SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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AMERICAN HOME ASSURANCE COMPANY,

Petitioner,

-against-

FIDUCIARY INSURANCE COMPANY of AMERICA,

Respondent.

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DECISION AND ORDER
Index No. 650976/14

PRESENT:
Hon. Geoffrey D.S. Wright
Acting Justice Supreme Court

RECITATION, AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order to confirm Arbitration Award.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	
Other.....cross-motion.....	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Petitioner moves this court, pursuant to CPLR 7510, to confirm an arbitration award rendered by Arbitration Forums, Inc. (AFI) as of January 14, 2014, which found nonparty the New York City Office of the Comptroller (the City), and respondent Fiduciary Insurance Company of America (FICA), each 50% liable for damages paid on behalf of the insured of petitioner American Home Assurance Company (AHAC) (the Final Award). Respondent FICA cross-moves, pursuant to CPLR 7511 (b), to vacate the award on the ground that it was arbitrary and capricious, and rendered with manifest disregard for the law.

BACKGROUND

The parties agree on the facts giving rise to the arbitration. On February 23, 2010, a motor vehicle accident occurred at the intersection of East 68th Street and 2nd Avenue, in New York, New York. The accident involved a taxi/vehicle for hire owned and driven by FICA's insured, Elkin S. Guerrero, and an unmarked police vehicle owned and operated by the City. As a result of the collision between the two vehicles, Guerrero lost control of his vehicle, which struck pedestrian David Arndt, an employee of AHAC's insured, J. Dannunizo & Sons Inc., as he was setting up construction barriers in the vicinity.

As a result of the incident, Mr. Arndt was injured and treated at various medical facilities. He made a claim to AHAC for no-fault benefits, and AHAC paid $73,645.95 on his behalf. As of February 5, 2013, AHAC commenced an arbitration before AFI, pursuant to Insurance Law § 5105 (b),[1] against FICA and the City for reimbursement of the benefits in the sum of $50,000.00, the maximum amount allowable under the law. *See* Insurance Law § 5104 (b) ("[n]o such action may be compromised by the covered person except with the written consent of the insurer, or with the approval of the court, or where the amount of such settlement exceeds fifty thousand dollars").

AFI made an award as of June 25, 2013 (the Prior Award), finding that "[l]iability will only be determined v [FICA] on this docket . . . [and that a]pplicant proved 0% liability against [FICA] based on: [FICA] entered the intersection on a green light when struck by the NYPD vehicle that improperly entered the intersection on a red light at a high rate of speed while not on an emergency call. Comparative negligence considered." In addition, AFI found that

[1] Under Insurance Law § 5105 (b), "[t]he sole remedy of any insurer or compensation provider to recover on a claim [on behalf of a covered person for benefits which another insurer would otherwise be obligated to pay, shall be] mandatory arbitration . . . ."

"[a]pplicant proved 0% liability against [the City] based on: [affirmative defense of failure to send an Intercompany Reimbursement Notification (IRN) form] upheld for this Respondent."

In the discussion of the basis of the Prior Award, AFI summarized that "[n]o liability has been proven v [FICA]. [The City] was released from any liability determination on this docket due to the upholding of the affirmative defense regarding the condition precedent as set forth in the NY PIP AF Rules."

On or about August 5, 2013, an arbitration proceeding was re-filed by AHAC with AIF against FICA and the City. That document explained in its "Contentions" that

> "this is a refiling in direct response to the affirmative defense upheld under the original filing on this matter under Docket # I068-01273-1300, wherein Respondent's (Office of the Comptroller NYC) affirmative pleading of no Intercompany Reimbursement Notification (IRN) being sent prior to filing was upheld. Applicant did properly submit a subrogation package with an IRN attached directed to the Office of the Comptroller prior to filing arbitration but was unable to procure the IRN form which had been sent to Respondent at the hearing. Applicant resent the IRN to Respondent on July 10, 2013 . . . and re-filed this matter."

The Contentions also state that "the sole cause of this accident and subsequent injuries to Applicant's employee due to the negligence, carelessness and/or recklessness of [the City's] actions." More importantly, that section goes on to highlight

> "the previous filing under Docket I068-01273-13-00 wherein the dispute of liability was resolved finding [FICA] 0% liable and stating the [the City], the unmarked police vehicle, was travelling at an excessive rate of speed through the intersection, was not an emergency call, disregarded a red traffic signal and did not properly activate its warning siren. . . . Based upon the above, Applicant requests an award of 100% from [the City]."

In response, the City gave an affirmative defense in August 5, 2013 filing with AFI that

> "this is a priority of payment case not loss transfer as applicant has filed . . . . yes the applicant paid workers comp benefits . . . on behalf of the injured parties does not take away from the fact that

> they were also pedestrians involved in an accident with 2 vehicles." FICA responded that "this is not a priority of payment case as liability against [FICA] is res judicata under Doc # I068-01274-13-00."

In the Final Award, of January 14, 2014, AFI determined that

> "this is not a res judicata situation in that [the Prior Award] was not determined on its merits, and upheld that Priority of Payment appropriate. Determination of the panel of 3 to allow this case to go forward under Priority on payment after arguments presented, jurisdiction for either in this forum."

In explaining the decision, AFI noted that "although there is a qualifying vehicle under loss transfer, arguments made and evidence presented indicates that this case falls under Priority of Payment. Fiduciary cited to no authority indicating that Priority of Payment was not applicable. Panel of 3 determined despite filing under Loss Transfer, case should go forward and decided accordingly."

The Final Award granted $25,000 against each of the City and FICA, noting that AHAC "sustained its prima facie case of 50% versus [each of the respondents] in the apportionment under Priority of Payment."

The City has already made payment under the Final Award, and AHAC now seeks to confirm the Award, in order to receive payment from FICA. FICA objects that the issue of liability, as determined in the Prior Award, was res judicata, and that, as a result, the determination in the Final Award was irrational, arbitrary and capricious, and in manifest disregard of the law. Accordingly, they ask that this court vacate the Final Award.

STANDARDS

Courts in

> "[o]ur State ha[ve] long sanctioned arbitration as an effective alternative method of settling disputes . . . and[,] as long as arbitrators act within their jurisdiction, their awards will not be set

> aside because they have erred in judgment either upon the facts or the law. Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined."

Matter of Goldfinger v Lisker, 68 NY2d 225, 230-231 (1986) (internal citations omitted).

Thus, this court should normally confirm the Final Award pursuant to CPLR 7510 unless there are grounds to vacate or modify the award pursuant to CPLR 7511. CPLR 7511 (b) (1) provides that where, as here, the parties participated in the arbitration, an award may be vacated only due to:

> "(i) corruption, fraud, or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or (iii) 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; or (iv) failure to follow the procedure in this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

However, as the arbitration in question was a mandatory arbitration, the standard has been judicially adjusted to accommodate due process concerns. The Court of Appeals has slightly eased the strict CPLR 7511 standard to "whether the award is supported by evidence or other basis in reason, as may be appropriate, and appearing in the record." *Mount St. Mary's Hosp. of Niagra Falls v Catherwood*, 26 NY2d 493, 508, *rearg denied* 27 NY2d 737 (1970); *accord Matter of Gongora v New York City Dept. of Educ.*, 98 AD3d 888, 889-90 (1st Dept 2012); *Matter of Commercial Union Ins. Co. v Ewall*, 168 AD2d 247, 249 (1st Dept 1990).

ANALYSIS

This court is bound to confirm the Final Award as long as it has some rational basis, even if it is affected by a clear error of law. As a preliminary matter, the court notes several applicable statutory provisions governing the relationship between the parties.

The Insurance Regulations (11 NYCRR 65-3.12 [a] [2]) provide that

> "[a]n applicant who is neither an operator nor an occupant of a motor vehicle or a motorcycle, and who sustains a personal injury arising out of the use or operation in New York State of more than one insured motor vehicle or insured motorcycle *shall institute the claim against the insurer of any one of such motor vehicles* or motorcycles unless the insurers agree among themselves that one of them will accept and pay the claim initially."

Emphasis added.

That section then goes on to clarify how payment should be made to the insurer of the injured non-occupant of a vehicle. More specifically, 11 NYCRR 65-3.12 (e) provides that

> "[a]ny insurer paying first-party benefits shall be reimbursed by other insurers for their proportionate share of the costs of the claim and the allocated expenses of processing the claim, in accordance with the provisions entitled 'other coverage' contained in section 65-1.1 of this Part and provisions entitled 'other sources of first-party benefits' contained in Subpart 65-2 of this Part."

The "other coverage" section of 65-1.1 provides that

> "[w]here more than one source of first-party benefits required by article 51 of the New York Insurance Law and article 6 or 8 of the New York Vehicle and Traffic Law is available and applicable to an eligible injured person in any one accident, [each insurer] is liable to an eligible injured person only for an amount equal to the maximum amount that the eligible injured person is entitled to recover under this coverage, divided by the number of available and applicable sources of required first-party benefits."

The "other sources of first-party benefits" section (11 NYCRR 65-2.6 [a]) reiterates that

> "[w]here more than one source of first-party benefits required by article 51 of the New York Insurance Law and article 6 or 8 of the New York Vehicle and Traffic Law is available and applicable to an eligible injured person in any one accident, the self-insurer is liable to an eligible injured person only for an amount equal to the maximum amount that the eligible injured person is entitled to recover from the self-insurer, divided by the number of available and applicable sources of required first-party benefits."

Finally, 11 NYCRR 65-4.11 (a) (6) provides that "any controversy between insurers involving the responsibility or the obligation to pay first-party benefits (*i.e., priority or 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." Emphasis added.

It is clear, therefore, that the Insurance Regulations do not require any particular finding of liability in order for a non-occupant of a vehicle, such as the insured of AHAC, to make a claim against either the City or FICA. Thus, it is equally clear that AFI made an award that is grounded in a rational basis, to wit, the applicable statutory law with regard to priority of payment.

Nonetheless, FICA argues that the matter of liability as determined in the Prior Award is res judicata, and that the determination of the Final Award violated the strong public policy of this state. The Court of Appeals summarized this long-standing policy in *Commissioners of State Ins. Fund v Low*, 3 NY2d 590, 595 (1958), in which it announced, with regard to res judicata and collateral estoppel that "a question once tried out should not be relitigated between the same parties or their privies . . . [, and] these doctrines must not be allowed to operate to deprive a party of an actual opportunity to be heard." *See also Schuylkill Fuel Corp. v B. & C. Nieberg Realty Corp.*, 250 NY 304, 306-307 (1929, Cardozo, Chief Judge) ("[a] judgment in one action is conclusive in the later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first"); *accord Statter v Statter*, 2 NY2d 668, 673 (1957).

Here, however, the issue of priority of payment, *which is wholly independent of questions of liability* (*see* 11 NYCRR 65-3.12 [e]), was not addressed at all in the Prior Award determination. As such, it cannot be res judicata. Moreover, it is apparent in the record that FICA presented its view on the matter to AFI, and AFI rejected it. Even if this court were

wholly convinced that AFI was wrong on the law, *and it is not*, the Final Award should be confirmed "as long as there is a barely colorable basis for the decision." *Matter of Roffler v Spear, Leeds & Kellogg,* 13 AD3d 308, 310 (1st Dept 2004), citing *Wallace v Buttar*, 378 F3d 182, 190 (2d Cir 2004); *see also Matter of Troeller v Department of Educ. of the City Sch. Dist. of the City of N.Y.*, 118 AD3d 640 (1st Dept 2014), quoting *Matter of United Fedn. of Teachers, Local 2, AFT, AFL–CIO v. Bd. of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 83 (2003) ("even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice"). As there is a more than colorable basis for the decision, the award should be confirmed.

FICA has had a full opportunity to present its arguments to the arbitrator, including the argument that the matter vis-à-vis FICA was res judicata, and that priority of payment did not apply. *See* Final Award ("[d]etermination of the panel of 3 to allow this case to go forward under Priority on payment after arguments presented . . . this is not a res judicata situation in that [the Prior Award] was not determined on the merits . . ."). Thus, FICA has had an actual opportunity to be heard on the issue. *Schuylkill Fuel Corp.*, 250 NY at 306-307.

Finally, it is accepted that the parties may limit the issues to be arbitrated (*see Stolt-Nielsen S.A. v AnimalFeeds Intl. Corp.*, 559 US 662, 683 [2010]), and that "where arbitrators rule on issues not presented to them by the parties, they have exceeded their authority and the award must be vacated." *Matter of Colorado Energy Mgt., LLC v Lea Power Partners, LLC*, 114 AD3d 561, 564 (1st Dept 2014), citing *Fahnestock & Co., Inc. v Waltman*, 935 F2d 512, 515 (2d Cir), *cert denied* 502 US 942 (1991). Here, however, there is no indication that the decision of AHAC to seek 100% reimbursement from the City operated to remove the power of the arbitrator to decide the matter based on priority of payments. Indeed, the right to decide the

matter on that basis was statutorily bestowed, and not even mentioned in AHAC's application. AHAC's application could not somehow delimit that power, given that AHAC's policies presumably included the required language from the "other coverage" and the "other sources of first-party benefits" sections (*i.e.* 11 NYCRR 65-1.1 and 65-2.6). Those sections patently adopt the priority of payments mechanism that the arbitrator applied.

CONCLUSION

The submissions indicate that, far from being arbitrary or capricious, the Final Award was rationally based and reasonable. In addition, the Final Award was made within the bounds of the authority of the arbitrator, and with due regard, as opposed to manifest disregard, for the clearly applicable statutory law. A fortiori, the Final Award was "supported by evidence or other basis in reason, as may be appropriate, and appearing in the record." *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d at 508.

Furthermore, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' a court's conviction that the arbitrator has 'committed serious error' in resolving the disputed issue 'does not suffice to overturn his decision.'" *ReliaStar Life Ins. Co. of N.Y. v EMC Natl. Life Co.*, 564 F3d 81, 86 [2d Cir 2009], quoting *United Paperworkers Intl. Union AFL-CIO v Misco*, 484 US 29, 38 (1987). Here, the Final Award more than meets the requirements under CPLR 7510 to be confirmed, and CPLR 7511 is not implicated. The Final Award is confirmed.

Settle order on notice.

Date: September 22, 2014

Enter:

GEOFFREY D. WRIGHT
AJSC

A.J.S.C.