[* 1]

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

PRESENT: Joan B. Lobis Justice

PART 6

ndex Number : 113587/2009
MORRIS, TIA
'S.
OBIAKOR OB/GYN P.C.
SEQUENCE NUMBER : # 001
CONFIRM ARBITRATION AWARD

INDEX NO. 113587-09
MOTION DATE 12/18/09
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for _____

	PAPERS NUMBERED
Notice of ~~Motion~~/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits (Petition)	6-9
Replying Affidavits	10-13

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT
File 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).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 3/12/10

J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

----------X

In the Matter of the Application of
TIA MORRIS

Petitioner,

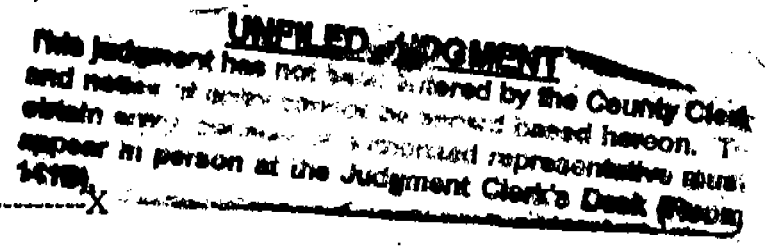
Index No. 113587/2009

-against-

Decision, Order, and Judgment

OBIAKOR OB/GYN P.C. and AFAM MEDICAL GROUP,

Respondents,



For an Order Pursuant to CPLR Article 75 Confirming an Arbitration Award

----------X

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

Petitioner Tia Morris, M.D., seeks an order, pursuant to C.P.L.R. Article 75, confirming the Opinion and Partial Final Award, dated October 29, 2008, the Final Award, dated January 22, 2009, and the Disposition for Final Application of Modification of the Award, dated February 11, 2009 (collectively, the "Award"); directing respondents to implement the Award in within thirty (30) days; awarding interest on the amounts due to petitioner from the date of the Opinion and Partial Final Award, dated October 29, 2008; and granting petitioner costs and attorneys' fees in this proceeding. Respondents oppose the petition only as to the attorneys' fees in the Award

On September 1, 2006, petitioner entered into an employment agreement (the "Agreement") with respondents whereby petitioner would provide medical services on behalf of respondents' medical practice. The Agreement included a provision that required respondents to pay for petitioner's medical malpractice insurance. The medical malpractice insurance included "tail

coverage," which covered lawsuits that were commenced after the policy period ended, but concerned events that occurred during the policy period. The Agreement called for all disputes to be resolved by arbitration before and pursuant to the rules of the American Arbitration Association (the "AAA"). Petitioner was employed by respondents from September 1, 2006 through March 9, 2007.

Sometime after her employment ended, petitioner was named as a defendant in a medical malpractice action arising out of events that occurred while she was employed by respondents. Petitioner then learned that respondents had failed to pay the premium for tail coverage. On December 19, 2007, petitioner filed a demand for arbitration. The arbitration occurred on August 9, 2008, before Arbitrator Merrick T. Rossein of the AAA. In an opinion dated October 29, 2008, Arbitrator Rossein found that respondents had breeched the Agreement by failing to pay for petitioner's tail coverage. In an effort to put petitioner "'in the position [she] would have been in had there been no violation' of the contract," Arbitrator Rossein concluded that respondents should pay attorneys' fees already incurred by petitioner in defending the medical malpractice suit. He further found that the Agreement, by requiring arbitration before the AAA, implicitly required both parties to participate in the arbitration in good faith. Arbitrator Rossein concluded that respondents' meritless defense to its failure to pay the tail coverage and refusal to pay AAA fees constituted bad faith and therefore required respondents to pay their share of AAA fees and petitioner's attorneys' fees incurred as a result of the arbitration. In a partial final award, also issued on October 29, Arbitrator Rossein required respondents to "either purchase[ ] the required insurance or provid[e] its equivalent, i.e. to defend, hold harmless, and indemnify [petitioner] to the fullest

extent possible of the . . . insurance policy in effect at the time." Arbitrator Rossein divided up the AAA fees between the parties. Arbitrator Rossein awarded petitioner's attorneys' fees for the arbitration and attorneys' fees incurred in the medical malpractice action. He gave petitioner thirty days to submit her attorneys' hourly rates. Petitioner submitted an Affirmation in Support of Legal Fees Application, which respondents failed to oppose. On January 22, 2009, Arbitrator Rossein issued a final award, awarding petitioner $45,983.75 in attorneys' fees. On February 11, 2009, Arbitrator Rossein made a technical modification to the final award, but upheld the award of attorneys' fees in the amount of $45,983.75.

Petitioner seeks a confirmation of Arbitrator Rossein's award in full and requests that this court award attorneys' fees incurred in this proceeding. Though respondents oppose petitioner's application in "all respects", respondents do not dispute the findings of Arbitrator Rossein that respondents failed to pay for the tail coverage nor the requirement that they indemnify and defend petitioner in the medical malpractice suit and pay AAA fees and attorneys' fees incurred by the medical malpractice action. Respondents dispute Arbitrator Rossein's decision to award petitioner with attorneys' fees incurred by the arbitration.

As a preliminary matter, petitioner has not demonstrated that she is entitled to recover attorneys' fees for bringing this proceeding. An award of such fees is available only when it "is authorized by agreement between the parties, statute or court rule." Hooper Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491 (1989) (citations omitted). Petitioner's claim for attorneys' fees incurred by this proceeding is therefore denied.

Under C.P.L.R. § 7510, "[t]he court shall confirm an award upon application of a party made within one year of its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." The award "[u]nless otherwise provided in the agreement to arbitrate" can include "the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration." C.P.L.R. § 7513. This section does not bar the winner of an arbitration from obtaining attorneys' fees in an award, but limits the award of such fees to three situations: where a "statute provide[s] for such an award" (McLaughlin, Piven, Vogel Securities, Inc. v. Ferrucci, 67 A.D.3d 405, 406 [1st Dep't 2009] [citation omitted]); where "it was . . . authorized by an express provision of the arbitration agreement" (Id.); or where it is "unmistakably clear" that both parties intended such an award. Matza v. Oshman, Helfenstein, & Matza, 33 A.D.3d 493, 495 (1st Dep't 2006). Frivolous conduct and objectionable behavior in the arbitration are not sufficient grounds to award attorneys' fees. Emey Roth & Sons, P.C. v. M&B Oxford Inc., 298 A.D.2d 320, 321 (1st Dep't 2002); MKC Development Corp. v. Weiss, 203 A.D.2d 573 (2d Dep't 1994).

Arbitrator Rossein had no authority to award petitioner's attorneys' fees incurred pursuant to the arbitration action. The conduct of the losing party in the arbitration is not sufficient grounds to award attorneys' fees. The Agreement is silent on attorneys' fees and no statute controls attorneys' fees in this case. Petitioner argues that respondents consented to Arbitrator Rossein's award for attorneys' fees incurred by the arbitration, because they failed to oppose petitioner's request for such fees at the arbitration. Nevertheless, petitioner has not submitted sufficient proof to demonstrate that respondents' intention to allow such an award was unmistakably clear.

Petitioner's request for attorneys' fees incurred by this proceeding is denied. The arbitration award is confirmed to the extent that it requires respondent to indemnify and defend petitioner in the medical malpractice suit; requires respondent to pay certain AAA fees; and requires respondent to pay attorneys' fees already incurred by petitioner in the medical malpractice suit. The portion of the arbitration award that requires respondent to pay attorneys' fees incurred by petitioner in bringing the arbitration is vacated. Since the attorneys' fees were awarded in one lump sum, the case is remanded to the AAA for a determination of the attorneys' fees incurred only in the medical malpractice lawsuit. Accordingly, it is

ORDERED and ADJUDGED that petitioner Tia Morris, shall have judgment and recover against respondents Obiakor OB/GYN P.C. and AFAM Medical Group, having their address at 5205-7 Church Avenue, Brooklyn, NY 11203, in the amount of $8,775.00, plus interest at the statutory rate from February 11, 2009, as computed by the Clerk, representing a portion of AAA fees incurred by petitioner, and that the petitioner have execution therefor.

This constitutes the decision, order, and judgment of the court.

Dated: March / 2, 2010

JOAN B. LOBIS, J.S.C.