

**Matter of American Country Ins. Co. v Motor Veh.
Acc. Indem. Corp.**

2011 NY Slip Op 30402(U)

February 18, 2011

Supreme Court, New York County

Docket Number: 116462/2010

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. Justice

PART 10

Index Number : 116462/2010
AMERICAN COUNTRY INSURANCE
 VS.
M.V.A.I.C.
 SEQUENCE NUMBER : 001
 VACATE OR MODIFY AWARD

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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 (s) and cross-motion(s)
 decided in accordance with
 the annexed decision/order
 of even date.**

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: 2/18/11

J. Gische
 HON. JUDITH J. GISCHE J.S.C.
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
In the matter of the application of
AMERICAN COUNTRY INSURANCE COMPANY,

Petitioner

-against-

MOTOR VEHICLE ACCIDENT INDEMNITY
CORP.,

Defendant (s).

DECISION/ ORDER
Index No.: 116462-2010
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

-----X
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Notice of Pet and Pet w/EMM affirm, FP affid, exhs, AOS 1

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a petition by American Country Insurance Company ("American Country") for an order vacating the arbitration award and decision entered against it on September 22, 2010 ("arbitration award") on the basis that the arbitrator exceeded her authority, it was rendered in violation of law and the decision is utterly arbitrary. Though there is proof of service on respondent ("MVAIC") and the arbitrator, neither respondent has opposed the motion. Therefore, it will be decided on default and the court's decision is as follows:

Fact and arguments presented

American Country was at one time the insurer of a vehicle registered to non-

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party Work for Freedom, Co., Inc. ("WFF") On September 20, 2008, the vehicle, being driven by Carmen Munoz, was involved in a collision. American Country had, however, terminated WFF's policy effective September 15, 2008. WFF had been notified that coverage would be terminated due to non-payment of premiums. That notice was sent to WFF on August 11, 2008.

After claims were filed with American Country, American Country notified WFF and other insureds that the insurance policy had expired on September 10, 2008, prior to the date of the accident on September 20, 2008.

MVAIC brought an arbitration proceeding on behalf of Munoz who was injured in the collision. According to Frank Petrino, American Country's Claims Supervisor, once he received notification of the arbitration he contacted MVAIC's attorney handling the matter and advised the attorney that there was lack of coverage. Assuming the hearing would be cancelled, Petrino states that no one appeared for the hearing which took place September 21, 2010. In her decision, the arbitrator notes American's non-appearance. She also wrote the following notations: "Carmen Munoz is a covered person" and "No evidence of cancellation no document from DMV."

Petrino states that he immediately contacted the arbitrator after receiving a copy of the arbitration award to try to "resolve the Decision." He has not however, provided the court with any proof he did this nor explained what he means by "resolve." Apparently no formal attempt was made to bring a motion to vacate the arbitration award. Petrino also refers to emails he sent to and received from the arbitrator, but none of them have been provided to the court. American Country's attorney makes a similar statement that he also made attempts to "resolve" this matter and his request

* 4]
was "refused."

American Country contends the arbitrator's award is an abuse of discretion because there was no insurance policy in effect with the insured on the date of the accident and that the arbitrator simply went by what was listed in the police report which is inadmissible hearsay. Petitioner alleges further that the arbitrator's award is contrary to public policy because it imposes a contract where there is none. Petitioner argues that MVAIC had the burden at the hearing of proving an insurance policy was in effect on the date of the accident which it did not do and that insurance cannot be created through equitable estoppel.

Discussion

CPLR § 7511 [b] sets forth the narrow grounds upon which an arbitrator's award may be vacated. An award may be vacated by the court only if the petitioner can prove: it was procured by corruption, fraud, or misconduct, the arbitrator was not impartial, the arbitrator exceeded his or her power, or executed it so imperfectly that the award is indefinite or not final. It may also be vacated if there was a complete failure to adhere to required arbitration procedures.

Although in certain extraordinary circumstances, an award may be vacated if the petitioner can prove it is "utterly arbitrary or violative of public policy," this is a difficult burden to meet, and an award will not be vacated by the court merely because the arbitrator may have committed an error of law or fact. Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471 (2006).

Pursuant to Vehicle and Traffic Law, an insurer must adhere to certain notice requirements when seeking to terminate an insured's insurance contract (VTL §§ 312-a,

313). Among the requirements is that the insurer keep records of of the notice of termination sent and the certificate of mailing as proof such notice was sent. Another requirement is that the notice of termination must be filed with DMV (VTL § 313). Notice of cancellation of automobile liability policy is ineffective unless in strict compliance with requirements of VTL § 313 [1] [a] (Geico Indem. v. Roth, 56 A.D.3d 1244 [4 Dept 2008]).

In her award, the arbitrator specifically noted that there was no evidence of cancellation or proof of filing with DMV. Since American Country would have had the burden of presenting evidence of its compliance with all applicable statutes, but the insurer defaulted in appearing for the hearing, the arbitrator made her decision based upon the information available to her. American Country has failed to show that the arbitrator exceeded her authority in rendering her award. Therefore, the petition to set aside the award is denied although the petition is before the court on default.

Conclusion

In accordance with the foregoing,


It is hereby

ORDERED DECREED AND ADJUDGED that the petition is denied and this proceeding dismissed; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
February 18, 2011

ENTER :



Hon. Judith J. Gische, JSC

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