

**Travelers Indem. Co. v Hereford Ins. Co.**

2007 NY Slip Op 32527(U)

August 6, 2007

Supreme Court, New York County

Docket Number: 0102286/2007

Judge: Joan Madden

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

-----X  
TRAVELERS INDEMNITY COMPANY,

Index No: 102286/2007

Petitioner,  
-against-

HEREFORD INSURANCE COMPANY,

Respondent.

-----X  
JOAN A. MADDEN, J.:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Petitioner Travelers Indemnity Company ("Travelers") moves pursuant to CPLR § 7511 for a judgment vacating an arbitration award issued following a loss transfer arbitration held pursuant to N.Y. Ins. Law § 5105(a) on the grounds that the arbitrator exceeded his powers, rendered a decision which was arbitrary and capricious, and that the award is so imperfectly executed that a final and definite award upon the subject matter submitted was not made. Respondent Hereford Insurance Company ("Hereford") opposes the petition, which is denied.

**Background**

This dispute arises out of a car accident that occurred in Brooklyn, New York on November 6, 2000, when a vehicle owned and operated by Mark Thomches ("Thomches") collided with another vehicle that was parked and unoccupied at the time of accident. A police report indicates that the front-end of the vehicle that was driven by Thomches and insured by Travelers collided with the rear-end of the parked vehicle.<sup>1</sup> Jana Bolobanic ("Bolobanic") was a passenger in the vehicle driven by Thomches. As a result of the accident, Bolobanic received workmen's compensation benefits from Hereford, which then sought reimbursement from Travelers through a loss transfer arbitration proceeding held by Arbitration Forums, Inc. ("AFF"). The arbitrator issued a \$49,999.99 award to Hereford on December 5, 2006. (Travelers Exhibit A).

<sup>1</sup> Respondent states that the parked vehicle was also insured by Travelers.

Travelers raised various affirmative defenses before the arbitrator, including that Hereford failed to satisfy a condition precedent for loss transfer arbitration under N.Y. Ins. Law § 5105(a), which requires that “at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire.” Although the second vehicle which met the weight requirements under § 5105(a), Travelers argued that the vehicle was not “involved” in the accident since it was parked and unoccupied when it was hit by the vehicle operated by Thomches. In support of its argument, Travelers relied on the police report from the accident, the Merriam-Webster on-line dictionary definition of the word “involve,”<sup>2</sup> and Travelers v. Allstate, 248 A.D.2d 1024 (4<sup>th</sup> Dept. 1998).

Hereford countered that the parked vehicle was involved in the accident, since it was a “part of or included in the accident” in accordance with Travelers v. Allstate, *supra*.

The arbitrator found that the parked vehicle was “involved” in the accident for the purposes of N.Y. Ins. Law § 5105(a), writing that:

As to the affirmative defense of jurisdiction, the vehicle meeting weight requirement was parked. Accordingly, [Travelers] contends that vehicle was not “involved” within meaning of statute. While liability of a qualifying vehicle is not at issue, [Travelers] contends involvement is defined by active participation. Further, an unoccupied vehicle is not “in use.” However, the statute is silent as to what “involved” means and § 5102 [the section defining the statute’s terms] does not define same. I find that the subject vehicle was a part of the accident, much like a tree or median. However, but for the subject vehicle being struck, it would not have been involved in the accident. Until the legislature amends the statute to clarify this question, this tribunal must find the subject vehicle to be “involved” in accident.

(Travelers Exhibit D).

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<sup>2</sup> The dictionary cited by petitioner offers several definitions of “involve” including to enfold or envelop so as to encumber, to engage as a participant, to oblige to take part, to relate closely, to have within or as part of itself, and to require as a necessary accompaniment.

Travelers now seeks to vacate the award, relying on its arguments before the arbitrator, and Hereford opposes the petition.

### Discussion

Under Article 75 of the CPLR, judicial review of an arbitration award is narrowly circumscribed. Thus, to vacate an award, a party who has participated in arbitration must show that “the rights of that party were prejudiced by corruption, fraud or misconduct in procuring the award, partiality of the arbitrator, that the arbitrator exceeded his power or failed to make a final and definite award, or a procedural failure that was not waived [CPLR 7511, subd. [b], par. 1].” Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 307 (1984).

At the same time, since arbitration under N.Y. Ins. Law § 5105 is compulsory, New York case law has imposed “closer scrutiny of the arbitrator’s determination under CPLR 7511(b).” See Motor Vehicle Acc. Indemnification Corp. v. Aetna Casualty and Surety Co., 89 N.Y.2d 214, 223 (1996). Thus, “an award in a compulsory arbitration must have evidentiary support and cannot be arbitrary and capricious.” Id.

Contrary to Travelers’ position, it cannot be said that the arbitration award is without evidentiary support or is arbitrary or capricious. In Travelers, on which both parties rely, the issue before the court was whether a truck weighing more than 6,500 pounds was involved in the accident since it had slowed almost to a stop when it was hit in the rear by a stopped car that had been pushed forward during a chain reaction accident. The court held that the truck was “involved” within the meaning of the statute because it was part of, or included in, the accident. Travelers v. Allstate, 248 A.D.2d at 1025. See American Heritage College Dictionary, 3<sup>rd</sup> Edition, p. 716 (defining involve as “to contain as a part; include”); see generally McKinney’s Cons Laws of NY, Book 1, Statutes § 232.

In this case, the record demonstrates that the front-end of the vehicle operated by Thomches collided with the rear-end of the parked vehicle. While the parked vehicle was unoccupied and not moving at the time of the accident, the arbitrator's determination that it was nonetheless involved in the accident for the purposes of Insurance law § 5105(a)(2) is not arbitrary or capricious as it was part of or included in the accident insofar as damage to Thomches' vehicle and the injury to his passenger resulted from the collision with the parked vehicle.

In any event, Traveler's objection on the ground that Hereford's claim is not subject to loss transfer arbitration under N.Y. Ins. Law § 5105(a) had to be asserted in an application to stay the arbitration, and Travelers' failure to do so waived the objection. See In the Matter of Arbitration between Liberty Mutual Ins. Co. and Allstate Ins. Co., 234 A.D.2d 901 (4<sup>th</sup> Dept. 1996) (denying application to vacate award in loss transfer arbitration under N.Y. Ins. Law § 5105(a) on the grounds that the none of the vehicles involved in the accident weighed more than 6,500 pounds, since this argument was waived by petitioner's failure to seek a stay of arbitration).

Accordingly, the petition to vacate the award must be denied.

#### Conclusion

In the view of the above, it is

ORDERED and ADJUDGED that the petition is denied, and the arbitration award, which was rendered in favor of respondent and against petitioner, is confirmed.

DATED: August 10, 2007

  
J.S.C.

#### **UNFILED JUDGMENT**

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