

Matter of Continental Indem. Co. v City of New York

2024 NY Slip Op 32619(U)

July 1, 2024

Supreme Court, New York County

Docket Number: Index No. 654655/2023

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

CONTINENTAL INDEMNITY COMPANY, as subrogee of
GINO PIZARRO,

Petitioner,

- v -

CITY OF NEW YORK,

Respondent.

-----X

INDEX NO. 654655/2023

MOTION DATE 07/12/2024

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, 10

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT.

Continental Indemnity Company (Continental) petitions pursuant to CPLR 7510 to confirm an arbitration award, dated April 18, 2023, made by an arbitrator acting under the auspices of Arbitration Forums, Inc. (AFI), and pursuant to CPLR 7514 to direct the entry of judgment thereon. The respondent, City of New York, does not oppose the petition. The petition is granted, the award rendered under AFI Docket No. I068-04857-19-00 is confirmed, and Continental is entitled to enter a money judgment against the City in the principal sum of \$50,000, plus statutory interest on that sum from April 18, 2023.

Continental was the insurer of a box truck owned by Pierless Fish and operated by Gino L. Pizarro, who operated the vehicle in his capacity as an employee of Pierless Fish. The City was the owner and self-insurer of a sanitation truck that was operated by New York Department of Sanitation employee Tomas A. Bracho. On June 17, 2017, at approximately 5:00 p.m., Bracho had just pulled out of a sanitation garage and began to proceed eastbound on 52nd Street in Brooklyn, New York, near its intersection with 1st Avenue, when Pizarro, who was proceeding southbound on 1st Avenue, came into contact with the sanitation truck.

Pizarro thereafter made a claim upon his insurer, Continental, for Workers' Compensation benefits in lieu of first-party no-fault benefits (*see A.I. Transp. v New York State Ins. Fund*, 301 AD2d 380, 380 [1st Dept 2003]; *Arvatz v Empire Mut. Ins. Co.*, 171 AD2d 262, 268 [1st Dept 1991]; Insurance Law §§ 5102[a], [b]; 5103 [a]; Workers' Compensation Law § 2[3]). Continental paid claims totaling on Pizarro's behalf in the sum of \$50,000, the maximum allowable amount for first-party benefits.

Inasmuch as the vehicle that both Continental had insured and the City had self-insured were "motor vehicle[s] weighing more than six thousand five hundred pounds unloaded" (Insurance Law § 5105[a]), Continental was entitled to seek a personal injury protection (PIP) or Workers' Compensation "loss transfer" from the City to reimburse it for the benefits that it had paid out to Pizarro (*see A.I. Transp. v New York State Ins. Fund*, 301 AD2d at 380). To obtain this loss transfer, Continental was required to establish that Bracho, as the operator of the self-insured City vehicle, was completely or partially at fault in the happening of the accident. Insurance Law § 5105(b) provides that, where an insurer seeks to recover first-party benefits/PIP or Workers' Compensation loss transfer from the "insurer of any other covered person" on the ground that the other covered person was at fault in the happening of the accident, "[t]he sole remedy . . . shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent" of the New York State Department of Financial Services. Pursuant to those regulations, AFI has been designated as the exclusive forum for resolution of no-fault related arbitration matters (*see* 11 NYCRR 65.10).

On April 15, 2019, Continental demanded inter-insurer arbitration with the City before AFI, and thus filed a PIP loss-transfer arbitration claim with AFI. In an award dated April 18, 2023, an AFI arbitrator found Pizarro's description of the accident, as supported by photographic evidence, to be credible. Specifically, she found that Bracho confirmed that his vehicle struck Pizarro's vehicle, and that a photograph of the area confirmed that Bracho's

vehicle was governed by a stop sign on a one-way street, and that he thus did not have the right-of-way, while no stop sign governed the movement of Pizarro's vehicle, so that he did have the right-of-way. Thus, she found that Bracho was negligent, and that he was 100% at fault in the happening of the subject accident. Upon finding that the amount of medical expenses and lost wages that Pizarro had claimed, in the sum of \$50,000, had been "proven," she determined, in an award dated April 18, 2023, that the City was obligated to pay Continental the total sum of \$50,000 in first-party benefits for Pizarro's basic economic loss. On September 21, 2023, Continental commenced this proceeding to confirm the award.

Pursuant to CPLR 7510, the court "shall confirm an [arbitration] award upon application of a party made within one year after its delivery to him [or her] unless the award is vacated or modified upon a ground specified in section 7511." Thus, the award may only be vacated if the court finds that the rights of a 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"

(CPLR 7511[b][1]). 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]). Nonetheless, where a challenged award is one, such as the one here, that is rendered after compulsory arbitration, i.e., an arbitration mandated by statute, the court must give "closer judicial scrutiny of the arbitrator's determination under CPLR 7511(b)" than would be warranted in reviewing an award made after a consensual arbitration (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; see *Matter of Fiduciary Ins. Co. v American Bankers Ins. Co. of Fla.*, 132 AD3d 40, 46 [2d Dept 2015] [with respect to

determinations of law, the applicable standard in mandatory no-fault arbitrations is whether any reasonable hypothesis can be found to support the questioned interpretation]; *Matter of Lackow v Department of Educ. (or "Board") of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]; *Matter of Curley v State Farm Ins. Co.*, 269 AD2d 240, 242 [1st Dept 2000]; *Matter of Travelers Ins. Co. v Job*, 239 AD2d 289, 291 [1st Dept 1997]). “To be upheld, an award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious” (*Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d at 223 [citations omitted]; see *Matter of Santer v Board of Educ. of E. Meadow Union Free Sch. Dist.*, 23 NY3d 251, 261 [2014]; *Matter of Travelers Ins. Co. v Job*, 239 AD2d at 291).

The instant proceeding to confirm the arbitration award was timely commenced on September 21, 2023 (see CPLR 304[a]). Continental contends that the award was proper in all respects, and that no grounds exist for modification or vacatur. The court agrees. The court notes that, although Pizarro had commenced a prior personal injury action against the City and Bracho (see *Pizzaro v City of New York*, et al, Supreme Court, Kings County, Index No. 518096/2018), in which the issue of Bracho’s negligence and the apportionment of fault between Pizarro and Bracho may have been disputed, a “final judgment on the merits” is required to assert either the doctrine of res judicata or collateral estoppel to bar this proceeding (*Kilduff v Donna Oil Corp.*, 74 AD2d 562, 563 [2d Dept 1980], quoting Siegel, New York Practice, § 444, p 589; see *Allmed Mdse. & Trading, Inc. v Geico*, 2023 NY Misc LEXIS 19623, *2 [Sup Ct, Queens County, Jul, 14, 2023]; see also *Eastern Air Lines, Inc. v Trans Caribbean Airways, Inc.*, 29 AD2d 379, 381-382 [1st Dept 1968], *affd* 23 NY2d 709 [1968]; 5 Weinstein, Korn & Miller, New York Civil Practice para. 5011.10 at p. 50-78.). In other words, it would only be the entry of a final judgment in the related, prior action that could act as a bar, since “neither the verdict of a jury nor the findings of a court in a prior action upon the precise point involved in a subsequent action . . . constitute a bar, unless followed by a judgment based thereon, or into which the verdict or findings entered” (*Church v New York State Thruway Auth.*, 16 AD3d 808,

810 [3d Dept 2005], quoting *Rudd v Cornell*, 171 NY 114, 128-129 [1902]; see *Peterson v Forkey*, 50 AD2d 774, 774-775 [1st Dept 1975]; see also *Matter of Timperio v Bronx-Lebanon Hosp.*, 203 AD3d 179, 184 [3d Dept 2022]). “Though a prior verdict appears to be decisive of precise issues raised in a later action, it cannot, absent entry of judgment, act as a bar” (*Peterson v Forkey*, 50 AD2d at 775; see *Church v New York State Thruway Auth.*, 16 AD3d at 810 [“[w]hen no order or final judgment has been entered on a verdict or decision . . . collateral estoppel is inapplicable”]; *Wiederhorn v Karlan*, 267 App Div 163, 164 [1st Dept 1943]). Hence, even though, under appropriate circumstances, the doctrines of res judicata or collateral estoppel could bar the arbitration of a claim that has been litigated in court (see *Matter of Shapiro v Hayes*, 2016 NY Slip Op 30643[U], *7-8, 2016 NY Misc LEXIS 1348, *11-12 [Sup Ct, N.Y. County, Apr. 13, 2016]), inasmuch as the parties settled the Kings County action on November 9, 2022, there was no judgment on the merits entered in that action and, thus, no basis for rejecting the instant request to confirm the subject arbitration award.

Consequently, the court concludes that Continental is entitled both to the confirmation of the award and to the entry of a money judgment in the principal sum of \$50,000. The money judgment must bear interest from the date of the arbitration award, that is, from April 18, 2023 (see CPLR 5002; *Board of Educ. of Cent. School Dist. No. 1 of Towns of Niagara, Wheatfield, Lewiston & Cambria v Niagara-Wheatfield Teachers Assn.*, 46 NY2d 553, 558 [1979]; *Dermigny v Harper*, 127 AD3d 685, 686 [2d Dept 2015]; *Matter of Levin & Glasser, P.C. v Kenmore Prop., LLC*, 70 AD3d 443, 446 [1st Dept 2010]; *Matter of Gruberg v Cortell Group, Inc.*, 143 AD2d 39, 39 [1st Dept 1988]).


Accordingly, it is,

ADJUDGED that the petition is granted, without opposition, and the arbitration award rendered in the matter entitled *Matter of Continental Indemnity Co. v City of New York, Arbitration Forums, Inc.*, Docket No. I068-04857-19-00, dated April 18, 2023, be, and hereby is, confirmed; and it is further,

ORDERED that the Clerk of the court shall enter a money judgment in favor of Continental Indemnity Company and against the City of New York, in the principal sum of \$50,000, plus statutory interest at 9% per annum thereon from April 18, 2023.

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

7/1/2024
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE