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MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY

I.A.S. PART 50

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ALLSTATE INSURANCE COMPANY, by its authorized agent SECOND LOOK, INC.,

Petitioner,

- against -

FIDUCIARY INSURANCE COMPANY OF AMERICA,

Respondent.

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By: Tarantino, A.J.S.C.
Dated: April 11, 2014

Index No. 13-12430
Mot. Seq. # 002 - MotD
003 - MotD;CDISPSJ

Return Date: 6-28-13 (#002)
11-15-13 (#003)
Adjourned: 1-07-14

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In this Article 75 proceeding, the petitioner Allstate Insurance Company, by its agent Second Look, Inc. (Allstate), seeks a judgment confirming an arbitration award dated October 19, 2012, in the amount of $14,966.02 for a loss transfer claim arising out of a motor vehicle accident that occurred on April 19, 2008. The respondent Fiduciary Insurance Company of America (Fiduciary) has filed a cross petition which seeks a judgment vacating said arbitration award.

The subject accident allegedly occurred when a vehicle owned by Fiduciary's insured came into contact with a vehicle owned and operated by Allstate's insured, in which Noshaba Arooj (Arooj) was a passenger. After paying no-fault benefits to Arooj, Allstate filed demands for arbitration seeking to recoup the amount paid for medical treatments for injuries allegedly sustained as a result of the accident. Under the circumstances herein, the rights and obligations of insurers are subject to mandatory arbitration (Insurance Law §§ 5105 and 5221 [b]). It is undisputed that, as a result of Allstate's initial filing, a prior arbitration award dated March 22, 2010 (Prior Decision) found Allstate's driver and Fiduciary's driver each 50% liable for the accident.

Thereafter, Allstate filed a demand for arbitration regarding additional no-fault benefits paid to Arooj. In a decision dated October 19, 2012 the arbitrator awarded Allstate 50% of the amount paid out on Arooj's behalf based, at least in part, on the finding of liability in the Prior Decision. Allstate indicates that Fiduciary failed to pay the initial arbitration award until a prior petition to confirm was granted, and that this is the second petition against Fiduciary arising out of the same accident.

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In its petition, Allstate alleges that the vehicle owned and operated by Fiduciary's insured was a vehicle for hire which enables Allstate to make a qualified claim for loss transfer, that, pursuant to the rules of Arbitration Forum Inc. (AFI) and the relevant regulations, Fiduciary was required to pay the instant arbitration award within 30 days, and that Fiduciary has failed to pay said award. Allstate further alleges that Fiduciary failed to move to vacate the arbitration award within 90 days pursuant to CPLR 7511, that it is entitled to recover its legal fees on the grounds that Fiduciary has no valid defense or reason for non-payment of the arbitration award, that Fiduciary's actions are frivolous, and that it is entitled to interest from the date of the arbitration award as well as court costs.

In support of its petition to confirm the subject arbitration award, Allstate submits the decision dated October 19, 2012, a number of prior orders of the court in unrelated proceedings, two pages from the E-Courts website, and an affirmation from its attorney regarding its claim for legal fees. In addition, Allstate submits a copy of a letter, dated April 1, 2011 on Allstate letterhead, which states that Second Look, Inc. "is the duly appointed agent for Allstate Insurance Company to process and collect subrogation claims . . . [and] is authorized to take any administrative/legal actions needed to pursue" such claims.

In her decision dated October 19, 2012, the arbitrator notes that there has been a prior arbitration award, and "[Allstate] has filed for supplemental amounts. [Fiduciary] in their contentions has challenged liability ... [and] contends that they have evidence where [Allstate] has admitted their insured was at fault in the loss ... [Fiduciary]'s representative ... was advised that the [Prior Decision] is final and binding and ... liability ... is no longer an issue." Thus, the arbitrator found that Allstate "proved 50% liability against [Fiduciary]. In the paragraph labeled "Damages Decision," the arbitrator sets forth the following:

> [Allstate] submitted proof of damages as required by [AFI] rules and regulations. [Fiduciary] claims that they did not receive paperwork from [Allstate] to substantiate the amounts claimed, [Fiduciary] made several arguments in regards to the injuries claimed by the injured party but was unable to prove that the payments made were unrelated or excessive. Since [Fiduciary] claims they never received the proof of payment from [Allstate] there is no way they can prove the treatment rendered was unrelated or excessive.

In opposition, Fiduciary submits its cross petition which seeks judgment vacating and setting aside the arbitration award on the ground that the decision was irrational, arbitrary and capricious, and exceeded the arbitrator's power in that she failed to consider new evidence which proved that Allstate's driver was 100% liable for the accident, to consider Fiduciary's evidence as to damages, and to allow a court reporter to record the arbitration hearing in violation of Fiduciary's due process rights. The Court will address Fiduciary's cross petition before it reviews Allstate's petition as it directly opposes the relief sought in the petition, and this may well determine the issues before the Court.

CPLR 7511 (b) (1) sets forth the exclusive grounds for vacating an award where, as here, the aggrieved party participated in the arbitration including, but not limited to, corruption, fraud or

misconduct in procuring the award, partiality of an arbitrator appointed as a neutral, or the arbitrator making the award exceeded her power. However, compulsory arbitration awards are subject to closer judicial review than awards resulting from consensual arbitration, "as claimants are denied access to the courts in the first instance" (***Rose v Travelers Ins. Co.***, 96 AD2d 551, 551, 465 NYS2d 64 [2d Dept 1983]; *see* ***Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 214, 652 NYS2d 584 [1996]; ***Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund***, 47 AD3d 633, 850 NYS2d 478 [2d Dept 2008]). Here, it undisputed that the controversy between the parties is subject to compulsory arbitration, and that the arbitration process remains Allstate's sole remedy to recover herein (CPLR 5105 [b]).

It is well settled that an arbitration award in a compulsory arbitration proceeding must be in accord with due process and supported by adequate evidence in the record (*see* ***City School Dist. of the City of N.Y. v McGraham***, 17 NY3d 917, 934 NYS2d 768 [2011]; ***Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.***, *supra*; ***Motor Veh. Mfrs. Assn. of U.S. v State of New York***, 75 NY2d 175, 551 NYS2d 470 [1990]; ***Matter of Petrofsky [Allstate Ins. Co.]***, 54 NY2d 207, 445 NYS2d 77 [1981]; ***Matter of Mangano v United States Fire Ins. Co.***, 55 AD3d 916, 866 NYS2d 348 [2d Dept 2008]). The award also must be rational and satisfy the arbitrary and capricious standard of CPLR Article 78 (***Motor Veh. Mfrs. Assn. of U.S. v State of New York***, *supra*; ***Caso v Coffey***, 41 NY2d 153, 391 NYS2d 88 [1976]; ***Lackow v Department of Educ. (or "Board") of City of N.Y.***, 51 AD3d 563, 859 NYS2d 52 [1st Dept 2008]). An arbitration award may be found to be rational if any basis for the determination is apparent to the court upon reading the evidentiary record before the arbitrator (*see* ***Caso v Coffey***, *supra*; ***Matter of Travelers Indem. Co. v United Diagnostic Imaging***, 70 AD3d 1043, 893 NYS2d 899 [2d Dept 2010]; ***Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers***, 21 AD3d 1110, 801 NYS2d 624 [2d Dept 2005]; *see generally* ***Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County***, 34 NY2d 222, 356 NYS2d 833 [1974]). In addition, the burden of establishing the invalidity of an arbitration award is on the party challenging it (***Caso v Coffey***, *supra*; ***Lackow v Department of Educ. (or "Board") of City of N.Y.***, *supra*).

Here, Fiduciary contends that the subject decision is irrational because the arbitrator "improperly applied the liability finding in the Prior Decision," and failed to consider newly discovered evidence that Allstate's driver was 100% liable for the accident. Fiduciary further contends that, in its investigation in connection with the subject filing for arbitration, it obtained a copy of an ISO Report in which Allstate noted "Insured. Was Speeding Doing 80 MPH. Went Through R," and that said report is "conclusive proof" that Allstate knew that its insured driver was 100% liable for this accident. Fiduciary alleges that ISO is a "shared comprehensive database where insurers report, among other things, the results of their claims and fraud investigations," and that said report was not entered into ISO until well after the Prior Decision.

A review of the record reveals that Fiduciary has failed to submit a copy of the police accident report regarding the subject accident in support of its cross petition, that the arbitrators in the Prior Decision and the subject decision considered the police report, and that the arbitrator in the Prior Decision noted that Allstate was "able to prove through the police report that Fiduciary is half at fault for this loss." Under the heading "What evidence caused you to render this decision and why?" the

arbitrator in the Prior Decision stated "based on the police report, [Fiduciary's driver] was cited for traffic control disregarded." Under these circumstances, there was a rational basis for the arbitrator's determination in the second arbitration that the Fiduciary vehicle was 50% liable for the accident (*see* ***Matter of Mangano v United States Fire Ins. Co.***, *supra*).

Fiduciary's allegation that the arbitrator did not consider the ISO report, even if true, does not change the result. 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 (*see* ***Matter of Travelers Indem. Co. v United Diagnostic Imaging***, *supra*; ***Matter of State Farm Mut. Auto Ins. Co v City of Yonkers***, *supra*). In any event, Allstate contends that the ISO report is not its final conclusion in its claim and fraud investigation, and that the notation therein is merely the memorialization of the initial statement made by Fiduciary's driver to Allstate's examiner. Here, it is determined that there is sufficient basis for the arbitrator to consider the Prior Decision, which is based on the subject police report, to be convincing evidence regarding the relative culpability of the parties. This is especially true where the record reveals that both parties submitted said police report to the arbitrator in the hearing which is the subject of this proceeding, and Fiduciary does not challenge its probative value.

Fiduciary further contends that the arbitrator "did not hold Allstate to its burden of proof, but inappropriately shifted the burden to Fiduciary to disprove the damages." As noted above, the arbitrator held that, because Fiduciary claimed that it never received proof of payment from Allstate it could not prove that the treatment rendered to Arooj was unrelated or excessive. It is undisputed that the only evidence submitted by Allstate regarding its damages, and the only evidence considered by the arbitrator in rendering her decision, was Allstate's payment ledger. Under the heading "What evidence caused you to render this decision and why?" the arbitrator stated "Decision based on ... proof of payment submitted," and the record indicates that the sole item in support of Allstate's claim for damages was its "payment history."

Fiduciary asserts that pursuant to AFI's rules, where a respondent disputes a damages claim, a payment ledger is insufficient to establish damages. In support of this assertion, Fiduciary submits a copy of the "Summary of May 11, 2011 Loss Transfer Advisory Committee Meeting"[1] wherein it is stated that

> Per the rules, a payment ledger is sufficient as "minimal" proof of damages should the Respondent not dispute damages. If the Respondent does dispute damages, then additional evidence may be needed to support the amount claimed/sought. In addition, if specific damages are disputed and the arbitrator believes the Respondent's argument is valid, the arbitrator may adjourn the hearing to require the Applicant to provide the Respondent with a copy of their proofs, specific to the damages disputed.

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[1] Pursuant to 11 NYCRR § 65-4.11(f) governing mandatory arbitration for insurers, a loss transfer advisory committee is charged with regularly reviewing the rules and all other relevant matters involving settlements between insurers and reporting its findings and recommendations to the superintendent of insurance.

In addition, Fiduciary contends that AFI arbitrators "are required to look to additional proofs of damages where damages have been disputed by a Respondent as to the reasonableness and necessity of the damages sought by the Applicant." In support of this contention, Fiduciary submits a copy of AFI's "Guide For Arbitrators,"[2] wherein it is stated that

> If a responding company raises a damages argument in the Disputed Damages section that could be valid, you should review the filing company's proofs for damages to respond to the challenge. The responding company must provide a valid reason for its challenge — causation, pre-existing damages, reasonable and necessary, ACV versus RCV, etc., and not simply indicate "we challenge all damages." However, if it provides a valid rationale for the challenge, it should be considered even if the responding company isn't given the opportunity to itemize it.

It is undisputed that Fiduciary submitted documents which raise the question whether Arooj was truthful regarding her injuries and the need for treatment. More importantly, the arbitrator herself indicates that Fiduciary claimed that it had not received the "paperwork from [Allstate] to substantiate the amounts claimed." AFI's "Guide For Arbitrators" addresses this issue as follows: "It must be noted that the responding company is at the mercy of the filing company when it is challenging damages. If the filing company has not provided the responding company with full documentation of the damages it is claiming for recovery, it will be difficult, if not impossible, to itemize exceptions to what it has never seen."

Here, upon reading the evidentiary record before the arbitrator, it is not apparent to the Court that there is any rational basis for the determination that Fiduciary bore the burden for the alleged failure of Allstate to provide full documentation to Fiduciary regarding its damages, or that an adjournment of the hearing was not warranted. Therefore, that portion of the award was irrational as well as arbitrary and capricious (*see* ***Caso v Coffey***, *supra*; ***Matter of Travelers Indemnity Co. v United Diagnostic Imaging***, *supra*; ***Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers***, *supra*). Under these circumstances, the matter is remitted to the arbitrator for a new determination as to the amount of damages recoverable by Allstate herein (*see* CPLR 7511 [d]).

Finally, Fiduciary contends that its due process rights were violated when the arbitrator refused its request to allow a court reporter to record the subject hearing. Fiduciary fails to cite any authority for its position, and relies instead on conclusory statements in its verified cross petition and an affidavit submitted in support thereof that, because this is a mandatory arbitration process, it was a denial of due process to refuse its request. The only regulation touching on the subject appears in 11 NYCRR § 65-4.5, entitled "No-fault arbitration forum procedure," which provides in pertinent part in sub-paragraph (l): "Record of proceedings. A stenographic record of the arbitration proceedings shall not be

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[2] The document submitted includes the notation "Updated: June 27, 2013," which is subsequent to the subject decision dated October 19, 2012. However, there is no indication in the document that the quoted material has been updated, and Allstate does not contend that the content is inapplicable herein.

required. However, a party requesting such a record shall inform the other party or parties of such intent, make the necessary arrangements, and pay the cost thereof directly to the person or agency making such record."

It is undisputed that AFI's rules do not permit a party to require that a court reporter be present at a hearing. Generally, courts avoid interfering in the arbitral process, and they afford arbitrators wide discretion in procedural matters, which will not be limited absent a compelling reason (*see* ***Matter of Glen Rauch Sec. v Weinraub***, 2 AD3d 301, 768 NYS2d 611 [1st Dept 2003]; ***Matter of Travelers Ins. Co. v Job***, 239 AD2d 289, 658 NYS2d 585 [1st Dept 1997]; ***Avon Prods. v Solow***, 150 AD2d 236, 541 NYS2d 406 [1st Dept 1989]). The sworn statement of Fiduciary's affiant that court reporters have been permitted in other hearings, does not establish that the arbitrator's denial of the request herein was irrational or violative of Fiduciary's due process rights. Here, Fiduciary has not established that it informed Allstate of its intent to schedule a court reporter, and made the necessary arrangements pursuant to the subject regulation. More importantly, Fiduciary has not established that arbitration hearings in general, and the subject hearing in particular, cannot be conducted in a fair and rational manner without the aid of a court reporter. In light of the subject regulation, and the absence of an AFI rule permitting a party to require the presence of a court reporter, the determination whether a court reporter is needed generally rests with the arbitrator.

A review of the entire record does not alter the determinations herein. In its petition, Allstate alleges that Fiduciary failed to move to vacate the arbitration award within 90 days pursuant to CPLR 7511, that it is entitled to recover its legal fees on the ground that Fiduciary has no valid defense or reason for non-payment of the arbitration award, and that it is entitled to interest from the date of the arbitration award as well as court costs. Allstate's first allegation, in which it implies that Fiduciary is not permitted to contest the petition, is without merit. A party may oppose an arbitration award either by motion pursuant to CPLR 7511 (a) to vacate or modify the award within 90 days after delivery of the award or, as here, by objecting to the award on the grounds set forth in CPLR 7511 (b) upon an application to confirm the award notwithstanding the expiration of the 90-day period (*see* ***Matter of Brentnall v Nationwide Mut. Ins. Co.***, 194 AD2d 537, 598 NYS2d 315 [2d Dept 1993]; ***Karlan Constr. Co. v Burdick Assoc. Owners Corp.***, 166 AD2d 416, 560 NYS2d 480 [2d Dept 1990]; ***State Farm Mut. Auto. Ins. Co. v Fireman's Fund Ins. Co.***, 121 AD2d 529, 504 NYS2d 24 [2d Dept 1986]). That branch of Allstate's petition which seeks to recover its attorney's fees on the ground that Fiduciary's failure to pay the arbitration award amounts to frivolous conduct is denied. The Court finds that Fiduciary's failure to pay the subject arbitration award, and its cross petition, are based, in part, upon a potentially valid legal argument, and considering that the cross petition has been granted in part, clearly did not rise to the level of "frivolous conduct" as contemplated by court rules (*see* CPLR 8303-a; Uniform Rules for Trial Cts [22 NYCRR] § 130-1.1 [a]; ***S&B Petroleum, Inc. v Gizem Realty Corp.***, 8 AD3d 550, 778 NYS2d 696 [2d Dept 2004]; ***Agostini v Sobol***, 304 AD2d 395, 757 NYS2d 555 [1st Dept 2003]; ***Juron & Minzner v State Farm Ins. Co.,*** 303 AD2d 463, 756 NYS2d 428 [2d Dept 2003]; ***Matter of Christopher,*** 280 AD2d 546, 720 NYS2d 391 [2d Dept 2001]). Lastly, it is determined that Allstate's request for interest and court courts must be held in abeyance until a decision is rendered in accordance with this decision.

If an application to vacate an award is denied, the Court must confirm the award (CPLR 7511 [e]). Accordingly, the petition is granted to the extent that the determination of liability in the subject award is confirmed and is otherwise denied. Concomitantly, that branch of the cross motion which seeks judgment vacating the award of damages in the subject arbitration award is granted, and the matter is remitted to the arbitrator, or a substitute, for a determination of damages in accordance with this decision.

Settle judgment.

April 11 2014

A.J.S.C.