

**Matter of Hereford Ins. Co. v ACE Am. Ins. Co.**

2014 NY Slip Op 33096(U)

September 15, 2014

Supreme Court, Queens County

Docket Number: 1093/14

Judge: Darrell L. Gavrin

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## NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**  
Justice

IA PART 27

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IN THE MATTER OF APPLICATION OF HEREFORD  
INSURANCE COMPANY a/s/o FELIX SORIANO,

Index No. 1093/14

Plaintiff,

Motion

Date April 14, 2014

- against-

ACE AMERICAN INSURANCE COMPANY,

Motion

Cal. No.

Defendant.

Motion

Seq. No. 1

The following papers numbered 1 to 11 read on this application by petitioner pursuant to CPLR 7511 (b) (1) (iii) to vacate and set aside the arbitration award published on November 12, 2013, upon the ground the arbitrator making the award exceeded her powers and so imperfectly executed it that a final and definite award upon the subject matter was not made, and to refer the matter back to Arbitration Forums, Inc. (Arbitration Forums) for a rehearing and final determination based upon the merits, and this cross application by respondent pursuant to CPLR 7511 (e) and 7510 to confirm the arbitration award.

	<u>Papers Numbered</u>
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Upon the foregoing papers, it is ordered that the petition and cross petition are determined as follows:

On June 11, 2009, Felix Soriano, petitioner's insured, owned and operated a taxi cab which was involved in an accident with a 2000 Chevrolet automobile, owned by DL Peterson Trust, leased to Colgate-Palmolive Corporate and operated by Vlahopoulos. The accident occurred at or near the Grand Central Parkway and 94th Street, Queens, New York. Respondent insured Colgate-Palmolive Corporate. Soriano was allegedly injured in the accident and sought medical care and attention for those injuries. He made a claim for personal injury protection benefits (PIP) under the automobile insurance policy issued by petitioner. As a

result, petitioner paid to, or on behalf of, Soriano, the sum of \$41,140.06 in PIP benefits.

Petitioner applied to Arbitration Forums, seeking a determination that Vlahopoulos was at fault in the accident, and petitioner was entitled to inter-company reimbursement of those paid benefits (\$41,140.06) from respondent, pursuant to the loss transfer provisions of Insurance Law §§ 5105 and 5221.

By award, published on November 12, 2013, the arbitrator found respondent 100% liable, but awarded no damages. The arbitrator noted that petitioner provided a payment ledger and “IRN” (inter-company reimbursement notification) form, but respondent challenged all of the damages claimed. She also noted that respondent provided a bio-mechanical report and several IME (independent medical examination) reports confirming that the injuries claimed were not related to the accident. She additionally noted that petitioner failed to provide any bills, IME reports or other evidence, to confirm that the injuries claimed were causally related to the loss, and did not refute any of the findings set forth in the respondent’s reports by submitting additional evidence. The arbitrator referred to the police report, which indicated an impact (of the vehicles) on the date of loss, (i.e. damage to the front of respondent’s vehicle), but lacked any notation of injuries. She noted that respondent provided vehicle damage photographs confirming the minimal impact. The arbitrator also noted petitioner failed to provide any “IME claims investigation,” driver’s statement, or “EUO” to support its claim of damages.

Petitioner commenced this Article 75 proceeding to vacate the arbitration award made in connection with compulsory arbitration pursuant to the Insurance Law. It asserts that in support of its filing of the application for arbitration, it submitted to Arbitration Forums the inter-company reimbursement notification, the police report, and proof of payment of medical benefits and medical bills, including bills for peer reviews and IMEs. Petitioner claims that respondent made its submissions by mail, but failed to mail it a copy of the NY PIP Form and Contentions Sheet, as required by the rules of Arbitration Forums. Petitioner asserts that, as a consequence, petitioner was unaware of the challenge made by respondent regarding damages and the causal relationship between the claimed injuries to the accident, and, therefore, was denied a proper opportunity to refute such challenge. Petitioner also asserts that the arbitrator should have realized, from petitioner’s own submissions, that a causal relationship existed between the injuries and the accident. Petitioner contends that the itemized medical bills and expense charges regarding the IMEs show that seven IMEs were conducted of plaintiff between the dates of September 14, 2009 and February 19, 2010, by “ortho, chiro, acupuncture, psych and neuro” specialists. Respondent’s submissions show IME’s were performed on behalf of respondent years after the accident. Petitioner therefore claims that based upon respondent’s failure to comply with the rules of the forum, and the arbitrator’s failure to take into consideration all of petitioner’s evidence, the arbitration award is not supported either by the evidence or by reason, is arbitrary and capricious, and should be vacated.

Respondent opposes the petition and cross-petitions, pursuant to CPLR 7510 and 7511 (e), to confirm the award on the ground that the decision and award was rendered on

November 12, 2013, the award was not vacated or modified by Arbitration Forums, and respondent's application to confirm the award is timely made (CPLR 7510, 7511 [e]). Respondent contends that the award has evidentiary support, is not arbitrary and capricious, and that, to the extent the arbitrator failed to review all the evidence prior to rendering a decision, such failure does not constitute a ground upon which the award may be vacated. Respondent also contends that petitioner had a full and fair opportunity to present evidence necessary to support petitioner's position during the arbitration, but failed adequately to do so. Respondent further contends that petitioner was not prejudiced by respondent's failure to mail a copy of its NY PIP Form and Contentions Sheet to petitioner, and, in any event, waived any objection to consideration of respondent's evidence.

CPLR 7511 (b) (1) sets forth the exclusive grounds for vacating an award where, as here, the aggrieved party participated in the arbitration, which include, but are not limited to, corruption, fraud or misconduct in procuring the award, partiality of an arbitrator appointed as a neutral, or the arbitrator 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 [2d Dept 1983]; see *Matter of Motor Vehicle Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493 [1970]; *Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633 [2d Dept 2008]). In the instant case, it undisputed that the controversy between the parties is subject to compulsory arbitration.

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]; *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d at 223; *Matter of Mangano v United States Fire Ins. Co.*, 55 AD3d 916 [2d Dept 2008]; *Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633 [2d Dept 2008]). The award must be rational and not capricious, and satisfy the arbitrary and capricious standard of CPLR Article 78 (see *Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [1990]; *Caso v Coffey*, 41 NY2d 153 [1976]; *State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110 [2d Dept 2005]). 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*, 41 NY2d at 158; *Matter of Travelers Indem. Co. v United Diagnostic Imaging*, 70 AD3d 1043 [2d Dept 2010]; *Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d at 1111; 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 [1974]). In addition, the burden of establishing the invalidity of an arbitration award is on the party challenging it (see *Caso v Coffey*, 41 NY2d at 159).

Petitioner has failed to meet its burden of establishing any such ground for vacating the award. The award was not arbitrary and capricious or irrational, and there was evidentiary

support for the arbitrator's findings of no liability and no damages. The arbitrator engaged in an analysis of the proof submitted by petitioner and respondent, and arrived at a reasoned conclusion that petitioner established 100% liability on the part of respondent due to respondent's failure to maintain a proper lookout and a safe following/stopping distance, but respondent had shown there was no causal relationship between the accident and any claimed injuries, and petitioner failed to refute such showing by additional evidence. It was not irrational, therefore, for the arbitrator to find that petitioner was not entitled to an award of damages.

The arbitrator's consideration of the NY PIP Form and Contentions Sheet and submissions when making the award did not violate petitioner's due process rights, notwithstanding respondent's failure to mail petitioner a copy of the NY PIP Form and Contentions Sheet by the "Materials" due date. As conceded by petitioner, the rules of Arbitration Forums do not require or allow for discovery, and the parties are not able to view the contents of the evidence submitted by each other, but rather only a list of the evidence being submitted in the event the party is filing online. In this instance, petitioner nevertheless received advance notice of the substance of respondent's arguments and evidence, by virtue of electronic communication sent by respondent to petitioner's representative on October 8, 2013. The communication included copies of the neurological and orthopedic IME reports, and the report of an expert in biomedical engineering. In addition, petitioner was placed on notice that materials had been received by Arbitration Forums on October 24, 2013, before the arbitration hearing. Petitioner has made no showing that it objected, either at the hearing or prior thereto, to any consideration of such submission by the arbitrator on the ground respondent had failed to mail the NY PIP Form and Contentions to petitioner. Furthermore, petitioner was responsible for presenting its own evidence to support its position at the hearing, and the evidence presented by petitioner was found by the arbitrator to be insufficient to confirm a causal relationship to the loss.

It is also well-settled that an arbitrator is not bound by technical rules of evidence, and the admission of evidence that might well be precluded in a court of law is not sufficient cause for vitiating an award unless the mistake or error of law is so gross or palpable as to amount to fraud, misconduct or breach of authority (*see Nyack Hosp. v Government Employees Ins. Co.*, 139 AD2d 515 [2d Dept 1988]; *Dahn v Luchs*, 92 AD2d 537, 538 [2d Dept 1983]). Petitioner has failed to demonstrate that the arbitrator's admission of respondent's evidence was a mistake or error of law which was so gross or palpable as to amount to fraud, misconduct or breach of authority.

To the extent petitioner seeks an order of the court referring the matter back to Arbitration Forums for a rehearing and final determination on the merits, petitioner admits it requested that Arbitration Forums modify or void the award, but the request was denied because the award did not involve a clerical or administrative error, and thus the decision is final and binding under the arbitration rules (*see* Rule 5 [I]). The court therefore declines to remit the matter to the arbitrator (*cf. Matter of Lewis v County of Suffolk*, 70 AD2d 107 [2d Dept 1979]).

Accordingly, the petition to vacate the arbitration award, published on November 12, 2013, is denied, and the cross petition to confirm the award is granted (CPLR 7511 [e]).

Dated: September 15, 2014

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DARRELL L. GAVRIN, J.S.C.