

171 A.D.3d 598
Supreme Court, Appellate Division, First Department, New York.

In re **PROGRESSIVE INSURANCE COMPANY**, Petitioner–Appellant,
v.
Fern **BARTNER**, et al., Respondents–Respondents.

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ENTERED: APRIL 23, 2019

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... application to stay arbitration under the supplemental underinsured motorist provision of a policy issued to nonparty Josef Traffic Consulting & Expediting Service (Josef), and dismissed the petition, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for a hearing on the issue of whether respondents were “occupying” Josef’s van at the time of the accident.

[1] It is for a court, not an arbitrator, to decide the threshold issue of whether respondents were occupying the van, i.e., whether they were “insureds” entitled to demand arbitration (*see e.g. Matter of Continental Cas. Co. v. Lecei*, 47 A.D.3d 509, 850 N.Y.S.2d 76 [1st Dept. 2008]). Unlike the agreement in *Matter of Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 26 N.Y.3d 659, 669, 47 N.E.3d 463 [2016], the arbitration clause in the subject policy does not say that the arbitrator will decide arbitrability.

[2] A framed-issue hearing is required because “there is a genuine triable issue” (*Matter of AIU Ins. Co. v. Cabreja*, 301 A.D. 2d 448, 449, 754 N.Y.S.2d 253 [1st Dept. 2003] [internal quotation marks omitted]) as to whether respondents were occupying the van.

All Citations

--- N.Y.S.3d ---, 171 A.D.3d 598, 2019 WL 1768585, 2019 N.Y. Slip Op. 02994

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