SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART** 13
Justice

COUNTRY-WIDE INSURANCE COMPANY,

Petitioner

- Against-
AVALON RADIOLOGY, PC
A/A/O IAN JEFFERS,

Respondent.

INDEX NO. 655372 /16
MOTION DATE 02-08-2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to vacate arbitration award .

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-4
Replying Affidavits	

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this motion for an order vacating the arbitration award is denied.

Petitioner moves to vacate the arbitration award rendered on November 19, 2015 and confirmed by the Master Arbitrator on July 5, 2016 in an arbitration that took place under the auspices of the American Arbitration Association (AAA) No-Fault Tribunal on October 26, 2015 titled AVALON RADIOLOGY, P.C./ IAN JEFFERS (Applicant) v. COUNTRY-WIDE INSURANCE COMPANY (Respondent), AAA Case No. 17-15-1010-5354. Petitioner alleges that the award is outside the Arbitrators' powers, arbitrary, capricious and irrational. Furthermore, Petitioner alleges that this court's June 3, 2016 default judgment against Respondent in a declaratory judgment action precludes payment to Respondent on the claims.

On November 19, 2015 the Arbitrator, Laura E. Villeck, awarded Respondent $1,871.61 for No-fault claim reimbursement , with interest running from April 20, 2015. The arbitrator was "to determine whether the Applicant established entitlement to No-fault compensation for the MRI's performed on the claimant on July 17 and July 24, 2014, and whether Respondent properly denied payment on the ground that the claimant failed to appear for an Examination Under Oath."

The Arbitrator determined, after a thorough review of the facts and the applicable law, "that the Applicant was entitled to No-fault compensation for the MRI's performed and that Respondent failed to prove that the claimant failed to appear for an Examination Under Oath." The Arbitrator held that "the affidavit of Fatima Zuhra, Petitioner's EUO Clerk", was" devoid of any specific factual details. Ms. Zuhra's affidavit does not state the address where the EUOs were scheduled to be conducted,

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

the time in which the EUOs were scheduled, whether she was present in the office on the aforementioned dates and whether she has personal knowledge of the no show. Therefore, Ms. Zuhra's affidavit is not conclusive evidence of the no show." (see Petition Exhibit A).

Petitioner timely appealed to the Master Arbitrator. Master Arbitrator Peter Merani, taking into consideration that his review is limited to the standards of CPLR Article 75, on July 5, 2016 affirmed the Arbitrator's Award finding that " the arbitrator made factual findings that the Respondent insurer failed to establish that the Applicant violated a condition precedent to coverage by failing to attend the EUOs. The Arbitrator found the evidence provided by the Respondent failed to establish that the Applicant failed to show up for the EUO. The Arbitrator found that there was nothing submitted in the Affidavit that supported the statements contained in the Affidavit. The Arbitrator is the judge of the relevance and materiality of the evidence submitted and it is for the Arbitrator to weigh the evidence. The Arbitrator found [that] the Respondent's affidavit was insufficient to establish that the Applicant failed to appear for the EUOs." (see Petition Exhibit D).

Finally Master Arbitrator Merani found "based upon a review of the record, that the Arbitrator below arrived at her decision in a rational manner and that the evidence was sufficient for the Arbitrator to make her findings and support her determination." Master Arbitrator Merani affirmed the award finding that "it was neither irrational, arbitrary and capricious or incorrect as a matter of law."(see Petition Exhibit D)

After the initial arbitration award, but before the Master Arbitrator's award, Petitioner commenced a declaratory judgment action in this court and on June 3, 2016 obtained a default judgment against Respondent for its failure to answer the complaint. The Judgment declared that Petitioner has no duty to pay Respondent No-fault benefits with respect to its claim (the very same claim that was being arbitrated by the parties and that Arbitrator Villeck had determined in Respondent's favor). (see Petition Exhibit E).

"The doctrine of res judicata applies to Arbitration awards and may serve to preclude subsequent relitigation of issues or claims. A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first (Matter of Trudeau 135 A.D.2d 150, 524 N.Y.S.2d 856 [3rd. Dept. 1988]; Matter of Ranni's Claim, 58 N.Y.2d 715, 444 N.E.2d 1328, 458 N.Y.S.2d 910 [1982]). Res Judicata is applicable to issues raised at arbitration (Mac Organization, Inc., v. Dublin Co., 89 A.D.2d 581, 452 N.Y.S.2d 241 [2nd. Dept. 1982]). An Arbitration award will bar subsequent litigation for first-party benefits under an automobile policy which were subject of arbitration, even if medical expenses for which benefits sought are incurred after arbitration (Monroe v. Providence Washington Insurance Co., 126 A.D.2d 929, 511 N.Y.S.2d 449 [3rd. Dept. 1987]). The Arbitration Award will have res judicata effect even if it has not been confirmed (Casey v. Country-Wide Insurance Company, 240 A.D.2d 232, 658 N.Y.S.2d 613 [1st. Dept. 1997]).

Ordinarily a default judgment in a declaratory judgment action will have res judicata effect barring any action [or arbitration] to recover no-fault benefits (EBM Medical health Care, P.C., v. Republic Western Insurance, 38 Misc.3d 1, 956 N.Y.S.2d 398 [App. Term 2nd. , 11th & 13th Judicial Districts 2012]). However, an insurer cannot collaterally attack an arbitration award via a plenary action for declaratory judgment; an award can only be vacated on the grounds set forth in CPLR 7511. Following arbitration and award, dismissal of the action pursuant to CPLR 3211(a)(5) is required (Home Insurance Company v. Country-Wide Insurance Company, 134 A.D.2d 570, 521 N.Y.S.2d 470 [2nd. Dept. 1987]).

Instead of proceeding under CPLR 7511 Petitioner sought a declaratory judgment that it was not obligated to pay Respondent no-fault benefits because the insured failed to appear at two duly scheduled EUOs thereby breaching a policy condition that voided the policy. These were the very issues that were determined by the arbitrator when she rendered an award in favor of Respondent. Those issues were previously litigated in the arbitration and, even if the award has not been confirmed, have res judicata effect barring relitigation of these issues in the declaratory judgment action[1] (see Casey v. Country-wide Insurance Company, 240 A.D.2d 232, Supra; Home Insurance Company v. Country-Wide Insurance Company, 134 A.D.2d 570, Supra; Mac Organization, Inc., v. Dublin Co., 89 A.D.2d 581,Supra).

In accordance with CPLR § 7511(b) 1- "an arbitration award may be vacated if the court finds that the rights of a party receiving notice and participating in the arbitration were prejudiced by:

(I) corruption, fraud or misconduct in procuring the award;

or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;

or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made;

or (iv)failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection."

"It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached. An arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator, and the courts should not assume the role of overseers to mold the award to conform to their sense of justice. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one." (Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y. 3d 471, 846 N.E. 2d 1201, 813 N.Y.S. 2d 691 [2006]).

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[1]The court had not been made aware that there had been issued an arbitration award against petitioner resolving the issues in the declaratory judgment action when it moved for a default judgment against Respondent.

It therefore follows that a court should not vacate an award because it does not agree with the result arrived at by the arbitrator. However, when there is ambiguity, uncertainty, irrationality, lack of clarity and definition the award should be vacated and remanded to the arbitrator for clarification. Such is not the case here.

"A trial court may vacate an arbitration award if it exhibits a manifest disregard of the law. But the manifest disregard standard rarely results in vacatur because it is limited to those rare occurrences of apparent egregious impropriety on the part of the arbitrators which requires more than a simple error in law or failure by the arbitrators to understand or apply it. In other words, it must be more than an erroneous interpretation of the law" (Cheng, M.D., v. Oxford Health Plans Inc., 45 A.D. 3d 356, 846 N.Y.S. 2d 16 [1st. Dept. 2007]). The arbitrators herein have not exhibited such manifest disregard of the law as to require vacating the award.

Arbitrator Villeck stated the factual and legal basis for her decision. Master Arbitrator Merani applied the proper standard of review in affirming the award. It appears to this court that the arbitration award was rendered in accord with due process, was supported by adequate evidence and was factually and legally sound. The award was not the product of misconduct, irrational, arbitrary or capricious (see CPLR§7511; Denhoff v. Mamaroneck Union Free School District, 101 A.D.3d 997, 957 N.Y.S.2d 208 [2nd. Dept. 2012]; Matter of Farrell v. Allstate, 232 A.D.2d 934, 648 N.Y.S.2d 835 [3rd. Dept. 1996]; Gravanese v. Allstate, 245 A.D.2d 507, 666 N.Y.S.2d 710 [2nd. Dept. 1997]; Nationwide v. Markuson, 113 A.D.2d 1014, 494 N.Y.S.2d 574 [4th. Dept. 1985]), and should not be vacated.

Accordingly, it is ORDERED and ADJUDGED that the petition seeking to vacate, and set aside the arbitrators' decision dated November 19, 2015 and the Master Arbitrator's decision dated July 5, 2016 affirming the arbitrator's decision and award is denied, and it is further

ORDERED that the petition is dismissed, and it is further

ORDERED that the Clerk is Directed to enter judgment accordingly.

Enter:

Dated: March 28, 2017

Manuel J. Mendez
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE