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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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IN THE MATTER OF THE ARBITRATION BETWEEN NEW PENN MOTOR EXPRESS, INC.,

Petitioner,

-against-

GEICO GENERAL INSURANCE COMPANY,

Respondent.

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Index No. 5469/11

Motion Submitted: 5/18/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Petitioner seeks an Order vacating the arbitration award issued in favor of respondent in the amount of $38,245.81, for no-fault benefits paid to or on behalf of an individual involved in a motor vehicle accident. Respondent opposes the requested relief, and requests that the petition be denied.

Petitioner acknowledges that it was aware that respondent filed an arbitration application with Arbitration Forums, Inc. in November 2010. In response, petitioner served, by mail, an answer and contentions to the application claiming that the application was insufficient because it did not contain any medical records or proof of payments.

Petitioner claims that it was never notified of the arbitration hearing that was conducted on December 13, 2010. Petitioner claims to have first been notified of the award

and provided a copy thereof on January 13, 2011, when respondent sent petitioner a letter enclosing a copy of the award. Petitioner asserts that the award should be vacated because it was not given notice of the hearing, and because the award was arbitrary and capricious in that it is not based on legally sufficient proof.

The instant petition was served upon respondent, and filed with the Nassau County Clerk's Office, on April 13, 2011.

Respondent contends that petitioner's application to vacate the arbitration award is untimely, and fails to raise a valid ground pursuant to CPLR § 7511(b). According to respondent, petitioner never notified Arbitration Forums, Inc. ("AF") that a representative would attend the hearing, but instead filed its answer indicating that a representative would not appear.

CPLR § 7511(a) imposes a ninety (90)-day time limit for an application to vacate or modify an arbitration award. The time period for bringing such an application commences upon delivery of the award to the aggrieved party.

In this case, respondent claims that the instant application is untimely, having been filed 121 days after the award was published upon the AF website on December 13, 2010. Respondent avers that Section (5)(vi) of the NY PIP Rules states that decisions will be posted on the AF Web site promptly following the hearing, and that AF will provide electronic notification to the parties of a decision's publication. Respondent has failed to submit any proof that AF delivered the award to petitioner in any form, including by electronic means.

Petitioner has submitted the January 13, 2011 letter sent to it by respondent enclosing a copy of the arbitration award. In that letter, respondent's claims examiner advises petitioner's senior claims representative, Jane Holt, that petitioner's "claim representative was contacted regarding delay of payment of this award" on December 17, 2010.

Although petitioner has included respondent's letter evidencing contact between the parties' representatives on December 17, 2010, Jane Holt states in her affidavit submitted with the instant petition that she never received notice of the hearing, and was never provided with any notices from AF until she received the letter from respondent dated January 13, 2011.

Respondent does not claim, or submit evidence, that the award was delivered to petitioner on December 17, 2010, just simply that there was "contact" of some kind on that date.

Accordingly, based on the evidence presented to the Court for its consideration, the Court concludes that the instant petition was timely made pursuant to CPLR § 7511(a).

The Court now turns to the merits of the petition to vacate the arbitration award issued in this matter, recognizing that the use of arbitration to resolve disputes is strongly encouraged in the State of New York (*See* ***State of New York v. Philip Morris, Inc.***, 8 N.Y.3d 574, 869 N.E.2d 636, 838 N.Y.S.2d 460 (2007); ***Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.***, 37 N.Y.2d 91, 95, 332 N.E.2d 333, 371 N.Y.S.2d 463 [1975]), and that an arbitrator's award may be vacated only upon the grounds specified in CPLR § 7511 (***Blamowski v. Munson Transportation, Inc.***, 91 N.Y.2d 190, 690 N.E.2d 1254, 668 N.Y.S.2d 148 (1997); ***Miro Leisure Corp. v. Prudence Orla, Inc.***, 83 A.D.3d 945, 922 N.Y.S.2d 424 (2d Dept., 2011); ***Domotor v. State Farm Mutual Insurance Company***, 9 A.D.3d 367, 778 N.Y.S.2d 919 (2d Dept., 2004); ***Wicks Construction, Inc. v. Green***, 295 A.D.2d 527, 744 N.Y.S.2d 452 [2d Dept., 2002]).

The grounds specified in CPLR § 7511(b)(2) apply "only if the aggrieved party did not participate in the arbitration and such party was not served with a notice of intention to arbitrate. Assuming these two conditions are met, the grounds for vacatur include all of those listed in subdivision (b)(1) and expand to include the threshold objections that could have been raised in advance of the arbitration" (***Alexander, Practice Commentary, § 7511:2, p. 772-73, Book 7B, McKinney's Cons. Laws***). In this case, petitioner concedes that it was served with a notice of arbitration in November 2010 and interposed an answer; thus, 7511 (b)(2) does not apply, and the only grounds for vacatur of the award are those set forth in (b)(1).

Further, the burden of proof that an arbitration award is subject to vacatur rests on the party moving to vacate. (See, ***Boggin v. Wilson,*** 14 A.D.3d 523, 524, 789 N.Y.S.2d 168 [2d Dept., 2005]).

As to petitioner's first claim that the award should be vacated because it was not notified of the hearing, the Court notes that the NY PIP Rules annexed to respondent's opposition papers as Exhibit A state in pertinent part that, "[i]n the event either party to the hearing questions proper notice following an award issuance, Arbitration Forums *shall* schedule the case for a rehearing with the consent of the adverse party" (Section 4[i])(emphasis added).

Petitioner does not dispute that the NY PIP Rules apply to this matter. Petitioner has, however, failed to advise this Court whether petitioner raised the issue of notice with AF, and whether respondent consented to, or opposed a rehearing. It appears to the Court that petitioner's compliance with the NY PIP Rules may have avoided the necessity for the instant petition. Thus, petitioner has failed to establish that it has fully exhausted the

remedies available to it prior to bringing this special proceeding.

Nonetheless, the Court will consider petitioner's claims made pursuant to CPLR § 7511(b)(1).

Petitioner's contention that the award should be vacated because it was not notified of the hearing sounds in a violation of CPLR § 7511(b)(1)(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." A court must also find that the rights of the party seeking vacatur were prejudiced by the failure to follow procedure (***CPLR § 7511[b][1]***).

CPLR § 7506(b) provides in pertinent part that, "[t]he arbitrator shall appoint a time and place for the hearing and notify the parties in writing personally or by registered or certified mail not less than eight days before the hearing."

Furthermore, the NY PIP Rules, Section (4)(i), submitted by respondent, provide as follows:

> For cases filed via AF's Web Site, AF will immediately notify the parties of the hearing date and any subsequent changes. For parties that do not file or respond online, AF will send a Hearing Notice at least 40 days prior to the initial hearing date, unless waived, and notify them of any changes. A scheduled hearing shall proceed in the event that the respondent fails to answer after the requisite Hearing Notice has been sent. In the event either party to the hearing questions proper notice following an award issuance, Arbitration Forums shall schedule the case for a rehearing with the consent of the adverse party.

According to the affidavit of Jane Holt, petitioner's senior claims representative, petitioner's answer and contentions raised the defense that respondent's application for arbitration was insufficient in that it contained only the application itself and a contentions sheet, but no medical records or proofs of payment to support the claim for $38,245.81. Ms. Holt further states that she did not receive any notices from AF regarding the matter until she received the aforementioned January 13, 2011 letter from respondent enclosing a copy of the arbitration award. Ms. Holt avers that petitioner company was not notified of the hearing that took place on December 13, 2010.

Despite establishing that petitioner was not notified of the hearing pursuant to statute and the NY PIP Rules, petitioner has failed to establish how its rights were prejudiced by failure to be so notified. Ms. Holt's affidavit makes no claim that petitioner wished to have a representative present at the hearing, nor does her affidavit allege prejudice attributable to

the failure to notify.[1]

Furthermore, petitioner does not controvert respondent's claim that petitioner chose not to send a representative to the hearing. Respondent attaches a printout from the AF website reflecting that petitioner filed its answer by mail, and that no personal representative would appear at the hearing on petitioner's behalf. Although the computer printout is not certified, petitioner has not submitted a reply denying the accuracy of that printout, which also reflects that petitioner admits coverage for the accident and does not dispute damages. Further according to the printout, petitioner's answer and contentions were received by AF on November 22, 2010.

Thus, petitioner has failed to establish its entitlement to vacatur based on the mere fact that it was not notified of the arbitration hearing.

Petitioner also claims that the award was "arbitrary and capricious," in that the application was not based on legally sufficient proof.

"An award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious" ***(Motor Vehicle Accident Indemnification Corp. v. Aetna Casualty & Surety Co.***, 89 N.Y.2d 214, 223, 674 N.E.2d 1349, 652 N.Y.S.2d 584 [1996]; ***CPLR § 7511 (b)(1)(iii)***).[2]

In support of its contention that the award is arbitrary and capricious, petitioner has submitted a copy of the award, which states that the applicant (respondent in this action) provided proof of the medical damages claimed, and that liability was established by an independent witness confirming that petitioner's insured ran a red light striking several cars, including respondent's insured traveling with the green light. The award further states that the arbitrator considered the application, contentions, all listed evidence received, the personal representative for respondent, as well as petitioner's response and contentions filed in November 2010.

Petitioner also relies on Ms. Holt's affidavit claiming that, since petitioner was not served with copies of any medical records or proofs of payment, the arbitrator's decision is arbitrary and capricious, but fails to address the statement in the award that proof of medical damages was submitted.

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[1]The NY PIP Rules, Section (4)(iii) provides that "[a]n applicant or respondent may send a representative to a hearing or proceed on the written submission of evidence without a representative."

[2]The parties do not dispute that the claim at bar is subject to mandatory arbitration.

Without more, such as a transcript of the hearing, petitioner has failed to sustain its burden of proof in establishing that the arbitration award is unsupported by the evidence, and therefore arbitrary and capricious (*See* ***Boggin, supra***).

The petition is denied, and the arbitration award dated December 13, 2010 is confirmed pursuant to CPLR § 7511(e) *(see also* ***Mercury Casualty Company v. Healthmakers Medical Group, P.C.***, 67 A.D.3d 1017, 888 N.Y.S.2d 762 [2d Dept., 2009]).

The foregoing constitutes the Order of this Court.

Dated: July 21, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
JUL 26 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE