

Country-Wide Ins. Co. v SMK Pharm. Corp.
2020 NY Slip Op 33006(U)
September 10, 2020
Supreme Court, New York County
Docket Number: 655847/2019
Judge: Melissa A. Crane
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. MELISSA ANNE CRANE</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>COUNTRY-WIDE INSURANCE COMPANY</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>SMK PHARMACY CORP.</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART IAS MOTION 15EFM</p> <p>INDEX NO. <u>655847/2019</u></p> <p>MOTION DATE <u>10/08/2019,</u> <u>11/08/2019</u></p> <p>MOTION SEQ. NO. <u>001 002</u></p> <p style="text-align: center;">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 22 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

By notice of petition (motion sequence number 001), petitioner Country-Wide Insurance Company (Country-Wide) seeks, pursuant to CPLR 7511 (b) (1) (iii), to vacate a master arbitration award, dated July 10, 2019 and the original no-fault arbitrator's (NFA) award, dated April 9, 2019 in the underlying no-fault arbitration entitled *SMK Pharmacy Corp / Sheriff Ahmed v Country-Wide Ins. Co.*, AAA Case No 17-18-1110-0479, on the ground that the NFA's determination exceeded his powers and that the master arbitration award was imperfectly executed.

By notice of motion (motion sequence number 002), respondent SMK Pharmacy Corp. a/a/o Sheriff Ahmed (SMK) moves to dismiss the petition on the ground that the court lacks de novo subject matter jurisdiction under Insurance Law § 5106 (c), and because petitioner has failed to set forth grounds to disturb either the NFA's findings or the master arbitrator's findings.

BACKGROUND

Country-Wide issued non-party Malick Sillah (Sillah) a personal motor vehicle insurance policy, bearing policy no. RS-8136508-17, for the period of June 9, 2017 to June 9, 2018 (the Policy). The Policy provided coverage for, amongst other things, no-fault coverage, including coverage for accidents involving an insured pedestrian struck by a motor vehicle.

On November 30, 2017, Sheriff Ahmed (Ahmed) resided in Sillah's apartment. On that day, a motor vehicle struck Ahmed, a pedestrian, while he was crossing the intersection of Vyse Avenue and East 179th street in the Bronx. The driver of the vehicle fled the scene of the accident. Police were called and a report was taken. At the time of the accident, Ahmed did not own a vehicle or carry motor vehicle insurance of his own.

Ahmed submitted an application for no-fault benefits, dated March 1, 2018, to Country-Wide, under the Policy, wherein he described himself as a "pedestrian struck by hit + run vehicle" (petition, exhibit B). As a result of the accident, Ahmed sought medical treatment for injuries allegedly suffered and was prescribed several medications. The prescriptions were filled by SMK. SMK submitted to Country-Wide no-fault bills for the prescriptions, in the aggregate amount of \$664.46 (*id.*).

By denial of claim dated August 22, 2018, Country-Wide denied SMK's claims on the following ground:

"Per insured's statement, claimant is not a member of insured household. The claimant is not an "eligible" injured person under this policy"

(*id.*).

SMK demanded arbitration through the American Arbitration Association (AAA). Country-Wide's defense was predicated upon (1) a statement in its own investigator's report

indicating that the claimant, Ahmed, was not a relative of its insured, Sillah (the Report), and (2) a notarized statement by Sillah stating the same (the Statement). Based on these documents, Country-Wide argued that, because Ahmed was not Sillah's relative, Ahmed was not an insured under the Policy (*see* Insurance Law § 5102 [h] [defining "member of his household" as "a spouse, child or relative of the named insured who regularly resides in his household"]).

By award dated April 9, 2019, the NFA awarded SMK \$664.46 (petition, exhibit A). The NFA found that "[Country-Wide] failed to provide sufficient evidentiary basis to conclude that [Ahmed] was not a member of [Sillah's] household and not covered by the [Policy]" (*id.* at 2). The NFA also found "sufficient contradiction" between the investigator's report and Sillah's statement to call both documents into question and "render both of little or no value (*id.*). Based on this, the NFA concluded that Country-Wide "failed to show that [Ahmed] was not a member of [Sillah's] household" (*id.* at 3).

Country-Wide appealed the award to a master arbitrator. In a letter memorandum dated June 10, 2019, Country-Wide argued that the NFA's award was arbitrary and capricious because it created coverage for a person not entitled to receive coverage under the Policy (petition, exhibit C).

By award dated July 10, 2019, the master arbitrator affirmed the NFA's award, noting that "[t]he NFA's decisions on the factual matters are unappealable" (petition, exhibit D, at 2).

The master arbitrator then stated:

"There are a substantial number of decisions interpreting the definition [of 'member of his household'], and I was surprised to find that the Courts have not limited it to "a spouse, child or relative of the named insured"

(*id.*). The master arbitrator cited to *Government Empls. Ins. Co. v Paolicelli*, (303 AD2d 633 [2d Dept 2003]) for the proposition that "[t]he standard for determining residency for purposes of

insurance coverage requires something more than temporary or physical presence” in the insured’s residence (petition, exhibit D at 2). Finally, the master arbitrator determined that he has “a duty to accept [the NFA’s] conclusions and affirm his decision” (*id.* at 3).

DISCUSSION

An arbitration award may only be vacated where an arbitrator exceeded his or her power, or where the award violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*see Rubin Films LLC v Kaul*, 175 AD3d 419, 420 [1st Dept 2019], *citing Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480, 480 [1st Dept 2016]). “[A]n arbitrator’s rulings, unlike a trial court’s, are largely unreviewable” (*Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530, 534 [2010]).

Arbitration under the no-fault law is compulsory. Under compulsory arbitration, judicial review of an arbitrator’s award “is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record” (*Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [1990]). Therefore, the scope of a court’s review is limited to whether the arbitration award was arbitrary and capricious, irrational or without a plausible basis (*see Matter of Miller v Elrac, LLC*, 170 AD3d 436, 437 [1st Dept 2019], *citing Matter of Petrofsky (Allstate Ins. Co.)*, 54 NY2d 207 [1981]).

A master arbitrator may modify and/or vacate an underlying arbitration award based on the grounds set forth in CPLR Article 75 as well as on the ground that an award was incorrect as a matter of law (11 NYCRR 65-4.10 [a] [1] and [4]). A court sitting in review of a master arbitrator’s award is constrained by the following:

“A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact,

courts will not assume the role of overseers to conform the award to their sense of justice”

(*Madison Realty Capital, L.P. v Scarborough-St. James Corp.*, 135 AD3d 652, 652 [1st Dept 2016], quoting *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321 [1999]).

Even though the decision must have evidentiary support, the “[a]ssessment of the evidence presented at an arbitration proceeding is the arbitrator’s function rather than that of the court” (*Fitzgerald v Fahnstock & Co., Inc.*, 48 AD3d 246, 247 [1st Dept 2008] [internal quotation marks and citation omitted]). In addition, “[a]n arbitrator may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be . . .” (*id.* [internal quotation marks and citation omitted]).

Pursuant to article 75, arbitrators are not bound by substantive rules of law, including those of evidence (*see Matter of Silverman (Benmor Coats)*, 61 NY2d 299, 308 [1984]). In addition, “[e]ven where an arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator's decision” (*Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d at 534). Further, “[a]n arbitral award cannot be attacked on the ground that an arbitrator refused to consider, or failed to appreciate, particular evidence or arguments” (*Genger v Genger*, 87 AD3d 871, 874, n 2 [1st Dept 2011], citing *Matter of Solow Bldg. Co. v Morgan Guar. Trust Co. of N.Y.*, 6 AD3d 356 [1st Dept 2004], lv denied 3 NY3d 605 (2004), cert denied 543 US 1148 [2005]).

Here, Country-Wide fails to set forth a sufficient basis to set aside the awards. The NFA reviewed the evidence submitted by petitioner and respondent, including the Report and the Statement. The NFA determined that the Report and the Statement contained contradictions that

made both documents “of little or no value” (petition, exhibit A at 2). On that basis, the NFA found that the evidence supplied by Country-Wide “failed to show that [Ahmed] was not a member of [Sillah’s] household” (*id.* at 3). The court finds no basis to disturb this finding (*Fitzgerald v Fahnestock & Co., Inc.*, 48 AD3d at 247).

Further, the court finds the master arbitrator correctly determined that the NFA’s determination did not exceed his powers and was not arbitrary or capricious. As noted above, after a review of the evidence provided, the NFA was not persuaded that Ahmed was not a resident of Sillah’s apartment and found that Country-Wide had not met its burden. As the master arbitrator correctly noted, decisions on factual matters are unappealable to a master arbitrator (11 NYCRR 65-4.10 [a] [4] [“procedural or factual errors committed in the arbitration below are not encompassed” in a master arbitrator’s review]). In addition, with respect to this petition, the NFA’s findings – which go to the credibility and weight of the evidence provided – is not within the scope of this court’s review (*Fitzgerald v Fahnestock & Co., Inc.*, 48 AD3d at 247; *see also Madison Realty Capital, L.P. v Scarborough-St. James Corp.*, 135 AD3d at 652).

The court notes that the master arbitrator erred in his analysis of *Government Empls. Ins. Co. v Paolicelli*. As correctly pointed out by Country-Wide, *Paolicelli* does not set aside the requirement that a “resident-relative” be a spouse, child or relative of the insured. Rather, it addresses whether a “spouse, child or relative of the named insured” in fact, resided in the home of the insured and sets forth a framework to make such a determination (*see* 303 AD2d at 633-634).

That said, this error is immaterial in light of the NFA’s clear finding that Country-Wide failed to provide sufficient evidence to persuade him that Ahmed was not a member of Sillah’s household in the first instance (*see Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15

NY3d at 534). Further, the NFA’s statement that he “got the feeling” that Sillah was intimidated into making the Statement is, in and of itself, not grounds for vacating the award (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006] [“An arbitration award must be upheld when the arbitrator ‘offer[s] even a barely colorable justification for the outcome reached’ (citation omitted)]; *Fitzgerald v Fahnestock & Co., Inc.*, 48 AD3d at 247 [“[a]n arbitrator may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be”] [internal quotation marks and citation omitted]).

Finally, SMK is entitled to an award of attorneys’ fees for services rendered in connection with this “court appeal from a master arbitration award,” that are to be awarded as a matter of course (11 NYCRR 65-4.10 [j] [4]; *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 705 [2d Dept 2017]). However, SMK has submitted no proof as to the amount of those fees. Accordingly, the court denies the motion to the extent it seeks attorney’s fees without prejudice to making a separate motion for same upon proper proof.

The parties remaining arguments have been considered and found to be unpersuasive.

CONCLUSION

For the foregoing reasons, it is

ORDERED that the petition by Country-Wide Insurance Company (motion sequence number 001) is denied and the proceeding is dismissed; and it is further

ORDERED that the motion by SMK Pharmacy Corp a/a/o Sheriff Ahmed (motion sequence number 002) is granted; and it is further

ORDERED AND ADJUDGED that the master arbitration award in this matter is hereby confirmed; and it is further

ORDERED that the Clerk of the Court may enter judgment accordingly; and it is further

ORDERED that that part of SMK’s motion for attorney’s fees is denied without prejudice; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry upon all parties within 20 days.

9/10/2020
DATE


MELISSA ANNE CRANE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE