

Matter of Lancer Ins. Co. v Kushetsky
2021 NY Slip Op 31950(U)
May 4, 2021
Supreme Court, Nassau County
Docket Number: 617831/19
Judge: Diccia T. Pineda-Kirwan
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Short Form Order/Judgment

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN
Justice

IA PART 20

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In the Matter of the Application of LANCER
INSURANCE COMPANY,

Index No.:617831/19
Motion Date: 3/4/21
Seq. No.: 1, 2
Teams: 11:45 A.M.

Petitioner(s),

-against-

JOANNA KUSHETSKY PT as assignee of
DMITRY BENDER,

Respondent(s).

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The following numbered papers read on this petition to vacate an Arbitration Award, and cross-petition by respondent to confirm an arbitration award.

PAPERS	NUMBERED
Notice of Petition-Petition-Exhibits.....	EF 1, 3 - 4, 7 - 12
Notice of Cross-Petition-Affidavits-Exhibits.....	EF 18 - 21
Answering Affidavits-Exhibits.....	EF 14 - 17
Replying.....	EF 5, 13

Upon the foregoing cited papers, and after Microsoft Teams conference, it is ordered that the petition by Lancer Insurance Company (“Lancer”) for an order pursuant to CPLR Article 75 vacating an Arbitration Award dated March 25, 2019 (“Award”), and Master Arbitration Award dated June 17, 2019 (“Master Award”), and cross-petition by respondent for an order confirming the awards, are consolidated for disposition, and are determined as follows:

This matter arises from a motor vehicle accident on June 16, 2016. Respondent, a health care provider, as assignee of claimant Dmitry Bender, sought no-fault benefits regarding a claim in the amount of \$1,662.46 for services rendered between December 9, 2016 and March 5, 2017. Lancer denied the claims on the basis that Mr. Bender was a passenger on a bus at the time of the accident and thus not an eligible injured person under Lancer’s policy, and therefore, reimbursement must be sought through his own carrier, Geico.

Respondent filed a No-Fault Arbitration demand with the American Arbitration Association. An arbitration was held on March 21, 2019, and in the Award dated March 25, 2019, determined that “[i]t is not at all clear to this Arbitrator that the Assignor was a passenger on a bus...” and awarded respondent \$1,662.46.

Lancer thereafter appealed for Master Arbitration, and the Master Award affirmed the Award in respondent’s favor. Lancer now seeks to vacate the Award and Master Award on the basis that both are arbitrary, capricious, irrational, and clearly contradicted by the evidence.

As a threshold matter, respondent contends that the petition to vacate the awards is untimely. Pursuant to CPLR 7511, a party’s application to vacate an arbitration award must be made within ninety days of its delivery to him or her. Here, the Master Award was dated June 17, 2019, and was mailed on June 19, 2019. Respondent maintains that since the instant petition was not made until December 20, 2019, six months later, it is thus untimely (*see* CPLR 7511[a]; *American Country Ins. V Allstate Ins. Co.*, 2007 NY Slip Op 32080[U][Sup Ct, NY County 2007]).

In response, Lancer does not dispute that this proceeding was not commenced within the 90-day period provided by CPLR 7511, but instead maintains that since it has provided proof that there is no coverage as the claimant was a passenger on a bus, coverage cannot be created whether or not the application is timely. However, the cases Lancer relies on deal with obviating the time requirements for disclaiming coverage pursuant to Insurance Law §§ 3420 (d) and 5106 (a), and 11 NYCRR 65.15 (g) (3) (*see State Farm Mut. Auto. Ins. Co. v Laguerre*, 305 AD2d 490, 491 [2003]; *Cent. Gen. Hosp. v Chubb Grp. of Ins. Companies*, 90 NY2d 195, 199 [1997]), and not the timeliness of a special proceeding to vacate an arbitration award pursuant to CPLR 7511.

Additionally, even if the proceeding was timely commenced, petitioner has not established its entitlement to vacate the awards. It is well-settled that there are three narrow grounds for vacating an arbitrator’s award: (1) that it violates public policy, (2) is irrational, or (3) clearly exceeds a specifically enumerated limitation on the arbitrator’s power (*see Matter of Shenendehowa Cent. Sch. Dist. Bd. of Educ.*, 20 NY3d 1026, 1027

[2013]; *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123 [2010]). Even if an arbitrator misapplies substantive rules of law or make an error of fact, the award will not be vacated unless one of the three narrow grounds applies (see *Chin v State Farm Ins. Co.*, 73 AD3d 918, 919 [2010]). The party seeking to vacate an arbitration award has a heavy burden and must establish a basis for such relief by clear and convincing evidence (see *Denaro v Cruz*, 115 AD3d 742, 742–43 [2014]).

Here, petitioner argues that the awards were arbitrary, capricious, irrational, and clearly contradicted by the evidence. However, in the Award, the arbitrator explains that the petitioner was permitted to submit post-hearing evidence in support of its denial, but took issue with the evidence provided. The arbitrator noted that although Lancer had submitted a computer screen-shot showing that the vehicle involved in the accident was a 2009 “SETR,” this term was not defined. Additionally, Lancer submitted a document titled “Business Auto Declarations,” but there was no explanation or an affidavit from the carrier to interpret these documents. The arbitrator concluded that “[i]t is not at all clear to this Arbitrator that the Assignor was a passenger on a bus...” and found in respondent’s favor.

A review of the record reveals that the awards were not arbitrary, capricious, irrational, or clearly contradicted by the evidence. The screen-shot is of an unidentified page that contains the date of the accident, a policy number, a description of the vehicle as a “2009 SETR” and a VIN number. No context is provided as to what this page is a screen-shot of, or the source or accuracy of the information provided on it. Nor, as the arbitrator noted, is there an explanation or an affidavit from the carrier to interpret the “Business Auto Declarations.”

However, even if petitioner had met its burden, pursuant to 11 NYCRR 65-1.1, insurance coverage does not apply to a personal injury sustained by a person occupying a bus, but only if such person is a named insured or relative under any other policy providing the coverage required by the New York Comprehensive Motor Vehicle Insurance Reparations Act. Although Lancer maintains that it provided the arbitrator with a DMV insurance expansion report indicating that at the time of this loss there existed a household automobile policy under the name of Yelena Bender with Geico, no copy of same is provided to the Court.

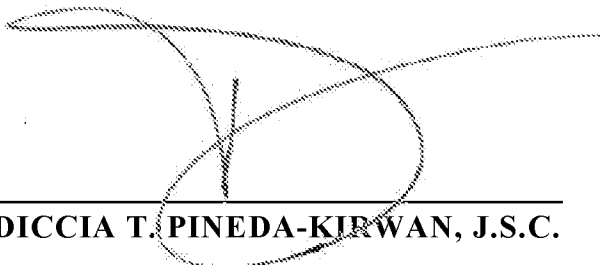
As to the cross petition, pursuant to CPLR 7510, “[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511” (CPLR 7510). Here, the Master Award was mailed on June 19, 2019, giving respondent until June 19, 2020 to seek confirmation. However, by Executive Order No. 202.8, issued by Governor Cuomo on March 20, 2020, statutes of limitations were tolled in response to the COVID-19 pandemic and the toll was renewed by further executive orders until, on October 4, 2020, the Governor issued Executive Order No. 202.67, extending the toll to November 3, 2020. As the cross petition was filed on October 1, 2020, it is therefore timely. In any event, as petitioner has not established a basis for *vacatur* pursuant to CPLR 7511(b), the Court must confirm the awards (*see* CPLR 7511 [e]; *Matter of Mercury Cas. Co. v Healthmakers Med. Group, P.C.*, 67 AD3d 1017 [2009]).

Lastly, respondent’s request for reasonable attorney’s fees is granted. Since this is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10(j)(4), respondent is entitled to an attorney’s fee which “shall be fixed by the court adjudicating the matter.” Here, respondent’s counsel submits an affirmation detailing that she expended 6 hours in answering the petition at a customary rate of \$300 per hour for a total of \$1,800.00 (*see Matter of Country-Wide Ins. Co. v Bay Needle Acupuncture, P.C.*, 162 AD3d 407 [2018]).

Accordingly, it is ORDERED and ADJUDGED that the petition is denied and dismissed, the awards are confirmed, and respondent is awarded attorney’s fees in the amount of \$1,800.00.

This constitutes the order and judgment of the Court.

Dated: May 4, 2021



DICCIA T. PINEDA-KIRWAN, J.S.C.

ENTERED

May 12 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE