[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Paul Wooten

Index Number : 111802/2008

U.S. BANK, N.A.

vs

SYLVIA SAVAGE

Sequence Number : 002

OTHER RELIEFS

PART 7

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted on default, and the within order is signed.

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

FILED

DEC 03 2013

COUNTY CLERK'S OFFICE NEW YORK

Dated: 11/21/13

, J.S.C.

Paul Wooten

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

At an IAS Part of the Supreme Court of the State of New York held in and for the County of **New York, 60 Center Street** New York, New York, 10007 on NOV. 21, 2013.

PRESENT:

Hon. **Paul Wooten**, JUSTICE

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR J.P. MORGAN ACQUISTION TRUST-2006 ACCI

Index No. 111802/08

ORDER TO DISCONTINUE ACTION, AND CANCEL LIS PENDENS

Plaintiff,

- against -

SYLVIA SAVAGE, BORAD OF MANAGERS OF THE ENDYMION CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

Defendants.

----------X

On reading and filing the notice of motion and annexed affirmation of Lisa Wallace, both dated September 27, 2013, with exhibits annexed, and due deliberation having been had thereon, it is hereby

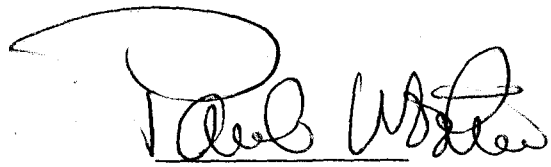
ORDERED, that said motion hereby is granted, and it is further

ORDERED, that the above entitled action be and the same is hereby discontinued without prejudice and all parties will bear their own fees and costs associated with this action; and it is further

ORDERED, that the County Clerk of **New York** County is directed, upon payment of the proper fees, if any, to cancel and discharge of record a certain Notice of Pendency filed in this action on August 27, 2008 against property known as Block 1943 Lot 1023, and said Clerk is hereby directed to enter upon the margin of the record of same a Notice of Cancellation referring to this Order; and it is further

ORDERED, that the Clerk of **New York** County be served with a copy of this order with Notice of Entry and execute same accordingly.

ENTER:



Paul Wooten J.S.C.

FILED

DEC 03 2013

NEW YORK
COUNTY CLERK'S OFFICE

[* 4]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
JOSEPH A. CHRISTIAN, JR.,
Petitioner,

INDEX NO. 102475/12

For a Judgement Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules,

MOTION SEQ. NO. 001

-against-

THE METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD,
Respondents.

The following papers were read on this motion by petitioner for an order and judgement pursuant to Article 78 of the Civil Practice Law and Rules.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

In this article 78 proceeding, Joseph A. Christian, Jr. (petitioner) seeks a judgment nullifying the determination of the Metropolitan Transportation Authority (MTA) and Metro-North Commuter Railroad's (Metro-North) (collectively, respondents) insurance company, which denied petitioner's application for no-fault first-party benefits. Petitioner seeks a declaratory judgment stating that he is entitled to $2,000.00 a month plus interest, retroactive to October 31, 2011, as and for his no-fault first-party wage loss benefits, in addition to payments for his medical treatment until his first-party benefits are exhausted. Respondents seek dismissal of the petition, and contend that their determination was not arbitrary and capricious.

BACKGROUND

Petitioner is employed as a sheet-metal worker by Metro-North, a commuter railroad

which operates between the State of New York and the State of Connecticut. Metro-North is a public benefit subsidiary corporation of the MTA. On October 31, 2011, petitioner was involved in a car accident during the course of his employment. While driving a Ford van owned by Metro-North another car crashed into petitioner, and as a result of the collision he became disabled from work. Respondents maintained an automobile insurance policy for the Ford van with the Travelers Indemnity Company of Connecticut (Travelers Insurance Policy). Claims Service Bureau of New York, Inc. (Claims Service Bureau) is the third-party administrator of the Travelers Insurance Policy.

After his accident, petitioner, through counsel, requested an application for no-fault benefits from the Metro-North Risk Management Department. Over the phone, counsel was advised that petitioner would be denied no-fault benefits since "workers' comp benefits are primary and No-Fault is secondary" (Respondents' exhibit C at 1). Petitioner then formally requested an application to apply for no-fault benefits and mailed his application to the Claims Service Bureau on December 23, 2011. Petitioner contends that, based on his wage rate of $29.50 an hour, he is eligible to receive the maximum no-fault, first-party wage benefit of $2000.00 per month.

On December 28, 2011, the Claims Service Bureau denied petitioner's application for all no-fault benefits, including loss of earnings benefits, health services benefits and other reasonable and necessary expenses. The explanation for the denial was as follows: "[y]ou were injured while in the course of your employment. Therefore, all New York no-fault benefits are denied" (Petitioner's exhibit 3). The denial letter explained that petitioner was entitled to contest the denial by filing a complaint.

Petitioner filed a complaint with the New York State Department of Financial Services. Pursuant to a letter dated January 24, 2012, petitioner received a response to his complaint from the Claims Service Bureau. The letter advised petitioner that the Claims Service Bureau is

the duly authorized representative for the Metro-North on the issue. The letter explained that the denial of no-fault benefits "is in order and [we] do not feel any payments should be made with regard to this matter" (Petitioner's exhibit D at 1). The explanation was sparse, only indicating that the insurance coverage for the van petitioner was driving, owned by Metro-North, had exclusions. The letter states the following in pertinent part:

> "This insurance does not apply to any of the following:
> 3. Workers's Compensation
> Any obligation for which the 'insured' or the 'insured's' insurer may be held liable under any workers' compensation, disability or unemployment compensation law or any similar law.
> 4. Employee Indemnification And Employer's Liability
> 'Bodily injury' to:
> a. An 'employee' or the 'insured' arising out of and in the course of:
> (1) Employment by the 'insured'; or
> (2) Performing the duties related to the conduct of the 'insured's' business ..." (*id.* at 2).

The letter reiterated that petitioner had indicated that he was working for Metro-North at the time of the accident, and that the denial of benefits was based on the occurrence.

Petitioner then commenced this action, seeking to nullify the December 28, 2011 decision issued on behalf of respondents which denied him no-fault, first-party wage loss benefits. In support, petitioner argues that the denial of no-fault benefits was arbitrary and capricious. Since petitioner is an employee of an interstate railroad, respondents are aware that he is exempt from the New York State Workers' Compensation Law and the Social Security system.[1] As such, petitioner is ineligible to apply for, and receive, workers' compensation as a result of his injury. Although petitioner can apply for sickness benefits for an on-the-job injury from the RRB, these benefits will result in a statutory lien that will have to be satisfied out of recovery from any third-party lawsuit. Since this would constitute a reduction

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[1] The U.S. Railroad Retirement Board (RRB) is the agency which administers a social insurance program to railroad workers; it administers retirement, survivor, unemployment and sickness benefits.

in income, it is not a proper offset for no-fault law, according to petitioner, and should not preclude him from receiving no-fault, first-party wage benefits.

Respondents first argue that petitioner's application is barred by the statute of limitations. They maintain that petitioner should have commenced this action within four months of speaking to respondents over the phone regarding an application for no-fault benefits. This conversation was in November of 2011. Since petitioner commenced this action on April 19, 2012, respondents maintain that this proceeding was commenced past the statute of limitations.

Respondents also contend that the Federal Employers' Liability Act (FELA) preempts petitioner's right to obtain no-fault benefits. They argue that FELA, not any other state law, would determine petitioner's rights. As such, they allege that petitioner is trying to circumvent this statute by attempting to recover under the no-fault law. Dean Lo-Giudice, director of Metro-North's Claims Services Department, states that, "Metro-North's and the MTA's policy that employees involved in motor vehicle accidents while on duty would be covered under the benefits associated with the FELA and would not receive no-fault wage loss benefits ... was final" (Respondents' exhibit B). Respondents further argue that, since petitioner already filed a complaint with the New York State Department of Financial Services, he is precluded from commencing this action. They also state that this Court cannot interpret provisions of petitioner's collective bargaining agreement.

Petitioner responds that the date on which he received the denial of the no-fault benefits is the date which would start the period from which he could commence this action. Petitioner received a denial on December 28, 2011. As such, he argues that this action was timely commenced.

With respect to FELA, petitioner argues that FELA has no application to his state law claims, since he is not alleging any negligence on the part of respondents and FELA is only

applicable to accidents which are caused by the negligence of the railroad. He states the following, in pertinent part:

> "Respondents chose to ignore their statutory obligation to secure a motor vehicle policy that would pay first party benefits to Metro-North employees like Petitioner for situations where the FELA is inapplicable. That roll of the dice by Respondents was with knowledge of the risk that Respondents' interpretation of the FELA might be determined to be erroneous by the Courts and a violation of New York law" (Reply affirmation of Ira Maurer ¶ 29).

DISCUSSION

In the context of an article 78 proceeding courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" (*Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006], citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *see also* CPLR 7803[3]). An agency's decision is considered arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell*, 34 NY2d at 231). "It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (*Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999] [internal quotation marks and citations omitted]).

Respondents' argument that petitioner missed the statute of limitations is without merit. Respondents contend that the phone call that occurred in November 2011, advising petitioner of his status, constituted a final and binding determination for purposes of an article 78 proceeding. However, petitioner was merely advised over the phone that, if he did apply for no-fault benefits, he would be denied. He had not yet applied for and been denied, those benefits. When he did apply and was denied, the letter dated December 28, 2011 indicated that he could contest the denial. As such, the statute of limitations started to run upon receipt of this letter,

and petitioner did not miss the statute of limitations by commencing this action on April 19, 2012.

Respondents' allegation that petitioner cannot proceed with this action since he filed a complaint with another agency, is also without merit. Likewise are the allegations that the court lacks the subject matter jurisdiction to interpret petitioner's collective bargaining agreement. Although the petitioner refers to parts of the collective bargaining agreement in his petition to describe some of his sick benefits, petitioner is not asking the court to interpret those provisions. As petitioner sets forth, his allegations that respondents should provide him with no-fault benefits arise under state insurance law, not the collective bargaining agreement.

Nevertheless, although the petition is timely, as set forth above, respondents' decision to deny no-fault benefits was not arbitrary and capricious, and will be upheld. The FELA is a federal law which compensates and protects railroad workers who are injured on the job. "FELA wholly preempts State-law [*sic*] remedies for railway employees injured in the course of their employment" (*Ganci v Port-Auth. Trans-Hudson Corp.*, 258 AD2d 386, 386 [1st Dept 1999]). FELA requires negligence on the part of the railroad in order for the employee to recover. It provides, in pertinent part,

> "Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" (45 USC § 51).

Even in the case where the railroad is not negligent and there is no recovery, FELA still applies. As explained in the statutory comments, "even as to injuries occurring without fault, for which FELA provides no remedy, Congress has pre-empted entire field of liability in respect of personal injuries to railroad employees whose duties 'further' or 'directly' or 'closely affect'

interstate commerce and no room exists for state regulation in this field" (45 USC § 51, n 27, citing to *Matter of Ahern v South Buffalo Ry. Co.*, 303 NY 545, [1952], *affd* 344 US 367 [1953]).

"FELA is applicable to ... Metro-North Railroad, which operates [between states]" (*Linetskiy v N.Y. City Tr. Auth.*, 2 AD3d 503, 504 [2d Dept 2003]). Petitioner was first denied no-fault benefits due to being injured during the course of his employment. When he contested this determination, the reply letter explicitly stated the denial of no-fault benefits was based on the fact that he was working for Metro-North at the time of the accident. The law is well-settled that FELA was intended to pre-empt state law claims as long as they relate to interstate commerce. As such, it was not arbitrary and capricious for the administrative agency responsible for Metro-North's insurance policy to deny no-fault benefits to petitioner.

Petitioner argues that the respondents' interpretation of FELA should be determined to be erroneous, and that it should not apply to petitioner's motor vehicle accident. However, it is well settled that "[a]n agency's interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481 [2008] [internal quotation marks and citations omitted]). Given this maxim, coupled with FELA's broad preemption powers, the Court will not interfere with respondents' policies regarding their application of FELA.

The Court notes that petitioner has admitted that he is not without recovery. He was advised, pursuant to a letter in the record, that FELA will pay for his medical claims and that he can apply for sickness benefits from the RRB and supplemental sickness benefits from MetLife. He is also able to commence a third-party lawsuit against the negligent driver. The fact that petitioner is not satisfied with the benefits he would be entitled to since they are both subject to a lien does not make the agency's determination of benefits arbitrary and capricious.

Accordingly, since respondents' determination to deny no-fault benefits is upheld,

petitioner's application is denied. Moreover, the Court has considered petitioner's other contentions and finds them without merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed without costs or disbursements to the respondents; and it is further,

ORDERED that respondents are directed to serve a copy of this Order with Notice of Entry upon petitioner and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11/19/13

Enter: _____
PAUL WOOTEN , J.S.C.

Check one: [X] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**
Check if appropriate: : [ ] **DO NOT POST** [ ] **REFERENCE**