

American Family Connect Ins. Co. v Uptown Healthcare Mgt
2025 NY Slip Op 35447(U)
January 24, 2025
Supreme Court, Nassau County
Docket Number: Index No. 614972/24
Judge: Erica L. Prager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: ERICA L. PRAGER, J.S.C.

AMERICAN FAMILY CONNECT INSURANCE
COMPANY f/k/a AMERIPRISE INS. CO.,

Petitioner,

-against-

UPTOWN HEALTHCARE MGT d/b/a EAST
TREMONT MED. CENTER a/a/o ALEXIS
DELEONARD,

Respondent.

IAS/TRIAL PART 15

Motion Seq.: 001

Submission Date: 11/6/24

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DECISION AND ORDERPapers Considered:NYSCEF Doc. No.

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Upon the foregoing papers, Petitioner seeks an Order pursuant to CPLR §7511 vacating a No-Fault Arbitration Award and Master Arbitration Award.

This matter arises out of a claim for No Fault benefits, under a policy of insurance issued by petitioner AMERICAN FAMILY CONNECT INSURANCE COMPANY ("Petitioner"), in the total sum of \$397.10 (the "Claim"). The Claim was made by respondent UPTOWN HEALTHCARE MGT d/b/a EAST TREMONT MED. CENTER ("Respondent"), as assignee of ALEXIS DELEONARD ("Respondent's Assignor"), seeking compensation for anesthesiology services allegedly rendered to Respondent's Assignor on January 26, 2023 for injuries sustained in an automobile accident.

The Petitioner denied the Claim based upon the failure of Respondent's Assignor to appear for an examination under oath (EUO), which is a condition precedent to coverage under the No Fault regulations and the applicable policy of insurance. Upon denial of the Claim, Respondent commenced compulsory arbitration before the American Arbitration Association pursuant to Insurance Law §5106.

A hearing was held on March 19, 2024 before arbitrator Pamela Hirschhorn (the "Arbitrator"). On March 22, 2024, the Arbitrator issued an award in favor of Respondent in the total sum of \$397.10 (plus interest and fees), in full satisfaction of the Claim (the "Award"). The

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Arbitrator found that Petitioner had failed to mail the EUO notices to the correct address of Respondent's Assignor; that is, they were sent to addresses that were different from the address provided by Respondent's Assignor on her NF-2 forms. The Arbitrator held that this was fatal to Petitioner's EUO no-show defense. The Arbitrator found further that Petitioner failed to establish that it properly tolled the Claim, insofar as it failed to provide proof that it notified Respondent of the delay pending the EUO of Respondent's Assignor.

Thereafter, the Petitioner sought to appeal the Award in master arbitration, upon the ground that the Award was irrational and legally incorrect. The Petitioner argued that its mailing of the EUO scheduling letters constituted proper and sufficient notice: the scheduling letters were sent to the attorney for Respondent's Assignor, with copies sent to Respondent's Assignor at two addresses confirmed as accurate in a comprehensive background report. Petitioner cited lower court and appellate term authority for the proposition that the mailing of EUO scheduling letters to an assignor's counsel satisfied the insurer's prima facie burden of mailing/due notice. Moreover, Petitioner argued, the address provided by Respondent's Assignor on her NF-2 was incomplete (it did not include the apartment number in a multiple unit building). Petitioner asserted further that, contrary to the finding of the Arbitrator, Petitioner did, in fact, notify Respondent that its Claim was being delayed pending the EUO of Respondent's Assignor.

Master Arbitrator Robert Trestman (the "Master Arbitrator") issued a Master Arbitration Award dated May 21, 2024 (the "Master Award"), which affirmed the underlying Award in its entirety. The Master Arbitrator held¹:

I acknowledge that there is no clear consensus in the arbitration forum or in the courts as to whether the mailing of the EUO notices to assignor's counsel constitutes sufficient notice to the assignor. In contrast to the cases cited by respondent hereinabove, in *Global Liberty Ins. Co. v. New Century Acupuncture*, 161 AD 3d 498 [App. Div. 1st Dept. 2018], the Court held that, despite the IME scheduling letters sent to assignor's counsel, the IME scheduling letters sent to assignor at the wrong address, failed to establish the insurer's IME no-show defense. See also AAA Case No. 17-22-1247-2692 for a similar holding. Given the lack of a definitive stance by the courts and the AAA forum, I cannot, within my power of review, find that the arbitrator erred as a matter of law or acted so irrationally as to warrant vacatur of her award.

Regarding the address utilized by respondent's [sic] for its mailing of the EUO scheduling letters to assignor, I note the following: [1] one of assignor's NF-2 forms lists an incomplete address of 190 Bethel Loop; the other NF-2 form lists an address of 190 Bethel Loop,

¹ All references to "respondent" in this quoted passage are intended to signify the insurer, Petitioner herein, who was the respondent in the underlying arbitration.

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Brooklyn, NY 11239 - the evidence suggests that respondent received the latter NF-2 dated 12/12/22 prior to the first scheduled EUO appearance [2] the "Comprehensive Report," listing the "Address Details" for assignor, is dated 12/16/22, prior to respondent's mailing of its EUO scheduling letters; the address summary lists 9 different addresses with different corresponding time periods; respondent utilized the 2 addresses with the most recent listed time periods [in Far Rockaway and Astoria, NY] yet the most recent period was prior to respondent's mailing of its EUO notices. It should also be noted that respondent's EUO no-show denial dated 5/18/23 lists assignor's address as matching the address listed on applicant's NF-2 [with an apartment number]. In *Logic Chiro. v. Hereford*, 2017 NY Slip Op 51754 [App. Term 2d], the Court held that the discrepancy between assignor's address as listed on the claim forms and NF-2 and the address to which the IME scheduling letters were sent demonstrated that the insurer did not establish a proper mailing to assignor. Regarding the absence of an apartment number on the NF-2, this was an evidentiary determination within the fact-finding discretion of the trier of fact. Additionally, respondent's argument as to the absent apartment number is attenuated by the fact that respondent sent the EUO notices to completely different addresses. Based on the foregoing, I do not find reversible error in the arbitrator's finding that respondent did not establish due and proper mailing to assignor.

Petitioner now brings the instant petition pursuant to CPLR §7511 to vacate the Award and the Master Award. Petitioner argues that the Award and the Master Award are irrational, arbitrary, capricious and incorrect as a matter of law. According to Petitioner, case law establishes that notice served upon a party's attorney is sufficient for purposes of requesting verification of claims or an appearance at an EUO. Moreover, additional notices were sent to Respondent's Assignor at her two most recent addresses identified in a comprehensive background report, and the address provided by Respondent's Assignor on her NF-2 was invalid.

Petitioner argues that there is no rational basis for the Arbitrator's finding that Respondent's Assignor did not receive notice of the scheduled EUO's. Further, the Arbitrator's Award fails to address Petitioner's argument, and the case law proffered in support thereof, that it was sufficient to send notice to the attorney for Respondent's Assignor.

The Master Arbitrator erred, in Petitioner's view, by finding "no clear consensus" on this issue, in reliance upon *Global Liberty Ins. Co. v. New Century Acupuncture*, 161 AD 3d 498 (1st Dept. 2018), which Petitioner deems to be factually distinguishable. Moreover, Petitioner argues, the Master Arbitrator made an impermissible finding of fact – namely, that the Arbitrator based her Award on purported inconsistencies in the law – whereas the Arbitrator was, in fact, silent on the issue.

In addition, Petitioner reasserts the argument made before the Master Arbitrator that the Claim was properly tolled insofar as Petitioner did, in fact, notify Respondent that its Claim was

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being delayed pending the EUO of Respondent's Assignor. Copies of the Explanations of Benefits addressed to EAST TREMONT MEDICAL CENTER which advise of the delay are included in the Petitioner's submissions to the Arbitrator and the Master Arbitrator.

Finally, Petitioner argues that subsequent to the arbitration proceeding, Petitioner's investigators determined that the underlying event giving rise to the Claim was not the result of an accident, but rather was a deliberate collision in furtherance of an insurance fraud scheme. Accordingly, there is no insurance coverage for the alleged loss. Moreover, this defense is not waivable, and can be raised at any time.

In response to the Petition, Respondent submits an Answer with 23 affirmative defenses, including that the Insurer had not processed the Claim in accordance with the applicable law and regulations.

"Judicial review of a master arbitrator's award is restricted, by the terms of the statute, to the grounds for review set forth in article seventy-five of the CPLR (except in those cases where the award is \$5,000 or more, and the applicant or insurer may seek de novo review in the courts). ... CPLR 7511 allows a court to vacate an arbitrator's award and, by judicial construction, a master arbitrator's award on the application of either party if the court finds that the rights of that party were prejudiced by: (iii) an arbitrator, or agency or person making the award exceeded his power or that a final and definite award upon the subject matter submitted was not made." *Matter of Petrofsky (Allstate)*, 54 NY2d 207, 210 (1981) (internal citations and quotation marks omitted), citing CPLR §7511[b][1][iii]).

"In cases of compulsory arbitration, this court has held that CPLR article 75 includes review of whether the award is supported by evidence or other basis in reason. ... This standard has been interpreted to import into article 75 review of compulsory arbitrations the arbitrary and capricious standard of article 78 review. ... In addition, article 75 review questions whether the decision was rational or had a plausible basis." *Matter of Petrofsky (Allstate)*, 54 NY2d at 211 (internal citations and quotation marks omitted).

"The master arbitrator, when reviewing an arbitrator's award made in a compulsory arbitration setting pursuant to 11 NYCRR 65.17 [a] [1] which authorizes article 75 review, is, therefore, like the courts, limited to reviewing on the basis of the limited grounds enumerated by article 75 ... and to reviewing whether the arbitrator acted in a manner that was arbitrary and capricious, irrational or without a plausible basis. ... The superintendent's regulations (11 NYCRR 65.17), in addition, broaden the master arbitrator's review to include questions of law (11 NYCRR 65.17 [a] [4]) which are not normally reviewable under article 75." *Matter of Petrofsky (Allstate)*, 54 NY2d at 211 (internal citations and quotation marks omitted).

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Applying these standards to the matter at bar, in order to vacate the Master Award or the Award in this case, the Court must find that the Master Arbitrator exceeded his powers in affirming the Award of the Arbitrator, or that the Master Award and the Award were arbitrary and capricious, irrational, or without a plausible basis.

In the view of this Court, such findings are not warranted. As set forth in the Award, the Arbitrator considered and weighed the evidence before her, and found it insufficient to establish that the Respondent's Assignor was properly notified of the EUOs.² In reviewing such determination, this Court may not "re-weigh or re-examine the evidence," and may not "substitute its judgment for that of the arbitrator." *TC Contracting, Inc. v. 72-02 N. Blvd. Realty Corp.*, 39 A.D.3d 762, 763 (2d Dept. 2007).

Moreover, notwithstanding Petitioner's claim to the contrary, the Arbitrator did consider the Petitioner's argument that notice to the attorney was sufficient. She held:

This arbitrator agrees with Arbitrator Horn's interpretation of the relevant case law and finds that the insurer was in possession of the assignor's NF-2 form, which is usually determinative of an injured person's address since the signatory swears under penalty of perjury as to its accuracy. The EUO letters were sent in this case to an address different from the one referenced in the assignor's NF-2 form. This arbitrator also concurs with Arbitrator Horn that failure to send the scheduling notice to the injured person at the correct address is fatal, even if the notice was sent to his attorney. See, *Colin v. Global Liberty Ins. Co. of NY*, supra; *Matter of Mercury Cas. Co. (Patient Care Assoc.)*, supra.

Award, p.4. The Arbitrator discussed, with approval, another arbitrator's opinion on the issue, and cited *Matter of Mercury Cas. Co. (Patient Care Assoc.)*, 134 A.D.3d 1204, 1206 (3d Dept. 2014) (declining to vacate an arbitrator's determination that, where notices were improperly addressed, the insured did not have proper notice of the IME, notwithstanding that IME notices were also mailed to the insured's attorney).

The Master Arbitrator, finding no controlling precedent on the issue of whether or not notice to the attorney is sufficient, determined only that "I cannot, within my power of review, find that the arbitrator erred as a matter of law or acted so irrationally as to warrant vacatur of her award." Master Award, p.3. The Master Arbitrator made no improper findings of fact, but rather, refrained from doing so.

² Contrary to the argument advanced by Petitioner, the Arbitrator did not find that the Respondent's Assignor failed to receive notice of the EUOs. Rather, she found only that Petitioner failed to provide proper notice, and thus failed to establish its defense.

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This Court finds nothing irrational or arbitrary in the determination by the Arbitrator in favor of Respondent, or the affirmance by the Master Arbitrator, based upon the proposition that sending the EUO notice to Respondent's Assignor at an address different from that on her NF-2 was insufficient, notwithstanding that notice was also sent to her attorney. Such position is supported by appellate authority, notwithstanding that there is also precedent to the contrary.³ So long as the arbitrators' determination is grounded in law and fact, it is not the role of this Court to substitute its judgment for that of the arbitrators with respect to the interpretation and application of legal precedent.

Based upon the foregoing, the Court need not reach the question of whether or not the Respondent was properly notified of the delay. Moreover, the question of whether or not the underlying incident was a deliberate event was never raised in the arbitration proceedings. Accordingly, it may not be considered in this Article 75 proceeding, which is limited in scope to a review of the underlying arbitration awards.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. In view of the foregoing, the Court finds no basis to disturb the Master Award or the underlying Award. Accordingly, the Master Award and Award must be confirmed. See CPLR §§ 7511(e), 7510; *Blumenkopf v. Proskauer Rose LLP*, 95 A.D.3d 647, 648 (1st Dept. 2012). It is therefore

ORDERED, that the Petition to vacate the Master Arbitration Award and Award is *denied*; and it is further

ORDERED, that the Master Arbitration Award and Award are confirmed.

Any requests for relief not specifically addressed herein are *denied*.

This constitutes the Decision and Order of this Court.

Dated: January 24, 2025
Mineola, NY, 11501

ENTER:


HON. ERICA L. PRAGER, J.S.C.

ENTERED

Jan 30 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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³ The Court notes that the only authority cited by Petitioner that is directly applicable to requests for EUOs are decisions of the Supreme Court and the Appellate Term. The appellate decision in *St. Vincent's Hosp. of Richmond v. Am. Tr. Ins. Co.*, 299 AD2d 338, 340 (2d Dept 2002) pertains to requests for documentary verification. There, the Appellate Division held that "the hospital's attorney was its authorized representative for the purposes of receiving and responding to requests for further verification of the claims, ... Even if American Transit's request for the hospital records should have been sent directly to the hospital, its attorney, upon receiving the requests, should have contacted American Transit and communicated that requirement, or forwarded American Transit's requests to the hospital himself" (internal citations omitted).