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| Matter of Giampaola v Allstate Ins. Co. |
| 2009 NY Slip Op 31151(U) |
| May 26, 2009 |
| Supreme Court, New York County |
| Docket Number: 104920/2007 |
| Judge: Shirley Werner Kornreich |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 104920/2007
GIAMPAOLA, THOMAS
vs
ALLSTATE INSURANCE
Sequence Number : 001
VACATE

INDEX NO. _____
MOTION DATE 9/1/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

| PAPERS NUMBERED |
|-----------------|
| <u>1-5</u> |
| <u>6-7</u> |
| <u>8</u> |

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

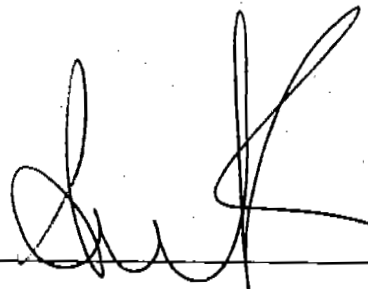
**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM,
DECISION AND ORDER.**

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 141B).

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

Dated: 5/26/09


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST DEFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
In the Matter of the Application of
THOMAS GIAMPAOLA,

Index No.:104920/2007

Petitioner,

For an Order Pursuant to Article 75 of the
Civil Practice Law and Rules

**DECISION and
ORDER**

- against -

ALLSTATE INSURANCE COMPANY,

Respondent

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 at the Judgment Clerk's Desk (Room
4115).**

-----X
KORNREICH, SHIRLEY WERNER, J.:

Petitioner Thomas Giampaola seeks an Order vacating the December 28, 2006 Decision of the Master Arbitrator and the September 12, 2006 Arbitration Award. Respondent Allstate Insurance Company (Allstate), by Cross-Petition, seeks to affirm the arbitration decision and award and also to enter judgment thereon.

I. Background

This No-Fault arbitration proceeding arose from a January 26, 1990 accident in which petitioner allegedly was hurt. After Allstate denied petitioner's claims for \$56,000 in lost earnings and \$43,195.26 in medical bills spanning a four-year period from December 1990 through January 1994, petitioner submitted a Demand for Arbitration on or about October 21, 1996.¹ In an Arbitration Award dated January 30, 2001 (the first Award), Arbitrator Kurz

¹The Demand was submitted to the American Arbitration Association.

dismissed the application “without prejudice to renew following the parties’ failure to provide the Arbitrator with the necessary documentation to fully and fairly adjudicate the claim.”

Petitioner filed a new Demand for Arbitration dated February 1, 2006. After a hearing held on May 19, 2006 and declared closed by the Arbitrator on September 11, 2006, Arbitrator Horowitz issued an Award, dated September 12, 2006 (2006 Award), which held that petitioner’s claim was barred by a breach of contract’s six-year statute of limitations. The Arbitrator further found that the new Demand barred by CPLR 205(a) because it was filed more than six months after the first arbitration had been dismissed. And he found that the statute of limitations was not been tolled during the four years it took the first Arbitrator to render an Award. Petitioner appealed the 2006 Award to a Master Arbitrator (MA), who affirmed it on December 28, 2006. The MA Award decision was delivered to Allstate on January 11, 2007.

II. *Discussion*

This Court’s jurisdiction to vacate an arbitration award is controlled by CPLR 7511(b), which provides,

An arbitration award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

CPLR 7510 requires the Court to confirm an award “upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.”

Allstate filed its Cross-Petition for confirmation less than one year after delivery of the MA’s Award. Petitioner argues that the MA and the Lower Arbitrator exceeded their powers and/or improperly executed those powers, in violation of CPLR 7511(b)(iii) by: (i) failing to hold that Allstate waived the statute of limitations by failing to apply a stay of arbitration prior to participating in it; (ii) failing to hold that the statute of limitations was tolled during the time that the first arbitrator had the matter *sub judice*; and (iii) agreeing that Allstate did not need to serve a timely denial of claim in response to petitioner’s 2006 Demand.

This court is asked to review an arbitrator’s decision made in a compulsory no-fault arbitration proceeding. The court must affirm an award in such proceedings if there is evidentiary support and the award was neither arbitrary nor capricious. *Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur.*, 89 N.Y.2d 214, 220-222 (1996); *Cady v. Aetna Life & Casualty Co.*, 96 A.D.2d 967, 968-969 (3d Dep’t 1983)(option of insured to arbitrate denial of first party benefits under Insurance Law §675 [now §5106] is classified as compulsory arbitration). Further, an arbitration award made after all parties have participated will not be overturned “merely because the arbitrator committed an error of fact or of law.” *Id.* The issues before this Court are based entirely on statutory interpretation, which removes any assessment of “evidentiary support” from the analysis. Thus, if the MA’s Award was rational, that is if it constituted a rational construction of the applicable statutes, then it must be upheld.

Here, it was not error for the MA to consider Allstate's limitations argument because failing to apply for a judicial stay prior to arbitration waives only the right to bring a subsequent application for a stay in court. The MA concluded that under CPLR 7502(b), an arbitrator retains the power to apply a limitations bar even if no application to stay arbitration on that basis has been brought. This exact argument was made in *Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur.*, *supra*, 89 N.Y.2d at 222-223, where the Court of Appeals found:

In asserting its Statute of Limitations defense, Aetna failed to avail itself of its opportunity to have the issue of timeliness decided judicially pursuant to CPLR 7503 (b), which permits an application to stay arbitration on the grounds that the claim sought to be arbitrated is time-barred (*see*, CPLR 7502 [b]). CPLR 7502 (b) further provides that the failure to assert the limitations bar "shall not preclude its assertion before the arbitrators" and, "[e]xcept as provided in subdivision (b) of section 7511, such exercise of discretion by the arbitrators shall not be subject to review by a court on an application to confirm, vacate or modify the award." Thus, while CPLR 7502 (b) states that the arbitrators' decision to apply the Statute of Limitations is generally insulated from judicial review, the phrase "[e]xcept as provided in subdivision (b) of section 7511" makes it clear that our review is not completely foreclosed (emphasis supplied).

The Court of Appeals reasoned that the issue was whether the arbitrator had made a rational, albeit erroneous, decision on which statute of limitations applied. In upholding the award, the Court of Appeals stated that because the issue of the accrual of the limitations period was judicially unsettled at the time the award was rendered, the award was rational. Here, the MA rationally concluded that Allstate's time to move for a stay because petitioner never presented proof of service of the demand, that more than six years had passed since Allstate refused to pay petitioner's claims, and that there was no applicable tolling provision.

However, the MA also based its award on the conclusion that there was no error of law in the Lower Arbitrator's Award. In that Award, the Lower Arbitrator concluded that petitioner

was procedurally barred under CPLR 205(A) because he renewed the arbitration demand more than six months after the dismissal of his earlier claim. CPLR 205(A) provides, in pertinent part,

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment on the merits, the plaintiff ... may commence a new action upon the same transaction or occurrence ... within six months after the termination

Here petitioner waited five years. On this basis, the MA's and the Lower Arbitrator's Awards were rational and should be upheld. The Court need not address petitioner's additional grounds.

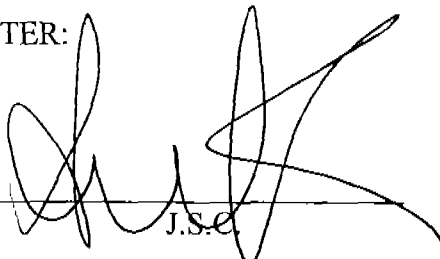
Accordingly, it is hereby

ORDERED and ADJUDGED that Thomas Giampaola's petition to vacate the Master Arbitrator's and the Lower Arbitrator's Awards is denied and the petition is dismissed; and it is further

ORDERED that respondent Allstate's petition to confirm the awards is granted; and it is further

ORDERED that the Clerk shall enter judgment forthwith.

ENTER:


J.S.C.

Date: May 26, 2009
New York, N. Y.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and no legal action can be served based hereon. To have this judgment entered, an authorized representative must appear in person at the Judgment Clerk's Desk (Room 4312).