

Insurance Co. of the State of Pa. v Hereford Ins. Co.
2020 NY Slip Op 31421(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 653601/2019
Judge: W. Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Petitioner,

- v -

HEREFORD INSURANCE COMPANY,

Respondent.

-----X

INDEX NO. 653601/2019
MOTION DATE 10/31/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this special proceeding, petitioner, Insurance Company of the State of Pennsylvania, seeks an order, pursuant to CPLR 7511 (b) (iii), to vacate the arbitration award of Arbitrator Michele Mehr (Arbitrator) of Arbitration Forums, Inc. in the arbitration proceedings between petitioner and respondent, Hereford Insurance Company (docket number I068-06776-18-00), pursuant to Insurance Law § 5105 and 11 NYCRR § 65-4.10 (a) (2), finding that the award was so imperfectly executed that a final and definite award upon the subject matter submitted was not made, that the award was arbitrary and capricious and incorrect as a matter of law, or in the alternative remanding this matter to a new arbitrator for full consideration of the facts of this matter. Respondent cross-petitions for an order, pursuant to CPLR 7510, confirming the award of the Arbitrator and directing that judgment be entered thereon.

For the reasons set forth below, the petition is denied and the cross petition is granted.

Background

Underlying Accident

On August 29, 2016, a motor vehicle accident occurred in which a vehicle driven by respondent's insured, Johnny E. Delgado, struck the rear end of the vehicle of Ulysses Suarez, petitioner's insured, (petitioner's insured or Suarez). Petitioner's insured claimed that he was driving in front of the vehicle of respondent's insured, and that Delgado's vehicle struck Suarez's vehicle from the rear.

Delgado claims, however, that Suarez's car stopped abruptly. According to respondent, Delgado "was traveling in the left lane of the parkway. As [Delgado] was driving, he passed a merging lane on the left side [or sic] that had a [stop sign]. Suddenly, [Suarez] sped up and cut off [Delgado] from this left merging lane. [Delgado] attempted to brake but was unable to avoid collision" (NYSCEF Doc. Nos. 10, 11).

As a result of the accident, petitioner paid \$50,000.00 in first-party No-Fault benefits to Suarez. On June 5, 2018, pursuant to Insurance Law §§ 5104 (a) and 5105, petitioner submitted an "Intercompany Reimbursement Demand" letter (demand) to respondent. Thereafter, on June 5, 2018, petitioner filed the underlying arbitration action.

The Evidence Submitted to the Arbitrator

The police report recounted the statements made by both drivers, and provides:

At time and place of occurrence driver of Vehicle #1 [Suarez] states he started in traffic after stopping at a stop sign when Vehicle #2 collided into the rear of Vehicle #1. Driver of Vehicle #2 [Delgado] states Vehicle #1 stopped abruptly in front of Vehicle #2 and collision occurred. . . . Both Vehicle's [sic] were non-drivable [sic] and towed to Riverside Drive to await a private tow.

Petitioner relied mainly on the police report contending that "the Police Report confirms, [petitioner] was driving a vehicle and was rear-ended by a vehicle for hire[;]" "the driver failed

to avoid petitioner's stopped vehicle." (NYSCEF Doc No. 5). Petitioner argued that respondent's rebuttal response "is speculative and a creative narrative which does not reflect the facts of loss as specified by the Police Report" (NYSCEF Doc. No. 10).

Delgado submitted an affidavit and avers that:

I was traveling southbound on the Henry Hudson Parkway, which has 3 lanes for traffic. I was traveling in the left lane. As I was traveling along to my left further up ahead is a fork which divides the entrance ramp from the main parkway. As I was passing the fork suddenly a vehicle cuts into my lane. I immediately apply my brakes to try and avoid an emergency situation but there is not enough time and space. The rear right side of the other vehicle came into contact with the front left side of my vehicle. . . .

(NYSCEF Doc No. 11). Respondent asserted that the loss "was not a stop short but an incident involving an improper merger." (NYSCEF Doc No. 10). Respondent noted that the photographs of the vehicles indicate that the police report incorrectly designates the point of impact as the middle rear of the Suarez vehicle; but the photographs show that the damage to Suarez's vehicle is on the rear of the passenger side, with damage to the passenger's side tail light, rear passenger's side quarter panel and the area over the rear passenger's side wheel (NYSCEF Doc Nos. 5, 12, 13). Also, a review of the photographs, shows that the damage to respondent's insured's vehicle is to the front driver's side, with most of the damage to the front driver's side bumper and headlight (*id.*). According to respondent, petitioner was in violation of Vehicle and Traffic Law (VTL) § 1122 (a), which states that "[t]he driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle."

Arbitration

An arbitration hearing was held on March 21, 2019. By award dated March 21, 2019, the Arbitrator found that "[a]s per the police report the points of impact confirm that the respondent

vehicle was merging in front of the applicant vehicle. . . I reviewed the scene photos, confirming this was a merge situation where the applicant was merging onto the roadway. The respondent was already established traveling straight on the roadway, when the applicant did not merge correctly causing the respondent to strike their vehicle.” (NYSCEF Doc No. 4).

Based on a review of the evidence, the Arbitrator determined that petitioner proved 0% liability against respondent finding pure contributory negligence.

Petitioner claims that the Arbitrator’s determination is inconsistent in that the determination: (1) references that respondent’s insured’s vehicle was ahead on the roadway and then respondent’s insured’s vehicle struck Suarez’s vehicle; (2) conflicts with the actual police accident report referenced in the award; and (3) states that the photographic evidence supported the contention that an improper merge was involved and not a rear end collision.

Respondent counters that the liability decision is clearly supported by the evidence. Namely, the pictures of the cars at the scene of the accident indicate that the accident is in line with a collision caused by merging, and not caused by a direct rear end, as petitioner argues.

Discussion

Under Insurance Law § 5105, “an insurer who pays out first-party benefits or workers’ compensation benefits in lieu thereof is afforded the mandatory intercompany arbitral process to recoup payment of those benefits through a loss transfer” (*see Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110, 1111 [2d Dept 2005]). A right to recovery under Insurance Law § 5105 (a) requires that “at least one of the motor vehicles involved” is “used principally for the transportation of persons or property for hire” (*Matter of Progressive Cas. Ins. Co. v New York State Ins. Fund*, 47 AD3d 633, 634 [2d Dept 2008]).

Where parties are obligated by statutory mandate to submit their dispute to arbitration, the arbitrator's determination is subject to "closer judicial scrutiny" than an arbitration conducted pursuant to a voluntary agreement (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). "To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious" (*id.*). In addition, the determination must also be "rational or ha[ve] a plausible basis" and may not exceed a specific, enumerated limitation of an arbitrator's power, as delineated under CPLR 7511 (*Matter of Petrofsky (Allstate Ins. Co.)*, 54 NY2d 207 [1981]; *see also Matter of Kowaleski (New York State Dept. of Correctional Servs.)*, 16 NY3d 85, 90 [2010]).

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]). "A claim that the driver of the lead vehicle made a sudden stop, standing alone is insufficient to rebut the presumption of negligence" (*id.*); however, "[a]dmissible evidence that the lead vehicle changed lanes immediately prior to the accident" may create a "non-negligent explanation for striking [a] plaintiff's vehicle in the rear" (*Campbell v Elizer*, 2020 WL 1613166, *1 [Sup Ct, Bronx County Feb. 25, 2020, index No. 34634/2018E]; *see Figueroa v Cadbury Util. Constr. Corp.*, 239 AD2d 285, 285 [1st Dept 1997] [the defendant's affidavit asserting that he was cut off by the plaintiff's automobile raises issues sufficient to defeat summary judgment]). Further, "[a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Fratello v County of Suffolk*, 96 AD3d 798, 799 [2d Dept 2012]).

Here, petitioner made a prima facie showing that Suarez's vehicle was struck in the rear by respondent's insured's vehicle (*see* police report dated 8/26/16). Respondent met its burden by offering Delgado's affidavit, in rebuttal, wherein he states that Suarez did not stop at the stop sign on the ramp to the Henry Hudson Parkway causing Delgado to hit Suarez's vehicle on the right side of the rear bumper (*see Fratello*, 96 AD3d 799; NYSCEF Doc No. 11). Petitioner contends that the Arbitrator erred in that she relied on the police report, which opined that the accident was a rear end collision, but sua sponte determined that the accident occurred due to improper merging.

Contrary to petitioner's position, "[a] police accident report made by a police officer who was not an eyewitness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question" (*Figueroa v Luna*, 281 AD2d 204, 205 [1st Dept 2001], quoting *Kajoshaj v Greenspan*, 88 AD2d 538, 539 [1st Dept 1982]). Petitioner offers no further statement. A review of the record demonstrates that the Arbitrator relied on that portion of the police report reflecting "the points of impact" as well as the scene photos, which supported respondent's position "that this was a merge situation where petitioner's insured was merging on to the roadway" (NYSCEF Doc No. 4).

It was petitioner's burden "to show that its factual explanation is more likely true than any other alternative explanations. It also means that all possible alternative explanations need not be specifically ruled out in order for [petitioner] to prevail" (New York Loss Transfer Frequently Asked Questions, <https://arbfile.org/resources/frequently-asked-questions/frequently-asked-questions-new-york-loss-transfe#Question216> last accessed June 19, 2019). That the Arbitrator found that petitioner did not meet this burden does not render the determination

arbitrary or capricious, nor irrational or implausible. Rather, the evidence submitted supports the Arbitrator’s determination that petitioner did not meet its burden. The court, therefore, denies the petition to vacate the March 21, 2019 arbitration award and grants the cross petition to confirm said award.

Conclusion

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition by petitioner, Insurance Company of the State of Pennsylvania, is denied; and it is further

ORDERED and ADJUDGED the cross petition by respondent, Hereford Insurance Company, is granted and the arbitration award of Arbitrator Michele Mehr of Arbitration Forums, Inc. in the arbitration proceedings between petitioner and respondent (docket number I068-06776-18-00) is confirmed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of respondent.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/14/2020

DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE