

**Matter of Allstate Ins. Co. v Eveready  
Ins. Co.**

2008 NY Slip Op 30149(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0110415/2007

Judge: Judith J. Gische

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

JUDITH J. GISCHE, J.S.C.

PRESENT: \_\_\_\_\_

PART 10

Index Number : 110415/2007

**ALLSTATE INSURANCE COMPANY**

VS.

**EVEREADY INSURANCE COMPANY**

SEQUENCE NUMBER : # 001

VACATE (AWARDS OF ARBITRATOR)

Justice

INDEX NO.

110415-07

MOTION DATE

#001

MOTION SEQ. NO.

MOTION CAL. NO.

ad on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

JAN 22 2008

NEW YORK  
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

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

Dated: 1/16/08

J.S.C.

Check one:  FINAL DISPOSITION

**JUDITH J. GISCHE, J.S.C.**  
 NON-FINAL DISPOSITION

DO NOT POST

REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----X  
In the Matter of the Application of

ALLSTATE INSURANCE COMPANY,

Petitioner,

-against-

EVEREADY INSURANCE COMPANY,  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY and  
ARBITRATION FORUMS, INC.,

Respondents.  
-----X

**DECISION/ORDER**

Index No.: 110415/07

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

<b>Papers</b>	<b>Numbered</b>
Pet n/m [article 75] w/verified petition, exhs . . . . .	1
Resp x-mot [confirm arb awd], exhs . . . . .	2
Pet JK affirm in opp . . . . .	3

*Upon the foregoing papers the court's decision is as follows:*

Petitioner has brought this petition to have the court vacate the arbitration decision and award against it vacated in its entirety. CPLR § 7511. Respondent Everready Insurance Company ("Everready") has cross moved to have the award confirmed and in opposition to the petition. Respondents State Farm Mutual Insurance Company ("State Farm") and Arbitration Forums, Inc. ("AFI") have not taken a position on this proceeding, although proof of service of the papers herein has been provided.

**The underlying dispute**

On July 1, 2006, there was a motor vehicle accident in Manhattan on the

Franklin D. Roosevelt East River Drive at East 49<sup>th</sup> Street (the "accident"). The accident involved three vehicles: [1] a vehicle operated by Ronen Bachar and insured by State Farm; [1] a vehicle operated by Lazaro Castellanos and insured by Eveready; and [3] a vehicle owned by Melvin Olivencia and allegedly insured by Allstate.

Allstate, Eveready and State Farm are voluntary members of an automobile property damage subrogation arbitration forum administered by AFI. Both Eveready and State Farm sought to arbitrate their claims through AFI for reimbursement of property damage paid against Allstate.

Allstate submitted its Answers with Contentions to AFI wherein it denied that Melvin Olivencia was an insured under a policy or contract with Allstate and, therefore, denied coverage. The Contentions further allege that Allstate "indexed [its] customer database and found no record of an active or inactive automobile insurance policy in Pennsylvania for Melvin Olivencia."

AFI notified all parties that it scheduled the subject arbitrations hearing for May 3, 2007. A copy of the hearing notice mailed to Allstate and AFI's mailing record has been provided to the court.

On May 7, 2007, the Arbitrator, Mitchel Lustig, made an award in favor of Eveready and against Allstate for 100% of the amount claimed, \$31,128.10 (the "Eveready award"). Lustig wrote:

"Considered [and] denied. [Allstate's Insured] lost control of its vehicle and struck [Eveready's Insured] and [State Farm's Insured]. [Allstate] failed to prove its affirmative defense. Records from Pennsylvania and list Allstate as insured. [Allstate] did not submit an affidavit from its underwriter that ID Card was fraudulent. [Allstate] only submitted an unsworn letter."

Also on May 7, 2007, Lustig awarded State Farm \$19,120.40 against Allstate,

only (the "State Farm award").

Arguments of the parties

Allstate contends that both AFI and the Arbitrator exceeded their authority by proceeding with the arbitration after Allstate pled no coverage because no policy had been issued. Allstate has provided the affidavit of Sandra White, an underwriter and manager employed by Allstate. White states the various methods in which she sought to determine whether the alleged vehicle was insured by Allstate, and she concludes that Allstate "never insured Melvin Olivencia or a 2000 Nissan on the date of accident, July 1, 2006, or at any other time."

Allstate also claims that the vehicle which respondents claim was involved in the accident was not properly identified and therefore the Arbitrator abused his power in failing to hold the claimants "to the burden of establishing the involvement of the alleged vehicle."

In the alternative, Allstate argues that if the court does find coverage, the court should limit the award to "the statutory minimal coverage for property damage of \$10,000 per occurrence and, therefore, reduce the awards to a total of \$10,000 to be divided between Eveready and State Farm."

Eveready contends that had Allstate acted timely and processed this claim properly, the issue of coverage would have been adjudicated in a court forum. Instead, Allstate chose to go forward with the arbitration and now should be estopped from denying coverage and raises new issues which it had a full and fair opportunity to raise at the arbitration itself. Eveready also states that this court should reject Allstate's request to review the arbitration decision for errors of fact.

[\* 5 ]

## Discussion

CPLR § 7511 [b] sets forth the narrow grounds upon which an arbitrator's award may be vacated. An award may be vacated by the court only if the petitioner can prove: it was procured by corruption, fraud, or misconduct, the arbitrator was not impartial, the arbitrator exceeded his or her power, or executed it so imperfectly that the award is indefinite or not final. It may also be vacated if there was a complete failure to adhere to required arbitration procedures.

Although in certain extraordinary circumstances, an award may be vacated if the petitioner can prove it is "utterly arbitrary or violative of public policy," this is a difficult burden to meet, and an award will not be vacated by the court merely because the arbitrator may have committed an error of law or fact. Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471 (2006).

The court should not assume the role of overseer to mold an award to conform to its sense of justice. In the matter of Sprinzen v. Nomberg, 46 NY2d 623, 629;. Therefore, judicial review of an arbitration award is extremely limited and it must be upheld when the arbitrator has offered "even a barely colorable justification for the outcome reached." Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d at 479.

Allstate contends that both AFI and the Arbitrator exceeded their authority by proceeding with the arbitration after Allstate pled no coverage because no policy had been issued. Allstate argues that only a court can determine whether insurance coverage existed.

AFI's Automobile Subrogation Arbitration Agreement (the "Agreement"), Article First provides that:

“Signatory companies are bound to forego litigation and in place thereof submit to arbitration any questions or disputes which may arise from any automobile physical damage subrogation or property damage claim not in excess of \$100,000.

This Article shall not apply to:

...

any claim as to which a company asserts a defense of lack of coverage on grounds other than

[1] delayed notice

[2] no notice

[3] noncooperation”

While Allstate clearly had a right to challenge the Arbitration, pursuant to the Agreement, Allstate is estopped from raising such a challenge at this time. Allstate participated in the arbitration process in a substantial and meaningful manner. First, instead of responding to Eveready's arbitration papers by advising respondents that it would not participate in the arbitration proceeding because it never insured the alleged offending motor vehicle, Allstate submitted an answer where it advised respondents that it wished to receive notice of the hearing and indicated that it would have a representative present to represent its interest.

In addition, at the hearing, Allstate made a strategic determination to submit documents in support of its no coverage position seeking the arbitrator to make such a finding. Lustig stated in his decision that he did not accept the letter submitted by Allstate because it contained an unsworn employee statement and was insufficient to support Allstate's no coverage position. Allstate does not even argue that it did not have a full and fair opportunity to present admissible satisfactory proof at the hearing.

Allstate waived its objection to the underlying arbitration by failing to timely put this dispute before the court and, instead, defending their position on this issue before the arbitrator. Allstate, therefore, is estopped from raising this issue now before the court in an attempt to "get a second bite at the apple."

The court rejects Allstate's arguments with regards to any alleged mistake of fact or law that it claims Lustig made in reaching his decisions in favor of Eveready and State Farm. The question of whether the arbitrator arrived at the correct conclusions is not for the court to decide. "An arbitration award is not reviewable by a court for errors of law or fact." Colleti v. Mesh, 23 A.D.2d 245 (1<sup>st</sup> Dept. 1965) *aff'd*. 17 N.Y.2d 460.

Accordingly, the petition is hereby denied in its entirety. The cross motion by respondent Eveready to confirm the award by Arbitrator Lustig dated May 7, 2007 which awarded \$31,128.10 in favor of Eveready and against Allstate is hereby granted and the award is confirmed. Eveready is entitled to a money judgment against Allstate for the respective amount awarded.

### **Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that the petition is denied in its entirety; and it is further

**ORDERED** that the cross motion to confirm the award by Arbitrator Lustig dated May 7, 2007 which awarded \$31,128.10 in favor of Eveready and against Allstate is hereby granted; and it is further

**ORDERED** that the Clerk of Court shall enter judgment in favor of respondent Eveready Insurance Company and against petitioner Allstate for the total amount set forth in the arbitrator's opinion and award, Thirty One Thousand One Hundred Twenty


[\* 8 ]  
Eight and 10/100 Dollars (\$31,128.10), with interest thereon from May 7, 2007.

Any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
January 16, 2008

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JAN 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE