

Insurance Co. of State of Pennsylvania v Kaouache
2009 NY Slip Op 30101(U)
January 12, 2009
Supreme Court, New York County
Docket Number: 104000/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT.

PART _____

Justice _____

Index Number : 104000/2008
INSURANCE CO.OF THE STATE OF PA
VS.
KAOUACHE, BORHANE
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 104000-08

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision & Order.

FILED

JAN 21 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 12, 2009

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

-----X
INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA a/s/o MARK ROZYNSKI, ,

Index No. 104000/08

Plaintiff,

FILED

-against-

JAN 21 2009

BORHANE KAOUACHE,

Defendant.

COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN, J.:

Defendant Kaouache Borhane s/h/a Borhane Kaouache ("Borhane") moves for summary judgment on the grounds of collateral estoppel, and plaintiff Insurance Company of the State of Pennsylvania a/s/o Mark Rozynski (hereafter "AIG")¹ opposes the motion. For the reasons set forth below, the motion is granted.

This is a property damage subrogation action which arises out of a motor vehicle accident occurring on October 12, 2006 on the Long Island Expressway. AIG, as the insurer of the vehicle owned by Mark Rozynski, commenced this action seeking \$19,975.25 in damages against Borhane, the owner of a second vehicle involved in the relevant accident. The Hereford Insurance Company ("Hereford") is the insurer of the vehicle owned by Borhane.

According to the police report annexed to the moving papers,

¹ISOP is a subsidiary of AIG

Borhane stated he collided into a cement barrier in the left lane and the driver of Rozynski vehicle, Jill Rozynski, stated that she struck Borhane's vehicle and collided with a third vehicle in the middle lane traveling in the same direction.

AIG made payments of \$494.40 under its no fault coverage for medical treatments to Jill Rozynski. Thereafter, AIG sought reimbursement for these payments from Hereford in an arbitration proceeding conducted at the Arbitration Forums, Inc. AIG and Hereford fully participated in the arbitration.

By decision dated February 12, 2008, the arbitrator found that AIG failed to satisfy its burden of proof against Hereford, explaining that "Applicant admitted that Respondent's vehicle was stopped when Applicant collided with respondent's vehicle. As visibility was poor and it was raining at the time Applicant failed to operate her vehicle at a prudent rate of speed to avoid the prior accident." An award was entered in favor of Hereford. AIG did not seek to vacate or modify the award.

Based on the award, Borhane argues that collateral estoppel applies to bar this property damage action by AIG. In opposition, AIG asserts that collateral estoppel does not apply since Borhane was not a party to the arbitration proceeding and the no-fault hearing involved the nominal sum of \$494.00. See Terman v. Gonta, 26 AD3d 160, 160-161 (1st Dept 2006) (holding that prior property subrogation action against plaintiffs'

insurance company did not bar plaintiffs from litigating second action when plaintiffs did not have an opportunity to litigate the issues in the prior proceeding since they "lacked control over or financial interest in, that action").

The doctrine of collateral estoppel or "issue preclusion" prevents a party from relitigating an identical issue which has previously been decided against it in a prior action in which it had a fair opportunity to fully litigate the issue. See Allied Chemical v Niagara Mohawk Power Corp., 72 NY2d 271 (1988), cert denied, 488 US 1005 (1989). "The policies underlying the application [of collateral estoppel] are avoiding relitigation of a decided issue and the possibility of inconsistent results. Buechel v. Bain, 97 NY2d 295, 303 (2001) (citation omitted).

New York courts have found that the determinations of arbitrators, including no-fault arbitrators, have collateral estoppel effect on subsequent court proceedings. See American Ins. Co. v. Messinger, 43 NY2d 184 (1977); Acevedo v. Holton, 239 AD2d 194 (1st Dept 1997); AllState Ins. Co. v. Toussaint, 163 AD2d 444 (2d Dept 1990). Moreover, a non-party to the prior proceeding may assert collateral estoppel so long as "the party against whom estoppel is being asserted had a full opportunity to contest the issues." Schwartz v Public Administrator of the County of Bronx, 24 NY2d 65 (1969).

Under this standard, the February 8, 2006 determination of

the arbitrator bars this action. First, there is no dispute that the issue of liability was resolved in favor of Borhane's insurer in the arbitration. Furthermore, while Borhane was not a party to the arbitration proceeding, AIG, the party against whom collateral estoppel is being asserted, was a party to and, in fact, commenced the arbitration proceeding and had a full and fair opportunity to contest the issue of liability. American Ins. Co. v. Messinger, 43 NY2d at 192. In addition, AIG did not avail itself of the opportunity to vacate or otherwise challenge the award.

Accordingly, Terman v. Gonta, supra, on which AIG relies, is not dispositive here as, in that case, the First Department found that collateral estoppel did not apply since plaintiffs were not parties to the prior action and thus did not have an opportunity to litigate or control the issues in the prior action.

Furthermore, while the amount sought in the arbitration was modest, the courts have rejected arguments a party should be permitted to litigate the same issue twice based on a purported lack of incentive to vigorously litigate it the first time. American Ins. Co. v. Messinger, 43 NY2d at 192; AllState Ins. Co. v. Toussaint, 163 AD2d at 445. Finally, it cannot be said that the amount at issue in this action is so substantial or that other factors are present which would make it manifestly

unfair to bind AIG by the prior adverse determination. American Ins. Co. v. Messinger, 43 NY2d at 194.

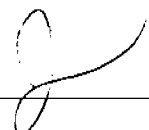
Accordingly, collateral estoppel applies to preclude AIG from relitigating the issue of liability, and the complaint must be dismissed.

In view of the above, it is

ORDERED that the motion by defendant Kaouache Borhane s/h/a Borhane Kaouache for summary judgment dismissing the complaint on the grounds of collateral estoppel is granted; and is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

DATED: January 12, 2009



J.S.C.

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NEW YORK