Ameriprise Ins. Co. v Electrodiagnostic & Physical Medicine, P.C.
2020 NY Slip Op 33246(U)
October 2, 2020
Supreme Court, New York County
Docket Number: 652106/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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AMERIPRISE INSURANCE COMPANY, Index No.: 652106/2019

Petitioner,

-against-

Motion Seq. No. 001

ELECTRODIAGNOSTIC & PHYSICAL MEDICINE, P.C.
a/a/o DONA JOHNSON,

Respondent.

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PAPERS NUMBERED

Notice of Motion/Order to Show Cause — Affidavits — Exhibits … _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

CROSS-MOTION: YES X NO

Petitioner Ameriprise Insurance Company (Ameriprise) moves pursuant to CPLR 7501 (b)(1)(iii) to vacate an award of a master arbitrator dated March 30, 2019, that affirmed the award of a lower arbitrator, dated November 27, 2018, awarding $1,756.20 in no-fault motorist benefits to respondent Electrodiagnostic & Physical Medicine, P.C. (EPM) as assignee of Dona Johnson (Johnson).

Johnson was allegedly injured in a motor vehicle accident on December 9, 2015. As part of her medical treatment, EPM provided Johnson with physical therapy and office visits between August 30, 2016 and April 7, 2017. Johnson assigned EPM right to recover no-fault benefits from Ameriprise under policy number AI02373219, that provided a limit of $50,000.00 in Personal Injury Protection (PIP) and $5,000.00 in Medical Expense coverage. EPM submitted claims for its services in the amount of $1,756.20. Ameriprise denied the claim based upon two medical examinations conducted in June 2016.

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On June 28, 2017, EPM commenced an arbitration proceeding seeking recovery of the unpaid claims, plus statutory interest, attorney fees, and filing fees. Ameriprise submitted a response raising the lack of medical necessity as its sole defense. A hearing was held on November 21, 2018 before arbitrator Thomas Awad, Esq. In his November 27, 2018 arbitration award, Awad found in favor of EPM, stating that EPM's medical evidence was more credible and persuasive. The arbitrator awarded EPM the $1,756.20 demanded, plus interest of 2% per month and attorney's fees pursuant to 11 NYCRR 65-4.6.

Ameriprise thereafter sought reversal of the award before master arbitrator Robert Trestman, Esq. (Trestman). In that proceeding, Ameriprise did not challenge the medical necessity of the treatments, but instead relied solely upon the exhaustion of the policy limits. Specifically, Ameriprise asserted that between January 12, 2016 and August 29, 2017, it had made payments under the policy of $44,000 for PIP, $5,000 for Medical Pay and $6,000 for lost wages. Trestman rejected this defense on the ground that it had not been raised at the initial arbitration proceeding, noting that 11 NYCRR 65-4.10 (c)(6) states that "[t]he master arbitrator shall only consider those matters which were the subject of the arbitration below or which were included in the arbitration award appealed from." Trestman further observed that Ameriprise had had the opportunity to raise the exhaustion issue at the first hearing insofar as it conceded that the policy limits had been reached in August 2017, approximately 15 months prior to the hearing.

The petition is granted. Under 11 NYCRR 65-4.10(a)(2), one of the grounds upon which a master arbitrator is authorized to vacate a lower arbitrator's award is "that the award required the insurer to pay amounts in excess of the policy limitations." Under CPLR 7511 (b)(1)(iii), "an award may be vacated if the arbitrator exceeds his or her power" and "[a]n arbitrator exceeds

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his/her power if the award is 'beyond the policy limits'" (*Ameriprise Ins. Co. v Kensington Radiology Group.*, P.C., 179 AD3d 563, 564 [1st Dept 2020] *quoting Matter of Brijmohan v State Farm Ins. Co.*, 92 NY2d 821, 823 [1998]; *see also Countrywide Ins. Co. v Sawh*, 272 AD2d 245 [1st Dept 2000]). Because Ameriprise has submitted uncontroverted proof that the policy limits were exhausted at the time of the lower arbitration, the master arbitrator's award must be vacated (*see Country-Wide Ins. Co. v Walter E. Mendoza Chiropractic P.C.*, 2020 WL 1929820, *2 [Sup Ct, NY Co 2020]; *Country-Wide Ins. Co. v. Harmony JY Acupuncture, PC*, 2020 WL 1033760 *2 [Sup Ct, NY Co 2020]); *IDS Property Cas. Ins. Co. v Novelli Wellness Chiropractic*, 2019 WL 3764057, *1 [Sup Ct, NY Co. 2019]; *IDS Property Cas. Ins. Co. v Jerry J. Tracey III, Physician PLLC*, 2019 WL 4274330, *1 (Sup Ct, NY Co 2019]).

EPM nevertheless contends that there is a conflict between the prohibition of 11 NYCRR 65-4.10(a)(2) against an award exceeding the policy limits, and the prohibition of 65-4.10 (c)(6) against a master arbitrator's consideration of matters not before the lower arbitrator. In view of the conflict, EPM urges that the master arbitrator acted within his discretion to resolve a question of interpretative law. The Court rejects this argument, because "[t]he defense that an award exceeds an arbitrator's power is so important that a party may introduce evidence for the first time when the other party tries to confirm the award" (*Ameriprise,* 179 AD3d 563, 564, *citing Brijmohan,* 92 NY2d 821, 822–23).

Finally, in view of the Court's holding in favor of petitioner, respondent is not entitled to attorney's fees (*see Presbyterian Hosp. in the City of New York v Maryland Cas. Co.*, 90 NY2d 274, 278 [1997]; *Country v Mendoza Chiropractic*, 2020 WL 1929820, *3).

Accordingly, it is

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ADJUDGED that the petition is granted, and the Award, dated March 30, 2019, rendered in favor of respondent Electrodiagnostic & Physical Medicine, P.C. a/a/o Dona Johnson, and against petitioner is disaffirmed and vacated.

Dated: October 2, 2020
New York, New York

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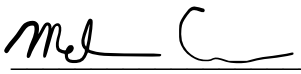

MELISSA A. CRANE, J.S.C.

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