

<b>Digiso v Allstate Ins. Co.</b>
2017 NY Slip Op 30314(U)
February 14, 2017
Supreme Court, New York County
Docket Number: 655474/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. CAROL R. EDMEAD
J.S.C.

PRESENT: \_\_\_\_\_

PART 35

Index Number : 655474/2016
DIGISO, DONNA
vs
ALLSTATE INSURANCE COMPANY
Sequence Number : 001
VACATE OR MODIFY AWARD

INDEX NO. \_\_\_\_\_
MOTION DATE 12.5.2016
MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ [No(s)] \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ [No(s)] \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ [No(s)] \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

In this Article 75 proceeding, petitioner Donna Digiso ("petitioner") seeks an order (1) modifying the award ("Award") of the American Arbitration Association arbitrator, Jodi Zagoory (the "Arbitrator"), rendered on July 19, 2016, and awarding petitioner the full amount of available Supplemental Uninsured Motorist ("SUM") coverage (\$50,000) (7511(c)(1)), or (ii) vacating the Award and directing a rehearing and determination of the issue of damages (CPLR 7511(b)(iii)).

Factual Background

Petitioner allegedly suffered injuries in a motor vehicle accident in April 2008. In May 2008, petitioner commenced a personal injury action for neck and back injuries against the driver and owner of the offending vehicle (collectively referred to as "Koxha"), whose motor vehicle carrier tendered the full amount of its liability insurance coverage to the petitioner, \$50,000.00. The action settled for that amount in September 2014.

A month after the settlement, in October 2014, petitioner commenced a medical malpractice action based solely on petitioner's contraction of Hepatitis-C (between May 2008 and July 2009) (see Bill of Particulars (2(b)) during medical treatment following the motor vehicle accident.

The medical malpractice action settled for an amount exceeding the SUM policy limits. Thereafter, petitioner filed arbitration proceedings against respondent Allstate Insurance Company ("respondent") for payment of all SUM benefits, to wit: \$50,000, related to the motor vehicle action pursuant to respondent's motor vehicle insurance policy. The sum was calculated

Dated: \_\_\_\_\_, J.S.C.

- 1. CHECK ONE: ... [ ] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: ... [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

after deducting the \$50,000 petitioner received from the motor vehicle action settlement from the SUM policy coverage limit of \$100,000.00.

Respondent sought a stay of arbitration in Richmond County, which was denied based on untimeliness of the stay application (Hon. Jody Zagoory). Petitioner points out that in denying the stay, the Court also stated, only *in dicta*, that petitioner would not be entitled to recover any additional benefits in the SUM arbitration proceeding due to her recovery in the medical malpractice action. According to petitioner, the Court's determination that the monies received in the medical malpractice settlement also included payment for damages to petitioner's neck and/or back injury, was erroneous, because the only injury alleged in the medical malpractice action was Hepatitis-C.

Thereafter, the Arbitrator held a hearing, and issued a decision, stating in relevant part:

. . . At issue is whether respondent is entitled to a set-off of the settlement proceeds (\$850,000) received by claimant in an unrelated and subsequently filed medical malpractice action after the subject motor vehicle accident.

\* \* \* \* \*

Findings, conclusions and basis therefor:

\* \* \* \* \*

. . . she was admitted for observation, with complaints of pain in her neck, lower back, and the right side of her body, including the knee, ankle, hip and shoulder. . . .

Following discharge from the hospital . . . claimant came under the care of Dr. Dima Rozen, an anesthesiologist, for, among other things, "excruciating lower back pain with radiation to both legs with a burning sensation" and neck pain." . . . Claimant received multiple series of 3 lumbar epidural injections until sometime in 2009, when it was discovered claimant contracted Hepatitis C, which was diagnosed on August 11, 2009.

\* \* \* \* \*

Claimant commenced a medical malpractice action . . . and received a settlement of \$850,000. Respondent argues, and claimant disagrees, that the settlement of \$850,000 constitutes a complete offset of the applicable SUM policy of \$100,000.

\* \* \* \* \*

Justice Kim Dollard declined to stay the arbitration . . . However, the Justice held that "the amount [claimant] would have been entitled to recover under her SUM coverage was negated due to her recovery of [\$50,000] in damages under the . . . policy and \$850,000 as damages in the medical malpractice action, the total of which exceeded her SUM policy limits . . . .

\* \* \* \* \*

Claimant argues that "since claimant never alleged the same, similar or aggravating injuries in either the motor vehicle or medical malpractice actions" and since she did not "join the medical malpractice defendants in the subject motor vehicle litigation, there can be no claim of offset for the monies received in the medical malpractice action." *However, in a supplemental bill of particulars dated January 12, 2012, claimant did allege, among other injuries, chronic viral hepatitis, type C, against the owner and driver of the car involved in the April 18, 2008 accident.*

Based on Justice Dollard's decision and on the applicable SUM policy language that respondent is entitled to an offset including, "any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies," I agree with respondent's counsel that respondent is entitled to a complete setoff. Therefore, claimant's claim is denied with prejudice.  
*(emphasis added)*

In support of her petitioner, petitioner argues first that because the SUM arbitration proceeding was statutorily mandated, closer judicial scrutiny of any such awards are warranted. Under Regulation 35-D of the New York State Insurance Regulations (11 NYCRR §60-2.3), which governs payment of Supplementary Uninsured/Underinsured Motorists Insurance benefits by insurance carriers, the only reduction applicable to the SUM claim applies to the settlement proceeds received from the motor vehicle liability carrier, and not from any settlement proceeds realized in the separately commenced medical malpractice action. Thus, respondent is not entitled to any set-off of settlement proceeds recovered in the unrelated medical malpractice proceeding.

And, even if such Regulation does not apply, the settlement funds from the malpractice action should not be a set off to petitioner's SUM claim. The only damages claimed in the SUM arbitration was for neck and/or back injuries, and no claim was presented for damages related to Hepatitis-C. Thus, there was no duplication and/or overlapping claims of damages for moneys received in the medical malpractice settlement, and the Arbitrator improperly determined, without any factual or legal basis, that SUM benefits were not available to the petitioner.

Further, respondent's argument to the Arbitrator that the Court's ruling as to the offset constitutes "law of the case" was inaccurate. The issue before that Court was the merits of the stay application, and the ruling regarding the offset was dicta, and not entitled to preclusive effect.

In opposition, respondent argues that REgulation 35-D does not mandate arbitration, and the arbitration proceedings were voluntary. Thus, the applicable standard herein is whether the decision violated public policy, was totally irrational or whether the Arbitrator exceeded her power. Based on the law of the case, the policy provisions, and the failure of petitioner to allege corruption, fraud or misconduct on the part of the Arbitrator, the petition should be denied.

Further, respondent points out that it filed a demand to change venue as the petition should be heard before the Justice which heard the issue.

In reply, petitioner objects to the demand to change venue, on the ground that venue is properly laid in New York County. Petitioner maintains that the relief sought in the underlying Petition involves a compulsory and/or mandatory arbitration proceeding,

*Discussion*

Contrary to petitioner's contention, the underlying arbitration was not mandatory, such that the resulting Award is subject to closer judicial scrutiny.

Although 11 NYCRR 60-2.4(a) requires that SUM coverage arbitrations "shall be conducted" pursuant to AAA's rules, ((a) All arbitrations involving SUM coverage under the endorsement prescribed in section 60-2.3 of this Subpart shall be conducted in accordance with procedures

established by the American Arbitration Association (AAA)), section 60-2.3(12) expressly states that arbitration is at the option of the claimant, and that upon the claimant's option and demand for arbitration shall the matter proceed to arbitration. Unlike the cases cited by petitioner, there is no statutory requirement that the claimant file such a demand or that the issue of SUM coverage be resolved solely through arbitration (*cf. Mt. St. Mary Hospital v. Catherwood*, 26 N.Y.2d 493 (1970) [involving statute which required arbitration of disputes in labor contract negotiations] and *Matter of Progressive Northeastern Ins. Co.*, 56 A.D.3d 1111, 1113 [3d Dept. 2008] (involving Ins. Law 5015(b), which requires mandatory arbitration regarding disputes between insurers as to the responsibility to pay first-party benefits)).

Endorsement Section 60-2.3(12) provides: "If any insured making claim under this SUM coverage and we do not agree that such insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, or do not agree as to the amount of payment that may be owing under this SUM coverage, then, at the option and upon written demand of such insured, the matter or matters upon which such insured and we do not agree shall be settled by arbitration."

"The scope of judicial review of an arbitration proceeding is extremely limited (*Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 A.D.3d 293, 854 N.Y.S.2d 391 [1st Dept 2008] citing *Matter of Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 371, 777 N.Y.S.2d 82 [2004]). "An arbitration award will be upheld so long as the arbitrator offers barely colorable justification for the outcome reached (*Elul Diamonds Co. Ltd.*, *supra* citing *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479, 813 N.Y.S.2d 691, 846 N.E.2d 1201 [2006], *cert dismissed* 548 U.S. 940, 127 S.Ct. 342, 165 L.Ed.2d 1012 [2006]), and will be vacated only where it is totally irrational or exceeds a specifically enumerated limitation on the arbitrator's power" (*Elul Diamonds Co. Ltd.*, *supra* citing *Merrill Lynch, Pierce, Fenner & Smith v. Benjamin*, 1 A.D.3d 39, 43, 766 N.Y.S.2d 1 [2003]).

As pointed out by respondent, the Arbitrator noted that plaintiff claimed in her supplemental bill of particulars in the motor vehicle accident case Hepatitis C was an injury resulting from the motor vehicle accident. The Arbitrator also noted that plaintiff received a settlement for \$850,000 in the medical malpractice action in which damages for Hepatitis C were sought. It is noted that the Court's decision, upon which the Arbitrator also relied, included a citation to the SUM Endorsement, as follows:

... The SUM Endorsement further provides, "[t]his SUM coverage shall not duplicate any of the following: ... (e) any amounts recovered as bodily injury damages from sources other than motor vehicle bodily injury liability insurance policies or bonds" (Decision, p. 3) (emphasis in original).

Notably, this proceeding calls for the Court's review of the Award and whether it is rational or arbitrary, and *not* a review of the propriety of Court's rulings in the underlying Decision.

Therefore, inasmuch as the Arbitrator's decision was based on the terms of the policy and the supplemental bill of particulars, it cannot be said that the Arbitrator's decision that was totally irrational or exceeded a specifically enumerated limitation on her power.

Thus, modification pursuant to CPLR 7511(c)(1) or vacature of the award pursuant to CPLR 7511(b)(iii) is unwarranted.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that order (1) modifying the award ("Award") of the American Arbitration Association arbitrator, Jodi Zagoory (the "Arbitrator"), rendered on July 19, 2016, and awarding petitioner the full amount of available Supplemental Uninsured Motorist ("SUM") coverage (\$50,000) (7511(c)(1)), or (ii) vacating the Award and directing a rehearing and determination of the issue of damages (CPLR 7511(b)(iii)) is denied; and it is further

ORDERED that the petition is dismissed; and it is further  
ORDERED that respondent shall serve a copy of this order with notice of entry upon  
petitioner within 20 days of entry. And it is further  
ORDERED that the Clerk may enter judgment accordingly.  
This constitutes the decision and order of the Court.

DATED: 2.14.2017



J.S.C.

HON. CAROL R. EDMEAD  
J.S.C.

- 1. CHECK ONE :
- 2. CHECK AS APPROPRIATE :
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REFERENCE

CASE DISPOSED       NON-FINAL DISPOSITION

MOTION IS:  GRANTED     DENIED       GRANTED IN PART     OTHER

SETTLE ORDER       SUBMIT ORDER