

Matter of Fill RX NY, Inc. v LM Gen. Ins. Co.
2023 NY Slip Op 32950(U)
August 24, 2023
Supreme Court, New York County
Docket Number: Index No. 651648/2023
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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In the Matter of

FILL RX NY, INC., as assignee of SHEILA MOLINA,

Petitioner,

- v -

LM GENERAL INSURANCE COMPANY,

Respondent.

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INDEX NO. 651648/2023

MOTION DATE 05/05/2023

MOTION SEQ. NO. 001

**DECISION, ORDER, and
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9

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

In this proceeding pursuant to CPLR 7511, the petitioner, Fill RX NY, Inc., as assignee of Sheila Molina, seeks to vacate the March 20, 2023 award of a master arbitrator, affirming a January 24, 2023 American Arbitration Association (AAA) arbitration award that had denied its claim for first-party (no-fault) benefits to reimburse it for drugs and pharmaceutical products that it had furnished to Molina in connection with an automobile accident. The petitioner requests that, upon vacatur, the court remit the matter to a different arbitrator for reconsideration or, in the alternative, enter judgment in its favor and against the respondent in the sum of \$4,151.53, along with interest at rate of 2% from the date that it submitted a demand to arbitrate until entry of judgment, along with attorneys' fees in the sum of 20% of the combined principal and interest, up to a maximum of \$1,360.00. Although the respondent insurer, LM General Insurance Company, does not oppose the petition, the petition is denied, and the award is confirmed.

Sheila Molina, a 45-year-old pedestrian, was injured in a July 29, 2021 motor vehicle accident when the respondent's insured struck her with her vehicle. She complained that, as a consequence of the accident, she sustained multiple injuries. On October 1, 2021, the

petitioner furnished Molina with numerous drugs and pharmaceutical products, totaling \$4,151.53. Molina assigned the petitioner her claim to recover no-fault benefits, upon which the petitioner made claim upon the respondent for reimbursement of that sum. The respondent processed the claim and rejected it, asserting that the amount requested was not in accordance with applicable statutory and regulatory fee schedules, and that the limits of coverage under the policy already had been exhausted in any event.

The petitioner sought arbitration of the claim before the AAA. At the arbitration hearing, the petitioner argued that the respondent was not entitled to rely on the exhaustion defense because the subject invoice should have been paid before any of Molina's other medical, hospital, pharmacy, and health-care claims that the respondent insurer received subsequent to the petitioner's claim.

Relying upon *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.* (47 Misc 3d 137[A], 2015 NY Slip Op 50525[U], *1, 2015 NY Misc LEXIS 1143, *2 [App Term, 1st Dept, Apr 14, 2015]), the lower arbitrator concluded that claims that are timely denied by an insurer do not hold a place in the priority-of-payment queue ahead of subsequently filed claims that were approved and paid by the insurer. The lower arbitrator consequently upheld the insurer's exhaustion-of-benefits defense. In a January 24, 2023 award, the lower arbitrator thus found in favor of the respondent insurer, and rejected the petitioner's claim for benefits. The petitioner sought review of the award before a master arbitrator. In a March 20, 2023 award, the master arbitrator affirmed the initial arbitration award. In his determination, the master arbitrator first explained that

"[r]elying, principally, on the holding in *Harmonic Physical Therapy, P.C. v. Praetorian Ins. Co.* (47 Misc3d 137[A] [1st Dept App Term 2015]) and an Opinion Letter issued by the Office of General Counsel of the New York State Department of Financial Security [isc] (See, Op. No. 08-07-28), the Lower Arbitrator rejected the Appellant's priority of payment argument and concluded that exhaustion of the limits of coverage was dispositive.

"Notably, an arbitration award which goes beyond the underlying policy limits exceeds the limited authority the parties have vested in the forum and would be

subject to vacatur on that ground. (See, CPLR 7511[b][iii]; *Matter of Motor Veh. Acc. Indem. Corp. v American Country Ins. Co.*, 126 AD3d 657 [1st Dept 2015]; *Spears v New York City Transit Auth.*, 262 AD2d 493, *lv den* 94 NY2d 761 [2000]; *see also, Countrywide Ins. Co. v Sawh*, 272 AD2d 245 [1st Dept 2000]).”

“Recent appellate case law lends further support to the Lower Arbitrator’s determination. ‘Once a no-fault insurer “has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease” (*Countrywide Ins. Co. v Sawh*, 272 AD2d 245, 708 N.Y.S.2d 862 [1st Dept 2000]). An arbitrator’s award directing payment beyond the monetary limit of a no-fault insurance policy exceeds the arbitrator’s power and constitutes grounds for vacatur of the award (*see Matter of Brijmohan v State Farm Ins. Co.*, 92 NY2d 821, 823, 699 N.E.2d 414, 677 N.Y.S.2d 55 [1998]; *see also Matter of Ameriprise Ins. Co. v Kensington Radiology Group, P.C.*, 179 AD3d 563, 118 N.Y.S.3d 82 [1st Dept 2020]).’ (*Matter of DTR Country-Wide Ins. Co. v Refill Rx Pharmacy, Inc.*, 212 AD3d 481, 181 NYS3d 252, 253 [1st Dept. 2023]; *see also, Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.*, 74 Misc3d 134 [A] [1st Dept. App. Term 2022]).

“Based on the foregoing, the Award under review cannot reasonably be assailed as arbitrary, capricious, or incorrect as a matter of law.”

This proceeding ensued.

The grounds specified in CPLR 7511 for vacatur of an arbitration award are exclusive (*see Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 8 [1st Dept 2009]), and it is a “well-established rule that an arbitrator’s rulings, unlike a trial court’s, are largely unreviewable” (*Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534 [2013]). 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 [1st Dept 2016]). Where, as here, arbitration is compulsory (*see Insurance Law* § 5105), closer judicial scrutiny of the arbitrator’s determination is required under CPLR 7511(b) than that applicable to consensual arbitrations (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d 757, 758 [1980]; *Mount St. Mary’s Hosp. v Catherwood*, 26 NY2d 493, 508-509 [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.*, 89 NY2d at 223; *Matter of Furstenberg [Aetna Cas. & Sur. Co.–Allstate Ins. Co.]*, 49 NY2d at 758).

In a compulsory no-fault arbitration, a party aggrieved by a lower arbitrator's award may seek vacatur or modification of that award solely by appeal to a master arbitrator, and only upon the grounds articulated in 11 NYCRR 65-4.10(a), which, as relevant here, include a contention that the award "was incorrect as a matter of law" (11 NYCRR 65-4.10[a][4]; see Insurance Law § 5106[b]). Hence, the function of the master arbitrator in reviewing the decision below is to confirm that the decision was arrived at in a rational manner, and that the decision was not arbitrary and capricious (11 NYCRR 65.17[a][1]) or incorrect as a matter of law (11 NYCRR 65.17[a][4]).

Inasmuch as the master arbitrator did not make his own factual determinations, review alleged factual or procedural errors made in the course of the arbitration, weigh the evidence, or resolve credibility issues, he did not exceed his authority (see *Matter of Richardson v Prudential Prop. & Cas. Co.*, 230 AD2d 861 [2d Dept 1996]).

Moreover, the court concludes that the master arbitrator's determination was not incorrect as a matter law. As the master arbitrator noted, there is a split in appellate authority on the issue of priority of claims in the face of the potential exhaustion of the limits of a no-fault insurance policy. The Appellate Term, First Department, has held that claims that are timely denied by an insurer do not hold a place in the priority-of-payment queue ahead of subsequently filed claims that were paid by the insurer, thus exhausting available coverage (see *Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.*, 47 Misc 3d 137[A]). The Appellate Term, Second Department, has held that fully verified claims are payable in the order they were received, and that there was no merit to an insurer's contention that it need not pay the denied claim because its payment of subsequent claims had the effect of exhausting the available coverage (see

Alleviation Med. Servs., P.C. v Allstate Ins. Co., 55 Misc 3d 44, 45 [App Term, 2d Dept, 2d, 11th, & 13th Jud Dists 2017], *affd other grounds* 191 AD3d 934 [2d Dept 2021]).

In *Harmonic Physical Therapy*, the Appellate Term, First Department, explained that

“[c]ontrary to plaintiff’s contention, defendant was not precluded by 11 NYCRR 65-3.15 from paying other providers’ legitimate claims subsequent to the denial of plaintiff’s claims. Adopting plaintiff’s position, which would require defendant to delay payment on uncontested claims, or, as here, on binding arbitration awards - pending resolution of plaintiff’s disputed claim – ‘runs counter to the no-fault regulatory scheme, which is designed to promote prompt payment of legitimate claims’ (*Nyack Hosp. v General Motors Accept. Corp.*, 8 NY3d at 300)”

(*Harmonic Physical Therapy, P.C. v Praetorian Ins. Co.*, 2015 NY Slip Op 50525[U], *1). The rule articulated in *Harmonic Physical Therapy* expressly has been applied by courts on numerous occasions to permit insurers to invoke the exhaustion defense under circumstances identical to those presented in the instant matter (see *Matter of Galaxy RX, Inc. v GEICO Ins. Co.*, 2023 NY Slip Op 31974[U], *1-2, 2023 NY Misc LEXIS 2912, *2-3 [Sup Ct, N.Y. County, Jun. 12, 2023] [denying petition to vacate master arbitrator’s award affirming lower arbitrator’s award]; *Advantage Radiology, P.C. v Motor Veh. Acc. Indem. Corp.*, 78 Misc 3d 126[A], 2023 NY Slip Op 50139[U], 2023 NY Misc LEXIS 751 [App Term, 1st Dept, Feb. 27, 2023] [insurer raised triable issue of fact as to whether it exhausted the coverage limits by payments to other providers and to the assignor for lost wages, and whether such payments were made in compliance with the priority of payment regulations]; *Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.*, 74 Misc 3d 134[A], 2022 NY Slip Op 50277[U], 2022 NY Misc LEXIS 1365 [App Term, 1st Dept, Apr. 19, 2022] [affirming vacatur of a master arbitrator’s award to a medical provider that was made despite the fact that subsequent claims had exhausted the policy limits, and holding that, when an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease]; see also *Matter of New Millennium Pain & Spine Med., P.C. v Progressive Cas. Ins. Co.*, 2023 NY Slip Op 32218[U], 2023 NY Misc LEXIS 3312 [Sup Ct, N.Y. County, Jun. 27, 2023] [Kelley, J.]). In the *Allstate* decision, the Appellate Term explicitly concluded that, “[c]ontrary to respondent’s contention, petitioner was not precluded by

11 NYCRR 65-3.15 from paying other legitimate claims subsequent to the denial of respondent's claims" (*Allstate Fire & Cas. Ins. Co. v Branch Med., P.C.*, 2022 NY Slip Op 50277[U], *1, 2022 NY Misc LEXIS 1365, *2]).

The determination of the Appellate Division, First Department, in *Matter of Ameriprise Ins. Co. v Kensington Radiology Group, P.C.* (179 AD3d 563 [1st Dept 2020]), relied upon by the petitioner, is not to the contrary. There, the Appellate Division did not address the issue of whether claims that are timely denied by an insurer did or did not hold a place in the priority-of-payment queue ahead of subsequently filed claims that ultimately were paid by the insurer. Rather, it generally enforced the regulatory no-fault payment protocols as set forth in title 11 of the New York Code Rules and Regulations. In *Ameriprise*, the insurer rejected a claim submitted by an injured party's assignee for no-fault benefits, where the insurer had requested additional verification by means of an examination under oath, but neither the injured party nor the assignee appeared for the examination. The Court thus concluded that the claims, as initially submitted, had not been properly verified, and that claims submitted by other health-care providers that had been verified would be entitled to priority over any unverified claims. It thus affirmed an Appellate Term decision remitting the matter to the Civil Court for a framed-issue hearing on the issue of whether the subject policy limits were in fact exhausted before the insurer ultimately became or would become obligated to pay the claims submitted by the injured party's assignee.

Inasmuch as the master arbitrator's award was not contrary to law or arbitrary and capricious, he properly affirmed the lower arbitrator's award. Hence, the petition to vacate the master arbitrator's award must be denied. Pursuant to CPLR 7511(e), "upon the denial of a motion to vacate or modify" an award, the court "shall confirm the award."

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied; and it is further,

ADJUDGED that, upon the denial of the petition, the March 20, 2023 award of Master Arbitrator A. Jeffrey Grob, made in American Arbitration Association Case No. 99-22-1233-4977, be, and hereby is, confirmed.

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

8/24/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: