

**Matter of Progressive Northeastern Ins. Co. v
Seaport Orthopedic Assn.**

2009 NY Slip Op 31915(U)

August 25, 2009

Supreme Court, New York County

Docket Number: 108896/09

Judge: Joan B. Lobis

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Joan B. Lohis

PART 6

Index Number : 108896/2009
PROGRESSIVE NORTHEASTERN
VS.
SEAPORT ORTHOPEDIC ASSOCIATION
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE 8/7/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

116

17-34

35

Notice of Motion ^{Petition} Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

~~PETITION~~
~~MOTION DECIDED IN ACCORDANCE WITH~~
~~ACCOMPANYING DECISION AND ORDER & JUDGMENT~~

UNPAID 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: 8/25/09

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
In the Matter of the Arbitration Between
PROGRESSIVE NORTHEASTERN INSURANCE
COMPANY s/h/a PROGRESSIVE INSURANCE
COMPANY,

Petitioner,

Index No. 108896/09

-against-

Decision and Order

SEAPORT ORTHOPEDIC ASSOCIATION a/a/o
ELIZABETH RANDAZZO,

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).**

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner, Progressive Northeastern Insurance Company s/h/a Progressive Insurance

Company ("Progressive"), brings this petition, pursuant to C.P.L.R. § 7511, to vacate the award of the William F. Laffan, Jr., Esq., the Master Arbitrator, dated April 14, 2009 (the "Award"), which denied Progressive's appeal and left standing the decision of the lower arbitrator, which was in favor of Seaport Orthopedic Association ("Seaport"). Progressive asserts that the decisions of the lower arbitrator and the Master Arbitrator "were arbitrary, irrational, contrary to applicable law and so imperfectly executed, as to warrant vacatur and reversal."

This case arises out of a motor vehicle accident that occurred on June 19, 2002. Elizabeth Randazzo suffered injuries and received physical therapy and other treatments. She was charged \$3,158.99 for treatments rendered from May 15, 2003 to July 22, 2004. The insurance claim forms set forth that the service facility is "Seaport Orthopaedic Assoc." while the billing provider information is set forth as "Downtown Physical Medicin" [sic], which is an entity known as

Downtown Physical Medicine & Rehabilitation, P.C. ("Downtown").¹ When Seaport submitted claims to Progressive, Progressive issued forty (40) denials of claims. The denials were based on examinations by a neuropsychiatrist, an orthopedist, a chiropractor, and a physical medicine and rehabilitation specialist. None of these examiners concluded that Ms. Randazzo's injuries had fully resolved. The lower arbitrator found that Progressive had not sustained its burden of proof to substantiate the denials.

As an additional ground for denying coverage, Progressive asserted at the hearing that Seaport did not have standing to assert these claims. This assertion was based on Progressive's argument that the entity that actually rendered services to Ms. Randazzo was Downtown, and not Seaport, which Progressive claimed was a separate and distinct corporate entity. Seaport argued that Downtown was a division of Seaport, and that Seaport had standing to bring the claim. The lower arbitrator did not reach the merits of the issue of standing. Rather, he noted that all forty (40) denials were based on the medical examination reports, and not on the defense of lack of standing. The lower arbitrator said he was bound by the decision in Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d 556 (2008), which holds that unless a defense of a policy violation is raised in a timely denial, the insurance company is precluded from raising that defense thereafter (except for a defense of lack of coverage in the first instance). Since Progressive failed to raise the defense of lack of standing in any of its denials, the lower arbitrator determined that Progressive was precluded from presenting such evidence at the hearing.

¹ One health insurance claim form, dated September 17, 2003, lists Seaport as the physician or supplier.

Accordingly, the lower arbitrator ruled in favor of Seaport on the full amount of the claim. The decision of the lower arbitrator was rendered on November 10, 2008. Progressive served a notice of appeal, dated December 1, 2008 (the "Notice"). The face of the Notice reflects that it was served by certified mail on the American Arbitration Association ("AAA"). But, where the Notice contains the service address for Seaport's counsel, there is no indication as to the manner of mailing. Title 11 N.Y.C.R.R. § 65-4.10(d) sets forth the procedure for serving and filing a notice of appeal from a decision of a lower arbitrator:

(1) If grounds exist, . . . , any party to an arbitration may request that the arbitration award be vacated or modified by a master arbitrator.

(2) The request for review by a master arbitrator shall be in writing and shall be mailed or delivered to the designated organization's Master Arbitration administrative office within 21 calendar days of the mailing of the award. The request shall include a copy of the award in issue and shall state the nature of the dispute and the grounds for review. . . .

(3) The applicant for master arbitration review shall send, by certified mail, a copy of its filing papers to the opposing party at the same time that it submits the request for review to the designated organization.

(Emphasis added.) The Master Arbitrator determined that Progressive failed to comply with the regulation—by not mailing the papers to Seaport's counsel by certified mail—and that such failure "invalidates the service of the Notice." The Master Arbitrator set forth that he was "constrained to deny this appeal by virtue of the claimant's failure to comply with the mandate set forth in 11 NYCRR 65-4.10(d)(3)."

Apparently, Progressive did in fact mail the Notice and other papers to opposing counsel by certified mail, but did not so indicate on the face of the Notice. After receipt of the

Award, on April 17, 2009, counsel for Progressive sent an e-mail correspondence with attachments to the AAA to prove that the Notice and brief were sent to both the Master Arbitrator and counsel for Seaport by certified mail. Progressive's counsel requested that the matter be "taken back" by the Master Arbitrator.

By letter dated April 24, 2009, Master Arbitrator Laffan wrote to the AAA concerning Progressive's request for a reversal of his determination. In his letter, the Master Arbitrator confirms that the Notice did not set forth on the face of it that it was sent to opposing counsel by certified mail. It was on this basis that the Master Arbitrator rejected the appeal; he maintains that a notice of appeal must contain all the requirements, as set forth in the regulations. Because Progressive's Notice did not observe this requirement, he asserts that it was fatally defective, and that he was correct to reject the appeal on these grounds. The Master Arbitrator concludes by stating that to allow Progressive to re-argue the appeal now would essentially violate the rule that an appeal must be served within twenty-one (21) days.

"Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined." Goldfinger v. Lisker, 68 N.Y.2d 225, 230 (1986) (citations omitted). The Notice failed to set forth compliance with 11 N.Y.C.R.R. § 65-4.10(d)(3) in that it failed to set forth the manner of service. There is no basis to vacate the award under C.P.L.R. § 7511. From the face of the Notice, the Master Arbitrator was within his power to hold that service was improper, and refuse to reach the merits of the decision of the lower arbitrator.

Accordingly, for the reasons set forth above, the Award is confirmed in all respects.
The petition is dismissed. This constitutes the decision and judgment of the court.

Dated: August 25, 2009



JOAN B. LOBIS, J.S.C.

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).