

Amica Mut. Ins. Co. v Fiduciary Ins. Co.
2012 NY Slip Op 32794(U)
November 14, 2012
Sup Ct, Queens County
Docket Number: 4730/12
Judge: Howard G. Lane
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
IA PART 6

AMICA MUTUAL INSURANCE COMPANY a/s/o
CARLA S. OMAR, DAVE SHEPPARD and
SHAWN HAYES,

Petitioners,

-against-

FIDUCIARY INSURANCE COMPANY,

Respondent.

BY: **LANE, J.**

DATED: November 14, 2012

INDEX NO.: 4730/12

MOTION DATE:
August 14, 2012

MOTION CAL. NO.: 1

MOTION SEQUENCE NO.: 1

In this Article 75 proceeding, petitioner Amica Mutual Insurance Company (Amica)a/s/o Carla S. Omar, Dave Sheppard and Shawn Hayes seeks a judgment confirming three arbitration awards each dated October 25, 2011, in the sum of \$14,236.65 on behalf of petitioner's subrogor Carla S. Omar; in the sum of \$682.33 on behalf of petitioner's subrogor Dave Sheppard; and in the sum of \$17,136.17 on behalf of petitioner's subrogor Shawn Hayes, pursuant to CPLR 7510. Respondent Fiduciary Insurance Companies (Fiduciary) cross-moves to vacate the arbitration awards, pursuant to CPLR 7511 and 7506(c).

On August 22, 2009, a motor vehicle operated by Shawn Hayes, and insured by Amica, was involved in an accident with a motor vehicle (taxi) operated by Rizui Syed Mali and insured by Fiduciary. Carla S. Omar and Dave Sheppard were passengers in the Hayes vehicle at the time of the accident.

According to the police report the accident occurred as follows: "At T/P/O D1 [Hayes] state he was in the second lane from the left lane when D2[Mali] struck him in the left back rear. D2[Mali] state he was driving in the far left lane when thr was a truck double parked, he signaled and changed lane and struck D1[Hayes]. All parties ...RMA [refused medical attention]. PO did not witness."

The police report noted that the point of impact was the left rear fender of the Hayes vehicle and the right front of the Mali vehicle, and also noted damage to the left rear of the Hayes vehicle and to the right front fender of the Mali vehicle. The police report diagram described the accident as a sideswipe in the same direction.

Mr. Mali, in his report of a motor vehicle accident (MV-104), dated August 27, 2009, stated that the accident occurred as follows: CAR #1 [Mali] DRIVING N/B ON 6TH AVE ON FAR RIGHT L/ LANE BEHIND DOUBLE PARKED TRUCK-PUT SIGNAL TO CHANGE LANES. CAR #2[HAYES] DRIVING SAME DIRECTION ON CENTER LANE ALSO WANTED TO CHANGE LANES & HIT CAR #1 [Mali] ON RIGHT FRONT SIDE"

On September 30, 2010, Amica filed three requests for arbitration with Arbitration Forums, Inc. against Fiduciary seeking reimbursement of no-fault benefits paid to Carla S. Omar in the sum of \$15,808.50, to Dave Sheppard in the sum of \$758.14, and to Shawn Hayes in the sum of \$19,040.19. The arbitrator's

file contains information pertaining to Amica and Fiduciary, and set forth the following regarding Fiduciary:

" Respondent 1 Disputed Damages

"Respondent challenges payments as excessive, improper, and unrelated to accident. Applicant failed to provide medical report or itemized bills making an itemized contestation impossible. Applicant failed to present medical evidence that stated damages were causally related to the accident.

Applicant failed to present evidence that bills were paid according to New York Workers Compensation Fee Schedule."

"Respondent 1 Contentions

"This loss took place on 0822/09. Weather was not a factor in the loss. The Respondent(Fiduciary) was traveling in the left lane of 3 on 6th Ave. Respondent motioned to move into the center lane, but stopped due to traffic. As Respondent awaited traffic to clear in a stopped position, Applicant in the center lane struck Respondent. The points of impact were the Respondent's right front fender, the Applicant's left rear quarter panel. Respondent was in a stopped position and could not have avoided any impact. Applicant is the sole proximate cause of the accident for not maintaining a safe vehicle and proper lookout. Respondent seeks a favorable decision. Comparative negligence should apply.

"Respondent contests Applicant's claim of \$15,818.50. Applicant

has not provided Respondent with supporting documentation of medical payments made. Applicant has included surcharges which are not recoverable.

"Applicant's payment ledger does not provide CPT codes that prove what and if treatments were necessary and prove that bills were paid according to New York Worker's Compensation Fee Schedule or Great Wall Acupuncture v GEICO which states bills are to be fee scheduled according to Chiropractic rate(see case attached).

"Respondent challenges medical payments as improper and unrelated to accident."

The arbitrator held a hearing on October 25, 2011, and published three separated decisions on October 26, 2011. With respect to Amica's claim as subrogee of Carla S. Omar, the arbitrator summarized the dispute as follows: "Applicant contends the Respondent struck Applicant in the left rear when Respondent admittedly changed lanes to avoid a double parked vehicle. The Respondent (Fiduciary) was traveling in the left lane of 3 on 6th Ave. Applicant (Amica) was in the center lane. As vehicles proceeded, Respondent approached a double parked truck in the left lane of 6th Ave. Respondent motioned to move into the center lane, but stopped due to traffic. As Respondent awaited traffic to clear in a stopped position, Applicant in the center lane struck Respondent." The arbitrator determined that "Applicant **AMICA MUTUAL INS CO** proved **90%** liability against

Respondent 1[Fiduciary] based on: Police report provided no apparent contributing factors for either operator". The arbitrator based her decision on the point of impact and accident diagram box contained in the police report, and found that the respondent operator's mv104 indicated that Mali had "signaled to change lanes when struck by Applicant (different than what told to officer at scene?) accident diagram box indicates 2 sideswipe". With respect to damages the arbitrator determined that "Applicant AMICA MUTUAL INS CO proved \$15,818.50 (All Damages) Respondent contests Applicant's claim of \$15, 818.50. Applicant has not provided Respondent with supporting documentation of medical payments made. Applicant has included surcharges which are not recoverable. Applicant's payment ledger does not provide CPT codes that prove what and if treatments were necessary and prove that bills were paid according to New York Worker's Compensation Fee Schedule or Great Wall Acupuncture v GEICO which states bills are to be fee scheduled according to Chiropractic rate (see case attached) Applicant rep provided proofs to Respondent rep at table-no issues at this time". The arbitrator awarded Amica \$14,236.65.

With respect to Amica's claim as subrogee of Dave Sheppard, the arbitrator in her decision set forth the identical summary of the dispute, and determined that Amica had proved Fiduciary was 90% liable, "based on: Police report provided no

apparent contributing factors for either operator". With respect to damages the arbitrator found that : "Applicant AMICA MUTUAL INS CO proved \$758.14 (All Damages) Respondent contests Applicant's claim of \$15, 818.50. Applicant has not provided Respondent with supporting documentation of medical payments made. Applicant has included surcharges which are not recoverable. Applicant's payment ledger does not provide CPT codes that prove what and if treatments were necessary and prove that bills were paid according to New York Worker's Compensation Fee Schedule or Great Wall Acupuncture v GEICO which states bills are to be fee scheduled according to Chiropractic rate (see case attached) Applicant rep provided proofs to Respondent rep at table-no issues at this time"; and stated that the evidence which caused her to render the decision consisted of "Points of impact Respondent 3 Applicant 10 Respondent operator mv104 provided indicating signaled to change lanes when struck by Applicant (different from what told to officer at scene?) accident diagram box indicates 2 sideswipe." The arbitrator awarded Amica \$682.33.

With respect to Amica's claim as subrogee of Shawn Hayes, the arbitrator in her decision set forth the identical summary of the dispute, and determined that Amica had proved Fiduciary was 90% liable, "based on: Police report provided no apparent contributing factors for either operator". With respect

to damages the arbitrator found that : "Applicant AMICA MUTUAL INS CO proved \$19,040.19 (All Damages) Respondent contests Applicant's claim of \$15, 818.50. Applicant has not provided Respondent with supporting documentation of medical payments made. Applicant has included surcharges which are not recoverable. Applicant's payment ledger does not provide CPT codes that prove what and if treatments were necessary and prove that bills were paid according to New York Worker's Compensation Fee Schedule or Great Wall Acupuncture v GEICO which states bills are to be fee scheduled according to Chiropractic rate (see case attached) Applicant rep provided proofs to Respondent rep at table-no issues at this time";and stated that the evidence which caused her to render the decision consisted of "Points of impact Respondent 3 Applicant 10 Respondent operator mv104 provided indicating signaled to change lanes when struck by Applicant (different from what told to officer at scene?) accident diagram box indicates 2 sideswipe." The arbitrator awarded Amica \$17,136.17.

Amica asserts that Fiduciary has failed to make payment within 30 days and therefore it is entitled to a judgment confirming the arbitrator's awards, pursuant to CPLR 7510.

Fiduciary, in opposition to the petition, and in support of its cross petition, seeks an order vacating the arbitrator's awards pursuant to CPLR 7511(b) and directing a new

hearing on the grounds that (1) the arbitrator awarded Amica "All Damages" and erroneously failed to specify the surcharges submitted by Amica, failed to set forth the amount of surcharges and failed to deduct the surcharges; (2) that the arbitrator exceeded her authority, and violated Arbitration Forums, Inc. Rule4(iv), in that she allowed Amica to submit evidence at the hearing which had not previously been exchanged with Fiduciary; (3) that the hearing was inherently unfair, in that the arbitrator ruled in Amica's favor despite finding that Amica did not provide Fiduciary with documentation of the medical payments; that the arbitrator noted that Amica had failed to submit CPT codes and medical records that establish "what and if treatments were necessary and prove that bills paid according to New York Workers' Compensation Fee Schedule or Great Wall Acupuncture v GEICO which states bills are to be fee scheduled according to Chiropractic rate"; that the arbitrator permitted Amica to submit at the hearing evidence that was solely in its possession, and failed to order Amica to provide a copy to Fiduciary or adjourn the hearing to afford Fiduciary the opportunity to be provided with a copy of the proofs and did not afford Fiduciary the opportunity to submit a reply for consideration in response to the proof Amica presented at the hearing; and that Amica failed to provide Fiduciary with an explanation for its failure to comply with Fiduciary's request for a copy of Amica's no-fault

files with respect to Omar, Sheppard and Hayes; and (4) that the arbitrator erroneously relied upon the police report.

Fiduciary further asserts that it has filed an appeal of the arbitrator's award and that it is awaiting a determination. Amica asserts that the arbitration rules do not include an appeal process, and that the only issues that can be raised following a PIP loss transfer arbitration determination relate to clerical or administrative errors, such as lack of hearing notice, the inadvertent reversal of the parties, and mathematical errors.

Amica opposes vacatur of the arbitrator's awards, and asserts that the exchange of evidence is not required in loss transfer arbitration; that the arbitrator conducted a full and fair hearing; that documentation provided at the hearing was in compliance with the arbitration rules; that Fiduciary, at the hearing, did not offer any argument as to the adequacy of the ledger submitted; that Fiduciary's demand for no-fault files is without statutory or regulatory authority and Amica was not required to respond to the demand or supply a copy of its no-fault files; that Fiduciary may not challenge the arbitrator's factual findings; and that the evidence was submitted to the arbitrator was either listed on the contentions sheet or submitted at the time of the hearing, in accordance with the arbitration rules; and that although hospital surcharges were

included in Amica's payment ledger and are admittedly not recoverable, the arbitrator considered this issue and subtracted these payments in two of the three dockets.

In its reply, Fiduciary asserts that its appeal raised clerical, administrative and factual issues; that the arbitrator failed to deduct the surcharges, and only reduced the award by 10% to allocate for the liability assessed against Amica's driver; and reiterates its claim that the arbitration was not a full and fair hearing as Amica refused to provide its no-fault files, submitted evidence at the hearing, and that the arbitrator should have adjourned the hearing.

Section (d)5(i) of Arbitration Forums Inc.'s NY PIP Rule Revisions, effective February 1, 2010, provides that "A decision of an arbitrator, or a majority of arbitration panel, on issues of fact or law is final and binding. However, this provision does not preclude Arbitration Forums from correcting a clerical error or administrative error on the part of either Arbitration Forums or the arbitrators(s) so long as the error is brought to Arbitration Forums' attention within 30 days of receipt of the decision. Any such correction must be approved by the arbitrator(s). In the event a party to the hearing questions an arbitrator(s) failure to address an affirmative defense in an award, Arbitration Forums shall schedule the case for a rehearing with the consent of the other party or parties".

Fiduciary, in an email dated December 1, 2011, and sent to Arbitration Forums claimed clerical, administrative and factual errors were made by the arbitrator in the subject awards. Arbitration Forums, in an email dated December 7, 2011 stated that the issue raised by Fiduciary had been assigned for further review; that the review process takes approximately 30 days; and that once the review process was completed a Member Service Representative would contact Fiduciary. There is no evidence that Arbitration Forums and the arbitrator, in response to Fiduciary's December 1, 2011 email, made any corrections to the subject arbitrators' awards which were published on October 26, 2011, and made available to Fiduciary by email notification on that date. Therefore, Fiduciary's December 1, 2011 "appeal" is not relevant here. CPLR 7511(b) provides that an application to vacate an arbitration award by a party who has participated in the arbitration may only be granted upon the grounds that the rights of that party were prejudiced by corruption, fraud, or misconduct in procuring the award, partiality of the arbitrator, the arbitrator exceeded his powers or failed to make a final and definite award, or a procedural failure that was not waived (see *Silverman v Benmor Coats, Inc.*, 61 NY2d 299 [1984]; *GEICO Gen. Ins. Co. v Sherman*, 307 AD2d 967, [2003]; *State Farm Mut. Auto. Ins. Co. v Arabov*, 2 AD3d 531 [2003]).

Consistent with the public policy in favor of

arbitration, the grounds for vacating an arbitration award are "few in number and narrowly applied" (*Chin v State Farm Ins. Co.*, 73 AD3d 918 [2010]; *Mercury Cas. Co. v Healthmakers Medical Group, P.C.*, 67 AD3d 1017 [2009]; *Domotor v State Farm Mut. Ins. Co.*, 9 AD3d 367 [2004]). CPLR 7511(c) provides that the court shall modify an award if there was a miscalculation of figures or a mistake in the description of a person, thing or property referred to in the award; the arbitrator has awarded on a matter not submitted for determination, or the award was imperfect in form.

An arbitrator exceeds his or her power within the meaning of the CPLR 7511(b)(1)(iii) only if the resulting award: (I) is clearly violative of a strong public policy, (ii) is totally or completely irrational; or (iii) manifestly exceeds a specific, enumerated limitation on the arbitrator's power (*Kowaleski v New York State Dept. Of Correctional Services*, 16 NY3d 85 [2010]; *Falzone v New York Central Mut. Fire Ins. Co.*, 15 NY3d 530 [2010]; *Chin*, 73 AD3d at 918). An arbitrator's error of law is not a basis for judicial vacatur (*Id.*). Even if the arbitrator misapplies substantive law, the resulting award will not be disturbed unless it is "patently irrational" or "so egregious as to violate public policy" (*Falzone*, 15 NY3d at 535).

"An arbitration award in a mandatory arbitration proceeding will be upheld if it is supported by the evidence and is not arbitrary and capricious" (*Matter of State Farm Mut. Auto.*

Ins. Co. v City of Yonkers, 21 AD3d 1110, 1111 [2005]; see also *Motor Vehicle Accident Indemnification Corp. v Aetna Casualty & Surety Co.*, 89 NY2d 214, 223 [1996]; *Matter of Travelers Indem. Co. v United Diagnostic Imaging, P.C.*, 70 AD3d 1043, 1043-1044 [2010]). "On review, an award may be found to be rational if any basis for such a conclusion is apparent to the court based upon a reading of the record" (*Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, *supra* ; see *Caso v Coffey*, 41 NY2d 153, 158 [1976]; *Matter of Travelers Indem. Co. v United Diagnostic Imaging, P.C.*, *supra*).

Here, the arbitrator relied upon the evidence submitted at the hearing including proofs relating to damages, the police report, and the MV104 report. With respect to the summary of the dispute, in each instance it is unclear as to whether the arbitrator made a factual determination or was stating Fiduciary's contentions. However, in each award the arbitrator clearly stated that based upon the police report and diagram, the two vehicles had sideswiped each another. She also discounted the version of events provided by Mr. Mali in the MV104 report. Therefore, the arbitrator's determination that Fiduciary was 90% liable for the accident, has a rational basis in the record.

With respect to damages, in each award the arbitrator determined that Amica had proven all of its damages. Again it is unclear as to whether the arbitrator made a factual determination

or merely stated Fiduciary's contentions regarding proof of damages. However, the arbitrator clearly stated that Amica had provided proof of its damages to Fiduciary at the arbitration, and that no issues existed as to its proof at that time. Contrary to Fiduciary's claims, the arbitrator neither exceeded her powers nor prejudiced Fiduciary by accepting proof of damages at the hearing in accordance with Arbitration Forums' Rules. Fiduciary seeks to rely solely upon Arbitration Forums' procedures section (d) 4(iv), which provides as follows:

"All documents (e.g. amendments, evidentiary material) must be received by Arbitration Forums by the Materials Due Date posted by AF. A copy of any amendments filed shall be simultaneously sent to all other parties.

(a) Documents not received within this period will not be sent to the hearing."

However, section (d) 4 (v) provides that: "Evidence not listed that is received subsequent to filing for arbitration may be submitted for consideration at the arbitrator's discretion" and section (d) 4(vi) provides that: "Subject to the limitations in (v) above, a representative of a party may bring his or her evidence to the hearing, rather than mailing same to Arbitration Forums."

Arbitration Forums' procedures regarding "proof of damages," states as follows:

"(d) (2) Initiation of Arbitration (I). Proof of damages shall include a computer printout or a ledger of benefits paid, kept in the regular course of business. The ledger must include the name of the payee, amount paid, date of service, date paid, and the total amount paid."

The arbitrator, in compliance with the above said procedures, permitted Amica to submit proof of its damages at the hearing, and determined that Amica had proven all of its damages with respect to each of its insured. To the extent that Fiduciary claims the arbitrator failed to subtract from her award impermissible hospital surcharges, it has neither set forth the amount of the surcharges nor established that the arbitrator made a mathematical error. Without more, such as a transcript of the hearing, or a copy of the ledger, Fiduciary has failed to sustain its burden of proof in establishing that the arbitration award is unsupported by the evidence, and therefore arbitrary and capricious.

There is no statutory or regulatory requirement that parties to a PIP loss transfer arbitration exchange documentary evidence prior to the arbitration hearing. Therefore, Fiduciary's objections to Amica's failure to respond to its pre-hearing demand for its no-fault files, and other documents, does not warrant vacatur of the arbitrator's award.

Finally, Fiduciary's claim that the arbitrator's

reliance on the police report was erroneous, is without merit. Arbitration Forums' Rule (4)(vii) provides that: "Formal rules of evidence shall not apply at hearings." The arbitrator, thus, was entitled to rely upon the contents of the police report, and was not required to speculate as to why the police officer did not place a number in "box 19", indicating other contributing factors to the accident. In addition, Fiduciary does not claim that it produced any evidence at the hearing of any contributing factors to the accident.

Accordingly, Fiduciary's cross petition to vacate the arbitrator's awards is denied in its entirety, and Amica's petition to confirm the three arbitration awards published on October 26, 2011 is granted (see CPLR 7511[e]; *Mercury Casualty Company v Healthmakers Medical Group, P.C.*, 67 AD3d 1017 [2009]).

Settle judgment.

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HOWARD G. LANE, J.S.C.