitrate is that there was some form of physical contact. Direct contact is not required where, as here, the collision involves multiple vehicles and the accident originates with a collision by the unidentified vehicle. See Insurance Law §5217, *Allstate Ins. Co. v. Killakey*, 78 NY2d 325, 329 (1991); *Matter of State Farm Mut. Auto Ins. Co. v. Johnson*, 287 AD2d 640 (2d Dept. 2001).

Petitioner bears the burden of coming forward with evidence establishing that the alleged offending vehicle was insured at the time of the accident, (*Allstate Ins. Co. v. Esposito*, 15 AD3d 648 [2d Dept. 2005]), and some evidence, sufficient at least to shift the burden to respondent, that there was no physical contact involving the offending vehicle and a vehicle in the accident chain. *Great Northern Ins. Co. v. Ballinger*, 303 AD2d 503 (2d Dept. 2003). Upon such a showing, the burden is placed on the insured who is seeking arbitration to establish that the loss was caused as a result of physical contact with the unidentified vehicle. *Nova Cas. Co. v Musco*, 48 AD3d 572 (2d Dept. 2008).

Here, petitioner has failed to address the issue of contact relying instead on its claim that the arbitration should be stayed because the two other vehicles were insured and they might bear some responsibility for the accident. The foregoing is insufficient to make a *prima facie* showing of entitlement to relief and to shift the burden of coming forward to the respondent.

That two other vehicles involved in the accident are insured is not a basis for a stay of arbitration. To adopt this view would require respondent to initiate a possibly spurious or frivolous claim against the other two vehicles despite the absence of any evidence of their culpability. The fact that there is an insured tortfeasor does not bar a claimant from obtaining uninsured motorist benefits under their own policy if one of the vehicles involved in a multivehicle collision is uninsured. *Electric Ins. Co. v. Woods*, 101 AD2d 840 (2d Dept. 1984); *O'Brien v. Aetna Cas. & Sur. Co.*, 33 AD2d 1085 (3rd Dept. 1970); *State-Wide Ins. Co. v. Lang*, 30 AD2d 974 (2d Dept. 1968); *Powers v. Continental Ins. Co.*, 29 AD2d 1041 (3rd Dept. 1968); *See also Fragoso v. Motor Vehicle Acc. Indemn. Corp.*, 23 Misc. 3d 430 (Sup. Ct. Kings Cty. 2009).

Petitioner's companion claim that respondent has failed to provide a duly executed proof of claim is made only by petitioner's counsel who does not profess to have any personal knowledge of the facts or the practices and procedures of the petitioner. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, plaintiff's attorney does not claim to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence.

Although respondent has chosen not to address this issue, the Court finds that petitioner has not submitted enough evidence to show that there was a lack of compliance with policy provisions. *Government Employees Ins. Co. v. Estate of Sosnov*, 275 AD2d 322

(2d Dept. 2000); cf *In Re Country-Wide Ins. Co. (Park)*, 277 AD2d 175 (1st Dept. 2000).

Where arbitration was stayed because the claimant did not give timely notice of the accident.

Based on the foregoing, the petition is dismissed.


Petitioner's additional request that respondent provide various disclosure prior to arbitration is granted without objection. Such disclosure shall go forward with dispatch.

As the temporary stay awarded herein will automatically abate upon the completion of such disclosure, the within proceeding is deemed disposed for record keeping purposes.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: October 30, 2009


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

NOV 05 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Jose S. Cruz
Proposed Additional Respondent
110 Prairie Lane
Levittown, NY 11756

Allstate Insurance Company
Proposed additional Respondent (Ins. Carrier Cruz)
Buffalo MCO (2310)
P.O. Box 1064
Attn: Robert A. Dzimian
Claim: 01388113597
Pol No. 000903345157

Brianne M. Marturella
Proposed Additional Respondent
80 Fairview Avenue
East Meadow, NY 11554

GEICO Indemnity Company
Proposed additional respondent (Ins. Carrier Marturella)
750 Woodbury Road
Woodbury, NY 11797
Attn: Joseph Leopold
Claim No. 0269008320101016
Pol No. 402599071

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Garden City, NY 11530