

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAIME A. RIOS
Justice

IA PART 8

_____ X
HARTFORD ACCIDENT & INDEMNITY CO.,

Index
Number 306/04

_____ Petitioner,

Motion
Date October 13, 2004

_____ - against -

ANGELA ROSE and LUCY CHEDDA,

Motion
Cal. Number 47

Respondents.

_____ X

The following papers numbered 1 to 9 were read on this petition by the petitioner Hartford Accident & Indemnity Co., pursuant to CPLR article 75, to permanently stay an arbitration demanded by the respondents or, in the alternative, to temporarily stay the arbitration until the respondents provide certain discovery.

	<u>Papers Numbered</u>
Notice of Petition - Affidavits - Exhibits	1-3
Answering Affidavits - Exhibits	4-6
Reply Affidavits	7-9

Upon the foregoing papers it is ordered that the petition is determined as follows:

On September 25, 2001, the respondents Lucy Chedda (Chedda) and Angela Rose (Rose) were the front and rear seat passengers, respectively, in a vehicle owned by Nandanina W. Seedo (Seedo), operated by Ramesh R. Toulisiram and insured by the petitioner Hartford Insurance Company (Hartford). On that day, the Seedo vehicle was involved in an accident with a vehicle owned by Peter Baressi and operated by Diane Baressi (collectively, Baressi).

Rose and Chedda commenced a personal injury action against Baressi, Seedo and Toulisiram; however, that action remains pending (see Index No. 17592/02)(the personal injury action).

Ultimately, Hartford disclaimed and denied coverage for Seedo and Toulisiram, and denied Chedda's claim for no-fault benefits.

As a result, on or about January 9, 2003, Rose and Chedda commenced a declaratory judgment action against Hartford and others seeking a declaration, inter alia, that Hartford was obligated to defend and indemnify Seedo and Toulisiram in the personal injury action and was obligated to provide no-fault benefits to Chedda (see Angela Rose et al v Hartford Ins. Co. et al (Index No. 616-2003))(the declaratory judgment action).

In the declaratory judgment action, Chedda moved for summary judgment as against Hartford and others; in turn, Hartford moved for summary judgment dismissing the complaint and a declaration that it had no duty to defend or indemnify Seedo or Toulisiram, or to pay no-fault benefits to Chedda.

In the declaratory judgment action, by order dated November 3, 2003 and entered on November 13, 2003 this court (Satterfield, J.) determined, inter alia, that: (1) Hartford acknowledged receipt of Chedda's claim for no-fault benefits by letter dated October 31, 2002, and denied that claim on January 11, 2002, based upon a livery exclusion; (2) at the time of the accident, Toulisiram was using the Seedo vehicle as a taxi or livery service and had picked up Rose and Chedda in response to a car service call; (3) as Hartford issued a timely disclaimer based on the livery exclusion set forth in the liability provisions of its policy, Hartford had no duty to defend or indemnify Toulisiram or Seedo; (4) the livery exclusion also applied to Chedda's no-fault claim, so Hartford had no duty to provide Chedda with no-fault benefits under the liability portion of its policy; (5) notwithstanding the livery exclusion, Chedda could seek uninsured motorist (UM) benefits from Hartford; and, (6) Chedda could submit a claim to Hartford for UM benefits within 90 days from the date of service of the court's order in the declaratory judgment action, with notice of entry (prior order).

Hartford appealed from so much of the prior order as directed that the period during which Chedda could submit a claim to Hartford for UM benefits was to run from the date of service of the prior order, with notice of entry; however, that aspect of the prior order was affirmed (see Rose v Hartford Ins. Co., 9 AD3d 402 [2004]).

Chedda and Rose then served a demand for arbitration dated December 16, 2003, which Hartford received on December 19, 2003. By letter dated January 5, 2004 Hartford, through its attorney, demanded that Rose and Chedda execute authorizations allowing

Hartford to obtain medical records, and appear for an examination under oath and a physical examination.

Hartford then timely commenced this proceeding to stay arbitration, contending that: (1) under the UM/Supplementary Uninsured Motorist (SUM) endorsement of its policy, the term "uninsured motor vehicle" is defined to exclude a motor vehicle that is "insured under the liability coverage of this policy" and the Seedo vehicle constituted an insured vehicle but for the livery exclusion; (2) in any event, as the Baressi vehicle was insured, Chedda and Rose are required to first obtain coverage from the Baressis' insurer in the personal injury action before seeking UM/SUM benefits; (3) it first received notice of the UM/SUM claim when it received the demand for arbitration on December 19, 2003, and such notice was untimely; and, (5) in any event, it is entitled to a temporary stay to enable it to obtain discovery from the respondents.

Rose and Chedda oppose the petition noting that: (1) they served their demand for arbitration within one day of the entry of the prior order; (2) Hartford knew about the no-fault claim as it denied such benefits on January 11, 2002; (3) in any event, their demand for arbitration was made "as soon as practicable"; (4) in view of the prior order finding that Hartford was not obligated to defend and indemnify Seedo and Toulisram, the Seedo vehicle was not insured on the date of the accident; (5) the fact that the Baressi vehicle was insured by Zurich Insurance Company c/o Valiant Insurance Company (Zurich) on the date of the accident is irrelevant, as Hartford does not provide liability coverage; and, (6) in the alternative, the court should grant a temporary stay pending a hearing on all issues raised in the petition.

Hartford replies, inter alia, that: (1) it never received any notice from Rose concerning her claim; and, (2) in a handwritten statement dated December 21, 2001, Rose indicated that she owned a vehicle so her insurance coverage is available in addition to the coverage provided under the Zurich policy.

Generally, the absence of insurance is the essential prerequisite for the existence of coverage under a UM indorsement (see Matter of Allstate Ins. Co. v Giordano, 108 AD2d 910 [1985], aff'd, 66 NY2d 810 [1985]; see also Matter of New York Central Mut. Fire Ins. Co. v Julien, 298 AD2d 587 [2002]; Matter of Electric Ins. Co. v Woods, 101 AD2d 840 [1984]). An insurer's failure to defend and indemnify its insured is the determinative factor in deciding whether the offending vehicle is uninsured within the intendment of the insurance law (see Matter of Allstate Ins. Co. v Giordano, supra). Where the offending vehicle is insured on the

date of the accident, a UM claim does not accrue until the vehicle thereafter becomes uninsured (see Matter of Allstate Ins. Co. v Giordano , supra).

In this case, once it was determined that Hartford was not obligated to provide liability coverage for the Seddo vehicle as a result of the livery exclusion, the Seddo vehicle became an uninsured vehicle pursuant to the terms of Hartford's policy (see Matter of Liberty Mut. Ins. Co. v Saravia, 271 AD2d 534 [2000], citing, Matter of Liberty Mut. Ins. Co. v Hogan, 82 NY2d 57 [1993]; Rowell v Utica Mut. Ins. Co., 77 NY2d 636, 640 [1991]).

Although the UM/SUM indorsement in Hartford's policy states that an uninsured vehicle does not include a vehicle that is "[i]nsured under the liability coverage of this policy," in view of the prior order determining that the livery exclusion precluded coverage under the liability provisions of the policy, the provision relied upon by Hartford cannot be invoked to deprive Rose and Chedda of the mandatory UM/SUM benefits required by Insurance Law § 3420[f][1] (see Matter of Liberty Mut. Ins. Co. v Saravia, supra).

Moreover, under the circumstances of this case, the claim for UM benefits made through a demand for arbitration was timely (see Rose v Hartford Ins. Co., supra, citing, Matter of Allstate Ins. Co. v Giordano, supra; see also Hermitage Ins. Co. v Alomar, 301 AD2d 465 [2003]).

Finally, pursuant to Insurance Law § 3420[f][2] and the Hartford policy, as a condition precedent to the obligation of Hartford to pay under the SUM endorsement, the limits of liability of all bodily injury liability bonds or insurance policies applicable at the time of the accident shall be exhausted by payment of judgments or settlements (see Matter of Federal Ins. Co. v Watnick, 80 NY2d 539 [1992]; Russell v New York Cent. Mut. Fire Ins. Co., __AD2d__, 2004 NY App Div LEXIS 12515 [2d Dept, 10/25/04]).

In view of the statutory scheme and the clause embodied in Hartford's policy, Hartford is entitled to a temporary stay of the arbitration pending a final determination in the underlying personal injury action commenced by Rose and Chedda (see Continental Ins. Co. v Richt, 253 AD2d 818 [1998], lv denied, 93 NY2d 805 [1999]; Matter of Polensky v Geico Ins. Co., 241 AD2d 551 [1997]; see also Andriaccio v Borg & Borg, Inc., 198 AD2d 253 [1993]).

ORDERED within ninety (90) days of the date of this order, Rose and Chedda are directed to provide the discovery sought by Hartford.

ORDERED the arbitration of the uninsured motorist claim is temporarily stayed pending resolution of the underlying personal injury action.

Hartford shall serve a copy of this order with notice of entry on the American Arbitration Association.

Dated: December 10, 2004

J.S.C.