

DTG Operations, Inc. v American Tr. Ins. Co.

2013 NY Slip Op 30119(U)

January 22, 2013

Sup Ct, NY County

Docket Number: 111017/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

DTG OPERATIONS, INC., d/b/a DOLLAR RENT-A-CAR,

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).

-against-

INDEX NO. 111017/11

MOTION SEQ. NO. 001

AMERICAN TRANSIT INSURANCE COMPANY,

Respondent.

The following papers, numbered 1-5 were considered on this petition to vacate arbitration award:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____ (letter brief)	<u>4, 5</u>

Cross-Motion: Yes No

Petitioner commenced this proceeding, pursuant to CPLR 7511 and 7507, for an order vacating and setting aside the arbitration award (Award), which granted respondent \$13,316.02. Petitioner seeks vacatur of the Award arguing that it was arbitrary and capricious, the arbitrator exceeded his authority, and the Award was not signed and affirmed by the arbitrator.

BACKGROUND

On January 18, 2010, petitioner's self-insured vehicle, occupied by Anthony Jackson, Rasheed Jamal Pace, and Crystal McMillan, allegedly collided with another vehicle, occupied by Renny Chinapen (Chinapen). On May 18, 2011, respondent served petitioner with a subrogation action in Arbitration Forums, Inc. (Arbitration Forums) to recover no-fault benefits provided to respondent's insured, Chinapen, relating to the January 18, 2010 accident. According to Arbitration Forums' rules, the last day for petitioner to respond was June 24, 2011; response to be received by such date. Petitioner's response, dated June 24, 2011, was received by Arbitration Forums on June 27, 2011, and contended that petitioner denied coverage for the underlying claim. Petitioner's response further contended that

petitioner does not consent to arbitration, as it filed a declaratory judgment action in the Supreme Court of the State of New York to litigate the coverage dispute.

Arbitration Forums rejected petitioner's response, and the defenses therein, as untimely. On the date of the hearing, July 12, 2011, petitioner appeared by counsel and advised the arbitrator that it did not consent to arbitrating the coverage dispute, and that coverage was denied. The arbitrator refused to consider petitioner's coverage defense at the hearing, claiming that Arbitration Forums did not have petitioner's response to the arbitration. The Award, issued on July 13, 2011, asserted that petitioner "did not answer the arbitration" and awarded \$13,316.02 to respondent. The Award, p. 1. Thereafter, petitioner commenced this proceeding to vacate the Award.

DISCUSSION

Pursuant to Insurance Law 5105, auto insurers and self-insurers, under no-fault regulations, are required to submit automobile subrogation actions to mandatory arbitration. In compulsory arbitration, such as provided for in Insurance Law 5105,¹ the courts have applied a combined Article 75 and Article 78 analysis. *Matter of Curley v State Farm Ins. Co.*, 269 AD2d 240, 242 (1st Dep't 2000). "Such CPLR article 75 review import[s] ... the arbitrary and capricious standard of article 78 review or, stated differently, the governing consideration is whether the decision was rational or had a plausible basis." *Matter of Curley v State Farm Ins. Co.*, 269 AD2d 240, 242 (1st Dep't 2000)(internal citations omitted).

Here, however, petitioner argues that the arbitration was not compulsory, as petitioner asserted a defense of lack of coverage in good faith. Where arbitration is non-compulsory, the standard for determining whether an arbitration award should be vacated is instead governed by CPLR 7511. Under CPLR 7511, one must demonstrate that he or she has been prejudiced by corruption, fraud, misconduct,

¹ While the Insurance Law states that arbitration, in specific circumstances, is "mandatory", New York case law establishes the standard of review for arbitration that is "compulsory"; both words being used interchangeably. See *Matter of Commercial Union Ins. Co. v Ewall*, 168 AD2d 247, 249 (1st Dep't 1990).

partiality or an abuse of power by the arbitrator. CPLR 7511(b); *Fishman v Roxanne Mgt.*, 24 AD3d 365, 366 (1st Dep't 2005); *Matter of Hegarty v Board of Educ. of City of N. Y.*, 5 AD3d 771, 772 (2d Dep't 2004).

Petitioner claims that the occupants of the vehicle insured by petitioner intentionally caused the accident, such that insurance coverage is disclaimed and arbitration is not mandatory. 11 NYCRR § 65-4.11(a)(6) states that Section 5105 of the Insurance Law, which requires arbitration, does “not apply to any claim for recovery rights to which an insurer in good faith asserts a defense of lack of coverage of an alleged covered person on any grounds, unless specific written consent of mandatory arbitration is obtained from the insurer asserting such defense.” Petitioner further argues that the arbitrator exceeded his authority by hearing this matter despite having received notice that coverage was denied by petitioner, and that petitioner was not consenting to the arbitration. While it is uncontested that petitioner violated arbitration rules by submitting a response three days past the deadline, petitioner argues that such a violation cannot be the basis on which an arbitration forum may gain jurisdiction. Petitioner claims that New York State Insurance Law and Regulations supersede arbitration rules, and specifically grants exclusive jurisdiction of subrogation actions, where there is a question of coverage, to the New York Supreme Court. Petitioner also argues that the award should be vacated because the arbitrator did not sign and affirm his decision.

In opposition, respondent argues that, notwithstanding that petitioner is correct that when a defense of lack of coverage is asserted in good faith, a claim is not subject to mandatory arbitration pursuant to 11 NYCRR §65-4.11(a)(6), here, petitioner nonetheless failed to properly notify Arbitration Forums of its defenses as its' response to the arbitration was untimely, and thus, no such defense was in fact asserted on a timely basis. Respondent further argues, nor is it disputed, that petitioner failed to comply with Arbitration Forums' Rule Revisions, effective February 1, 2009, Section 2-4, which

states that “[t]he parties must raise and support affirmative pleadings or defenses in the Affirmative Defenses/Pleadings section of the Contentions Sheet or they are waived”. Additionally, respondent states, nor is it disputed, that petitioner has failed to avail itself of any administrative remedies provided by Arbitration Forums, or any judicial remedy, which could have prevented the arbitration.

Petitioner’s argument that the arbitrator exceeded his authority, when he did not relinquish jurisdiction upon petitioner’s request is unavailing, as petitioner failed to timely assert a lack of coverage defense in good faith. The arbitrator denied petitioner’s lack of coverage defense due to the untimeliness of petitioner’s objection pursuant to Arbitration Forums’ Rule Revisions 2-4. While petitioner argues that New York State laws and regulations supersede arbitration rules, it fails to proffer any applicable legal authority to support its argument. Petitioner’s assertion of a lack of coverage defense at the arbitration was untimely and unsupported by evidence, thus petitioner failed to properly assert a good faith lack of coverage defense. As such, the coverage dispute is subject to mandatory arbitration pursuant to CPLR 5105, and the arbitrary and capricious standard of Article 78 review applies. *See Matter of Curley v State Farm Ins. Co.*, 269 AD2d 240, 242 (1st Dep’t 2000)(internal citations omitted). Since petitioner has failed to establish that the arbitrator’s decision was irrational or had no basis in facts, the Award was not arbitrary or capricious, and the petition must be denied.

Even if this Court determines that petitioner had properly asserted a good faith lack of coverage defense, Arbitration Forums would still be the proper forum for the adjudication of the subrogation action in question. 11 NYCRR 65-4.11(a)(6) states that “any controversy between insurers involving the responsibility or the obligation to pay first-party benefits (i.e., priority of payment or sources of payment as provided in section 65-3.12 of this Part) is not considered a coverage question and must be submitted to mandatory arbitration under this section.” *See also* Insurance Law 5105(b). New York courts have repeatedly held that where the insurers dispute the responsibility to pay first-party benefits, it is a priority

or source of payment issue, regardless of the defense an insurer asserts to deny such responsibility. *See M.N. Dental Diagnostics, P.C. v Gov't Employees Ins. Co.*, 24 Misc3d 43, 44 (1st Dep't 2009); *State Farm Mut. Auto. Ins. Co. v Nationwide Mut. Ins. Co.*, 150 A.D.2d 976, 977-78 (3rd Dep't 1989). Here, first-party benefits were rendered to an insured by respondent. Respondent then brought an arbitration proceeding against petitioner to recover benefits paid, to the insured, by respondent. New York's statutory and case law is clear that such a controversy is one of source or priority of payment, and, thus, subject to mandatory arbitration. Petitioner has utterly failed to meet its burden of establishing entitlement to vacatur of the Award, as petitioner fails to even claim that the Award is irrational or had no plausible basis. As such, the petition must be denied.

Lastly, petitioner objected to the form of the Award, asserting that the Award should be vacated because it was unsigned and unaffirmed, contravening the rule asserted in CPLR §7507, which states that "the award shall be in writing, signed and affirmed by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration." However, New York courts have often held that "the court [will not] concern itself with...some departure from formal technicalities in the absence of a clear showing that statutory grounds exist for vacatur of the award." *Korein v Rabin*, 29 AD2d 351, 356 (1st Dep't 1968). Here, petitioner has failed to establish any statutory grounds for vacatur of the Award; nor has petitioner disputed that such Award was otherwise legitimate, and thus, the petition is denied.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied in its entirety and the proceeding is dismissed; and it is further

ORDERED that within 30 days of entry of this order, respondent shall serve a copy upon petitioner with notice of entry.

This constitutes the decision/order of the Court.

Dated: 1/22/13


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST

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