

Country-Wide Ins. Co. v Epione Med. P.C.
2020 NY Slip Op 31728(U)
June 2, 2020
Supreme Court, New York County
Docket Number: 650476/2020
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

COUNTRY-WIDE INSURANCE COMPANY,

INDEX NO. 650476/2020

Petitioner,

MOTION DATE

- against-

MOTION SEQ. NO. 1

MOTION CAL. NO.

**EPIONE MEDICAL P.C. a/a/o DANIEL
BUENANO DORADO,**

Respondent.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

■

Answer – Affidavits – Exhibits _____

■

Replying Affidavits

■

Cross-Motion: Yes X No

Petitioner Country-Wide Insurance Company (“CWI”) submits a Petition seeking an Order “pursuant to CPLR 7511(b)(1)(i) and CPLR 7511(b)(1)(iii) vacating a lower Arbitrator’s Award dated July 31, 2019 (“the Award”) and a Master Arbitration award dated October 23, 2019, on the grounds that the lower Arbitrator exceeded his/her authority, or so imperfectly executed it, that a final and definite award upon the subject matter submitted was not made, and the Master Arbitrator erred in affirming the award.” Respondent Epione Medical P.C. a/a/o Daniel Buenano Dorado (“Respondent” or “Epione Medical”) opposes the Petition. For the reasons set forth below, the Court denies the Petition and confirms the award.

Factual Background and Procedural History

This matter arises from a motor vehicle accident that occurred on February 17, 2018, involving a vehicle registered in New York State and insured by CWI. Daniel Buenano Dorado (“Claimant”) sustained injuries in the accident and received medical services from Epione Medical. Epione Medical thereafter sought

reimbursement from CWI for the medical services it had provided to Claimant. CWI denied Epione Medical's claim for reimbursement. According to the lower Arbitrator's Award, CWI denied Epione Medical's claim "based on the Assignor's failure to appear for examinations under oath scheduled for June 15 and July 11, 2018."

This matter proceeded to arbitration on July 29, 2019, before Arbitrator Lucille S. DiGirolomo (hereinafter "the lower Arbitrator"). The lower Arbitrator found in favor of CWI, stating that CWI "had failed to establish, in admissible form, the proper mailing of the EUO notices and the Assignor's non-appearance." The lower Arbitrator "reviewed an affidavit by Annie Persuad in which she does not indicate she mailed the scheduling letters." The lower Arbitrator found that Persuad "only advises that she generated and signed the letters with no indication of what the mailing procedures in the office were." The lower Arbitrator further noted that CWI uploaded the EUO transcripts one business day before the hearing.

CWI appealed the lower Arbitrator's decision to the Master Arbitrator. On October 23, 2019, the Master Arbitrator held "that the award was not arbitrary and capricious and clearly had a plausible basis" and affirmed the Award.

In this proceeding, CWI states that the lower Arbitrator "incorrectly precluded CWI's EUO no-show defense and rendered an award for the applicant." CWI further asserts that the Master Arbitrator "incorrectly affirmed the lower arbitration award, holding that the [lower Arbitrator] reviewed the evidence in the matter, and it was not for the Master Arbitrator to review the same evidence and draw a different conclusion." CWI asserts that the Award "should be vacated on the grounds that the Arbitrators exceeded their powers and erred in rendering and affirming the awards, respectively."

CWI also contends in its Petition that "[t]here is a pending Declaratory Judgment action ["DJ action"] against this claimant and provider in the Supreme Court of the State of New York, New York County" under index number 654658/2018. CWI commenced the DJ action on September 19, 2018 by the filing of a Summons and Complaint seeking a declaratory judgment against Claimant and Epione Medical, among other defendants, due to Claimant's failure to appear for EUOs. In its reply, CWI attaches the default judgment decision rendered on November 7, 2019 in the DJ Action by Judge Alan C. Marin ("DJ Decision") declaring that CWI "owes no duty" to the defendant medical providers named therein, which includes Epione Medical, and ordering that all arbitrations, lawsuits and enforcement of awards or judgments arising from Claimant's accident be

permanently stayed. CWI argues that the Order “was a conclusive final determination, notwithstanding the fact that it was entered on default.”

Legal Standard

Pursuant to CPLR § 7511(b), the grounds for vacating an arbitration award are “(i) corruption, fraud or misconduct in procuring the award; ... (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; ... (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; [and] (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.”

Generally, 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 Acc. Indemnification Corp. v. Aetna Casualty & Surety Co.*, 89 NY2d 214, 223 (1996). “[W]here the arbitration is pursuant to the voluntary agreement of the parties, in the absence of proof of fraud, corruption, or other misconduct, the arbitrator’s determination on issues of law as well as fact is conclusive.” *Id.*

To establish that an arbitrator has “exceeded his power” under CPLR §7511, a party must show that the award “violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator’s power” under CPLR §7511(b)(1). *New York City Tr. Auth. v Transp. Workers’ Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005].

Where parties submit to “compulsory arbitration involving no-fault insurance, the standard of review is whether the award is supported by evidence or other basis in reason.” *Matter of Miller v Elrac, LLC*, 2019 NY Slip Op 01544 [1st Dept 2019]. “This standard has been interpreted to mean that the relevant test is whether the evidence is sufficient, as a matter of law, to support the determination of the arbitrator, is rational and is not arbitrary and capricious.” *Id.* “Although compulsory arbitration awards are subject to a broader scope of review than awards resulting from consensual arbitration, the scope of judicial review of such an arbitration award is still limited to whether the award is supported by the evidence or other basis in reason as appears in the record.” *Id.* “With regard to fact and credibility findings, the Court should accept the arbitrator’s credibility

determinations, even where there exists conflicting evidence and room for choice.” *Vieira-Suarez v. Syracuse City Sch. Dist.*, 93 NYS3d 628 [Sup. Ct, Onondaga County 2017], *aff’d*, 67 NYS3d 896 [4th Dept 2018], *leave to appeal denied*, 72 NYS3d 917 [4th Dept 2018], *and leave to appeal denied*, 109 NE3d 1156 [2018] (citation omitted).

Further, the power of the master arbitrator to review factual and procedural issues is limited to “whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis.” *Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207, 212 [1981]. Courts are required to uphold the determinations of the master arbitrator on questions of substantive law if there is a rational basis for the finding. *Liberty Mutual Ins. Co. v. Spine Americare Medical, P.C.*, 294 AD2d 574, 577 [2d Dept. 2002].”

“The failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage.” *Mapfre Ins. Co. of New York v Manoo*, 140 AD3d 468 [1st Dept 2016]. “To vitiate coverage, it must be shown that the notices for EUOs were timely and properly mailed to the claimants and that the claimants failed to appear.” (*Id.*). Pursuant to CPLR §7511(e), “upon the denial of a motion to vacate or modify” an award, the Court “shall confirm the award.”

Discussion

CWI fails to set forth a basis for disturbing the Award. The lower Arbitrator did not exceed her authority by precluding CWI’s EUO no show defense. The lower Arbitrator reviewed the affidavit provided by CWI and found that it was insufficient to demonstrate that the notices scheduling the EUOs had been mailed. “[A]ssessment of the evidence presented at an arbitration proceeding is the arbitrator’s function rather than that of the court.” *Fitzgerald v Fahnestock & Co., Inc.*, 48 AD3d 246, 247 [1st Dept 2008], *quoting Peckerman v D & D Assocs.*, 165 AD2d 289, 296 [1st Dept 1991]). The lower Arbitrator further found that other evidence submitted by CWI was late. An arbitrator has the discretion to refuse to entertain any late submissions proffered by Petitioner. *See Glob. Liberty Ins. Co. v. Coastal Anesthesia Services, LLC*, 145 AD3d 644, 645 [1st Dept 2016].

Further, the Master Arbitrator correctly determined that the lower Arbitrator did not exceed his powers and determined that the decision was rational and

neither arbitrary, capricious nor incorrect as a matter of law. *Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207, 209 [1981].

CWI also asks the Court to vacate the lower Arbitrator's Award in light of the DJ Decision declaring that CWI owes no duty to Epione Medical. However, post-arbitration decisions involving liability are not a proper basis to vacate an arbitration award. "While the preclusive effect of a pre-arbitration judicial decision may be sufficient to vacate an arbitral award... a post-arbitration judicial determination concerning the insurer's liability is not one of the limited grounds for vacating an arbitration award..." (*Hereford Ins. Co. v Iconic Wellness Surgical Servs., LLC*, 2019 NY Slip Op 50801(U) [Sup. Ct., App. Term, 1st Dept 2019] [internal citation and quotation marks omitted]).

Based upon the foregoing, the Petition for an order vacating the lower Arbitrator's Award dated July 31, 2019 and affirmed October 23, 2019 by a Master Arbitrator is denied. The Award in the matter of *Epione Medical, PC a/a/o Daniel Buenano Dorado v. Country-Wide Insurance Company - AAA Case No.: 17-18-1108-0061* is hereby confirmed in all respects.

Wherefore, it is hereby

ORDERED that the Petition of Country-Wide Insurance is denied in its entirety and this proceeding is dismissed; and it is further

ORDERED that the arbitration award in the matter of *Epione Medical, PC a/a/o Daniel Buenano Dorado v. Country-Wide Insurance Company - AAA Case No.: 17-18-1108-0061* is hereby confirmed in all respects; and it is further

ORDERED that the Clerk shall enter a judgment in favor of Respondent *Epione Medical, PC a/a/o Daniel Buenano Dorado* against Petitioner Country-Wide Insurance Company as follows: a) \$4,635.79, plus interest from October 17, 2018 at the rate of two per cent (2%) per month; together with b) Respondent's attorney's fees of 20% of the total amount of first-party benefits and any additional first-party benefits, plus interest subject to a maximum fee of \$1,360.00; together with c) forty dollars (\$40) to reimburse Respondent for the fees paid to AAA; and it is further

ORDERED that Respondent shall serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 2, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**