

Matter of Technology Ins. Co. v Allstate Ins. Co.

2019 NY Slip Op 31720(U)

June 14, 2019

Supreme Court, New York County

Docket Number: 650468/2018

Judge: Shlomo S. Hagler

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**COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17**

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**In the Matter of the Arbitration of Certain Controversies
between TECHNOLOGY INSURANCE COMPANY,**

Index No.: 650468/2018

Petitioner,

**Motion Sequence Nos.:
001 & 002**

- against -

ALLSTATE INSURANCE COMPANY,

DECISION/ORDER

Respondent.

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HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Technology Insurance Company (“Technology”) moves (Motion Sequence Number 001), pursuant to CPLR 7511, to vacate the arbitration award rendered in favor of respondent Allstate Insurance Company (“Allstate”) on November 2, 2017, on the grounds that the arbitration panel exceeded its authority and the decision was arbitrary and capricious.

By order to show cause (Motion Sequence Number 002), Allstate seeks an order vacating its default in answering the petition and denying the petition in its entirety. Motion sequence numbers 001 and 002 are consolidated for disposition.

BACKGROUND FACTS

On April 19, 2011, Demond Mitchell (“Mitchell”) was operating his employer’s vehicle, which weighed over 6,500 pounds, within the scope of his employment, when he was struck by another vehicle. Technology provided workers’ compensation coverage to Mitchell’s employer, non-party Genesee Transportation, Inc. Non-party National Insurance provided no-fault coverage for his employer’s vehicle. Allstate provided no-fault coverage for the other vehicle.

At the time of the accident, Mitchell also had a no-fault policy for his personal vehicle from non-party Metropolitan Group Property and Casualty Insurance Company

(“Metropolitan”). In addition to the basic \$50,000 of no-fault coverage, Metropolitan’s policy included \$25,000 in Optional Basic Economic Loss (“OBEL”) coverage.

Mitchell applied to Technology for workers’ compensation benefits and Technology paid out \$210,903.43. It then sought loss transfer reimbursement from Allstate, in mandatory arbitration pursuant to Insurance Law § 5105, for benefits it paid to Mitchell in lieu of \$50,000 of first party benefits. By decision dated July 11, 2014, the arbitration panel found that Allstate was 100% at fault for the subject accident and awarded Technology \$36,812.94, after “taking into consideration prior payments to Technology and the excess No Fault carrier” (Petition, Exhibit “D” at 1).

On August 2, 2017, Technology sent a request for loss transfer reimbursement to Allstate, seeking another \$25,000 that it paid to Mitchell in workers’ compensation benefits in lieu of no-fault benefits available under Mitchell’s OBEL coverage. Technology then commenced another arbitration proceeding, seeking reimbursement for the \$25,000. It argued that, under Insurance Law § 5105, it was entitled to recover payments made to cover basic economic loss and that, pursuant to Insurance Law § 5102 (a) (5), the availability of OBEL coverage increased the total recoverable basic economic loss from \$50,000 to \$75,000. In support of its application, Technology submitted the declaration page of Metropolitan’s policy, showing that Mitchell had an additional \$25,000 in OBEL coverage (Petition, Exhibit “E”). Allstate responded that the accident involved a commercial vehicle, being operated by an employee in the course of his employment and that, as such, the employee’s personal no-fault policy and OBEL coverage did not apply. By decision dated November 2, 2017, the arbitration panel denied Technology’s application, holding that “[t]he payment of OBEL benefits by a personal auto policy cannot be claimed as a Worker’s Compensation benefit” (*Id.*, Exhibit “A” at 1).

Technology commenced the instant special proceeding on January 30, 2018. Allstate failed to appear. According to the affidavit of Erin Burns (“Burns”), the Allstate claims handler who participated in the two arbitrations between Technology and Allstate, when she received the petition in the instant matter on February 26, 2018, she mistakenly assumed it was a no-fault matter and forwarded it to the no-fault department on March 2, 2018. She states that she only realized her error a few months later, when a supervisor inquired about the status of the petition. She then learned that a proposed order granting the petition on default had been filed and she retained counsel to have the matter reopened and adjudicated on the merits. By Order to Show Cause dated May 16, 2018, Allstate moved to vacate its default in answering the petition and to deny the petition and confirm the arbitrator’s award. Notably, no default judgment has been granted in the instant proceeding.

DISCUSSION

Technology contends that it paid out \$75,000 in lieu of first party benefits that Mitchell was entitled to through no-fault coverage, \$50,000 of basic economic loss coverage from National Insurance and \$25,000 in OBEL coverage from Metropolitan. It maintains that, just as it was entitled to recover the first \$50,000 that it paid in lieu of basic economic loss benefits, pursuant to Insurance Law §§ 5102 (a) (5), (b) and 11 NYCRR § 65-1.2, it is entitled to recover the additional \$25,000 it paid in lieu of OBEL benefits. Technology maintains that the arbitrators’ award should be vacated, because it creates an arbitrary distinction for workers’ compensation carriers when dealing with the eligibility of OBEL benefits for loss transfer.

Allstate argues that its motion should be granted, because: (1) its failure to timely answer was due to circumstances very similar to excusable law office failure; and (2) it has a meritorious defense, in that Technology is seeking to improperly stack the OBEL benefits, that Mitchell had

under a personal auto policy, upon a commercial workers' compensation policy. Technology counters that Allstate does not have a meritorious defense, because under pertinent regulations (11 NYCRR 65-1.2), OBEL coverage is available to an insured occupying a vehicle other than the insured vehicle unless OBEL coverage is provided by the policy covering the other motor vehicle.

“In order to successfully oppose a [motion for] default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense” (*Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006] [internal quotation marks and citation omitted]). “A determination of the sufficiency of the proffered excuse and the statement of merits rests within the sound discretion of the court” (*Marquez v 171 Tenants Corp.*, 161 AD3d 646, 647 [1st Dept 2018] [internal citation omitted]).

“To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious” (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *see also Matter of Emerald Claims Mgt. for Ullico Cas. Ins. Co. v A. Cent. Ins. Co.*, 121 AD3d 481, 482 [1st Dept 2014]). “Moreover, with respect to determinations of law, the applicable standard in mandatory no-fault arbitrations is whether *any* reasonable hypothesis can be found to support the questioned interpretation” (*Matter of Allstate Ins. Co. v Travelers Cos., Inc.*, 159 AD3d 982, 983 [2d Dept 2018] [internal quotation marks and citations omitted]; *see also Matter of Motor Veh. Acc. Indem. Corp.*, 89 NY2d at 224.

Here, Allstate provides a justifiable excuse for its failure to answer. As Allstate's claims handler explains, the default was not intentional. When she received the petition, she mistakenly assumed that she had been handed a no-fault matter and, acting on that belief, she failed to timely retain counsel and answer the petition (Burns Affidavit, ¶¶ 4-6). “Although the excuse for

delay in this case is not strictly speaking one of law office failure [it is] analyze[d] . . . in a similar fashion” (*Barajas v Toll Bros.*, 247 AD2d 242, 242 [1st Dept 1998] [internal citation omitted]). As there is no evidence of prejudice to Technology and the default was unintentional, “the excuse for the delay was reasonable and warrants vacatur” (*Id.* at 243; *see* CPLR 2005 [“the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure”]). In addition, Allstate has set forth a sufficiently meritorious defense in arguing that a workers’ compensation carrier is not entitled to recover an additional \$25,000 in loss transfer for benefits it paid out simply because the injured person has OBEL coverage under his personal automotive policy. Therefore, Allstate has made the necessary showing to warrant denial of a default judgment.

Moreover, there was a rational basis for the arbitrators to conclude that “[t]he payment of OBEL benefits by a personal auto policy cannot be claimed as a Worker’s Compensation benefit” (Petition, Exhibit “A” at 1). A close examination of the statutory and regulatory scheme providing for loss transfer among no-fault and workers’ compensation carriers makes this apparent.

Insurance Law requires no-fault automobile insurance policies issued in New York to provide up to \$50,000 in coverage for basic economic loss, which compensates the injured person for, among other things, medical expenses and lost income [Insurance Law § 5102 (a) (1), (2)]. In addition, when an insured chooses to purchase OBEL coverage, the total amount of basic economic loss rises to \$75,000 (*Id.* § 5102 (a) (5); *see* 11 NYCRR 65-1.2 (requiring insurers to furnish to all insureds who purchase OBEL coverage an “Optional Basic Economic Loss Coverage Endorsement,” which provides, in pertinent part, that “[b]asic economic loss of each eligible injured person on account of any single accident shall not exceed \$75,000, the last

\$25,000 of which represents optional basic economic loss coverage, payable after the first \$50,000 of basic economic loss has been exhausted . . .”); *Balanca v Geico Gen. Ins. Co.*, 13 Misc 3d 90, 93 (App Term, 2d Dept 2006) (finding that Insurance Law §§ 5102 [a], [b] and 11 NYCRR 65-1.2 [a] “establish that when OBEL coverage is purchased, there is \$75,000 in coverage for basic economic loss”).

Where an accident involves at least one vehicle weighing more than 6,500 pounds, a no-fault carrier who pays first party benefits, *i.e.* “payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle” (Insurance Law § 5102 [b]), is entitled to reimbursement from the tortfeasor’s insurer in mandatory loss transfer arbitration (Insurance Law § 5105). “Insurance Law § 5105 serves to mitigate the effect of placing the entire burden of loss on the first-party insurer, even where its insured was not at fault, and allows insurers to recover from each other the first-party no-fault benefits paid to their insureds, allocated on the basis of their relative fault” (*Matter of Fiduciary Ins. Co. v American Bankers Ins. Co. of Florida*, 132 AD3d 40, 48 [2d Dept 2015] [internal quotation marks and citations omitted]). To that end, where a no-fault insurer pays its insured \$75,000 in first party benefits, representing basic economic loss and OBEL, it is entitled to recoup the entire \$75,000 from the tortfeasor’s insurer, irrespective of whether that insurer has issued an OBEL policy to its insured (*See Matter of Allstate Ins. Co.*, 159 AD3d at 983 [finding that “the arbitrators’ determination that Travelers was entitled to recoup the entire payment made to its insured pursuant to basic economic loss and optional basic economic loss coverage . . . was rationally based on the relevant statutes and regulations”]).

Finally, pursuant to Workers’ Compensation Law § 29 (1-a), the sole remedy of a workers’ compensation carrier, who makes payment “in lieu of first party benefits which another

insurer would have otherwise been obligated to pay under article fifty-one of the insurance law,” is mandatory arbitration pursuant to Insurance Law § 5105. Workers’ compensation insurers may, therefore, seek reimbursement from the tortfeasor’s no-fault insurer for payments it makes to compensate the injured party for basic economic loss (*See Matter of Emerald Claims Mgt. for Ullico Cas. Ins. Co. v A. Cent. Ins. Co.*, 121 AD3d 481, 482 [1st Dept 2014] [finding that “arbitrators rationally construed Insurance Law § 5105 (a) as providing petitioner insurer,” who paid workers’ compensation benefits to its insured in lieu of no-fault benefits, “a direct right to recover loss transfer reimbursement from respondent, an adverse insurer of a tortfeasor who had a policy in effect at the time of the accident”]). Looking at the definition of basic economic loss, as provided in Insurance Law § 5102 (a) (5), Technology concludes that it includes “an additional twenty-five thousand dollars of [OBEL] coverage.”

However, Workers’ Compensation Law § 29 (1-a) was not passed for the benefit of workers’ compensation carriers. It was passed for the benefit of injured persons, in an acknowledgement of the fact that workers’ compensation benefits and no-fault benefits often cover the same types of loss, *i.e.* economic loss (*See Dietrick v Kemper Ins. Co. (American Motorists Ins. Co.)*, 76 NY2d 248, 252-253 [1990]). In *Dietrick*, the Court of Appeals explained the purpose of the Workers’ Compensation Law § 29 (1-a) as follows:

“The provision of . . . ‘first party benefits’ under the No-Fault Law precludes an automobile accident victim from bringing an action in negligence to recover any damages unless the victim has suffered a ‘serious injury’, in which case Insurance Law § 5104 (a) allows the victim to commence a direct party action for ‘non-economic losses’, such as pain and suffering, and other nonquantifiable detriments (Insurance Law § 5102 [c], [d]). Although Workers’ Compensation Law § 29 (1) grants a workers’ compensation carrier a lien on the proceeds of an employee’s direct party action for the amount of compensation awarded, Workers’ Compensation Law § 29 (1-a) correspondingly denies that lien on the proceeds from any direct party action received

pursuant to Insurance Law § 5104 (a), i.e., ‘for compensation and/or medical benefits paid which were *in lieu of first party benefits* which another insurer would have otherwise been obligated to pay under [the No-Fault Automobile Insurance Law].’

* * *

“... Prior to the [passage of Workers’ Compensation Law § 29 (1-a)], the existing Workers’ Compensation Law § 29 (1) lien was intended to prevent a victim from receiving a double recovery for the same economic losses. However, . . . when transplanted into the No-Fault Automobile Insurance Law context and strictly construed, Workers’ Compensation Law § 29 (1) subjected the victim to a double debit instead of preventing a double benefit.

“A seriously injured automobile accident victim is allowed to plead for basic economic loss recovery as well as for noneconomic loss in a direct action, but the final judgment must be reduced by the court by the amount of basic economic loss, for which recovery in the direct action forum is forbidden (Insurance Law § 5104 [a], [c]). The final judgment then reflects the victim’s noneconomic damages only, such as pain and suffering or customarily unquantifiable detriments. The intended result is that the injured person is made ‘whole’ by receipt of workers’ compensation and no-fault automobile insurance benefits representing economic losses, combined with the direct action noneconomic damages. If the injured person’s direct action settlement is offset by the workers’ compensation payments when the no-fault benefits have already been reduced by that amount, the lien produces the clearly unintended effect of rendering the victim uncompensated for at least part of the basic economic loss. The insurers get the victim coming and going.

“Workers’ Compensation Law § 29 (1-a) was passed to bridge the crevice between the No-Fault Law and the Workers’ Compensation Law into which the victim unintentionally slipped. Because workers’ compensation benefits and no-fault first-party benefits are intended essentially to cover the same types of losses—those that are economic in nature—and the Legislature has attempted to integrate and fit not entirely compatible statutes together through Workers’ Compensation Law § 29 (1-a), it is the fairer and preferred statutory construction to treat both types of benefits as categorically similar for purposes of the applicable lien provision” (*Id.*, 76 NY2d at 251-253 [internal citations omitted]).

As the Court of Appeals makes clear in *Dietrick*, Workers' Compensation Law § 29 (1-a) was passed "to integrate and fit not entirely compatible statutes together" (*Id.* at 253). As such, the arbitration panel's refusal to insert Insurance Law's definition of "basic economic loss," which includes OBEL, into Workers' Compensation Law § 29 (1-a) and its conclusion—that Technology's right of recovery against Allstate is limited to the workers' compensation benefits that it paid out, without reference to the OBEL benefits available under Mitchell's personal auto policy—cannot be said to have been "arbitrary and capricious or unsupported by any reasonable hypothesis" (*Matter of Motor Veh. Acc. Indem. Corp.*, 89 NY2d at 224). This is especially so, because neither the parties nor this Court could locate case law addressing the issue presented to the arbitrators [a worker's compensation carrier seeking to obtain reimbursement of OBEL benefits written in a policy of an uninvolved vehicle which policy did not provide any benefits to the injured party or to stack a personal auto policy upon a commercial worker's compensation policy] (*See id.* [finding that, where the law was previously unsettled, "[the Court] [could not] say, as a matter of law, that the arbitrator's decision was arbitrary and capricious or unsupported by any reasonable hypothesis and, thus, the awards [could not] be overturned in the courts even though . . . it entailed an erroneous application of the Statute of Limitations"]; *see also Matter of Philadelphia Ins. Co. (Utica Natl. Ins. Group)*, 97 AD3d 1153, 1155 [4th Dept 2012] [upholding award, where there was a "paucity of decisions interpreting [a certain phrase] in the Insurance Law § 5105 context"]).

CONCLUSION

Based on the foregoing, it is

ORDERED and ADJUDGED that the motion (sequence no. 002) of respondent Allstate Insurance Company is granted; and it is further

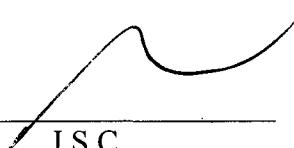
ORDERED and ADJUDGED that the petition (sequence no. 001) of Technology Insurance Company is denied, and the proceeding is dismissed; and it is further

ORDERED and ADJUDGED that the Arbitration Award rendered in favor of respondent Allstate Insurance Company on November 2, 2017, is confirmed; and it is further

ORDERED and ADJUDGED that the clerk shall enter a judgment accordingly.

Dated: June 14, 2019

ENTER:



J.S.C.
SHLOMO HAGLER
J.S.C.