

**Zeng Xi Chen v Spitz**

2009 NY Slip Op 32265(U)

October 5, 2009

Supreme Court, New York County

Docket Number: 102148/2006

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
Justice

PART 22

ZENG XI CHEN,

-against-

JEFFREY SPITZ and BERNARD SPITZ  
Defendants.

Plaintiff,

Defendants.

**FILED**  
OCT 02 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

INDEX NO. 102148/2006

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2, were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

1

2

Cross-Motion:  Yes  No

On November 15, 2005, a collision occurred between Zeng Xi Chen (Chen), a bicyclist, and a motor vehicle owned by Jeffrey Spitz and driven by Bernard Spitz. The collision occurred on Avenue C in Brooklyn. It was raining and dark at the time of the accident. The Spitz vehicle, which was eastbound, was making a left turn from Avenue C onto Ocean Parkway. Chen was traveling westbound on Avenue C, with a light on his bicycle. The collision occurred while Chen was making a food delivery for a non-party entity identified as "Lu Gang d/b/a 403 Restaurant" (Lu Gang). The action was commenced on or about February 14, 2006 (the underlying action). The note of issue was filed on September 11, 2008. Pursuant to a stipulation dated August 17, 2007, the underlying action under Index No. 102148/06 was discontinued against the named defendants, Jeffrey Spitz and Bernard Spitz. The signatories to the stipulation were Chen and the Spitzes. Chen now moves, by an order to show cause under motion

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sequence number 004, for an order (1) "granting nunc pro tunc approval, pursuant to Workers' Compensation Law § 29 (5), to the settlement of this case upon the terms set forth in the annexed affirmation" (the August 11, 2008 Affirmation attached to Chen's August 13, 2008 Order to Show Cause); and (2) such other and further relief as the court may deem just and proper.

### Procedural History

It is stated by Chen's counsel Cesar & Napoli (C&N) in its December 7, 2007 affirmation under motion sequence number 001<sup>1</sup> that:

"[o]n June 18, 2007, the parties appeared for a court sponsored mediation conference before Michael Tempesta, Esq. After a detailed discussion of the matter, Mr. Tempesta recommended a settlement of \$22,500.00. ...

As the parties continued to prepare the case for a September trial date, the matter was settled for \$25,500.00, an amount which exceeded the mediator's recommendation by \$3,000.00. A stipulation of discontinuance was accordingly filed in September as well.

It is noted that the plaintiff's [alleged] employer (not a party to this [underlying] action), in violation of the law, failed to procure workers [sic] compensation insurance for its employee. Thus, plaintiff's workers [sic] compensation claim was ultimately submitted to the Uninsured Compensation Fund. As the court is undoubtedly aware, when a motor vehicle accident occurs during the course of employment, the first \$50,000.00 of basic economic loss benefits are paid by workers' compensation in lieu of no-fault. Plaintiff cannot recover damages in his lawsuit for basic economic loss unless and until his damages exceed \$50,000.00. Thus, plaintiff's \$23,500.00 settlement herein was solely for

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<sup>1</sup>Under motion sequence number 001, Chen, through his counsel C&N, had moved by order to show cause for relief in the form of (1) restoring the matter to active status solely to permit the within motion to be decided; (2) deeming plaintiff's employer to have consented to settlement of the within action (the underlying action) nunc pro tunc for the sum of \$25,500.00 pursuant to Workers' Compensation Law § 29 (5); and (3) awarding motion costs of \$100.00 and sanctions of \$2,500.00 to be paid by plaintiff's employer pursuant to CPLR 8301 and CPLR 8303-a, premised upon the frivolous conduct of plaintiff's employer in unreasonably withholding consent.

pain and suffering and cannot be the subject of a workers [sic] compensation lien.

Notwithstanding the fact that the employer never provided compensation coverage for the plaintiff, on June 14, 2007, [Victor T. Tsai (Tsai)] counsel for the [alleged] employer [Lu Gang] wrote to the office of your affirmant [Chen's counsel, C&N], insisting that the matter could not be settled without its [Lu Gang d/b/a 403 Restaurant's] written consent. A copy of said correspondence is annexed hereto as Exhibit "E".<sup>2</sup> However, when your affirmant attempted to contact Mr. Tsai to discuss his letter and to obtain his consent to the settlement, Mr. Tsai stated that despite the content of his letter, the consent should not be obtained from him but rather from the Workers' Compensation Board or an unspecified individual in the State Insurance Fund. Your affirmant and the plaintiff, accordingly were ultimately compelled to consummate the settlement without Mr. Tsai's consent, informing Mr. Tsai with respect to the same via certified mail on September 20, 2007. A copy of said correspondence is annexed hereto as Exhibit "F".<sup>3</sup>

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<sup>2</sup>The June 14, 2007 letter from Tsai to C&N, plaintiff's counsel, and John C. Buratti & Associates, defendants' counsel in the underlying action, provides:

A review of the New York County docket reveals that a PI case has been commenced by Mr. Chen and that a note of issue has been filed on this matter.

Pending the Workers' Comp hearing and decision, notice is hereby given that 403 Restaurant will assert and claim a continuing lien against any recovery for injuries or damages arising out of the accident. Any settlement, compromise or discontinuance of the liability action must be done with the written consent of 403 Restaurant. Should the liability action be settled compromised or discontinued without consent of 403 Restaurant, it will be assert [sic] 403 Restaurant has been prejudiced and any claim to further Workers' Compensation benefits will be controverted. 403 Restaurant will claim a credit and offset for the net amount of the settlement, agreement or compromise payable to the plaintiff against any present or future claim for Workers' Compensation benefits or lost wages or medical benefits arising out of this accident pursuant to the matter of *Robinette v Arnold Meyer Sign Company*, 43 AD2d 458 (1974).

<sup>3</sup>This letter from C&N to Tsai provided:

As discussed over the telephone, in June of this year you corresponded with us to advise us that you represented our client's employer and that your written consent to any settlement of the above matter was required.

In August of this year, we accordingly sought your consent to settle the

Thereafter, the attorney representing the plaintiff with respect to his uninsured compensation claim [Kelman Winston & Vallone (KW&V)] contacted your affirmant to request that your affirmant secure consent to the settlement from the Uninsured Employers [sic] Fund. The discussion only took a few minutes and the Fund's written consent was promptly furnished, as per Exhibit G.<sup>4</sup>

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action for the sum of \$25,500.00. This was a mere formality, insofar as our client was injured in a motor vehicle accident and the first \$50,000.00 of any workers' compensation benefits received by our client would be in lieu of no-fault and thus could not give rise to a lien. Furthermore, in this particular matter, it is our understanding that our client has yet to receive any compensation benefits.

In any event the proposed settlement was in the best interest of all concerned. Our client was a bicyclist and the defendant argued that he was comparatively negligent for riding a bicycle on the wrong side of the road when it was dark and raining. The injury at issue is primarily a fractured wrist. The liability coverage available to defendants is limited to \$50,000.00. Finally the settlement is \$3,000.00 above the figure recommended by the Court designator after extensive conferencing.

Your response to us was to refer us to unspecified future proceedings and unidentified individuals at the State Insurance Fund or the Workers [sic] Compensation Board and to advise us that you would have to contact us in the future.

Under the circumstances, we concluded that your consent was unreasonably withheld and proceeded to consummate the settlement. More recently, we contacted you in one final attempt to obtain your written consent prior to disbursing the settlement funds from our escrow account. As discussed, when we did not hear from you by close of business on September 9, 2007, we proceeded to issue payment of the net proceeds to our client the next day in accordance with his request. A copy of our closing statement is enclosed for your records.

<sup>4</sup>This document from the Workers' Compensation Board Uninsured Employers' Fund to C&N, dated October 3, 2007, provides:

"Subject; Third-Party Settlement, Re: Zeng-Xi Chen, Employer: Lu Gang D/B/A 403 Restaurant, WCB Case #: 00549921; The Uninsured Employers' Fund consents to settlement of the third-party action for \$25,500.00. This consent is conditioned upon our receipt of a copy of the judicial closing statement from you. The Uninsured Employers' Fund does not have a lien at the present time against the claimant's third-party recovery (WCL Sec. 29 [1-a]). The Uninsured Employers' Fund reserved its right to credit the full extent of claimant's net

Subsequently, your affirmant was advised by plaintiff's counsel in the workers compensation proceedings that notwithstanding the consent of the Uninsured Employers [sic] Fund, the Workers [sic] Compensation Board now required an application to be made in the Supreme Court for an order deeming the employer to have consented to the settlement nunc pro tunc, as per the decision dated October 29, 2007 (filed November 2, 2007), a copy of which is annexed hereto as Exhibit "H".<sup>5</sup> (This decision was obtained by your affirmant on or about November 19, 2007.)

One last time your affirmant attempted to communicate with Mr. Tsai. However, his office would not even divulge his facsimile number and your affirmant merely mailed the intended transmittal on November 26, 2007, as per Exhibit "I"<sup>6</sup> hereto.

Subsequent to the aforesaid statement in C&N's December 7, 2007 affirmation and pursuant to an order by Justice Deborah Kaplan under motion sequence number 001, dated February 8, 2008, the very limited and specific issues of "whether Lu Gang d/b/a 403 Restaurant was [Chen's] employer at the time of the accident (underlying this

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recovery: provided that this credit shall only apply against any and all further claims herein which fall outside the scope of 'first party benefits'. See *Fellner v [Country Wide] Insurance*, 95 AD2d 106."

<sup>5</sup>This document from the State of New York Workers' Compensation Board provides:

"In regard to Zeng-Xi Chen, WCB Case #0054 9921, Notice of Decision No Insurance Case; At the Workers' Compensation hearing held on 10/29/2007 involving the claim of Zeng-Xi Chen at the Manhattan hearing location, Judge Joani Sedaca made the following decision, findings and directions: DECISION: Uninsured Employers sic Fund consented to the [third-party] settlement. Alleged employer has not given consent to [third-party] settlement upon information and belief. Claimant is to reopen with nunc pro tunc order. No further action is planned by the Board at this time.

<sup>6</sup>This document from C&N to Tsai provided:

"Consent to settlement from Uninsured Employers' Fund herewith. However, the WCB has requested your consent on behalf of the employer as well. If you continue to unreasonably withhold it, we shall have no alternative but to serve a motion in the Supreme Court for an order deeming the settlement to be fair and sanctioning you for your obstructive conduct."

action) and, if so, whether the employer shall be deemed to have consented to the settlement of this action," were referred to a Special Referee to hear and report with recommendations. Justice Kaplan further ordered that motion sequence number 001 was "held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee."

On March 20, 2008, a letter was sent to KW&V from C&N requesting that law firm's presence at the Special Referee's hearing to be held pursuant to Judge Kaplan's February 28, 2008 order. That letter provided in pertinent part:

As you should be aware, we represent the plaintiff in the above captioned action, which was previously settled for \$25,000.00.

Victor Tsai, Esq., counsel for Lu Gang, the person or entity we understood to be our client's employer at the 403 Restaurant, declined to consent to the settlement. Thereafter, at the urging of Kelman Winston & Vallone, Esqs. (Our client's workers [sic] compensation counsel), we served a motion in our action to deem the employer to have consented to the settlement nunc pro tunc. Mr. Tsai opposed our motion, arguing that he cannot be required to consent to the settlement until it has been determined that his client is indeed the employer. At oral argument, we urged Mr. Tsai to merely consent to the reasonableness of the settlement without admitting that his client was the employer. However, he declined to do so.

Justice Deborah Kaplan proceeded to issue an order referring the matter to a [S]pecial [R]eferee to conduct a hearing as to both the identity of plaintiff's employer and whether the employer should be deemed to have consented to the settlement. While we are fully prepared to address the latter issue, the former appears to be outside the scope of our retainer and representation. We have no information as to the identity of our client's employer, other than what he told us.

In view of the foregoing, we believe it is incumbent upon you to appear at the hearing in an effort to establish the identity of the employer, an issue we believe should have been reserved for the Workers' Compensation Board.

[\* 7 ]

The hearing is presently scheduled to take place on April 15, 2008. In connection therewith, the parties have been directed to appear before Justice Silbermann.

In a letter dated April 1, 2008 from Victoria Plotsky, an attorney with the New York State Workers' Compensation Board (WCB) Uninsured Employers' Fund (UEF) Legal Hearings Unit, to the Hon. Jacqueline Silbermann, Administrative Judge for the New York County Supreme Court, Civil Branch, the WCB UEF stated:

Please accept this letter stating the position of the Uninsured Employers' Fund of New York State Workers' Compensation Board in the matter of *Chen v Spitz*.

The Workers' Compensation Law does not require the consent of an uninsured alleged employer to a claimant's settlement of a [third-party] action. Pursuant to Workers' Compensation §§ 29 (5) and 26-a (7), the consent of the Uninsured Employer's fund is all that is required. Please also see Matter of Fast Operating Corp., 2008 NY Wrk. Comp. 403146, 2006 NY Wrk. Comp. Lexis 1381 (February 20, 2008) (copy enclosed). UEF's consent to the third party action was already granted. Because the Workers' Compensation Law Judge directed the claimant to produce a nunc pro tunc order granting consent to the settlement of the third party action, the UEF requests that such order be issued so that the claimant may proceed with litigation before the Board.

Additionally, I request that any issues of employer-employee relationship and the identity of the alleged employer be referred for a hearing at the Workers' Compensation Board. The Board is the correct forum for litigation of such issues. I respectfully refer the Court to *Catapane v Half Hollow Hills Central School District*, 45 AD3d 517, 846 N.Y.S. 225 (3d Dept 2007), "[P]rimary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board and ... it is therefore inappropriate for the courts to express views with respect thereto pending determination by the Board" [additional citations omitted].

An attorney for the UEF will not be available to attend the hearing before you ... as their schedules are dedicated to workers' compensation hearings.

Under motion sequence number 002, on April 16, 2008, Special Referee Marilyn

Dershowitz issued an order which noted that the issues before her were those of (1) whether Lu Gang was the plaintiff's employer at the time of the accident involved in the underlying action; and (2) if so, whether the employer should be deemed to have consented to the settlement of the underlying action. She further noted the appearances of Chen with his counsel and an interpreter, plus Lu Gang and his counsel. It was noted that Lu Gang's appearance was not as a result of a subpoena. Though counsel for both Chen and Lu Gang presented similar positions that the issues before the Special Referee should be heard by the Workers' Compensation Board, they nonetheless agreed to be heard under protest, pursuant to the court's February 28, 2008 order. Lu Gang's counsel reiterated that Lu Gang was a non-party, had come in voluntarily, and that the court did not have jurisdiction over him.

Documentation was presented at the hearing by Chen to indicate how he came to be doing a delivery for Lu Gang on the date of the accident. Chen testified as to the alleged reasons Lu Gang was not immediately notified of the accident. Chen stated that he had seen Lu Gang "at the Workmen's Compensation Board." After Chen had been questioned, but before Lu Gang could be questioned, Lu Gang left the hearing room without returning.

The Special Referee found the testimony of Chen to be credible and that she reasonably believed Chen was hired by Lu Gang's restaurant, just as Chen had also been previously hired by multiple other restaurants to make deliveries using his bicycle. However, she did not find credible Chen's claim that he notified Lu Gang about the accident. She also found that it would be inappropriate to deem that Chen's employer consented to the settlement of the underlying action. She recommended that, upon

motion, her report be confirmed pursuant to CPLR 4403, that Chen be construed to have been an employee of Lu Gang's restaurant at the time of the incident, but that it not be deemed that Lu Gang consented to the settlement of the underlying action.

On or about May 9, 2008, under motion sequence number 003, Chen's counsel submitted a motion for an order, pursuant to CPLR 4403, (1) confirming in part and rejecting in part the Special Referee's report; and (2) deeming the "putative employer of the plaintiff" to have consented to the settlement of the above action for the sum of \$25,500.00 nunc pro tunc. Lu Gang's counsel, filed opposition papers<sup>7</sup> seeking to deny Chen's motion in its entirety.

#### **The August 11, 2008 Affirmation**

C&N, in essence presents arguments, points of law and facts similar to those it previously included in the earlier December 12, 2007 Order to Show Cause under motion sequence number 001. Motion sequence number 001, which has been held in abeyance, was partially resolved by Judge Kaplan through the reference of certain issues to the Special Referee.

In C&N's affirmation under motion sequence number 004, Dana Northcraft, Esq., requests the court to still issue an order, nunc pro tunc, on Chen's behalf (1) granting consent to the settlement of the third-party action; (2) approving and confirming the settlement of this underlying action upon the terms set forth infra; and (3) re-commencing the hearings regarding plaintiff's benefits.

The request for a nunc pro tunc ruling ensues under motion sequence number 004, even though the UEF gave written consent to the settlement of the underlying

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<sup>7</sup>Tsai argued that the CPLR 4403 motion was untimely as it was not submitted within 15 days of the Special Referee's decision.

action in lieu of Chen's employer, Lu Gang. Lu Gang, through his attorney Victor T. Tsai (Tsai), has continued to oppose Chen's receipt of a consent to the settlement in the underlying action. The April 1, 2008 WCB UEF communication indicated that the WCB judge had directed Chen to provide the WCB UEF with a judicial ruling pronouncing consent to the underlying settlement. Regardless of Lu Gang's refusal to provide said consent, C&N argues that Chen's motion under sequence number 004 should now be granted as Lu Gang's consent to the settlement of the case is no longer needed.

Subsequent to C&N's filing of motion sequence number 003, which was done pursuant to Special Referee Dershowitz's recommendations under motion sequence number 002, on July 2, 2008, C&N spoke with the UEF which resulted in the withdrawal of motion sequence number 003 after the July 2, 2008 communication. Pursuant to an order by Justice Paul Wooten, dated September 11, 2008, the court permitted Chen to withdraw his CPLR 4403 motion. A further communication between C&N and the UEF on August 8, 2008 resulted in the filing of the instant motion on August 13, 2008, after that communication. During the August 8, 2008 communication, C&N informed the UEF that Special Referee Dershowitz had determined that an employer-employee relationship existed between Chen and Lu Gang, an issue the UEF itself had expected to resolve pursuant to its April 1, 2008 letter. As a result of being made aware of the Special Referee's determination and its subsequent review of the Special Referee's decision, the UEF informed C&N that the employer's consent was not required for the court to issue a nunc pro tunc order approving the settlement in the underlying action; the consent of the UEF had been given. An August 8, 2008 affirmation from Victoria

Plotsky was forwarded to C&N. Expanding upon her earlier April 1, 2008 letter to Justice Silberman, Ms. Plotsky stated, in pertinent part:

I spoke with Dana M. Northcraft, Esq. of the law office of Cesar & Napoli ... on July 2, 2008 and August 8, 2008. On August 8, 2008, Ms. Northcraft informed me that there had been judicial confirmation of the employer-employee relationship between Mr. Chen and Lu Gang d/b/a 403 Restaurant as decided in the referee's report of Marilyn Dershowitz. (Fn 1 [My letter dated April 1, 2008 was written under the assumption that the matter would be referred to the Workers [sic] Compensation Board for determination of these issues]). I have reviewed the referee's report stating so.

Now that an employer-employee relationship has been established, consent from Mr. Chen's employer is not needed for litigation to proceed with the Workers' Compensation Board. Since the Uninsured Employers' Fund has granted consent to the third-party action, separate consent from the employer is not required. See Matter of Fast Operating Corp., 2008 NY Wrk Comp 403146, 2008 Wrk Comp Lexis 1381 (February 20, 2008).

I respectfully request that the court grant Mr. Chen's petition for a nunc pro tunc Order granting settlement of this third-party action [s]o Mr. Chen may proceed with the litigation before the Board.

#### Lu Gang's Opposition

Tsai argues on behalf of Lu Gang that Chen cannot be granted the relief he seeks pursuant to Workers' Compensation Law § 29 (5), that being a nunc pro tunc approval of the settlement in the underlying action, as (1) the mandates for judicial relief under section 29 (5) have not been fulfilled; and (2) the relief he seeks under that statute is time-barred. More specifically, Tsai argues that a petition for judicial approval of a settlement must be made within three months after the settlement and asserts that more than a year has passed (*see Matter of Gilson v National Union Fire Ins. Co.*, 246 AD2d 897, 897 [3d Dept 1998] [nunc pro tunc after three months denied where no reasonable excuse offered and carrier was prejudiced]; *see also Matter of Taylor v Continental Ins. Co.*, 9 AD3d 657, 659 [3d Dept 2004] [nine-year delay in requesting

nunc pro tunc relief excessive even with a reasonable excuse and absence of prejudice], and Chen omitted the settlement terms (*Matter of Snyder v CNA Ins. Cos.*, 306 AD2d 677, 678-679 [3d Dept 2003]).

### Discussion

Regarding motion sequence number 001, Chen sought an order (1) restoring the matter to active status solely to permit the within motion to be decided; (2) deeming plaintiff's employer to have consented to settlement of the within action nunc pro tunc for the sum of \$25,500.00 pursuant to Workers' Compensation Law § 29; (3) awarding motion costs of \$100.00 and sanctions of \$2,500.00 to be paid by plaintiff's employer pursuant to CPLR 8301 (b) and 8303-a premised upon the frivolous conduct of plaintiff's employer in unreasonably withholding consent to the settlement. As the action was restored to an active status, the relief sought under item one is rendered moot. Motion sequence number 001 was held in abeyance pending, inter alia, "receipt of the determination of the Special Referee" which was so provided pursuant to motion sequence number 002.

Motion sequence number 003, which was a CPLR 4403 motion responsive to motion sequences 001 and 002, was withdrawn and, in its stead, motion sequence number 004 was submitted, which, in essence, seeks relief similar to that originally sought under item number two of motion sequence number 001. For purposes of deciding motion sequence number 001, that motion sequence is consolidated with and resolved pursuant to the decision and order of this court under motion sequence number 004.

The UEF letter affirmation from Victoria Plotsky, dated August 8, 2008, adopts

the conclusions reached by Special Referee Dershowitz under motion sequence number 002. This letter rendered moot the prior UEF requirement for Chen to acquire "receipt of a copy of the judicial closing statement" pursuant to the October 30, 2007 letter (*see* August 13, 2008 Order to Show Cause, Exhibit H) and the April 1, 2008 letter from the WCB UEF.

In paragraph 17 of the August 11, 2008 C&N affirmation, it is stated that motion sequence number 003 was withdrawn "in lieu of wasting court time and resources regarding a moot request" following C&N's July 2, 2008 conference with the UEF wherein it became aware that a consent from Lu Gang had become "unnecessary."

Ordinarily, Workers' Compensation Law § 29 (5) permits an employee to settle a third-party action arising out of the same accident as a workers' compensation claim as long as prior written consent is obtained or judicial approval of the settlement is sought within three months after the case has been settled (*see Matter of Lautenshuetz v AP Greene Indus., Inc.*, 48 AD3d 948, 949 [3d Dept 2008]). Judicial approval is "an alternative method to the requirement for written consent by the carrier' which preserves the right to future compensation benefits" (*Matter of Bernthon v Utica Mut. Ins. Co.*, 279 AD2d 728, 730 [3d Dept 2001] [citations omitted]). However, a "judicial order may be obtained nunc pro tunc approving a previously agreed-upon settlement, even in cases where the approval is sought more than three months after the date of the settlement, provided that the petitioner can establish that (1) the amount of the settlement is reasonable, (2) the delay in applying for a judicial order of approval was not caused by the petitioner's fault or neglect, and (3) the carrier was not prejudiced by the delay" (*see DeRosa v Petrylak*, 290 AD2d 596, 598 [3d Dept 2002] [citation

omitted).

The UEF may act as a workers' compensation carrier, where no insurance carrier exists (*see Matter of Ocasio v Sang Soo Kim*, 307 AD2d 662, 663 [3d Dept 2003]). Here, the facts indicate that Lu Gang, deemed to be Chen's employer by Special Referee Dershowitz, did not procure workers' compensation insurance for Chen. The UEF, as acting insurer, consented to the \$25,500.00 settlement in the underlying action, which, on its face, appears to be a reasonable amount. A review of the court record indicates a diligent effort on the part of C&N to procure either Lu Gang's consent to the third-party settlement or a nunc pro tunc ruling from the court, which it was seemingly unable to do until after the July 2, 2008 and August 8, 2008 communications with the UEF, and the receipt of the August 8, 2008 affirmation from the UEF. Quoting from the August 8, 2008 affirmation, "[n]ow that an employer-employee relationship has been established, consent from Mr. Chen's employer [Lu Gang] is not needed for litigation to proceed with the Workers' Compensation Board. Since the [UEF] has granted consent to the third-party action, separate consent from the employer is not required" (*see August 8, 2008 Plotsky Affirmation*, ¶ 3). The court perceives that the settlement is reasonable and that there is no prejudice to the carrier. In the absence of any prejudice to the insurance carrier, the granting of a nunc pro tunc order approving settlement of third-party claim is appropriate (*see Merrill v Moultrie*, 166 AD2d 392, 392 [1<sup>st</sup> Dept 1990]).

Accordingly, the Court concludes that, for these reasons and upon the foregoing papers, it is

ORDERED that the relief sought under item number two of motion sequence number 001 for a nunc pro tunc order is deferred to and determined pursuant to the decision and order

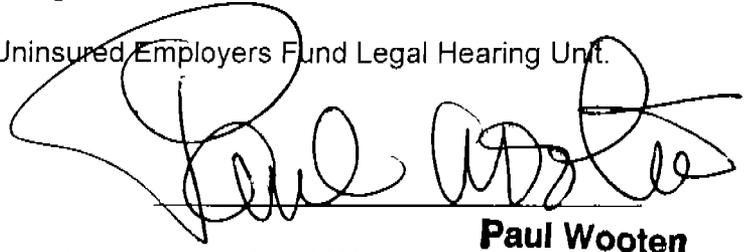
under motion sequence number 004; and it is further

ORDERED that the relief sought under item number three of motion sequence number 001 is denied; and it is further

ORDERED that that part of the motion by Zeng Xi Chen for an order, under motion sequence number 004, pursuant to Workers' Compensation Law § 29 (5), granting nunc pro tunc approval of the settlement in the underlying action, referenced by the August 17, 2007 Stipulation Discontinuing the Action, for the amount of \$25,500.00 as stated in the August 11, 2008 Affirmation annexed to the August 13, 2008 Order to Show Cause, is granted; and it is further

ORDERED that the relief sought in that section of the last paragraph in the annexed affirmation attached to the motion by Zeng Xi Chen for an order, under motion sequence number 004, directing the Uninsured Employees' Fund to recommence the hearings regarding plaintiff's benefits, if necessary, is deferred to the UEF pursuant to *Catapane v Half Hollow Hills Central School District* (45 AD3d 517, 518-519 [2d Dept 2007]); and it is further

ORDERED that Zeng Xi Chen shall serve a copy of this order, with notice of entry, upon Jeffrey Spitz, Bernard Spitz, Lu Gang d/b/a 403 Restaurant and the State of New York Workers' Compensation Board Uninsured Employers Fund Legal Hearing Unit.



Paul Wooten  
Paul Wooten J.S.C. J.S.G.

Dated: *Sept 25*, 2009

*SEP 25 2009*

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST

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