Supreme Court of the City of New York
County of Kings
Part 91

Index Number 3236/2016

In the Matter of the Application of

GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioner,

against

To Stay the Arbitration Demanded By

SHLOMO NEMET,

Respondent.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Petitioner's application to stay the arbitration between it and respondent is decided as follows.

As set forth in the Petition, petitioner commenced this proceeding pursuant to CPLR Article 75, to stay the arbitration commenced against it by respondent. Petitioner states that it issued a commercial insurance policy, to SN Consulting, Inc. covering a 2015 Chrysler Town & Country automobile leased by SN Consulting, Inc. In his affidavit, respondent's counsel states that respondent is the president and sole shareholder of SN Consulting, Inc. The Petition further states that a motor vehicle accident occurred on March 29, 2015, involving respondent. Respondent submitted a claim to petitioner for Supplemental Uninsured/Underinsured Motorists coverage, and petitioner denied the claim because respondent did not qualify as an "insured" under the policy. Thereafter, respondent initiated arbitration proceedings with the American Arbitration Association for uninsured motorist coverage.

Pursuant to CPLR 7503(c), "[a]n application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be [precluded from staying the arbitration]." Respondent contends that the Petition is untimely because petitioner received the demand for arbitration on February 17, 2016, as shown on the "received" stamp on the demand, but petitioner did not commence this proceeding until March 30, 2016, as shown on the stamp on the Petition.

Petitioner does not dispute the date it received the demand or the date it filed the Petition. Instead, petitioner argues that the twenty-day deadline in CPLR 7503 does not apply if there is no agreement between the parties to arbitrate. Respondent argues that this exception is not relevant here because there is an arbitration provision in the policy, and because respondent is the president and sole shareholder of SN Consulting, Inc.

The Second Department confronted a similar situation in *Interboro Ins. Co. v Maragh*, (51 AD3d 1024 [2d Dept 2008]), in which the respondent, Patrick Maragh sought arbitration with the petitioner, Interboro Insurance Company, who sought to stay the arbitration. Mr. Maragh claimed that he was covered under an insurance policy issued by Interboro to Mr. Maragh's mother, Deloreta Chouquette. The policy at issue defined an "insured" as the named insured or any "family member," which required the family member to be a resident of the named insured's household. Ms. Chouquette stated that Mr. Maragh was not a member of her household, while Mr. Maragh stated he was. The trial court denied petitioner's application for a stay (*Interboro*, 51 AD3d at 1024-25). The Second Department reversed, reasoning that "if Maragh was not an insured under the subject policy, then no agreement to arbitrate existed between him and Interboro, and the 20–day time limit set forth in CPLR 7503(c) is inapplicable"

(*id.* at 1025). The appellate court remitted the matter to the trial court for a hearing to resolve that issue and then decide anew petitioner's application for a stay (*id.* at 1025-26)

Likewise, in *Allstate Ins. Co. v Marke*, (121 AD3d 1107 [2d Dept 2014]), the respondent, a pedestrian hit by a vehicle whose operator was insured by Allstate Insurance, served Allstate with a notice to arbitrate, and Allstate sought a stay. The respondent argued that the application for a stay was untimely because it was filed after the twenty-day deadline. The trial court agreed with the respondent and denied the petition as untimely (*Allstate*, 121 AD3d at 1108). On appeal, the Second Department reasoned that the deadline did not apply because the respondent was not an insured within the meaning of the policy (*id.*). The policy defined an "insured" as an occupant of a vehicle operated by the named insured (*id.*). The appellate court found that the respondent was not "occupying" the vehicle operated by the named insured (*id.*). Therefore, the appellate court held that there was no agreement to arbitrate and the twenty-day requirement did not bar Allstate's application (*id.* at 1108-09).

Here, the policy defines insured as:

> Any person while acting in the scope of that person's duties for you, except with respect to the use and operation by such person of a motor vehicle not covered under this policy, where such person is: (a) Your employee and you are a fire department; (b) your member and you are a fire company, as defined in General Municipal Law section 1000; (c) Your employee and you are an ambulance service, as defined in Public Health Law section 3001; or (d) Your member and you are a voluntary ambulance service, as defined in Public Health Law section 3001.

Respondent correctly argues that the first portion of this provision should read, as applied here, "Shlomo Nemet while acting in the scope of that person's duties for SN Consulting, Inc." However, the interpretation of the remaining portion of the provision, beginning with the word

"except," may not be immediately clear. The issue is the scope of the "exception" in the remaining part of the clause, beginning with the word "except." In the first interpretation, the scope of the exception is the entire remaining portion of the clause. In that interpretation, insureds do not include persons who use and operate a non-covered vehicle and are any of the following persons described in (a) through (d). In the second interpretation, the scope of the exception is limited to the phrase separated by the commas, namely "except with respect to the use and operation by such person of a motor vehicle not covered under this policy". In such an interpretation, only the use and operation of a non-covered vehicle is excepted. Also, in this second interpretation, the person described must also be one of the categories of people described in (a) through (d).

Choosing which interpretation governs depends upon how New York law construes clauses separated by commas. Here, the presence of commas before "except" and after "policy" provides grammatical borders to the clause, and separates it from the rest of the provision, beginning with "where such person" (*see, e.g., Valleylab, Inc. v N.Y. City Health & Hosps. Corp.*, 228 AD2d 180, 181 [1st Dept 1996]; *compare A.J. Temple Marble & Tile, Inc. v Union Carbide Marble Care, Inc.*, 87 NY2d 574, 579–80 [1996]). Thus, the second interpretation prevails.

In this interpretation, respondent correctly construes that the first part reads "Shlomo Nemet while acting in the scope of that person's duties for SN Consulting, Inc." However, respondent must also show that he is also one of the people described in (a) through (d). Respondent makes no such showing, and further makes no showing that he meets any of the other definitions of "insured".

For the foregoing reasons, this court concludes that respondent is not an insured as defined by the policy, and that there is no agreement to arbitrate between the parties. Therefore, petitioner's application is not untimely, and the arbitration proceeding between the parties is hereby stayed.

This constitutes the decision and order of the court.

April 5, 2017
DATE

DEVIN P. COHEN
Acting Justice, Supreme Court