

Nationwide Mut. Fire Ins. Co. v Kanganis

2011 NY Slip Op 32124(U)

July 19, 2011

Sup Ct, Nassau County

Docket Number: 2629/11

Judge: Anthony L. Parga

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SHORT FORM ORDER

**SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:**

HON. ANTHONY L. PARGA
JUSTICE

-----X **PART 8**
**NATIONWIDE MUTUAL FIRE
INSURANCE CO.**

Petitioner,
-against-

INDEX NO. 2629/11
XXX
MOTION DATE: 06/10/11
SEQUENCE NO. 01

KIMBERLY KANGANIS, and JOHN NAUMANN,
Respondents.

-----X	
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Upon the foregoing papers, the application by petitioner, pursuant to CPLR §7511(b)(1), for an order vacating and setting aside the arbitration award, dated November 12, 2010, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

Petitioner moves for an order vacating the arbitration award, dated November 12, 2010, on the basis that it was prejudiced by corruption, fraud, and/or misconduct by the Respondents in procuring the award.

This claim arises out of an alleged slip and fall accident that occurred on September 30, 2007 at the premises located at 14 Elizabeth Court, Hempstead, New York, which was owned by Respondent, John Naumann, and insured by Petitioner. Respondent Kimberly Kanganis alleges that she slipped and fell on a staircase in said house and that she sustained severe and permanent personal injuries as a result of the alleged accident.

Respondent Kanganis commenced a lawsuit in Nassau County Supreme Court against

Respondent Naumann, entitled, *Kanganis v. Naumann*, bearing index number 19807/07. At the depositions in said matter, both Kanganis and Naumann testified under oath that the accident occurred at Naumann's home located at 14 Elizabeth Court in Hempstead, New York.

Following pre-trial discovery in said lawsuit, the parties entered into a Dispute Resolution Agreement, dated June 23, 2010, which provided that the parties agreed to a binding arbitration with the parameters of \$0 for the low and \$120,000 for the high. On November 11, 2010, an arbitration hearing was held before Arbitrator Peter J. Merani, Esq. of NAM in Garden City, New York. Both Kanganis and Naumann testified at the hearing that the accident occurred at Naumann's house. By decision dated November 12, 2010, the Arbitrator awarded Kanganis \$110,000 for pain and suffering, which was reduced to \$55,000 based upon the Arbitrator's comparative negligence finding of fifty percent (50%). Petitioner contends that it received the notice of decision on November 23, 2010 and that the within application is timely.

Petitioner contends that on or about October 31, 2010, Costas Kanganis, who was Respondent Kimberly Kanganis's husband at the time of the occurrence, sent a letter to the New York State Insurance Department stating that Kimberly Kanganis did not fall at Naumann's home, but rather fell at her own home, located at 62 Forge Lane, Levittown, New York. On December 9, 2010, Petitioner received a telephone call from the New York State Insurance Department Fraud Bureau advising of same. Thereafter, Petitioner referred the matter to its Special Investigation Unit ("SIU") for further handling.

In support of its petition to vacate the arbitration award due to corruption, misconduct and fraud on behalf of the Respondents in procuring said award, Petitioner submits several inconsistent affidavits of persons interviewed by the defendant's SIU investigators, each of which contain hearsay accounts of statements allegedly made by Kimberly Kanganis wherein she indicated that she fell at home, but was going to say she fell at Naumann's house so that she could assert a claim against Naumann's insurance company. None of the statements are taken from persons who actually witnessed Kimberly Kanganis's fall. Costas Kanganis and his niece, Jillian Ithier, attest that they heard Ms. Kanganis fall at her home, but have different accounts of what happened that evening. All of the affidavits submitted by Petitioner contain only hearsay accounts of "witnesses" to whom Ms. Kanganis allegedly told, or who overheard Ms. Kanganis

say, that she was going to claim that she fell and was injured at Naumann's home and split the proceeds of any award with him. One "witness" account even has Ms. Kanganis stating that her husband pushed her down the stairs of her home.

In opposition, Ms. Kanganis submits an affidavit in which she attests that she fell at Mr. Naumann's home on September 30, 2007 at approximately 9:00 A.M. at 14 Elizabeth Court, Hempstead, New York, while visiting John Naumann. She attests that she and Mr. Costas Kanganis are in the middle of a contentious divorce which "has become extremely hostile and violent." She obtained an order of protection from Mr. Kanganis and contends that same was served upon him in October 2010, directly prior to his October 31, 2010 correspondence to the New York State Insurance Department. She also attests that the affidavits submitted by Petitioner were obtained from Mr. Kanganis's family members and friends.

In addition, Ms. Kanganis has submitted an affidavit from her former attorney in the underlying personal injury action (entitled Kimberly Kanganis v. John Naumann, bearing Nassau County Index number 19807/07), Lawrence P. Krasin, Esq., who attests that Mr. Kanganis came to counsel's office a year after the underlying personal injury lawsuit was commenced to inquire why he was not included in the action brought by his wife. Mr. Krasin attests that he would not reveal any information about the case to Mr. Kanganis, due to the attorney-client privilege held by Kimberly Kanganis.

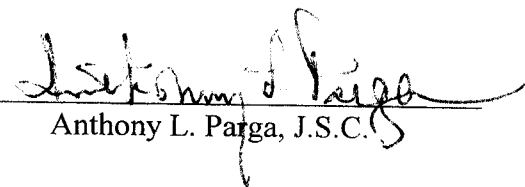
Respondent Naumann also submits opposition contending that the affidavits submitted by Petitioner are inconsistent and contain inadmissible hearsay statements. He also contends that the affidavits are submitted by Mr. Kanganis's family and friends only. Further, Respondent Naumann argues that Petitioner failed to meet its burden of proof with respect to the existence of fraud by clear and convincing evidence.

Petitioner has failed to establish by clear and convincing evidence the existence of fraud on behalf of the Respondents in the arbitration in the underlying personal injury action brought by Kimberly Kanganis. Petitioner has submitted inconsistent affidavits which contain only hearsay attestations in support of its allegations of corruption, fraud, and misconduct. Further, the petitioner offers no evidence that the fraud was not discoverable upon the exercise of due diligence on its behalf prior to the arbitration. There is no evidence that any effort was made to

determine whether the accident occurred where it is alleged to have occurred or that any persons living in the Kanganis home or the Naumann home were interviewed or subpoenaed for depositions prior to the date of the arbitration herein. "To vacate an arbitration award on the ground of fraud, a party must establish by clear and convincing evidence the existence of fraud, that the fraud would not have been discoverable upon exercise of due diligence prior to or during the arbitration, and that the fraud materially related to an issue in arbitration." (*Matter of Klikocki*, 216 A.D.2d 808, 628 N.Y.S.2d 876 (3d Dept. 1995); *Imgest Finance Establishment v. Shearson Lehman Hutton, Inc.*, 172 A.D.2d 291, 568 N.Y.S.2d 104 (1st Dept. 1991); *Silver v. Tribeca*, 26 Misc.3d 133(A), 907 N.Y.S.2d 104 (App. Term 1st Dept. 2010)). There is no clear and convincing evidence to support Petitioner's claims herein, and the Petitioners submission of inconsistent hearsay affidavits are insufficient to establish by that corruption, fraud or misconduct occurred. (See, *United Transportation Union, Local 1908 v. Cottrell Bus Service*, 72 A.D.2d 909, 422 N.Y.S.2d 181 (4th Dept. 1979)(hearsay assertions made in labor union's brief, which assertions were unsupported in the record, as to alleged inaccurate statements made during arbitration proceedings, constituted no basis for vacating arbitration award on the ground of corruption, fraud and misconduct); see also, *Rodriguez v. Sixth Precinct, Inc.*, 4 A.D.3d 406, 771 N.Y.S.2d 368 (2d Dept. 2004)(hearsay evidence is insufficient to bar an award of summary judgment to a movant who has made a prima facie showing of entitlement to same where the hearsay evidence is the only evidence presented); *Tomol v. Sbarro, Inc.*, 306 A.D.2d 461, 761 N.Y.S.2d 845 (2003)). There is no ground for vacatur of an arbitration award based on a mere suspicion of fraud. (*State Farm Mutual Automobile Ins. Co. v. Rodriguez*, 121 A.D.2d 386, 503 N.Y.S.2d 95 (2d Dept. 1986)).

As the Petitioner has failed to demonstrate by clear and convincing evidence that the Respondents procured the arbitration award at the arbitration of the underlying personal injury action through fraud, misconduct and/or corruption, there is no basis for a vacatur of the arbitration award dated November 12, 2010. Accordingly, petitioner's application is denied.

Dated: July 19, 2011


 Anthony L. Parga, J.S.C.

ENTERED

JUL 22 2011

**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**

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