

Country-Wide Ins. Co. v Protechmed Inc.

2020 NY Slip Op 33910(U)

November 24, 2020

Supreme Court, New York County

Docket Number: 650846/2020

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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INDEX NO. 650846/2020

COUNTRY-WIDE INSURANCE COMPANY

MOTION DATE 10/31/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

PROTECHMED INC.,

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

Upon the foregoing documents, it is

ORDERED that the petition of Petitioner Country-Wide Insurance Company (Motion Seq. 001) is denied in its entirety; and the Award of the Lower Arbitrator, as affirmed by Master Arbitrator, is confirmed; and it is further

ORDERED that the cross-petition of Respondent Protechmed Inc. (Motion Seq. 001) for the confirmation of the Award is granted; and it is further

ORDERED that Respondent's application for attorney's fees in the amount of \$2,700 is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent shall serve a copy of this order, along with notice of entry, on all parties within 20 days of entry.

MEMORANDUM DECISION

In this Article 75 action, Petitioner Country-Wide Insurance Company seeks, pursuant to CPLR 7511(b)(1)(i) and (iii), an order vacating a no-fault arbitration award dated September 9, 2019 (the "Award") issued in favor of Respondent Protechmed Inc. Respondent opposes and cross-moves for the confirmation of the Award.

For the reasons set forth below, the Court denies the petition to vacate the Award and grants the cross-petition for its confirmation.

BACKGROUND FACTS

Mr. Felix Popo (“Mr. Popo”), Respondent’s assignor, was injured in an automobile accident on November 14, 2016 and sought medical treatment from Respondent on October 4, 2017 (NYSCEF doc Nos. 1, ¶¶ 3-5). Respondent thereafter submitted medical bills to Petitioner for reimbursement on October 11, 2017, which were received by Petitioner on October 18, 2017 (NYSCEF doc No. 4, p. 4). The claim was denied by Petitioner on November 7, 2017 based upon an Independent Medical Examination Report (the “IME Report”) indicating that there was no medical necessity for Mr. Popo to seek further treatment (*Id.*).

The parties then proceeded to arbitration before arbitrator Christopher Persad (the “Lower Arbitrator”) on July 3, 2019. At said proceeding, Petitioner raised the defense of lack of medical necessity and exhaustion of the \$50,000 policy limit. The Lower Arbitrator rejected both arguments, finding that the IME Report failed to set forth an adequate factual basis and medical rationale for the rejection of the disputed claim and that Petitioner failed to submit documents to establish its allegation of policy exhaustion (NYSCEF doc No. 3, pp. 4-5). Accordingly, the Lower Arbitrator issued the Award in favor of Respondent herein and granted its claim in the amount of \$620.62, plus attorney’s fees (NYSCEF doc No. 3).

On October 15, 2019, Petitioner sought review of the Award on the ground that the Lower Arbitrator erred in finding the IME Report insufficient given that it was based on “various objective measurements and testing” (NYSCE doc No. 5, p. 6). Petitioner also argued that, based on the payout ledger and declaration page it submitted as evidence, it had already paid \$50,018.38 out of the \$50,000 policy. Master Arbitrator Richard Ancowitz, however, affirmed the Award,

holding that Petitioner's evidence "did not clearly demonstrate policy exhaustion" "nor [did] he find that the arbitrator's review of the medical evidence was in any way infirm" (NYSCEF doc No. 6, p. 2).

Petitioner now seeks vacatur of the Award pursuant to CPLR 7511 (b)(1)(i) and (iii). In support, Petitioner argues that the Lower Arbitrator's disregard of Petitioner's evidence in support of policy exhaustion constitutes misconduct under CPLR § 7511 (b)(1)(i) (NYSCEF doc No. 1, ¶ 25). Petitioner further argues that the Lower Arbitrator exceeded his power under CPLR § 7511 (b)(1)(iii) when he issued an award directing payment in excess of the monetary limit of the subject no-fault insurance policy (*Id.*, ¶¶ 18-24).

In opposition, Respondent argues that a de novo review is unavailable under CPLR Article 75 (NYSCEF doc No. 13, ¶¶ 7-13). In any event, Respondent maintains that an award can only be found in excess of an arbitrator's power if it directs payment of claims which became due after the policy has been exhausted in claim priority-order (*Id.*, ¶¶ 18-26). Simultaneous to opposing the Petition, Respondent cross-moves for confirmation of the Award and seeks an award of attorney's fees.

DISCUSSION

In pertinent part, Insurance Law § 5106 (c) provides that "[the] award of a master arbitrator shall be binding except for the grounds for review set forth in article seventy-five of the civil practice law and rules, and provided further that where the amount of such master arbitrator's award is five thousand dollars or greater...the insurer or the claimant may institute a court action to adjudicate the dispute de novo."

Similarly, 11 NYCRR § 65-4.10(h)(1) provides that "[a] decision of a master arbitrator is final and binding, except for: (i) court review pursuant to an article 75 proceeding; or (ii) if the

award of the master arbitrator is \$ 5,000 or greater, exclusive of interest and attorney's fees, either party may, in lieu of an article 75 proceeding, institute a court action to adjudicate the dispute de novo.”

As explained by the Court of Appeals in *Greenberg v Ryder Truck Rental, Inc.*, 70 NY2d 573, “judicial review” of a master arbitrator's award is limited to the grounds set forth in CPLR article 75 unless the award is \$ 5,000 or more, in which case the entire dispute is subject to a “plenary judicial adjudication”...The \$5,000 award provision is [the] threshold to acquiring the de novo court adjudication” (citations omitted).¹

Here, what was filed before this Court is a petition for vacatur of an award pursuant to CPLR Article 75, not an application for relief from an adverse award by trial de novo. Therefore, this Court’s power of review does not include de novo review of facts or determination of the weight of evidence; rather, its power is defined by the narrow standard of judicial review under Article 75, as explained below.

The Scope of Judicial Review under Article 75

Under CPLR Article 75, a final and definite arbitration award will not be vacated unless “it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power” (*See Matter of Isernio v Blue Star Jets, LLC*, 140 AD3d 480, 480, 31 N.Y.S.3d 884 [1st Dept 2016]). Where arbitration is compulsory, “judicial review under CPLR Article 75 is broad, requiring that the award be in accord with due process and supported by adequate evidence in the record The award must also be rational and satisfy the arbitrary and capricious standard of CPLR article 78” (*Motor Veh. Mfrs. Ass'n of U.S. v State of New York*, 75 NY2d 175, 550 N.E.2d 919, 551N.Y.S.2d 470 [1990]). While compulsory arbitration decisions

¹ The Award in the amount of \$620.62 is clearly below the \$5,000 threshold.

require a stricter scrutiny than consensual ones, courts are still bound by the arbitrator's factual findings, interpretation of relevant documents, and judgment concerning remedies. A court cannot substitute its judgment for that of the arbitrator simply because it believes its interpretation is superior to that of an arbitrator who has made errors of judgment or fact (*Matter of New York State Correctional Officers & Police Benevolent Ass'n v. State of New York*, 94 NY2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 [1999]).

Awards are also not vacated even where the error claimed is the incorrect application of a rule of substantive law, unless the error is so "irrational as to require vacate" (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232, 433 N.E.2d 509, 448 N.Y.S.2d 444 [1982]). To be upheld, an award in an arbitration proceeding need only have evidentiary support and not be arbitrary and capricious (*See Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223, 674 N.E.2d 1349, 652 N.Y.S.2d 584 [1996]). Even though the decision must have evidentiary support, "[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, 850 N.Y.S.2d 452 [1st Dept 2008], quoting *Peckerman v D & D Assocs.*, 165 AD2d 289, 296, 567 N.Y.S.2d 416 [1st Dep't 1991]). Under Article 75, arbitrators are not bound by substantive rules of law, including those of evidence. (*Silverman v Benmor Coats, Inc.*, 61 N.Y.2d 299, 308, 461 N.E.2d 1261, 473 N.Y.S.2d 774 [1984]). "An 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, 929 N.Y.S.2d 232 [1st Dept 2011]). Under CPLR 7511(b)(1)(iii), as long as an arbitrator addresses the issues submitted for resolution, vacatur will not be granted, unless the award is completely irrational -- that is, the resulting award goes beyond

the issues before the arbitrator (*Rochester City Sch. Dist. v Rochester Teachers Ass'n*, 41 NY2d 578, 582, 362 N.E.2d 977, 394 N.Y.S.2d 179 [1977]).

The Standards as Applied to this Case

Petitioner argues that vacatur of the award is warranted under CPLR 7511 (b)(1)(i) and CPLR 7511 (b)(1)(iii) as the Lower Arbitrator allegedly disregarded evidence and exceeded his power by issuing an award beyond the policy coverage of \$50,000. Respondent contends, however, that the Lower Arbitrator considered all evidence and, on the basis thereof, rejected Petitioner's claim of policy exhaustion.

Under CPLR 7511 (b)(1)(i), an award may be vacated if the Court finds that the rights of a party were prejudiced by "corruption, fraud or misconduct in procuring the award". Here, the Court finds that Petitioner failed to substantiate its claim of misconduct on the part of the Lower Arbitrator. Contrary to Petitioner's allegation, the record shows that the Lower Arbitrator considered all the evidence submitted by the parties, including the payout ledger and declaration page that allegedly were ignored by the Lower Arbitrator. The Lower Arbitrator, however, found the ledger and declaration page to be insufficient, holding that "[Petitioner's] attorney was unable to sufficiently explain, the pay outs, allegedly made by the [Petitioner]." (NYSCEF doc No. 3, p. 2). However, in the exercise of caution, and to the Lower Arbitrator's credit, the Lower Arbitrator directed Petitioner to supplement its evidence by submitting "an affidavit, from one with knowledge, detailing the pay outs on this claim." (*Id.*) Petitioner failed to comply with this directive, leaving the Lower Arbitrator with just the bare payout ledger and declaration page to consider. As Petitioner was given the opportunity to substantiate its claim of policy exhaustion but did nothing, it cannot now use this forum to escape the consequences of its inaction. The Court therefore rejects Petitioner's application to vacate the Award pursuant to CPLR 7511 (b)(1)(i).

Turning now to CPLR 7511 (b)(1)(iii), this provision provides a basis to vacate an award if “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.” Indeed, “an arbitration award made in excess of the contractual limits of an insurance policy has been deemed an action in excess of authority” (*State Farm Ins. Co. v. Credle*, 228 A.D.2d 191 [1st Dept 1996]). Such excess of authority constitutes grounds for vacatur of the award (*See Matter of Brijmohan v. State Farm Ins. Co.*, 92 N.Y.2d 821, 822 [NY Ct App, 1998]; *Countrywide Ins. Co. v. Sawh*, 272 A.D.2d at 245 [1st Dept 2000]; 11 NYCRR 65-1.1).

The Court finds that vacatur of the Award under CPLR 7511 (b)(1)(iii) is unwarranted in view of the Lower Arbitrator’s rational finding that Petitioner failed to demonstrate evidence of policy exhaustion. Given that the scope of judicial review under CPLR 7511 is narrowly limited, this Court cannot revisit and weigh Petitioner’s evidence all over again. Even if the Court does, Petitioner’s bare payout ledger fails to clearly show that the policy was properly exhausted before Petitioner was obligated to pay the claims at issue here (*see Mount Sinai Hosp. v. Dust Tr., Inc.*, 104 AD3d 823 [2d Dept 2013] [Similar to this case, the defendant therein “failed to establish the order in which the medical services were rendered, and the order in which the claims were received.” Thus, the Court held that based on the record, “it cannot be determined whether the defendant’s purported payments were made in compliance with 11 NYCRR 65-3.15.”])

The Court rejects the cases cited by Petitioner as they are inapplicable here. While the case of *Nyack Hospital v General Motors Acceptance Corp.* (8 NY3d 294 [2007]) stands for the proposition that an insurer awaiting additional verification is not precluded from paying other legitimate claims that may exhaust the policy limit, *Nyack Hospital* finds no application here as Petitioner failed to establish policy exhaustion in the first place. The pronouncement “failure to

disclaim coverage does not create coverage” from *Zappone v Home Ins. Co.* (55 NY2d 131 [1982]) is irrelevant here as *Zappone* involves the application of N.Y. Insurance Law § 167 (8) which imposed duty on insurers to give timely notice of a disclaimer or denial of liability. The case of *Brijmohan v State Farm Insurance* (92 NY2d 821 [1998]) also does not help Petitioner. In *Brijmohan*, the insurer failed to correct claimant’s statement during the arbitration that the coverage in question was \$100,000, when in fact the policy only covered losses up to \$ 10,000. Thus, the Court of Appeals vacated the Award of \$75,000 as it was beyond the correct policy limit. Here, there is no dispute that the policy limit is \$50,000 but Petitioner failed to show that at the time Respondent’s claim became due, there was not enough money from the policy to satisfy the same.

Petitioner also cites to Appellate Term cases in support of its position, but the Court finds these cases to be similarly inapplicable. The case of *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.* (2015 NY Slip Op 50525(U) [Sup. Ct., App. Term, 1st Dept]) does not involve a proceeding commenced pursuant to CPLR 7511.² While the other case, *Allstate Prop. & Cas. Ins. Co. v Northeast Anesthesia & Pain Mgt.* (206 NY Slip Op 50828 (U) [Sup. Ct., App. Term, 1st Dept]), involves a proceeding to vacate an arbitral award, it is not clear whether the same was commenced pursuant to CPLR 7511. In any event, the *Allstate* holding is inapposite as the evidence tendered by petitioner therein showed “when claims by various providers were received”, raising “triable issues as to whether the \$50,000 policy limit had been exhausted by payments of no-fault benefits to respondent and other health care providers before petitioner was obligated to pay the claims at issue [therein].” Here, Petitioner presented no such evidence to the Lower

² The case reached the Appellate Term by an appeal from a denial of summary judgment dismissing a complaint.

Arbitrator. Thus, the record is unclear whether Petitioner's purported payments were made in compliance with 11 NYCRR 65-3.15.

Attorney's Fees

Respondent seeks an award of attorney's fees pursuant to 11 N.Y.C.R.R. §65-4.10(j)(4). In support, Respondent submitted an affirmation detailing the hours spent by its counsel preparing the opposition to Petitioner's petition and the cross-petition for confirmation (see NYSCEF doc No. 5). In the affirmation, Respondent's counsel avers that they spent a total of 9 hours of legal work. Respondent seeks attorney's fees in the amount of \$2,700 pursuant to counsel's billing rate of \$300 per hour.

The Court finds that Respondent is entitled to attorney's fees. In *Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], the court held that the "Supreme Court has authority to award attorney's fees as this is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10 (j) (4), which, in pertinent part, provides: "The attorney's fee for services rendered in connection with . . . a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter." (see also *Matter of GEICO Ins. Co. v. AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]). The Court has reviewed Respondent's submission in support of its application for attorney's fees (NYSCEF doc No. 20) and finds the same to be reasonable and adequate. Thus, Respondent's application for attorney's fees in the amount of \$2,700 is granted.

CONCLUSION

Based on the foregoing, it is hereby

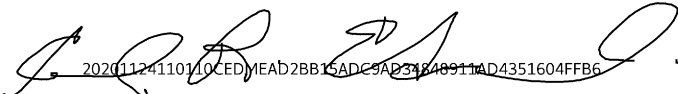
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11/24/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE