

**Matter of USAA General Indem. Co. v Queens Surgi  
Ctr.**

2016 NY Slip Op 31184(U)

June 16, 2016

Supreme Court, New York County

Docket Number: 162191/15

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

-----X

In The Matter of the Application of  
USAA GENERAL INDEMNITY COMPANY,

Petitioner,

-against-

QUEENS SURGI CENTER a/a/o  
CHRISTIAN ORTIZ,

Respondent(s).

-----X

**KATHRYN E. FREED, J.S.C.**

**DECISION AND ORDER**  
Index No.162191/15  
Mot. Seq. No. 002

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION:

PAPERS	NUMBERED
NOTICE OF PETITION AND PETITION	1, 2 (Exs. A-D)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Petitioner USAA General Indemnity Company (“USAA”) moves to renew its previous motion, pursuant to CPLR 2221(e), which was decided by this Court in its Decision and Order dated February 23, 2016. The motion is unopposed. After a review of petitioner’s papers and the relevant statutes and case law, **the motion for leave to renew is granted** and, upon renewal, the within petition pursuant to CPLR 7511 (b) (1) (i) and (b) (1) (iii) for an order vacating a master arbitration award, dated August 25, 2015, as well as the arbitration award dated May 30, 2015, is **granted**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On June 14, 2013, an accident occurred involving a vehicle registered in New York State and insured by petitioner. Petition, at par. 3.<sup>1</sup> Christian Ortiz, an individual insured under petitioner's policy, received healthcare services from respondent Queens Sugi Center as a result of the accident and respondent submitted medical bills to petitioner for reimbursement. *Id.*, at pars. 4-6.

On May 16, 2015, that matter proceeded to arbitration before arbitrator Bernadette Connor, Esq. USAA maintained that it provided the arbitrator with "payout documentation and pending arbitration award evidencing that [its] policy would be exhausted after the recent award was paid out." *Id.*, at par. 7. It further claimed that it sought to adjourn the arbitration "pending the outcome of a Master Arbitration on a case involving the same assignor and policy, in order to determine whether any benefits would remain" but that the request was denied. *Id.*, at par. 7.

In an award dated May 30, 2015, the arbitrator granted respondent's claim in its entirety, holding that petitioner "erroneously denied payment based on the 45 day rule as respondent clearly submitted the bill timely." Ex. B to Petition.

Petitioner USAA then pursued master arbitration on the ground that the award of the arbitrator was arbitrary and capricious and that the lower arbitrator misapplied the law with respect to the exhaustion of the policy limits. On August 25, 2015, the master arbitrator affirmed the arbitration award in its entirety, stating, *inter alia*, as follows:

---

<sup>1</sup>Unless otherwise noted, all references are to the original petition annexed to the within motion to renew as Exhibit A.

The arbitrator found that [petitioner] received a bill for services rendered on November 30, 2013 within 45 days of service. That [petitioner] denied payment on February 15, 2015. That [petitioner] erroneously denied payment based upon the 45 days rule. Had it not been for petitioner's late and erroneous denial, [respondent] would not have lost its place in terms of priority of payment. Therefore, [respondent's] claim was granted as there was no exhaustion of policy limits. I [thus] find that the arbitrator's award that there was no exhaustion of policy limits was not arbitrary, capricious, or contrary to law.

Ex. F to Petition.

Petitioner USAA then moved to vacate the awards of the arbitrator and master arbitrator. In support of that motion, petitioner submitted a copy of the policy under which Christian Ortiz was covered, the awards of the arbitrator and master arbitrator, the conciliation submission submitted by petitioner in connection with the arbitration, and papers pertaining to a then pending arbitration which petitioner at that time maintained could impact on its policy limits.

This Court, in its in its Decision and Order dated February 23, 2016, denied the petition, holding at that time that it was only speculative as to what the pending arbitration would decide and, therefore, at that time the subject policy was not exhausted.

#### **POSITION OF THE PETITIONER:**

Petitioner-movant USAA now brings this motion because the decision of the then pending related case, *Apex Medical P.C. a/a/o Christian Ortiz v. USAA General Indemnity Co.*, [17-14-9050-2141], annexed to the within motion as Exhibit A, has been rendered. Further, USAA alleges that that decision constitutes a new fact which was not previously offered, which, had it been available at the time of the underlying motion, would have changed the Court's

determination. Additionally, petitioner-movant states that it had a reasonable justification for the failure to produce such facts on the prior motion.

In *Apex Medical P.C. a/a/o Christian Ortiz v. USAA General Indemnity Co.*, decided on January 16, 2016, the arbitrator, Lori Ehrlich, awarded the remaining available limits under the subject policy. See Exhibit D, annexed to the within motion. Petitioner-movant USAA urges this Court to now find that the subject policy is exhausted, and to reverse its earlier decision and find that the awards of the arbitrator and master arbitrator must be vacated on the grounds that they are arbitrary and capricious and exceed the scope of the arbitrators' authority because they rendered arbitral awards in excess of petitioner's policy limits.<sup>2</sup>

#### **LEGAL CONSIDERATIONS:**

Petitioner-movant USAA General Indemnity Company moves to renew its previous motion, pursuant to CPLR 2221(e), which was decided by this Court in its Decision and Order dated February 23, 2016. The motion is unopposed.

CPLR 2221 (e) (2) provides that a motion for leave to renew:

shall be based on new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.

CPLR 2221 (e) (3) provides that a motion for leave to renew "shall contain reasonable

---

<sup>2</sup>Although in its original petition, petitioner moved pursuant to CPLR 7511(b)(1)(i) (corruption, fraud, or misconduct of the arbitrator) and CPLR 7511 (b)(1)(iii) (exceeding of authority by arbitrator), it focused its argument on the grounds set forth in paragraph (b)(1)(iii).

justification” for the failure to present such facts in a party’s initial motion.

Despite the requirement of demonstrating reasonable justification for “failing to present any new facts on the prior motion (*see* CPLR 2221[e][3]), ‘courts have discretion to relax this requirement and to grant such a motion in the interest of justice’ (*Mejia v Nanni*, 307 AD2d 870, 871 [1<sup>st</sup> Dept 2003]).” *Matter of Pasanella v Quinn*, \_\_\_AD3d\_\_\_ (1<sup>st</sup> Dept, March 12, 2015). Additionally, “the requirement that new facts be presented to support a motion to renew need not be applied to defeat substantive fairness.” *Lambert v Williams*, 218 AD2d 618, 620-21 (1<sup>st</sup> Dept 1995) (internal citations omitted). Therefore, in its discretion, this Court grants the petitioner-movant USAA General Indemnity Company’s renewal motion pursuant to CPLR 2221(e). Clearly, although the decision in *Apex Medical P.C. a/a/o Christian Ortiz v. USAA General Indemnity Co.*, [17-14-9050-2141], was technically rendered prior to this Court’s decision of February 23, 2016, and should have been presented to the Court before it’s decision, it is obvious that the short time involved made that unlikely and it would be unfair to penalize USAA given the short period of time involved.

Having granted renewal, this Court notes that a party may move to vacate the award of an arbitrator pursuant to CPLR 7511(b)(1)(iii) where the arbitrator “exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.” In the context of no-fault arbitrations, “an arbitration award made in excess of the contractual limits of an insurance policy has been deemed an action in excess of authority.” *State Farm Ins. Co. v Credle*, 228 AD2d 191 (1<sup>st</sup> Dept 1996).

Petitioner-movant has now proven that the arbitration award was made in excess of the

arbitrator's authority, in that the limits of the subject policy have now been exhausted. In support of its argument, USAA submits the affidavit of Laura McNamee, a Senior Litigation Manager for petitioner, along with a certified financial payment log, annexed as Exhibit D to the within motion. McNamee avers that she has reviewed the documents and that, as a result of the *Apex* decision, the subject policy has been exhausted.

In light of the foregoing, petitioner-movant is correct in its assertion that the arbitrator and master arbitrator exceeded their authority in rendering their awards. Thus, petitioner-movant's motion for an order vacating the master arbitration award, dated August 25, 2015, as well as the arbitration award dated May 30, 2015, is granted.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that USAA General Indemnity Company's motion to renew its prior application to vacate an arbitration award dated May 30, 2015 and a master arbitration award dated August 25, 2015 is granted; and it is further;

ORDERED that, upon renewal, USAA General Indemnity Company's motion for an order vacating the arbitration award dated May 30, 2015, as well as the master arbitration award, dated August 25, 2015, is granted; and it is further,

ORDERED that this constitutes the decision and order of this Court.

Dated: June 16, 2016

ENTER:



KATHRYN E. FREED, J.S.C.

JUDGE OF THE SUPREME COURT