

**Matter of Praetorian Ins. Co. v First Class Group,
Inc.**

2012 NY Slip Op 31150(U)

April 23, 2012

Sup Ct, NY County

Docket Number: 114042/11

Judge: Alexander W. Hunter Jr

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JP
Justice

PART 33

Practorian Inc
First Class

INDEX NO. 114042/11
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 12, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-3</u>
Answering Affidavits — Exhibits _____	No(s). <u>0-2 4-11</u>
Replying Affidavits _____	No(s). <u>12</u>

Upon the foregoing papers, It is ordered that this motion is

See memorandum decision and judgment annexed hereto.

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

FILED

APR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/23/12

Alexander W. Hunter, J.S.C.
ALEXANDER W. HUNTER JP

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Arbitration of Certain
Controversies Between

Index No.: 114042/11

Praetorian Insurance Company,

Petitioner,

Decision and Judgment

-against-

First Class Group, Inc.

Respondent,
-----X

FILED

APR 27 2012

HON. ALEXANDER W. HUNTER, JR.

NEW YORK
COUNTY CLERK'S OFFICE

Two separate motions were filed in this action. Both motions will be decided herein.

The application by petitioner Praetorian Insurance Company ("Praetorian" or "petitioner") for an order pursuant to C.P.L.R. 7510, confirming the Partial Final Award and directing that judgment be entered in favor of petitioner against respondent First Class Group, Inc. ("First Class" or "respondent") in the sum of \$ 1,100,000.00 plus interest from October 29, 2011, as well as costs and disbursements, is denied without prejudice.

The application by respondent for an order pursuant to C.P.L.R. 7511 for an order vacating or modifying the Partial Final Award on the grounds that 1) the arbitration panel exceeded its powers such that a final arbitration award was not made and 2) the award was issued as a result of the prejudice of the neutral Chairman of the arbitration panel, is denied without prejudice.

On March 1, 2001, Praetorian and First Class entered into a Program Administrator Agreement ("PAA"). Under the PAA, First Class was assigned as Praetorian's agent to solicit, underwrite, and bind policies for certain lines of insurance, and to collect and remit net premiums to Praetorian. In return, First Class would be compensated under two forms of payment, commissions pursuant to "Schedule A commissions" and payment under the "Profit Sharing Agreement". The PAA recognizes gross premiums and net premiums¹. Petitioner is entitled to net premiums once all fees and commissions were accounted for and as provided for under the

¹ Section VI of the PAA, entitled, "Premium Accounting and Payments" reads in pertinent part that "[N]et premiums means gross premiums on such business produced by the Administrator, less return premiums and applications fees as set forth in Section V above. Section V provides that the Administrator is entitled to compensation in the form of commissions and payments pursuant to the Profit Sharing Agreement a.k.a the PCA.

terms of the PAA and the Profit Commission Agreement ("PCA"). The PAA was terminated by respondent in May 2010.

On June 9, 2010, petitioner demanded arbitration with respondent. On March 31, 2011, three arbitrators were impaneled pursuant to the terms of the PAA agreement. Thereafter, both parties submitted statements of claim. On July 11, 2011, petitioner moved for summary judgment seeking outstanding premiums due from respondent. The arbitration panel issued a Partial Final Award, dated October 29, 2011. The Partial Final Award provides that petitioner was owed gross premiums in the amount of at least \$1,100,000.00. Respondent was directed to deposit that amount at a financial institution acceptable to Praetorian within five days of the date of the award.

Respondent did not pay its share of the Panel Chair's fees in connection with the arbitration. On November 10, 2011, the Panel Chair, Mr. Bakarar, notified the parties that until all outstanding bills regarding his fees are paid that no further awards from the Panel would be forthcoming.

Respondent opposes the petition in its entirety and also moves to vacate or modify the Partial Final Award on the grounds that 1) the "petition" is wholly defective and must be disregarded; 2) the arbitration panel exceeded its powers and imperfectly executed those powers such that a final and definite award was not made; and 3) the partiality of the appointed Chairman of the arbitration panel prejudiced First Class.

Petitioner did not file a petition to commence this proceeding. A review of the papers shows that there is a notice of petition, an affidavit in support of the application by petitioner's attorney, Joseph G. Harraka, a proposed order, and an affidavit of service. Respondent argues that an application to confirm an arbitration award is a special proceeding under C.P.L.R. Article 4. Section 402 of the C.P.L.R. provides that a petition is a required pleading and must conform to the requirements of a complaint in an action. First Class argues that Praetorian has failed to satisfy the pleading requirements of the C.P.L.R. and renders its whole application defective.

Respondent argues that the issue of whether premiums are due and owing pursuant to the PCA is a question for the Illinois State Court to decide and cannot be addressed by the arbitration panel. Respondent contends that the Partial Final Award is contingent on and subject to the adjudication of the claims in the Illinois State Court proceeding, and therefore the subject award is not final as contemplated by C.P.L.R. Article 75 and cannot be confirmed by this court. Article XI, Section C of the PAA which covers arbitration makes no mention of partial awards and only makes reference to a majority decision of the Panel to be final and binding. Therefore, respondent argues that the Partial Final Award is merely an interim order. Respondent also claims that Mr. Barakat, the Chairman of the arbitration panel, was prejudiced against them because of unpaid fees by respondent.

In support of its motion, respondent submits a copy of a signed Order *Nunc Pro Tunc* from the Circuit Court, Cook County, Illinois, dated May 25, 2011, which establishes its jurisdiction over the arbitrability of the breach of contract and fraud claims in connection with the PCA brought by First Class against Praetorian. Judge Joan E. Powell orders that: “[t]he arbitrators are prohibited from making any determination of any claim derived from the PCAs, including but not limited to, Count I set forth in Section V (Causes of Action) of Praetorian’s Statement of Claims submitted in the arbitration proceedings.” Respondent also submits a copy of the signed PAA and the Partial Final Award.

In her affidavit, Aileen Chan, President of First Class, asserts that all net premiums owed to petitioner have been paid. She further asserts that based on First Class’ claims concerning profit commission due and owing to First Class and various breaches and fraud committed by Praetorian, there are no net premiums due and owing to Praetorian. Moreover, petitioner maintains that the arbitration was unnecessary because the claims under the PCA had to be determined first through litigation. Pursuant to the terms of the PAA, petitioner commenced a proceeding in Cook County, Illinois to adjudicate its claims under the PCA and other claims relating to fraud.

Ms. Chan contends that First Class has not remit payment to Mr. Bakarar because his fees are excessive and because of the prejudice he has shown to respondent in the arbitration. As far as respondent is concerned, the arbitration has not been terminated because of this fee dispute.

In opposition to respondent’s petition to vacate or modify the Partial Final Award and in support of its petition to confirm the Partial Final Award, petitioner argues that the arbitration panel clearly and unambiguously awarded in favor of Praetorian the sum of \$1.1 million in insurance premiums without creating a new controversy between the parties. Petitioner has been precluded from filing additional submissions to the Panel due to respondent’s failure to pay its share of the Panel Chairs’ fees and therefore the arbitration has been terminated and is not still pending.

Petitioner also argues that an attorney’s affidavit meets all the requirements of the C.P.L.R. and prays this court to overlook form over substance. However, two days before the second return date of February 9, 2012, petitioner served a petition to confirm the Partial Final Award.

As to the Illinois State Court order, petitioner maintains that Judge Powell’s order in no way precludes the arbitration of the claims in the instant petition. Petitioner contends that the Illinois court order provides that the profit commission claims must be litigated in that court, however, there were no such limitations placed upon claims regarding PAA premiums and other claims. Petitioner asserts that the PAA and PCA are two distinct agreements. Petitioner argues that under the PAA, premiums are to be paid to Praetorian immediately after deducting regular commissions. Profit commissions under the PCA are paid in the year following the subject year. The amount owed in premiums is not contingent upon the amount owed in profit commissions.

In reply, respondent argues that petitioner failed once again to adhere to C.P.L.R. 402 and 403 by not serving an answer to their petition to vacate or modify. Respondent asserts that the C.P.L.R. requires the service of a petition along with a notice of petition and that the affirmation by Mr. Harraka does not serve as an equivalent to satisfy the procedural mandates of C.P.L.R. 402 and 403. Respondent has chosen to ignore the untimely and improperly served petition to confirm the Partial Final Award.

Respondent also notes that the Partial Final Award does not call for the immediate payment of the \$1.1 million to petitioner. Instead, the arbitration panel directed that gross premiums be placed into an account for future disbursement. Respondent argues that this fact supports its contention that the award was merely an interim award subject to the outcome of the Illinois State Court Proceeding.

Petitioner submitted an untimely and impermissible sur-reply and will be disregarded by this court.

An application to confirm an arbitration award is commenced upon the filing of the notice of petition and petition with the clerk of the court. **Matter of Travelers Indem. Co. /Aetna Cas. & Sur. Co., v. Roth, 258 A.D.2d 341 (1st Dept. 1999)**. The petition “shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions of occurrences, intended to be proved and the material elements of each cause of action. **C.P.L.R. 3013**. Although petitioner did not file a petition along with his notice of petition, the attorney affirmation contains all the pertinent allegations of fact intended to be proved by petitioner.

C.P.L.R. 7510 states that “the court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.” C.P.L.R. 7511 provides limited grounds to either vacate or modify an arbitration award. The grounds to vacate an award include corruption, fraud or misconduct in procuring the award, the partiality of the arbitrator, or an arbitrator exceeding his or her authority or a failure to follow the procedure of Article 75. **C.P.L.R. 7511(b)**. An arbitration award shall be modified in three instances: 1) the award contains a miscalculation or a mistake in the description of any person, thing or property referred to in the award; 2) the award concerns matters not submitted to arbitration, and the award can be corrected without affecting the merits of the decision; or 3) the award is imperfect as a matter of form, not affecting the merits of the controversy. **C.P.L.R. 7511(c)**.

C.P.L.R. 7511(b)(1)(iii) provides that an arbitrator’s award shall be vacated when “an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.” An arbitrator exceeds his or her power if the award violates a strong public policy, is irrational or exceeds a specifically enumerated limitation on the arbitrator’s power. **See, Matter of Kowaleski (New York State Dept. of Correctional Servs., 16 N.Y.3d 85 (2010); Matter of Falzone v. New**

York Central Mut. Fire Ins. Co., 15 N.Y.3d 530 (2010). An award is not final and indefinite if the parties are “unable to determine their rights and obligations, if it does not resolve the controversy submitted, or if it creates a new controversy.” Matter of Snyder-Plax v. American Arbitration Assn., 196 A.D.2d 872, 874 (2nd Dept. 1993).


The vacating of an arbitration award based on bias may be granted only if “the rights of that party was prejudiced...by partiality of an arbitrator appointed as a neutral...” C.P.L.R. 7511(b)(1)(ii). The mere suggestion of partiality on the part of the arbitrator does not warrant vacatur. See, Rose v. J.J. Lowrey, Co., 181 A.D.2d 418 (1st Dept. 1992); Matter of Provenzano v. Motor Vehicle Accident Indemnification Corp., 28 A.D.2d (1st Dept. 1967). The emails exchanged with Mr. Bakarar concerning his unpaid fees do not warrant vacatur of the Partial Final Award.

“In the absence of a final award, there is no authority for judicial intervention and the petition for confirmation must be dismissed.” Adelstein v. Thomas J. Manzo, Inc., 61 A.D.2d 933, 933 (1st Dept. 1978). Only final determinations made at the conclusion of arbitration proceedings are subject to judicial review. Mobil Oil Indonesia v. Asamera (Indonesia) Ltd., 43 N.Y.2d 276 (1977). In the case at bar, the arbitration proceeding has not been terminated. The issue presented to the arbitration panel was whether premiums were being held by First Class pursuant to the PAA. The Partial Final Award does not resolve this dispute. Although the arbitration panel determined that at least \$1.1 million in gross premiums were owed to Praetorian, petitioner is not entitled to gross premiums. Instead, petitioner is owed net premiums. Net premiums cannot be calculated without first determining the amount of profit commissions owed to First Class pursuant to the PCA. The amount owed to First Class under the PCA is currently pending in Illinois State Court. The arbitration panel has also directed the parties to submit additional papers for consideration and scheduled a hearing on November 14, 2011. As such, the Partial Final Award is not a final and definite award and is not ripe for review. Therefore, this court can neither confirm nor vacate the Partial Final Award.

Accordingly,

ADJUDGED that the application by petitioner to confirm the Partial Final Award is denied without prejudice. Respondent’s application to vacate or modify the Partial Final Award is denied without prejudice.

Dated: April 23, 2012

ENTER: 

J.S.C.

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