Technology Ins. Co. v Allstate Fire & Cas. Ins. Co.
2021 NY Slip Op 31051(U)
March 30, 2021
Supreme Court, New York County
Docket Number: 655007/2020
Judge: Carol R. Edmead

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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TECHNOLOGY INSURANCE COMPANY A/S/O JERCO, INC.,

Plaintiff,

- v -

ALLSTATE FIRE & CASUALTY INSURANCE COMPANY,

Defendant.

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INDEX NO. 655007/2020

MOTION DATE 10/06/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 10, 11, 12, 13, 14, 15

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

Upon the foregoing documents, it is

ORDERED that the petition of Petitioner Technology Insurance Company A/S/O Jerco, Inc. (Motion Seq. 001) is denied in its entirety; and the Award is confirmed; and it is further

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

ORDERED that counsel for Respondent Allstate Fire & Casualty Insurance Company 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 Technology Insurance Company ("Technology") seeks, pursuant to CPLR 7511, to vacate the "PIP Decision" dated August 7, 2020 (the "Award") issued by Ms. April Rivera (the "Arbitrator") of the Arbitration Forums, Inc. Respondent Allstate Fire & Casualty Insurance Company ("Allstate") opposes and seeks that the Award be confirmed.

For the reasons set forth below, the Court denies the petition to vacate the Award and confirms the Award pursuant to CPLR 7511(e).[1]

BACKGROUND FACTS

On November 12, 2018, the vehicle operated by Mr. Wilbert Stukes ("Mr. Stukes") was "stopped in traffic" and was hit in the rear by a vehicle operated by Mr. James Slater and owned by Mr. Charles Zanghi.

At the time of the accident, Mr. Stukes was employed by Jerco Inc., Petitioner's insured under the Worker's Compensation Law of the State of New York. Mr. Zanghi, on the other hand, was Respondent's insured.

As a result of the accident, Petitioner paid a total of $ 47,521.81 in medical and wage payment benefits to or on behalf of Mr. Stukes (see NYSCEF doc No. 5).

On June 16, 2020, Petitioner commenced arbitration to seek reimbursement from Respondent. At the arbitration, Petitioner argued that Insurance Law § 5105, which allows for loss transfer where at least one of the motor vehicles involved in an accident either weighs more than 6,500 pounds or is a motor vehicle for hire, is applicable.

The Arbitrator rejected the argument holding that "the police report [the "Police Report"] does not indicate that the vehicles are used for hire, nor does it establish that the unloaded weight

[1] "…upon the denial of a motion to vacate or modify, [the Court] shall confirm the award."

of either of these vehicles is in excess of 6500 pounds." The Arbitrator accordingly issued the Award denying Petitioner's claim.

Petitioner now seeks to vacate the Award. In support, Petitioner advances two arguments: (i) *first*, that the Police Report shows that Mr. Stukes' vehicle was a tow truck as it is described as "Vehicle Type: TOW" and its plate number ends in "TT"; and (ii) *second*, that the Vehicle and Traffic Law ("VTL") confirms that a duly registered tow truck satisfies both qualifications of §5105, *i.e.*, it qualifies as both a vehicle for hire and a vehicle that weighs in excess of 6,500 pounds.

Respondent opposes and argues that the Arbitrator considered the only evidence presented by Petitioner which was the Police Report and found that this was insufficient to establish that Mr. Stukes' vehicle was for hire or weighed in excess of 6500 pounds.

DISCUSSION

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including where the award violates strong public policy, is irrational, or clearly 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 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]).

Here, Petitioner commenced the arbitration to seek reimbursement from Respondent on the basis of Insurance Law § 5105 which, in pertinent part, provides that:

> Any insurer liable for the payment of first party benefits to or on behalf of a covered person and any compensation provider paying benefits in lieu of first party benefits which another insurer would otherwise be obligated to pay pursuant to subsection (a) of section five thousand one hundred three of this article or section five thousand two hundred twenty-one of this chapter has the right to recover the amount paid from the insurer of any other covered person to the extent that such other covered person would have been liable, but for the provisions of this article, to pay damages in an action at law. In any case**, the right to recover exists only if at least one of the motor vehicles involved is a motor vehicle weighing more than six thousand five hundred pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire**.... (emphasis added)

Pursuant to the above provision, therefore, Petitioner had the burden to establish at arbitration that at least one of the vehicles involved in the accident either weighted more than 6,500 pounds or was a motor vehicle for hire.

The Court finds that the Arbitrator's conclusion that Petitioner failed to establish the applicability of Insurance Law § 5105 had a rational basis. Petitioner submitted only one evidence to support its case and that is the Police Report which indicated Mr. Stukes' vehicles type as "TOW" (NYSCEF doc No. 3). It was not irrational for the Arbitrator to find that "[t[his alone does not establish that loss transfer would be applicable since the police report does not indicate that the vehicles used for hire, nor does it establish that the unloaded weight of either of these vehicles is in excess of 6500 pounds." (NYSCEF doc No. 3) It does not appear that Petitioner provided the Arbitrator with any authority to hold that police report entries are conclusive evidence of a vehicle's make for purposes of meeting the requirements of Insurance Law § 5105. As Respondent pointed out, Petitioner could have submitted other evidence such as affidavits, relevant insurance policies or registration papers to discharge its burden; instead, Petitioner opted to rely solely on the Police Report. 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. "Assessment 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)

Petitioner, however, argues that the fact that Mr. Stukes' vehicle bore a license plate ending in "TT" shows that it was registered as a tow truck. According to Petitioner, under VTL §401-b, a tow truck is a "motor vehicle operated for hire" and that a motor vehicle cannot be registered as such "unless it shall have a gross vehicle weight rating of at least eighty-six hundred pounds." (NYSCEF doc No. 1, §§ 17-20)

This Court rejects this argument as it is being improperly raised for the first time before this Court. Respondent alleges, and Petitioner does not deny, that Petitioner never raised this legal argument at arbitration. While certain arguments may be raised for the first time on a motion to vacate, such as violation of public policy (*see e.g.*, *Denson v Donald J Trump for President, Inc.*, 180 Ad3d 446 [1st Dept 2020]) or policy exhaustion (*see e.g.*, of *Matter of Ameriprise Inc. Co. v Kensington Radiology Group, P.C.* (179 AD3d 563 [1st Dept 2020]), Petitioner failed to provide any Court of Appeals or First Department authority that will allow this Court to consider arguments it never raised at arbitration.

Therefore, this Court denies Petitioners' application to vacate the Award. Under CPLR 7511(e), "upon the denial of a motion to vacate or modify, [the Court] shall confirm the award." Accordingly, the Award is confirmed.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the petition of Petitioner Technology Insurance Company A/S/O Jerco, Inc. (Motion Seq. 001) is denied in its entirety; and the Award is confirmed; and it is further

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

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

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3/30/2021
DATE

CAROL R. EDMEAD, J.S.C.

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