

**Philadelphia Indem. Ins. Co. v New York State Ins.
Fund**

2016 NY Slip Op 32433(U)

December 12, 2016

Supreme Court, New York County

Docket Number: 653058/2016

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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**PHILADELPHIA INDEMNITY INSURANCE
COMPANY,**

Petitioner,

-against-

**NEW YORK STATE INSURANCE FUND and
ARBITRATION FORUMS, INC.**

Respondents.
----- X

**Index No. 653058/2016
Motion Seq: 001**

DECISION & ORDER

HON. ARLENE P. BLUTH

Petitioner's petition to vacate an arbitration award is granted.

This proceeding to vacate an arbitration award arises out of out an arbitration award issued by Arbitration Forums (AFI) on March 25, 2016 in favor of respondent New York State Insurance Fund (NYSIF) and against petitioner. On January 28, 2016 NYSIF filed for mandatory arbitration of a loss transfer claim pursuant to Insurance Law § 5105 to recover certain workers' compensation benefits provided by NYSIF to a pedestrian who was struck by a vehicle that was allegedly insured by petitioner.

In the arbitration, NYSIF allegedly claimed that the injured party was struck by a vehicle and required medical benefits under insurance provided to the injured pedestrian's employer by NYSIF (totaling \$20,959.69).

Petitioner contends that it did not appear at the arbitration because the letter from AFI advising petitioner about the arbitration was sent to "Philadelphia Indemnity Insurance Co, Christopher Goss, 1 Bala Plz Ste 100, Bala Cynwyd PA, 19004-1401." Petitioner argues that

Christopher Goss is an employee of petitioner but in a marketing capacity rather than in the claims department and that Mr. Goss works in petitioner's Buffalo, NY office. Petitioner contends that it was not provided with proper notice of the arbitration because the notice, along with all later communications, were sent to the attention of Mr. Goss, who is not authorized to accept such notices. Petitioner also disputes that it issued an insurance policy for the subject vehicle.

Petitioner further asserts that prior to the arbitration request, NYSIF's counsel (Kevin Fitzpatrick) sent correspondence to petitioner on March 4, 2015 requesting reimbursement for benefits paid to the injured pedestrian. Petitioner's counsel contends that he called Mr. Fitzpatrick on June 12, 2015 and told him that petitioner had never provided insurance relating to the subject claim.

Petitioner alleges that NYSIF filed an ex parte request for arbitration despite communicating with counsel for petitioner. Petitioner's counsel claims that he sent a letter to Mr. Fitzpatrick, dated February 23, 2016, that included materials, including an affidavit from an Assistant VP, which indicated that petitioner had never issued an insurance policy for the subject vehicle. Petitioner's counsel also states that this letter requested that NYSIF advise him if NYSIF had initiated an arbitration regarding this disputed claim. Petitioner's counsel asserts that NYSIF's counsel never informed him of the arbitration despite the fact that the arbitration was scheduled for March 26, 2016.

At the arbitration, petitioner did not appear and the arbitrator awarded NYSIF \$20,959.69.

In response to the petition and in support of its cross-petition to confirm the arbitrator's

award, NYSIF claims that even had petitioner appeared at the arbitration petitioner would have been unable to provide enough evidence to rebut the presumption of coverage. NYSIF further claims that petitioner was given notice by AFI at the address of petitioner's claims department and NYSIF had no duty to serve or advise petitioner's attorneys of the arbitration. NYSIF contends that its attorneys were told to forward correspondence to the attention of Christopher Goss. NYSIF also claims that it sent three separate faxes to petitioner's claims department. NYSIF's counsel also disputes that he had a conversation with petitioner's counsel on June 12, 2015.

In reply, petitioner claims that it was not notified of the arbitration because of NYSIF's failure to notify AFI of the proper claims address. Petitioner also attaches a telephone record that purportedly shows a conversation with NYSIF's counsel on June 12, 2015.

Discussion

"An arbitrator's award may be vacated only upon the grounds specified in CPLR 7511" (*Matter of Blamowski*, 91 NY2d 190, 194, 668 NYS2d 148 [1997]). CPLR 7511(b)(2) permits a court to vacate an arbitration award "on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that (I) the rights of that party were prejudiced by one of the grounds specified in paragraph one." CPLR 7511(b)(1) holds that an arbitral award shall be vacated "if the court finds that the rights of that party were prejudiced by (I) corruption, fraud or misconduct in procuring the award."

As an initial matter, the Court finds that NYSIF failed to rebut petitioner's contention that

Mr. Christopher Goss was the wrong person to be served with the notice to arbitrate by AFI.¹ NYSIF did not offer any evidence surrounding how it identified Mr. Goss as the person to whom AFI should send arbitration notices.² NYSIF's only response appears to be that Mr. Goss, as Vice President, *could have accepted service* of AFI's notice of the arbitration. Whether Mr. Goss could have accepted service or not is besides the point. The issue is that NYSIF directed that AFI send the notice to arbitrate to the attention of Mr. Goss at the address of petitioner's claims department in Pennsylvania.

To ignore this incorrect address would place a unfair burden on petitioner because it would be wholly responsible for proper forwarding of every incorrectly addressed notice. Here, someone receiving the mail in Pennsylvania (assuming that is where the notice to arbitrate was received) would have had to realize that the mail should not have been addressed to Mr. Goss (in Buffalo, NY) and the issue should be handled by petitioner's claims department. Even assuming that Mr. Goss eventually received the notice, NYSIF wants this Court to place the burden on Mr. Goss to recognize that the notice should not have been sent to him and to forward the notice to arbitrate to the correct department. The Court declines to place this burden on petitioner in a situation where NYSIF failed to explain why it sent these notices to Mr. Goss' attention.

The letter dated February 23, 2016 in which petitioner's counsel requested he be informed

¹In fact, NYSIF's counsel attached a copy of what it insists is Mr. Goss' LinkedIn profile, which clearly indicates that he works for petitioner in an office located in upstate New York, that he has worked for petitioner in upstate New York since 1997, and that he manages 2 New York profit centers. There is no mention of Mr. Goss' relationship with petitioner's claims department.

²In support of its cross-petition, NYSIF attached a copy of what appears to be pages of petitioner's website relating to claims (*see* NYSIF's petition, exh N). The second page directs that correspondence relating to claims should be sent to the attention of *the claims department*. Mr. Goss is not mentioned in this exhibit.

if respondent had initiated an arbitration further compels this Court to vacate the award. NYSIF's counsel does not dispute receiving this letter or that it failed to respond to petitioner's counsel's request. NYSIF's counsel merely argues that it had no duty to inform petitioner's counsel of the arbitration. Although NYSIF had no *affirmative duty* to make sure that AFI sent a notice to arbitrate to petitioner, that does not mean that NYSIF's counsel was free to ignore the inquiry by petitioner's counsel. Petitioner's counsel's letter clearly demonstrated that petitioner was unaware of the pending arbitration.

Instead of alerting petitioner's counsel that NYSIF had already started the arbitration process, NYSIF's counsel was silent. NYSIF then obtained an award on default. This type of *gotcha* practice should not be rewarded.

To be clear, the Court observes that NYSIF or NYSIF's counsel's conduct does not evidence corruption or fraud. Here, the Court finds that these actions prejudiced petitioner's rights. When combined with the strong public policy in favor of resolving arbitrations on the merits (*see Matter of Connolly*, 213 AD2d 787, 788, 623 NYS2d 373 [3d Dept 1995]), this Court finds that there are grounds to vacate the arbitration award. The Court also observes that NYSIF's argument that it would have prevailed at the arbitration had petitioner appeared is unavailing. If NYSIF is correct, then it will win at a future arbitration. But this Court does not find it appropriate to speculate regarding how the arbitrator may have decided based on the record before this Court.

Accordingly, it is hereby

ORDERED that petitioner's petition to vacate the arbitration award dated March 25, 2016, is granted; and it is further

ORDERED that NYSIF's cross-petition to confirm the arbitration award is denied.

This is the Decision and Order of the Court.

Dated: December 12, 2016
New York, New York


ARLENE P. BLUTH
J.S.C.

ARLENE P. BLUTH, JSC