Omega Acupuncture PC v USAA Gen. Indem. Co.
2024 NY Slip Op 32035(U)
June 12, 2024
Supreme Court, Kings County
Docket Number: Index No. 520399/2023
Judge: Ingrid Joseph
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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 12th day of June 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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OMEGA ACUPUNCTURE PC A/A/O GIOLA WASEFA,
Petitioner(s)

-against-

USAA GENERAL INDEMNITY CO.,
Respondent(s)

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Index No: 520399/2023

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Petition/Affidavits Annexed Exhibits Annexed.....	1-10
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	11-15

Omega Acupuncture PC A/A/O Giola Wasefa ("Petitioner") brings this action (Motion Seq. 1) pursuant to Article 75 of the CPLR for an Order and Judgment vacating the Arbitration Awards of Arbitrator Giovanna Tuttolomondo ("Arbitrator Tuttolomondo") and/or Master Arbitrator Jeffrey Grob ("Grob") which denied Petitioner's claim request in the amount of $191.35 for medical services rendered from March 5, 2020 through March 12, 2020, to treat injuries allegedly sustained by Giola Wasefa ("Wasefa") as the result of a motor vehicle accident that occurred on February 23, 2020. Additionally, Petitioner seeks an award of additional attorney's fees pursuant to 11 NYCRR 65-4.10(j)(4). USAA General Indemnity Co., ("Respondent") has opposed the motion on the ground that the Arbitration Awards were not arbitrary and capricious, irrational and without plausible basis, or an error of law.

This matter arises out of a No-Fault action brought pursuant to Insurance Law 5106 and/or 11 NYCRR 65. In its Petition, Petitioner argues that Master Arbitrator Grob's decision affirming Arbitrator Tuttolomondo denial should be vacated because its submitted bill was actually timely as a result of an Executive Order issued during the COVID-19 pandemic which tolled the 45-day deadline to submit. Petitioner states that pursuant to 11 NYCRR 65-1.1, regulations require the Petitioner to submit its bill within 45 days of the date of service. Petitioner concedes that it submitted its bill on June 2, 2020, more than 45 days after the date of service, and claims that Respondent denied the bill on the 45-day rule, thus Petitioner was required to justify its lateness with a reasonable excuse. At the lower arbitration hearing, Petitioner argued that it was not required to respond to the corresponding denial claim form ("NF-10 Form") and that all claims submitted at the height of the pandemic should have been automatically excused if untimely, without further elaboration or submission of an explanation. Petitioner asserts that Arbitrator Tuttolomono's decision should be vacated because it found that because Petitioner provides in-person services, that "there is no reason to conclude that there was any hinderance to Petitioner's ability

to generate and submit claims, thus it would not be unreasonable for Respondent to request reasonable justification for the delay, " and that "for this reason it was incumbent upon [Petitioner] to communicate with Respondent, rather than disregard the request for justification," despite the fact that a tolling provision was in effect. Consequently, Petitioner contends that Master Arbitrator Grob's decision, which held that the lower arbitrator had a rational basis for her findings, should also be vacated. In support of its request for additional attorney's fees, Petitioner submits an affidavit and asks that the court award an hourly rate of $500.00 for 2 hours and 15 minutes of services rendered in connection with the Article 75 appeal totaling $1125.00.

In opposition, Respondent argues that Petitioner has failed to meet its burden of proof of proving that the arbitration awards are arbitrary and capricious, irrational, and without plausible basis, or an error of law. Respondent states that Arbitrator Tuttolomono found that Petitioner failed to comply with any aspect of the No-Fault regulations, specifically, that the requirement that a provider submit claims for medical services rendered within 45 days from the date of service or to provide any explanation in response to the NF-10 Form afforded to it. Respondent asserts that Arbitrator Tuttolomono had a rational basis for her decision, which was properly affirmed by Master Arbitrator Grob and should not be vacated.

CPLR 7511 provides that a Plaintiff can file a petition to vacate an arbitration award if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection. Judicial review of arbitration awards is extremely limited (*Wien & Malkin LLP v Helmsley-Spear, Inc.,* 6 N.Y.3d 471 [2006]; *Tauber v Gross,* 216 A.D.3d 1066 [2d Dept. 2023]; see *Jurcec v Moloney,* 164 A.D.3d 1434 [2d Dept. 2018]). A party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511(b)(1) bears the burden of establishing a ground for vacatur by clear and convincing evidence [*Tauber* at 1068; *Matter of Denaro v Cruz,* 15 A.D.3d 742 [2d Dept. 2014]; see *Jurcec v Moloney,* 164 A.D.3d 1431 [2d Dept. 2018]).

The award of a master arbitrator in a dispute over a no-fault claim is binding except for the grounds for vacating an award under CPLR 7511 (see Insurance Law 5106[c]; 11 NYCRR 65-4.10[h][1][I]). A master arbitrator has the authority to vacate or modify an arbitration award based upon a ground set forth in CPLR Article 75. A master arbitrator may overturn an award if an arbitrator exceeded his power (11 NYCRR § 65-4.10 (a)(1); CPLR 7511 [b] [1] [iii]). 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 (see *In re Petrofsky* [*Allstate Ins. Co.*], 54 N.Y.2d 207 [1981]). 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 Medical, P.C.,* 294 A.D.2d 144 [2d Dept. 2002]; *Richardson v Prudential Property & Cas. Ins. Co.,* 230 A.D.2d 861 [2d Dept. 1996]). A master arbitrator's powers of review does not encompass a de novo review of the matter presented to the lower arbitrator and does not authorize the master arbitrator to determine the weight or credibility of the evidence (*Id.*). Additionally, a master arbitrator may not substitute his judgment for that of the arbitrator (see *Matter of Aleman*, 62 N.Y.2d 1017 [1984]). A master arbitrator's grounds for review does include determining whether the decision was incorrect as a matter of law (11 NYCRR 65-4.10[a][4]). If the master arbitrator vacates the arbitrator's award based upon an alleged error of "a rule of substantive law," the determination of the master arbitrator must be upheld unless it is irrational (*Smith v Fireman's Ins. Co.,* 55 N.Y.2d 224 [1982]).

11 NYCRR 65, section 1, provides:

> Proof of Claim; Medical, Work Loss, and Other Necessary Expenses. In the case of a claim for health service expenses, the eligible injured person or that person's assignee or representative shall submit written proof of claim to the Company, including full particulars of the nature and extent of the injuries and treatment received and contemplated, as soon as reasonably practicable but, in no event later than 45 days after the date services are rendered.

11 NYCRR 65-3.3 (e) provides:

> When an insurer denies a claim based upon the failure to provide timely written notice of claim or timely submission of proof of claim by the applicant, such denial must advise the applicant that late notice will be excused where the applicant can provide reasonable justification of the failure to give timely notice.

In his Executive Order, Governor Cuomo states in relevant part that:

> "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the

> civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled…"

A toll stops the running of the applicable period of limitations for a finite period of time, and the period of the toll is excluded from the calculation of the relevant limitations period (*see Brash v Richards,* 195 AD3d 582 [2021]; *Chavez v Occidental Chemical Corp.,* 35 NY3d 492 [2020]; *Baker v 40 Wall Street Holdings Corp.,* 74 Misc. 3d 381 [Sup Ct, Kings County 2022, J. Silber]). Thus, the Court in *Brash* found that the subject Executive Orders constituted a toll of such filing deadlines (*Brash* at 582). While several court decisions have interpreted the holding of *Brash* to constitute a suspension[1] and others interpreted it to be a toll[2] the Court clearly held that the Executive Order created a toll and not a suspension on the statute of limitations.

Here, the court finds that there is no dispute as to the application of the Executive order or the application of Brash's tolling provisions. The issue before the court is whether Plaintiff was obligated under No Fault Law 11 NYCRR 65 to submit explanation as to the late submission of proof of claim. In the lower arbitration award, Arbitrator Tuttolomono found that because Petitioner failed to provide timely proof of claim, that there was no indication that any explanation asserting reasonable justification was ever provided to Respondent, and that as such there was insufficient evidence in the record to establish reasonable justification for the late submission. Additionally, Arbitrator Tuttolomono states that Petitioner's unsupported assertions are not evidence, thus Respondent's denial is upheld. In affirming the lower arbitration award, Master Arbitrator Grob held that Petitioner failed to meet its burden and that Arbitrator Tuttolomono examined and evaluated the positions asserted and articulated a rational basis for the conclusion reached, and that "the fact that a different conclusion could have been reasonably reached is not sufficient ground to set aside the determination." In cases regarding statute of limitations, movant must raise the affirmative arguments of their claims. Here, Plaintiff has failed to proofer evidence establishing that it was not required to submit any explanation in response to the NF-10 Form afforded to it.

Upon review of the foregoing papers, the Court finds that the Master Arbitrator Grob's decision affirming the Arbitrator Tuttolomono's decision, was not arbitrary and capricious and was rational and

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[1] (*Baker v 40 Wall Street Holdings Corp., v Star-Delta Electric, LLC,* 74 Misc.3d 381 [Sup Ct, Kings County 2022, J. Silber]; *Cruz v Guaba,* 74 Misc.3d 1207(A) [Sup Ct, Queens County 2022, J. Caloras];

[2] (*Foy v State of New York,* 71 Misc.3d 605 [Ct Cl 2021]; *Vivar v BSREP UA River Crossing,* 2021 NY Slip Op. 32153 [Sup Ct, NY County 2021]; *Crandell v Amofa et al* Index # 524250/2020 [Sup Ct, Kings County 2021, J. Landicino]).

was with a plausible basis. As the lower arbitrator's award is rational and based upon the evidence presented by both parties, there are no grounds to vacate or modify it.

Accordingly, it is hereby,

ORDERED, that Petitioner's motion (Motion Seq. 1) for an Order and Judgment vacating the Arbitration Awards of Arbitrator Tuttolomondo and/or Master Arbitrator Grob is denied in its entirety. Plaintiff is not entitled to attorney's fees.

Matters not addressed are either moot or without merit.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice