Matter of Allstate Prop. & Cas. Ins. v New Way Massage Therapy P.C.
2014 NY Slip Op 30874(U)
April 2, 2014
Sup Ct, New York County
Docket Number: 653879/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

ALLSTATE PROPERTY AND CASUALTY INSURANCE,

Petitioner,

Index No. 653879/2013

-against-

DECISION/ORDER

NEW WAY MASSAGE THERAPY P.C. a/a/o
NENCY FEBUS,

Respondent.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner Allstate Property and Casualty Insurance Company ("Allstate") commenced the instant proceeding seeking an Order pursuant to CPLR § 7511(a) vacating the no-fault arbitration award rendered by Master Arbitrator Norman H. Dachs on August 8, 2013 (the "Master Arbitrator award"). For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On or about October 17, 2012, respondent New Way Massage Therapy P.C. ("New Way") requested compulsory arbitration against petitioner stemming from unpaid no-fault benefits. On March 19, 2013, an arbitration hearing was held before arbitrator Marilyn Felenstein (the "lower arbitrator"). In the arbitration hearing, petitioner argued that respondent was not entitled to no-fault benefits on the ground that respondent was

illegally sharing fees with the billing company Island Billing and Processing LLC ("Island Billing"), in violation of the Education Law. Respondent and Island Billing's agreement was as follows:

> Island Billing and [New Way] agree that fees for the services shall include the following components: (1) reimbursement for time and labor dedicated to data entry, eligibility verification, coding, documents processing, reports typing and other services related to COLLECTION. Fee is calculated based on actual time spent and ISLAND BILLING average labor rate; (2) fee for services provided by ISLAND BILLING employees or shall be calculated at 5% rate on the amounts received.

On June 4, 2013, Arbirator Felensten issued an award in favor of Allstate. In her award, Felensten found that:

> Ultimately, it is the decision of the Arbitrator that [New Way] has not convinced the Arbitrator that the agreement does not violate the rules of the New York State Education Department or that the agreement does not violate the prohibitions of the New York State Department of Health Medicaid regulations. As the Arbitrator has not been provided with, nor has not located case law exactly on point, the Arbitrator concludes that there are sufficient questions that remain unanswered about the fee agreement between [New Way] and Island Billing to reach the conclusion that the denial issued by [Allstate] should be sustained.

New Way appealed Arbitrator Felensten's award to the Master Arbitrator asserting that the lower arbitrator improperly shifted the burden of proof in the matter to New Way. On August 8, 2013, Master Arbitrator Norman H. Dachs issued an award vacating Arbitrator Felensten's Award and directing an award in the amount of $1,041.84 for New Way. In vacating the lower arbitrator's award, the Master Arbitrator found that "the Lower Arbitrator not only inappropriately shifted the burden from [Allstate] to prove its defense to [New Way] to negate it, she also committed an error of law." Specifically, the Master Arbitrator found that Arbitrator Felensten had committed an error of law in two respects. First, the Master Arbitrator found that Arbitrator Felensten was incorrect in finding that New Way was involved in improper fee sharing as

> an arrangement whereby a medical provider pays a bill collector a fixed percentages of amount collected on matters referred to such bill collector, after services have been rendered and where self-collection efforts have been unsuccessful, cannot be said to be within the purview of either Education Law § 6530(19) . . . or 8 NYCRR § 29.1.

Additionally, the Master Arbitrator found that:

> if, in fact, the arrangement between the provider and the collection firm is, technically, illegal, the remedy lies in disciplinary proceedings or, at most, may provide a defense to the parties to the agreement. It should not be the basis for a windfall for the benefit of a non-party thereto, such as the insurer in the case.

Petitioner now moves to vacate the Master Arbitrator's award on the ground that it was arbitrary, capricious and contrary to settled law. Specifically, petitioner argues that the Master Arbitrator's finding that New Way and Island Billing's agreement is not violative of the Education Law is contrary to settled law. Additionally, petitioner argues that the Master Arbitrator exceeded his authority in reaching his decision inasmuch as he conduced a *de novo* review and made new findings of fact that were outside the record.

A party aggrieved by an arbitration award may move to vacate the award pursuant to Article 75 of the CPLR. Specifically, pursuant to CPLR § 7511(a), a party may move to vacate or modify an award within ninety days after receipt of the reward. Compulsory arbitration awards are subject to a broader scope of review than awards resulting from consensual arbitration and the standard of review to be applied to such awards is whether the award is supported by evidence or other basis in reason as appears in the record or may be appropriate. *See Rose v. Travelers Ins. Co.*, 96 A.D.2d 551 (2d Dept 1983); *see also DiNapoli v. Peak Automotive, Inc.*, 34 A.D.3d 674 (2d Dept 2006) ("Vacatur of an arbitration award is strictly limited to the reasons stated in CPLR § 7511(b), but where the parties have submitted to compulsory arbitration, the award must have evidentiary support and cannot be arbitrary or capricious if it is to be upheld.")

"The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the...action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974).

In the instant action, the petition to vacate the Master Arbitration award is denied as there was a rational basis for the award. Master Arbitrator Dachs vacated and reversed the lower arbitrator's award on the ground that it was contrary to law. Specifically, Master Arbitrator Dachs found that, among other things, Arbitrator Felensten's award was incorrect as a matter of law as a provider's participation in an improper fee sharing agreement is not a valid ground to deny said provider's claim for no-fault benefits. This determination is rational as there is no statute, regulation or established precedent that gives an insurer the authority to deny no-fault benefit claims on the ground that the provider is participating in improper fee sharing. Indeed, Allstate has failed to present the court with any authority supporting its contention that it is well established law that a provider participating in illegal fee sharing is not entitled to reimbursement of no-fault benefits. Instead, the cases cited by petitioner stand for the proposition that courts will not enforce contracts between parties that are violative of the prohibition of fee-splitting and, as such, are inapposite. *See Necla v. Glass*, 231 A.D.2d 457 (1st Dept 1996); *LoMango v. Koh*, 246 A.D.2d 579 (2nd Dept 1998); *Hartman v. Bell*, 137 A.D.2d 585 (2nd Dept 1988); *Sachs v. Saloshin*, 138 A.D.2d 586 (2nd Dept 1988). Thus, the Master Arbitrator acted rationally in vacating the lower arbitrator's decision and issuing an award in favor of New Way.

Additionally, to the extent petitioner relies on *State Farm Mut. Auto. Ins. Co. v. Mallela*,

4 N.Y.3d 313 (2005), to support its argument that the Master Arbitrator's award was contrary to settled law, such reliance is unavailing as *Mallela* is inapposite to the instant action. In *Mallela*, the court found that an insurer has no obligation to honor any claims submitted for no-fault reimbursements from facilities that are fraudulently incorporated. Specifically, the court reasoned that because New York licensing requirements prohibit non-physicians from owning or controlling medical service corporations, and 11 N.Y.C.R.R. § 65-3-1.6(a)(12), makes any healthcare provider that "fails to meet any applicable New York State or local licensing requirement" ineligible for reimbursement of no-fault benefits, a healthcare provider that is in fact owned or controlled by non-physicians does not meet the applicable licensing requirements and is, thus, not entitled to collect no-fault benefits. Here, petitioner's denial of New Way's claims was based on improper fee sharing, not fraudulent incorporation. As improper fee sharing is not a licensing requirement and no court has yet interpreted it as such, the holding in *Mallela* does not, contrary to petitioner's contention, grant it authority to deny New Way's claim and, as such, it does not make the Master Arbitrator's award contrary to settled law.

Based on the foregoing, the petition to vacate the Master Arbitration award is denied, the award is confirmed and the court need not discuss petitioner's remaining arguments. Settle Order and Judgment.

Dated: 4/2/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.