

**Travelers Prop. Cas. Co. of Am. v American Tr. Ins.  
Co.**

2009 NY Slip Op 32352(U)

October 10, 2009

Supreme Court, New York County

Docket Number: 115444/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. PAUL GEORGE FEINMAN PART 12

Justice

TRAVELERS PROPERTY CASUALTY COMPANY  
of America

- v -

AMERICAN TRANSIT INSURANCE COMPANY

INDEX NO. 115444/08  
MOTION DATE 6/3/09  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Art 75.

Notice of Motion/Petition — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Notice of Cross-Motion — Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED  
all attached

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ORDERED that this ~~motion~~

**PETITION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

**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).

Dated: 10/10/09

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 DO NOT POST  REFERENCE  
 Preliminary Conference \_\_\_\_\_  
 Compliance Conference \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
TRAVELERS PROPERTY CASUALTY COMPANY  
OF AMERICA,

Index Number 115444/2008  
Mot. Seq. No. 001

Petitioner,  
-against-

AMERICAN TRANSIT INSURANCE COMPANY,  
Respondent.

**DECISION, ORDER AND  
JUDGMENT**

-----X

**For the Petitioner:**  
Law Offices of Karen C. Dodson  
By: Kalman Miller, Esq.  
485 Lexington Ave., 7<sup>th</sup> Floor  
New York NY 10017  
(212) 778-6500

**For the Respondent:**  
Nicolini, Paradise, Ferretti & Sabella, PLLC  
By: Barbara L. Hall, Esq.  
Mineola NY 11501  
(516) 741-6355

Papers considered in review of this petition to vacate arbitration award:

- Papers
- Notice of Petition and Affidavits Annexed.
- Affidavit of Personal Service
- Affirmation in Opposition
- Reply

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**PAUL G. FEINMAN, J.:**

Petitioner seeks to vacate an arbitration award dated September 9, 2008 pursuant to CPLR 7511 (b) (1). For the reasons which follow, the petition is denied.

This proceeding arises out of a motor vehicle accident that occurred on August 19, 2004 when a driver in a vehicle insured by Travelers Property Casualty Company, struck a taxi insured by American Transit Insurance. American Transit paid an initial \$12,871.43 in medical expenses on behalf of the driver under the policy issued to the taxi owner. It later filed a supplemental claim for another \$5,694.36 in medical expenses (Aff. in Opp. ¶ 5 n.1), not addressed below.

Travelers alleges it first received notice of the claim more than three and a half years later on May 5, 2008. Travelers disclaimed coverage by letter dated May 27, 2008 in which it

explained its policy holder breached the policy agreement by failing to report the accident for more than three years, failing to make the vehicle available for inspection, and failing to provide a written proof of loss within 91 days (Pet. Ex. C, Letter from Travelers to Medina).

American Transit filed an application on July 15, 2008, for compulsory arbitration with Arbitration Forums, Inc., a company administering the mandatory no-fault arbitration program for the State Insurance Department (Pet. Ex. D). The arbitration was for a loss transfer claim (Insurance Law § 5105), based on the claim that American Transit's insured was operating a taxi when the accident occurred, was not at fault, and suffered damages.

On August 13, 2008, Travelers served its answer on both Arbitration Forums, Inc. and American Transit (Pet. Ex. C). Included was a Contentions Sheet which raised three affirmative defenses and four contentions. The defenses were: no jurisdiction based on denial of coverage; no jurisdiction based on failure to establish that one of the vehicles involved met the criteria for "loss transfer" arbitration, and late notice of claim. (Pet. Ex. C pp. 1-2). As contentions, it raised the same three items as well as a fourth concerning excess damages (Pet. Ex. C pp 3-5).

Arbitration took place on September 9, 2008, and by decision signed on that date, the arbitrator found in favor of American Transit, rejecting Travelers' defenses (Pet. Ex. A). Travelers timely filed the within petition seeking to vacate the award on the ground that it was arbitrary and capricious and that the arbitrator exceeded her authority.

CPLR Article 75 governs arbitration. CPLR 7511(b) sets forth the four grounds on which, in the ordinary case, a petitioner can seek to vacate an award. These grounds are: corruption, fraud or misconduct in procuring the award; partiality of an arbitrator; an arbitrator exceeding his or her power or so imperfectly executing the powers that a final and definite award

was not made, and failure to follow the procedures of Article 75 of the CPLR.

The burden of proof is upon the petitioner seeking to vacate the award, and failure to establish a statutory ground for vacatur requires confirmation of the award (*Matter of Granite Worsted Mills v Cowen*, 25 NY2d 451, 454 [1969], *overruled on other grounds sub nom. Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308, fn [1984]). Where arbitration is compulsory, judicial review must find evidentiary support for the award and it cannot be arbitrary and capricious (*Matter of MVAIC v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996], citations omitted). The decision must be found to be rational or that it had a plausible basis (*Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633, 634 [3d Dept. 2008], citing *Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]).

Travelers argues that the matter should never have gone to arbitration because it raised the jurisdictional defenses of lack of coverage and gave notice that it would not consent to arbitration. It relies on the No Fault Insurance regulation concerning mandatory arbitration for insurers under Insurance Law § 5105, which states,

(6) Other than claims asserted by MVAIC against an insurer, this section shall not apply to any claim for recovery rights to which an insurer in good faith asserts a defense of lack of coverage of an alleged covered person on any grounds, unless specific written consent of mandatory arbitration is obtained from the insurer asserting such defense.

Where an insurer asserts a defense of lack of coverage of an alleged covered person on any grounds relating to claims asserted by MVAIC for recovery rights, same shall be subject to mandatory arbitration. However, any controversy between insurers involving the responsibility or the obligation to pay first-party benefits (i.e., priority or payment or sources of payment as provided in section 65-3.12 of this Part) is not considered a coverage question and must be submitted to mandatory arbitration under this section.

(11 NYCRR 65-4.11 [a], emphasis added). It argues that because it asserted a defense of lack of coverage, the matter should not have been forwarded to an arbitrator, and that the arbitrator, in an

excess of authority, determined that the defense of lack of coverage, along with its other defenses, did not apply, and wrongly conducted the arbitration.

Travelers also argues that respondent did not establish as part of its prima facie case that Insurance Law § 5105 applied, and that the copy of the Police Report noting that one of the vehicles involved was a taxi, which was relied upon by the arbitrator as proof that the loss transfer provision applied, was provided by Travelers in its rebuttal case (Pet. ¶¶ 42-47). This is disputed by American Transit's representative who appeared at the arbitration; she avers that the arbitrator had the police report, among other submissions by American Transit, already in her possession at the time of the arbitration (Aff. in Opp., Philips Aff. ¶ 3).

American Transit agrees that it is an affirmative defense that there has been a denial of coverage, but contends that this concerns an actual lack of coverage at the time of the accident, pointing to the Arbitration Forum, Inc.'s rule that a "denial of coverage" is where the loss is not covered or there was no policy in effect (Aff. in Opp. p. 7, Ex. F, Personal Injury Protection Arbitration Definitions at 2). American Transit argues that Travelers' denial of the claim based on untimeliness, is not the type of denial considered in this provision.<sup>1</sup>

The arbitrator determined that Travelers' defense of late notice was not a valid defense for a claim of no coverage. She also found Travelers' other defenses to lack merit, as was its contention that the medical claims were excessive; the arbitrator noted that the amount had been settled in "AAA arb." (Pet. Ex. A, PIP Decision, Affirmative Defense/Deferment Findings).

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<sup>1</sup>Travelers' attempt to argue that the definition and rule applies only to Arbitration Forum, Inc.'s Personal Injury Protection (No Fault) Arbitration Program, but not its New York Personal Injury Protection Arbitration Program, if correct, is not persuasive evidence of an abuse of power by the arbitrator (Reply ¶¶ 6-8).

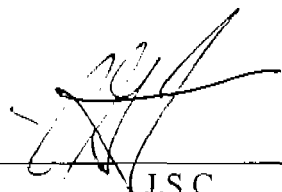
Here, the documentary evidence shows that the arbitrator considered the claims and the defenses, gave reasons for each of her findings, and found in favor of American Transit. Petitioner fails to meet its burden of showing that the arbitration was improper, that the award was irrational, or that there was no evidentiary support or was arbitrary and capricious (*see American Tr. Ins. Co. v Ebrahim*, 236 AD2d 274 [1<sup>st</sup> Dept.]; *Matter of MVAIC v Aetna Cas. & Sur. Co.*, *supra*). The petition to vacate the arbitration award is denied. Accordingly, the award rendered in favor of respondent is confirmed. It is

ORDERED that the petition to vacate the arbitration award is denied, and the award in favor of respondent and against petitioner is confirmed; and it is further

ORDERED and ADJUDGED that respondent American Transit Insurance Company, having an address care of Nicolini, Paradise, Ferretti & Sabella, PLLC, PO Box 9006, Mineola NY 11501, have judgment and recover against petitioner Travelers Property Casualty Company of America, having an address care of Law Offices of Karen C. Dodson, 485 Lexington Ave., 7<sup>th</sup> Floor, New York NY 10017, in the amount of \$12,871.43, plus interest at the rate of \_\_\_\_% per annum from the date of September 9, 2008 as computed by the Clerk in the amount of \$ \_\_\_\_\_, together with costs and disbursements in the amount of \$ \_\_\_\_\_ as taxed by the Clerk, for the total amount of \$ \_\_\_\_\_, and that the respondent have execution therefor.

Dated: October 10, 2009

ENTER:

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**

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