

53 A.D.3d 578, 862 N.Y.S.2d 93, 2008 N.Y. Slip Op. 06296  
(Cite as: 53 A.D.3d 578, 862 N.Y.S.2d 93)

**H**

Supreme Court, Appellate Division, Second Department, New York.  
In the Matter of HERTZ CLAIM MANAGEMENT CORPORATION, petitioner-respondent,  
v.

Andrew P. KULAKOWICH, appellant,  
Metropolitan Life Insurance Company, d/b/a Met-life Auto & Home, proposed additional respondent.  
July 15, 2008.

**Background:** Insurer sued insured, seeking to permanently stay arbitration of the insured's claim arising from a motor vehicle accident. The Supreme Court, Westchester County, Bellantoni, J. permanently stayed arbitration, and the insured appealed.

**Holdings:** The Supreme Court, Appellate Division, held that:

- (1) insured was not required to exhaust the liability coverage limits under a separate insurance policy of the operator of the offending vehicle, and
- (2) insurer's failure to respond to a letter notifying it of an offer to settle for the policy limits of the owner of the offending vehicle could be deemed an acquiescence to the offer to settle.

Reversed.

West Headnotes

**[1] Insurance 217 ↪2787**

217 Insurance  
217XXII Coverage--Automobile Insurance  
217XXII(D) Uninsured or Underinsured Motorist Coverage  
217k2785 Uninsured Motorists or Vehicles  
217k2787 k. Underinsurance; Exhausted Coverage. Most Cited Cases  
Insured under an automobile policy, having exhausted the bodily injury policy limits under an offending vehicle owner's policy, was not required to

also exhaust the liability coverage limits under a separate insurance policy of the operator of the offending vehicle prior to pursuing a claim for underinsured motorist benefits from the insured's insurer.

**[2] Insurance 217 ↪2793(2)**

217 Insurance  
217XXII Coverage--Automobile Insurance  
217XXII(D) Uninsured or Underinsured Motorist Coverage  
217k2789 Determination of Tort Liability; Actions and Settlements  
217k2793 Settlement of Tort Actions  
217k2793(2) k. Insurer's Consent to Settlement. Most Cited Cases

**Insurance 217 ↪3283**

217 Insurance  
217XXVII Claims and Settlement Practices  
217XXVII(B) Claim Procedures  
217XXVII(B)7 Arbitration  
217k3280 Enforcement of Agreement or Right  
217k3283 k. Stay of Arbitration.  
Most Cited Cases

Automobile insurer's failure to respond to a letter notifying it of an offer to settle for the policy limits of the owner of the offending vehicle and affording it the opportunity to consent to or reject such offer could be deemed an acquiescence to the offer to settle, and thus, it was error to permanently stay arbitration of the insured's claim against the insurer based on the failure of the insured to obtain the insurer's consent to settle.

**\*\*94** Law Offices of James J. Killerlane, P.C. (Jeffrey Samel & Partners, New York, N.Y. [David Samel] of counsel), for appellant.

George F. Sacco, Staten Island, N.Y., for petitioner-respondent.

Boeggeman, George & Corde, P.C., White Plains, N.Y. (Eugene N. Neoporanny and Cynthia Dolan of

53 A.D.3d 578, 862 N.Y.S.2d 93, 2008 N.Y. Slip Op. 06296  
(Cite as: 53 A.D.3d 578, 862 N.Y.S.2d 93)

counsel), for proposed additional respondent.

REINALDO E. RIVERA, J.P., ROBERT A. LIFSON, JOSEPH COVELLO, and RUTH C. BALKIN, JJ.

\*579 In a proceeding pursuant to CPLR article 75, inter alia, to permanently stay arbitration, Andrew P. Kulakowich appeals, as limited by his brief, from so much of an order of the Supreme Court, Westchester County (Bellantoni, J.) entered June 14, 2007, as granted that branch of the petition which was to permanently stay arbitration.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the petition which was to permanently stay arbitration is denied.

[1] The Supreme Court erred in granting the petitioner a permanent stay of arbitration on the ground that its insured failed to exhaust the policy limits of the operator of the offending vehicle (*see S'Dao v. National Grange Mut. Ins. Co.*, 87 N.Y.2d 853, 638 N.Y.S.2d 597, 661 N.E.2d 1378). It is undisputed that the petitioner's insured exhausted, through settlement, the bodily injury policy limits under the policy of the owner of the offending vehicle, which was less than the liability coverage provided under the petitioner's policy. The petitioner's insured was not required to exhaust the liability coverage limits under a separate insurance policy of the operator of the offending vehicle prior to pursuing a claim for underinsured motorist benefits from the petitioner (*see Matter of Liberty Mut. Ins. Co. v. Doherty*, 13 A.D.3d 629, 789 N.Y.S.2d 55).

[2] Moreover, the petitioner's failure to respond to a letter notifying it of an offer to settle for the policy limits of the owner of the offending vehicle and affording it the opportunity to consent to or reject such offer may be deemed an acquiescence to the offer to settle (*see Matter of State Farm Mut. Ins. Co. v. Del Pizzo*, 185 A.D.2d 352, 586 N.Y.S.2d 310). Thus, it was error to permanently stay arbitra-

tion based on the failure of the petitioner's insured to obtain the petitioner's consent to that offer to settle, as the petitioner, in effect, acquiesced to it (*see \*\*95Matter of State Farm Mut. Ins. Co. v. Del Pizzo*, 185 A.D.2d 352, 586 N.Y.S.2d 310).

Based on the foregoing, it is unnecessary to reach the \*580 petitioner's remaining contentions.

N.Y.A.D. 2 Dept., 2008.  
Hertz Claim Management Corp. v. Kulakowich  
53 A.D.3d 578, 862 N.Y.S.2d 93, 2008 N.Y. Slip Op. 06296

END OF DOCUMENT