

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----x
In the Matter of the Application for an Order Staying
Arbitration Between TRAVELERS PROPERTY
CASUALTY COMPANY,

Petitioner,

-against-

RESPONDENT I and RESPONDENT II,

Respondents.
-----x

NOTICE OF
PETITION TO STAY
ARBITRATION

Index No.:

Return Date:
August 13, 2001

S I R S :

PLEASE TAKE NOTICE, that upon the annexed Petition of TRAVELERS PROPERTY CASUALTY COMPANY verified July 3, 2001, the Demand for Arbitration received June 18, 2001, and other exhibits annexed hereto, the undersigned will apply to this Court, at an IAS Part, to be held in and for the County of Suffolk, at the Courthouse located at 235 Griffing Avenue, Riverhead, New York, on the 13th day of August 2001, at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an Order pursuant to C.P.L.R. 7503(b) permanently staying the uninsured motorist arbitration between Petitioner and Respondent and granting to Petitioner such other and further relief as may seem just and equitable.

PLEASE TAKE FURTHER NOTICE, that pursuant to C.P.L.R. Section 2214(b) you are required to serve all papers that will be used in opposition to this motion at least seven (7) days prior to the return date of this motion.

Dated: Garden City, New York
July 5, 2001

Yours, etc.,
LAW OFFICE

By:

JEENA R. BELIL, ESQ.

Attorneys for Petitioner
Office and P.O. Address
1225 Franklin Avenue
Garden City, New York 11530
Tel.: (516) 663-0200
File No. 011434JRB

TO: RESPONDENTS' ATTORNEYS
Attorneys for Respondents
Office and P.O. Address
XXXXXXXXXXXXXXXX Avenue
Huntington, New York 11743
Tel.: (631) XXX-XXXX

AMERICAN ARBITRATION ASSOCIATION
666 Old Country Road
Garden City, New York 11530

6. That it appears that Respondents are proceeding and alleging claimed rights under the "New York Automobile Accident Indemnification Endorsement", hereinafter referred to as uninsured motorist coverage, contained in the policy of automobile liability insurance which TRAVELERS issued to RESPONDENTS, claiming that the occurrence involved a "Hit and Run" automobile.

7. That it is respectfully submitted that Respondents have no right to proceed to arbitration on the ground that Respondents have not provided any objective proof that a "hit and run" vehicle accident occurred.

8. Therefore, as Respondent has not provided any objective proof that a "hit and run" vehicle was involved in the occurrence, Respondents have no right to proceed to arbitration and Petitioner is entitled to a permanent stay.

9. That it is further respectfully submitted that Respondents have no right to proceed to arbitration on the following additional ground.

10. That the above policy contains a provision in its Uninsured Motorists Coverage Endorsement which reads as follows:

1. The company will pay for all sums which the insured...shall be legally entitled to recover as damages from the owner or operator of an "uninsured motor vehicle because of bodily injury...resulting therefrom...sustained by the insured, caused by an accident arising out of the ownership, maintenance or use of such uninsured automobile (Copy annexed as Exhibit "C")

11. That it is respectfully submitted that Respondents have provided no objective proof that an accident occurred, or that an accident occurred involving another motor vehicle, or that this other motor vehicle was a hit and run or otherwise uninsured. Therefore, Respondents have no right to proceed to Arbitration.

12. That the alleged occurrence may have involved a hit-and-run motor vehicle, although Respondents are not in possession of a police report.

13. That the policy of insurance issued contains the following provision with regard to a hit-and-run uninsured motorist claim:

"Hit and Run Automobile. The term 'hit-and-run automobile' means an automobile which

causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (1) there cannot be ascertained the identity of either the operator or the owner of such 'hit-and-run automobile'; (2) the insured or someone on his behalf shall have reported the accident within 24 hours or as soon as reasonably possible to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 90 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable and setting forth the facts in support thereof; and (3) at the request of the company, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident." See Exhibit "C".

14. That Respondent's have offered no proof that a police report was ever filed within 24 hours or a reasonable period of time thereafter.

15. Further, if another vehicle was in fact involved in the subject "accident" there is no proof that this other vehicle came into direct contact with Respondent RESPONDENT I's vehicle. In Empire Mutual Insurance Company v. Zelin, 120 A.D.2d 365, 502 N.Y.S.2d 20, 21 (1st Dep't 1986), the Court noted that, "the insurance policy clearly provides that there must be 'physical contact' before 'hit-and-run' coverage attaches." The Court went on to state the "physical contact with the alleged offending vehicle is a condition precedent to arbitration under an uninsured motorist endorsement" (502 N.Y.S.2d at 21). The Court held that "where there is genuine triable issue with regard to whether the claimant's vehicle actually came into contact with a hit-and-run vehicle, the appropriate procedure is to stay arbitration pending a trial of the threshold issue." (Ibid).

16. That accordingly, as in Empire Mutual Insurance Company v. Zelin, the Court should permanently stay the arbitration or temporarily stay the arbitration pending a hearing on the issue of physical contact.

19. Further, your affirment respectfully submits that the Respondent has no right to proceed to arbitration as there is no showing that the occurrence was reported to the police within twenty-four (24) hours of the occurrence, or that it was reported to the police at all, as is required by the policy of insurance set forth above. Therefore, Petitioner is entitled to a permanent stay of the arbitration.

20. That if this court should find that a "hit and run" vehicle was involved, which is vehemently

denied by TRAVELERS, it is respectfully submitted that Respondent made no attempts to properly identify said vehicle, and therefore, the arbitration should be permanently stayed.

21. It is further submitted that Respondent RESPONDENT II is not entitled to a derivative claim. Therefore, her separate demand for uninsured motorist benefits in the amount of \$ 25, 000.00 must be summarily denied.

22. Moreover RESPONDENTS have no right to proceed to arbitration on the following additional ground.

33. Under the policy of insurance issued by the Petitioner, certain conditions precedent to arbitration must be complied with. If it is determined that the “accident” involved a hit and run vehicle and the matter proceeds to arbitration, Respondents shall give written proof to TRAVELERS of the full particulars and the nature and extent of the injuries, the treatment obtained, and must submit to physical examinations by physicians selected by TRAVELERS. Respondent must also serve written authorizations for medical reports and hospital records. Finally, respondent must also be available for and submit to an Examination Under Oath.

34. Although Respondents have indeed provided TRAVELERS with a number of medicals in this matter, they seem to end abruptly in the middle of respondent’s treatment. It is respectfully requested the Respondents provide TRAVELERS with a complete copy of their treatment to date.

35. Petitioner has not waived its right to request such items, as compliance with same is a condition precedent to arbitration under the policy.

36. That the issues of making an agreement to arbitrate and Respondent's failure to comply therewith are not arbitrable. They are preliminary issues which must be decided by this Court.

37. That no previous application to this or any other Court has been made for the same or similar relief herein.

WHEREFORE, TRAVELERS PROPERTY CASUALTY COMPANY respectfully requests an Order be made and entered granting a permanent stay of the aforementioned arbitration, and/or a temporary stay pending

the hearing and determination of the aforementioned preliminary issues, directing a trial of such issues, that a judgment be made and entered permanently staying the aforementioned arbitration, and all proceedings therein, and for such other and further relief as this Court deems just and proper.

Dated: Garden City, New York
July 5, 2001

JEENA R. BELIL