

Country-Wide Ins. Co. v CPM Med Supply, Inc.

2022 NY Slip Op 30193(U)

January 10, 2022

Supreme Court, New York County

Docket Number: Index No. 651994/2021

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

Country-Wide Insurance Company

INDEX NO. 651994/2021

- v -

MOT. DATE

MOT. SEQ. NO. 002

CPM Med Supply, Inc. s/h/a CPM Medical Supply, Inc. a/a/o Renita A. Grant

The following papers were read on this motion to/for vacatur and to restore
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

In this Article 75 proceeding, petitioner Country-Wide Insurance Company ("Country-Wide") seeks an order pursuant to CPLR § 7511(b) vacating an arbitration award and the subsequent master arbitration award. Previously, in an order dated May 12, 2021, the petition was denied without prejudice to re-new within ninety days because petitioner failed to provide proof of service of the petition on the respondent in accordance with CPLR § 403(c). Twenty-two days later, on June 3, 2021, respondent CPM Med Supply, Inc. ("CPM") filed a "notice of cross petition" without an actual cross petition and only an affirmation in support. CPM seeks an order denying the petition and affirming the arbitration award, as well as attorney's fees. Petitioner then filed the instant motion to restore which is presently before the court. For the reasons that follow, the petition is denied and the award is confirmed.

The underlying arbitration award, dated June 29, 2020, resolved a dispute arising from medical treatment that Renita A. Grant, petitioner's insured, received as a result of a car accident. Following the accident, Grant received treatment for alleged injuries to her neck, lower back, left shoulder and right knee, including the purchase of durable medical equipment from the respondent, CPM. CPM billed Country-Wide, and in turn, Country-Wide denied payment on grounds of lack of medical necessity based on a medical exam of Grant performed by John Vitolo, MD (the "IME").

The parties proceeded to arbitration before Anne Malone (the "arbitrator") who determined that Country-Wide failed to demonstrate that the durable medical equipment provided by CPM was not medically necessary, and thus awarded CPM \$4,014.86 plus interest and attorney's fees. Country-Wide appealed the arbitrator's decision to master arbitrator Victor J. Hershendorfer who affirmed the award and granted CPM additional attorney's fees.

Dated: 1/10/2021

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [X] OTHER
3. Check if appropriate: [X] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

In the petition, Country-Wide asked the Court to vacate the arbitration award and the master arbitration award pursuant to CPLR § 7511(b)(1)(iii) on two grounds. First, it argued that the arbitrators exceeded their power by awarding payment in excess of the policy limit. Second, Country-Wide argued that the arbitrator was arbitrary, capricious, and incorrect as a matter of law in failing to sustain Country-Wide's denial of CPM's bill based upon Grant's IME.

CPM contends that the award was not in excess of the policy limit because the petitioner had funds available to pay the subject claim, CPM had priority of payment, and Country-Wide is barred from raising the defense of policy exhaustion after a judgment has been entered. CPM also argues that the arbitration award is proper because the lower arbitrator reviewed all the evidence and properly found that Country-Wide did not meet its burden of demonstrating that the durable medical equipment provided by CPM was not medically necessary. Finally, CPM asks for \$1,600 in attorney's fees.

Discussion

Petitioner's motion should be denied on procedural grounds. The petition was denied because Country-Wide failed to provide proof of service of the petition on the respondent. CPLR § 403(c) states that "a notice of petition shall be served in the same manner as a summons in an action". A corporation may be served pursuant to BCL § 306 via personal service on an agent of the corporation or pursuant to CPLR § 306 via personal service upon the secretary of state.

The petitioner failed to provide any proof of service of the original petition and has failed to do so again on its motion to restore. There is still no evidence that the petition has been properly served upon the respondent. The petitioner submitted service of the petition by mail and served courtesy copies of the petition upon the respondent but has failed to demonstrate any personal service as mandated by BCL § 306. Although petitioner's counsel argues in support of the instant motion that respondent voluntarily appeared in this proceeding and thereby concedes jurisdiction, petitioner has nonetheless failed to follow this court's directives which granted it a limited basis to renew the petition. Nor does petitioner's counsel's law office issues excuse its failure to properly serve process.

Nonetheless, the court will consider the merits of the petition since CPM has appeared in this proceeding and thus implicitly consented to jurisdiction. The court will treat CPM's affirmation in support as a cross petition for an order confirming the award and additional attorneys fees since there is no confusion as to what CPM seeks and petitioner has had an opportunity to reply.

Pursuant to CPLR § 7511(b)(1)(iii), an arbitration award shall be vacated on the application of a party who participated in the arbitration if the court finds that the rights of that party were prejudiced by an arbitrator making the award who exceeded his or her power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. Generally, judicial review of arbitration awards is extremely limited (*Wien & Malkin LLP v. Helmsley-Spear, Inc.* 6 NY3d 471 [2006]). An arbitration award will only be set aside if it is completely irrational, violative of a strong public policy, or exceeds a limitation on the arbitrator's power (*Obot v. New York State Dep't of Correctional Servs.*, 637 NYS2d 544 [4th Dept 1996] *aff'd* 653 NYS2d 883 [1996]). The deference given to arbitral awards is such that even a misapplication of the law will not be a sufficient basis for vacatur under CPLR § 7511 (*Matter of Douglas v. New York City Dept. of Educ.*, 34 NYS3d 340 [Sup Ct New York County 2016]; *Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 119 [1973]).

However, when an arbitration award is the result of a compulsory arbitration, courts will review the award with closer scrutiny (*State Farm Mut. Auto Ins. Co. v. Arabov*, 767 NYS2d 905 [2d Dept 1980]; *see Furstenberg v. Aetna Casualty & Surety Co.*, 49 NY2d 757 [1980]). An award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious (*Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]). The party moving to vacate bears the burden of proof (*see Matter of New Penn Motor Express, Inc. v. GEICO Gen. Ins. Co.*, 2011 NY Slip Op 32138(U) [Sup Ct Nassau County 2011]).

An arbitrator exceeds his power when he directs payments in an arbitration award that exceed the no fault policy cap of an insurance company (*Brijmohan v. State Farm Ins. Co.*, 92 NY2d 821 [1998]; *Countrywide Ins. Co. v. Sawh*, 272 AD2d 245 [1st Dept 2000]). Moreover, such error will not be waived if the party relying on it asserts it in opposition to an application for confirmation (*Matter of Ameriprise Ins. Co. v. Kensington Radiology Group PC*, 179 AD3d 563 [1st Dept. 2020]). However, in order for this policy exhaustion argument to succeed, the award must be for a claim that was complete and filed after the full amount of the policy has been exhausted (*Nyack Hosp. v. General Motors Acceptance Corp.*, 8 NY3d 294 [2007]). A claim is complete when the party filing that claim has provided all necessary information to verify the claim (*id.*). Once a complete claim has been filed, if there is still sufficient money as part of the policy to pay that claim, the insurance company has a duty to maintain that sum of money (*Alleviation Medical Services. P.C. v. Allstates Ins. Co.*, 55 Misc. 3d 44 [App. Term, 2d Dept. 2017]). A “bare payout ledger [which] fails to clearly show that the policy was properly exhausted before Petitioner was obligated to pay the claims at issue” does not substantiate a policy exhaustion defense (see *Country-Wide v. Nyeeqasc*, 2021 NY Slip Op 31792[U], 2021 WL 2141370 [Sup Ct NY Co 2021] [J. Edmead, C.]).

Here, Country-Wide has submitted a payout ledger which it claims demonstrates that it has paid over \$50,000 in healthcare services for Grant in connection with the car accident. However, the payment ledger has no dates as to when claims were made, completed or paid out. Therefore, Country-Wide has not sustained its policy exhaustion defense.

Country-Wide argues that in analyzing its policy exhaustion argument, the court should not follow the Court of Appeals in *Nyack*, *supra*, but instead *Acuhealth Acupuncture, PC v. New York City Tr. Auth.*, 2016 N.Y. Slip Op 50297[U] [Sup. Ct., Kings County 2016]). In the latter case, Justice Genovesi of the Kings County Supreme Court denied a petition to vacate an arbitration award on the ground that the arbitrator failed to consider priority of payment in connection with a policy exhaustion defense. Justice Genovesi held that even if the arbitrator made an error of law by failing to consider priority of payment, courts generally cannot review legal errors in an Article 75 proceeding. Thus, petitioner’s reliance on *Acuhealth* is misplaced, as the result reached by Justice Genovesi does not mandate the relief it seeks here. Even if it did, *Acuhealth* is a decision from a court of coordinate jurisdiction and this court is bound to follow *Nyack*.

Next, Country-Wide argues that the award should be vacated because the arbitrator was arbitrary, capricious and/or incorrect as a matter of law when she failed to sustain Country-Wide’s lack of medical necessity defense. Specifically, Country-Wide argues that Dr. Vitolo’s IME demonstrates a lack of medical necessity for the durable medical equipment that CPM billed for.

In the award, the arbitrator found that Country-Wide failed to meet its burden of proof on the issue of medical necessity because Dr. Vitolo’s IME report was not supported by evidence and was conclusory or vague because it failed to provide specifics as to that issue.

Meanwhile, in his report, Dr. Vitolo stated that Grant demonstrated restricted range of motion in the shoulders, the right knee and the cervical and thoracolumbar spine. Based on these observations and without the review of any medical records, Dr. Vitolo diagnosed Grant with cervical, lumbar sprain/strain, left shoulder strain and right knee sprain. He further stated that Grant “was not disabled from daily activities, that there was not any objective evidence of any permanency from the injuries sustained, and that, in his professional opinion, the claimant did not require household help nursing care or special transportation due to the injuries sustained.” However, Dr. Vitolo did not opine as to the medical necessity or lack thereof for the durable medical equipment which CPM provided and billed for.

Malone found that the facts in this case were similar to those of *Torres*, where an insurer failed to meet its *prima facie* burden because its physician failed “to explain or substantiate, with objective medical evidence, the basis for his conclusion” (*Torres v Garcia*, 59 AD3d 705 [2d Dept 2009]). Here, since Dr. Vitolo did not make an explicit determination around the durable medical equipment, Malone’s reli-

ance on *Torres* is proper. The court agrees with the master arbitrator and finds that Country-Wide failed to prove that the award was arbitrary and capricious or incorrect as a matter of law. Therefore, the court denies the motion and confirms the awards.

Finally, turning to CPM's request for relief, CPM seeks \$1,600 in attorney's fees pursuant to 11 NYCRR §65-4.10(j)(4). CPM has submitted an affirmation from its attorney, Rachel Drachman, Esq., wherein she states that her hourly billing rate is \$400/hour and she worked for a total of four hours on this case. Attorney Drachman outlines what she worked on for four hours and further states that her hourly billing rate "takes into account the specialization of the field of [her] practice and [her] years of experience." Country-Wide has not submitted any opposition to this branch of CPM's application.

11 NYCRR §65-4.10(j)(4) states that "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" (11 NYCRR §65-4.10(j)(4)). Based upon this regulation, CPM is entitled to attorney's fees. However, "although an award of an attorney's fee is within the discretion of the court, such award must be based upon a showing of 'the hours reasonably expended . . . and the prevailing hourly rate for similar legal work in the community'" (*Gamache v. Steinhaus*, 776 NYS2d 310 [2d Dept 2004] citing *Gutierrez v. Direct Mktg. Credit Servs.*, 267 Ad2d 427 [2d Dept. 1999]). The party seeking attorney's fees must also demonstrate that the hourly rate is reasonable and customary outside of a self-serving declaration and must submit adequate documentation of the hours worked (*Gamache v. Steinhaus*, 776 NYS2d 310 [2d Dept 2004]). Based on the foregoing, the court finds that CPM is entitled to the amount it seeks for attorneys fees.

In accordance herewith, it is hereby

ORDERED that petitioner's motion is denied in its entirety; and it is further

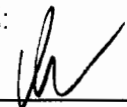
ORDERED that the awards are confirmed in their entirety; and it is further

ORDERED that CPM is awarded \$1,600 for its attorneys fees expended in defending this proceeding and seeking an order confirming the award.

Settle judgment on notice.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/10/2022
New York, New York

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.