

American Tr. Ins. Co. v DUP Physical Therapy PC

2023 NY Slip Op 32428(U)

June 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 532420/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of June 2023

HONORABLE FRANCOIS A. RIVERA

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AMERICAN TRANSIT INSURANCE COMPANY,

DECISION & ORDER

Petitioner,

Index No.: 532420/2022

- against -

DUP PHYSICAL THERAPY PC, A/A/O JUNIOR ORTEGA,

Respondents.

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By notice of petition and petition filed on November 7, 2022, under motion sequence number one, petitioner American Transit Insurance Company (hereinafter ATIC) seeks an order and judgment pursuant to CPLR 7511, Insurance Law 5016(c), 11 NYCRR 65-4.10(h)(1)(i) and 11 NYCRR 65-4.10(h)(2) vacating a no-fault insurance master arbitration award of Master Arbitrator Victor J. Hershdorfer, Esq., dated August 31, 2022, which affirmed the arbitration award of Arbitrator Gary Peters, Esq., dated June 9, 2022, granting the claim of respondent DUP Physical Therapy PC A/A/O Junior Ortega (hereinafter the DUP) for No-Fault insurance compensation in the amount of \$3,136.42.00 for physical therapy services performed on its assignor, Joseph Ortega.

By notice of cross petition filed on November 30, 2022, under motion sequence number two, DUP seeks an order: (1) confirming the No-fault arbitration award dated June 9, 2022, pursuant to CPLR 7510, that was affirmed by the master arbitrator on August 31, 2022 in the sum of \$3,136.42; (2) interest at the rate of 2% from November 9, 2020 until entry of a judgment; (3) no-fault statutory attorneys' fees in the sum of 20% of combined principle and interest up to a maximum of \$1,360.00, in an amount to be calculated by the clerk; (4) no-fault Master Arbitration fees in the sum of \$195.00; (5) reasonable attorney's fees to be determined by the Court in accordance with 11 NYCRR 65-4.10(j)(4); (6) Arbitration filing fee of \$40.00; and (7) costs and disbursements of this action as taxed by the Clerk.

NYSCEF documents numbered one through and including eighteen were considered in determining the instant petition and cross petition.

BACKGROUND

The petition arises out of a motor vehicle collision which occurred on September 22, 2019 (hereinafter the subject accident). Junior Ortega (hereinafter Ortega), the assignor of the no-fault benefits, is a 45-year-old male who was a rear seat passenger in a taxicab involved in the subject accident. Ortega sustained multiple bodily injuries and came under the care of various medical providers. In dispute in this case were the fees for physical therapy services provided by DUP to Ortega from October 22, 2019, through March 16, 2020. DUP, the applicant, and the assignee of the no fault benefits, applied for reimbursement for these services by submitting the bills to ATIC for payment.

ATIC denied the claim contending that the injuries that Ortega was being treated for were not caused by the subject accident. ATIC based this contention on, among other things, a report by Omid Komari, Ph.D., a biomechanical engineering consultant. Dr. Komari concluded that the subject accident would have generated average inertial body accelerations and average inertial head accelerations compatible with non-injurious daily living activities and that it did not appear that there was a causal relationship between the accident and Ortega's spinal injuries.

Arbitrator Gary Peters, Esq. (hereinafter the Arbitrator) found that the MRI studies and medical records in evidence clearly indicated that Ortega sustained injuries to his neck, back and left shoulder. The Arbitrator then concluded that ATIC had failed to establish that there was not an injury or aggravation of a pre-existing condition caused by the subject accident which might be covered by no-Fault. In sum, he found that ATIC

did not meet its burden of proof to establish that the injuries were not related to the subject accident or that Ortega was not an eligible injured person.

The Arbitrator then awarded the applicant a total of \$3,136.42 for the services rendered. The Arbitrator also awarded the applicant attorney's fees in accordance with 11 NYCRR 65-4.6(d) subject to a maximum fee of \$1,360.

Master Arbitrator Victor J. Hershdorfer, Esq. (hereinafter the Master Arbitrator) reviewed the record, including the findings, law and award determined by Peters and stated the following:

“Pursuant to [11] NYCRR § 65-4.5(o)(1), an arbitrator is the judge of the relevance and materiality of the evidence offered. The arbitrator weighs the evidence and is the fact finder...The arbitrator made a determination as a matter of fact. The role of the master arbitrator is to review the determination of the no-fault arbitrator to be sure that the arbitrator reached a decision in a rational manner and that the decision was not irrational, arbitrary, or capricious (*Petrofsky v Allstate Insurance Co.*, 54 NY2d 207 [1981]).”

The Master Arbitrator found that the claims raised by ATIC in their appeal were properly addressed by the Arbitrator. The Master Arbitrator further found that the award below was clearly articulated, had a rational and plausible basis in the evidence, and that there was no reason to disturb the Arbitrator's decision and award.

LAW AND APPLICATION

The Petition

A court reviewing the award of a master arbitrator is limited to the grounds set forth in CPLR Article 75, which include, in this compulsory arbitration, the question of whether the determination had evidentiary support, was rational, or had a plausible basis

(see *Matter of Petrofsky [Allstate Ins. Co.]*, 54 NY2d 207, 212 [1981]). Notably, the master arbitrator's review power is broader than that of the courts' because it includes the power to review for errors of law (see *id.* at 211-212; 11 NYCRR 65-4.10[a][4]). In contrast, the courts generally will not vacate an arbitrator's award where the error claimed is the incorrect application of a rule of substantive law, unless it is so irrational as to require vacatur (*Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232 [1982]; see also *Matter of Liberty Mut. Ins. Co. v Spine Americare Med.*, 294 AD2d 574, 576 [2nd Dept 2002]).

The Master Arbitrator reviewed the record and award of the Arbitrator and did not find the Arbitrator's interpretation of the evidence and applicable law pertaining to this dispute to be arbitrary, capricious, or contrary to law. Consequently, the Master Arbitrator upheld the award to the respondent in the amount of \$3,136.42.

The instant petition is a special proceeding. The procedure for special proceedings contemplates that the petition will be accompanied by affidavits demonstrating the evidentiary grounds for the relief requested (see CPLR 403[a]). It is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR 409 [b]; *Saadia Safdi Realty, LLC v Melvin Press*, 207 AD3d 633, 635 [2d Dept 2022], citing *Matter of Arben Corp. v Durastone, LLC*, 186 AD3d 599, 600 [2d Dept 2020]).

The evidentiary submissions and legal reasoning proffered by the petitioner did not make a prima facie showing that the no-fault arbitrator's award or the master arbitrator's award was either arbitrary or capricious. To the contrary, the petitioner's evidentiary submissions established that the no-fault arbitrator's award and the master arbitrator's affirmance of the award was based on sound and well-reasoned analysis of the evidence submitted and upon the proper application of the pertinent laws and regulations.

The Cross Petition

DUP seeks an order pursuant to CPLR 7510: (1) confirming the No-fault arbitration award dated June 9, 2022, that was affirmed by the master arbitrator on August 31, 2022, in the sum of \$3,136.42; (2) interest at a rate of 2% from November 9, 2020, until entry of a judgment; (3) no-fault statutory attorneys' fees in the sum of 20% of combined principal and interest up to a maximum of \$1,360.00, in an amount to be calculated by the clerk; (4) no-fault Master Arbitration fees in the sum of \$195.00.00; (5) reasonable attorney's fees to be determined by the Court in accordance with 11 NYCRR 65-4.10(j)(4); (6) arbitration filing fee of \$40.00; and (7) costs and disbursements of this action as taxed by the Clerk.

CPLR 7510 provides that the 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.

Here, the Arbitrator awarded DUP \$3,136.42 and interest at the rate of 2% from November 9, 2020, until entry of a judgment, and an attorney fee of 20% thereupon to a maximum of \$1,360.00 and reimbursement of costs. ATIC appealed the award to the

Master Arbitrator who affirmed the award. There is no legal basis to deny the cross-petition. It is therefore granted in its entirety.

However, regarding the branch of DUP's cross petition seeking additional attorney fees for opposing the instant petition and for cross petitioning to confirm the Master Arbitrator's award the following applies. The general rule is that in proceedings involving arbitration, as in other litigation, an attorney's fee is not recoverable unless provided for by agreement or statute (*see Myron Assoc. v Obstfeld*, 224 AD2d 504 [1996]).

Pursuant to Insurance Law § 5106 (a), if a valid claim or portion of a claim for no-fault benefits is overdue, the claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to the limitations promulgated by the superintendent in regulations. In a proceeding for judicial review of an award by a master arbitrator, an attorney's fee shall be fixed by the court adjudicating the matter (*Matter of Country-Wide Ins. Co. v TC Acupuncture P.C.*, 179 A.D.3d 414, 414 (1st Dept. 2020); *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 139 A.D.3d 947, 948 [2nd Dept 2016]; *see also* 11 NYCRR 65-4.10[j][4]).

Accordingly, an additional attorney fee is appropriate. Counsel for DUP may submit an affirmation setting forth the additional attorney fees sought and an explanation of how the amount requested was determined. The affirmation should be filed on the NYSCEF system or before July 17, 2023. ATIC may respond to the affirmation by filing its response on or before August 10, 2023. The parties will appear in Part 52 on

August 17, 2023, at 10:00 a.m. for the Court's decision on this branch of DUP's cross petition.

CONCLUSION

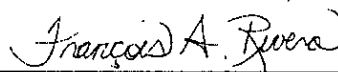
The petition by American Transit Insurance Company for an order and judgment pursuant to CPLR 7511 vacating the no-fault insurance master arbitration award of Master Arbitrator Victor J. Hershdorfer, Esq., dated August 31, 2022, which affirmed the arbitration award of Arbitrator Gary Peters, Esq., dated June 9, 2022, granting the claim of respondent DUP Physical Therapy PC A/A/O Junior Ortega for No-Fault insurance compensation in the amount of \$3,136.42.00 for physical therapy services performed on its assignor, Joseph Ortega is denied and the petition is dismissed.

The cross petition by DUP Physical Therapy to confirm the master arbitration award is granted.

Regarding the branch of DUP Physical Therapy's cross petition seeking additional attorney fees for opposing the instant petition and for seeking confirmation of the master arbitrator's award, DUP Physical Therapy must submit an affirmation supporting this request in accordance with the instant decision and order.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.