

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D26515
H/ct

_____AD3d_____

Argued - February 16, 2010

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
SHERI S. ROMAN, JJ.

2009-01435

DECISION & ORDER

In the Matter of Progressive Northeastern Insurance
Company, appellant, v Richard S. Turek, respondent.

(Index No. 11215/07)

Buratti, Kaplan, McCarthy & McCarthy, Yonkers, N.Y. (Michael A. Zarkower of
counsel), for appellant.

Eppinger Reingold & Korder, Larchmont, N.Y. (Mitchell L. Korder of counsel), for
respondent.

In a proceeding, inter alia, pursuant to CPLR article 75 to stay arbitration of a claim
for supplementary underinsured/uninsured motorist benefits, the petitioner appeals from an order of
the Supreme Court, Rockland County (Weiner, J.), entered December 16, 2008, which granted the
respondent's motion to vacate an arbitration award dated April 9, 2008, and denied its cross motion
to confirm the arbitration award.

ORDERED that the order is reversed, on the law, with costs, the motion to vacate
the arbitration award is denied, the cross motion to confirm the arbitration award is granted, and the
matter is remitted to the Supreme Court, Rockland County, for the entry of an appropriate judgment.

The respondent Richard S. Turek (hereinafter the claimant) contracted with the
petitioner Progressive Northeastern Insurance Company (hereinafter the insurer) for supplementary
underinsured/uninsured motorist coverage. The supplementary underinsured/uninsured motorist
endorsement (hereinafter the SUM endorsement) provided that the insurer "[would] pay all sums that

the [claimant] shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . . caused by an accident arising out of such uninsured motor vehicle's ownership, maintenance or use." The SUM endorsement also provided that "[i]f [the claimant] and [the insurer] do not agree that [the claimant] is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle . . . , the matter or matters upon which [the claimant] and [the insurer] do not agree shall be settled by arbitration."

Contrary to the claimant's contention, "the arbitrator neither committed misconduct (*see* CPLR 7511[b][1][i]) nor exceeded his authority (*see* CPLR 7511[b][1][iii]) when he considered the issue of liability in determining whether the [claimant was] entitled to [uninsured] motorist benefits under [the SUM endorsement]" (*Matter of GEICO Gen. Ins. Co. v Sherman*, 307 AD2d 967, 968; *cf. Karadhimas v Allstate Ins. Co.*, 9 AD3d 429, 430-431). Moreover, the arbitrator did not err in considering the testimony of the nonparty witness, Lisa Cordaro, on the issue of whether "the claimant's negligence was the sole proximate cause of the accident" (*Karadhimas v Allstate Ins. Co.*, 9 AD3d at 431; *see Matter of GEICO Gen. Ins. Co. v Sherman*, 307 AD2d at 968).

Accordingly, the Supreme Court erred in granting the claimant's motion to vacate the arbitration award, and in denying the insurer's cross motion to confirm the arbitration award.

RIVERA, J.P., ANGIOLILLO, DICKERSON and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court