

Matter of MVAIC v NYC East-West Acupuncture, P.C.
2008 NY Slip Op 32998(U)
October 31, 2008
Supreme Court, New York County
Docket Number: 111677/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobbis

PART 6

Index Number : 111677/2008
 M.V.A.I.C.
 VS.
 NYC EAST-WEST ACUPUNCTURE, PC
 SEQUENCE NUMBER : 001
 VACATE OR MODIFY AWARD

INDEX NO. 111677/08
 MOTION DATE 10/27/08
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion to vacate award

PAPERS NUMBERED
1-9

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

Cross-Motion: Yes No

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 1415).

Upon the foregoing papers, It is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 10/31/08 _____ JBL
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of MVAIC
to Vacate an Arbitration Award,

MVAIC,

Petitioner,

Index No. 111677/08

Decision, Order and Judgment

-against-

NYC EAST-WEST ACUPUNCTURE, PC
A/A/O CHUN HONG LI & GEICO
INSURANCE COMPANY,

Respondents.

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 141B).

JOAN B. LOBIS, J.S.C.:

Petitioner MVAIC, the Motor Vehicle Accident Indemnification Corporation, moves for an order pursuant to C.P.L.R. § 7511, vacating the November 14, 2007 award of the Lower Arbitrator, as affirmed in a decision dated April 28, 2008 by the Master Arbitrator, in the above-captioned matter. MVAIC seeks entry of judgment on its behalf, dismissing the claim, with prejudice. Respondents have not submitted opposition papers and are in default. For the reasons set forth below, the decisions of the Lower Arbitrator and Master Arbitrator are vacated, and the matter is remanded for further proceedings.

This case arises out of an alleged motor vehicle accident that occurred on Sunday, September 21, 2003, at approximately 10:00 p.m. Chun Hong Li was reportedly hit by a car while in front of 7420 13th Avenue in Brooklyn. According to the police accident report, the accident was witnessed by Jian Neng Wu, who is reported to be the husband of Chun Hong Li, both of whom are listed as residing at the same address. The witness told the police officer that the driver of the

vehicle and Ms. Li were having a verbal dispute. When Ms. Li approached the vehicle, the driver sped away, apparently striking Ms. Li, who fell onto the pavement and struck her head. The driver of the vehicle left the scene, but the witness reported the license plate number, V272LZ, to the police officer. The police accident report does not set forth any insurance information for Ms. Li. The license plate was traced to Phyllis Chu, who resides in Staten Island. That vehicle is insured by Government Employees Insurance Company, known as GEICO.

Ms. Li underwent medical treatment for her injuries from respondent NYC East-West Acupuncture, P.C. ("East-West"), beginning on or about September 26, 2003. East-West submitted claims to GEICO, which issued a denial on December 1, 2003, based on its investigation that Ms. Chu was not involved in the loss. It is unclear whether MVAIC was aware of the denial at that time. On December 10, 2003, Ms. Li completed a "Notice of Intention to Make Claim" to MVAIC, in which she avers that her injury is not covered by insurance. She also completed an "Affidavit of No Insurance," in which she states that she was "a passenger in a vehicle [sic - should be a pedestrian] insured by Government Employees Insurance Company." (Underline in original.) Ms. Li swore under penalty of perjury as follows: "[o]n the date of the above accident, . . . I maintained no insurance which would provide coverage to me for the above accident, and no person residing in my household owned an automobile or maintained such insurance."

East-West submitted bills to MVAIC totaling \$4,302.79 for services. MVAIC denied the claim, since the vehicle that was reported to be owned by Ms. Chu was insured by GEICO. MVAIC sent a letter to Chun Hong Li and to East-West, on or about January 20, 2004, stating that since there was coverage with GEICO, MVAIC would not provide coverage. Meanwhile, Chun

Hong Li commenced a personal injury action against Ms. Chu in Supreme Court, Kings County. According to MVAIC, after depositions, Ms. Chu moved for summary judgment; Chun Hong Li failed to oppose the motion, so the motion was granted on default. The Lower Arbitrator states that the case was dismissed because Chun Hong Li failed to provide disclosure.

On June 1, 2007, East-West then filed a claim for arbitration with the American Arbitration Association against both MVAIC and GEICO. The first hearing date was scheduled for August 20, 2007 before Arbitrator Kenneth C. Rybacki. No one appeared on behalf of GEICO, and the matter was adjourned. On the next date, September 24, 2007, GEICO's witness was unavailable. GEICO was directed to produce deposition transcripts and court papers from the underlying personal injury action that Ms. Li had brought. On the next hearing date, October 15, Ms. Chu, GEICO's insured, appeared, but GEICO did not produce the requested documents, including deposition transcripts. GEICO was given until October 22 to serve the transcripts and the court order from the personal injury action. The hearing was adjourned until November 5, 2007.

When Ms. Chu testified on October 15, she stated that although she still owns the vehicle listed in the police report, the license plate listed in the report was surrendered to the New York State Department of Motor Vehicles well before the accident. She further testified that at the time of the accident, she was preparing her children for bed, and neither she nor anyone else was using her vehicle. Finally, according to the Lower Arbitrator's decision, "Ms. Chu testified that her counsel in the personal injury action against her advised her that the assignor [Ms. Li] stated that Ms. Chu was not the person involved in the accident." The Lower Arbitrator therefore dismissed the claims against GEICO, finding that GEICO's insured was not involved in the accident.

The Lower Arbitrator then turned to whether MVAIC was required to provide benefits to Ms. Li. At the November 5 hearing date, MVAIC argued that Ms. Li was not a “qualified person” entitled to receive no-fault benefits. During the course of these proceedings, apparently once it became clear that GEICO would not be responsible, MVAIC began to investigate Ms. Li. MVAIC learned that Ms. Li is also known by the name Lillian Li, since an individual with the name Lillian Li has the same date of birth and resides at the same address as Chun Hong Li. MVAIC advised the Lower Arbitrator on November 5, 2007 that upon investigation, MVAIC learned that Ms. Li may have a policy with Allstate Insurance Company (“Allstate”).

The Lower Arbitrator rejected MVAIC’s proffer, asserting that the individual listed on MVAIC’s uncertified insurance information did not have the exact same name as Chun Hong Li. When MVAIC requested an adjournment to determine whether or not a policy of insurance existed, the arbitrator rejected the request on the ground that MVAIC failed to exercise due diligence for nearly four years. The arbitrator denied the request for a stay and found MVAIC responsible for payment of first party benefits to Chun Hong Li. The arbitrator found that MVAIC failed to issue any denial of the claim within thirty (30) days of receipt of the Notice of Claim, as required by 11 N.Y.C.R.R. § 65-3.8(a)(1), or failed to otherwise seek to toll the thirty-day time period by seeking a request for verification. The arbitrator determined that MVAIC was precluded from asserting a defense that the treatment was not medically necessary, and found that of the \$4,302.79 claimed, East-West was entitled to payment of \$2,337.85 for Ms. Li’s treatment, with interest at the rate of 2% per month, together with attorneys’ fees.

MVAIC appealed to a Master Arbitrator, who affirmed the decision, finding that the award was not irrational, biased, arbitrary, capricious, or incorrect as a matter of law. The Master Arbitrator rejected MVAIC's contention that MVAIC was under no obligation to investigate whether another insurer was responsible unless and until it was determined that GEICO was not responsible. The Master Arbitrator specifically states that he found MVAIC's contention that it had no duty to investigate to be "inconsistent with the purpose and intent of both Article 51 and Article 52 of the Insurance Law."

MVAIC was created by the Legislature, pursuant to Article 52 of the Insurance Law, to pay damages for bodily injuries to innocent victims of motor vehicle accidents cause by uninsured motorists. To recover MVAIC benefits, the injured individual must be eligible for MVAIC benefits. Insurance Law § 5202(b) defines a "qualified person" as "a resident of this state, other than an insured or the owner of an uninsured motor vehicle and his spouse when a passenger in such vehicle." (Emphasis added.) If in fact Ms. Li had valid insurance coverage at the time of the accident, she is not a "qualified person." Universal Acupuncture Pain Services P.C. v. MVAIC, 13 Misc. 3d 1244(A) (Table), 2006 WL 3510617 (Dist. Ct., Nassau Co. 2006). Until it was clear that GEICO was not responsible, MVAIC had no reason to investigate whether Chun Hong Li may have given false information on the MVAIC forms as to whether or not she was insured. The essence of MVAIC's argument is that this is a "lack of coverage" issue, since Ms. Li would not be covered by MVAIC if she has other insurance.

The case relied upon by the Master Arbitrator, New York Hosp. Med. Center of Queens v. Motor Vehicle Accident Indemnification Corp., 12 A.D.3d 429 (2d Dep't), lv. denied, 4

N.Y.3d 705 (2005), is inapposite. In that case, the issue was whether the injured party's claim was fully submitted on June 23, 2003, in which case MVAIC's denial, issued on October 7, 2003, would be untimely, or whether the injured party first qualified on September 30, in which case a denial issued on October 7 would be timely. See Brief for Plaintiff-Respondent in New York Hosp. Med. Center of Queens v. Motor Vehicle Accident Indemnification Corp., *supra*, cited at 2004 WL 3253550; *see also*, Howard M. Rombon, Ph.D, P.C. v. MVAIC 2008 WL 4712439 (App. Term, 2d Dep't 2008) (noting that the holding in New York Hosp. Med. Center of Queens, *supra*, does not apply to cases of lack of coverage). The only issue in that case was the timeliness of the rejection.

Here, however, the issue is whether there is lack of coverage, and when MVAIC was reasonably put on notice that it needed to investigate whether Chun Hong Li was not insured. MVAIC had no reason to believe that GEICO was not responsible for payment until the time of the hearing, when GEICO submitted evidence that Ms. Chu was not the driver of the vehicle.

"Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined." Goldfinger v. Lisker, 68 N.Y.2d 225, 230 (1986) (citations omitted). MVAIC presented some evidence to the Lower Arbitrator that there was an issue of possible lack of coverage, and requested an adjournment of the November 2007 hearing, after three adjournments had been granted on behalf of GEICO. While MVAIC contends that it was entitled to rely on the police report that showed the other vehicle had coverage and had no duty to act to investigate the accuracy of Chun Hong Li's claim of lack of coverage, this court does not condone MVAIC's failure to promptly investigate whether or not Chun Hong Li was otherwise covered by insurance. The primary purpose of MVAIC is to promptly pay the claims of those

uninsured individuals who have legitimate claims. Nyack Hosp. v. General Motors Acceptance Corp., 8 N.Y.3d 294, 300 (2007). Therefore, since lack of coverage goes to the heart of whether a claim is legitimate, the issue of lack of coverage may be raised at any time. Under these unique factual circumstances, the arbitrator's failure to grant MVAIC's request is deemed to constitute "an abuse of discretion constituting misconduct within the meaning of CPLR 7511(b)(1)(I)," since it resulted in "the foreclosure of the presentation of pertinent and material evidence." Insurance Co. of North America v. St. Paul Fire & Marine Ins. Co., 215 A.D.2d 386, 387 (2d Dep't 1995), citing, Matter of Bevona (Superior Maintenance Co.), 204 A.D.2d 136, 139 (1st Dep't 1994).


Therefore, the Lower Arbitrator's failure to allow MVAIC to fully explore this claim, despite MVAIC's failure to do so promptly, warrants a remand for a new hearing. A disclaimer based on lack of coverage is not a denial that must be asserted within the thirty-day period, since the essence of a claim of lack of coverage is that there is no policy in effect. 11 N.Y.C.R.R. § 65-3.8(e); Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 199-200 (1997); Presbyterian Hosp. v. Maryland Cas. Co., 90 N.Y.2d 274 (1997); see also, Universal Acupuncture Pain Services, supra; A.B. Medical Services PLLC v. Motor Vehicle Acc. Indemnification Corp., 10 Misc. 3d 145(A) (Tabc), 2006 WL 287202 (App. Term, 2d Dep't 2006). Since MVAIC was not afforded an opportunity to fully explore the issue of lack of coverage, the matter must be remanded for a new hearing. C.P.L.R. § 7511(b)(1)(I).

MVAIC further learned that approximately one year before the accident, Lillian C. Li commenced an uncontested matrimonial action in New York County against defendant Jianneng

Wu, who is listed as Chun Hong Li's husband on the police accident report, although a judgment of divorce was granted by the Supreme Court, New York County on August 1, 2002 under Index No. 308617/02. The court records that MVAIC obtained from eLaw show that the plaintiff in the matrimonial proceeding is listed as Lillian C. Li a/k/a Lillian Li a/k/a Chun Hong Li. MVAIC also learned from a search of the Department of Motor Vehicles records that Lillian Li and Chun Hong Li have the same date of birth, and that Lillian Li had a policy with Allstate covering the date of loss. MVAIC is entitled to present this information during the arbitration proceeding.

There is sufficient information here to remand this matter for a new hearing, at which time MVAIC shall be entitled to present evidence to show that Ms. Li is not entitled to MVAIC benefits because she is otherwise insured. The decisions of the Lower Arbitrator and Master Arbitrator are vacated to the extent that they determined that MVAIC is required to provide benefits. Those portions of the decisions that determined that GEICO is not responsible shall remain in full force and effect. The matter is remitted to the arbitrator for further proceedings consistent with this decision. This constitutes the decision, order and judgment of the court.

Dated: October 31, 2008



 JOAN B. LOBIS, J.S.C.

This judgment has not been entered by the County Clerk and notice of entry cannot be given until the County Clerk obtain entry. Counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).