

M E M O R A N D U M

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - IAS PART 16

In the Matter of the Application of
REALM NATIONAL INSURANCE CO.,

Petitioner,

for a Judgment pursuant to Article 78
of the CPLR against The State on New
York Workers' Compensation Board,

Respondent.

BY: KELLY, J

DATED: March 11, 2004

INDEX

NUMBER: 18436/2003

MOTION

DATE: October 21, 2003

This special proceeding has its origin in a construction site accident that occurred on October 24, 2001 in New York County. In the accident, a number of workers were killed while others were injured. Certain employees in the accident filed claims for workers' compensation benefits and were later adjudicated by the respondent Workers' Compensation Board ("Board") to be employees of New Millennium Construction & Restoration Corp. ("New Millennium").

The petitioner, Realm National Insurance Company ("Realm"), issued a workers' compensation insurance policy to New Millennium that was intended to be effective from August 31, 2001 through August 31, 2002 to cover New Millennium's renovation activities at the location of the aforementioned accident.

A mere nine days after Realm received the first notices requiring their attendance at initial proceedings before the Board concerning claims filed by the workers involved in the accident, Realm commenced a declaratory judgment action against New Millennium in Supreme Court,

Queens County, seeking to declare the workers' compensation policy in question void. Specifically, Realm asserted that New Millennium had obtained the policy by fraudulently misrepresenting in its application that New Millennium would be performing exclusively interior renovation work, when in fact a portion of the construction involved exterior demolition/masonry work. In a decision dated February 20, 2002, Justice Frederick D. Schmidt granted Realm's motion for a default judgment based upon New Millennium's failure to appear in the action and directed "[the clerk] to enter judgment accordingly." In a judgment dated February 26, 2002, the policy of insurance issued by Realm to New Millennium was adjudged "void ab initio pursuant to New York Insurance Law Section 3105(b)."

A hearing was held before Workers' Compensation Board Judge Madeline Pantzer on April 2, 2002, during which the issues of employment status and insurance coverage common to a number of the claimants were addressed. Realm attended the hearing and asserted that, based upon the default judgment it obtained during the pendency of the workers' compensation proceedings, the Board was without authority to rule on the issue of coverage.

In decisions filed on December 12, 2002, Judge Pantzer, with respect to the issue of coverage, rejected Realm's arguments and determined that the "declaratory judgment action brought to void the workers' compensation policy after claims [had] arisen was not properly before the Supreme Court." Moreover, the Judge found "Realm was incorrect on its choice of forum . . . and that [t]he correct forum [was] the WCB [Workers' Compensation Board]". Judge Pantzer reasoned

that the common law remedy to void a policy ab initio "did not survive the adoption of the Workers' Compensation Law" and that Realm was relegated to seeking cancellation pursuant to WCL §54. Ultimately, the court held that Realm failed to properly cancel the policy prior to the accident and was, therefore, the entity responsible for paying compensation benefits to the employees involved in the accident.

Realm appealed Judge Pantzer's decisions to the Board which filed its initial decisions on July 21, 2003. While finding Judge Pantzer "was incorrect as a matter of law in finding that [WCL] §54(5) abrogated the Supreme Court's ability to find that, as a matter of contract, the policy was void ab initio", the Board Panel nonetheless affirmed the Judge's ultimate determination that Realm was responsible to reimburse the State Insurance Fund. The Board Panel reasoned that since the Uninsured Employers Fund and the claimants were not parties to the declaratory judgment action, the Supreme Court's judgment did not have "collateral estoppel or res judicata effect upon the Workers' Compensation Board's authority to determine the question of whether the workers' compensation policy in question was in effect, and if in effect, had been cancelled per WCL §54(5) before the date of the accident".

On October 2, 2003, the Board Panel issued amended decisions that modified a portion of the reasoning underpinning their earlier findings. On the topic of whether the Supreme Court possessed the authority to void the policy, after a lengthy analysis the Board concluded that while it could not "speak to the jurisdictional reach of the Supreme Court in a procedural sense, . . . the doctrine of void ab initio, or retroactive

cancellation, is incompatible with WCL §45(5), and may not be used by a carrier as a basis for circumventing the Workers' Compensation statutory scheme." The Board adhered to its prior decision holding the Supreme Court's judgment did not have collateral estoppel or res judicata effect on the Board.

Petitioner, pursuant to Article 78 of the CPLR, now seeks a writ of prohibition to, inter alia, prevent the Board from enforcing the above decisions. The respondents have separately moved, pursuant to CPLR §§3211(a)(7) and 7804(f) to dismiss this special proceeding.

Before this application may be considered on its merits, the petitioner must establish the extraordinary remedy of prohibition codified under CPLR §7803[2] may be invoked in the present circumstances (See, La Rocca v Lane, 37 NY2d 575). It is well established that "[u]se of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings" (Rush v Mordue, 68 NY2d 348, 353).

The two initial inquiries that must be satisfied are whether the body or officer in question was acting in a judicial or quasi-judicial capacity and whether the error sought to be corrected was jurisdictional in nature (See, Town of Huntington v New York State Div. of Human Rights, 82 NY2d 783, 786; Donald P. v Palmieri, 246 AD2d 597). So strict is the latter inquiry, that if an act taken does not constitute a jurisdictional excess, it may not be addressed by a writ of prohibition no matter how "egregious the error may be, and however cleverly the error may be characterized by counsel as an excess of jurisdiction or

power" (Rush v Mordue, supra at 353). The petitioner must also demonstrate a clear legal right to the relief requested (Holtzman v Goldman, 71 NY2d 564, 569).

Even if these preliminary factors are satisfied and prohibition is "technically appropriate", the court must consider three additional factors and determine whether, in its discretion, issuance of a writ is merited (See, Town of Huntington v New York State Div. of Human Rights, supra). Specifically, the court must weigh "the gravity of the harm caused by the act sought to be performed by the official; whether the harm can be adequately corrected on appeal or by recourse to ordinary proceedings at law or in equity; and whether prohibition would furnish "a more complete and efficacious remedy . . . even though other methods of redress are technically available" (Rush v Mordue, supra at 354, quoting Matter of Dondi v Jones, 40 NY2d 8, 14).

Neither party disputes that the Board was acting in a judicial capacity when it rendered its decisions. The parties diverge significantly, however, over whether the Board acted in excess of its statutorily accorded jurisdiction by refusing to give effect to the declaratory judgment Realm obtained from the Supreme Court.

Realm insists that once the Supreme Court rendered its judgment, the policy, along with the Board's jurisdiction to render any findings affecting Realm vanished from existence. Therefore, it states the issue to be addressed is the Board's lack of jurisdiction to render any decision affecting Realm in the face of such judgment. In the court's view, Realm fatally mischaracterizes the question to be attended. The proper question to be analyzed in assessing the Board's jurisdictional

power in the context of these decisions is whether the Board's statutory powers are sufficiently comprehensive to enable it to determine the application of the principles of collateral estoppel or res judicata.

Realm's argument rests on the proposition that the Board must blindly apply the judgment from the Supreme Court without consideration of the principles of collateral estoppel or res judicata as it had no jurisdiction to do otherwise. However, such a theory conveniently ignores the equally valid proposition that if the Supreme Court judgment either was defective or was not binding on the other claimants appearing before the Board then the Supreme Court's decision that the policy was void based upon fraud would not have preclusive effect. Voiding an insurance policy by obtaining a default declaratory judgment without giving notice to any of the prospective claimants thereunder may be an efficient and convenient method to dispose of potential liability. But the court does not find such a legal strategy can be reconciled with the legislative purpose and goal of the Worker's Compensation Law or the entity statutorily created to determine the scope of said law. This is especially true when Realm asserts such a judgment would be immune from attack in the forum statutorily proscribed to resolve claims of injured workers.

As a general matter, the Board is expressly empowered to make "rulings of law" when determining claims for compensation (WCL §142). The doctrine of collateral estoppel is an equitable defense "grounded in the facts and realities of a particular litigation, rather than rigid rules" (Buechel v Bain, 97 NY2d 295, 303). The Court of Appeals has expressly ruled that "[t]he jurisdiction to hear and determine equitable

defenses is incidental to the general jurisdiction of the Board to enforce policies [of insurance] under the Workman's Compensation Law" (Royal Indemnity Company v Heller, 256 NY 322, 326). Accordingly, the court finds the Board did not exceed its jurisdiction when it declined to apply the Supreme Court's judgment (See, Town of Huntington v New York State Division of Human Rights, 82 NY2d 783).

Even assuming the court were to find the Board exceeded its jurisdiction, it would not be inclined to determine whether a writ of prohibition is warranted as the alleged hardship upon Realm can be adequately addressed on appeal (See generally, Molea v Marasco, 64 NY2d 718). In the present case, an appeal from a determination of the Board to the Appellate Division, Third Department is not only available, but mandated (See, WCL §23). Contrary to Realm's assertion, it can be accorded complete relief on appeal. Realm's concern that it may be forced to pay the claims as directed by the Board during the pendency of the appeal process can be addressed by an application to the Appellate Division for a stay. While an appeal may, in Realm's opinion, be a less effective route than this special proceeding, this is an insufficient basis to justify entertaining Realm's claims (See, Graham v Miles, 89 AD2d 817).

Accordingly, Realm's application for a writ of prohibition is denied and the motions of the respondent and non-parties to dismiss the petition is granted.

Settle Judgment.

Peter J. Kelly, J.S.C.