

<b>Selective Ins. Co. of Am. v New York City Tr. Auth.</b>
2009 NY Slip Op 30617(U)
March 20, 2009
Supreme Court, New York County
Docket Number: 603785/05
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: SHULMAN  
Justice

PART 1

SELECTIVE INSURANCE COMPANY OF AMERICA

INDEX NO. 603785/05

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

THE N.Y.C. TRANSIT AUTHORITY

MOTION SEQ. NO. 02

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 1-10

PAPERS NUMBERED  
1

Answering Affidavits - ~~Exhibits~~

2

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

**FILED**  
MAR 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: March 20, 2009

MARTIN SHULMAN  
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: IAS PART 1

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

Plaintiff,

- against-

Index No.: 60 785/05

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

Defendant.

-----x  
**Martin Shulman, J.:**

**FILED**  
MAR 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff Selective Insurance Company of America ("Selective" or "plaintiff"), seeks renewal or reargument of this court's September 18, 2008 Decision and Order ("Sept. 18<sup>th</sup> Decision") which granted defendant, New York City Transit Authority's ("NYCTA" or "defendant") motion for summary judgment dismissing this action for lack of subject matter jurisdiction and denied plaintiff's cross-motion for partial summary judgment on the issue of liability as well as other related relief.

In the underlying action, Selective, a no-fault insurer, sought to recover approximately \$255,467.00 from NYCTA that Selective claims it paid out in no-fault automobile insurance payments and benefits to non-party, NYCTA employee, Dante Cruz ("Cruz") for injuries that Cruz suffered in a motor vehicle accident in New Jersey. More specifically, plaintiff asserted a subrogation claim against defendant, Cruz's workers' compensation self-insurer because Cruz's accident allegedly arose out of and in the course of his employment.

The Sept. 18<sup>th</sup> Decision *inter alia* determined that the New York State Workers' Compensation Board ("Board") has primary jurisdiction to decide whether Cruz's injuries

were work-related and, therefore, dismissed Selective's subrogation action. The Sept. 18<sup>th</sup> Decision further noted that because Selective is legally affected by the issue of coverage and compensability, plaintiff has standing to fully participate in Board proceedings to ultimately resolve the employment coverage issue (*see Esposito v. Petruzzi*, 278 AD2d 698 [3<sup>rd</sup> Dept. 2000]).

Selective's order to show cause ("OSC") for renewal and reargument of this court's Sept. 18<sup>th</sup> Decision (Exhibit 7 to OSC) is largely grounded on the Board's refusal to re-open Cruz's case<sup>1</sup> (*see* Board's October 25, 2008 letter as Exhibit 8 to OSC) and decide the employment coverage issue which will either support or defeat plaintiff's claim for reimbursement of its no-fault payments to Cruz. Stated differently, because the Board's no action letter essentially locks out plaintiff from the very statutory forum mandated to decide this coverage issue, the OSC now seeks renewal requesting the court to exercise "secondary jurisdiction," and vacate the Sept. 18<sup>th</sup> Decision, reinstate the complaint, grant plaintiff's cross-motion for partial judgment against NYCTA for liability or alternatively, strike NYCTA's answer unless NYCTA produces Cruz for an examination before trial.

In opposition, NYCTA contends: Selective has not factually or legally demonstrated entitlement to any type of CPLR §2221 relief and the Sept. 18<sup>th</sup> Decision must stand; the court properly punted plaintiff's disputed subrogation claim to the Board because the Legislature squarely placed the responsibility on the Board for deciding the

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<sup>1</sup> It is undisputed on the underlying record that Cruz filed a claim for workers' compensation benefits. In February 2004, a Board Administrative Law Judge issued a Notice of Decision advising that the Board was taking no further action on Cruz's claim because of the latter's then apparent unwillingness to pursue the claim and submit prima facie medical evidence of his injuries caused by the accident.

issue of employment coverage and compensability; as a subrogee, Selective is subject to the same defenses that could be raised against Cruz, viz., "the jurisdiction of the . . . Board and its findings" (Pankowski -Diamond Opp. Aff. at ¶ 18); and because Cruz's injuries resulted from a motor vehicle accident, plaintiff has a remedy of an expedited Board hearing pursuant to WCL §142[7] to decide whether no-fault or workers' compensation insurance coverage is implicated.

### Discussion

CPLR 2221 states as follows:

Motion affecting prior order.

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it ...

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 AD2d 558 (1<sup>st</sup> Dept. 1979). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 (1<sup>st</sup> Dept. 1984); *William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22 (1<sup>st</sup> Dept. 1992).

Plaintiff's branch of its OSC seeking reargument must fail. Selective has not shown, let alone argued, that the Sept. 18<sup>th</sup> Decision dismissing its action was wrong, e.g., the court misapprehended any of the critical facts or even misapplied the law.

While this court understands plaintiff's frustration with the Board's inaction, still, this is legally insufficient to warrant CPLR 2221(d) relief.

A motion for renewal (CPLR 2221 [e][2] and[3]) "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." Here too, plaintiff has not shown any basis for renewal. *Mike v. Riverbay Corp.*, 56 AD3d 357 (1<sup>st</sup> Dept. 2008).

As to plaintiff's rights under WCL §142[7]<sup>2</sup>, it is noted that "[a]s of September 8, 2005, the Board *must* hold an expedited hearing if there is a dispute when an injury from a motor vehicle accident arose out of and in the course of the employment . . ." (emphasis supplied)(see Minkowitz, Practice Commentaries [McKinney's Cons. Laws of N.Y., Book 64, 2006, WCL §142 at 447]). Under these circumstances and absent a time bar, it would appear that the mandatory language in this statutory provision would allow for an Article 78 proceeding in the nature of mandamus to compel the Board to hold an expedited hearing and fulfill its mandated responsibilities. *Cf.*, *Fortunato v. Workers' Compensation Board*, 270 A.D.2d 641 (3<sup>rd</sup> Dept. 2000).

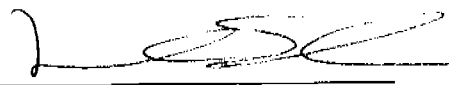
Accordingly, plaintiff's OSC for reargument and renewal is denied.

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<sup>2</sup> WCL §142[7] states: "[w]here there has been a motor vehicle accident which caused personal injury and there is a dispute as to whether the injury occurred in the course of employment, the workers' compensation board shall, after notice to the no-fault carrier and the workers' compensation carrier, hold an expedited hearing on the issue of whether the accident occurred during the course of employment."

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  
March 20, 2009



Hon. Martin Shulman, J.S.C.

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