Repwest Ins. Co. v Allstate Indem. Co.
2015 NY Slip Op 32604(U)
January 6, 2015
Supreme Court, Kings County
Docket Number: 505813/14
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of January, 2015.

PRESENT:

HON. DEBRA SILBER,
Justice.

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REPWEST INSURANCE COMPANY,

Petitioner,

- against -

ALLSTATE INDEMNITY COMPANY,

Respondent.

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Decision / Order / Judgment

Index No. 505813/14

The following papers numbered 1 to 4 read on this motion:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	

Upon the foregoing papers, petitioner Repwest Insurance Company (Repwest) moves by petition, pursuant to CPLR 7511, for an order and judgment vacating and setting aside the three related arbitration awards of Arbitration Forums Arbitrator James Zappa, dated April 1, 2014 (Arbitration Awards). For the reasons which follow, the petition is granted.

Background

On June 5, 2010, Remy Preval, Omar Cobb and Adam Prescott (Subrogors) were passengers in a four-door sedan owned by Emmanuel Jeanty which was allegedly rear - ended by a U-Haul vehicle operated by Troy Marks the (Collision). The sedan was insured by Allstate Indemnity Company (Allstate) and the U-Haul truck was insured by Repwest, the petitioner. Allstate apparently paid thousands of dollars in no-fault benefits or on behalf of to the three passengers, the Subrogors herein.

According to Repwest,[1] its investigation revealed that there was a "high likelihood" that the Collision (as well as several other motor vehicle accidents) were staged by the Subrogors (and others) (Petition at ¶ 8).

The Underlying Arbitration

Pursuant to Insurance Law § 5105, auto insurers and self-insurers, under no-fault regulations, are required to submit covered automobile loss transfer subrogation actions to mandatory arbitration. One category of coverage is an accident involving a vehicle which weighs more than 6,500 pounds, which is presumably applicable here.

Allstate commenced compulsory PIP (personal injury protection) arbitration with Arbitration Forums, Inc. (AF) seeking reimbursement from Repwest for the no-fault benefits that it paid to or on behalf of its Subrogors.[2] Loss transfer subrogation claims pursuant to

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[1]*See* the June 25, 2014 affirmation of Daniel L. Klein, Esq. submitted as the "Petition to Vacate Arbitration Award" (Petition).

[2] Specifically, Allstate sought reimbursement under separate AF docket numbers for: (1) $17,676.90 that it paid for Adam Prescott (AF Docket No. I068-03409-11-00); (2) $6,306.67 that it paid for Remy Preval (AF Docket No. I068-03412-11-00); and (3) $26,156.16 that it paid for Omar Cobb (AF Docket No. I068-03413-11-00).

Ins. Law §§ 5105 and 5221 are subject to mandatory (also known as compulsory) arbitration. According to the arbitration schedule, the parties were required to submit their evidence on or before March 17, 2014 in preparation for an arbitration hearing to be held on April 1, 2014.

The Declaratory Judgment Action

Repwest commenced a declaratory judgment action on June 19, 2013 in Kings County Supreme Court entitled *Repwest Ins. Co. v Rolanda Alston et al,* Index No. 11234/13 (DJ Action), seeking a declaration that the Collision (along with seven other accidents) were intentionally staged auto collisions designed to appear as accidents and were, consequently, "uncovered losses." Repwest moved for a default judgment against the Subrogors herein, and others, and the court (Toussaint, J.) issued an order (DJ Order) on March 19, 2014 granting Repwest's motion:[3]

> "Plaintiff's motion for a default judgment and a declaration that the 8 underlying incidents of 12/12/09, 12/16/09, 12/30/09, 1/8/10, 3/4/10, 4/11/10, ***6/5/10*** and 7/22/10 were intentionally staged collisions and, therefore, uncovered losses with respect to all defaulting defendants . . . is GRANTED IN ITS ENTIRETY, on default.
>
> "It is further ordered that ***the Plaintiffs have no duty to afford*** 3rd party bodily injury coverage, liability coverage, ***no-fault coverage***, uninsured &/or underinsured coverage, property coverage or defend or indemnify the aforementioned defaulting defendants in any action, claim, ***arbitration*** or other proceeding brought in connection with the aforementioned 8 underlying staged incidents . . ." (Petition Exhibit C [emphasis added]).

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[3]This court has not reviewed and has no opinion on the correctness of this decision and order. It is the law of the case.

Importantly no attempt was made by the Subrogors or Allstate (not a party to the DJ Action) to vacate the DJ Order. Also, Allstate never sought to intervene in the DJ Action.

The April 1, 2014 Arbitration

The arbitration hearing concerning the collision proceeded on April 1, 2014 before Arbitrator James Zappa, at which time Repwest's counsel presented Arbitrator Zappa with a copy of the DJ Order. According to the Petition, Repwest's counsel, Suzin L. Raso, Esq., "explain[ed] how [the DJ Order] was a dispositive adjudication of the rights and interests of the parties involved" and "that Repwest could not have submitted [it] by the evidence submission deadline of March 17th, 2014, because [it] was not written *until two days after*, on March 19th" (Petition at ¶ 12).[4]

The Arbitration Decisions

Arbitrator Zappa issued three Arbitration Decisions in which he determined that Allstate was entitled to reimbursement from Repwest because it proved the U-Haul was 100% liable (Arbitration Decisions, Petition Exhibit E). Arbitrator Zappa explicitly noted in the Arbitration Decisions that Repwest's counsel "brought documents from a court stating that this was a staged accident" (*id.*) and that those documents were deemed to be "inadmissable." Under the heading "*What evidence caused you to render this decision and why?*," Arbitrator Zappa wrote:

> "The police report narrative has the applicant states he was stopped at a red light when he was rear ended by the respondent. The narrative has the respondent stating that his foot got stuck and was unable to dislodge when

[4] *See also* the June 20, 2014 affirmation of Suzin L. Raso, Esq. submitted in support of the Petition (Raso Affirmation), a copy of which is annexed to the Petition as Exhibit D.

> he struck the applicant. The respondent failed to keep a safe distance and failed to keep a proper lookout. ***The documents that the respondent representative brought were inadmissable because they were not listed as evidence***" (*id.* [emphasis added]).

Thus, Arbitrator Zappa relied entirely upon the police report regarding the Collision and refused to consider the DJ Order because it was "not listed as evidence."

Repwest's Instant Motion to Vacate The Arbitration Decisions

Repwest now seeks an order vacating the three Arbitration Decisions, pursuant to CPLR 7511 (b), on the grounds that: (1) Arbitrator Zappa's refusal to consider material evidence (i.e., the DJ Order) constituted "prejudicial misconduct" (Petition at ¶¶ 23-24) and (2) the Arbitration Decisions violated public policy by disregarding the Supreme Court's DJ Order, which is the law of the case (*id.* at ¶¶ 25-28).

Allstate, in opposition to the Petition, submitted the affirmation of its counsel, Daniel Wm. DeLuca, Esq., who notes that "the Police Accident Report is customarily relied upon by the parties and the Arbitrators as to the liability issue in these mandatory arbitrations."[5] DeLuca contends that the Petition must fail on the grounds that: (1) Repwest waived any challenge to the Arbitration Decisions by participating in the Arbitration; (2) "Repwest failed to follow the Rules of Arbitration (11 N.Y.C.R.R. § 65-4.11) for presenting evidence";[6] and (3) "Repwest did not make Allstate a party to the declaratory judgment action . . ." (DeLuca Affirmation at ¶ 13). DeLuca also argues that the DJ Order was "not a decision on the

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[5] *See* the September 22, 2014 affirmation of Daniel Wm. DeLuca, Esq. in opposition to the Petition (DeLuca Affirmation) at ¶ 7.

[6] Specifically, Allstate argues that "[t]he Rules of Arbitration require that a party must submit its evidence before the hearing on or before the materials due date. The Petitioner failed to do so and the arbitrator did not consider it" (DeLuca Affirmation at ¶ 26).

merits" (*id.* at ¶ 35) and that it "is not binding as to Allstate and therefore the Arbitrator properly refused to allow it as evidence" (*id.* at ¶ 40).

Discussion

Under CPLR 7511 (b) (1), a party who has participated in an arbitration may seek an order vacating the arbitration award where the party's rights were prejudiced by corruption, fraud or misconduct in procuring the award, a procedural failure that was not waived, the partiality of an arbitrator, the arbitrator exceeded his or her power or the arbitrator failed to make a final and definite award (*Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 307 [1984]). "It is well-settled that an arbitrator 'exceed[s] his power' under the meaning of the statute where his 'award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power'" (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010] citing *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]).

In the case of compulsory arbitration – like that at issue here – the arbitration award may also be vacated where the determination is without a rational basis (*Caso v Coffy*, 41 NY2d 153, 158 [1976]), is arbitrary and capricious (*see Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 211 [1981]), or if the determination disregards applicable law or is based on an error of law (*Brunner v Allstate Ins. Co.*, 79 AD2d 491, 494 [1981] [holding that "the standard of review in a case of compulsory arbitration requires . . . that an arbitrator's determination be set aside if it disregards applicable law

or is based on an error of law"]).

Thus, in compulsory arbitration, such as provided for in Insurance Law 5105, the courts have applied a combined Article 75 and Article 78 analysis. *Matter of Curley v State Farm Ins. Co.*, 269 AD2d 240, 242 (1st Dep't 2000). "Such CPLR article 75 review import[s] ... the arbitrary and capricious standard of article 78 review or, stated differently, the governing consideration is whether the decision was rational or had a plausible basis." *Matter of Curley v State Farm Ins. Co.*, 269 AD2d 240, 242 (1st Dep't 2000) (internal citations omitted).

Here, the Arbitrator disregarded and refused to consider the DJ Order, in which the Supreme Court specifically determined, albeit on the Subrogors' default, that Repwest has "no duty to afford 3rd party bodily injury coverage, liability coverage, no-fault coverage, uninsured &/or underinsured coverage, property coverage or defend or indemnify" Allstate's Subrogors.

"Under New York's transactional-analysis approach to res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based upon different theories or if seeking a different remedy'" (*Joem Intl. Ltd. v Swedwall, Inc.*, 215 AD2d 530, 530 [1995] [citations omitted]). Here, the Arbitration and the DJ Action both arose out of the same event, as regards the Subrogors herein, the Collision. Furthermore, the DJ Order is a final determination that Repwest has no duty to indemnify Allstate for payment to its Subrogors, notwithstanding the fact that it was granted on the Subrogors' default, since

the doctrine of res judicata applies to default judgments that have not been vacated (*Yardeny v Jordan*, 118 AD3d 985, 985 [2014] [holding that doctrine of res judicata is applicable to an order or judgment "entered upon default that has not been vacated . . ."]; *Santiago v Lalani*, 256 AD2d 397, 398 [1998] [same]; *Trisingh Enterprises, Inc. v Kessler*, 249 AD2d 45, 46 [1998] [same]; *Robbins v Growney*, 229 AD2d 356, 357 [1996] [same]).

Furthermore, Allstate's contention that the DJ Order is not "binding as to Allstate" because it was not a party to the DJ Action is contrary to controlling legal precedent. Because Allstate's Subrogors are barred by the doctrine of res judicata, Allstate, as their subrogee, is similarly barred *(see Merrimack Mut. Fire Ins. Co. v Alan Feldman Plumbing & Heating Corp.,* 102 AD3d 754, 755 [2013] [holding that insurer's claim to recover for property damage to subrogor's home allegedly caused by contractor's negligence was barred by the doctrine of res judicata because the issue was previously litigated by the subrogor).

To be clear, were it not for the DJ Order, the arbitrator's decision would be proper. Compulsory arbitration awards will be upheld so long as there is evidentiary support and they are not arbitrary and capricious (*see Matter of Emerald Claims Mgt. for Ullico Cas. Ins. Co. v A. Central Insurance Company,* 121 AD3d 481 [1st Dept 2014], citing *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). The arbitrators, in the *Matter of Emerald Claims Mgt.* decision, were found to have rationally construed Insurance Law § 5105(a) as providing petitioner insurer a direct right to

recover loss transfer reimbursement from respondent, an adverse insurer of a tortfeasor who had a policy in effect at the time of the accident, regardless of respondent's disclaimer of coverage on non-cooperation grounds. See *Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110, 1110-1112 [2d Dept 2005]. The loss transfer recovery right of petitioner under Insurance Law § 5105(a) is separate from the personal right of the insured tortfeasor (and his heirs, assignees, or subrogees) to receive a defense and indemnification from respondent. See also *Aetna Life & Cas. Co. v Nelson,* 67 NY2d 169, 175 [1986]; *Matter of Liberty Mut. Ins. Co. [Hanover Ins. Co.]*, 307 AD2d 40, 42 [4th Dept 2003]; *State Farm Mut. Auto. Ins. Co.*, 21 AD3d at 1110-1112). Here, the issue is fraud and not non-cooperation, but the result would have been the same were it not for the DJ order. A claim of a pending fraud investigation or evidence as to liability not available until after an arbitration is held has been held to be immaterial to a loss transfer subrogation claim and not grounds to vacate the award. Matter of *DTG Operations, Inc. v AutoOne Ins. Co.*, 2014 NY Slip Op 32464(U) [Sup Ct NY Co]; *Allstate Ins. Co. v Fiduciary Ins. Co. of Am.*, 2014 NY Slip Op 30973(U) [Sup Ct Suffolk Co 2014].

Accordingly, it is hereby

ORDERED that the petition to vacate the arbitration awards is granted and the arbitration awards rendered on April 1, 2014 by arbitrator James Zappa of AF in Cases I 068-03409-11-00, I 068-3412-11-00 and I 068-03413-11-00 are hereby vacated; and it is further

ORDERED that each party shall bear its own costs and disbursements.

This constitutes the decision and order of the court and judgment may be entered hereon accordingly.

E N T E R,

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court