

**Matter of GEICO Indem. Co. v Global Liberty Ins. Co.
of N.Y.**

2014 NY Slip Op 32493(U)

August 25, 2014

Sup Ct, Queens County

Docket Number: 344/14

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED & RECORDED

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

AUG 29 2014

COUNTY CLERK
QUEENS COUNTY

In the Matter of the Application of
GEICO INDEMNITY CO.,

Index No.: 344/14

Petitioner

Motion Date: 6/9/14

-against-

Motion Seq. No.: 1

GLOBAL LIBERTY INSURANCE COMPANY
OF NEW YORK

ENTERED
9:52 AM PM
AUG 29 2014
COUNTY CLERK
COUNTY OF QUEENS

Respondent.

The following papers numbered 1 to 11 read on this petition pursuant to CPLR Article 75, to confirm an arbitration award dated April 12, 2013 and for a judgment thereon; and cross-petition by respondent to vacate the same arbitration award.

	<u>PAPERS</u> <u>NUMBERED</u>
Notice of Petition-Petition-Exhibits	1 - 4
Notice of Cross-Petition-Petition-Exhibits ...	5 - 8
Answering Affidavits-Exhibits.....	9
Replying Affidavits.....	10 - 11

Upon the foregoing papers it is ordered that this petition is granted and the award of the arbitrator dated April 12, 2013 is confirmed. The Petitioner may enter judgment thereon with the judgment clerk in the amount of \$50,000.00 with interest from April 12, 2014 together with costs and disbursements of this action and have execution thereon.

The respondent's cross-petition is denied.

The petitioner's insured, a pedestrian, was injured when he was struck by vehicle insured by respondent. The driver of the vehicle fled the scene. Respondent denied coverage relying on the exclusion provision in the policy of late notice and non-cooperation. As a result, petitioner paid its insured under the policy's uninsured motorist provision.

The petitioner commenced the subject compulsory arbitration proceedings against the respondent seeking reimbursement of the personal injury payments made to its insured as a result of the automobile accident pursuant to Insurance Law §5105 and section 65-4.11(d) of the New York State Insurance Department Regulation No.68.

A hearing attended by both parties was held where respondent raised the affirmative defense of "no coverage" based upon its disclaimer of coverage. It appears from the arbitrator's findings that the respondent submitted its letter of disclaimer, dated August 31, 2012, in support of its defense. The arbitrator, by decision dated April 12, 2013, found in favor of the petitioner finding that although respondent sent a denial of coverage letter, it failed to provide evidence to show when the loss was reported to it or how many attempts were made to contact its insured or the insured's driver. Petitioner was awarded \$50,000.00.

Petitioner moves to confirm the arbitration award. The respondent opposes confirmation and cross-petitions to vacate the arbitration award on the ground that the award "* * * lacked any rational basis or evidentiary basis, was inherently unfair and the arbitrator's decision was against the weight of the evidence." Respondent further asserts that there is a separate declaratory judgment action pending in the Supreme Court of Nassau County regarding the validity of the respondent's disclaimer and a motion for summary judgment has been submitted in that action.

CPLR 7511(b)(1) 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]). In cases of mandatory arbitration, the arbitrator's award is subject to 'closer judicial scrutiny' under CPLR 7511(b) and must have evidentiary support and cannot be arbitrary and capricious (Matter of American Exp. Property Cas. Co. v. Vinci, 63 AD3d 1055, 1055-1056 [2009] quoting Matter of Mangano v. United States Fire Ins. Co., 55 AD3d 916, 917; see (Deluca v. Arch Ins. Group, 109 AD3d 912

[2013]; Pradip Das/N.Y. Medical Rehab P.C. v. Allstate Ins. Co., 297 AD2d 321, 322 [2002])).

Applying the heightened scrutiny required in this case, respondent has failed to demonstrate the existence of any of the statutory grounds for vacating the arbitrator's award (see Matter of Wieder v. Schwartz, 35 AD3d 752, 753 [2006]; Matter of Local 295-295C, IUOE v. Phoenix Envtl. Servs. Corp., 21 AD3d 901 [2005]; Matter of Domotor v. State Farm Mut. Ins. Co., 9 AD3d 367, 367-368 [2004]) and that the award has no evidentiary support and is not rationally based (see American Exp. Property Cas. Co. v. Vinci, supra at 1056).

Essentially, respondent claims that the arbitrator made a "mistake of fact", did not consider the respondent's letter of disclaimer and, even if it was considered, the arbitrator's finding of a failure of proof of late notice is "irrational." Respondent's argument are without merit.

"An award is irrational only if there is no proof whatever to justify the award" (Susan D. Settenbrino, P.C. v. Barroga-Hayes, 89 AD3d 1094, 1095 [2011]). An arbitration award made after all parties have participated will not be overturned even where the arbitrator made an error of fact or of law (see Matter of Falzone New York Cent. Mut. Fire Ins. Co., 15 NY3d 530, 534 [2010]; Wien & Malkin LLP, 6 NY3d 471, 479-480 [2009]; Motor Vehicle Acc. Indemnification Corp. v. Aetna Cas. & Sur. Co., 89 NY2d 214, 223 [1996]; Allstate Ins. Co. v. GEICO, 100 AD3d 878 [2012]). "An arbitration award must be upheld when the arbitrator 'offer[s] even a barely colorable justification for the outcome reached' " (Allstate Ins. Co. v. GEICO [Govt. Empls. Ins. Co.], supra at 878, quoting Wien & Malkin LLP v. Helmsley-Spear, Inc., supra at 479, quoting Matter of Andros Compania Maritima, S.A. [Marc Rich & Co., A.G.J], 579 F2d 691, 704 [2d Cir 1978]).

The respondent failed to submit any evidence to demonstrate that the decision was irrational as it was based on "no proof whatever." It appears from the arbitrator's report, and respondent submitted nothing to demonstrate otherwise, that the only evidence of the alleged "late notice" was the respondent's denial letter. The arbitrator specifically referred to the letter, and rejected the respondent's defense of disclaimer on the ground of insufficient proof (see Allstate Ins. Co. v. GEICO, 100 AD3d 878 [2012]). "Courts are bound by an arbitrator's factual findings, *** and judgment concerning remedies" (Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York, 94 NY2d 321, 326 [1999]; Matter of TC Contr., Inc., v. 72-02 N. Blvd. Realty Corp., 39 AD3d 762, 763

[2007]). The court reviewing an arbitration award may not "re-weigh or re-examine the evidence" (Matter of Miro Leisure Corp. v. Prudence Orla, Inc., 83 AD3d 945 [2011] quoting Matter of McMahan & Co. [Dunn NewFund I], 230 AD2d 1, 5 [1997] [internal quotation marks omitted]). The respondent's cross-motion to vacate the award improperly asks the court to "re-weigh or re-examine the evidence" submitted at the arbitration and to consider additional evidence, including among other things, the affidavit of Mark Isaacs, which it failed to submit at the arbitration hearing. The court may not vacate an arbitration award and substitute its own judgment for that of the arbitrator (see Wien & Malkin LLP v. Helmsley-Spear, Inc., supra at 479; Allstate Ins. Co. v. GEICO, supra at 878; Matter of Miro Leisure Corp. v. Prudence Orla, Inc., supra at 945).

Insofar as respondent relies on the pending Nassau County declaratory judgment action, there is nothing in Article 75 which would warrant vacature on that basis.

Accordingly, the petition is granted and the cross-petition is denied.

Dated: August 25, 2014
D# 50

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J.S.C.

Audrey A. Sheffer
CLERK

ENTERED
9:52 (AM) PM
AUG 29 2014
COUNTY CLERK COUNTY OF QUEENS

FILED & RECORDED
AUG 29 2014
COUNTY CLERK
QUEENS COUNTY