St. John's Law Review

Volume 42
Number 3 *Volume 42, January 1968, Number 3*

Article 40

Ins. Law § 167: Defense of Failure to Cooperate Difficult to Establish

St. John's Law Review

operated by respondent was in physical contact with a hit and run automobile. The supreme court, Queens County, held that the insurer was not entitled to the jury trial requested, but, rather, to a preliminary hearing by the court on the issue.[169]

While there is no constitutional right to a jury trial of issues raised on a motion to stay arbitration,[170] Sections 1450 and 1458(2) of the Civil Practice Act granted a statutory right to such a trial. Although these sections were not transposed to the CPLR, the general feeling of authors[171] and commentators,[172] based on the Second Report of the Advisory Committee on Practice and Procedure, was that the new arbitration provisions were not intended to eliminate trial by jury if desirable or constitutionally required. This seemingly clear evidence of legislative intent regarding the right to jury trial weakens, somewhat, the arguments posed by the court in favor of their holding, *i.e.*, that the legislature has had ample time to correct any alleged error and that calendar delay demanded the decision.

NEW YORK INSURANCE LAW

Ins. Law § 167: Defense of failure to cooperate difficult to establish.

Section 167 of the Insurance Law provides that, upon the service of notice, a judgment creditor of an insured may maintain a direct suit against a judgment debtor's insurance company in order to satisfy a judgment. The insured's failure to cooperate with the insurer is a defense of the insurer to this direct action. However, the burden of proving such lack of cooperation is upon the insurer.[173]

In *Thrasher v. United States Liability Insurance* Co.,[174] plaintiffs, judgment creditors of an insured, sought to satisfy their judgments against the judgment debtor's insurer. The defendant

---

169 Liberty Mutual Insurance Co. v. Gottlieb, 54 Misc. 2d at 185, 281 N.Y.S.2d at 598.

170 Andolina v. MVAIC, 23 App. Div. 2d 958, 259 N.Y.S.2d 938 (4th Dep't 1965); MVAIC v. Coccaro, 40 Misc. 2d 1038, 244 N.Y.S.2d 972 (Sup. Ct. Kings County 1963).

171 "Although the specific provisions of sections 1450 and 1458(2) are omitted from the CPLR, the new arbitration provisions were 'not intended to eliminate trial by jury if it is desirable or constitutionally required.'" 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4101.28 (1966). *See also* 8 *id.* ¶ 7503.25; "[T]here was no intention on the part of the draftsmen to eliminate the right to trial of the issues of the existence of an arbitration agreement and compliance with the agreement when a jury trial is desirable or constitutionally required."

172 7B McKINNEY'S CPLR 7503, commentary 488 (1963).

173 N.Y. INS. LAW § 167(5).

174 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967).

insurance company set up the defense, *inter alia*, of the insured's failure to cooperate. Defendant's efforts to secure its insured's cooperation included visiting his last known address on two separate occasions, mailing a certified letter to that address, telephoning his last known employer, visiting his old neighborhood, and employing a process serving company to serve him with a subpoena. The Court, nevertheless, felt that the defendant had failed to sustain the extremely heavy burden of proving lack of cooperation.[175] Under the test set down by the Court, the insurer must demonstrate that it acted diligently in seeking to bring about the insured's cooperation; that the efforts employed were reasonably calculated to obtain the insured's cooperation; and, that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction.[176]

The instant case, by relying on a long line of decisions refusing to allow disclaimer of liability,[177] illustrates the rigid policy of the State in protecting the victims of automobile accidents. Because of this rigid policy, the burden required to prove lack of cooperation so as to disclaim liability approaches the insurmountable.

---

[175] "Since the defense of lack of co-operation penalizes the plaintiff for the action of the insured over whom he has no control, and since the defense frustrates the policy of this State that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them . . . , the courts have consistently held that the burden of proving the lack of co-operation is a heavy one indeed." Thrasher v. United States Liability Ins. Co., 19 N.Y.2d at 168, 225 N.E.2d at 508, 278 N.Y.S.2d at 800.

[176] *Id.*

[177] *See, e.g.*, Amatucci v. Maryland Cas. Co., 25 App. Div. 2d 583, 267 N.Y.S.2d 41 (3d Dep't 1966) (the insured's unexplained disappearance was held not to be willful and avowed obstruction); Rosen v. United States Fid. & Guar. Co., 23 App. Div. 2d 335, 260 N.Y.S.2d 677 (1st Dep't 1965) (the insurer's efforts to locate its insured, including letters and the use of a company investigator, were held not to be reasonable under the circumstances); National Grange Mut. Ins. Co. v. Lococo, 20 App. Div. 2d 785, 248 N.Y.S.2d 150 (1st Dep't 1964), *aff'd*, 16 N.Y.2d 585, 209 N.E.2d 99, 261 N.Y.S.2d 50 (1965) (the insured's disappearance was held not to be willful and avowed obstruction); Wallace v. Universal Ins. Co., 18 App. Div. 2d 121, 238 N.Y.S.2d 379 (1st Dep't), *aff'd*, 13 N.Y.2d 978, 194 N.E.2d 688, 244 N.Y.S.2d 779 (1963) (the court conceded that the insurer used reasonable efforts but, nonetheless, the insured's unexplained disappearance was not willful and avowed obstruction).