

**Country-Wide Ins. Co. v National Liab. & Fire Ins. Co.**

2017 NY Slip Op 32135(U)

October 10, 2017

Supreme Court, New York County

Docket Number: 653302/2016

Judge: Carmen Victoria St. George

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 34**

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COUNTRY-WIDE INSURANCE COMPANY,

Petitioner,

Index No. 653302/2016

-against-

**Decision, Order  
and Judgment**

NATIONAL LIABILITY & FIRE INSURANCE CO.,

Respondent,

-----X  
**ST. GEORGE, J.S.C.:**

Country-Wide Insurance Company (Country-Wide) brings this special proceeding pursuant to CPLR § 7511(b) to vacate an arbitration award dated March 25, 2016 (Award). The Award found Country-Wide to have 100% liability for damages related to an automobile accident. National Liability & Fire Insurance Company (“National”) opposes the motion and cross-moves to confirm the Award. CPLR § 7510 and § 7511(e). These motions were argued before Justice Lucy Billings on January 19, 2017 and June 2, 2017. For the following reasons, the petition is denied and the Award is confirmed.

On July 15, 2011, an automobile accident took place involving a vehicle owned and operated by Rockford James and insured by County-Wide and a vehicle owned by Chadwick Williams and insured by National. Chiji Otisi claimed to have been a passenger in Mr. William’s car and sustained injuries as a result of the accident. National paid \$35,366.87 in No-Fault benefits to and on behalf of Mr. Otisi. On March 24, 2016, the parties entered into compulsory no-fault arbitration pursuant to Section 5105 of the Insurance Law. The arbitrator found 100% liability against Country-Wide and awarded \$35,366.87 to National.

Country-Wide now petitions to vacate the Award. In its petition, Country-Wide asserts that Mr. Otisi was not a passenger of National’s car at the time of the accident. In support of its position, Country-Wide relies on an uncertified version of the police report dated July 15, 2011. It notes that the report states

the name of the driver of National's car, but fails to identify Mr. Otisi as a passenger.<sup>1</sup> Country-Wide presumes that because Mr. Otisi was not listed in the police report, he was not in the car at the time of the accident. Country-Wide maintains that Mr. Otisi is not an "eligible injured person" under 11 NYCRR § 65-1.1(c) because his injuries did not arise out of the use or operation of National's vehicle and/or National's vehicle was not the proximate cause of his injuries. Country-Wide reasons it is not liable for the loss transfer payments because Mr. Otisi was not in vehicle at the time of loss.

National opposes the petition and cross-moves to confirm the Award. In its cross-motion, National contends that Country-Wide's arguments are untimely, unsubstantiated, and not subject to vacatur under CPLR § 7511 (b). National argues that Country-Wide's new assertions regarding Mr. Otisi's passenger status and its reliance on the uncertified police report should have been raised before the arbitrator. In contrast, National relies on the NF-2 report, a sworn document made under penalty of perjury stating that Mr. Otisi was a passenger in National's vehicle which was part of the record. National maintains that the arbitration award was rational and that the arbitrator acted within the scope of her authority.

In reply, Country-Wide claims that the issue of the insured's involvement is not coverage issue, but rather an issue of fact or liability. It adds that National has not submitted any proof of an investigation to support that Mr. Otisi was a passenger in National's vehicle. Moreover, Country-Wide argues that the arbitrator issued an award without having evidentiary support and that its decision was arbitrary and capricious. In reply to Country-Wide's opposition to National's cross-motion, National reiterates that Country-Wide has not shown sufficient grounds for vacatur and improperly tries to raise an argument not previously made before the arbitrator. In addition, it notes that Country-Wide contradicts its initial argument by stating that the issue of an insured's involvement is an issue of fact.

A court shall vacate an award based on a party's application if the court finds that the rights of that party were prejudiced by "corruption, fraud or misconduct in procuring the award," partiality of a neutral

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<sup>1</sup> Notably, the record reflects that the police report did not list any occupants for either vehicle involved in the accident. (Country-Wide tr at 5-7, lines 24-26).

arbitrator, or that the arbitrator “exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made ...” (CPLR § 7511 [b][1] [i-iii]).

An arbitration award made after all parties have participated “will not be overturned merely because the arbitrator committed an error of fact or of law.” (*Motor Vehicle Accident Indemnification Corp. v Aetna Cas. & Sur.*, 674 NE2d 1349, 652 NYS2d 584 [1996]). Courts are limited to the grounds for vacatur set forth in CPLR § 7511 and an award cannot be vacated based on legal or factual errors, or the lack of reasoning or calculations to justify the award (*see Lentine v Fundaro*, 36 AD2d 539, 318 NYS2d 564 [2d Dept 1971] *and Burt Bldg. Materials Corp. v Local 1205*, 18 NY2d 556, 558, 223 NE2d 884, 277 NYS2d 399 [1966]). Courts “should not assume the role of overseers to mold the award to conform to their sense of justice,” nor can a court substitute its own judgment for that of an arbitrator merely because it believes it has a better interpretation (*Wien & Malin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-80, 846 NE2d 1201, 813 NYS2d 691 [2006]).

Compulsory arbitration awards, such as no-fault proceedings, are subject to closer judicial scrutiny of the arbitrator's determination and a broader scope of review than awards resulting from voluntary arbitration (*Motor Vehicle Accident Indemnification Corp.*, 89 NY2d at 223; *Rose v Travelers Ins. Co.*, 96 AD2d 551, 551, 65 NYS2d 64 [2d Dept 1983]). To be upheld, such award must have evidentiary support or other basis in reason, as may be appropriate, and appearing in the record, and cannot be arbitrary and capricious (*Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493, 508, 260 NE2d 508, 311 NYS2d 863 [1970]; *Motor Vehicle Accident Indemnification Corp.*, 89 NY2d at 223; *Rose*, 96 AD2d at 551; and *DiNapoli v Peak Automotive, Inc.*, 34 AD3d 674, 675, 824 NYS2d 424 [2d Dept 2006]). The arbitrary or capricious test mainly pertains to whether a particular action should have been taken or was justified and whether it was based on fact (*Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 313 NE2d 321, 356 NYS2d 833 [1974]). An arbitrary action is “without sound basis in reason and is generally taken without regard to the facts” (*id.*).

When an aggrieved party attempts to challenge an arbitrator's award because the arbitrator exceeded his or her powers, the award will only be vacated when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*N. Y. City Transit Auth. v Transp. Workers' Union, Local 100*, 6 NY3d 332, 336, 845 NE2d 1243, 812 NYS2d 413 [2005]).

Here, Country-Wide has not met its heavy burden in connection with its petition to vacate the award in favor of National. Country-Wide's contention that Mr. Otisi was not a passenger in National's car is untimely and this Court notes that Country-Wide failed to raise this seemingly significant argument before the arbitrator. Nevertheless, Country-Wide's belated assertion is improper. (*Gaspard v. American Transit Insurance Co.*, 157 AD2d 543, 550 NYS2d 11 [1<sup>st</sup> Dept 1990]). Furthermore, Country-Wide's argument that the arbitrator's decision was made without evidentiary support is unavailing. While Country-Wide presents conflicting legal arguments in its petition and reply, neither are sufficient grounds for vacatur pursuant to CPLR § 7511 (b). Country-Wide has failed to demonstrate that the arbitrator committed corruption, fraud or misconduct, was partial to National, or that the award was arbitrary, capricious, or incorrect as a matter of law. For these reasons, Country-Wide failed to meet its burden of establishing that it is entitled to vacatur based on any ground set forth in CPLR § 7511 (b)(1).

The Court now turns to National's cross-motion to confirm the Award. The motion to vacate the Award has been rejected. CPLR § 7511(e). This Court shall confirm an award upon application made within one year after its delivery to an applicant unless the award is vacated or modified. *See id.* CPLR § 7510. Accordingly, it is


ORDERED that the petition to vacate the Award is denied; it is further

ORDERED that the cross-motion to confirm the Award is granted; and it is further

ORDERED that National does recover from Country-Wide, the amount of \$35,366.87, plus interest at the rate of 9% per annum from the date of March 24, 2016, as computed by the Clerk, together with costs and disbursements, as taxed by the Clerk, and that National shall have execution for that amount.

Dated: October 10, 2017

ENTER:



**CARMEN VICTORIA ST. GEORGE, J.S.C.**

**HON. CARMEN VICTORIA ST. GEORGE  
J.S.C.**