

Matter of BWM of N. Am., LLC v Burgos
2015 NY Slip Op 32654(U)
June 15, 2015
Supreme Court, Nassau County
Docket Number: 003594-15
Judge: Daniel R. Palmieri
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. DANIEL PALMIERI
J.S.C.**

TRIAL/IAS PART 20

-----X
**IN RE:
BWM OF NORTH AMERICA, LLC**

Index No. 003594-15

Petitioner,
-against-

**Mot. Seq. #001
Mot. Seq. #002
Mot. Date: 5-19-15
Submit Date: 5-21-15**

ASHLEY BURGOS,
Respondent.

-----X
The following papers were submitted on this motion:

- Notice of Petition, dated 4-17-15.....1**
- Order to Show Cause, dated 4-17-15.....2**
- Affidavit in Opposition, dated 5-15-15.....3**

The petition to vacate the Arbitration Award (defined below) is denied, the Order to Show Cause in Civil Action with Temporary Restraining Order is denied, the petition is dismissed and the award is confirmed pursuant to CPLR § 7511(e).

All requests for relief not specifically addressed are denied.

This is a proceeding pursuant to CPLR § 7511(b) seeking to vacate an arbitration award of Barry Cohen, dated March 18, 2015, granting respondent a full refund of the purchase price of her vehicle under the New York New Car Lemon Law.

It is undisputed that respondent purchased a 2013 BMW S1000RR motorcycle from Gold Coast Motor Sports. Respondent filed a request for arbitration on September 9, 2014, alleging that there was an ignition switch problem with the vehicle, the vehicle had been out of service for sixty

days, and requested a full refund of the vehicle purchase price. Petitioner, BMW OF NORTH AMERICA, LLC ("BMW"), was notified of the request for arbitration on February 9, 2015. The hearing before arbitrator Barry Cohen occurred on March 9, 2015. Respondent did not bring the vehicle to the arbitration.

After hearing the evidence and consulting with the Attorney General's office, the arbitrator issued an award of \$17,940.00 in favor of the respondent based on a finding that the subject vehicle was out of service due to repairs for more than thirty days. This proceeding ensued.

The legislature enacted the New Car Lemon law to provide consumers with greater protections than those afforded by a manufacturer's express warranty or federal law. *Motor Vehicle Mfrs. Ass'n v. State*, 75 N.Y.2d 175, 179 (1990); Gen. Bus. Law § 198-a. In pertinent part, the Lemon Law provides that owners of new vehicles which encounter problems expressly warranted by the manufacturer "during the first eighteen thousand miles of operation or during the period of two years following the date of original delivery of the motor vehicle," whichever occurs first, report the problem to the manufacturer in order to get the warranted problem fixed at no cost to the owner. Gen. Bus. Law § 198-a(b)(1).

If the problem is not remedied after a reasonable number of attempts, or a reasonable period of time, the manufacturer can, with the consent of the consumer, either have the vehicle replaced with a comparable vehicle or return the vehicle to the manufacturer, dealer, or an authorized agent in exchange for a full refund of the vehicle purchase price. Gen. Bus. Law § 198-a(c)(1). It is presumed that a reasonable number of attempts have been made if the same defect still exists after four attempted repairs or if the vehicle is out of service and being repaired for thirty days or more. Gen.

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Bus. Law § 198-a(d)(1), (2). It is an affirmative defense to any claim made under the Lemon Law that the defect does not diminish the value of the vehicle or that the defect exists due to abuse, neglect or unauthorized modifications to the vehicle. Gen. Bus. Law § 198-a(c)(3)(i), (ii).

Consumers have the option of submitting Lemon Law disputes to arbitration subject to regulations created by the New York State Attorney General. Gen. Bus. Law § 198-a(k); 13 NYCRR § 300. Upon the consumer's application to have the dispute resolved via arbitration, the manufacturer must "submit to such arbitration." Gen. Bus. Law § 198-a(k).

Judicial review of arbitration awards is extremely limited, and the "the burden of invalidating an arbitration award rests with the party attacking it." *Matter of General Motors Corp. (Gurau)*, 33 A.D.3d 1149, 1151 (3d Dep't. 2006). An arbitration award can only be vacated if "(1) the rights of a party were prejudiced by corruption, fraud or misconduct in procuring the award, or by partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect." *Matter of Djafari v. BMW of N. Am. LLC*, 119 A.D.3d 860 (2d Dep't. 2014) (quoting *Hacket v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 154-155 (1995)).

Additionally, because Lemon Law arbitration is compulsory rather than voluntary, "judicial review under CPLR article 75 is broad, requiring that the award be in accord with due process and have a rational basis supported by adequate evidence in the record." *Matter of Megatouch Used Cars and Trucks, Inc. (New York State Dispute Resolution Resolution Assn., Inc.)*, 96 A.D.3d 1268-69 (3d Dep't. 2012) (quoting *Ianotti v. Safari Motor Coaches*, 225 A.D.2d 848, 849 (3d Dep't. 1996)). The award must also be rational and "supported by adequate evidence in the record." *Motor Vehicle*.

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frs, Assn. of U.S., 75 N.Y.2d at 186. As the Lemon Law statute is remedial in nature, it "should be liberally construed in favor of consumers." *DaimlerChrysler v. Spitzer*, 7 N.Y.3d 653, 660 (2006).

BMW claims, *inter alia*, that it was denied due process because it was unable to present its complete case before the arbitrator, that the award was not supported by adequate evidence in the record, and that the respondent is unable to recover because the respondent no longer possessed the vehicle.

The Court finds that the Arbitration Award has a rational basis, is not arbitrary and capricious, there is evidentiary support in the record and is thus confirmed. Disagreeing with the outcome is not sufficient grounds for vacating an Arbitration Award. *Matter of State Farm Mut. Auto Ins. Co. v. City of Yonkers*, 21 A.D.3d 1110 (2d Dep't. 2005).

Here, the arbitrator stated that the arbitration was being adjourned to seek guidance on whether respondent could recover without possession of her vehicle. Nothing in the record indicates that the arbitration was to be resumed at a later date, nor is there any indication that BMW requested that the arbitration be rescheduled. 13 NYCRR § 300.8. The Attorney General's office correctly stated that respondent did not need to be in possession of her vehicle to recover. *See Kucher v. DaimlerChrysler Corp.*, 20 Misc.3d 64 (Sup. Ct. App. T. 2d Dep't. 2008). *See also Diaz v. Audi of Am., Inc.*, 19 A.D.3d 357 (2d Dep't. 2005) (holding that lack of possession of the vehicle did not preclude some remedy under the Lemon Law). Even if respondent was still in possession of the vehicle, it was in the arbitrator's discretion whether the vehicle was to be examined. 13 NYCRR § 300.12(f). This point is moot, because, as indicated in the arbitrator's decision, the vehicle had been properly returned.

BMW was not precluded from presenting any of the evidence it wanted to present at any point in the arbitration. See 13 NYCRR § 300.12(c), (e) (permitting the submission of affidavits for consideration by the arbitrator). There is no allegation that evidence BMW wished to submit was rejected, nor does BMW even disclose to the Court what evidence it wished to present. The arbitrator, in its discretion, could have requested further information from either party in order to come to his decision, but he did not do so. See 13 NYCRR § 300.9; 13 NYCRR § 300.12(i). In short, BMW was not denied any opportunity to present its evidence or its case.


Submit judgment on notice.

Based on the above, the petition is denied and dismissed, and the award is confirmed.

This shall constitute the Decision and Order of this Court.

Dated: June 15, 2015

ENTER:



HON. DANIEL PALMIERI
Supreme Court Justice

Attorneys for Petitioner
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ENTERED

JUN 16 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Ashley Burgos
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