American Tr. Ins. Co. v Gentle Care Acupuncture, P.C.
2023 NY Slip Op 32196(U)
June 28, 2023
Supreme Court, Kings County
Docket Number: Index No. 500684/2023
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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AMERICAN TRANSIT INSURANCE COMPANY,

Petitioner,

-against-

GENTLE CARE ACUPUNCTURE, P.C., a/a/o ERIK ROBINSON,

Respondent.

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DECISION / ORDER / JUDGMENT
Index No. 500684/2023
Motion Seq. No. 1 & 2
Date Submitted: 4/27/23.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this petition to vacate an arbitration award and cross-petition to confirm it and be awarded counsel fees.

Papers	NYSCEF Doc.
Notice of Petition and Petition and Exhibits Annexed.....	1-12
Affirmation in Opposition, Cross-Petition and Exhibits Annexed..	13-16
Opposition to Cross-Petition and Reply	17

Upon the foregoing cited papers, the Decision/Order on this petition and cross motion is as follows:

This is a special proceeding -- pursuant to CPLR Article 75 -- commenced by American Transit Insurance Company (ATIC) seeking an order and judgment vacating a No-Fault Insurance master arbitrator award [Doc 4], which affirmed the hearing arbitrator's award [Doc 3] and granted respondent Gentle Care's claim for No-Fault insurance benefits for acupuncture treatments provided to their assignor. The arbitrator awarded the sum $4,361.75 of the respondent's claim for $5,230.15, plus interest from 11/24/2020, statutory attorneys' fees and the $40 filing fee. Respondent's assignor was a pedestrian injured in a motor vehicle accident on October 13, 2019. For the reasons which follow, the petition is dismissed, and the cross-petition is granted.

The arbitration was held by the American Arbitration Association (AAA), which has been designated by the New York State Department of Financial Services to coordinate

the mandatory arbitration provisions of Insurance Law § 5106 [b], which provides: "Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent."

It must be noted that the assignee's claims for the first three months of treatment with this acupuncturist, Gentle Care, were determined in a different arbitration, before the same arbitrator as in this matter, and there was an affirmance by a master arbitrator. Petitioner then petitioned the court to vacate the award, and under Ind. 500651/2023. This court denied the petition, by decision and order dated April 24, 2023. Assignee Robinson had subsequent treatment with this acupuncturist, Gentle Care, and it is that treatment, administered from February 2020 to August 2020, which is this subject of this petition. A separate arbitration was conducted by the same arbitrator, it was affirmed by the same master arbitrator, and petitioner filed this new petition to vacate the subsequent award.

At oral argument before this court on April 27, 2023, petitioner ATIC appeared by counsel and argued that the above-referenced arbitration awards (arbitrator and master arbitrator) should be vacated as they are not supported by settled law. Respondent appeared by counsel and submitted an answer, opposition and a cross petition for a judgment confirming the award and for an award of attorneys' fees pursuant to 11 NYCRR §65-4.10(j)(4).

Petitioner argues that "[t]he claim at issue in the amount of $5,230.15 for dates of service 02/05/2020 - 08/19/2020 was properly and timely denied because the services were not medically necessary as per the peer review of Dr. Peter Chiu. Arbitrator Paul Keenan,

Esq. applied collateral estoppel to justify an award in favor of Respondent in the amount of $4,361.75 [he denied the remainder on fee schedule grounds]. The only reason the Arbitrator gave for the decision was that collateral estoppel applied. In finding that collateral estoppel applies the Arbitrator merely noted that a prior award had addressed the documents that formed the basis of the defense. The arbitrator did not discuss whether any of the 4 conditions had been met in order for collateral estoppel to apply." Petitioner's counsel lists the four factors as follows "Collateral estoppel does not apply unless 4 conditions are met; (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" [Doc 1 ¶43].

The court notes that Dr. Peter Chiu's peer review, dated October 2, 2020, prepared after all the services at issue had been rendered, was the same peer review document submitted for the arbitration of the first three months of services, and it discusses all the services addressed at both arbitrations. The master arbitrator in this matter also made her determination based on principles of collateral estoppel. Respondent's counsel states "Master Arbitrator DeSimone . . . wrote: 'I note that I was assigned AAA Case # 17-20-1183-7159 for a Master review. I confirmed the award of the NFA and found in favor of Applicant/Appellee. I also rely on the principles of res judicata and collateral estoppel'" [Doc 13 ¶19].

The main point of the petitioner's expert's peer review, by Dr. Peter Chiu, is that there was no medical necessity for any of the treatments provided by Gentle Care. He also states, in his six-page single spaced affirmed report, that there is scientific support that acupuncture is effective to treat chronic pain, but not acute pain, and that the claimant was

receiving concurrent care. He notes, however, that "there remains considerable controversy as to its value."

Respondent provided a rebuttal to the arbitrator, from Arkady Kiner, a licensed acupuncturist and the principal of respondent [Doc 5]. This same document was also provided at the earlier arbitration. The respondent's rebuttal affidavit claims that the peer review doctor is incorrect in concluding that acupuncture is only effective for treating chronic pain and not acute pain, and avers that acupuncture is effective in treating pain in general. In the earlier petition, the petitioner claimed that the rebuttal did not address the other point made by the peer doctor; that the claimant was already receiving concurrent care and that the acupuncture treatment would not have added a benefit above and beyond the physical therapy and chiropractic treatment the claimant was already receiving. This court denied the petition to vacate the award, in a lengthy opinion.

Respondent's answer/opposition (Docs 13-15) contends that there is no basis to vacate the award, arguing that "[i]t is within an arbitrator's authority to determine the preclusive effect of a prior arbitration" [Doc 13 ¶16]. The respondent also argues that the "[t]he award by Arbitrator Keenan is neither arbitrary and capricious nor incorrect as a matter of law. Therefore, the master arbitrator was required to affirm it."

In support of its cross petition (MS #2) the respondent argues that "when the court denies the petition, it must affirm the arbitration award. Moreover, because a cross petition is a special proceeding pursuant to CPLR article 4, it must terminate in a judgment, not an order to confirm the award". Finally, respondent argues that it's entitled to attorneys' fees pursuant to 11 NYCRR §65-4.10 (j)(4), which it contends provides for mandatory attorneys' fees to the prevailing party in connection with post-arbitration Article 75 petitions filed in court. Respondent seeks $1,200 "for the 3 hours worked in securing a resolution," plus

costs and disbursements.

In opposition to the cross-petition, the petitioner again argues [Doc 17 ¶34] that "Arbitrator Paul Keenan, Esq. applied collateral estoppel to justify an award in favor of Respondent in the amount of $4,361.75. The only reason the Arbitrator gave for the decision was that collateral estoppel applied. In finding that collateral estoppel applies the Arbitrator merely noted that a prior award had addressed the documents that formed the basis of the defense. The arbitrator did not discuss whether any of the 4 conditions had been met in order for collateral estoppel to apply." Finally, the petitioner argues that the attorneys' fees requested by respondent are excessive.

Discussion

Petitioner's main argument here is that the arbitrator failed to adhere to the law on collateral estoppel. Specifically, counsel states [Doc 1 ¶45] that "[t]he underlying decision does not discuss whether the decision relied upon by the Arbitrator was appealed to a Master or whether a de novo action or petition to vacate was filed. Applicant did not offer any evidence to establish that the decision that the Arbitrator relied upon was confirmed in Court and, therefore, necessary to 'support a valid and final judgment on the merits' as required by the Court of Appeals in the above Conason[1] decision."

It was confirmed by a master arbitrator and this court in fact confirmed both, as described above, albeit after arbitrator Keenan issued his decision in the second and subject arbitration, but this is a red herring. Because the arbitrator is not required to determine that a master arbitrator and a court confirmed his award before he may apply the doctrine of collateral estoppel to a No-Fault insurance arbitration award.

[1] *Conason v Megan Holding LLC*, 25 NY3d 1, 6 N.Y.S.3d 206, 29 N.E.3d 215 [2015]).

As Justice Maslow recently stated, in response to the same argument in *American Tr. Ins. Co. v U.S. Med Supply Corp.,* 2023 NY Slip Op 50560(U) [Sup Ct Kings Co]:

> [T]he issue of the preclusive effect of No-Fault arbitration determinations has been sanctioned by appellate courts in New York ever since the issuance of the decision in *Kilduff v Donna Oil Corp.*, 74 AD2d 562 [2d Dept 1980]. . . The Court of Appeals considered the issue of the preclusive effect of a No-Fault arbitration for the first time in *Clemens v Apple* (65 NY2d 746 [1985]), where it was held that a factual finding made in an arbitration award constituted collateral estoppel in court against the party who commenced the arbitration where that party had a full and fair opportunity to litigate the factual issue [that was] determined. . .
>
> It is within the arbitrator's authority to determine the preclusive effect of a prior arbitration (*see Matter of Falzone v. New York Central Mutual Fire Ins. Co.*, 15 NY3d 530 [2010], *affg*, 64 AD3d 1149 [4th Dept. 2009]). In that case, a supplementary uninsured/underinsured motorist (SUM) arbitrator failed to accord preclusive effect to a prior award by a No-Fault arbitrator. "In this appeal, we are merely applying this State's well-established rule that an arbitrator's rulings, unlike a trial court's, are largely unreviewable. . . Thus, if a court makes an error and fails to properly apply collateral estoppel, the issue can be reviewed and corrected on appeal. By contrast, if an arbitrator erred in not applying collateral estoppel, the general limitation on judicial review of arbitral awards precludes a court from disturbing the decision unless the resulting arbitral award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*id*. at 534-535).
>
> . . . collateral estoppel is applicable to No-Fault arbitration awards, even if the awards are not judicially confirmed (*see Country-Wide Ins. Co. v Ospina*, 2019 NY Slip Op. 30444[U] [Sup Ct, NY County 2019]). This decision confirms that if a No-Fault insurance arbitrator decides to apply collateral estoppel to a prior arbitration award the prior award need not have been judicially confirmed into a judgment, contrary to ATIC's position herein.

Accordingly, in this Article 75 proceeding, the court finds that Arbitrator Keenan's award, was not incorrect “as a matter of law” within the purview of 11 NYCRR §65-4.10(a)(4).

Turning to the issue of the master arbitrator’s affirmance, the standard for Article 75 court scrutiny of a No-Fault insurance arbitration is whether the master arbitration award was so irrational as to require vacatur (*see Matter of Smith v Firemen's Ins. Co.*, 55

NY2d 224, 232 [1982]; *Matter of Accuhealth Acupuncture, PC v Country-Wide Ins. Co.*, 170 AD3d 1168 [2d Dept 2019]; *Matter of Accuhealth Acupuncture, P.C. v New York City Transit Authority*, 167 AD3d 314 [2d Dept 2018]; *Matter of Accuhealth Acupuncture, P.C. v Country-Wide Ins. Co.*, 149 AD3d 828 [2d Dept 2017]). A master arbitrator's review of a hearing arbitrator's award where an error of a rule of substantive law is alleged must be upheld unless it is irrational (*see Golden Earth Chiropractic & Acupuncture, PLLC v Global Liberty Ins. Co. of New York*, 54 Misc 3d 31 [App Term, 2d Dept, 2d, 11th & 13th Dists 2016]).

In the case at bar, the court finds that Master Arbitrator DeSimone's determination to also apply the principles of collateral estoppel was not irrational. With respect to the factual issues reviewed by Master Arbitrator DeSimone, the proper standard of her review was whether Arbitrator Keenan reached his decision in a rational manner, i.e., whether it was arbitrary and capricious, irrational, or without a plausible basis. The master arbitrator may not engage in an extensive factual review, such as weighing the evidence, assessing the credibility of the medical reports, or making independent findings of fact (*Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 429 N.E.2d 755, 445 N.Y.S.2d 77 [1981]).

Judicial review of a master arbitrator's determination not to vacate a hearing arbitrator's award derives from the Insurance Law and involves the question of whether the master arbitrator exceeded his or her power (*Matter of Smith v Firemen's Ins. Co.*, 55 NY2d 224, 231, 433 N.E.2d 509, 448 N.Y.S.2d 444 [1982]). Here Master Arbitrator DeSimone did not exceed her power when she reviewed the factual findings of Arbitrator Keenan. She applied the correct standard of review when she wrote, "I cannot conclude on the basis of the record before me that Arbitrator Keenan's decision was incorrect as a matter of law or arbitrary and capricious" (NYSCEF Doc No. 4, at Page 1).

The court finds that Master Arbitrator DeSimone's review was not arbitrary, capricious, irrational, or without a plausible basis (*see Matter of Petrofsky v Allstate Ins. Co.,* 54 NY2d 207, 211-212, 429 N.E.2d 755, 445 N.Y.S.2d 77 [1981]). In affirming Arbitrator Keenan, who properly applied the law of collateral estoppel and did not make arbitrary, capricious, or irrational findings of fact, Arbitrator DeSimone did not contravene the limitations on her powers. Her master award conformed to the permitted standard of review of a hearing arbitrator's award by a master arbitrator.

Accordingly, this Court rejects ATIC's contentions in its petition and dismisses the petition.

Cross-Petition

In addition to seeking to confirm Master Arbitrator DeSimone's award, respondent seeks additional attorney fees, costs and disbursements.

After calculating the total of the first-party benefits awarded in this arbitration plus interest thereon, ATIC was directed in the arbitrator's award to pay respondent an attorneys' fee equal to 20 percent of that total sum, subject to a maximum fee of $1,360.00, as provided for in 11 NYCRR §65-4.6 [d].

Additionally, pursuant to 11 NYCRR §65-4.10 [j][4], having successfully prevailed in this Article 75 proceeding, respondent is entitled to an additional attorneys' fee (*see Global Liberty Ins. Co. of New York v North Shore Family Chiropractic*, 178 AD3d 525 [1st Dept 2019]; *GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]).

Naomi Cohn, Esq. submitted an affirmation in support with this Article 75 proceeding (NYSCEF Doc No. 13). In pertinent part, she states that she is of counsel to Ursulova Law Office P.C., attorneys for respondent. She avers that she has provided valuable and necessary services on behalf of respondent, for which she is requesting compensation

pursuant to 11 NYCRR §65-4.10(j)(4). She states that her usual billing rate is $400.00 per hour, which she avers "takes into account over a decade of experience specializing primarily in no-fault litigation and arbitration." Ms. Cohn states that the total time required to provide these legal services to the client was 3 hours "including case review, research, drafting, exhibit preparation, and e-filing. Based upon the above calculations, respondent seeks an attorneys' fee of $1,200.00 (3 x $400) for the services performed in this matter."

Considering the applicable factors, this court awards respondent $1,200.00 for the work performed by respondent's counsel on this Article 75 proceeding.

As the prevailing party, respondent is entitled to its costs and disbursements, to be taxed by the County Clerk, should a judgment need to be entered.

Conclusions of Law

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** that:

(1) ATIC's petition to vacate the master arbitration award of Toby DeSimone is dismissed.

(2) Gentle Care's cross-petition to confirm the master arbitration award is granted.

(3) The master arbitration award is confirmed in its entirety.

(4) Gentle Care is awarded the principal amount of $4,361.75 as No-Fault insurance benefits, along with simple interest thereon (i.e., not compounded) at two per cent per month on a pro rata basis, using a 30-day month, computed from November 24, 2020 to the date of payment of the principal amount of $4,361.75.

(5) After calculating the total of the principal amount of $4,361.75 plus the interest thereon, to the date of entry of this order, ATIC shall pay Gentle Care an attorneys' fee equal to 20 percent of that total sum, subject to a maximum fee of $1,360.00.

(6) ATIC shall pay Gentle Care an additional attorneys' fee of $130.00 as awarded by the Master Arbitrator.

(7) ATIC shall pay Gentle Care an additional attorneys' fee of $400.00 per hour for work performed by counsel on this Article 75 proceeding, in the sum of $1,200.00.

(8) ATIC shall pay Gentle Care $40 to reimburse respondent for the fee to AAA, as awarded by the arbitrator.

(9) Gentle Care shall recover from ATIC costs and disbursements as allowed by law, to be taxed by the County Clerk if a judgment is entered, pursuant to the Bill of Costs submitted by counsel.

This shall constitute the decision, order and judgment of the court.

Dated: June 28, 2023

ENTER:

Hon. Debra Silber, J.S.C.