

Kohli v Allstate Ins. Co.
2012 NY Slip Op 31044(U)
March 30, 2012
Sup Ct, NY County
Docket Number: 115291/2010
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.

PART 46

Index Number : 115291/2010
KOHLI, SADHANA
VS.
ALLSTATE INSURANCE CO.
SEQUENCE NUMBER : 001
VACATE OR MODIFY AWARD

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2
3

Notice of Motlon/ 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~~ and adjudged that:

The court denies the amended petition and dismisses this proceeding, pursuant to the accompanying decision. C.P.L.R. § 751(b)(1).

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: 3/30/12

Lucy Billings
LUCY BILLINGS 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: PART 46

-----x

SADHANA KOHLI,

Index No. 115291/2010

Petitioner

- against -

DECISION AND ORDER

ALLSTATE INSURANCE COMPANY,

Respondent

-----x

LUCY BILLINGS, J.S.C.:

Petitioner seeks to vacate a decision dated August 18, 2010, after arbitration that found her 100% liable and therefore denied her claim to supplementary uninsured/underinsured motorist (SUM) benefits for a motor vehicle collision. She seeks vacatur on the grounds that the arbitrator committed corruption, fraud, and misconduct and failed to follow required procedures. C.P.L.R. § 7511(b) (1) (i) and (iv).

In a stipulation dated February 9, 2011, the parties agreed to serve an amended petition and an amended answer. After oral argument, for the reasons explained below, the court denies the amended petition and dismisses the proceeding.

I. UNDISPUTED FACTUAL BACKGROUND

Petitioner was involved in a motor vehicle collision April 30, 2008, while operating a motor vehicle insured by respondent. The insurance policy included \$100,000.00 of SUM coverage. Petitioner complied with the policy's notification and inspection requirements. She requested arbitration of an uninsured motorist

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(UM) claim by filing an application December 17, 2009, with the American Arbitration Association (AAA). After arbitration June 22, 2010, AAA arbitrator Richard Kesnig found the collision was not covered by the policy respondent issued to petitioner because of her 100% liability for the collision.

II. APPLICABLE STANDARDS

Corruption, fraud, misconduct, and failure to follow required procedures are grounds for setting aside an arbitration award. C.P.L.R. § 7511(b)(1)(i) and (iv); Henneberry v. ING Capital Advisors, LLC, 10 N.Y.3d 278, 283 (2008); Azrielant v. Azrielant, 301 A.D.2d 269, 275 (1st Dep't 2002); Matter of Curley (State Farm Ins. Co.), 269 A.D.2d 240, 241 (1st Dep't 2000); Sims v. Siegelson, 246 A.D.2d 374, 376 (1st Dep't 1998). Petitioner bears a heavy burden to show that the arbitral determination warrants vacatur. Cherry v. New York State Ins. Fund, 83 A.D.3d 446 (1st Dep't 2011); Scollar v. Cece, 28 A.D.3d 317 (1st Dep't 2006). See Vick v. Albert, 34 A.D.3d 331, 332 (1st Dep't 2006). To overturn the arbitrator's decision, petitioner must demonstrate partiality, misconduct, or other impropriety by clear and convincing evidence. Motor Veh. Acc. Indem. Corp. v. NYC E.-W. Acupuncture, P.C., 77 A.D.3d 412, 415 (1st Dep't 2010); Moran v. New York City Tr. Auth., 45 A.D.3d 484, 485 (1st Dep't 2007); Kalfus v. Kalfus, 270 A.D.3d 41 (1st Dep't 2000). See Scollar v. Cece, 28 A.D.3d 317. The court may not set aside an arbitration award based simply on the interests of justice or the arbitrator's legal or factual errors. Social Serv. Empls. Union,

Local 371 v. City of New York, 50 A.D.3d 264 (1st Dep't 2008); Azrielant v. Azrielant, 301 A.D.2d at 275. The court must uphold the award if it rests on any plausible basis. Campbell v. New York Tr. Auth., 32 A.D.3d 350, 352 (1st Dep't 2006).

III. PETITIONER'S CLAIMS

A. LACK OF EVIDENCE

The proceedings before arbitrator Kesnig were not recorded. A stenographic record of the arbitration is not required, but AAA Rule 16 provides that "a party wishing a stenographic record shall make arrangements directly with the stenographer and shall notify the other party of such arrangements in advance of the hearing." Am. V. Pet. Ex. 5. Petitioner does not claim, however, that she requested a stenographer for the hearing. Instead, the parties present conflicting accounts on personal knowledge of what occurred at the arbitration. Thus, insofar as petitioner's account of the arbitration proceedings contradicts respondent's account, the lack of a record permitting meaningful review prevents petitioner from meeting her burden to vacate the arbitration determination. Vick v. Albert, 34 A.D.3d at 332. See Yoonessi v. Givens, 78 A.D.3d 1622, 1623 (4th Dep't 2010); Matter of Military Contrs. (Marrano/Marc Equity Corp.), 2 A.D.3d 1382 (4th Dep't 2003).

B. GROUND TO VACATE THE ARBITRATION AWARD

Even considering petitioner's claims as uncontradicted, they do not warrant vacatur on their merits. Petitioner's specific contentions mainly stem from her core claim that the arbitrator

exceeded his authority in determining liability because respondent's insurance policy provided her coverage regardless of fault.

The insurance policy's endorsement in effect when the collision occurred provides that respondent:

will pay sums that the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by an accident arising out of such uninsured motor vehicle's ownership, maintenance or use

Aff. of Wendy Castillo Ex. A at 2. The definition of "an uninsured motor vehicle" includes "a hit-and-run vehicle." Id. at 1.

Petitioner challenges the arbitrator's insistence on considering a police report of the collision, because the police report bore on liability. Whether or not the arbitrator's determination that petitioner was not "legally entitled to recover . . . damages" was erroneous as discussed further below, the insurance policy provides coverage for "an accident." Id. at 2. Therefore the arbitrator's solicitation and consideration of the police report, relevant to whether an accident occurred, was reasonable. In particular, the police report showed less damage to the rear than to the front of petitioner's vehicle, the middle vehicle in a chain collision. While this evidence may bear on which vehicle first hit the vehicle in front, the extent and location of the damage also bears on the force of the impacts, relevant to petitioner's injury. Reliance on evidence outside the record presented only by the parties does not constitute

corruption, fraud, or misconduct. Watt v. Roberts, 79 A.D.3d 525, 526 (1st Dep't 2010).

1. Corruption and Fraud

Petitioner claims arbitrator Kesnig committed fraud by misrepresenting in his decision (1) that petitioner introduced the police report and did not object to it and (2) that the proceedings were closed July 23, 2010, when the hearing was concluded a month earlier. Petitioner further claims Kesnig committed corruption by threatening to terminate the hearing unless the police report was produced. Respondent merely maintains that the evidence does not support petitioner's claims.

Even if the arbitrator's decision falsely reported that petitioner introduced the police report and did not object to it and that the hearing was closed July 23, 2010, and such misrepresentations constituted fraud, corruption, or misconduct, petitioner fails to demonstrate prejudice from the misrepresentations. Meisels v. Uhr, 79 N.Y.2d 526, 535 (1992); Watt v. Roberts, 79 A.D.3d at 526; Scollar v. Cece, 28 A.D.3d 317. See C.P.L.R. § 7511(b)(1). While petitioner also contends the arbitrator's alleged threats demonstrated corruption, she further fails to demonstrate how they affected his impartiality or procured the decision. Matter of Accessible Dev. Corp. (Ocean House Ctr.), 4 A.D.3d 217 (1st Dep't 2004); Velez Org. v. J.C. Contr. Corp., 289 A.D.2d 105, 106 (1st Dep't 2001).

2. Failure to Follow Procedures

Petitioner claims the arbitrator failed to follow the arbitration procedures and committed misconduct by depriving her of the opportunity to test the police accident report's credibility; by considering the report, which was not evidence exchanged by the parties; and by conducting an independent investigation. Petitioner contends that the arbitrator prevented her from challenging the police accident report by denying her requests to subpoena the police officer who prepared it and to adjourn the hearing to allow her to produce the officer.

Although petitioner claims the arbitrator's alleged failures to follow AAA procedures were grounds for reversing the arbitral decision, C.P.L.R. § 7511(b)(1)(iv) applies only to a failure to follow C.P.L.R. Article 75's procedures. Sims v. Siegelson, 246 A.D.2d at 377; Matter of Eagle Ins. Co. (National Union Fire Ins. Co. of Pa.), 202 A.D.2d 273 (1st Dep't 1994); 21 Lizenski Corp. v. Spillman, 14 A.D.3d 617 (2d Dep't 2005); Travelers Prop. Cas. Co. v. Place Transp., 270 A.D.2d 352 (2d Dep't 2000). See Chawki v. New York City Dept. of Educ., Manhattan High Schools, Dist. 71, 39 A.D.3d 321, 323-24 (1st Dep't 2007). Even if C.P.L.R. § 7511(b)(1)(iv) applied to failure to follow procedures outside C.P.L.R. Article 75, however, petitioner does not demonstrate that the arbitrator failed to follow AAA procedures.

While petitioner faults the arbitrator for denying an adjournment to allow her to challenge the police accident report, the arbitrator's decision regarding adjournments is discretionary

and may not be disturbed unless abused. Motor Veh. Acc. Indem. Corp. v. NYC E.-W. Acupuncture, P.C., 77 A.D.3d at 415; Chawki v. New York City Dept. of Educ., Manhattan High Schools, Dist. 71, 39 A.D.3d at 324; Campbell v. New York City Tr. Auth., 32 A.D.3d at 352. Petitioner claims surprise that the arbitrator raised liability issues at the hearing, but petitioner filed an Arbitration Statement April 1, 2010, that addressed liability as well as jurisdiction and damages. The statement referred to and appended as exhibits an ambulance call report and a hospital report, both indicating that petitioner's vehicle was struck from the rear before she struck a motor vehicle in front of her, and her examination under oath (EUO) to that effect. See Am. V. Pet. Ex. 6.

Since petitioner herself had framed liability as an issue for the arbitration, she had reason to be prepared to address that issue. Thus the arbitrator's denial of an adjournment did not impermissibly preclude her from addressing an issue to be determined at the arbitration, Motor Veh. Acc. Indem. Corp. v. NYC E.-W. Acupuncture, P.C., 77 A.D.3d at 415-16; Campbell v. New York City Tr. Auth., 32 A.D.3d at 352, or abuse his broad discretion regarding adjournments. Chawki v. New York City Dept. of Educ., Manhattan High Schools, Dist. 71, 39 A.D.3d at 324; Campbell v. New York City Tr. Auth., 32 A.D.3d at 352.

Because petitioner claimed a hit-and-run driver struck her vehicle in the rear, and the policy limits coverage to "an accident arising out of such uninsured motor vehicle's . . .

use," the arbitrator's request for the police report, which was likely to offer evidence of an accident, was a relevant independent inquiry or investigation. Castillo Aff. Ex. A at 2. See Watt v. Roberts, 79 A.D.3d at 526. Insofar as either the arbitrator's underlying interpretation of the policy or his denial of an adjournment and opportunity to challenge evidence not introduced by petitioner constituted an erroneous ruling, the court may not set the ruling aside unless it is against strong public policy, irrational, or in excess of the arbitrator's power. Matter of Falzone (New York Cent. Mut. Fire Ins. Co.), 15 N.Y.3d 530, 535 (2010); New York State Correctional Officers & Police Benevolent Assn. v. State of New York, 94 N.Y.2d 321, 326 (1999); Campbell v. New York City Tr. Auth., 32 A.D.3d at 351. None of those grounds is established.

Although petitioner also claims the arbitrator violated AAA rules by improperly relying on evidence not exchanged by the parties under the rules, AAA Rule 19 provides that the parties "shall produce such additional evidence as the arbitrator may deem necessary to understand and determine the dispute." Am. V. Pet. Ex. 5. Here, the police report, as evidence of an accident, may have aided the arbitrator's understanding of the claim.

Petitioner claims the arbitrator further violated AAA rules by relying on the police accident report because it was hearsay. AAA Rule 19, however, provides that the "arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be

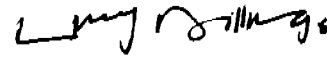
necessary." Am. V. Pet. Ex. 5. Nor are arbitrators otherwise bound by the rules of evidence. Social Serv. Empls. Union, Local 371 v. City of New York, 50 A.D.3d 264; Azrielant v. Azrielant, 301 A.D.2d at 275. The report recites that "driver stated she was looking at an accident scene in the HOV lane when the car in front of her stopped." Am. V. Pet. Ex. 8. Assuming this hearsay statement is by petitioner, the arbitrator's decision did not rely on her statement, but relied only on the absence of any reference in the report to any collision with the rear of petitioner's vehicle. To establish this fact, petitioner relied on another hearsay document, the ambulance call report, which refers to petitioner's account that her vehicle was struck from behind.

Again, even if the arbitrator's actions constituted a failure to follow procedure under C.P.L.R. § 7511(b)(1)(iv), petitioner nowhere demonstrates prejudice from the arbitrator's reliance on hearsay. Social Serv. Empls. Union, Local 371 v. City of New York, 50 A.D.3d at 265; Sims v. Siegelson, 246 A.D.2d at 377. See C.P.L.R. § 7511(b)(1). Petitioner, having designated liability as an issue at the arbitration, was not precluded from presenting any witness on that issue when the arbitration convened, by producing the police officer herself, or testifying herself, based on her personal knowledge regarding the sequence of impacts, and controverting the police report, which was not based on the officer's personal knowledge.

IV. CONCLUSION

For all the above reasons, the court denies the amended petition and dismisses the proceeding. This decision constitutes the court's order and judgment dismissing the proceeding.

DATED: March 30, 2012



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

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