

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - September 28, 2007

REINALDO E. RIVERA, J.P.
JOSEPH COVELLO
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2006-10947

DECISION & ORDER

In the Matter of State Farm Insurance Company,
petitioner-respondent, v Jeanne Colangelo, et al.,
respondents-respondents; National Continental
Insurance Company, proposed additional
respondent-appellant, et al., proposed additional
respondents.

(Index No. 17143/04)

Marshall, Conway, Wright & Bradley, P.C., New York, N.Y. (Christopher T. Bradley
of counsel), for proposed additional respondent-appellant.

Wilson, Bave, Conboy, Cozza & Couzens, P.C., White Plains, N.Y. (Robert Gironda
of counsel), for petitioner-respondent.

Curtiss N. Buell, P.C., Port Chester, N.Y., for respondents-respondents.

In a proceeding pursuant to CPLR article 75 to permanently stay arbitration of an
uninsured motorist claim, National Continental Insurance Company appeals from an order of the
Supreme Court, Westchester County (Carey, J.H.O.), entered October 16, 2006, which denied its
motion, inter alia, pursuant to CPLR 5015(a)(2) to vacate a judgment of the same court entered
October 12, 2005, granting the petition and permanently staying the arbitration, based on newly-
discovered evidence.

ORDERED that the order is affirmed, with costs.

October 16, 2007

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MATTER OF STATE FARM INSURANCE COMPANY v COLANGELO

To succeed on a motion to vacate a judgment on the ground of newly-discovered evidence, the movant must establish, among other things, that the evidence could not have been discovered earlier through the exercise of due diligence (see CPLR 5015[a][2]; *Roslyn Sav. Bank v Kline*, 17 AD3d 441; *Kleet Lbr. Co., Inc. v Saw Horse Remodelers, Inc.*, 13 AD3d 414, 415; *Feldstein v Rounick*, 295 AD2d 398, 399-400; *Zaccaria v Russell*, 288 AD2d 468; *Contractors Cas. & Sur. Co. v 535 Broadhollow Realty*, 276 AD2d 738; *Exclusive Envelope Corp. v Tal-Spons Corp.*, 187 AD2d 555, 555-556). Here, the appellant failed to establish that the evidence that it relied on could not have been timely discovered through the exercise of due diligence. Accordingly, the Supreme Court properly denied that branch of the appellant's motion which was pursuant to CPLR 5015(a)(2) to vacate the judgment entered October 12, 2005.

The appellant's remaining contentions either are without merit, are barred by the law of the case doctrine (see *Stone v Stone*, 39 AD3d 534, 535; *Matter of Suzuki-Peters v Peters*, 37 AD3d 726; *Matter of Shondel J. v Mark D.*, 18 AD3d 551; *Jacobs v Macy's E., Inc.*, 17 AD3d 318, 320; *Palumbo v Palumbo*, 10 AD3d 680, 682), or need not be reached in light of our determination.

RIVERA, J.P., COVELLO, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court