

**Matter of MVAIC v V & B Magic Recovery Supplies,
Inc.**

2014 NY Slip Op 33090(U)

September 29, 2014

Supreme Court, Queens County

Docket Number: 88/2014

Judge: Thomas D. Raffaele

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This opinion is uncorrected and not selected for official publication.

Upon the foregoing papers it is ordered and adjudged that the petition is determined as follows:

In this Article 75, proceeding, petitioner MVAIC seeks an order from the court vacating the award of the master arbitrator Harris Levy upon the ground that he exceeded his authority by substituting his findings of fact for that of the lower arbitrator Maureen A. Callahan, and rendered a decision that was arbitrary, capricious and irrational; confirming that lower arbitration award; and staying all future proceedings between the parties, including the scheduled arbitration, pending the outcome of this petition to vacate. Respondents V & B Magic Recovery Supplies, Inc. as Assignee of Sherrilyn Sylvester (V&B) and American Country Insurance Company (ACIC) oppose the petition. This Court has carefully reviewed and considered all of the papers submitted with respect to this petition.

V&B, on March 4, 2011, commenced an arbitration proceeding against MVAIC and ACIC seeking reimbursement of \$2,049.99 for durable medical equipment rendered to its assignor, Sherrilyn Sylvester, after a motor vehicle accident on January 1, 2010. The claim had been denied by ACIC upon the policy of insurance no longer being in effect at the time of the accident since the policy had been previously cancelled on September 7, 2009, for failure of the insured, MHBAH Farma Associates, LLC (MHBAH), to pay the policy premium to its premium finance company, Arizona Premium Finance, Co. Sherrilyn Sylvester was a passenger in the single vehicle involved in that accident, which was owned by MHBAH, registered in New Jersey and insured by ACIC. At issue in the arbitration was whether ACIC properly cancelled the insurance policy prior to the date of the accident. The arbitrator Charles E. Sloane, on March 26, 2012, after a hearing, ruled that ACIC did not properly cancel the policy of its insured, MHBAH, since the New Jersey Administrative Code (N.J.A.C. 11:3-8.11[a];[c]) required at least 15 days notice prior to the effective date of the cancellation, which notice was not given by ACIC, and that consequently, said policy was still in effect on the date of the accident. As such, the arbitrator Sloane determined that ACIC was responsible for any no-fault benefits which may be attributable to any injuries sustained by Sherrilyn Sylvester, and granted V&B's claim for reimbursement.

ACIC sought review of the lower arbitrator's decision by a master arbitrator Steven Rickman. ACIC argued that the award of the arbitrator Sloane was arbitrary, capricious and incorrect as a matter of law. ACIC claimed that the arbitrator Sloane applied an incorrect section of the New Jersey Administrative Code. ACIC maintained that N.J.A.C. 11:1-20.2 applies to Commercial Auto Policies, such as the one it issued to MHBAH, and that since this section provides for a 10-day cancellation notice period, it effectively cancelled the policy with its 14-day notice. In response, V&B argued that

N.J.A.C. 11:1-20.2, entitled Medical Practice Insurance-Renewal and Nonrenewal Notices, is inapplicable to the subject policy.

The master arbitrator Rickman, on July 12, 2012, vacated the award of the lower arbitrator Sloane and remanded the matter for a new hearing before a different arbitrator. The master arbitrator Rickman determined that the arbitrator Sloane imperfectly executed the award so that a final and definitive award was not made. Rickman noted that the arbitrator Sloane failed to address and/or to consider whether or not N.J.A.C. 11:1-20.2 was applicable to the commercial policy at hand. The master arbitrator Sloane also noted that he did not have access to the Electronic Case Folder (ECF) so did not know whether this issue was raised and addressed by prior briefs and/or at the hearings. He further noted that it was unclear if the policy of insurance was submitted into evidence, and that even if N.J.A.C. 11:1-20.2 was applicable, the policy of insurance could have provided for terms more favorable to policyholders, such as requiring 15 days rather than 10 days notice for termination based upon nonpayment of premiums. The master arbitrator Rickman determined that at the new arbitration, the lower arbitrator Sloane's factual determination that 14 days notice was provided shall stand, and that all other relevant issues may be reexamined.

On January 8, 2013, and June 18, 2013, hearings were held before arbitrator Maureen A. Callahan, who, on June 28, 2013, after receiving post-hearing briefs from the parties, issued an award where she determined that the cancellation of the subject insurance policy was not entirely proper pursuant to all of the requirements required by New Jersey law, and granted V&B's claim for reimbursement by ACIC. Thereafter, ACIC sought review by a master arbitrator. On October 7, 2013, the master arbitrator Harris Levy vacated the award of the lower arbitrator Callahan and remanded the matter for a new hearing before a different arbitrator. The master arbitrator Levy found that the lower arbitrator Callahan's determination that the cancellation of the policy was "not entirely proper" and to allow the claim was arbitrary, unsupported and without a rational basis. The master arbitrator Levy noted that the award of the lower arbitrator Callahan did not contain a single finding of fact or any legal conclusion with respect to the issue of whether the cancellation of the policy was proper under applicable Jersey law.

Petitioner MVAIC brought the instant Order to Show Cause to vacate the award of the master arbitrator Levy, pursuant to CPLR 7511, and to confirm the lower arbitrator Callahan's award, pursuant to CPLR 7510. The arbitration scheduled for February 28, 2014, before American Arbitration Association arbitrator Vincent Gerardi has been stayed pending the Court's decision on this petition.

Judicial review of a master arbitrator's vacatur of an award pursuant to Insurance Law § 5106, as in this case, derives from CPLR 7511 (b) (1), and involves the question of whether the master arbitrator exceeded his or her power. (*See Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224 [1982]; *see also Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207 [1981]; *Matter of Government Employees Ins. Co. v Sheehan*, 181 AD2d 678 [1992].) 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 his or her power, or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. Compulsory arbitration awards, such as in this case, are subject to closer judicial review than awards resulting from consensual arbitration since claimants are denied access to the courts in the first instance. (*See Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *see also Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633 [2008]; *Rose v Travelers Ins. Co.*, 96 AD2d 551 [1983].)

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 [2011]; *see also Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, *supra*; *Matter of Petrofsky [Allstate Ins. Co.]*, *supra*.) An arbitration award in a mandatory arbitration proceeding will be upheld if it is supported by the evidence and is not arbitrary and capricious. (*See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, *supra*; *see also Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110 [2005]; *Matter of Kemper Ins. Co. v Westport Ins. Co.*, 9 AD3d 431 [2004].) On review, an arbitration award may be found to be rational if any basis for the determination is apparent to the court based upon a reading of the record. (*See Caso v Coffey*, 41 NY2d 153 [1976]; *see also Matter of Travelers Indem. Co. v United Diagnostic Imaging, P.C.*, 70 AD3d 1043 [2010]; *Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, *supra*.) In addition, the burden of establishing the invalidity of an arbitration award is on the party challenging it. (*See Caso v Coffey*, *supra*; *see also Allstate Ins. Co. v Fiduciary Ins. Co. of Am.*, 44 Misc 3d 1205[A], 2014 NY Slip Op 51021[U] [Sup Ct, Suffolk County 2014].)

In the instant matter, petitioner MVAIC contends that the master arbitrator Levy's award should be vacated because Levy exceeded the scope of his authority and acted in an arbitrary and capricious manner. This Court disagrees, and finds that the master arbitrator Levy, who was empowered to vacate the lower award on any grounds specified in CPLR 7511 or on the basis that the lower arbitrator Callahan acted in a manner which

was arbitrary, capricious or without rational basis (*see Matter of Petrofsky [Allstate Ins. Co.]*, *supra*), properly vacated the lower arbitration award because in a highly conclusory fashion, that lower award failed to set forth any basis for arbitrator Callahan's conclusions. (*See* CPLR 7511 [b] [1] [iii].) Since the lower arbitration award did not give any indication as to the nature of the evidence relied upon or the arbitrator Callahan's factual findings, the master arbitrator Levy could not perform a meaningful review of that award. (*See Matter of Petrofsky [Allstate Ins. Co.]*, *supra*; *see also Matter of Government Employees Ins. Co. v Sheehan*, *supra*; *Matter of City of Yonkers v Willsea*, 141 AD2d 820 [1988].) Contrary to petitioner MVAIC's claims, the master arbitrator Levy did not make a de novo review of the matter, and the determination of the master arbitrator Levy vacating the lower arbitrator Callahan's award and remanding the matter for a new hearing before a different arbitrator was not in excess of his authority.

Petitioner MVAIC, thus, failed to meet its burden of establishing the invalidity of the master arbitrator Levy's award, dated October 7, 2013. That award by the master arbitrator Levy has a rational basis. (*See Matter of Smith [Firemen's Ins. Co.]*, *supra*; *see also Matter of Green v Liberty Mut. Ins. Co.*, 22 AD3d 755 [2005]; *Matter of Liberty Mut. Ins. Co. v Spine Americare Med.*, 294 AD2d 574 [2002].)

Accordingly, it is

ORDERED and ADJUDGED that the petition to vacate the master arbitrator's award is denied and the petition is dismissed; and it is further

ORDERED and ADJUDGED that the award of the master arbitrator is confirmed; and it is further

ORDERED and ADJUDGED that the stay is vacated; and it is further

ORDERED and ADJUDGED that the matter is remanded for a new hearing before a new arbitrator.

This constitutes the decision and judgment of this court.

Dated: September 29, 2014

Thomas D. Raffaele, J.S.C.