

Matter of Continental Cas. Co. v Lecei
2009 NY Slip Op 31009(U)
April 29, 2009
Supreme Court, New York County
Docket Number: 103754/06
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Petition of
CONTINENTAL CASUALTY COMPANY,
To Obtain a Stay in Arbitration

INDEX NO. 103754/06

MOTION DATE April 7, 2009

MOTION SEQ. NO. 003

MOTION CAL. NO. 33

Petitioner,

-against-

TIBOR LECEI

Respondent.

The following papers, numbered 1 to 6 were read on this motion to reject the Referee's report and recommendation

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits _____	4
Replying Affidavits _____	5-6

Cross-Motion: Yes No

Upon the foregoing papers, the petitioner's motion pursuant to CPLR § 4403 to reject the report and recommendation of the Special Referee, rendered November 13, 2008, is decided in accordance with the accompanying decision and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 29, 2009

O.P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 61

-----X
In the matter of the Petition of
CONTINENTAL CASUALTY COMPANY,
To Obtain a Stay in Arbitration

DECISION AND
JUDGMENT

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103754/06

TIBOR LECEI,

Respondent.

-----X
O. PETER SHERWOOD, J.:

This petition was remanded from the Appellate Division to the Supreme Court for an evidentiary "hearing on the issue of whether respondent [Tibor Lecei] was 'occupying' the truck [owned by his employer] at the time of the accident." *Matter of Continental Casualty Company v. Lecei*, 47 AD3d 509, 510 (1st Dept 2008). Under the terms of the Supplementary Uninsured/Underinsured Motorist (SUM) endorsement of a policy of insurance, Lecei would be an "insured" if, *inter alia*, he was "occupying" the truck at the time of the accident.

Upon remand, the case was referred to special referee, Howard G. Leventhal, to hear and report pursuant to CPLR Rule 4312. A hearing was held on November 13, 2008. Thereafter, the special referee rendered a decision, report and recommendations on the record. He found that respondent "was in fact occupying the truck at the time of the accident". He recommended that the application of petitioner, Continental Casualty Company ("CCC"), to stay arbitration be denied and that the parties be directed to proceed to arbitration.

Currently before the court is CCC's motion pursuant to CPLR Rule 4403 to reject the recommendation and pursuant to CPLR Rule 7503(b) to stay the arbitration (motion sequence no. 3). Lecei has opposed the motion and has moved pursuant to CPLR Rule 4403 to confirm the report and to dismiss the petition (motion sequence no. 4).

Generally, the courts will not disturb findings of a referee to the extent that the record substantiates the findings. They may reject findings not supported by the record (*see Kardanis v. Velis*, 90 AD2d 727 [1st Dept 1982]; *Thomas v. Thomas*, 21 AD3d 949 [2d Dept 2005], *lv. to appeal den.* 6 NY3d 704) ["The report of a Referee should be confirmed whenever the findings are

substantially supported by the record, the Referee has clearly defined the issues and resolved matters by credibility”)). Conversely, a court may reject a referee’s findings, including credibility findings, if the record fails to substantiate them (*see In the Matter of Maxi Cohen*, 168 Misc.2d 91 [Sup. Ct., NY Cty 1995]). Further, the fact that a referee disbelieved parts of a witness’ testimony and believed other parts is no reason for setting aside the referee’s findings on disputed questions of fact (*see In re Winsweiler’s Estate*, 146 Misc. 436 [Surrogates Ct., NY Cty 1933] and PJI 1:22, 3d Ed.). The facts in this case must be considered in light of these governing principles.

Lecei and Anthony Hall are electricians who were employed in the street light maintenance division of Welsback Electric Company, a named insured under the policy. Lecei is not a named insured but would be entitled to coverage if he was “occupying” his employer’s insured vehicle at the time of the accident. The term “occupying” is defined by the policy and Insurance Law § 3420(f)(3) as “in, upon, entering into, or exiting from a motor vehicle”. Courts have construed the term liberally (*see Matter of Travelers Insurance Company v. Youdas*, 13 AD3d 1044, 1045 [3d Dept 2004]).

The Court of Appeals has explained that “the status of a passenger is not lost even though the individual is not in physical contact with (the vehicle), provided there has been no severance of connection with it, his departure is brief and he is still vehicle-oriented with the same vehicle” (*Matter of Rice v. Allstate Insurance Company*, 32 NY2d 6, 11 [1973]). Applying this standard, courts have found individuals who were physically outside the insured vehicle as “occupying” motor vehicles where, for example, (1) an operator of a stalled panel truck was working under the raised hood of the vehicle, and the plaintiff-passenger alighted from the truck to walk toward the front of the truck when he was struck by a hit-and-run vehicle (*see State-Wide Insurance Company v. Murdock*, 31 AD2d 978 [2d Dept 1969]; and (2) while standing between his vehicle and another vehicle to exchange credentials following a minor accident, a taxidriver was injured when an uninsured driver struck the rear of the taxicab pushing it into the taxidriver (*Matter of Arbitration of Nassau Insurance Company v. Maylon*, 103 AD2d 780 [2d Dept. 1984]). Courts have declined to find that individuals were “occupying” motor vehicles where the evidence revealed that the connection with the vehicle had been severed, (*see, e.g. Rice*, 32 NY2d at 349 [connection with vehicle 1 severed where passenger injured after alighting from vehicle 1 to take wheel in vehicle

2 during trip involving both vehicles to a common destination.]; and *Matter of Martinez v. Motor Vehicle Accident Indemnification Corporation*, 295 AD2d 277, 278 [1st Dept. 2002] [Severed connection with tow truck found where driver alighted from tow truck and was struck by a hit-and-run vehicle while walking toward the disabled vehicle he had been despatched to assist. Although the driver intended eventually to return to the truck, his immediate purpose was to attend to the disabled vehicle]).

The special referee found that Hall and Lecei drove in separate trucks southbound along the Clearview Expressway at about 10:00 p.m., on March 25, 2005, to check street lighting conditions and to do repairs. At one point, the vehicles stopped in the far left lane to do a repair. Hall was in the lead vehicle. Before leaving the cab of his truck, Hall began jotting down information relating to the light outage. It was his normal procedure to do the required paperwork before doing a repair. Lecei who drove the backup truck was stopped 20 to 25 feet behind Hall's vehicle. Lecei alighted from the truck intending to collect a few safety cones from his vehicle and then to place them on the roadway to guide motorists away from the stopped trucks. At that point, a vehicle being driven by Brian Haggerty struck the rear of Lecei's truck, traveled along the left side of the truck, struck Lecei and ran into Hall's truck. Lecei was thrown over the median and onto the northbound roadway. He suffered severe injuries. Hall was not injured.

Hall did not see Haggerty's vehicle strike Lecei. After the incident, Hall exited his vehicle and immediately went to aid Lecei. Hall also called 911 and his supervisor, Arthur D'Angelo, who arrived at the scene approximately 15 minutes after the accident.

In a series of four (4) statements given at various times after the accident, Hall stated that Lecei had put out warning cones before the accident and was walking toward the front truck when the accident occurred. The statements included one prepared by Paul Martin, an insurance adjuster, to which a diagram was attached. The diagram placed Lecei between the two trucks at the time of impact and as landing directly east of that point after being struck. At the trial, Hall repudiated these statements and insisted that there were no safety cones on the roadway at the time of the accident. *Tr. 84*. Lecei and Haggerty testified that Lecei was next to his truck when he was struck and that there were no safety cones in the roadway prior to the accident. Hall testified that he put out the warning cones after the accident.

Focusing on the inconsistency between his pre-trial statements and his testimony at trial, CCC has charged Hall with perjury. CCC asserts that Hall's testimony that there were no warning cones in the road at the time of the accident is false. CCC argues that the determination of the special referee crediting Hall's trial testimony is unsubstantiated and ignores Hall's prior statements. For this reason, CCC urges that the special referee's report be set aside.

The special referee characterized the inconsistency as "the main problem in this proceeding". *Tr. 146.* He credited Hall's repudiation of his prior statements and accepted his statement at trial "that he did not in fact see where Mr. Lecei was at the time the offending vehicle hit Mr. Lecei." *Tr. 146.* At another point in the report and as highlighted by CCC, the special referee stated that:

For whatever reason, I did not find that the information given by Mr. Hall was accurate. Looking at the diagram of the accident prepared by Mr. Martin on Petitioner's Exhibit 3 (Exhibit "E" hereto) I don't see how it could have happened physically for the impact to have been as set forth in the diagram with Mr. Tibor's body ending up at the right angles to it, based on the way he was struck.

CCC's attack misses the mark. CCC seeks to discredit that portion of Hall's trial testimony that repudiates his prior statements that Lecei had placed safety cones on the roadway prior to the accident. The special referee did not expressly credit this portion of Hall's testimony. Rather, he credited Hall's statement at trial that he did not in fact see where Lecei was standing when he was struck.

The special referee found that the information Hall gave to Martin was not accurate. Specifically, he found that the diagram prepared by Martin that placed Lecei between the two trucks at the point of impact, was inaccurate because, in the special referee's view, it was not physically possible for the impact to have been as set forth on the diagram with Lecei's body ending up at the right angles to the point of impact.¹ The court agrees. Moreover, the record contains ample independent evidence to support the findings of the special referee. Both, Lecei and Haggerty

¹ The statement written by Martin also contains the following: "Mr. Lecei was walking in the area between the two trucks when the accident occurred" (Affidavit of James Walsh in Support of Motion to Reject Report, Exhibit E). By necessary implication, the special referee found this statement to be inaccurate as well.

testified that Lecei was next to his truck when the accident occurred. They also testified that there were no warning cones in the road prior to the accident.

The special referee's determination is fully consistent with precedent. In *Matter of Arbitration between Travelers Insurance Co. v. Youdas* (13 A.D.3d 1044, 1045 [3d Dept 2004]), the Appellate Division, Third Department held that a driver who had just stopped his van, exited, walked to the rear of the van and was unloading medical supplies for delivery when a vehicle struck him from behind, had not yet severed his connection with the van and was still vehicle oriented at the time he was struck. Similarly here, Lecei had stopped his vehicle, exited and was about to unload safety cones which he intended to place on the highway before performing repair work on a street light. Under these circumstances, he was still in the process of alighting from his truck and preparing to unload safety cones, conduct that was still vehicle oriented (*see id.*). The special referee's finding that Lecei was "occupying" the vehicle must be upheld.

Accordingly, it is hereby

ORDERED that petitioner's motion to reject the report and recommendation of the special referee (motion sequence no. 3) is denied; and it is further

ORDERED that respondent's motion to confirm the special referee's report and recommendation (motion sequence no. 4) is granted; and it is further

ORDERED and ADJUDGED that the report and recommendations of the special referee is confirmed; and it is further

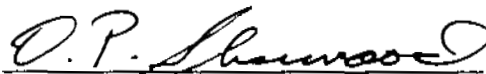
ORDERED and ADJUDGED that the parties shall proceed to arbitration; and it is further

ORDERED and ADJUDGED that the petition to stay arbitration is dismissed.

This constitutes the decision and judgment of the court.

DATED: April 29, 2009

E N T E R,



UNFILED JUDGMENT PETER SHERWOOD

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).