

Oxford Health Plans (NY), Inc. v Leventhal
2007 NY Slip Op 31777(U)
June 13, 2007
Supreme Court, New York County
Docket Number: 0115694/2006
Judge: Lewis Bart Stone
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LEWIS BART STONE
Justice

PART 505

Index Number : 115694/2006

OXFORD HEALTH PLANS [NY]

vs

LEVENTHAL, GERALD H., M.D.

Sequence Number : 001

CONFIRM AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ 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 *is granted and cross motion is denied in accordance with the annexed decision and order.*
Settle judgment

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

Dated: 13 June 07

Lewis Bart Stone

HON. LEWIS BART STONE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

-----X
OXFORD HEALTH PLANS (NY), INC., :
 :
 Petitioners, : DECISION AND
 : ORDER
 GERALD H. LEVENTHAL, M.D. :
 : INDEX NUMBER
 -against- : 115694/06
 :
 Respondent. :
-----X
Hon. Lewis Bart Stone, J

This proceeding was commenced by Petitioner, Oxford Health Plans (NY), Inc. (“Oxford”), by Notice of Petition and dated October 19, 2006, pursuant to Civil Practice Law and Rules (“CPLR”) §7510 to confirm an arbitration award dated September 28, 2006 (the “Award”) awarding Oxford the sum of \$206,983.50 plus interest as against Respondent Gerald H. Leventhal, M.D. (“Leventhal”). On January 12, 2007, Leventhal cross-moved to vacate the Award, dismiss Oxford’s petition and order a new arbitration proceeding before a different arbitrator.

On January 18, 1994, Oxford and Leventhal entered into a Primary Care Physician Agreement (the “Agreement”) under which Leventhal was to provide certain health services to Oxford’s insured and be compensated for such services pursuant to agreed reimbursement rates. The underlying dispute in this proceeding is a claim under the Agreement by Oxford that Leventhal regularly mischaracterized

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procedures and diagnoses so as to inflate the amounts payable to him by Oxford. To resolve this claim, Oxford commenced an arbitration under Paragraph 11 of the Agreement which provided for the resolution of all disputes by “final and binding arbitration in New York, pursuant to the rules of the American Arbitration Association (“AAA”) with one arbitrator.”

The arbitration was commenced on March 30, 2006, by Oxford submitting a demand for arbitration (the “Demand”) to the AAA, and sending a copy to Leventhal as provided by AAA rules. A single arbitrator was selected and after a hearing at which evidence on the merits of the dispute were heard, the arbitrator issued the Award. Leventhal did not attend the arbitration and submitted no evidence at the hearing.

Leventhal asserts that the Award was improper and must be set aside as he had no notice of the arbitration, either from Oxford or AAA and that his failure to receive notice was the reason he did not participate. He also challenges the arbitrator for bias. Leventhal further asserts that he was ill during the time of the arbitration process and was never aware of the proceeding. To support his position, Leventhal asserts that neither he nor his staff remember receiving any of the notices sent by Oxford or the AAA during the arbitration process. Further, Leventhal claims that from the time the arbitration was commenced until the time of the Award, he was “in

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a blur” suffering from heart disease which impaired his ability to focus on his practice. Finally, Leventhal asserts that the notices were procedurally defective in that they failed to advise him that he should consult with counsel.

Oxford asserts that its attorneys sent two Federal Express packages to Leventhal during the course of the proceeding, one on March 30, 2006, containing a copy of the Demand together with a “cover” letter from Oxford’s attorneys, and the other, on September 12, 2006, which contained the hearing exhibits and expert reports, which Oxford intended to and did introduce at the September 19, 2006 hearing before the arbitrator.

Oxford has submitted with this motion documents from AAA’s files, certified by an Assistant Vice President of AAA, which includes copies of the following letters sent by AAA to both Leventhal and Oxford between the time Oxford filed the Demand with the AAA up to the time of the Award, viz:

1. Letter of April 3, 2006 advising Leventhal that the arbitration process had begun and advising the parties of certain procedural matters and options. This letter was sent by AAA to Leventhal by ordinary mail.

2. Letter of April 12, 2006, confirming the results of a conference call of such day (scheduled and referred to in the AAA April 3, 2006 letter). Although Leventhal did not participate in the conference call (the letter recites that AAA was unable to

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reach him), the letter offered Leventhal the opportunity, by April 19, 2006, to object to those procedural matters which were addressed in the conference call. AAA sent this letter to Leventhal by both ordinary and certified mail.

3. Letter of April 20, 2006, which introduced the AAA case manager and gave the parties a list of names of ten potential arbitrators with their resumes. AAA sent this letter to Leventhal by both ordinary and certified mail.

4. Letter of May 24, 2006, advising of the appointment of the arbitrator and requesting any comments of the parties as to his qualifications and conflicts. AAA sent this letter to Leventhal by UPS overnight letter.

5. Letter of June 7, 2006, confirming the appointment of the arbitrator and setting dates for a preliminary hearing to resolve procedural issues. AAA sent this letter to Leventhal by regular and by certified mail, return receipt requested.

6. Letter of July 6, 2006, confirming that the preliminary hearing had been held and setting the date for the final hearing. AAA sent this letter to Leventhal by both ordinary and certified mail.

7. Letter of September 13, 2006, addressing Leventhal's failure to pay his half of AAA's fees for the arbitration and asking Oxford to cover them if Oxford wished to proceed to hearing. AAA sent this letter to Leventhal by regular and certified mail.

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Although Leventhal denies being aware of any of this correspondence, his office manager Nadine Lieberman, acknowledged receipt of the September 12, material sent by Federal Express by from Oxford's counsel on September 12, 2006. Although Lieberman also apparently signed the certified mail receipt for AAA's June 7, 2006 letter, her affidavit claims she did not remember any correspondence other than the September 12 Federal Express material from Oxford.

Leventhal attempted to explain these serial non-deliveries by insinuating that the building staff of his building must have failed to deliver the mail or overnight courier packages sent to him. He submitted photographs of his building and his separate external office door to support this contention.

In further support of its position, Oxford submitted proof (by checks endorsed and deposited by Leventhal) that other regular mailings by Oxford to Leventhal, addressed to his office during the time in question, were duly received.

NOTICE REQUIRED

Although the CPLR sets forth exacting notice and service requirements for the commencing of an action or proceeding and for the service of subsequent motions and notices, procedural requirements of the CPLR do not control the procedural process of arbitration. As parties may elect to arbitrate, they may elect to adopt such

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reasonable procedural steps and requirements as they wish for an arbitration. As both the New York Arbitration Law (CPLR Art. 75) and Federal Arbitration Act (FAA) generally require the enforcement of arbitration agreements, agreements relating to procedural aspects of arbitration are equally subject to such enforcement rules, except only to the extent they violate the respective state or federal arbitration laws. Leventhal has made no such showing of violation.

Here, under Paragraph 11 of the Agreement, the parties agreed to be bound by AAA procedural rules (the "Rules"). AAA Rule R-39 provides:

(a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (E-mail), or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

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Both the two communications from Oxford and all the seven above described communications from AAA complied with the Rules. The fact that AAA also sent additional copies of certain communications by certified mail does not negate that proper notice under the Rules were given. Further, Leventhal's assertion that he had not received or been aware of the notices is legally irrelevant. In the Agreement, Leventhal agreed that notice could be served on him by mail, which notices would be binding. While Leventhal and Oxford could have agreed to different rules such as for example, requiring notices only to be effective upon receipt, or only when Leventhal became aware of the contents, or require notice to be sent to Leventhal's post office box, they did not. Leventhal is therefore bound by the Agreement. ThermaSol, Ltd. v. Dreiske, 52 NY2d 1069 (1981), cert. den. 454 US 826 (1981).

New York law presumes that a letter properly addressed, stamped and mailed has been duly delivered. See Trusts Guar. Co. V. Bernhardt, 270 NY 350 (1936) (testimony that the notice was not received is not competent as bearing on whether it was mailed). Denial of receipt alone is thus insufficient to overcome this presumption. Clearly, a letter not properly addressed cannot rely on this presumption. See Connolly v. Allstate Ins. Co., 213 AD2d 787 (3rd Dept. 1995), (incorrect post office box number on address and the recipient attorneys' denial receiving the letter is sufficient to find notice ineffective in the context of an arbitration proceeding).

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However, even a misaddressing is not always fatal if the party asserting service can show by proof from the post office that they would have delivered the letter in any event. See Brounell v. Feingold, 82 AD2d 844 (2nd Dept. 1981), (postmaster affirmation that post office routinely processed mail improperly addressed to Bethpage and Old Bethpage is sufficient to overcome incorrect address problem). See also Taft v. Lesko, 182 AD2d 1008 (3rd Dept 1992) (affidavit that a mailing of a copy of a service to a defendant at “Minisink Road, Goshen” would be delivered to the defendant from the letter carrier who delivered the mail to Minisink Road was sufficient to overcome the address issue). In any event, there was no showing here of any improper or incorrect address or any evidence to counter the credible submissions of Oxford that the notices were sent.

The material submitted by Leventhal shows that his office was located in a substantial Park Avenue doorman residential building making it exceedingly likely that correspondence addressed to him and delivered to the building, was at least received by building service employees as agents for the tenants or tenant owners of the building. Having elected to maintain his office in such a building, and having employed staff (including his office manager and wife) to deal with correspondence, Leventhal is also bound by the actions of his agents. While Leventhal, his wife and his office manager “do not recall” receiving certain notices, no further proof was

presented from building service employees or other sources to indicate any systematic breakdown of message and package delivery, even if such proof were sufficient to overcome the presumption of delivery where proof of mailing had been established.

While Leventhal's office manager conceded the receipt of one delivery of material, she also signed for another letter, and does not remember such acknowledgment. While Leventhal argues that there were no receipts signed for all certified mail letters, AAA had no obligation under its rules to send notices in a manner to require receipts. It is to no avail that Leventhal implies that the lack of receipts for certified mailings show they were not mailed. Certified mail comes in several flavors, one of which does not provide for a receipt. As the Rules require neither Certified Mail nor Certified Mail with Receipt Requested, the fact that no receipt was returned may be proof of nothing more than no receipt was requested. However, in any event, certified mail was not required by the Rules, to which Leventhal had agreed.

Oxford has provided sufficient proof of giving of notices as required by the Rules. At least two were conclusively received, putting Leventhal on notice of the arbitration. These proven receipts of two of the pieces of correspondence were sufficient to belie Leventhal's claims that notice of the arbitration was insufficient even if he could establish that some or all of the other notices went astray. In fact,

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Leventhal's assertion that all but one of nine notices to him were not received strains the credulity of this Court.

Leventhal's claim of illness is also no defense to Oxford's award. During the period from the Demand to the Award, the record is clear that Leventhal maintained his practice, albeit at a reduced level, and maintained full staff at his office and even had his wife substitute for his office manager during her vacation. Further, his office was at a large Park Avenue apartment building, where there is no showing that Leventhal's illness had any effect on the continued functioning of building staff to receive and deliver mail. In fact, the delivery of Oxford's checks and their cashing by Leventhal and/or his staff during such period provides clear evidence that Leventhal's office was open and functioning during the period in question. The failure of the post office, UPS or Federal Express to return material sent to Leventhal by reason of non-delivery confirms this conclusion.

NO NOTICE TO CONSULT WITH COUNSEL

Leventhal asserts that the form of the notices were procedurally defective in that none of them advised him that he should consult with counsel. There is no such requirement in the AAA rules. Further, as the dispute between the parties was a civil dispute not involving any consumer transaction, the assertion that a notice to arbitrate

should advise the recipient to consult with counsel is frivolous and should not have even been raised.

Leventhal has cited two cases to support his position, Nataji v. Artenberg, 130 AD2d 469 (2nd Dept. 1987) and Sartiano v. Becker, 119 AD2d 656 (2nd Dept. 1986) app. disp. w.o. opinion 68 NY2d 806 (1986). They do not. Both cases set aside arbitration awards where the arbitration procedures forbade a party from being represented by counsel.¹ Citing such bases here are to irrelevant as to be frivolous.

BIAS

Leventhal's first claim of bias is that Oxford selected the arbitrator. AAA submitted list of arbitrators to both parties in accordance with the Rules. Both parties had, under the Rules, the right to strike arbitrators. Leventhal's failure to exercise this right is part of his failure to participate, which if not excused (as this court so finds), binds him to the choice of arbitrator. The additional fact that the arbitrator was paid by Oxford who advanced the full costs because of Leventhal's default to contribute, adds nothing to any bias inquiry.

¹ R-24 of the Rules, which Leventhal agreed would control any arbitration procedure, makes it clear that Leventhal, unlike the petitioners in Nataji and Sartiano, had the right to be represented by counsel at all times in the arbitration proceeding.

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Leventhal's arguments boils down to an assertion that arbitration conducted where one party refuses to participate and pay the fees he had agreed to, would be invalid for bias of the arbitrator, as in all such cases, by definition, the arbitrator is acceptable to and paid by the non defaulting party. The argument is absurd.

Leventhal's second claim of bias is that the arbitrator had been involved in six other Oxford matters, and that at least two of the nine other arbitrators had not arbitrated an Oxford matter. This is an insufficient basis to establish any showing of bias or evident partiality.

The fact that the arbitrator had been selected for six other Oxford cases is hardly proof of bias. It is instead evidence of a lack of bias as such arbitrator had not been rejected by at least five other persons who had arbitrated against Oxford, even after knowing of his prior experience. To make a case of bias, mere speculation is insufficient. This court rejects Leventhal's assertion of bias.

Accordingly, Oxford's petition is granted and Leventhal's cross-motion is denied.

This is the Decision and Order of the Court.

Settle judgment.

DATED: JUNE 13, 2007
NEW YORK, NEW YORK

A handwritten signature in black ink, appearing to read "Lewis Bart Stone", written over a horizontal line.

Hon. Lewis Bart Stone
Justice of the Supreme Court