

**Travelers Indem. Co. v Hereford Ins.  
Co.**

2009 NY Slip Op 30707(U)

March 23, 2009

Supreme Court, New York County

Docket Number: 102286/07

Judge: Joan A. Madden

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

PRESENT: Hon Joan A Madden

PART 11

Index Number : 115303/2007

TRAVELERS INDEMNITY COMPANY

VS.

HEREFORD INSURANCE COMPANY

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

Justice

INDEX NO.

115303-07

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 and cross-motion are decided in accordance with the answered memorandum decision and order.

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

**FILED**  
MAR 31 2009  
CLERK'S OFFICE  
NEW YORK

Dated:

March 23, 2009

[Signature]  
HON. JOAN A. MADDEN <sup>J.S.C.</sup>

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 11

-----x  
TRAVELERS INDEMNITY COMPANY,  
Plaintiff,

Index No. 102286/07

-against-

HEREFORD INSURANCE COMPANY,  
Defendant.

**FILED**  
MAR 31 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
JOAN A. MADDEN, J.:

Defendant Hereford Insurance Company (Hereford) moves, pursuant to CPLR 3211 (a) (5), to dismiss the complaint of plaintiff Travelers Indemnity Company (Travelers) on the grounds of res judicata and/or collateral estoppel. Hereford claims that Travelers is barred from pursuing its priority of payments claim herein because Travelers failed to assert this ground in a prior proceeding between the parties in this court entitled *Matter of Travelers Indemnity Company v Hereford Insurance Company* (Index No. 115303/07), and also failed to assert this ground in a prior arbitration proceeding between the parties at Arbitration Forums, Inc., entitled *Travelers Indemnity Company v Hereford Insurance Company* (Docket No. IO68-55209-06).

Travelers opposes the motion and cross-moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor on the ground that no triable issues of fact exist.

**BACKGROUND**

This dispute arises out of a car accident that occurred in Brooklyn, New York, on November 6, 2000, when a vehicle owned and operated by Mark Thomches collided with a parked, unoccupied vehicle. The Thomches vehicle was insured by Travelers. Jana Bolobanic, a passenger in the Thomches vehicle, collected workers compensation benefits from Hereford as a result of the accident.

Hereford sought reimbursement of its workers' compensation payments from Travelers through a loss transfer arbitration proceeding held by Arbitration Forums, Inc. On December 5, 2006, the arbitrator ruled in Hereford's favor and issued a \$49,999.99 award to Hereford. Travelers commenced a proceeding in this court seeking to vacate the arbitration award, pursuant to Article 75 of the CPLR (*Matter of Travelers Indemnity Company v Hereford Insurance Company*, Index No. 115303/07) (Prior Proceeding). Travelers argued that the matter did not qualify for "loss transfer" arbitration. By decision and judgment, dated August 6, 2007, this court dismissed the petition and confirmed the arbitration award. Travelers did not file a Notice of Appeal.

In October 2007, Travelers commenced the instant action, once again seeking return of the \$49,999.99. In the complaint, dated October 24, 2007 (Complaint), Travelers relies upon Insurance Law § 5102 (b) (2), which provides that workers' compensation benefits serve as an offset against first-party benefits payable under no-fault as compensation for "basic economic loss." In its answer, dated December 6, 2007 (Answer), Hereford asserts that Travelers's claims are barred because Travelers failed to raised them in the prior arbitration and/or Prior Proceeding, and that the August 6, 2007 decision and judgment rendered therein constitutes a final judgment on the merits.

### DISCUSSION

Hereford seeks to dismiss the complaint on the ground that Travelers's claims are barred by the doctrines of res judicata and/or collateral estoppel. Travelers contends that these doctrines are inapplicable because there has been no final determination of its priority of payments theory of recovery against Hereford. Travelers also claims that it did not have a full

and fair opportunity to be heard on this issue. Specifically, Travelers argues in its supplemental memorandum of law, that collateral estoppel should not apply as it did not chose the arbitration forum and that while it raised the priority of payments defense in the arbitration,<sup>1</sup> “as an automobile insurer Travelers was not permitted to seek affirmative relief against a worker’s compensation provider such as Hereford in inter-company arbitration proceedings commenced pursuant to Ins. Law § 5105” (Travelers Supplemental Mem. of Law, at 12). For these reasons, Travelers maintains that it is not precluded from presenting its priority of payments theory in this action.

“The doctrine, or principle, of res judicata is that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different relief. The party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in the instant action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue. Res judicata is an affirmative defense with the following three elements (1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them [and]; (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.”

(*Rosen v Kessler*, 15 Misc 3d 1139 [A] \* 2 [Sup Ct, Suffolk County, April 24, 2007, Whelan, J.], *affd* 51 AD3d 761 [2d Dept 2008] [citations omitted]).

Under this approach to res judicata, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are

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<sup>1</sup>In its contention sheet, Travelers asserted that “Insurance Law § 5102(b)(2) expressly provides that worker’s compensation benefits serve as an offset against first-party benefits payable under no-fault as compensation for ‘basic economic loss.’ That as between no-fault and workers’ compensation, the later (sic) is ‘primary’ and an injured party may not elect between workers’ compensation benefits and no-fault benefits. In this case, the applicant provided ‘primary’ workers’ compensation coverage, and therefore may not recover payments from respondent under any priority of payments theory.”

barred, even if based upon different theories or if seeking a different remedy” (*Ebanks v 547 W. 147<sup>th</sup> St. Hous. Dev. Fund Corp.*, 37 AD3d 290, 291 [1<sup>st</sup> Dept 2007], quoting *O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Thus, once a claim is finally adjudicated, all other claims emanating from the same set of events are precluded, even if they are premised on a new legal theory (*see Sosa v JP Morgan Chase Bank*, 33 AD3d 609, 611 [2d Dept 2006])

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 the party had a fair opportunity to fully litigate the issue (*see Allied Chem. 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], *cert denied* 535 US 1096 [2002]).

The determinations of arbitrators, including no-fault arbitrators, are accorded collateral estoppel effect on subsequent court proceedings (*see Matter of American Ins. Co. [Messinger]*, 43 NY2d 184 [1977]; *Allstate Ins. Co. v Toussaint*, 163 AD2d 444 [2d Dept 1990]). Moreover, a nonparty to the prior proceeding may assert collateral estoppel so long as “the party against whom estoppel was being asserted had a full opportunity to contest the issue” (*Schwartz v Public Adm’r of County of Bronx*, 24 NY2d 65, 70 [1969]).

Upon review, the court holds that arbitrator’s determination, which was confirmed by the August 6, 2007 decision and judgment in the Prior Proceeding, bars this action. First, there is no dispute that the issue of liability was resolved in favor of Hereford in the arbitration. Furthermore, Travelers, the party against whom collateral estoppel is being asserted, was a party

to the arbitration, and, in fact, commenced the Prior Proceeding and is unable to show that it did not have a full and fair opportunity to contest the issue of liability (*Matter of American Ins. Co. [Messinger]*, 43 NY2d at 192). Furthermore, Travelers acknowledges that it raised the priority of payment defense in the context of the arbitration proceeding. Moreover, in the Prior Proceeding, Travelers did not assert, or otherwise seek to preserve, the priority of payments argument which it now seeks to assert.

In addition, while Travelers argues that, as a no-fault insurer, it was not permitted to seek affirmative relief in the arbitration against a workers' compensation carrier, like Hereford, the case law relied on by Travelers does not support this argument. Specifically, although Travelers points to case law holding that as a no-fault carrier, Travelers could not require a workers' compensation carrier like Hereford to submit to mandatory arbitration pursuant to Insurance Law 5105 (*American Mutual Ins. Co. v. Merchants Ins. Group*, 123 Misc2d 331 [Sup Ct Onondaga Co. 1984]; *National Union Fire Ins. v. Farmers New Century Ins. Co., Inc.*, 8 Misc3d 1004(A) [Sup Ct NY Co. 2005]), it cites no law or other basis supporting its assertion that when, as here, the no-fault carrier is named as a respondent in a mandatory arbitration proceeding brought by the workers' compensation carrier that the no-fault carrier cannot seek any affirmative relief in that proceeding.

Accordingly, and regardless of the merits of the new claim asserted by Travelers in this action, it is precluded from relitigating the issue of liability, and the motion to dismiss the Complaint is granted.(*see generally North Shore Envtl. Solutions, Inc. v Glass*, 17 AD3d 427 [2d Dept 2005]).

CONCLUSION

It is

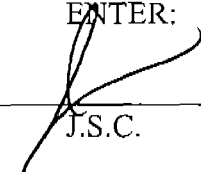
ORDERED that the motion by defendant Hereford Insurance Company to dismiss the complaint herein is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by plaintiff Travelers Indemnity Company for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 23 2009

ENTER:

  
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J.S.C.

**HON. JOAN A. MADDEN**  
J.S.C.

**FILED**  
MAR 31 2009  
COUNTY CLERK'S OFFICE  
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