Matter of DTG Operations, Inc. v Autoone Ins. Co.
2014 NY Slip Op 32464(U)
September 16, 2014
Supreme Court, New York County
Docket Number: 156932/13
Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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In the Matter of the Arbitration of Certain Controversies Between DTG OPERATIONS, INC. d/b/a DOLLAR RENT-A-CAR,

Petitioner,

INDEX NO. 156932/13

-against-

AUTOONE INSURANCE COMPANY, a/s/o Vincent-Harris, Ricardo Davey, Jennifer Singh Paige, and Michelle Chase,

Respondents.

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JOAN A. MADDEN, J.:

Petitioner DTG Operations, Inc. ("DTG") commenced this proceeding pursuant to CPLR 7511(b) seeking to vacate and set aside four arbitration awards dated May 5, 2013, which granted respondent AutoOne Insurance Company's ("AutoOne") claims for loss transfer subrogation pursuant to Insurance Law §5105(a). Respondent AutoOne opposes the petition.

On April 20, 2010, a vehicle insured by petitioner DTG allegedly struck the rear end of a vehicle insured by respondent AutoOne. Four occupants of the AutoOne vehicle, Vincent Harris, Ricardo Davey, Jennifer Singh Paige, and Michelle Chase, received no-fault insurance benefits. On December 5, 2012, AutoOne commenced four separate arbitration proceedings against DTG seeking loss transfer subrogation pursuant Insurance Law §5105(a) with respect to the no-fault benefits paid on behalf of the four occupants of the AutoOne Vehicle. On May 3, 2013, the arbitrator issued four decisions determining that AutoOne "proved 100% liability" against DTG for "failure to maintain a proper distance and lookout at all times," explaining that "liability solely rests with the respondent [DTG] as the points of impact indicated on the police report,

point 7, 8 and 9 for the applicant [AutoOne] and point 1, 2 and 3 for the respondent demonstrate rear-end collision." The arbitrator also determined that "[b]ased on the EUO submitted by the applicant which shows that the applicant vehicle was being used as livery, Loss Transfer does apply." In each decision, the arbitrator found that "AutoOne proved all damages" and explicitly noted that "Respondent(s) indicate that they are not disputing damages." The arbitrator awarded damages in the following amounts: $60,155.31 on behalf of Harris; $15,991.07 on behalf of Davey; $41,637.82 on behalf of Paige; and $8,749.75 on behalf of Chase.

On July 30, 2013, DTG commenced the instant proceeding to vacate the four arbitration awards. DTG asserts the arbitrator exceeded his authority by awarding more than the statutory no-fault limit of $50,000 in connection with the claim submitted on behalf of Harris. DTG also asserts the arbitration awards are arbitrary and capricious, as they lack evidentiary support that the AutoOne vehicle was registered or used "principally" as a livery for hire. DTG argues that even if the AutoOne vehicle was being used as a "dollar van" at the time of the collision, there is no evidence it was used "principally" as a livery, as required under Insurance Law §5105(a). DTG further asserts the arbitration awards lack evidentiary support that the $127,493 in medical bills for the occupants of the AutoOne vehicle are causally related to injuries suffered in the collision. Specifically, DTG objects that AutoOne submitted no medical evidence, and according to the police report, no one was injured in the collision[1]

In opposition, AutoOne argues that DTG "failed to adequately preserve their right to make the present Petition," by waiving any objection to the arbitrator's jurisdiction to resolve the

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[1]Petitioner additionally objected that the awards were not signed and affirmed by the arbitrator in violation of CPLR 7507, but withdrew that objection at oral argument when respondent produced signed copies.

threshold question of whether AutoOne's loss transfer claims were subject to arbitration. AutoOne also argues there was "ample evidence" to support the arbitrator's decision that the AutoOne vehicle was used primarily as a vehicle for hire, and that DTG failed to raised any issue of damages or causation at the arbitration, and as a result waived its right to contest the nature of the payments, whether the expenses were causally related to the collision, and the amount sought in the Harris claim. With respect to the amount of the Harris claim, AutoOne additionally argues an additional $25,000 is available as Optional Basis Economic Loss coverage.

In reply, DTG explains that it is not objecting to the arbitrability of AutoOne's loss transfer claims, and states that it consented to participate in the arbitration and for the arbitrator to determine those claims, and is now seeking review of the arbitrator's awards on "in its merits pursuant to CPLR 7511." DTG asserts that at the arbitration AutoOne "never argued" that the claim on behalf of Harris included benefits paid under Optional Basis Economic Loss coverage. DTG requests that the court take judicial notice that no-fault coverage is statutorily limited to $50,000 per claimant, and argues it cannot be compelled to pay more than the statutory limit. DTG further argues that it is not precluded from raising an issue as to causation, since AutoOne had the prima facie burden to establish that the medical treatments were causally related to the collision.

Insurance Law §5105 provides that "an insurer who pays out first-party benefits or workers' compensation benefits in lieu thereof is afforded the mandatory intercompany arbitral process to recoup payment of those benefits through a loss transfer." State Farm Mutual Automobile Insurance Co v. City of Yonkers, 21 AD3d 1110, 1111 (2nd Dept 2005). As a "condition precedent to ultimate recovery" on a loss transfer claim, section 5105(a) imposes

statutory weight and use prerequisites that "at least one of the motor vehicles involved" either weighs more than 6,500 pounds or is "used principally for the transportation of persons or property for hire." Progressive Casualty Insurance Co v. New York State Insurance Fund, 47 AD3d 633, 634 (2nd Dept 2008); see Allstate Insurance Co v. New York Petroleum Association Compensation Trust, 104 AD3d 682 (2nd Dept), lv app den 21 NY3d 858 (2013); Progressive Northeastern Insurance Co v. New York State Insurance Fund, 56 AD3d 1111 (3rd Dept 2008), lv app den 12 NY3d 713 (2009).

Since arbitration pursuant to Insurance Law §5105(b) is mandatory, the arbitrator's determination is subject to "closer judicial scrutiny" than an arbitration conducted pursuant to a voluntary agreement. Motor Vehicle Accident Indemnification Corp v. Aetna Casualty & Surety Co, 89 NY2d 214, 223 (1996). "To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious." Id. "In addition, Article 75 reviews questions whether the decision was rational or had a plausible basis." Progressive Casualty Insurance Co v. New York State Insurance Fund, supra at 634 (quoting Petrofsky v. Allstate Insurance Co, 54 NY2d 207 [1981]). "[A]n award may be found to be rational if any basis for such a conclusion is apparent to the court based upon a reading of the record." State Farm Mutual Automobile Insurance Co v. City of Yonkers, supra at 1111. Moreover, an arbitration award may be modified or vacated pursuant to CPLR 7511(b)(1)(iii), if it "manifestly exceeds a specific, enumerated limitation on the arbitrator's power." Kowaleski v. New York State Department of Correctional Services, 16 NY3d 85, 90 (2001);

At the outset, the court notes that contrary to AutoOne's assertion, at no point during the ~~corse~~ course of the proceedings in this matter, has DTG taken the position that the arbitrator lack

jurisdiction or that AutoOne's claim was not arbitrable. Rather, as DTG explains, it consented to and participated in the arbitration proceedings.

Applying the foregoing standards, the court concludes there was sufficient evidentiary support for the arbitrator's determination that the AutoOne vehicle was being "used principally for the transportation of persons or property for hire" within the meaning of Insurance Law §5105(a). The arbitrator determined that based on the examinations under oath (EUOs) submitted by AutoOne, which were the EUOs of each of the four injured occupants, "the vehicle was being used as livery and Loss Transfer does apply." As stated in AutoOne's contentions, and conceded by DTG, each injured occupant testified under oath that on the day of the accident they had paid to ride in the AutoOne vehicle, which was a 15-passenger van. While DTG argues that such testimony does not show that the vehicle was "principally" used for hire or livery, AutoOne submitted documentary evidence showing that the vehicle was registered as "Livery Use" in 2006, 2007, 2008, 2009 and 2011, and in 2010 until five days before the accident. AutoOne's contentions state as follows:

> Please note that investigation has established that the Applicant (AutoOne) vehicle a 15 passenger E-350 Econo Super Extended Sport van which was originally sold and titled as a 'rental vehicle, or part of a rental fleet' on July 20, 2005 . . . has always been registered as and was principally used as fleet or livery vehicle except for a short time between when it was registered on April 15, 2010 (just prior to this loss) and subsequent to the loss on April 29, 2011, when it was properly registered as livery vehicle. Applicant contention relative to the registration status of the vehicle involved is supported by the VIN History trace done on the vehicle which has been submitted into evidence. It is clear that the vehicle in question was principally used by the insured as a livery vehicle prior to the time he claimed he switched it to a normal use. Who uses a 15 person van for personal use? Evidence proves that it was switched back to livery status following the accident. Additionally as from the testimony that has been submitted herein in the form of EUO's each of the individuals involved in this accident testified they paid to ride the van.

> Please note that the insurance agent that wrote the Applicant policy for personal use was charged with insurance fraud, among other crimes, for bilking several insurance companies out of more than $150,000 in owed premiums by underinsuring nearly two dozen dollar vans operating in Queens. This is supported by the press release which has also been submitted as evidence.
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> All of the evidence will show that the Applicant (AutoOne) did not receive the correct premium owed by the agent and their insured, and clearly the agent and insured knew the vehicle was being used as a livery vehicle. Specifically, our evidence shows that the vehicle involved in this accident was clearly being used as a livery vehicle, and has always been principally used as a livery vehicle although has not always paid the proper premium due. The investigation and fraud charged to the insurance agent, the vehicle owner in registering and insuring the vehicle as a personal use vehicle to save money on the premium, should not have any bearing on the fact that the Applicant's vehicle was used as a livery vehicle on the date of the loss and as such, loss transfer will apply.

Contrary to DTG's contentions, Insurance Law §5015(a) does not require that the vehicle and its driver be officially licensed by the New York City Taxi and Limousine Commission. Rather, as noted in Philadelphia Insurance Co v. Utica National Insurance Group, 97 AD3d 1153 (4th Dept 2012), "there is a paucity of decisions interpreting the phrase 'for hire' in the Insurance Law §5015 context, and out own decisions on this point noted that the statute is 'inartfully drafted' and does not limit the universe of vehicles embraced thereby to 'taxis and buses, and livery vehicles.'" Id at 1155-1156 (quoting State Farm Mutual Auto Insurance Co v. Aetna Casualty & Surety Co, 132 AD2d 930, 931 [4th Dept 1987], aff'd 71 NY2d 1013 [1988]).

The decision on which DTG relies, Progressive Northeastern Insurance Co v. New York State Insurance Fund, supra, is distinguishable on its facts. In that case, on the day of the accident, a mini van registered as a passenger vehicle and bearing livery license plates belonging to a commercial vehicle, was being used to transport wheelchair passengers for a company engaged in the business of such transportation. Vacating the arbitration award, the Third

Department found the record "devoid of evidence establishing the 'principal use' of the passenger vehicle insured by petitioner," explaining that "[n]o proof established *when* the livery plates were put on the passenger vehicle, or if this plate-switching or use of the passenger vehicle to transport passengers or property for hire occurred on any occasions other than the date of the accident, i.e. whether it was Taddeo's or Redden's practice to use this passenger vehicle 'for hire.'" Id at 1113. The Court concluded that "[t]o the extent the arbitrator granted respondent's application based upon its finding that petitioner's insured passenger vehicle was 'at the time' being used as a vehicle for hire, such a conclusion is inadequate to support the award and is 'in disregard of the standard prescribed by the legislature,' i.e. that one of the vehicles be used '*principally* . . . for hire.'" Id at 1113-1114 (internal citations omitted). In the instant matter, however, AutoOne submitted evidence which established not only that the occupants had paid to ride in the 15-passenger van, but also that the van was registered as "livery use" for the five-year period prior to the accident. Notably, it does not appear DTG disputed that the vehicle was being used as a so-called "dollar van."

Thus, under the circumstances presented, it cannot be said that the arbitrator's determination as to the livery use of the vehicle was "arbitrary and capricious or unsupported by any reasonable hypothesis." Motor Vehicle Accident Indemnification Corp v. Aetna Casualty & Surety Co, supra at 224.

Turning to DTG's objections as to the lack of evidentiary support for the $127,493 in medical bills and the absence of medical evidence as to causation, such objections go to the issue of damages. Each of the arbitrator's awards states that "Applicant AutoOne Insurance Company proved all damages," and that "Respondents(s) indicates that they are not disputing damages." In

view of DTG's failure to dispute damages in the arbitration, it waived its right to object to damages in both the arbitration and the instant proceeding. Notably, contrary to DTG's assertion that the police report indicates no one was injured, the portion of the police report entitled "PERSONS KILLED OR INJURED IN ACCIDENT," lists the names, addresses and other identifying information of the four occupants of the AutoOne vehicle.

Notwithstanding the foregoing conclusion that DTG waived any issues as to damages, the arbitrator exceeded his authority in awarding damages in the amount of $60,155.31 on behalf of Harris. An arbitrator's award directing payment in excess of the statutory no-fault limit of $50,000 exceeds the arbitrator's power and constitutes grounds for vacatur of the award. See Brijmohan v. State Farm Insurance Co, 92 NY2d 821, 822 (1998); Countrywide Insurance Co v. Sawh, 272 AD2d 245 (1st Dept 2000); Allstate Insurance Co v. DeMoura, 30 Misc3d 145(A) (App Term 1st Dept 2011). Contrary to AutoOne's argument, since DTG has raised this objection in support of the instant application to vacate the award, this particular objection has not been waived. See Brijmohan v. State Farm Insurance Co, supra at 822; Silverman v. Benmor Coats, Inc, 61 NY2d 299 (1984); Allstate Insurance Co v. Demoura, supra. Moreover, even if, as AutoOne contends, the "ability" to collect more than $50,000 exists by purchasing Optional Basic Economic Loss coverage, the record does not show that such coverage was purchased and was in effect at the time of the accident. Thus, the arbitration award on behalf of Harris is modified to the extent of reducing the damages amount to the statutory limit of $50,000.

Based on the foregoing, DTG's petition to vacate the four arbitration awards is granted only the extent the award on behalf of Vincent Harris is modified and reduced to $50,000. In all other respects, DTG's petition to vacate the four arbitration awards is denied.

Finally, where, as here, an application to vacate an arbitration awards is denied, the awards must be confirmed pursuant to CPLR 7511(e). See Blumenkopf v. Proskauer Rose LLP, 95 AD3d 647 (1st Dept 2012). Accordingly, the arbitration award on behalf of Vincent Harris is confirmed as modified, and the arbitration awards on behalf of Ricardo Davey, Jennifer Singh Paige, and Michelle Chase are confirmed.

Settle order and judgment on notice.

DATED: September 16, 2014

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.