

New S. Ins. Co. v Endurance Ins. Org.

2017 NY Slip Op 31840(U)

September 1, 2017

Supreme Court, New York County

Docket Number: 653697/2016

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 47

NEW SOUTH INSURANCE COMPANY,

Index No: 653697/2016

Petitioner,

DECISION AND ORDER

-against-

ENDURANCE INSURANCE ORGANIZATION,

Respondent.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Petition and Affidavits/Affirmations/ Memos of Law annexed	<u>1, 2</u>
Opposition and Affidavits/Affirmations/ Memos of Law annexed	<u>3</u>
Reply	<u>4</u>

ERIKA M. EDWARDS, J.:

There are two motions pending before this court: 1) Petitioner New South Insurance Company's ("Petitioner") motion to confirm the arbitration award issued on July 16, 2015, under Arbitration Forums, Inc. ("AF") docket number: I068-04550-15-00, under motion sequence 001 and 2) Respondent Endurance Insurance Organization's ("Respondent") motion to vacate the award under motion sequence 002. These motions are hereby consolidated for disposition. For the reasons set forth herein, the court: 1) denies Petitioner's motion to confirm the award and dismisses the petition and 2) grants Respondent's motion to vacate the award.

This action arises out of an accident that occurred on July 1, 2013, in Oceanside, New York. Petitioner's insured was dumping materials using a dump trunk at the premises of

Respondent's insured, Stony Creek Industries, Inc. ("Stony Creek"), when a payload¹, operated by a Stony Creek employee, backed into the dump truck insured by Petitioner. On April 30, 2015, Petitioner filed a demand for arbitration with AF and on July 16, 2015, the matter was heard before an arbitrator in Tampa, Florida. Respondent did not appear for the arbitration and in its absence, the arbitrator issued an award in favor of Petitioner in the amount of \$63,989.53. Petitioner now moves to confirm the award and Respondent moves to vacate the award.

Respondent argues that it did not participate in the arbitration because AF lacked jurisdiction over it since Respondent is not a signatory company to AF and did not give written consent to be governed by AF. Respondent further argues that it is not an insurer bound by the mandatory arbitration provisions of the no-fault law under Article 51 of New York's Insurance Law because it only issued Stony Creek a commercial general liability insurance policy. Respondent also argues that it was not obligated to arbitrate Petitioner's claims because it is not a "covered person" as defined by Article 51. Furthermore, Respondent argues that the commercial general liability policy did not provide coverage for bodily injury or property damage arising out of the use of an automobile and that the payload is not a "motor vehicle" as defined by Article 51. Lastly, Respondent argues that the court should vacate the award because Stony Creek can be held liable in tort which is evidenced by a pending civil action in Nassau County Supreme Court. The main issue before this court is whether Respondent is an "insurer" subject to the mandatory arbitration provisions of Article 51 of New York Insurance Law.

In opposition to Respondent's motion to vacate the award, Petitioner argues that it is not in a position to dispute Respondent's allegations regarding Respondent's policy but requests that

¹ A payload is a heavy, wheeled vehicle with a large, movable blade or scoop at the front (Dictionary.com, <http://www.dictionary.com/browse/payload> [accessed Sept. 1, 2017]).

the court make specific findings of fact regarding the policy to assist with the pending litigation in Nassau County Supreme Court.

Where arbitration is compulsory rather than voluntary, the court must review the arbitrator's determination with closer judicial scrutiny under CPLR 7511 (b) (*Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). An arbitration determination rendered after compulsory arbitration will be upheld if it has evidentiary support and is not arbitrary or capricious (*id.*, citing *Furstenberg v Allstate Ins. Co.*, 49 NY2d 757, 759 [1980]). The obligation to arbitrate no-fault claims between two insurance companies is a statutory mandate (*see* Insurance Law 5105 [b]). Mandatory arbitration is binding only upon insurers and self-insurers and not to insurance carriers which do not meet those definitions (*Aetna Health Plans v Hanover Ins. Co.*, 116 AD3d 538 [1st Dept 2014]). Furthermore, pursuant to AF's Personal Injury Protection (No-Fault) Arbitration Agreement, "no company shall be required, without its written consent, to arbitrate any claim or suit if it is not a signatory company nor has given written consent." Lastly, the mandatory arbitration provisions of Article 51 of Insurance Law "do not apply where New York's no-fault insurance law does not prevent the tortfeasor from being held liable to pay damages in an action at law" (*Fiduciary Ins. Co. v Am. Bankers Ins. Co. of Florida*, 132 AD3d 40, 49 [2d Dept 2015], citing *Hunter v OOIDA Risk Retention Group, Inc.*, 79 AD3d 1, 12 [2d Dept 2010]).

The term "insurer" is defined as an "insurance company or self-insurer, which provides the financial security required by article six or eight of the vehicle and traffic law" (Insurance Law 5102 [g]). Section 311 of the Vehicle and Traffic Law provides that financial security is the "ability to respond in damages for liability arising out of the ownership, maintenance or use of a motor vehicle as evidenced by an owner's policy of liability insurance, a financial security bond,

a financial security deposit, or qualifications as a self-insurer under section three hundred sixteen of this chapter.” (*emphasis added*). A “motor vehicle” is defined as “every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power ... the term motor vehicles shall exclude ... self-propelled caterpillar or crawler-type equipment while being operated on the contract site” (Vehicle and Traffic Law 125).

Here, Respondent’s commercial general liability policy issued to Stony Creek did not provide no-fault insurance coverage for the type of accident which occurred in this case. Also, the policy did not insure any motor vehicles. However, even if Respondent’s policy covered motor vehicles, the payloaders does not fall within the definition of a motor vehicle since it was not operated on a public highway and falls into the categories of “self-propelled caterpillar or crawler-type equipment.” Additionally, Respondent is not an “insurer” as defined by Article 51 since it did not provide Stony Creek the financial security required by the Vehicle and Traffic Law. Therefore, Respondent was not bound by the mandatory arbitration provisions of Article 51. Also, since Respondent is not a signatory company nor did it give consent to arbitrate this claim before AF, Respondent is not bound by AF’s arbitration determination. Lastly, Insurance Law 5105 does not apply here because New York’s No-Fault law would not preclude Stony Creek from being held liable to pay damages in an action at law, which is evidenced by the pending tort action entitled, *New South Insurance Company a/s/o Miguel Maldonado v. Stony Creek Industries, et al.*, Supreme Court, Nassau County, Index Number 604868/2016. Therefore, the court grants Respondent’s motion to vacate the arbitration award and denies Petitioner’s motion to confirm the award. The court vacates the award, but declines to make any further findings of fact.

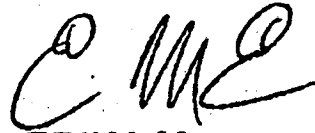
Accordingly, it is hereby

ORDERED that Petitioner New South Insurance Company's motion to confirm the award under motion sequence 001 is denied and the petition is dismissed; and it is further

ORDERED that Respondent Endurance Insurance Organization's motion to vacate the award under motion sequence 002 is granted.

This constitutes the decision and order of the court.

Date: September 1, 2017



HON. ERIKA M. EDWARDS

HON. ERIKA M. EDWARDS, J.S.C.