

Allstate Ins. Co. v Countrywide Ins. Co.

2013 NY Slip Op 33179(U)

December 12, 2013

Sup Ct, NY County

Docket Number: 152000/2013

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART 35

Allstate Insurance

INDEX NO. 152000/13

-v-

MOTION DATE _____

Countrywide Ins.

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ No(s). _____

Answering Affidavits -- Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the petition and motion (seq. 002) by petitioner pursuant to CPLR 7511, to vacate the December 5, 2012 arbitration award of Arbitration Forums Arbitrator Stacy Schutter is granted and said arbitration award is vacated; and it is further

ORDERED that the cross-motion by respondent pursuant to CPLR 7510, to confirm the award is denied; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry on all parties; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 12/12/13

[Signature], J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X

ALLSTATE INSURANCE COMPANY,

Petitioner,

-against-

COUNTRYWIDE INSURANCE COMPANY

Respondent.

-----X

CAROL R. EDMEAD, J.S.C.:

Index No.: 152000/2013

DECISION AND ORDER

Motion Seq. 001

MEMORANDUM DECISION¹

Petitioner Allstate Insurance Company (“Petitioner”) brings this proceeding pursuant to CPLR 7511, to vacate the December 5, 2012 award (“the award”)² of Arbitration Forums Arbitrator Stacy Schutter (“Shutter”), which awarded \$13,045.87 against Petitioner for personal injury protection payments that Respondent Countrywide Insurance Company (“Respondent”) allegedly paid to Respondent’s insured, pedestrian Sheena Arora (“Arora”) and/or her assignees.³

Respondent cross-moves, pursuant to CPLR 7510, to confirm the award.

Factual Background

Respondent brought a priorities arbitration before Arbitration Forums after a dispute arose between Respondent and Petitioner as to the no-fault benefits payable for, and arising out of, a motor vehicle accident alleged to have occurred on October 4, 2010. The matter proceeded to arbitration on December 4, 2012 before Arbitrator Schutter. Respondent claimed

¹ The petition (seq. 001) was granted, originally, by order dated April 26, 2013. However, upon motion by respondent (seq. 002), the April 26, 2013 order was vacated, and the petition was restored for further submissions and determination.

² The arbitration award has a publication date of December 5, 2012. In its petition, Petitioner’s reference to an arbitration award date of December 10, 2012, appears to have been in error.

³ The notice of petitioner includes a request that judgement be entered in its favor on the ground of lack of insurance coverage.

reimbursement from Petitioner of no-fault benefits allegedly paid to Respondent's insured, pedestrian Arora and/or her assignees. In the resulting decision dated December 5, 2012, Arbitrator Schutter concluded that Respondent proved 100% liability against Petitioner because Petitioner is primary for No-Fault benefits. Arbitrator Schutter relied on the police report as the basis for her decision, and cited no proof submitted by Petitioner that No-Fault policy was exhausted.

In support of its motion to vacate, Petitioner contends that the award was beyond the scope of the arbitrator's powers in that the arbitrator awarded no-fault benefits where no coverage existed. Petitioner argues under the No-Fault Regulations, Personal Injury Protection payments are capped at \$50,000, and permits an insured to purchase an additional amount of \$25,000 Basic Economic Loss coverage. According to Petitioner's claim representative, John Renda, Petitioner's payments totaling \$74,999.92 to the Respondent's insured, exhausted the policy limits, with the exception of \$.08 cents. Thus, Respondent failed to meet its burden of showing that coverage existed, and the arbitrator exceeded her powers by awarding an amount in excess of the policy limits. Petitioner further argues that the award was arbitrary, capricious, irrational, incorrect as a matter of law, or based on insufficient evidence and excess of power and a failure to make a final and definite award, and/or a procedural error not waived. Petitioner notes that policy exhaustion can be raised at any time and is not precluded by lack of denial or untimely denial. Therefore, the award must be reversed, or in the alternative, vacated, and the matter remanded for a new hearing.

Respondent opposes the motion to vacate and cross-moves, pursuant to CPLR 7510, to confirm the award. Respondent contends the award is not irrational nor does it clearly exceed a specifically enumerated limitation on the arbitrator's power, but rather, is based upon evidence

submitted to the arbitrator which included a police report indicating that Petitioner's insured was 100% liable for the injuries to the pedestrian. Additionally, no proof was submitted by Petitioner that their no-fault policy was exhausted. Thus, the award was neither arbitrary nor capricious, and was rationally based on the evidence that was presented to the Arbitrator. Respondent further argues that the affidavit of John Renda annexed to the petition should not be considered as it is hearsay and self serving. Accordingly, the award should be confirmed.

In reply, Petitioner argues it has made a showing sufficient to vacate the award on the grounds of lack of coverage and contends that Respondent has failed to make any showing that there was coverage remaining on the policy. Further, Respondent's challenge to the evidentiary value of the affidavit annexed to the petition to vacate is without merit in that it fails to explain specifically what it claims to be hearsay, and that the affidavit and petition to vacate clearly meet the standards as set from by case law.

Analysis

It is well settled that "[t]he scope of judicial review of an arbitration proceeding is extremely limited" (*Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 A.D.3d 293, 854 N.Y.S.2d 391, 392 [1st Dept 2008]). Courts are "obligated to give deference to the decision of the arbitrator" and may vacate an arbitrator's award only on the grounds stated in CPLR 7511 (b) (*New York City Transit Auth. v. Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 N.Y.3d 332, 336, 845 N.E.2d 1243, 1245 [2005]).

CPLR 7511(b)(1) sets forth four grounds for vacating an arbitration award: (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 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.

A party seeking to vacate an arbitration award carries a “heavy burden” (*Scollar v. Cece*, 28 A.D.3d 317, 812 N.Y.S.2d 521, 522 [1st Dept 2006] citing *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326, 704 N.Y.S.2d 910, 726 N.E.2d 462 [1999]). Generally, “so long as the arbitrator offers [even a] barely colorable justification for the outcome reached,” the arbitration award will be upheld (*Id.*, citing *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479, 813 N.Y.S.2d 691, 846 N.E.2d 1201 [2006], cert dismissed 548 U.S. 940, 127 S.Ct. 342, 165 L.Ed.2d 1012 [2006]).

To establish that an arbitrator has “exceeded his power” within the meaning of CPLR 7511(b)(1)(iii), a party must show that the award “violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR 7511(b)(1)” (*Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 A.D.3d 293, 854 N.Y.S.2d 391, 392 [1st Dept 2008]). With respect to arbitration proceedings concerning no-fault insurance benefits, “an arbitration award made in excess of the contractual limits of an insurance policy has been deemed an action in excess of authority” (*State Farm Ins. Co. v. Credle*, 228 A.D.2d 191, 643 N.Y.S.2d 97, 98 [1st Dept 1996]). Such excess of authority constitutes grounds for vacatur of the award (See *Matter of Brijmohan v. State Farm Ins. Co.*, 92 N.Y.2d 821, 822 [1998]; *Countrywide Ins. Co. v. Sawh*, 272 A.D.2d at 245; 11 NYCRR 65–1.1). Notably, the issue of policy exhaustion may be raised at any time (see *Brijmohan v. State Farm Ins. Co.*, 92 N.Y.2d 821, 822, 699 N.E.2d 414, 415 [1998] (“A limitation on the arbitrator's power ‘will not be waived if the party relying on it asserts it at Special Term in opposition to an application for

confirmation” (citing *Matter of Silverman Benmor Coats*, 61 N.Y.2d 299, 309, 473 N.Y.S.2d 774, 461 N.E.2d 1261; see, CPLR 7511[b][1][iii])).

Here, the contractual limits for Basic Personal Injury Payments and Optional Basic Economic Loss coverage under the policy in question is \$75,000. As noted on the payout ledger annexed to the petition, Petitioner made payments to Respondent’s insured totaling \$74,999.92. These payments were made between November 2010 and April 2011. Thus, at the time of the arbitration proceeding in December 2012, policy coverage for the Respondent’s insured was exhausted, with the exception of \$.08 cents.

At the arbitration proceeding, Petitioner raised the issue of policy exhaustion. Although Petitioner did not submit proof of policy exhaustion to the arbitrator, Petitioner is not precluded from offering such proof at this time (see *Brijmohan v. State Farm Ins. Co.*, 92 N.Y.2d 821, 822, 699 N.E.2d 414, 415 [1998] (“[t]he declarations page produced at the confirmation proceeding demonstrates that the arbitrator’s award was beyond the policy limits and therefore in excess of the arbitrator’s powers)). Given that the policy coverage for Respondent’s insured was exhausted, with the exception of \$.08 cents, the arbitrator’s award of \$13,045.83 was in excess of the contractual limits. Thus, the arbitrator exceeded her power and the award must be vacated. (*State Farm Ins. Co. v. Credle*, 228 A.D.2d 191, 643 N.Y.S.2d 97, 98 [1st Dept 1996] (“CPLR 7511 provides that an arbitration award should be vacated where an arbitrator exceeds the limits of his powers and the rights of a party are prejudiced”)).

Motion to Confirm

CPLR 7510 provides that the court “shall confirm an award ... unless the award is vacated or modified upon a ground specified in section 7511” (*Bernstein Family Ltd. P’ship v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 3, 883 N.Y.S.2d 201, 202 [1st Dept 2009]). Here, the

arbitrator's award in excess of the policy limit constitutes grounds for vacatur of the award.

Accordingly, the motion to confirm is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the petition (seq. 001) by petitioner pursuant to CPLR 7511, to vacate the December 5, 2012 arbitration award of Arbitration Forums Arbitrator Stacy Schutter is granted and said arbitration award is vacated; and it is further

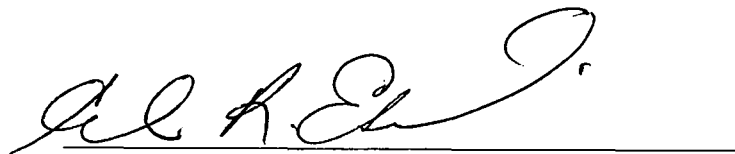
ORDERED that the cross-motion by respondent pursuant to CPLR 7510, to confirm the award is denied; and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry on all parties.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: December 12, 2013



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD