

Country-Wide Ins. Co. v Greenleaf Chemists, Inc.

2023 NY Slip Op 32554(U)

July 24, 2023

Supreme Court, New York County

Docket Number: Index No. 650369/2023

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

GREENLEAF CHEMISTS, INC. a/a/o Luisa Bernabe,

Respondent.

-----X

INDEX NO. 650369/2023

MOTION DATE 04/07/2023

MOTION SEQ. NO. 001

**DECISION, ORDER
AND JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

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

Country-Wide Insurance Company (“Country-Wide”) petitions pursuant to CPLR 7511(b)(1)(iii) to vacate a master arbitrator’s award dated October 23, 2022, which confirmed an arbitrator’s award, dated August 30, 2022, of \$1,524 in no-fault benefits to respondent Greenleaf Chemists Inc. (“Greenleaf”), as assignee of Luisa Bernabe, Country-Wide’s insured. Country-Wide contends that the lower arbitrator exceeded her powers in issuing an award because the limits of the subject insurance policy were already exhausted, and that the master arbitrator erred in rejecting its policy exhaustion defense, which was raised for the first time before the master arbitrator. The master arbitrator concluded that, pursuant to 11 NYCRR 65-4.10(c)(6), it would be beyond his authority to consider any evidence of policy exhaustion that was not submitted and presented to the lower arbitrator. Country-Wide further argues that the lower arbitrator erred in rejecting its defense based on lack of medical necessity, and the master arbitrator erred in affirming that determination. Greenleaf opposes the petition.

An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where an arbitrator exceeded his or her power, including 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, as here, arbitration is compulsory (see Insurance Law § 5105), closer judicial scrutiny of the arbitrator’s determination under CPLR 7511(b) is required than that applicable to consensual arbitrations. See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., 89 NY2d 214 (1996); Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.], 49 NY2d 757 (1980); Mount St. Mary’s Hosp. v Catherwood, 26 NY2d 493 (1970). To be upheld, an award in a compulsory

arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious. See Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co., *supra*; Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.], *supra*.

An arbitrator exceeds her power when she directs payments in an arbitration award that exceed the no-fault policy cap of an insurance company. See Brijmohan v State Farm Ins. Co., 92 NY2d 821 (1998); Countrywide Ins. Co. v Sawh, 272 AD2d 245 (1st Dept. 2000). However, for a defense based on policy exhaustion to succeed, the award must be for a claim that was complete and filed after the full amount of the policy had been exhausted. See 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.*

With respect to the award of the master arbitrator,

A master arbitrator has the authority to vacate or modify an arbitration award based upon a ground set forth in CPLR article 75. The power of the master arbitrator to review factual and procedural issues is limited to whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis. If the determination of the arbitrator is challenged based upon an alleged factual error, the master arbitrator must uphold the determination if it has a rational basis.

Liberty Mut. Ins. Co. v Spine Americare Med., P.C., 294 AD2d 574, 575-76 (2nd Dept. 2002) (internal citations and quotation marks omitted).

Country-Wide does not present an adequate basis to support vacatur pursuant to CPLR 7511(b)(1)(iii). It argues that that the arbitration award and the master arbitration award should be overturned because the lower arbitrator exceeded her power in issuing an award beyond the already exhausted limits of the subject insurance policy, and the master arbitrator likewise exceeded his power by rejecting Country-Wide's policy exhaustion defense and affirming the initial award. Country-Wide further argues that the lower arbitrator erred in rejecting its defense based on lack of medical necessity, and the master arbitrator erred in affirming that determination. In support of these contentions, Country-Wide submits an attorney affirmation, the conciliation submission from the original arbitration, its master arbitration brief, the declaration pages for the subject insurance policy, and a payment ledger that purports to show that the limits of the subject policy were exhausted on or about March 29, 2022, approximately five months before the initial arbitration award was issued. These submissions do not provide a basis for vacatur.

With respect to the original arbitration, Country-Wide did not raise an exhaustion defense or include any evidence in support of such a defense in its conciliation submission. Further, as

discussed at length in the master arbitration award, the record reflects that the lower arbitrator reviewed all the relevant medical evidence and that there is a valid basis in the evidence for her ultimate decision finding the subject services were medically necessary. Therefore, the original arbitrator was not arbitrary or capricious in awarding Greenleaf its claim amount of \$1,524 and did not exceed her power based upon the documentation and information before her, and the master arbitrator did not err in affirming the arbitrator's findings with respect to medical necessity.

As for the master arbitrator's treatment of the exhaustion issue, the master arbitrator correctly determined that he lacked authority to consider Country-Wide's policy exhaustion defense. Pursuant to 11 NYCRR 65-4.10(c)(6), "[t]he master arbitrator shall only consider those matters which were the subject of the arbitration below or which were included in the arbitration award appealed from." Because Country-Wide did not raise the issue, or submit evidence of, policy exhaustion in the initial arbitration, its policy exhaustion defense was beyond the scope of the master arbitrator's authority to review.

Greenleaf argues that Country-Wide has waived its policy exhaustion defense by failing to raise it in the initial arbitration, and that this court, like the master arbitrator, should not consider the defense. However, the issue with respect to the master arbitrator was one of authority, not waiver, and the First Department has clearly ruled that an insurer is "not precluded from raising the issue of policy exhaustion before the court, even if it was not before the arbitrators in the underlying arbitration." DTR Country-Wide Ins. Co. v Refill Rx Pharmacy, Inc., 212 AD3d 481 (1st Dept. 2023). Nevertheless, even though not waived, Country-Wide's submissions are insufficient to support its defense of policy exhaustion. Country-Wide's policy exhaustion defense consists of a payment ledger that purports to show the subject policy was exhausted approximately five months before the initial arbitration hearing. However, because Country-Wide does not submit an affidavit by a person with knowledge to authenticate the payment ledger, the court cannot accept the ledger as proof that the payments listed therein have been made. See CPLR 4518(a); Speirs v Not Fade Away Tie Dye Co., Inc., 236 AD2d 531, 532 (2nd Dept. 1997); JPC Med., P.C. v State Farm Mut. Auto. Ins. Co., 75 Misc. 3d 136(A) (App. Term, 2nd Dept. 2022); cf. Alleviation Med. Servs., P.C. v Allstate Ins. Co., 191 AD3d 934, 935 (2nd Dept. 2021) (insurer's submissions failed to establish policy exhaustion defense because, *inter alia*, the affidavit submitted was "bereft of any specific information regarding this claim").

CPLR 7511(e) provides that "upon the denial of a motion to vacate or modify [an award], [the court] shall confirm the award." Thus, the court confirms the award challenged here.

Greenleaf is entitled to reasonable attorneys' fees for this proceeding. See 11 NYCRR 65-4.10(j)(4); Unitrin Advantage Ins. Co. Kemper A. Unitrin Bus. v Pro. Health Radiology, 143 AD3d 536, 537 (1st Dept. 2016). Based upon the affidavit of Greenleaf's counsel and the

contemporaneous timesheets submitted therewith, the court awards Greenleaf \$2,750.00 for attorneys' fees and any other associated expenses incurred in this proceeding.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied; the master arbitration award made by the American Arbitration Association, dated October 23, 2022, in the arbitration proceeding entitled Matter of Greenleaf Chemists Inc. a/a/o Luisa Bernabe v Country-Wide Insurance Company, AAA Case No. 99-20-1174-8371, is confirmed; and respondent Greenleaf Chemists Inc. is awarded \$2,750.00 for attorneys' fees and any other associated expenses incurred in this proceeding, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

<u>7/24/2023</u>				
DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE