Country-Wide Ins. Co. v Diagnostic Plus Med. PC
2020 NY Slip Op 32959(U)
September 8, 2020
Supreme Court, New York County
Docket Number: 656661/2019
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. MELISSA ANNE CRANE** **PART** **IAS MOTION 15EFM**

Justice

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COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- v -

DIAGNOSTIC PLUS MEDICAL PC

Defendant.

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INDEX NO. 656661/2019

MOTION DATE 10/10/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11 were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Upon the foregoing documents, it is

Petitioner Country-Wide Insurance Company (CWI) seeks an order, pursuant to CPLR 7511 (b) (i), (iii) and (iv), vacating a master arbitrator's award granted in favor of respondent Diagnostic Plus Medical PC (Diagnostic), awarding Diagnostic first-party no-fault benefits for its bills for health care services provided to Ana Ortiz (Ortiz).[1] Petitioner CWI contends that the no-fault benefits were assigned to Diagnostic by Ortiz, who was involved in a motor vehicle accident on February 7, 2011.

On September 30, 2011, CWI denied Diagnostic's claims/bills, for services provided to Ortiz in March and April of 2011. CWI denied the claims on the ground that Diagnostic failed to appear for an examination under oath (EUO), that CWI requested under the terms and conditions of the insurance policy, and scheduled twice, first on September 13, 2011 and then on September 28, 2011 (NYSCEF Doc. No. 4).

On May 14, 2019, a hearing was held before a no-fault arbitrator (arbitrator) of the American Arbitration Association at which Diagnostic, as applicant, sought review of CWI's denial of Diagnostic's claims. Concerning CWI's defense to the claim, specifically that Diagnostic had failed to appear for an EUO (the Nonappearance Defense), the arbitrator found that Diagnostic failed to forward responses to information sought in CWI's

[1] Some of CWI's submissions here indicate that the name of the car accident victim was Ena Ortiz.

verification letters, but that CWI did not deny the claim after 120 days, and, instead, sought an EUO of Diagnostic. The arbitrator further stated that he had read all documents contained in the electronic filing system as of the date of the hearing. The arbitrator found that CWI failed to submit: (1) letters directing CWI to appear at an EUO; (2) proof of mailing of those letters; and (3) proof of Diagnostic's failure to appear at the EUO; but had, on September 30, 2011, six months after receipt of the bills, denied the claim. The arbitrator further stated in his report that:

> "[s]upposedly the EUOs were scheduled for 9/13 and 9/28. Again no request for [Diagnostic] to appear is submitted.
>
> As [CWI] does not submit scheduling letters, I have no way to determine when the letters were sent to [Diagnostic].
>
> In any event, the EUOs were not requested within the 30 day timeline and the request for the EUOs is late. The failure to provide any proof at all in support of the defense of non appearance where timely requested results in a decision in favor of Diagnostic"

(NYSCEF Doc. No. 3).

The master arbitrator affirmed the arbitrator's award in its entirety. In doing so, the master arbitrator opined that the arbitrator should have determined whether the EUO demands were made within a reasonable time period, as opposed to 30 days. However, the master arbitrator determined that, based upon the record before the arbitrator, the arbitrator's determination was not arbitrary and capricious, because the arbitrator found that CWI had failed to submit proof in support of its defense, that is, the Nonappearance Defense (NYSCEF Doc. No. 6).

Concerning "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*, 170 AD3d 436, 436-437 [1st Dept 2019], citing *Matter of Petrofsky* [*Allstate Ins. Co.*], 54 NY2d 207, 210-211 [1981]). The First Department has instructed that:

> "[t]his 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. 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"

(*Matter of Miller*, 170 AD3d at 437 [internal citation omitted]). A master arbitrator, in reviewing the determination of an arbitrator, may not make his or her own factual determinations, other than that necessarily involved in reviewing whether or not the decision is supported by evidence (*Matter of Petrofsky*, 54 NY2d at 212).

CWI argues that the arbitrator's award was irrational, arbitrary and capricious, and not supported by the evidence, and that the master arbitrator exceeded his power and erred in affirming the award. The basis for that argument is CWI's contention that it properly and timely denied the claim after Diagnostic failed to appear for an EUO. In support, CWI asserts that it "submitted its conciliation submission, which included proof that claimant Ana Ortiz failed to attend an EUO as requested by CWI" (NYSCEF Doc. No. 1, ¶ 7). CWI also asserts that, on appeal to the master arbitrator, it argued that the arbitrator erred in awarding Diagnostic $2,670.40 because Ortiz failed to appear for two EUOs.

The First Department has recently stated that "[t]he failure of a party eligible for no-fault benefits to appear for a properly-noticed [EUO] constitutes a breach of a condition precedent, vitiating coverage (*Hertz Vehicles, LLC v Alluri*, 171 AD3d 432, 432 [1st Dept 2019]). To demonstrate proper notice and failure to appear, CWI here submits: (1) two letters, one of which sought an EUO of Diagnostic on September 13, 2011, and the other on September 28, 2011; (2) mailing documents that CWI contends support its claim of service of the letters on CWI; and (3) transcripts, dated, respectively, September 13, 2011 and September 28, 2011. In each of the transcripts, an attorney representing CWI indicated on the record that Diagnostic had not appeared. CWI argues that the service of an EUO demand upon CWI's law firm sufficiently demonstrates proper notification to Diagnostic,[2] and that CWI's request for an EUO was proper and gave Diagnostic the opportunity to reschedule the examination. CWI further argues that, if Diagnostic believed that the EUO was improper, its counsel had a duty to communicate with CWI regarding the request.

CWI carries the burden in this proceeding to demonstrate that the master arbitrator's determination was arbitrary and capricious, or not supported by evidence or other basis in reason (*see American Tr. Ins. Co. v Ebrahim*, 236 AD2d 274, 275 [1st Dept 1997] [movant carries burden]; *Matter of Government Empls. Ins. Co. v Schussheim*, 122 AD3d 849, 849-50 [2d Dept 2014] [same]). The master arbitrator credited the arbitrator's findings about the

[2] CWI argues that, because Diagnostic's attorney's office was notified regarding scheduling the EUOs, the attorney had a duty to notify their client, Diagnostic, to attend the EUOs in order to ensure that a breach of CWI's policy would not occur. Assuming, arguendo, that this is correct, CWI does not demonstrate that the attorney to which documents were mailed was Diagnostic's attorney, or agent, for this matter. In addition, perhaps because Diagnostic made the claims in 2011, CWI does not provide an affidavit from a person with personal knowledge about the mailing, or the law firm's mailing procedures in 2011. Not all of the postal documents submitted by CWI are self-explanatory or, as far as the court can ascertain, demonstrate delivery to CWI.

record. While CWI addresses what it deems to be the merits of its Nonappearance Defense, it fails directly, or adequately, to address the threshold issue of the actual basis for the master arbitrator's determination, which was the arbitrator's finding that the record before him did not contain the EUO demand letters or proof of Diagnostic's failure to appear. As discussed, CWI submits copies of EUO demand letters and some mailing materials and transcripts here. However, CWI does not adequately demonstrate that those documents were appropriately and timely filed with the American Arbitration Association, or otherwise presented or made available to the arbitrator at the hearing.[3] Further, CWI does not argue that the arbitrator purposefully ignored documents properly submitted in the record, and CWI's letter brief to the master arbitrator does not directly and concretely discuss the arbitrator's findings about the content of the record before him. Under these circumstances, CWI has not met its burden to demonstrate that the master arbitrator's decision, to credit the arbitrator's findings about the materials in the record before him, was arbitrary and capricious or lacked a basis in reason. Consequently, the petition must be denied. While the court is denying the unopposed petition, denial is without prejudice to renewal, if CWI is so-advised by counsel, but made upon a proper record, as discussed above.

Accordingly it is,

ORDERED that the petition to vacate the award of master arbitrator Victor J. Hershdorfer, dated August 12, 2019 (American Arbitration Association, No Fault Tribunal Assessment No.: 99-17-1074-4192) is denied.

9/8/2020
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:	X	CaseDISPOSED			NON-FINAL		
		GRANTED	X	DENIED	GRANTED IN		OTHER
APPLICATION:		SETTLE			SUBMIT ORDER		
CHECK IF		INCLUDES			FIDUCIARY		REFERENCE

[3] CWI's counsel states that the source of her information and knowledge is a review of the file referable to this action, which is maintained by her firm in its regular course of business, but provides nothing to show that the firm's records demonstrate that the documents submitted here were appropriately submitted to the American Arbitration Association's no-fault arbitrator. Even though the petition is verified by an officer of CWI, counsel for CWI avers that the source of information submitted here is her firm, not CWI's files.