

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

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Matter of COUNTRY-WIDE INSURANCE COMPANY,		Number <u>9252</u> 2003
Petitioner,		Motion
For an Order Staying the Arbitration		Date <u>July 2,</u> 2003
Demanded by LING LIN,		Motion
Respondent,		Cal. Number <u>22</u>
-against-		

MOHAMED S. RASHED, ACADEMY BUS TOURS,
INC., RELIANCE INS. CO., RALPH COLLETTA,
RYDER TRUCK RENTAL INC. AND LUMBERMEN'S
MUTUAL CASUALTY CO. and MOTOR VEHICLE
ACCIDENT INSURANCE GROUP,

Proposed Additional Co-Respondents.

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The following papers numbered 1 to 12 were read on this notice of petition and petition by the petitioner, pursuant to CPLR article 75, for (a) an order permanently staying an arbitration on the ground that the adverse vehicle was insured or, (b) in the alternative, temporarily staying arbitration pending a framed-issue hearing and the joinder of additional respondents to determine all coverage issues relating to the adverse vehicle or, (c) in the alternative, temporarily staying arbitration pending the respondent's execution of various authorizations.

	Papers Numbered
Notice of Petition - Petition - Exhibits	1-4
Answering Affidavits - Exhibits	5-9
Reply Affidavits	10-12

Upon the foregoing papers it is ordered that the notice of petition and petition are determined as follows:

I. The Relevant Facts

The respondent Ling Lin ("Lin") was one of several passengers on a bus owned by Academy Bus Tours, Inc. ("Academy"), a New Jersey corporation, and operated by Mohamed S. Rashid ("Rashid"). The bus was involved in an accident in Kings County with a truck owned by Ryder Truck Rental ("Ryder") and operated by Ralph Colletta ("Colletta").

Codes in a police report for the accident indicate that the Academy bus was insured by Reliance Insurance Company ("Reliance"), and the Ryder truck was insured by Lumbermen's Mutual Casualty Co. ("Lumbermen's").

Lin had a personal auto policy with the petitioner Country-Wide Insurance Company ("Country-Wide"). Part C of the policy provides uninsured motorist coverage. Part C (4) defines an uninsured motor vehicle as a land motor vehicle or trailer of any type:

"To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:

- a. denies coverage; or
- b. is or becomes insolvent."

A "Limit of Liability" clause in Part C provides, in subsection B, that amounts otherwise payable for damages shall be reduced by all sums paid for bodily injury by or on behalf of persons or organizations who may be legally responsible, and payments from workers' compensation or disability benefits. An "other insurance" clause embodied in Part C also provides, inter alia,

"[A]ny insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance."

In addition to providing uninsured motorist coverage, the Country-Wide policy contains a Supplementary Uninsured Motorists ("SUM") endorsement, which was to be applicable where a premium was paid for such coverage. The SUM endorsement also defines an uninsured motor vehicle as one where the insurer is or becomes insolvent.

As a result of the accident, Colletta commenced an action, Ralph Colletta & Mary Colletta v Academy Bus Tours, Inc. and Mohamed S. Rashid, Index No. 28974/97) ("the Colletta action"). By

order dated April 7, 2003 this court (Weiss, J.), granted Colletta's motion for summary judgment on the issue of the liability of Academy and Rashid. In addition, the court granted a cross motion by Academy to the extent of staying the trial on damages until Colletta and his wife exhausted their uninsured motorist benefits. In the order, the court noted that five pending related actions brought by passengers of the bus were combined for joint trial.

II. Notice of Petition and Petition

Country-Wide seeks to permanently stay an arbitration demanded by Lin, contending that the Academy bus and Colletta's vehicle were insured by Reliance and Lumbermen's, respectively, and as a result, Lin is not entitled to uninsured motorist benefits under its policy. In addition, Country-Wide asserts that if either of those insurers have disclaimed, the Motor Vehicle Accident Insurance Corporation ("MVAIC") should be added as a respondent, as the Insurance Law makes MVAIC funds available to Lin. Country-Wide asserts that pursuant to the uninsured motorist provision of its policy, Lin must first seek benefits from Reliance, then Lumbermen's and then MVAIC.

In the alternative, Country-Wide asserts that the arbitration should be temporarily stayed, and Rashid, Academy, Colletta, Ryder, Lumbermen's and MVAIC should be joined as additional respondents for a framed-issue hearing on the coverage issue. Finally, and also in the alternative, Country-Wide seeks to temporarily stay arbitration pending Lin's submission to an examination under oath, physical examinations by physicians selected by Country-Wide, and execution of various authorizations.

Academy and Rashid oppose the petition, contending that: (1) Academy is a New Jersey corporation and its insurer, Reliance, was declared insolvent and placed in liquidation; (2) after Reliance was declared insolvent, the New Jersey Property-Liability Insurance Guaranty Association ("Guaranty Association") undertook the administration of all covered claims covering New Jersey insureds; (3) the New Jersey Guaranty Association Act (NJSA § 17:30A-1 et seq.) requires a plaintiff to exhaust all other available insurance coverage before seeking statutory benefits from the Guaranty Association; (4) as Reliance is insolvent, Academy and Rashid must be considered uninsured for the purpose of any SUM endorsement provided under Insurance Law § 3420[f][2]; (5) in the Colletta action, this court recognized that Academy and Rashid were uninsured, as it stayed trial on damages until uninsured motorist benefits were exhausted; and, (6) as a result, Lin should be

permitted to proceed to arbitration for SUM benefits under the Country-Wide policy.

Lin opposes the petition on the same grounds, adding that the order in the Colletta action determined that Rashid, the driver of the Academy bus, was the primary tortfeasor.

Country-Wide replies that it did not provide SUM coverage to Lin and, instead, it only provided compulsory uninsured motorist coverage. It urges that Lin, Academy and Rashid have failed to demonstrate that Reliance, Lumbermen's and MVAIC do not provide coverage for the adverse vehicle at the time of the accident, and a hearing is warranted.

III. Decision

In State-Wide Ins. Co. v Curry, 43 NY2d 298, 302-303, the Court of Appeals held that where insolvency renders a domestic insurer incapable of satisfying its insurance obligations to a tortfeasor, the tort victim is not entitled to receive uninsured motorist benefits from his or her own insurer.

The basis for the State-Wide holding was that under the compulsory uninsured motorist scheme: (1) the offending vehicle whose domestic insurer became insolvent did not meet the "uninsured motor vehicle" definition in the then-applicable Insurance Law provision; and, (2) the Insurance Law established the Motor Vehicle Liability Security Fund to provide protection for accident victims where the domestic insurer was insolvent (see, State-Wide Ins. Co. v Curry, supra, at 301-303; Eagle Ins. Co. v St. Julian, 297 AD2d 737; American Mfrs Mut. Ins. Co. v Morgan, 296 AD2d 491).

The rule is different with respect to SUM coverage, which is an optional, additional coverage providing broader protections than that provided under the compulsory uninsured motorist statute (see, American Mfrs. Mut. Ins. Co. v Morgan, 296 AD2d 491). Pursuant to the relevant regulation and statute pertaining to SUM coverage, the individual insured is not required to wait for a recovery from the Security Fund on behalf of the insolvent insurer; instead, the SUM insurer has a subrogation right against the insolvent insurer, and although the Security Fund still remains liable, the insured is provided with a more prompt recovery from his or her own insurer (see, American Mfrs. Mut. Ins. Co. v Morgan, supra, citing and referring to, inter alia, Regulation 35-D, N.Y. Comp. Codes R. & Regs. Tit. 60-2.3).

Here, the Country-Wide uninsured motorist provision embodied in Part C of the policy defines "uninsured motor vehicle" as one

where the insuring company is or becomes insolvent. Nonetheless, it also appears that by virtue of the limit of liability and other insurance clauses in Part C, any insurance paid by Country-Wide is either reduced by payments from legally responsible parties, or is excess over any other collectible insurance.

Furthermore, the Colletta action determined that Rashid and Academy are the legally responsible parties. The evidence demonstrates, however, that Reliance, the insurer of Academy and Rashid is in liquidation, and that the Guaranty Association handling claims for New Jersey insureds such as Academy requires the exhaustion of all other coverage before it pays claims (see, e.g., Carpenter Tech Corp. v Admiral Ins. Co., 172 NJ 504).¹ In addition, although Colletta has been determined to be not liable for the accident, he was covered by Lumbermen's and it is unclear the extent to which, if any, benefits are available to Lin under the Lumbermen's policy.

Finally, the parties dispute whether Country-Wide provided only uninsured motorist coverage to Lin, or whether Lin also purchased the SUM coverage. The resolution of the issue of whether Lin purchased SUM coverage is critical to the issue of whether Lin is entitled to proceed directly to arbitration and seek coverage solely from Country-Wide (see, State-Wide Ins. Co. v Curry, supra; Eagle Ins. Co. v St. Julian, supra; American Mfrs. Mut. Ins. Co. v Morgan, supra).

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NJSA 17:30A-12 provides:

"a. Any person having a covered claim which may be recovered from more than one insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured at the time of the insured event. . . . Any recovery under this act shall be reduced by the amount of recovery from any other insurance guaranty association or its equivalent. However, if recovery is denied or deferred by the association, a person may proceed to recover from any other insurance guaranty association or its equivalent from which recovery may be legally sought.

b. Any person having a claim against an insurer, whether or not the insurer is a member insurer, under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, shall be required to exhaust first his right under that other policy. . . ."

Accordingly, Country-Wide's petition is granted to the extent that Country-Wide shall join the proposed additional respondents, and the arbitration is temporarily stayed pending a framed-issue hearing to determine the coverage issues (see, Eagle Ins. Co. v Tichman, 185 AD2d 884).

Country-Wide is directed to join the proposed additional respondents within sixty (60) days of service of a copy of this order upon it with notice of entry, and shall also serve the additional respondents with a copy of this order. Country-Wide, Lin and the additional respondents should be prepared for a framed-issue hearing to be held on Thursday, January 8, 2004, at 9:30 a.m., in courtroom 26.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the notice of petition and petition by the petitioner, pursuant to CPLR article 75, for (a) an order permanently staying an arbitration on the ground that the adverse vehicle was insured or, (b) in the alternative, temporarily staying arbitration pending the joinder of additional respondents and a framed-issue hearing to determine all coverage issues relating to the adverse vehicle or, (c) in the alternative, temporarily staying arbitration pending the respondent's execution of various authorizations, is granted to the extent that the arbitration is temporarily stayed pending the joinder of the additional respondents and a framed-issue hearing to determine all coverage issues relating to the adverse vehicle and, otherwise, is denied; and it is further

ORDERED that within sixty (60) days of service of a copy of this order upon the petitioner, the petitioner shall join the proposed additional respondents and shall also serve the additional respondents with a copy of this order; and it is further

ORDERED that the petitioner, respondent and proposed additional respondents shall appear at a framed-issue hearing to be held on Thursday, January 8, 2004 at 9:30 a.m. in courtroom 26, and at that time, shall appear with all documents, witnesses or other evidence necessary to proceed with the hearing on the coverage issues.

Dated: September 16, 2003

J.S.C.