

Matter of State Farm Mut. Auto. Ins. Co. v McIntosh

2023 NY Slip Op 34660(U)

September 18, 2023

Supreme Court, Queens County

Docket Number: Index No. 723794/2022

Judge: Ulysses B. Leverett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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In the Matter of the Petition of
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

Index No.: 723794/2022

Petitioner,
-against-

For an Order staying the arbitration attempted to be had
By GINA JANAY McINTOSH

Motion Seq. No.:1

Respondent,
-and-

ALEX GUTIERREZ GONZALES, ROYER
HERNANDEZ GONZALES, GAINSCO AUTO
INSURANCE AND MGA INSURANCE COMPANY, INC.,

**DECISION, JUDGMENT
AND ORDER**

FILED & RECORDED
9/19/2023
9:03 AM
COUNTY CLERK
QUEENS COUNTY

Additional Respondents.

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Present: **HONORABLE ULYSSES B. LEVERETT**

The Petitioner, State Farm Mutual Automobile Insurance Company (State Farm) having moved for a permanent stay of arbitration demanded by Respondent Gina Janay McIntosh (McIntosh), and this Court having conducted a framed issue hearing on July 18, 2023 and the parties having submitted post trial memorandums in lieu of closing statements, the Court makes the following findings of facts and conclusions of law.

This Petition arises out of a demand for arbitration of an uninsured motorist claim by Respondent McIntosh from her insurer State Farm by reason of her involvement in a motor vehicle accident on October 16, 2021 in Queens County, New York. The police accident report in evidence lists Respondent's involved vehicle as a 2016 Infiniti bearing New York plates. The report lists the registered owner of the alleged non covered motor vehicle as additional Respondent Alex Gutierrez Gonzales, the driver as additional Respondent Royer Hernandez Gonzales and the vehicle as a 2014 Mitsubishi Lancer bearing Alabama license plate #1FG576. Additional Respondent's Gainsco Auto Insurance and MGA Insurance Company Inc. (Gainsco/MGA) issued a policy of automobile liability in the State of Alabama to Juan Suazo Amaya who is a non-party to this proceeding. Mr. Amaya's policy was effective August 17, 2021 to February 17, 2022.

The drivers listed on the policy were Juan Suazo, Alex A. Gonzales, Yolanda Hernandez and Adrian Nunez. The 2014 Mitsubishi Lancer was one of the insured vehicles described in the

Gainsco/MGA policy. The trial of the framed issues were (1) whether proper personal jurisdiction has been secured over Gainsco/MGA as parties to this proceeding, (2) whether there was available liability coverage on the 2014 Mitsubishi pursuant to the terms the Gainsco/MGA insurance policy on the date of the alleged accident on October 16, 2021, (3) whether there was a valid and proper disclaimer of coverage issued for the lack of cooperation and (4) whether Gainsco/MGA insured Amaya provided permission to use the host vehicle on the date of the accident.

Based on the credible testimony and the exhibits in evidence by Stipulation and adduced at the hearing the Court makes the following findings of facts and conclusions of law. The parties have stipulated in evidence various exhibits including: Gainsco/MGA policy; police accident report; Juan Amaya's MGA policy dated August 12, 2021; Articles of Incorporation of MGA; correspondence of October 18, 2021 from MGA to Amaya requesting contact; correspondence of November 2, 2021 from MGA to Alex Gutierrez Gonzales requesting contact with MGA; correspondence of November 2, 2021 from MGA to Royer Hernandez Gonzales requesting contact with MGA; correspondence of December 3, 2021 from MGA to Royer Hernandez Gonzales demanding he appear for an Examination Under Oath (EUO); certificate of nonappearance of Royer Hernandez Gonzales for EUO dated December 14, 2021; correspondence of January 31, 2022 from MGA to respondent McIntosh's counsel denying coverage under the MGA policy; MGA's January 31, 2022 denial of coverage correspondence to Juan Amaya and MGA's January 31, 2022 denial of coverage to Royer Hernandez Gonzales.

The Court heard the testimony of Joe Lord of Fortworth, Texas who testified that he is a 9-year employee of Gainsco/MGA and has worked as a corporate claims adjuster and in claims litigation. He stated that MGA Insurance Company is incorporated in Texas but is not a licensed insurer in New York; is not registered with the Department of Finance in New York; has no offices, employees, agents, in New York or otherwise issues policies in New York. He stated that Gainsco/MGA issued the Alabama personal automobile policy to Juan Suazo Amaya which listed the subject 2014 Mitsubishi and that he had reviewed the Gainsco/MGA personal automobile policy of Juan Suazo Amaya as well as the company's claim file of the October 16, 2021 date of loss. He testified that Gainsco/MGA denied coverage for Amaya's claim pursuant to Gainsco's letter of January 31, 2022. The denial as based on Amaya's failure to cooperate in Gainsco/MGA's investigation to determine if the driver of the offending vehicle, Royer Hernandez Gonzales had the express permission from an insured under the policy to operate the vehicle on the date of loss. Respondent Royer Hernandez Gonzales was not one of the listed drivers on the Gainsco/MGA policy nor had Gonzales responded to phone calls, letters or demands to appear for examination under oath previously requested by Gainsco/MGA, nor had Respondent Royer Hernandez Gonzales appeared for the framed issue hearing, nor was his family relationship with the named insured or other listed driver under the policy provided.

Mr. Lord also testified that non-party insured Juan Suazo Amaya had a responsibility under the policy to cooperate in the coverage investigation and provide proofs as to whether he had given additional Respondent Royer Hernandez Gonzales permission to operate the offending vehicle. However, he also did not respond to telephone calls, letters and failed to appear for scheduled examination under oaths. Mr. Lord also testified that a special investigation unit went to the residence of the insured Amaya and the registered owner Alex Gutierrez Gonzales but

were unable to locate either. Mr. Lord testified that Gainsco/MGA Insurance disclaimed coverage as a result of non-cooperation of Royer Hernandez Gonzales and Juan Suazo Amaya. Mr. Lord testified that he was aware that Gainsco/MGA was presently owned by State Farm, but was not aware of the January 1, 2021 purchase date.

The parties submitted written post-closing arguments. Additional Respondent Gainsco/MGA argues that there was no available coverage under MGA's policy in Alabama to Juan Amaya because the driver Royer Hernandez Gonzales was not a named insured, or a determined relative of the named insured Amaya, nor listed a driver under the policy. Respondent Royer Hernandez Gonzales did not cooperate in the investigation to determine whether he was using the 2014 Mitsubishi insured by Respondent Amaya with Amaya's expressed permission as provided in the Alabama issued policy. Gainsco/MGA also argues lack of personal jurisdiction.

Petitioner State Farm argues (1) that service on Additional Respondents were proper; (2) that Gainsco/MGA insured the 2014 Mitsubishi at the time of the October 16, 2021 accident; New York Deemer Statute applies to Gainsco/MGA as an alleged wholly owned subsidiary and affiliate of State Farm, a New York Licensed Insurer and that the New York State Financial Security Requirement and all New York state laws apply to the Alabama Gainsco/MGA policy, (3) the Court has jurisdiction over Gainsco/MGA as an affiliate of a licensed New York insurer, (4) Gainsco/MGA presented no evidence or knowledge of lack of expressed permissive use of the vehicle by driver Royer Hernandez Gonzales and (5) Gainsco/MGA did not prove lack of cooperation to disclaim coverage.

After trial of the framed issues, the Court makes the following findings of fact and conclusions of law.

The Court finds that the Additional Respondents were properly served with the Petition and Notice of Petition after being added as parties to this proceeding pursuant to this Court's Order dated May 16, 2023 and consistent affidavits of services NYSCEF Documents No. 29 through 32, and the service requirements of CPLR, Article 3. The Court notes that CPLR §312-a is an alternative service method rule for service authorized under CPLR §308 and that Additional Respondents as acknowledged and owner business affiliates of State Farm, a New York insurer was served pursuant to 308(3). The Court also has jurisdiction over Gainsco/MGA through its acknowledged affiliate State Farm, where the accident was in the State of New York.

The Court also finds that Additional Respondents Gainsco/MGA presented no evidence that driver Royer Hernandez Gonzales did not have expressed permissive use from the named insured. However, Additional Respondents assert that its lack of proof is because of the lack of cooperation by the driver Royer Hernandez Gonzales and the insured Amaya.

To determine the validity of the disclaimer based upon the insureds failure to cooperate in an investigation of expressed permissive use as provided in the Alabama policy language, the Court must determine whether the disclaimer of coverage was proper. *See Eagle Ins. Co. v. Singletary*, 279 A.D.2d 56 (2000) and *Nationwide Ins. Co. v. Guareno*, 278 A.D.2d 419 (2000). Despite Petitioners assertion that New York Deemer requires the application of New York's

implied permissive use statute, this Court must apply the conflict of law in favor of the Alabama policy language which requires a determination of the insured's expressed permissive use of the insured's vehicle or failure to cooperate as provided in the policy.

New York Vehicle and Traffic Law (VTL) §388 establishes a rebuttable presumption that a vehicle owner consented to the operation of its vehicle by another party once the plaintiff establishes the threshold requirement of providing a defendant's ownership of a vehicle. The purpose of VTL §388 is to

“...impose liability on vehicle owners for death or injuries resulting from negligent use or operation of vehicle is to ensure recourse to vehicle's owner, a financially responsible party and to discourage owners from permitting people who are irresponsible or who might engage in unreasonably dangerous activities to use their vehicles. “

See Chambers v. City of New York, 309 A.D.2d 81 (2d Dep't 2003).

Additionally, Article 51 of New York Insurance Law §5107 generally known as the “Deemer” statute is a law which deems all out of state automobile policies to incorporate new York's minimum insurance limits for liability and Personal Injury Protection (PIP) of \$25,000.00 per person and \$50,000.00 per accident. Petitioner argues that Gainsco/MGA as State Farm's subsidiary is subject to all New York laws including the VTL. However, documentation evidencing Gainsco/MGA subsidiary relationship with State Farm including choice of law or conflict priority was not offered.

Here, the out of state coverage provision of Amaya's Alabama policy only applies if the driver participant Royer Hernandez Gonzales is an insured person, which pursuant to the terms of the policy and Alabama law would require that he was a relative of the insured or was using the insured's vehicle with the express rather than implied permission of the named insured, Juan Suazo Amaya. The driver has the burden to establish express permission. *See Alabama Farm Bureau Mut. Cas. Co. v. Mattison*, 286 Ala 541 (Ala 1971) and *Alabama Farm bureau MCI Co. v. Government Employees Insurance Company and Joseph S. Szczeponski et al.*, 286 Ala 414 (Ala 1970). Here, Additional Respondents Gainsco/MGA assert that no proof of express permission of the named insured or their familial relationship was established because of lack of cooperation by the insured.

To disclaim coverage based on lack of cooperation, the insurance carrier must demonstrate that (1) they made a diligent effort to bring about the insured's cooperation, (2) made efforts calculated to obtain the insured's cooperation and (3) that the attitude of the insured was of willful and avowed obstruction.

The Court finds that the insured efforts which included phone calls, correspondence, hiring investigators who made personal attempts at the last known address of the insureds Juan Suazo Amaya and Alex Gutierrez Gonzales, as well as correspondence to and attempted examination under oath of driver Royer Hernandez Gonzales with no response from the insured

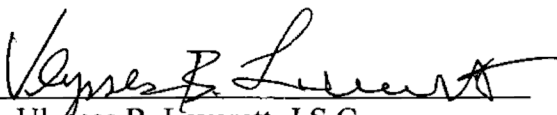
or additional respondents establish a bases for Gainsco/MGA's disclaimer of coverage for lack of cooperation.


Accordingly, it is

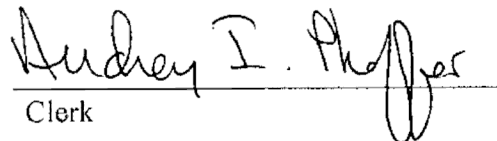
ORDERED and ADJUDGED that the Petition to permanently stay the arbitration is denied and the Petition is dismissed. The Petitioner and Respondent McIntosh are to proceed with arbitration after completion of discovery as provided in the Court's May 16, 2023 Order.

Petitioner shall serve a copy of this Decision, Judgement and Order together with a Notice of Entry upon all parties and the American Arbitration Association within 20 days of the entry of the Decision, Judgement and Order.

Dated: September 18, 2023


Hon. Ulysses B. Leverett, J.S.C.
HON. ULYSSES B. LEVERETT

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9:03 AM
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QUEENS COUNTY


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