MVAIC v Lida's Med. Supply
2020 NY Slip Op 32995(U)
September 11, 2020
Supreme Court, New York County
Docket Number: 451743/2019
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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MVAIC

Plaintiff,

- v -

LIDA'S MEDICAL SUPPLY,

Defendant.

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INDEX NO. 451743/2019

MOTION DATE 10/08/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16

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

Upon the foregoing documents, it is

Petitioner MVAIC moves for judgment pursuant to CPLR 7511 vacating and setting aside the award of the master arbitrator and the award of the lower arbitrator, and for judgment in favor of petitioner. The petition is unopposed.

Respondent Darnelle Davis was injured in a car accident and was supplied with a deep tissue massager, a cervical traction unit, and several other devices by respondent Lida Medical Supply, Inc. (Lida). Lida sought to recover the cost of the medical supplies, totaling $2,448.27, from MVAIC under Article 51 of the Insurance Law, commonly known as the no-fault law (*see Aetna Health Plans v Hanover Ins. Co.*, 27 NY3d 577, 582 [2016]). At the arbitration hearing between MVAIC and Lida, on March 18, 2019, Lida submitted the bills and MVAIC submitted a peer review by Isandr Dumesh, M.D. stating that Davis did not need these medical devices. The arbitrator Aaron Maslow held that Lida had made a prima facie case of entitlement to recover the medical costs, and that MVAIC had failed to rebut this by showing that the treatment was medically unnecessary. The arbitrator gave no credence to the peer review. MVAIC contends that the arbitrator acted arbitrarily.

The peer review states that "I hereby declare and affirm pursuant to CPLR 2106 under the penalties of perjury, that I am a physician licensed to practice in the State of New York and that the statements contained in this report are true and made under penalties of perjury" (NY St Cts Elec Filing Doc No. [NYSCEF] 9). Immediately underneath is the signature of the physician.

The arbitration award, dated March 25, 2019, noted that the signature of the doctor on the peer review was identical to that on a peer review in another arbitration between the same parties. The arbitrator wrote that it was "evident that this was a facsimile signature affixed by someone electronically. It has been my position consistently that medical reports, narratives, and peer reviews which do not bear authentic signatures, but rather facsimiles, should not be accorded probative value for their contents, such as findings and opinions, unless authenticated" (NYSCEF 4, at 4).

The arbitrator noted that the no fault arbitration process was designed to enable parties to resolve disputes "in an expeditious manner, without the formalities attendant to court actions" (*id.*). The lack of formality enabled parties in arbitration to submit documents prepared by physicians, in lieu of personally testifying, a practice that would not be permitted in a regular court action, where rules of evidence apply. The arbitrator went on to state that, while the lack of formality expedited the arbitration process, it entailed the risk that parties might submit documents that were not prepared or authorized by the signatories.

> "Documents bearing rubber-stamped, computer-generated, or other facsimile signatures fall into this category. Were I to give credence to such documents, I would be encouraging their submission, thus leading to the possibility of the introduction into the arbitration process of fraudulent materials -- materials prepared by others bearing the signatures of the physicians who have no idea that they are being submitted"
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> (NYSCEF 4, at 4).
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> "I am not persuaded that it was genuinely prepared or approved by [Dr. Dumesh]. In the absence of a genuine signature of Dr. Dumesh or an affidavit or affirmation authenticating the facsimile signature, there is no assurance that he, and not someone else, wrote the peer review"
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> (*id.* at 12).

The arbitrator wrote that such documents should not be admitted because they lack probative value, not because their admission would violate the rules of evidence, as those rules do not govern arbitrations (NYSCEF 4, at 12).

MVAIC sought review of the arbitrator's award, that the master arbitrator Steven Rickman affirmed on June 23, 2019 (NYSCEF 5, master arbitration award). The master arbitrator stated that his ability to review a decision by a lower arbitrator was limited. Citing to the following cases, the master arbitrator stated that one in his position could not engage in a de novo review of the matter originally presented to the lower arbitrator, weigh and assess the credibility of the evidence, and then on that basis make independent findings of fact (*Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 212 [1981]; *Matter of Richardson v Prudential Prop. & Cas. Ins. Co.*, 230 AD2d 861, 861 [2d Dept 1996]). "The evaluation of the weight, credibility, persuasiveness, and admissibility of the evidence is exclusively within the province of the lower arbitrator" (NYSCEF 5, at 3). The master arbitrator stated that the lower arbitrator was in the best position to evaluate the evidence before him or her, and that an arbitrator is not limited to strict conformity with the rules of evidence. The master arbitrator found that, as the lower arbitrator's determination was not irrational, arbitrary, capricious, or incorrect as a matter of law, it would not be vacated (*id.* at 4).

MVAIC presented the same arguments at the review that it presents here. MVAIC points out that, although Lida's bills contained facsimile signatures, the lower arbitrator determined that they were probative. It was therefore capricious and arbitrary for the lower arbitrator to decide that MVAIC's peer review was not probative because it too contained a facsimile signature. MVAIC argues that, although the rules of evidence are relaxed in arbitration, evidentiary decisions must be applied equally and impartially. MVAIC also argued that the arbitrator's rule of not accepting facsimile signatures goes against law and practice.

Because of the great degree of deference afforded to arbitration awards, the grounds for vacating them are extremely limited (*Matter of New York City Tr. Auth. v Transport. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]). Under CPLR 7511, an award can be vacated due to fraud, misconduct, partiality, or the arbitrator exceeding his or her power (*id.*; *Matter of NRT N.Y., LLC v Spell*, 166 AD3d 438, 439 [1st Dept 2018]). Where the arbitration is compulsory, as in the instant case, courts additionally inquire whether the arbitration award was arbitrary, capricious, irrational, contrary to settled law (*Matter of DTG Operations, Inc. v Travelers Indem. Co.*, 145 AD3d 646, 646 [1st Dept 2016]; *Matter of Kane v Fiduciary Ins. Co. of Am.*, 114 AD3d 405 [1st Dept 2014]) or lacking evidentiary support (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). An award taken without sound basis in reason or regard to fact is arbitrary and capricious (*Matter of Peckham v Caleogero*, 12 NY3d 424, 431 [2009]). An award is irrational if there is "no proof whatever to justify" it (*Matter of Roberts v City of New York*, 118 AD3d 615, 617 [1st Dept 2014]).

The lower arbitrator cited to cases where peer reviews were inadmissible in trial court because they contained computerized, affixed, or stamped facsimiles of the physician's signature, and were not subscribed and affirmed, and there was no evidence that the signatures were authorized (*see Vista Surgical Supplies, Inc. v Travelers Ins. Co.*, 50 AD3d 778, 778 [2d Dept 2008]; *Support Billing & Mgt. Co. v Allstate Ins. Co.*, 15 Misc 3d 126[A], 2007 NY Slip Op 50496[U], *1 [App Term 2d & 11th Jud Dists 2007]). The lower arbitrator did not cite to any Appellate Division, First Department cases. As acknowledged in *Eill v Morck* (37 Misc 3d 1211[A], 2012 NY Slip Op 51996[U], *3 [Sup Ct, Kings County 2012]), the Appellate Division, Second Department follows the rule that medical reports with stamped or electronic facsimile signatures where the record does not demonstrate that the signature was placed on the report by the doctor or at the doctor's direction are inadmissible (see 2 NY Prac. Series, Com. Litig. in New York State Courts, § 8:37, Evidence permitted on motion – Affirmations [4th ed 2019] [Westlaw]). However, a recent second department case, in express disagreement with *Vista* (50 AD3d 778), overturned a decision that a doctor's report with an electronic signature was not admissible (*Ramirez v Miah*, 166 AD3d 690, 691 [2d Dept 2018]).

Trial courts in the First Department follow the rule that electronically signed physician's reports are admissible and do not require indicia as to who placed them on the reports or that the signatures were authorized (*Martin v Portexit Corp.*, 98 AD3d 63, 65-67 [1st Dept 2012]; *see also Pietropinto v Benjamin*, 104 AD3d 617, 617 [1st Dept 2013]; *O'Connell v Macy's Corp. Svcs. Inc.*, 2016 NY Slip Op 31716[U], *4 [Sup Ct, NY County 2016], *affd* 154 AD3d 628 [1st Dept 207]).

CPLR 2106 provides that a signed affirmation by a physician has the same effect as a notarized affidavit. It does not prohibit an electronic signature. In *Martin* (98 AD3d at 66), the court held that electronic signatures are admissible pursuant to CPLR 2106 and the State Technology Law (Electronic Signatures and Records Act [ESRA]). State Technology Law § 304 (2) provides that an electronic signature may be used in lieu of a signature affixed by hand, and that an electronic signature shall have the same validity and effect as a signature affixed by hand. By enacting ESRA, New York "'appear[s] to have chosen to incorporate the substantive terms of E–SIGN [Electronic Signatures in Global and National Commerce Act, 15 USC § 7001 *et seq*.] into New York state law"' (*Martin*, 98 AD3d at 66, quoting *Naldi v Grunberg*, 80 AD3d 1,12 [1st Dept 2010]). Under 15 USC § 7001 (a) (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.

Where the no-fault arbitrator gave no weight to an independent medical examination report, prepared by a chiropractor, because it was not notarized pursuant to CPLR 2106, the arbitration award was vacated and remanded on the ground of arbitrariness because the no-fault arbitrator adhered to the evidentiary rule in CPLR 2106 with strict conformity, although such conformity was not required in arbitration (*Auto One Ins. Co. v Hillside Chiropractic, P.C.*, 126 AD3d 423, 424 [1st Dept 2015]). This case is also one where the arbitrator adhered to an evidentiary rule that was not required.

For this review, the court will follow the First Department rule that a duly affirmed electronic signature, pursuant to CPLR 2106, does not need more evidence to support it, without some further indication of a lack of authenticity. Here, the arbitrator rejected the peer review for no other reason than it bore an electronic signature. There was no other reason to doubt the signature. The court grants MVAIC's motion to vacate the lower arbitration decision on the ground of arbitrariness. The master arbitrator's decision is likewise vacated.

It is hereby

ORDERED, ADJUDGED, and DECREED that judgment be entered herein vacating and setting aside the lower arbitrator's award and the master arbitrator's award, and it is further

ORDERED, ADJUGED, and DECREED that a rehearing of controversies between the petitioner MVAIC and the respondent Lida Medical Supply, Inc./Darnelle Davis be had.
No costs.

9/11/2020
DATE

MELISSA ANNE CRANE, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[X]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**