

**Matter of Ace Prop. & Cas. Ins.
Co. v RLI Ins. Co.**

2008 NY Slip Op 32877(U)

October 16, 2008

Supreme Court, New York County

Docket Number: 117084/07

Judge: Herman Cahn

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PRESENT: Cahn

PART 49

Justice

Index Number : 117084/2007
ACE PROPERTY & CASUALTY
 VS.
RLI INSURANCE
 SEQUENCE NUMBER : # 001
 VACATE ARBITRATION DECISION

INDEX NO. 117084-07
 MOTION DATE _____
 MOTION SEQ. NO. #001
 MOTION CAL. NO. _____

read 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

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE.....

FILED
 OCT 21 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 10/16/08

A. Cahn
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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NEW YORK

-----X
In the matter of certain controversies between :
ACE PROPERTY & CASUALTY INSURANCE :
COMPANY c/o RECOVERY SERVICES :
INTERNATIONAL. :

Petitioner, :

- against - :

RLI INSURANCE COMPANY, :

Respondent. :
-----X

Index No. 117084/07

Herman Cahn, J.

Petitioner Ace Property & Casualty Insurance Company ("ACE") moves to vacate an arbitration award.

BACKGROUND

This action is based on a bus accident in which Jack Lodato was injured on August 6, 2004.

Non-party Talent Partners employed Lodato as a background actor for a commercial. Petitioner ACE provides workers' compensation insurance for Talent Partners. Respondent RLI Insurance Company ("RLI") is the insurance carrier of the bus company involved in the accident in which Lodato was injured.

Lodato was injured during the course of his employment. Pursuant to his employer's instructions, Lodato was being transported by bus from Manhattan to New Jersey for a location shoot, and then back again. While the bus was moving, Lodato walked to the bus' restroom, when the bus driver suddenly braked. Lodato fell backwards, landing on his left side, shoulder, neck and buttocks.

The Comprehensive Motor Vehicle Insurance Reparations Act ("Statute") controls the dispute currently at issue. The Statute concerns insurance associated with automobile accidents. Article 51, regarding the settlement of claims between insurers, provides that:

[a]ny insurer liable for the payment of first party benefits to or on behalf of a covered person and any compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay . . . has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable *However, in the case of occupants of a bus other than operators, owners, and employees of the owner or operator of the bus, an insurer which . . . provides coverage for first party benefits for such occupants under a policy providing first party benefits to the injured person . . . shall have no right to recover the amount of such benefits from the insurer of such bus.*

Ins. Law § 5105(a)(emphasis added).

On July 12, 2005, following a hearing on the present matter, the State Workers' Compensation Board filed a Notice of Decision that determined that Lodato had sustained a work-related injury to his back and left shoulder. The Workers' Compensation Board Administrative Law Judge ordered ACE to pay Lodato the sum of \$14,040.00. ACE claims it paid Lodato medical and indemnity benefits in the sum of \$45,140.91. ACE then sought arbitration to transfer its loss to RLI, for the workers' compensation benefits in lieu of first party benefits it paid to Lodato.

In a decision, dated October 2, 2007, the arbitrator determined that ACE failed to prove its contentions that it was entitled to reimbursement from RLI for the benefits it paid to Lodato. The arbitrator decided that ACE could not transfer loss to RLI because Lodato had been a passenger on the bus at the time of the accident, rather than an owner, operator or employee of the bus company. As such, the arbitrator determined that, as provided by the Statute, ACE has "no right to recover the amount of such benefits from the insurer of such bus." Ins. Law §

5105(a). ACE seeks to vacate the arbitration award and contends the decision “is arbitrary and capricious because [it] contravenes controlling case law.” Pet, ¶ 16.

DISCUSSION

Review under the Statute

The Statute provides that “[t]he sole remedy of any insurer or compensation provider to recover on a claim . . . shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent.” Ins. Law § 5105(b).

Respondent contends that Petitioner failed to exhaust all administrative remedies before challenging the arbitration decision in court. Specifically, Respondent argues that Petitioner was required to first appeal to a “master arbitrator” before moving to vacate the arbitrator’s decision. *Matter of Staten Is. Hosp.*, 103 AD2d 744 (2d Dep’t 1984)(citing Ins. Law § 675(2), now Ins. Law § 5106(b) & (c)). Petitioner argues that the arbitrator’s decision was final. It notes that a provision exists in the Statute for the review by a master arbitrator where there is an issue regarding the settlement of a claim between an injured individual and its provider. *See* Ins. Law § 5106(b) & (c). Petitioner argues, however, that no such provision exists for the review by a master arbitrator where the dispute concerns the transfer of loss between multiple insurance providers. In this, ACE is correct. Therefore, the requirement to appeal to a master arbitrator is not applicable in the instant case.

Standard for Vacatur

ACE seeks to have the arbitration award vacated, arguing that the arbitrator misapplied the law. Although vacatur “of an arbitration award is strictly limited to the reasons” itemized in CPLR 7511(b), courts will generally not vacate an arbitration award if the arbitrator made an

error of law or fact unless the award is irrational.¹ *Carty v Nationwide Ins. Co.*, 212 AD2d 462, 462 (1st Dep't 1995). Although the standard for vacatur of an arbitration award can vary, such as a requirement of a showing of manifest disregard of the law (*see Wedbush Morgan Securities, Inc. v Robert W. Baird & Co.*, 320 F Supp 2d 123, 126 (SDNY 2004)), "where the parties have submitted to compulsory arbitration [under New York law], the award must have evidentiary support and cannot be arbitrary or capricious if it is to be upheld." *Cigna Prop. & Casualty v Liberty Mut. Ins. Co.*, 12 AD3d 198, 199 (1st Dep't 2004).

Petitioner relies on *A.I. Transport v New York State Insurance Fund*, in which the First Department affirmed the denial of a liability insurer's application to stay an arbitration proceeding. 301 AD2d 380, 380 (1st Dep't 2003). The *A.I. Transport* court interpreted Insurance Law § 5105(a)

to provide that where one of the vehicles involved in an accident is a bus, then any insurer liable to a bus passenger for payment of no-fault first party benefits—including a workers' compensation provider . . . 'paying benefits in lieu of first party benefits'—can recover the amounts it paid to the passenger from the insurer of a liable party . . . except where the loss arises 'out of the use or operation in this state of such motor vehicle.'

Id. (internal citations omitted).

Petitioner is incorrect in its contention that the arbitrator misapplied the law in this case. The arbitrator applied Insurance Law § 5105(a), wherein ACE, as a workers' compensation insurance carrier liable to Lodato for the payment of benefits in lieu of first party benefits, is not

¹ Courts have a broader judicial review of compulsory arbitration, which must be held in accordance with due process and supported by adequate evidence. *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 (1996); *see also Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 260 NY2d 493, 508-510 (1970). Non-compulsory arbitration occurs when the arbitration is pursuant to a voluntary agreement of the parties. *Matter of Motor Veh.*, 89 NY2d at 223. Courts have a more limited scope of judicial review of non-compulsory arbitration.

[* 6]
entitled to recover the benefits it paid to Lodato from RLI because Lodato was a passenger on the bus rather than an owner, operator or employee of the bus company. The arbitrator's decision may not have relied upon the case law to which Petitioner cites, but the award is not irrational, has sufficient evidentiary support and is not arbitrary or capricious.


Accordingly, it is

ORDERED that Petitioner's motion to vacate the arbitration award is denied; and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: October 16, 2008

ENTER :



J.S.C.

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