

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAIME A. RIOS
Justice

IA PART 8

ALLSTATE INSURANCE COMPANY, X

Petitioner,

_____ - against -

ANGELINA DUFFY,

Respondent,

- and -

MERCHANTS MUTUAL INSURANCE COMPANY,

Additional Respondents.

_____ X

Index

Number: 23384/01

Motion

Date: February 28, 2007

Motion

Cal. Number: 2

The following papers numbered 1 to 10 were read on this motion by respondent, Angelina Duffy (Duffy) to confirm the award of the arbitrator dated August 18, 2006 and cross motion by additional respondent, Merchants Mutual Insurance Company (Merchants) to vacate the arbitration award.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavits-Exhibits.....	1-3
Notice of Cross Motion-Affirmation-Affidavits-Exhibits.....	4-6
Affirmation in Opposition-Affidavits-Exhibits.....	7-8
Reply Affirmation-Affidavits-Exhibits.....	9-10

Upon the foregoing papers, the motion and cross motion are determined as follows:

On January 6, 2001, Duffy was a passenger in a motor vehicle registered to Hugo Lapedre (Lapedre) and insured by Merchants which was involved in an accident with an uninsured motor vehicle owned and operated by George White (White).

Duffy commenced a lawsuit against Lapedre, which was settled by Merchants for their bodily injury liability limits of \$100,000.00.

Thereafter, by demands dated August 15, 2001, Duffy sought arbitration of her claim for uninsured motorist (UM) benefits with Merchants and underinsured motorist (UIM) benefits with Allstate.

Allstate commenced this CPLR 7503 proceeding seeking inter alia to stay the arbitration for UIM benefits sought by Duffy and join Merchants as an additional respondent to the proceeding. Duffy filed a cross notice of petition also seeking to add Merchants as an additional respondent, compel Merchants to proceed to UM arbitration as Merchants failed to respond to the demand for arbitration served upon it within twenty days of its service upon Merchants and amend Duffy's demand for UIM arbitration to include a claim for UM coverage.

Merchants opposed the petition and cross petition arguing that despite their failure to move to stay the arbitration demanded by Duffy within twenty days, they should not be compelled to proceed to arbitration on the basis that there is no further coverage available to Duffy under the Merchants policy, which contains the same limits of \$100,000/\$300,000 for bodily injury liability and UM/UIM benefits.

By order dated October 10, 2002, this court (Thomas, J.) inter alia granted the petition and cross petition to the extent of adding Merchants as a party to the proceeding; compelling arbitration against Merchants; amending Duffy's arbitration demand to include a claim for UM benefits against Allstate, and setting this matter down for a hearing on the issue of whether Duffy qualified as an insured under the terms of Allstate's policy.

Merchants appealed the October 10, 2002 decision, which was affirmed by the Appellate Division on the ground that Duffy's entitlement to UM benefits from Merchants relates to whether certain conditions of coverage were met, not whether the parties agreed to arbitration. As Merchants failed to move for a stay within twenty days, the lower court properly directed that Merchants be added as a party and proceed to arbitration.

Following the arbitration in this matter held on July 19, 2006, the arbitrator awarded Duffy \$100,000.00 representing the full limits of UM coverage available under the Merchants' policy, despite Merchants' argument that it was entitled to an offset of \$100,000.00 already paid to Duffy under the Bodily Injury Liability portion of its policy.

Duffy currently seeks to confirm the arbitration award dated August 18, 2006 and enter judgment upon it.

Merchants opposes Duffy's application and cross moves to vacate the August 18, 2006 arbitration award contending that the arbitrator did not consider whether the \$100,000.00 Duffy recovered under the Bodily Injury Liability portion of the Merchants policy precluded any further recovery by Duffy for UM benefits under the Merchants policy on the erroneous basis that it is a coverage issue which already was or should be determined by the court.

Duffy opposes Merchant's cross motion arguing that: (1) the court already determined that Merchants' failure to move for a stay within the twenty day period precludes it from contesting the validity of Duffy's entitlement to UM benefits; (2) had the court determined that Merchants was entitled to a set off, it would have specified so in its decision as there no longer would have been a basis to proceed to arbitration; (3) there is no provision for a set off for UM coverage in the Merchants' policy, and in any event, an offset is not permitted under the law of the State of New Jersey, which Duffy argues is applicable herein.

Merchants replies that the application of New Jersey law at this late date would be very prejudicial, since, up until now, New York law which permits such set offs has governed this proceeding.

CPLR 7511 provides that an application to vacate an arbitration award by a party who has participated in the arbitration may only be granted upon the grounds that the rights of that party were prejudiced by corruption, fraud, or misconduct in procuring the award, partiality of the arbitrator, the arbitrator exceeded his powers or failed to make a final and definite award, or a procedural failure that was not waived (see Silverman v Cooper, 61 NY2d 299 [1984]; State Farm Mut. Auto. Ins. Co. v Arabov, 2 AD3d 531 [2003]; GEICO Gen. Ins. Co. v Sherman, 307 AD2d 967 [2003]).

Consistent with public policy in favor of arbitration, the grounds specified in CPLR 7511 for vacating an arbitration award are few in number and narrowly applied, with the list of potential objections being exclusive (see Domotor v State Farm Mut. Ins. Co., 9 AD3d 367 [2004]).

Here, Merchants does not challenge the award on any of the enumerated statutory grounds, but instead argues that the arbitrator did not consider whether the \$100,000.00 already

received by Duffy offset any UM recovery from Merchants based upon the arbitrator's erroneous belief that the issue of an offset was already determined by the court.

It is well settled that an arbitration award may not be vacated for errors of fact or law unless the award violates public policy, is totally irrational or exceeds a specifically enumerated limitation of the arbitrator's powers (see In re Wicks Constr., Inc., 295 AD2d 527 [2002]; Allstate Ins. Co. v Valeri, 221 AD2d 337 [1995]; Barbee v Nationwide Mut. Ins. Co., 194 AD2d 604 [1993]).

Whatever the merits of Merchants' claim to a set off, it is no basis for vacating an arbitration award (see Commerce & Indus. Ins. Co. v Nester, 90 NY2d 255 [1997]) as Merchants failed to demonstrate the existence of any of the grounds specified in the statute nor is the award totally irrational or violative of public policy (see Allstate Ins. Co. v Valeri, 221 AD2d 337, supra).

In light of this determination, it is unnecessary to consider the parties' remaining contentions.

Accordingly, Duffy's motion to confirm the arbitration award is granted and Merchants' cross motion to vacate the award is denied. The arbitration award of August 18, 2006 is confirmed and Duffy is granted leave to enter judgment accordingly.

Dated: April 4, 2007

J.S.C.