

**Selective Ins. Co. of Am. v New
York City Tr. Auth.**

2008 NY Slip Op 32553(U)

September 18, 2008

Supreme Court, New York County

Docket Number: 0603785/2005

Judge: Martin Shulman

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

PRESENT: HON. MARTIN SHULMAN

PART 1

Justice

Selective Ins. Co.

INDEX NO.

603785/05

- v -

MOTION DATE

MOTION SEQ. NO.

001

New York City Transit Authority

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-E
~~Cross-Motion~~
 Answering Affidavits — Exhibits 1-7
 Replying Affidavits + Exh. A-B
 Replying Affidavit + Exh. 1

PAPERS NUMBERED	
1	<u>1</u>
2, 3	<u>2, 3</u>
4	<u>4</u>
5	<u>5</u>

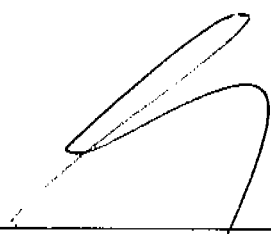
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross-motion are determined in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
 SEP 22 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: September 18, 2008



 Martin Shulman, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
SELECTIVE INSURANCE COMPANY OF AMERICA
as the insurer of DANTE CRUZ,

Plaintiff,

- against-

THE NEW YORK CITY TRANSIT AUTHORITY,
as the self-insured for workers' compensation claims,

Defendant

Index No.: 603785/05
FILED
SEP 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Martin Shulman, J.:

Plaintiff Selective Insurance Company of America ("Selective" or "plaintiff"), a no-fault insurer, seeks to recover approximately \$255,467 from defendant, the New York City Transit Authority ("NYCTA" or "defendant"), that Selective claims it paid out in no-fault automobile insurance payments and benefits to non-party Dante Cruz for injuries that Cruz suffered in an automobile accident in New Jersey.

Defendant NYCTA moves for an order, pursuant to CPLR 3211 (a) (2), dismissing the complaint for lack of subject matter jurisdiction. Selective cross-moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor, and for an inquest to determine damages. In the alternative, Selective seeks an order, pursuant to CPLR §3126, striking NYCTA's answer, or directing NYCTA to produce Cruz for an examination before trial.

In its complaint, Selective alleges that Cruz was employed by NYCTA on September 23, 2003 when the underlying automobile accident occurred and was

injured within the scope of his employment. Selective further alleges that because it issued an automobile liability insurance policy to Cruz, which included State of New Jersey mandated personal injury protection (no-fault) coverage, it was obligated to provide and pay no-fault benefits to him, and will continue to be so-obligated. Selective contends that because workers' compensation benefits are primary to no-fault benefits, NYCTA, as the self-insurer of its employees' workers' compensation benefits, is obligated to reimburse Selective for its payments to, and on behalf of, Cruz. Alternatively, Selective alleges that it and NYCTA are co-insurers of the same risk, thereby entitling Selective to reimbursement from NYCTA of one-half of its payments, and that NYCTA has been, and remains, unjustly enriched by Selective's no-fault payments to Cruz.

In its answer, NYCTA admits that as a public benefit corporation, it provides benefits to certain eligible injured persons as required pursuant to New York State Workers' Compensation Law and regulations. NYCTA also admits that Cruz filed for workers' compensation benefits, and was assigned a workers' compensation claim number. NYCTA denies the remaining allegations of the complaint, including Selective's allegation that Cruz was within the scope of his employment with NYCTA when he was injured operating his automobile. NYCTA asserts 10 affirmative defenses, including a jurisdictional defense based on the jurisdiction of the New York State Workers' Compensation Board (the "Board").

It is undisputed that Cruz submitted a claim to the Board. On or about February 20, 2004, Judge Nance Kaplan, the Administrative Law Judge presiding

over the claim, issued a Notice of Decision in which she states that the Board planned no further action on the claim because Cruz had not appeared to pursue it and the record did not contain prima facie medical evidence. Judge Kaplan also stated that upon submission of such evidence, "for example, a medical report giving a history, diagnosis and opinion as to causal relationship of the medical condition," the case "will be evaluated to determine further board action" (Ostrager Mov. Aff., Exh. D, at 1). Finally, Judge Kaplan noted that NYCTA had raised "all C-7 issues" (*id.*).¹

NYCTA's counsel avers that on May 25, 2004, the Board received prima facie medical evidence, but did not re-open the hearing. The basis for this assertion, however, is not apparent from NYCTA's submissions, or the record as a whole. There is also no indication that Selective was given notice of the hearing, and Selective submits here a letter, dated after the hearing, advising the Board that it is the no-fault carrier, and requesting Cruz's file.

NYCTA argues that Cruz has a case before the Board and that this action should be dismissed because the Board has exclusive jurisdiction over the subject matter of this dispute. NYCTA maintains that Selective filed this lawsuit against NYCTA as the workers' compensation insurer for Cruz, and that Selective's right to reimbursement is predicated on whether Cruz had the right, initially, to collect workers' compensation benefits. Furthermore, NYCTA argues

¹ Form C-7 is a notice form on which an employer controverts a claimant's right to compensation (*cf. Friedenjohn v Three Star Offset Printing*, 176 AD2d 379, 380 [3d Dept 1991]).

that Selective, as subrogee to Cruz, is bound by defenses that may be raised against him.

NYCTA contends that Selective is also provided a remedy through 11 NYCRR 65-3.19 (c),² but that there is no evidence that Selective took the steps enumerated therein to obtain an agreement to pursue workers' compensation benefits from its insured, or that any such agreement was forwarded to the Board, as set forth under this rule. NYCTA accuses Selective of choosing to sue NYCTA in order to circumvent adjudication of the workers' compensation claim by the Board, and seemingly implies that Selective is not entitled to reimbursement if it did not adhere to the requirements of 11 NYCRR 65-3.19 (c). NYCTA argues that, in any event, Selective's right to reimbursement arises only if workers' compensation benefits were paid to Cruz, in which instance, Selective could only recover from him, and not from NYCTA as the workers' compensation carrier.

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11 NYCRR 65-3.19 (c) (1) provides that:

"If any source of workers' compensation benefits, or disability benefits under article 9 of the Workers' Compensation Law, denies liability for payment of benefits, in whole or in part, the insurer responsible for the payment of first-party or additional first-party benefits shall pay benefits without deducting the withheld workers' compensation or disability benefits; provided, however, that the applicant executes a prescribed agreement to pursue workers' compensation or New York State disability benefits (NYS Form N-F 9), which shall obligate the applicant to diligently pursue the claim and to repay first-party benefits equal to the withheld amounts in the event such amounts are eventually paid to the applicant. The insurer is entitled to independent verification of the claim in accordance with this subpart."

In opposition to NYCTA's motion, Selective contends that this court has jurisdiction over this dispute, which Selective characterizes as a controversy between a no-fault insurer and a workers' compensation insurer that involves only a question of law as to whether an employee who is injured while in transit to or from a doctor that the employee is directed by his employer to visit, has incurred his or her injury in the course of employment. Selective argues that, for purposes of workers' compensation benefits, it has established, as a matter of law, that Cruz was injured during the course of his employment, and is entitled to summary judgment, and that the benefits and wages it paid to Cruz should have been paid by NYCTA, as workers' compensation is primary over no-fault insurance.

The threshold issue presented here is whether the Board has primary jurisdiction over the issue of whether Cruz's injuries occurred during the course of employment. The issue of the Board's jurisdiction over compensability was addressed by the Court of Appeals in *O'Rourke v Long* (41 NY2d 219, 228 [1976]), when it stated that "where the availability of work[ers'] compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions" (*id.*, at 228; *see also Mattaldi v Beth Israel Med. Ctr.*, 297 AD2d 234, 234-235 [1st Dept 2002] ["threshold question of whether plaintiff was in the course of her employment at the time of the attack is a matter that must in the first instance be determined by the . . . Board"]). More recently, the Legislature enacted Workers' Compensation Law ("WCL") § 142 (7), which specifically

requires the Board to hold an expedited hearing, upon notice to the no-fault carrier, on the issue of whether an accident occurred during the course of employment where, as here, such a dispute arises.

While Selective contends that this case is merely about an issue of law, and that the facts are established, the record does not support its contention. Specifically, Selective argues that Cruz's records reflect that "Cruz visited a doctor employed by [NYCTA] in connection with his disability leave and was subsequently injured in an automobile accident on September 22, 2003 . . . while he was on his way back to his New Jersey residence" (Kramer Mov. Aff., ¶ 4). Selective also maintains that NYCTA should be deemed to have admitted that Cruz was injured in the automobile incident, while on his way home from a NYCTA physician's office, because NYCTA's objection to Selective's Notice to Admit is improper. NYCTA counters that there exist, among others, questions as to whether Cruz was headed straight home.

Certainly Selective's general citation to an exhibit consisting of various medical records and other documents, some of which are illegible, supported by an attorney's conclusory assertion about what those records reflect does not establish factual issues as a matter of law.³ Selective is also not aided by its Notice to Admit with which it seeks, impermissibly, to establish what is both the

³ Selective, as the movant on its summary judgment cross-motion, bears the burden of submitting admissible evidence sufficient to eliminate material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Selective's submissions do not meet this burden, and thus, its summary judgment cross-motion must be denied "regardless of the sufficiency of the opposing papers" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]).

heart of the issue at hand, and disputed (*see Lewis v Hertz Corp.*, 193 AD2d 470 [1st Dept 1993] [stating that notice to admit “is designed to elicit a stipulation regarding specific matters concerning which there is general agreement”]; *see also DeSilva v Rosenberg*, 236 AD2d 508 [2d Dept 1997] [(a) notice to admit which goes to the heart of the matters at issue is improper”).

If Cruz was not in the course of his employment, he is not entitled to Workers' Compensation benefits, and the basis of Selective's claim evaporates. This is the issue directly addressed by WCL § 142. Selective argues that its ability to prosecute its case will be severely prejudiced if this matter is put before the Board because, as a no-fault insurer, it will be accorded only limited discovery and will not be accorded the opportunity to confront and question witnesses. Selective also states that 11 NYCRR 65-3.19 (c) is not applicable to it as a New Jersey no-fault insurer, and objects to defendant's having taken two years to make this motion.

While there have been instances where no-fault insurers have not been permitted to re-open a case where the Board has made a determination (*see Roa v American Transit Ins. Co.*, 96 AD2d 609 [3d Dept 1983] [affirming Board's denial of no-fault insurer's request to re-open hearing]), or participate in a workers' compensation hearing (*see Lotito v Salt City Playhouse*, 66 AD2d 437 [3d Dept 1979]), no-fault insurers are permitted to submit evidence to the referee and to request that he or she put specific questions to the parties (11 NYCRR 65-3.19 [c] [2]). Furthermore, a no-fault insurer that participates in a workers' compensation hearing is not thereafter without procedural recourse (*see*

Esposito v Petruzzi, 278 AD2d 698 [3d Dept 2000] [no-fault insurance carrier which was allowed to fully participate in workers' compensation proceeding was "party in interest" with standing to obtain Board review of decision that claimant was independent contractor and not entitled to benefits]).

A full record of the incident does not exist here but, as Selective itself maintains, should be developed, and undoubtedly will be through investigation by the Board. The Board can conduct depositions, and has the ability, and certainly the expertise, to investigate this matter and develop a record, as well as the primary jurisdiction to do so. While, with the record before her, Judge Kaplan stated that she could not evaluate, and thus did not reach on the merits, the issue of whether Cruz's accident occurred during the course of his employment, she explicitly left open the door for the case's further evaluation. The parties have not submitted evidence to demonstrate that the Board had been asked to make such an evaluation, and Cruz "may not . . . 'elect' between work[ers] compensation benefits and no-fault benefits" (*Carlo Serv. Corp. v Rachmani*, 64 AD2d 579, 580 [1st Dept 1978] [quotation marks and citation omitted]; see also *O'Rourke*, 41 NY2d at 227 [stating that Board has discretion to process compensation claim and render a decision where claimant objects]).

Of course, as Selective was not afforded notice or an opportunity to participate in a hearing before the Board, it is not bound by Judge Kaplan's determination (see *Liss v Trans Auto Sys.*, 68 NY2d 15 [1986]; *Wofsy v Dial Car*, 211 AD2d 52 [3d Dept 1995]; cf. *Lutheran Med. Ctr. v Hereford Ins. Co.*, 43 AD3d 1064 [2d Dept 2007] [affirming trial court's vacatur of a no-fault arbitration

award and direction to parties to resubmit case to the Board where no-fault insurer was not afforded opportunity to participate in Board hearing]), but should have this opportunity before the Board, which has primary jurisdiction over this claim. Selective emphasizes the age of this case, and that it has provided discovery to NYCTA, but it has been on notice of NYCTA's affirmative defense since the answer was served. Presumably, the Legislature enacted WCL § 142 (7) in order to conserve limited public resources, avoid inconsistent results, and provide the public and no-fault insurers with the benefit of the Board's considerable expertise. While Selective does not wish to appear before the Board, it may not avoid the statutory forum that the Legislature has specified for these types of disputes.

As this case is being dismissed on other grounds, it is unnecessary to reach Selective's cross motion for an order striking NYCTA's answer. Finally, the parties are directed to resubmit the issue of whether Cruz's accident occurred during the course of employment to the Board in accordance with the order below.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

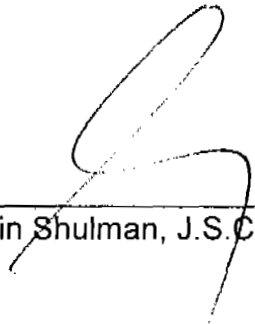
ORDERED that the plaintiff's cross motion for summary judgment and to strike the answer or direct defendant to produce Dante Cruz for an examination before trial is denied; and it is further

ORDERED that the parties are directed to resubmit the issue of whether Cruz's accident occurred during the course of employment to the New York State Workers' Compensation Board within 30 days after the service of a copy of this decision and order with notice of entry by either party; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes this court's Decision and Order. A courtesy copy of this Decision and Order has been sent to counsel for plaintiff and defendant.

Dated: New York, New York
September 18, 2008



Hon. Martin Shulman, J.S.C.

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