

**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL SECTION**

SCOTT SMJETANA	:	APRIL TERM 2001
	:	
vs.	:	NO. 02372
	:	
	:	
STATE FARM INSURANCE CO.	:	2250 EDA 2010

OPINION

The Plaintiff filed an appeal of this Court’s July 8, 2010 Order denying his Motion for Reconsideration of the Court’s early Order, dated June 24, 2010, which denied his Petition to Substitute Neutral Arbitrator. The appeal appears to be ripe for decision pursuant to 42 Pa.C.S. § 7320¹ and/or Pa. R.A.P 311(c).²

I. PROCEDURAL/FACTUAL HISTORY

1. Plaintiff is seeking underinsured motorist benefits from State Farm Insurance Company as a result of injuries he allegedly sustained in a 1998 Motor Vehicle Accident; Plaintiff received \$15,000 from the tortfeasor.

2. The UIM action was originally instituted on April 19, 2001. A Petition to Appoint a Neutral Arbitrator was filed by Allen Feingold, Esquire on behalf of Plaintiff. Mr. Feingold was subsequently disbarred from the practice of law in August 2008. In March of 2008, Jeffrey Pearson, Esquire entered his appearance on behalf of the Plaintiff; Mr. Pearson was suspended

¹ (a) GENERAL RULE.-- An appeal may be taken from: (1) A court order denying an application to compel arbitration made under section 7304 (relating to proceedings to compel or stay arbitration).

² (c) Changes of venue, etc. An appeal may be taken as of right from an order in a civil action or proceeding changing venue, transferring the matter to another court of coordinate jurisdiction, or declining to proceed in the matter on the basis of forum non conveniens or analogous principles.

from the practice of law. Elliott Tolane, Esquire filed the Petition that is the subject of this appeal; Mr. Tolane has never formally entered his appearance on behalf of Plaintiff.

3. In response to the April 2001 Petition to Appoint a Neutral Arbitrator, Defendant filed Preliminary Objections on June 6, 2001.

4. On July 18, 2001, the Honorable John Herron overruled the Preliminary Objections and further directed that “*Plaintiff and Defense arbitrator shall have 30 days to agree upon a neutral arbitrator. If the arbitrators cannot agree within 30 days, the Court will do so upon further application.*”

5. On September 14, 2001, Plaintiff again filed a Petition to Compel the Appointment of a Neutral Arbitrator. In response, Judge Herron appointed Angelo Scaricamazza, Esquire on October 24, 2001.

6. On November 26, 2007, Plaintiff filed another Petition to Compel Arbitration. Prior to a decision on the Petition, Allen Feingold, Esquire withdrew as counsel and Jeffry Pearson, Esquire entered his appearance on behalf of Plaintiff on March 24, 2008.

7. On March 27, 2008, the Honorable Ester Sylvester entered the following Order “*Upon consideration of Plaintiff’s Motion to Appoint a Third Neutral arbitrator and preclude Defendant’s arbitrator, and Defendant’s Response thereto, Plaintiff’s Motion is Denied*”. No appeal was taken from this order.

8. In September of 2008, Plaintiff, and his former attorney, Allen Feingold, who was disbarred at the time, filed a separate action stemming from the same claim for UIM benefits against the insurance carrier, the carrier’s counsel, the carrier’s selected defense arbitrator, the doctor retained to perform an IME and a medical expert referral company for allegedly conspiring to deprive “*the plaintiffs of benefits to which they were entitled by delaying the start*

of arbitration, obtaining a false medical examination, and appointing a biased arbitrator".³ The matter was docketed in the lower court as Scott Smietana and Allen Feingold v. State Farm, et. al., September Term, 2008, No. 1604. The Pennsylvania Superior Court affirmed the trial court's Order sustaining the defendants' preliminary objections to the complaint, No 501 EDA 2009.

9. On May 24, 2010 the Petition under consideration in this appeal was filed. It is entitled "Petition for Substitute Third Neutral" and was a copy of the original Petition filed in April of 2001 commencing this action, with the word "Substitute" penciled throughout the document. Additionally, it seeks the same relief as that requested in the Petition denied by Judge Sylvester in 2008.

10. The carrier filed an Answer, which raised venue, insufficiency of the pleading and a demurrer. A Reply was filed.

11. On June 24, 2010 this Court denied Plaintiff's Petition to Substitute Neutral Arbitrator, noting that the contract of automobile insurance in force at the relevant time directed that UM/UIM claims be subjected to arbitration "*in the county in which the insured resides unless the parties agree to another place*". Plaintiff's address of record is a Montgomery County address. The Order was entered without prejudice to the Plaintiff's right to pursue a UIM claim in the appropriate forum.

12. Plaintiff filed a Motion for Reconsideration, which was denied by Order dated July 8, 2010.

13. A Notice of Appeal was filed on July 23, 2010.

³ Page 2 of Superior Court Memorandum Opinion, Smietana and Feingold v. State Farm, 501 EDA 2009.

II. DISCUSSION

Plaintiff alleges in his Motion for Reconsideration that the June 24th Order violates the principle of coordinate jurisdiction and cites Golden v. Dion & Rosenau, et. al. 410 Pa.Super 506, 600 A.2d 568, 1991 Pa.Super LEXIS 3733 in support of his contention that denial of the Petition to Substitute Neutral Arbitrator was erroneous. Golden is distinguishable.

In Golden defendants filed preliminary objections seeking dismissal of the complaint. The preliminary objections were denied. After additional pleadings were filed, defendants sought reconsideration on the basis that the plaintiff had filed other lawsuits through the same counsel which alleged similar facts and causes of action against the defendants, and that in those cases, identical preliminary objections were granted. The trial court denied reconsideration. Inexplicably, approximately thirty days later a second judge reconsidered the first judge's order and granted the preliminary objections, resulting in the dismissal of the complaint. 600 A.2d 568, 569-570.

In finding that the principle of coordinate jurisdiction was clearly violated, the Golden court held that

As a panel of this court has cogently stated, the purpose of the rule prohibiting one trial judge from overruling a decision by another judge on the same court is to ". . . ensure a degree of pretrial finality 'so that judicial economy and efficiency can be maintained.'" Salerno v. Philadelphia Newspapers, Inc., 377 Pa.Super. 83, 87, 546 A.2d 1168, 1170 (1988) (quoting Commonwealth v. Eck, 272 Pa.Super. 406, 409, 416 A.2d 520, 522 (1979)). Clearly the second judge's reversal of the first judge's order did not serve the interests of judicial economy and efficiency which the rule seeks to promote. The issue concerning the preliminary objections had been decided and reconsideration thereof denied. At that point, the trial court should not have been called upon to devote any further time to the consideration of that issue.
600 A.2d at 570.

Relevant to the Court's holding was its finding that the defendants were clearly judge shopping and attempting to "appeal" an unfavorable interlocutory order within the trial court system, as opposed to pursuing the issue after a final appealable order was entered. To allow the second judge's order to stand would have violated the principle's goals of finality and judicial economy, so found the Court.

In reversing the second judge's order, the Superior Court in Golden noted that there is an exception to the prohibition of one judge of equal jurisdiction overruling a prior ruling of a judge on the same court. The exception was held applicable in Boyle v. Steiman, 429 Pa. Super 1, 631 A.2d 1025, 1993 Pa. Super. LEXIS 3145, wherein the Superior Court stated:

Absent some new evidence, it is improper for a trial judge to overrule an interlocutory order of another judge of the same court in the same case. Reifinger v. Holiday Inns Inc., 315 Pa.Super. 147, 461 A.2d 839 (1983). However, an exception exists where new evidence is placed on the record in the interim between the first trial court judge's ruling and the second trial court judge's reassessment. Gabovitz v. State Auto Ins. Assn., 362 Pa.Super. 17, 21 n. 2, 523 A.2d 403, 405 n. 2 (1987), *appeal denied*, 516 Pa. 634, 533 A.2d 92 (1987); Melendez by Melendez v. City of Philadelphia, 320 Pa.Super. 59, 62 n. 2, 466 A.2d 1060, 1062 n. 2 (1983). Where the record is materially different from the record that was before the preceding judge, it is not improper for the succeeding judge to reach a different result. Hutchison by Hutchison v. Luddy, 417 Pa.Super. 93, 110, 611 A.2d 1280, 1289 (1992); McNally v. Dagney, 353 Pa.Super. 402, 405, 510 A.2d 722, 724 (1986).

In Boyle a discovery sanction order was entered against the plaintiff for failure to file answers to interrogatories; the plaintiff was precluded from introducing evidence on any matter covered by the interrogatories⁴. The plaintiff, an investigator, sought payment of fees for investigative services performed for the defendant-attorney. Shortly after the preclusion order was entered, the plaintiff died and the administrator of the plaintiff's estate retained new counsel. New counsel immediately filed a motion to rescind the preclusion order on the basis that the

⁴ Plaintiff's original counsel did not contest the request for sanctions despite having answered the interrogatories.

defendant sought production of documents which were already under his control. 631 A.2d 1025, 1029.

The motion to rescind was considered by a different judge as the first judge had completed his rotation in discovery court. The preclusion order was lifted in the “interest of justice”. At trial, judgment was entered in favor of the plaintiff-investigator’s estate. An appeal was taken; on appeal the defendant challenged the order lifting the sanction/preclusion order on the basis that the ruling violated the principle of coordinate jurisdiction. The Superior Court concluded that it had not, finding that “*new counsel's motion to rescind the preclusion order and whatever evidence was offered at the subsequent non-transcribed oral argument represented a material change in the record and thereby permitted Judge Maier to reexamine and rescind the preclusion order entered by his predecessor in motions court.*” Id., at 1032.

Addressing the matter currently before the Court, it was neither error nor a violation of the principle of coordinate jurisdiction for this Court to deny Plaintiff’s Petition to Substitute Neutral Arbitrator. Interestingly, Plaintiff ignores the fact that Judge Sylvester denied Plaintiff’s Petition requesting the same relief on March 27, 2008. Query? Would not the granting of Plaintiff’s current petition have “violated” the March 2008 Order denying the identical request for relief? Has Plaintiff waived the right to request the substitution of the neutral arbitrator since no appeal was taken of the March 2008 Order?

In any event, an argument can be made for the fact that the principle of coordinate jurisdiction was not even affected by the most recent Order denying Plaintiff’s request to substitute the neutral arbitrator. This matter is ultimately governed by a contract of insurance which clearly states that disputes over UM/UIM coverage are to be resolved by way of arbitration.

Upon consideration of the initial Petition to Compel Arbitration, Judge Herron ordered the parties' arbitrators to select a neutral within thirty days; the parties were directed to only seek court intervention if an agreement could not be reached. Unfortunately, court intervention was required and a neutral arbitrator was appointed in October of 2001. There was no court action on the case until November of 2007 when Plaintiff filed a motion to appoint a new neutral arbitrator, which was denied in March of 2008. The three Orders to this point were a "final" court resolution of the particular issue presented to the court in an arbitration matter. The most recent Order can be similarly characterized and thus addressed a separate request for relief.

Assuming coordinate jurisdiction is at issue, the June 24, 2010 Order did not violate that principle of law. As noted, this matter was initially filed in April of 2001. Largely as the result of Plaintiff's original counsel's dilatory and vexatious actions, the continued existence of this case has violated the court system's goals of finality and judicial economy.⁵

Plaintiff commenced this action in April of 2001 with a petition requesting the appointment of a neutral arbitrator. Nine years have passed since the inception of the claim and despite court intervention to assist the parties in the resolution of a UIM claim that should be resolved via arbitration, a quick resolution has not occurred.

III. CONCLUSION

It was not error to deny the Petition to Substitute Neutral Arbitrator in this UIM matter. Thus, appellate relief is not warranted.

BY THE COURT:

D. Webster Keogh, J.

⁵ Attached to this opinion is a copy of the September 2, 2009 Memorandum and Order issued by the President Judge of the First Judicial District granting injunctive relief at the request of the Office of Disciplinary Counsel against Mr. Feingold; reference is made to this matter in the Memorandum.