

Matter of Sinai Med., PC v Zurich Am. Ins. Co.

2015 NY Slip Op 32066(U)

October 15, 2015

Supreme Court, Queens County

Docket Number: 704813/15

Judge: Howard G. Lane

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 6

In the Matter of SINAI MEDICAL, PC, et al.,
Petitioners,

- against -

ZURICH AMERICAN INSURANCE CO.,
Respondent.

By: **Lane, J.**

Index No. 704813/15

Dated October 15, 2015

Motion Date August 6, 2015

Motion Cal. No. 127

Motion Seq. No. 1

Sinai Medical PC, Fada Acupuncture PC, and Evergreen Chiropractic PC, the assignees of Guo Xin Suo, have brought a petition to vacate three (3) related master arbitration determinations rendered by Master Arbitrator Harris Levy which affirmed arbitration determinations rendered by arbitrator Carolyn Terrell-Nieves.

On April 4, 2005, Guo Xin Suo, a passenger in a mini-van, sustained injuries in a motor vehicle accident. After the petitioners provided Suo with medical services and received assignments of benefits, they submitted no fault claims to AIU Insurance Company. However, the insurer issued denials of claims on the ground that “applicant must apply to the insurer of his/her own motor vehicle or that of a resident relative.” The petitioners subsequently submitted their no-fault claims to Zurich American Insurance Company, but that insurer also denied coverage.

The petitioners began arbitration proceedings against AIU and Zurich, and arbitrator Carolyn Terrell- Nieves held a hearing in 2007. AIU argued that Guo Xin Suo was a passenger in a commercial vehicle (a bus) for which the insurer provided commercial coverage and that he had no-fault insurance available to him through Zurich Insurance for a 1988 Ford. Regulation 11 NYCRR 65-1.1(d) provides in relevant part that no-fault coverage under a commercial policy does not apply to personal injury sustained by “[a]ny person in New York State while occupying the insured motor vehicle which is a bus *** but only if such person is a named insured or relative under any other policy providing the coverage required by the New York Comprehensive Motor Vehicle Insurance Reparations Act ***.” In decisions dated July 31, 2007, the arbitrator found that Zurich Insurance provided no-fault coverage for Guo Xin Suo, but that the petitioners had never provided Zurich Insurance with an opportunity to review the claim for “medical necessity.” The arbitrator then apparently dismissed the arbitration proceeding against Zurich Insurance without prejudice for the purpose of “allowing Zurich the opportunity to respond to the medical treatment in issue.”

On May 14, 2013, petitioner Evergreen Chiropractic began another arbitration proceeding against Zurich Insurance again seeking an award of \$1,773 for medical treatment provided between April 6, 2005 and October 20, 2005. The arbitrator found that Zurich Insurance had received the last bill sent by the petitioner on November 14, 2005, that the insurer had denied the claim on November 22, 2005, that

“[a]t the latest it is clear that benefits became overdue 30 days after the 6th bill was received or December 14th 2005,” and that the petitioner had only until December 14, 2011 to begin an arbitration proceeding against Zurich Insurance. The arbitrator dismissed the proceeding on Statute of Limitations grounds since it was not begun until May 14, 2013. The arbitrator also dismissed proceedings brought by petitioner Fada Acupuncture and petitioner Sinai Medical against Zurich Insurance on Statute of Limitations grounds for the same reasons.

The petitioners appealed to a master arbitrator, arguing that their time to begin new arbitration proceedings against Zurich Insurance should have been computed from thirty (30) days after the date (July 31, 2007) that the lower arbitrator rendered her determinations. In upholding the lower arbitrator’s determinations, the master arbitrator stated: “ In the three awards reviewed here the arbitrator determined the accrual date of the action and the expiration of the statute of limitations without finding that her prior award in any way affected the critical dates.”

This special proceeding to vacate the master arbitrator’s determination ensued.

The respondent insurer did not waive its Statute of Limitations defense by not asserting it before a court prior to participating in the arbitration proceeding, and the insurer could assert the defense before the arbitrator (*see*, CPLR 7502[b])“The failure to assert such bar by such application shall not preclude its assertion before the arbitrators

***.”]; *see, Motor Vehicle Acc. Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214).

“ In cases of compulsory arbitration, due process considerations require the courts to exercise a broader scope of review than in cases of consensual arbitration ***.” (*Pradip Das/N.Y. Med. Rehab P.C. v. Allstate Ins. Co.*, 297 A.D.2d 321, 322). The standard of judicial review in cases of compulsory arbitration has been expressed in various ways such as: (1) “An arbitration award in a mandatory arbitration proceeding will be upheld if it is supported by the evidence and is not arbitrary and capricious ***.” (*State Farm Mut. Auto. Ins. Co. v. City of Yonkers*, 21 AD3d 1110, 1111; *Motor Vehicle Acc. Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214). (2) In cases of compulsory arbitration, the determination of the arbitrator will be upheld if the award is “supported by evidence or other basis in reason appearing in the record.” (*Pradip Das/N.Y. Med. Rehab P.C. v. Allstate Ins. Co.*, *supra*. 322). “The standard applicable to judicial review of a compulsory arbitration proceeding is whether the award was supported by a reasonable hypothesis' and was not contrary to what could be fairly described as settled law***,” (*Linden Med., P.C. v. MVAIC*, 21 Misc. 3d 134[A][Table], 2008 WL 4810806 [Text] [AT 2nd & 11th]; *Metro. Radiological Imaging, P.C. v. Country-Wide Ins. Co.*, 19 Misc3d 130[A][Table], 2008 WL 711878 [Text][AT 2nd & 11th]; *see, Kane v. Fiduciary Ins. Co. of Am.*, 114 AD3d 405); *State Farm Mut. Auto. Ins. Co. v. Lumbermens Mut. Cas. Co.*, 18 AD3d 762).

As required by law, the petitioners' claims against respondent Zurich Insurance had to be arbitrated, and, thus, the arbitrator's acceptance of respondent's Statute of Limitations defense is subject to judicial review under an arbitrary and capricious standard (*see, State Ins. Fund v. Country Wide Ins. Co.*, 276 AD2d 432).

Insurance Law § 5106 provides in relevant part: “(a) Payments of first party benefits and additional first party benefits shall be made as the loss is incurred. Such benefits are overdue if not paid within thirty days after the claimant supplies proof of the fact and amount of loss sustained.” (*see, Countrywide Ins. Co. v. 563 Grand Med., P.C.*, 50 AD3d 313). Regulation 11 NYCRR 65-3.8 provides in relevant part: “(a)(1) No-fault benefits are overdue if not paid within 30 calendar days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to section 65-3.5 of this Subpart.”

The six-year statute of limitations provided by CPLR 213, applies to a cause of action based upon wrongfully withheld no-fault benefits (*Mandarino v. Travelers Prop. Cas. Ins. Co.*, 37 AD3d 775), and the cause of action accrues when the payments become overdue (*see, Benson v. Boston Old Colony Ins. Co.*, 134 AD2d 214).

The petitioners argue that the payments from Zurich Insurance became overdue thirty (30) days after the arbitrator made her determinations on or about July 31, 2007 in which she stated: “This matter was never reviewed for medical necessity by the proper insurance carrier” and in which she “allow[ed] Zurich the opportunity to respond

to the medical treatment in issue.” The petitioners argue that the arbitrator committed error in her subsequent determinations in which she found that their causes of action accrued thirty (30) days after the original denial of the claims and not thirty (30) days after the date of her decision.

However, as the master arbitrator stated: “The prior award did not impose any obligation upon the respondent but allowed it to ‘respond’ to the issue raised in the re-filed arbitration.” The lower arbitrator did not order Zurich Insurance to review the claims. The petitioners do not allege that either they or Zurich Insurance took any action after the arbitrator made her decisions on July 31, 2007, and it may be rationally concluded that the claims, the last of which became overdue on December 14, 2005, should be used in determining the accrual date for Statute of Limitations purposes. There are no other claims and no obligations upon the insurer which could be used as a measuring point. The petitioners did not cite any cases directly on point in support of their position, and Insurance Law § 5106 and 11 NYCRR 65-3.8 are of no avail. In the case at bar,” the award was supported by a reasonable hypothesis and was not contrary to what could be fairly described as settled law***.” (*Linden Med., P.C. v. MVAIC, supra*). The arbitrator’s acceptance of the insurer’s Statute of Limitations defense was not arbitrary and capricious (*see, State Ins. Fund v. Country Wide Ins. Co., supra*).

The arbitrator said nothing about the Statute of Limitation problems in her original determinations, and her subsequent determinations did not violate the doctrine of

the law of the case (*see, Martin v. City of Cohoes*, 37 NY2d 162).

Accordingly, the petition is dismissed.

Settle judgment and submit to the Motion Support Office, Room 140.

Howard G. Lane, J.S.C.