

**Travelers Indem. Co. v Rapid Scan
Radiology, P.C.**

2008 NY Slip Op 30315(U)

February 1, 2008

Supreme Court, New York County

Docket Number: 0115827/2007

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: _____ J.S.C.
Justice

PART ~~4~~ Part 5

TRAVELERS INDEMNITY COMPANY

INDEX NO.

115827/07

MOTION DATE _____

- v -

RAPID SCAN RADIOLOGY, P.C.

MOTION SEQ. NO.

01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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 1412).

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

Dated: 2/1/08



EILEEN A. RAKOWER J.S.C.

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
TRAVELERS INDEMNITY COMPANY,

Petitioner,
- against -

Index No.
115827/07

RAPID SCAN RADIOLOGY, P.C.,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain a copy of any filed judgment, representative must appear at the Judgment Clerk's Desk (Room 1309) at the County Clerk's Office.

DECISION
and ORDER

Respondent.

-----X
HON. EILEEN A. RAKOWER

Petitioner, Travelers Indemnity Company (Travelers) files this Order to Show Cause seeking an order from the court vacating the award of the master arbitrator upon the ground that he exceeded his power and so imperfectly executed the award that it is arbitrary, capricious and contrary to existing law. Travelers also argues that the master arbitrator committed error by not deciding the issue of defective service that was before him.

Rapid Scan Radiology, P.C. (Rapid Scan), on March 26, 2007, commenced an arbitration proceeding against Travelers seeking reimbursement of \$912 for an MRI it claims to have performed. The arbitrator, on July 25, 2007, after a hearing, ruled that Rapid Scan did not perform the disputed MRI, and its claim was denied.

Rapid Scan appealed the arbitrator's decision to a master arbitrator. It mailed a copy of its request for review to Travelers' counsel via first class mail. The parties submitted memoranda of law to the master arbitrator in support of their respective positions regarding the lower arbitrator's findings. Travelers, among its arguments, objected to Rapid Scan's service of its request for review by a master arbitrator, stating that Rapid Scan failed to send it by certified mail, as required by 11 NYCRR 65-4.10(d). Travelers recognized that the master arbitrator might find this defect "de minimus and/or harmless" and, therefore, it provided alternative arguments in response to Rapid Scan's brief.

The master arbitrator, on December 31, 2007, vacated the lower arbitrator's award, based upon an error of law, and remanded the matter back to a different arbitrator for a new hearing. Thereafter, Travelers brought this Order to Show Cause.

Travelers argues that the master arbitrator failed to adhere to 11 NYCRR 65-4.10(d) and 11 NYCRR 65-4.10(e). Rapid Scan argues that a master arbitrator's substantive law determinations must be upheld if there is a rational basis for his determination.

11 NYCRR 65-4.10(d) states, in relevant part:

(2) The request for review by a master arbitrator shall be mailed to the designated organization's Master Arbitration administrative office within 21 calendar days of the mailing of the award . . . [and] 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.

11 NYCRR 65-4.10(e) states , in relevant part:

(I) The [master arbitrator's] award shall be in writing . . . [and] the award shall be determinative of all issues submitted to the master arbitrator by the parties.

11 NYCRR 65-4.10(c) states, in relevant part:

(6) The master arbitrator shall only consider those matters which were the subject of the arbitration below or which were included in the arbitration award appealed from.

11 NYCRR 65-4.10(f) states, in relevant part:

The master arbitrator shall interpret and apply the procedures of this section . . .

Courts favor permitting consenting parties to submit their disputes to arbitration and "the law has adopted a policy of noninterference, with few exceptions, in this

mode of dispute resolution.” (*Sprinzen v. Nomberg*, 46 NY2d 623 [1979]). “If the master arbitrator vacates the arbitrator’s award based upon an alleged error of a rule of substantive law, the determination of the master arbitrator must be upheld unless it is irrational.” (*Colon v. Geico*, 18 AD3d 467 [2nd dept. 2005], citations omitted). An award will not be found irrational absent a showing that there was “no proof whatever to justify the award.” (*Peckerman v. D&D Associates*, 165 AD2d 289 [1st Dept. 1991]). Moreover, the power of the master arbitrator to review factual and procedural issues is limited to “whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis.” (*Petrofsky v. Allstate Insurance Company*, 54 NY2d 207 [1981]). Courts are required to uphold the determinations of the master arbitrator on questions of substantive law if there is a rational basis for the finding. (*Liberty Mutual Insurance Company v. Spine Americare Medical, P.C.*, 294 AD2d 574 [2nd dept. 2002]).

Here, the master arbitrator, based on the holding of the Appellate Division, Second Department in *Fair Price Medical Supply Corp. v. Travelers Indemnity Company*, (42 AD3d 277 [2nd Dept 2007]), found that the arbitrator committed error as a matter of law. This determination, based on *Fair Price, supra*, is not irrational and, therefore, the court must uphold the master arbitrator’s determination. (*Colon v. Geico, supra*).

Additionally, Travelers’ argument that the master arbitrator’s decision should be vacated because the request for review was not properly served by certified mail is unavailing. Travelers participated in the master arbitrator’s review and recognized in its own submission that the defect could be viewed as “de minimus and/or harmless” Pursuant to 11 NYCRR 65-4.10(c)(6), “the master arbitrator shall only consider those matters which were the subject of the arbitration below.” As those matters did not include a complaint of defective service, it cannot be said that the master arbitrator’s award was not determinative of all issues properly submitted to him. (11 NYCRR 65-4.10(e)). To the extent that there was a procedural defect in service upon Travelers, the master arbitrator has the power to interpret and apply the arbitration procedures of section 5106(b) of the Insurance Law. (11 NYCRR 65-4.10(f)). The court notes that Travelers raises for the first time in its Order to Show Cause that Rapid Scan did not include a copy of the lower arbitrator’s decision with its notice to Travelers of its intention to seek a master arbitrator’s review. However, this issue was not before the master arbitrator, and is not the proper subject of a review by the court.

5]

Lastly, Travelers raises for the first time in its reply brief that Rapid Scan's request for a master arbitrator's review was not timely under 11NYCRR 65-4.10(d). The lower arbitrator's decision was rendered on July 25, 2007, Rapid Scan's letter requesting the review of a master arbitrator is dated August 3, 2007, and the envelope in which it was mailed to Travelers (provided as an exhibit by Travelers) is postmarked August 8, 2007. Travelers' argument is meritless as the evidence clearly demonstrates that Rapid Scan made its request "within 21 calendar days of . . . of the award." (11NYCRR 65-4.10(d)). Accordingly, Travelers' application for an order from the court vacating the award of the master arbitrator upon the ground that he exceeded his power and so imperfectly executed the award that it is arbitrary, capricious and contrary to existing law must be denied. Wherefore, it is hereby

ORDERED that the petition is denied and the award of the master arbitrator is confirmed; and it is further

ORDERED and ADJUDGED that the matter is remanded for a new hearing before a new arbitrator.

This constitutes the decision and judgment of this court.

Dated: February 1, 2008



EILEEN A. RAKOWER, 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 1402).