

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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

Petitioner,

Index No. 55785/2020

-against-

DECISION and ORDER

for an Order Staying the Arbitration attempted to be had by

Motion Sequence No. 1

ALIEU SAHOR,

Respondent,

-and-

BREONNA TILLMAN, ESURANCE INSURANCE
COMPANY, UBER TECHNOLOGIES and
ALLSTATE INSURANCE COMPANY,

Proposed Additional Respondents.

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RUDERMAN, J.

The following papers were considered in connection with petitioner's application to stay uninsured arbitration pursuant to CPLR 7503(c):

<u>Papers</u>	<u>Numbered</u>
Notice of Petition, Petition, Exhibits A - G	1
Uber Technologies Affirmation in Opposition, Exhibits A - B	2
Sahor Affirmation in Opposition, Exhibits A - F	3
Esurance Affirmation in Opposition, Exhibits A - D	4
Reply Affirmation	5

This proceeding arises out of an automobile collision that occurred on December 29, 2018, between a vehicle owned and operated by respondent Alieu Sahor and the alleged offending vehicle owned and operated by proposed additional respondent Breonna Tillman. Petitioner State Farm Mutual Automobile Insurance Company ("State Farm") is Sahor's insurer. The police report regarding the accident listed Esurance as Tillman's insurer; however, when Sahor forwarded a claim to Esurance, it responded on January 30, 2019 with a denial of coverage indicating that the policy it had issued to Tillman had been cancelled on November 27, 2018, prior to the accident. State Farm preliminarily denied Sahor's claim on February 11, 2020, and issued a final denial letter on April 5, 2020. The ground it offered for the denial was a policy exclusion applicable to injuries incurred while the insured vehicle was being used by a "transportation network company driver" under specified circumstances. In response, Sahor served State Farm with a demand for uninsured motorist arbitration dated May 12, 2020.

State Farm now proceeds by notice of petition dated June 4, 2020 for a permanent stay of the uninsured motorist arbitration, based on the same policy exclusion, contending that Sahor was driving for Uber at the time of the accident, and that therefore this claim falls within the exclusion to the State Farm policy which states that

"This SUM coverage does not apply to: . . . 4. bodily injury to an insured incurred while the insured motor vehicle is used by a transportation network company driver who is logged onto a transportation network company's digital network but is not engaged in a transportation network company prearranged trip or while the driver provides a transportation network company prearranged trip pursuant to article 44-B of the Vehicle and Traffic Law."

State Farm asserts that the website for Uber reflects that Allstate Insurance Company (hereinafter “Allstate”) is the insurance carrier representing Uber, and has named Allstate as a proposed additional respondent.

In the alternative, State Farm seeks a temporary stay of arbitration pending a hearing to determine whether the Esurance policy was properly cancelled or was in effect at the time of the accident. State Farm does not submit evidence of any impropriety in the cancellation; it merely asserts that it has not been provided with evidence establishing that the Esurance policy was properly cancelled prior to the accident. It maintains that Esurance must prove that it properly and strictly complied with the statutes and regulations governing notices of cancellation.

Finally, State Farm seeks a temporary stay of arbitration pending Sahor’s compliance with its discovery demands.

In opposition, Sahor observes that the term “transportation network company” as used in the State Farm policy exclusion is defined in the Vehicle and Traffic Law as companies providing trips to *passengers* (*see* Vehicle & Traffic Law § 1691). He asserts that at the time of the subject accident, he was working for UberEats, an electronic food delivery service application, pursuant to a Technology Services Agreement with Portier, LLC. He therefore contends that the policy’s exclusion is inapplicable.

The opposition submitted by Uber provides further support for Sahor’s argument, and contends that those branch of the petition seeking to add Uber as an additional respondent must be denied. Uber re-states Sahor’s assertion that at the time of the subject accident, Sahor did not have an agreement with Uber or any of its other subsidiaries to receive trip leads from passengers, and was not transporting passengers at the time of the accident, but rather, had

entered into a Technology Services Agreement with Portier, LLC to receive trip leads for independent delivery services. Uber adds that while Portier was insured under an automobile insurance policy issued by Fireman's Fund, and Sahor was an insured while logged into the Driver App, Portier is under no obligation, statutory or otherwise, to maintain an insurance policy with UM/SUM coverage on behalf of Sahor or any other delivery partners, as such coverage is optional, and was not elected herein (citing Insurance Law § 3420 [f] [2] [A]).

State Farm does not offer any argument in reply to Sahor's and Uber's assertions in this regard.

In Esurance's opposition to the petition, it submits its documentation for its cancellation of Tillman's policy, namely, the cancellation notice and the proof of its mailing. In reply, State Farm argues that those proofs fail to establish that the policy was properly cancelled, since (1) no affidavit by a person with knowledge was provided regarding the delivery of cancellation notices, and (2) the language in the cancellation notice does not fully conform to the language dictated by 15 NYCRR § 34.11.

Discussion

The party seeking a stay of arbitration "has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay" (*American Protection Ins. Co. v DeFalco*, 61 AD3d 970, 972 [2d Dept 2009]).

State Farm has not disputed the information provided by Sahor and Uber that at the time of the accident Sahor was not engaged in transporting passengers or receiving trip leads from passengers, but rather, was employing a food delivery application. Nor does State Farm challenge the argument that the policy exclusion in question, concerned with term "transportation

network companies,” is limited by the Vehicle and Traffic Law definitions to companies providing trips to *passengers* (*see* Vehicle and Traffic Law § 1691). Accordingly, State Farm has failed to establish that it may properly rely on the cited policy exclusion to deny Sahor’s uninsured motorist claim, and that aspect of the petition is denied.

State Farm fails to support its claim that Tillman’s Esurance policy was not properly cancelled prior to the accident. While State Farm relies on the rule that the burden of establishing that a cancellation met the strictures of the governing statutes and rules is upon the insurer alleging a cancellation (*see Viuker v Allstate Ins.*, 70 AD2d 295 [2d Dept 1979]), Esurance observes that State Farm, as the party seeking affirmative relief, namely, a stay of arbitration, had an initial burden of establishing that the cancellation was defective. State Farm’s petition offered only “unsubstantiated conjecture that there may have been some defect in the cancellation of the policy covering the offending vehicle,” which did not make even a *prima facie* showing of a need for a hearing on the issue (*see Allstate Ins. Co. v Lopez*, 266 AD2d 209, 210 [2d Dept 1999]).

Moreover, Esurance’s submitted documents established its compliance with the statutes and regulations governing notices of cancellation. First, contrary to State Farm’s assertion, the submitted copy of the cancellation notice contained all the requisite language set forth in Vehicle and Traffic Law § 313 (1) (a) and 15 NYCRR § 34.11. Second, the submissions are sufficient to demonstrate that Esurance mailed the cancellation notice to Tillman: the first class bulk certification names Tillman among the list of the bulk mailing’s addressees, and lists her address and her policy number, and the certificate of mailing that accompanies it bears a post-marked date of November 7, 2018 (*see Pardo v Central Coop. Ins. Co.*, 223 AD2d 832, 833 [3d Dept

1996]). In this context, Esurance has provided State Farm with sufficient evidence that the notice of cancellation was mailed to Tillman.

While State Farm has a right to obtain discovery from Sahor, based on its discovery demands dated June 4, 2020, Sahor has agreed to provide authorizations and medical records to State Farm within thirty days of this order, and to appear for an examination under oath and a physical examination to be held expeditiously before the arbitration hearing occurs. Thus, there is no need for a temporary stay of the arbitration pending the completion of that discovery.

Based on the foregoing, it is hereby

ORDERED that State Farm's petition for a permanent stay of arbitration, or a temporary stay pending a framed issue hearing to include the proposed additional respondents, is denied, and the parties are directed to proceed to arbitration; and it is further

ORDERED that Sahor is directed to provide authorizations and medical records to State Farm within thirty days of this order, and to appear for an examination under oath and a physical examination on dates to be expeditiously scheduled upon the agreement of counsel.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
May 5, 2021


HON. TERRY JANE RUDERMAN, J.S.C.