# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. CAROL EDMEAD** **PART** **35**

***Justice***

----------X

ARCH INSURANCE COMPANY

Petitioner,

- v -

AMERICAN TRANSIT INSURANCE COMPANY,

Respondent.

----------X

**INDEX NO.** 656595/2021

**MOTION DATE** 02/09/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12, 13

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

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the application of Petitioner Arch Insurance Company (Motion Seq. 001) is denied in its entirety; and the Award of Arbitrator Yolaine Clark is confirmed; and it is further

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

ORDERED that the counsel for Respondent American Transit 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 special proceeding, Petitioner Arch Insurance Company seeks, pursuant to CPLR §7511, an order vacating an arbitration award dated October 6, 2021 ("the Arbitration Award") issued in favor of Respondent American Transit Insurance Company. (Mot. Seq. 001). Respondent opposes the motion in its entirety.

## BACKGROUND FACTS

Mr. Anthony Watts—an employee of Brownyard Group Ramac Corp., Petitioner's Assignor—was injured on July 10, 2017, when, as a pedestrian acting within the scope of his employment, he was struck by a vehicle insured by Respondent. In the police report accompanying the accident, the driver of the vehicle admitted that he did not see Mr. Watts crossing the street with the signal in his favor. The accident left Mr. Watts with significant injuries. Petitioner made first-party benefit and worker's compensation payments totaling $41,395.35 to Mr. Watt from January 19, 2017,[1] through June 6, 2018. (NYSCEF doc No. 3.)

In 2020[2], Petitioner first sought reimbursement from Respondent pursuant to Insurance Law § 5105 by filing a claim before Arbitration Forums, Inc.[3] However, Petitioner named as the respondent "American Transportation Insurance Company," a different insurance company, and American Transit Insurance Company as the underlying insurance policyholder. While the Arbitrator granted an award in favor of Petitioner for the amount it paid in first-party benefits to Mr. Watt, the award was later overturned as it could not be enforced against Respondent. In

[1] It is unclear how payments made by Petitioner to Mr. Watts beginning on January 17, 2017 can properly be attributed to Respondent considering Mr. Watts' accident occurred six months later, on July 10, 2017. However, this issue was not raised by either party on appeal.
[2] The record before the Court does not include the specific dates that Petitioner first attempted to file claims for reimbursement.
[3] For background purposes, with respect to accidents involving motor vehicles used for the transportation of persons or property for hire, as here, Insurance Law §5105 provides that any insurer liable for the payment of first party benefits has a right to recover the amount paid from the insurer of any other covered person. (*See* NY CLS Ins. §5105.)

December 2020, Petitioner filed a second claim, but this time Petitioner failed to properly name Respondent's insured policyholder. (*See* NYSCEF doc No. 12.) The Arbitrator held that this "forum does not have jurisdiction to make an award" and essentially dismissed the action without prejudice. (*Id.*)

On July 28, 2021, Petitioner filed a third arbitration action, this time properly against Respondent, and the Arbitration Award issued therein is the subject of the instant application.

On October 6, 2021, Arbitrator Yolaine Clark issued the Arbitration Award in favor of Respondent. She held that, as Petitioner filed its third arbitration proceeding on July 28, 2021, any claim for reimbursement must correspond to payments made after July 28, 2018, or they would be time barred by the three-year statute of limitations for such claims pursuant to NY PIP Rule 2(i)[4]. Arbitrator Clark found that, since Petitioner's claims are all based on payments made before July 28, 2018, and as Petitioner "has not cited any AFI rules/FAQ's/case laws which prove they are still entitled to recover expired payments," Petitioner's right to recover these first-party benefits was time barred.[5] (NYSCEF doc No. 3.) Consequently, Arbitrator Clark found that Petitioner could not recover from Respondent. (*Id.*)

***The Article 75 Proceeding***

Pursuant to CPLR §7511, Petitioner now seeks an order vacating the Arbitration Award on the grounds that Arbitrator Clark "irrationally, arbitrarily, and capriciously" applied the statute of limitations. Petitioner contends that Arbitrator Clark's calculation of the statute of limitations did not account for the fact that Governor Andrew Cuomo's March 20, 2020,

---

[4] The NY PIP Rules are the procedures that apply to the mandatory intercompany arbitration process at Arbitration Forums, Inc. pursuant to Regulation 68 of 11 NYCRR 65. As relevant here, Rule 2(i) states: "Arbitration shall be requested no later than three (3) years from the date that each claim payment is made." See: https://home.arbfile.org/ArbitrationForums/media/resources/Downloads/NYPIP_Rules.pdf.

[5] Arbitrator Clark noted that prior arbitration filings "do not protect the statute of limitations if they are filed against incorrect parties." (NYSCEF doc No. 3 at 1.)

Executive Order No. 202.8 (9 NYCRR 8.202.8) tolled filing deadlines for all legal actions from March 20, 2020 through November 3, 2020 (a 228-day toll) due to the COVID-19 pandemic. (*See Brash v Richard*, 195 AD3d 582 [2d Dept 2021] [holding that Executive Order 202.8 tolled, as opposed to suspended, the statute of limitations].) Petitioner argues that, after excluding those 228 days, the proper date for calculating the three-year statute of limitations would be December 12, 2020—not July 28, 2021. (NYSCEF doc No. 1 at ¶19.) If correct, Petitioner notes, it could still recover on payments made between December 12, 2017, and July 28, 2018. (*Id.*) Petitioner contends that the Arbitrator's failure to consider *Brash* when declaring Petitioner's claims were time barred constitutes reversible error.

Respondent, by contrast, argues that Governor Cuomo's Executive Order tolled filing deadlines only for *court* litigation—not arbitration proceedings. (NYSCEF doc No. 8.) Respondent argues that as the *Brash* Court considered a 30-day filing deadline to appeal a trial court order, any substantive holding contained in *Brash* is limited in scope to litigation in New York courts. In Respondent's view, as private alternative dispute forums did not limit their filing systems during the initial stages of the pandemic, as the New York Court System did, Petitioner was not prevented from filing the application within the ordinary statute of limitations time frame. Consequently, Respondent contends that Executive Order 202.8 and *Brash* do not apply to alternative dispute resolution forums such as the subject forum here, Arbitration Forums, Inc., and Arbitrator Clark thus properly applied the statute of limitations.

**DISCUSSION**

An arbitration award may be vacated pursuant to CPLR 7511 (b)(1)(iii) where an arbitrator exceeded their power, which includes 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 [1st Dept 2016].) Where arbitration is compulsory, judicial review under CPLR Article 75 is broader, requiring that the award be in accord with due process, supported by adequate evidence on the record, 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 [1990].)

While compulsory arbitration decisions require a stricter scrutiny than consensual ones, courts cannot conduct a *de novo* review of the evidence and substitute its judgment for that of the arbitrator simply because it believes its interpretation is superior to that of the arbitrator. (*Matter of New York State Correctional Officers & Police Benevolent Ass'n v State of New York*, 94 NY2d 321 [1999].) Consequently, courts are bound by the arbitrator's factual findings, interpretation of relevant documents, and judgment concerning remedies. (*Id.*) Unless an error is so 'irrational as to require vacatur,' courts cannot vacate an award even where the error claimed is the incorrect application of a rule of substantive law. (*Matter of Smith v Firemen's Ins. Co.*, 55 NY2d 224, 232 [1982].) Rather, to be upheld, a mandatory arbitration award need only have evidentiary support and not be arbitrary and capricious. (*Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 48 AD3d 246, 247 [1st Dept 2008].) As long as an arbitrator addresses the issues submitted for resolution, vacatur will not be granted under Article 75, 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 [1977]).

In the instant proceeding, the Court is constrained by the narrow scope of its power to review arbitration awards. While the issue of the statute of limitations was raised as an affirmative defense by Respondent at the underlying arbitration, upon the record before the Court, Petitioner did not raise the issue of Executive Order 202.8's applicability for Arbitrator

Clark's consideration. The First Department has made it clear that, with the exception of the important defense of policy exhaustion, new arguments may not be raised for the first time on appeal of an arbitration award (*see Ameriprise Inc. Co. v Kensington Radiology Group, P.C.* (179 AD3d 563 [1st Dept 2020]).

In a section of the Arbitration Award entitled "Applicant's Contentions," Arbitrator Clark described the case's procedural history, including Petitioner's failure to properly file an arbitration proceeding against Respondent twice. Arbitrator Clark does not indicate that Petitioner disputed the start date of the relevant statutory time period. (*See* NYSCEF doc No. 3.) Instead, Arbitrator Clark wrote, "[Petitioner] prays that the Arbitrator will take into consideration the on-going process of arbitrations being filed with the statute and the Respondent's awareness of the claim and the opportunity to resolve the claim before the first Arbitration was filed." (*Id.*) As the above quote demonstrates, Petitioner made no arguments regarding the correct date for calculating the statute of limitations, but appears to have made an argument to *ignore* the statute of limitations and instead focus on the *fairness* of dismissing its case against a respondent that has been aware of its claims throughout the arbitration process, an argument that Arbitrator Clark found unpersuasive given that prior filed claims against the wrong entity do not affect the statute of limitations.

Furthermore, the Court cannot hold that Arbitrator Clark's decision was irrational or arbitrary and capricious when the record lacks any evidence that Petitioner raised a dispute as to the proper calculation of statute of limitations. Petitioner's claim that Arbitrator Clark ignored, misconstrued, or incorrectly described its arguments strains credulity given that, as discussed, Arbitrator Clark addressed Petitioner's contention that its claims should still be considered for reimbursement notwithstanding the statute of limitations, but found Petitioner's argument

unavailing. Arbitrator Clark also wrote that "[Petitioner] has not cited any AFI rules/ FAQ's/ case laws which proves they are still entitled to recover expired payments" (NYSCEF doc No. 3.) The argument that Executive Order 202.8 and *Branch* apply to this type of arbitration is one that should have been made to the Arbitrator and not raised here for the first time only after the arguments Petitioner made during the arbitration proved unsuccessful. As Arbitrator Clark clearly addressed all issues that were submitted before her, the Award has a rational basis and must be confirmed.

While the Court is precluded from reaching the dispute between the parties regarding the scope of Executive Order 202.8, the Court writes separately to note that, contrary to Respondent's assertions, there is support for Petitioner's argument that Executive Order 202.8 applies to legal actions beyond court proceedings. Executive Order 202.8 stated, in pertinent part:

> "In accordance with the directive of the Chief Judge of the State to limit court operations during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of *any* legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, *the civil practice law and rules*, the court of claims act, the surrogate's court procedure act, and the uniform court acts, *or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof*, is hereby tolled…"
>
> (emphasis added).

While the stated purpose of Executive Order 202.8 was to limit non-essential court operations during the pandemic, the Executive Order contains no language limiting its scope solely to court proceedings. Instead, Executive Order 202.8 applies to "any legal action" or "proceeding" with a filing deadline prescribed by the state's procedural laws. Here, as discussed, Arbitrator Clark found Petitioner's claims were time-barred in accordance with New York's PIP Rules that apply to all mandatory arbitrations held pursuant to 11 NYCRR 65. Insurance Law

§5105, as implemented by the Insurance Department regulations found at 11 NYCRR 65-1 through 65-5, requires that an insurer seeking to recover any-first-party benefits paid to its policyholders from another insurance provider must submit the controversy to mandatory arbitration. (*See* Insurance Law §5105 [b]). In *MVAIC v Aetna Cas. & Sur. Co.* (89 NY2d 214), the Court of Appeals held that the right to recover set out in Insurance Law §5105 is a statutorily-created right—as opposed to one based in common law—and therefore CPLR 214 [2] (the three-year limitation period arising out of liabilities created or imposed by statute) governs no-fault and loss-transfer claims arising out of §5105. (89 NY2d at 220-221.) Therefore, the three-year statute of limitations set forth in NY PIP Rule 2(i) is clearly derived from CPLR 214 [2] through Insurance Law §5105.

Given that that Executive Order 202.8 tolled time limits for the filing of any action as prescribed by the CPLR or any other statute or regulation, the Court finds there is substantial support for Petitioner's argument that, in addition to court litigation, the Executive Order also tolled filing deadlines in arbitration proceedings that are statutorily mandated by a regulation such as §5105.[6]

Regardless, as discussed *supra*, the Court is precluded from reaching the matter of whether Executive Order 202.8 applies to Petitioner's claims as a matter of law given that the instant dispute was not before Arbitrator Clark. As Petitioner has asserted no other grounds for vacatur of the Award, the Court cannot find that that Arbitrator Clark acted so irrationally as to

[6] The Court recognizes that there is a disagreement within the Supreme Court as to whether Executive Order 202.8 tolled or suspended filing deadlines that fell outside the March 2020 to November 2020 tolling period. (*See Vivar v BSREP UA River Crossing LLC*, 2021 NY Slip Op 32153[U] [Sup. Ct. NY County 2021] [Jaffe, J.] [holding that *Brash v Richards* tolled filing deadlines that fell outside the tolling window; *cf Baker v 40 Wall St. Holdings Corp.*, 2022 NY Slip Op. 22002 [Sup. Ct. Kings County 2022] [Silber, J.] [holding that Executive Order 202.8 *suspended* [emphasis added] filing deadlines that fell within the Order's window but had no effect on those that fell outside the window].) The Court, however, need not reach this dispute as it is precluded from considering Petitioner's argument.

warrant vacatur or otherwise rendered her Award in an arbitrary and capricious manner. Therefore, Petitioner's application to vacate the award of Arbitrator Clark is denied, and the instant petition is dismissed with prejudice.

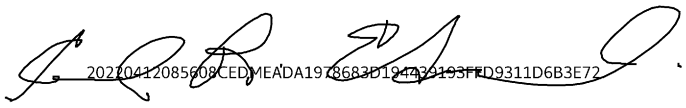
**CONCLUSION**

Accordingly, it is hereby

ORDERED AND ADJUDGED that the application of Petitioner Arch Insurance Company (Motion Seq. 001) is denied in its entirety; and the Award of Arbitrator Yolaine Clark, is confirmed; and it is further

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

ORDERED that the counsel for Respondent American Transit Insurance Company shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days of entry.




4/11/2022
DATE

CAROL 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 |