

Country-Wide Ins. Co. v M EL Sayed Physical Therapy, P.C.
2022 NY Slip Op 31874(U)
June 9, 2022
Supreme Court, New York County
Docket Number: Index No. 654364/2021
Judge: Frank P. Nervo
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PRESENT: <u>HON. FRANK NERVO</u> <i>Justice</i> -----X COUNTRY-WIDE INSURANCE COMPANY Plaintiff, - v - M EL SAYED PHYSICAL THERAPY, P.C., Defendant. -----X	PART 04 INDEX NO. <u>654364/2021</u> MOTION DATE <u>07/15/2021</u> MOTION SEQ. NO. <u>001</u> AMENDED DECISION, ORDER, AND JUDGMENT ON MOTION
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The Court's decision under NYSCEF Doc. No. 11 is amended as below.

Petitioner seeks to vacate the award of a master arbitrator finding petitioner failed to argue or provide clear citations to evidence upon which petitioner relied to deny the claims and awarding respondent \$1,385.16. Petitioner contends that the evidence was provided and the arbitrator simply failed to consider same. Petitioner further contends that the master arbitrator improperly failed to vacate the award, after petitioner provided citations to its exhibits on appeal. The application is unopposed.

As relevant here, petitioner denied the claims at issue on the basis that the insured failed to appear for examination. In support of this claim,

petitioner offered testimony from employees with knowledge of procedures but without personal knowledge regarding the insured appearance at examination; these employees averred that the insured's name did not appear in sign-in logs kept to record those who appear for examination. The arbitrator found that the logs relied upon by the affiants were not provided as evidence and, in weighing the employees' testimony purportedly relying on the missing logs, found petitioner had not met its burden of establishing the insured failed to appear at all scheduled examination dates. On appeal to the master arbitrator, petitioner claimed that the logs were provided and simply overlooked by the arbitrator. However, the master arbitrator found that the logs forming the heart of petitioner's claim appeared no sooner than on page 195 of the 260 pages of exhibits submitted and were not effectively highlighted by counsel. Consequently, the master arbitrator affirmed the award finding that the arbitrator had not acted arbitrarily nor capriciously, and that petitioner merely failed to effectively argue its claim before the arbitrator.

It is not the duty of the arbiter, be it an arbitrator or Court, to parse though hundreds of pages of exhibits to make a out a claim or defense for a party (*see e.g. Barsella v. City of New York*, 82 AD2d 747, 748 [1st Dept 1981]); such duty belongs to counsel, as advocate. Failing to elucidate evidence in

support of a party's claim is not error of the arbitrator but is rather error of counsel, and such failure does not render an arbitrator's award arbitrary and capricious (*see Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co.*, 35 AD3d 720, 721 [2d 2006]).

Where a motion to vacate an arbitration award is denied, the Court must confirm the award (CPLR § 7511[e]; *see also Matter of Board of Educ. Of Ardsley Union Free School Dist., Town of Greenburgh v. Ardsley Congress of Teachers*, 78 AD2d 879 [2d Dept 1975]).

Accordingly, it is

ORDERED that the petition to vacate the master arbitrator's award dated April 16, 2021 is denied; and it is further

ORDERED that the master arbitrator's award of April 16, 2021, upholding the award in favor of respondent, is confirmed; and it is further

ORDERED that any requested relief not addressed herein has nevertheless been considered and is hereby denied; and it is further

ORDERED and ADJUDGED that respondent M EL SAYED PHYSICAL THERAPY, P.C does recover from petitioner COUNTRY-WIDE INSURANCE COMPANY the amount of \$1,385.16, plus interest at the rate of 9% per annum from the date of April 16, 2021, as computed by the Clerk in the amount of \$ _____, together with costs and disbursements in the amount of \$ _____ as taxed by the Clerk, for the total amount of \$ _____, and that the respondent has execution therefor.

THIS CONSTITUTES THE DECISION, ORDER, AND JUDGMENT OF THE COURT.

<u>6/9/2022</u>			
DATE		HON. FRANK P. NERVO J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ OTHER
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE