

Ameriprise Ins. Co. v Queens Med. Pavilion, LLC

2020 NY Slip Op 30433(U)

February 13, 2020

Supreme Court, New York County

Docket Number: 655454/2019

Judge: Lynn R. Kotler

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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 8**

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AMERIPRISE INSURANCE COMPANY

Petitioner,

DECISION/ORDER
INDEX NO. 655454/2019
Mot Seq No: 001

-against-

QUEENS MEDICAL PAVILION, LLC d/b/a NY MED
a/a/o EVELYN TEMPLE

Present:
Hon. Lynn R. Kotler, J.S.C.

Respondents.

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

| Papers | Numbered |
|------------------------------------------|-----------------|
| N/Petition, Affirmations, Exhibits | 1-11, 13-17 |

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This is a petition to vacate the findings and recommendations of a Master Arbitrator, pursuant to CPLR § 7511. The petition was submitted without opposition on November 1, 2019. Thereafter, petitioner filed a "supplemental affirmation" without leave of court. Since the court does not consider papers submitted after a motion or petition has been marked fully submitted absent prior court approval, the court declines to consider the supplemental affirmation.

For the reasons that follow, the petition is denied.

The underlying award was rendered by Arbitrator Lucille S. DiGirolomo (the "lower arbitrator" or "No-Fault arbitrator") in the arbitration proceedings between petitioner Ameriprise Insurance Company ("Ameriprise" or "petitioner") and the respondent NY Med/Evelyn Temple ("respondent"), AAA Case No. 17-18-1097-7716 and is dated April 26, 2019 and affirmed August 8, 2019 by Master Arbitrator A. Jeffrey Grob (the "master arbitrator"). The award is in favor of respondent for \$1,529.56, plus interest from June 21, 2018 at a rate of 2% per month. The lower arbitrator also awarded respondent attorney's fees equal to 20% of the total amount of first-party

benefits and any additional first-party benefits, plus interest thereon subject to a maximum fee of \$1,360 and reimbursement of fees paid by respondent to American Arbitrator Association ("AAA"). The award at issue was delivered to both sides by the arbitrator less than one year ago (CPLR § 7507). Therefore, this petition is timely.

The underlying arbitration proceeding arose out of a motor vehicle accident which occurred on January 7, 2015. The motor vehicle was insured by petitioner. According to the petition, the subject insurance policy carried a limit of \$50,000.00 in Personal Injury Protection (PIP), \$5,000.00 in Medical Expense coverage, and did not contain any Additional Personal Injury Protection or Optimal Basic Economic Loss Protection. Respondent instituted compulsory arbitration against Ameriprise and a final hearing was held on April 25, 2019. At the arbitration hearing held before the No-Fault arbitrator, Ameriprise presented its defense that the disputed bill(s) were for services rendered after Ameriprise terminated chiropractic and physical medicine and rehabilitation services based upon independent medical examinations performed upon respondent-assignor, Evelyn Temple ("Temple"). The arbitrator ruled in respondent's favor. Upon receipt of the lower arbitration award, Ameriprise sought Master Arbitration review seeking vacatur of the lower arbitration award on the grounds that it was in excess of the subject policy of insurance as PIP and Medical Expense coverage which had been exhausted and the that the award is in violation of 11 NYCRR 65-4.109(a)(2).

The master arbitrator affirmed the lower arbitration award. According to the Master Arbitration Award, "[w]hile an award that exceeds the contractual limits of an insurance policy may be subject to vacatur on that ground.... and while a policy exhaustion defense is not subject to preclusion... the issue of policy exhaustion, as readily conceded by counsel for the Appellant, did not arise until after the award below was rendered." The Master Arbitrator further stated, "Appellant, in violation of 11 NYCRR 65.10(c)(6), seeks consideration of evidence being proffered for the first time on appeal. The referenced regulation limits the scope of a Master's

review to “[t]hose matters which were the subject of the arbitration below or which were included in the arbitration award appealed from...”

Petitioner appeals to this court on the ground that the master arbitrator exceeded his powers. Petitioner has provided the court with a ledger, annexed as Exhibit “F,” showing payments issued under the policy and an Affidavit of Ameriprise’s litigation examiner, Andrea Mueller (“Mueller”). According to Mueller, after the issuance of the subject arbitration award, as well as multiple other related arbitration awards between respondent and Ameriprise all rendered on April 26, 2019, Ameriprise issued payments in date order. Full payment was made to satisfy six awards and partial payment was made on a seventh award thereby exhausting PIP and Medical Expense coverage. Consequently, petitioner alleges, there remains no available coverage under the policy.

Discussion

CPLR §7511 outlines the limited grounds for judicial review of an arbitrator’s award.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party 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.

Petitioner now moves to vacate pursuant to CPLR § 7511(b)(1)(iii) on the ground that the master arbitrator exceeded his power. For the reasons that follow, petitioner failed to meet its burden.

An arbitration award will be upheld unless the moving party can establish clear and convincing evidence 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.” *Greenky v. Aytes*, 138 AD3d 460 [1st Dept 2016]; *Muriel Siebert & Co., Inc. v. Ponmany*, 190 AD2d 54 [1st Dept 1993]. An arbitrator exceeds his power when the “award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator’s power” (*In re Kowaleski (New York State Dept. of Correctional Services)*, 16 NY3d 85 [2010] quoting *Matter of New York City Tr. Auth. v. Transport Workers’ Union of Am., Local 100, AFL–CIO*, 6 NY3d 332 [2005]).

Petitioner argues that the decision of the master arbitrator was arbitrary and capricious, and incorrect as a matter of law because it is a violation of 11 NYCRR 65-4.10(a)(2) to grant an award in excess of the insurance policy coverage. Under this provision, an award by an arbitrator may be vacated or modified solely by appeal to a master arbitrator on the ground that that the award requires the insurer to pay amounts in excess of the policy limitations for any element of first-party benefits. While exhausted coverage may be a ground for vacatur by the master arbitrator, he has a limited scope of review. The master arbitrator shall only consider “those matters which were the subject of the arbitration below or which were included in the arbitration award appealed from” (11 NYCRR 65-4.10[c][6]). As set forth in the master arbitrator’s award, petitioner did not raise policy exhaustion as a defense and the issue did not arise until after the arbitration award below was rendered. “[T]he Lower Arbitrator rendered an award which was, at its issuance, well within applicable policy limits.” Petitioner’s defense in the arbitration proceeding was that the bills were for services rendered after Ameriprise terminated chiropractic and physical medicine and rehabilitation services based upon independent medical examinations performed upon Temple, not policy exhaustion.

A master arbitrator’s powers of review do not encompass a review of the facts, nor do they authorize him to determine the weight of the evidence. His review is limited to whether or

not the evidence is sufficient, as a matter of law, to support the determination of the arbitrator. Petrofsky (Allstate Ins. Co.), In re, 54 NY2d 207, 212 [1981]. The role of the master arbitrator is to review the determination of the arbitrator to assure that the arbitrator reached his decision in a rational manner, and that the decision was not arbitrary and capricious. *Id.*

Assuming *arguendo* that the master arbitrator failed to consider the above referenced provision of the statute (11 NYCRR 65-4.10(a)(2)), errors of law and misapplication of substantive law generally do not suffice to permit the court to disturb an arbitrator's decision. *In re Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530 [2010].

Although petitioners' surreply was submitted post-submission in violation of the CPLR, even if the court were to consider same, a different result would not be reached. In support of its petition, petitioner cites two related and two unrelated matters decided by other Justices of the Supreme Court, New York County. Those cases have no precedential effect and this court declines to adopt their reasoning.

Based upon the foregoing, the petition for an order vacating the master arbitrator's award dated August 8, 2019 is hereby DENIED. The arbitration award in the matter of Ameriprise Insurance Company and the NY Med/Evelyn Temple - AAA Case No. 17-18-1097-7716 is hereby CONFIRMED in all respects.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the petition is denied and this proceeding is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the arbitration award in the matter of Ameriprise Insurance Company and the NY Med/Evelyn Temple - AAA Case No. 17-18-1097-7716, in favor of respondent St. Barnabas Hospital, against petitioner Country-Wide Insurance Company is hereby CONFIRMED in all respects; and it is further

ORDERED that the clerk shall enter a money judgment in favor of respondent NY Med and against petitioner Ameriprise Insurance Company as follows:

a) \$1,529.56, plus interest from June 21, 2018 at the rate of two per cent (2%) per month, simple, calculated on a pro rata basis using a 30-day month and ending with the date of payment of the award; together with

b) respondent attorney's fees equal to 20% of the total amount of first-party benefits and any addition first-party benefits, plus interest thereon subject to a maximum fee of \$1,360; together with

c) forty dollars (\$40) to reimburse respondent for the fees paid to AAA.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 2/13/20

New York, New York



Hon. Lynn R. Kotler, J.S.C.