

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

----- TRIAL/IAS, PART 8  
NASSAU COUNTY

In the Matter of the Application of

STATE FARM MUTUAL AUTOMOBILE INSURANCE  
COMPANY,

Petitioner,

MOTION DATE:

May 23, 2003

INDEX No. 5482/03

-against-

SEQUENCE No. 1

MARILYN JACKLE and ELRAC INC.,

Respondents.

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The following papers read on this motion:

Notice of Petition and Supporting Papers

Affirmation in Opposition

Affirmation in Opposition

Application by petitioner State Farm Mutual Automobile Insurance Company ("State Farm") to stay arbitration of an uninsured motorist claim is determined as hereinafter provided.

On March 2, 2001, co-respondent Marilyn Jackle was a passenger in a vehicle owned and operated by David Jackle. On this date, the Jackle vehicle was involved in an accident with a vehicle owned by Elrac, Inc. According to the police accident

report, the driver of the Elrac vehicle fled the scene of the accident. Subsequently, an investigation was conducted by Detective K. McGee of the Fourth Squad of the Nassau County Police Department wherein it was determined that the operator of the Elrac vehicle, Mr. Maurice Orr, was not a permissive driver of the rental car. In connection therewith, Mr. Orr was arrested for aggravated unlicensed operation of a motor vehicle and leaving the scene of the accident.

Elrac denied coverage claiming that pursuant to the terms of the rental agreement, Adam Smilowitz was the only authorized driver and the insurance coverage for the vehicle owned by Elrac, therefore, did not inure to the benefit of the non-permissive driver of the vehicle, Mr. Maurice Orr.

Initially, the court notes that petitioner has failed to name either Mr. Orr or Mr. Smilowitz to the within proceeding. In order to avoid unnecessary future litigation, Messrs. Orr and Smilowitz should be added as additional respondents.

It is well settled that the party seeking to stay arbitration has the initial burden of establishing that the offending vehicle was insured at the time of the accident (Liberty Mut. Ins. Co. v Horowitz, 121 AD2d 634; Insurance Co. of North America v Lyman, 148 AD2d 456, Matter of Insurance Company of North America v Castillo, 158 AD2d 691). Once such a prima facie case of coverage is established, the burden is on the party seeking to disclaim coverage to prove that vehicle was not

insured at the time of the accident (see; Eagle Ins. Co. v Patrik, 233 AD2d 327; Allstate Ins. Co. v Karadaq, 205 AD2d 531).

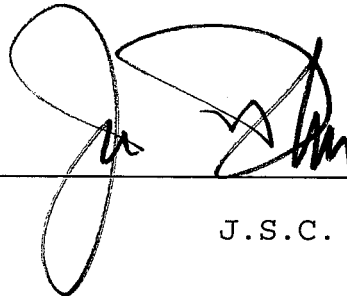
In the instant proceeding, issues of fact exist which warrant a hearing to ascertain whether there was insurance coverage for the offending vehicle at the time of the accident (Metropolitan Property & Liability Co. v Pisanelli, 151 AD2d 761, appeal after remand 175 AD2d 469; Public Service Mut. Ins. Co. Binder, 121 AD2d 903).

VTL Section 388(1) makes every owner of a vehicle liable for injuries resulting from negligence "in the use or operation of such vehicle...by any person using or operating the same with the permission, express or implied, of such owner." ELRAC, is the owner of the vehicle driven by Maurice Orr. Where the lessee of a rental vehicle (Adam Smilowitz, herein) permits another person to operate it, the rental company is deemed to have constructively consented to such use, even where the lessee violated the rental agreement by entrusting the rental car to another (see, Motor Vehicle Accident Indemnity Corp., v. Continental National American Group, 35 NY2d 560, reaffirmed in Murdza v. Zimmerman, 99 NY2d 375). The linchpin to a finding that a rental company has constructively consented to use of its vehicle is the third party's permissive use vis-a-vis the lessee.

The question then is, whether the rental car was operated without the lessee's consent and if so, the operation of the rented car by Maurice Orr, would have been that of a thief-the antitheses of a permissive user (see, Lancer Insurance Company v.

Republic Franklin Insurance Company, 304 AD2d 794 (N.Y.A.D.2 Dept.)). The conclusion drawn by the liability claims representative on behalf of ELRAC (Affirmation in Opposition by counsel for respondent Marilyn Jackle, Exhibit C) that Maurice Orr stole the vehicle, is unsubstantiated on the documents provided in connection with this motion and the opposition thereto. Therefore, it is necessary that a hearing be held to determine whether or not the operation of the vehicle owned by respondent, ELRAC, on the date of the accident, March 2, 2001, by Maurice Orr, was a permissive use or not.

In view of the foregoing, the application to stay arbitration is temporarily granted pending the resolution of the insurance coverage issue. Plaintiff is to file a Note of Issue along with payment of the requisite fees and have the matter placed on the calendar of Calendar Control Part II for the 18th day of August, 2003 to be referred to a Court Attorney/Referee for a hearing. A copy of this order and the papers upon which this application was made shall be served upon Mr. Maurice Orr and Mr. Smilowitz as well as a copy of this Order being served upon defendants herein.



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J.S.C.

**ENTERED**

Dated: July 23, 2003

**JUL 30 2003**