Country-Wide Ins. Co. v Excel Surgery Ctr., LLC
2018 NY Slip Op 33260(U)
December 12, 2018
Supreme Court, New York County
Docket Number: 652611/2018
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, *Justice* — PART IAS MOTION 23EFM

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COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

- v -

EXCEL SURGERY CENTER, LLC, A/A/O ANTHONY MARCELLE

Respondent.

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INDEX NO. 652611/2018

MOTION DATE 09/27/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

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

Upon the foregoing documents, the Petition seeking to vacate the arbitration award is dismissed and the cross motion seeking to confirm the arbitration award is granted.

Petitioner seeks an order pursuant to CPLR § 7511(b)(1)(iii) to vacate a no-fault master arbitrator's decision, claiming that he affirmed the lower arbitrator's award which was rendered in excess of the appropriate fee schedule and issued after the policy limits were exhausted. Respondent seeks an Order, pursuant to CPLR 7510, confirming the arbitration awards of the master arbitrator, which affirmed the lower arbitration award.

BACKGROUND/CONTENTIONS

Anthony Marcelle was involved in a rear-end motor vehicle accident on October 9, 2015 while driving a vehicle insured by Country-Wide Insurance Company (hereinafter Country-Wide). Marcelle received treatment for injuries to the neck and low back and underwent lumbar injection therapy on December 9, 2015 at Excel Surgery Center. The issue before the lower

arbitrator was whether the claim for a facility fee and anesthesia service for the lumbar injection therapy was properly denied upon exhaustion of the policy limits.

The lower arbitrator found that Excel Surgery timely submitted claims for reimbursement for these services. (NYSCEF Doc. No. 3, p.2). Specifically, the lower arbitrator found as follows: "the claim was verified as of March 14, 2016. At that time, [Excel Surgery] fully responded to [Country-Wide's] verification requests specific to this claim. Resending the verification requests over and over does not extend the time that the claim was not verified. [Excel Surgery] was in full compliance on March 19, 2016 (allowing for five days mailing). It is at that point that [Country-Wide] had 30 days to either pay the claim, deny the claim or seek additional reasonable verification." (NYSCEF Doc. No. 3. p.4).

In an exhaustive review of the electronic file submitted and the case law discussing priority of payment and award claims in excess of policy limits, the lower arbitrator found, "that an Arbitrator may award claims in excess of policy limits, at a minimum, in those instances where the respondent insurer acted in gross disregard of the claims process as I find in this case." (NYSCEF Doc. No.3, p.9).

Additionally, in denying Country-Wide's fee schedule defense, asserting that the appropriate fee for the services rendered is $2,571.27, and not $3,105.16, the lower arbitrator found that "[Country-Wide] did not submit an affidavit from a certified bill coder or medical expert providing a basis to demonstrate that the applicant's amended claim was inconsistent with the fee schedule." (NYSCEF Doc. No. 3, p.8).

In affirming the lower arbitrator's award in its entirety, the master arbitrator concluded: "Arbitrator Hill did a very extensive review of the applicable law on policy exhaustion and no-

fault priority. Arbitrator Hill determined that the priority of payments rule requires some penalty for a violation of the rule. A Respondent would not be in violation of the rule if it timely denied a claim based upon credible defense or where it seeks verification at a time when the policy is not exhausted and then is subsequently exhausted. Arbitrator Hill determined that such was not the case here. . . . The lower arbitrator further determined that based upon court decisions an arbitrator can award more than the policy limits where the Respondent, as here, acted in gross disregard of the claims process." (NYSCEF Doc. No.6, p.3).

Petitioner now seeks to vacate the arbitration awards, claiming that the lower arbitrator's award was in excess of the appropriate fee schedule and was issued after the policy limits were exhausted. Petitioner claims that the master arbitrator erred in affirming the decision. (NYSCEF Doc. No. 1). In opposition to the Petition and in support of its cross motion to confirm the arbitration awards, respondent contends that the arbitrators' decisions were neither arbitrary nor capricious; were grounded in law and equity; were not irrational and the arbitrators did not exceed their authority in rendering the award. Respondent also seeks an award of reasonable attorneys' fees pursuant to 11 NYCRR 65-4.10(j)(4), which petitioner does not oppose.

STANDARD OF REVIEW/ANALYSIS

It is well settled that a party seeking to vacate an arbitration award carries a "heavy burden". *Scollar v. Cece*, 28 AD 3d 317, 812 NYS2d 521, 522 (1st Dept. 2006), citing *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 NY2d 321, 326, 704 NYS2d 910, 726 NE2d 462 (1999). An arbitration award must be upheld when the arbitrator "offers even a barely colorable justification for the outcome reached." *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471, 479, 813 NYS2d 691, 846 NE2d 1201 (2006), cert. dismissed 548 US 940, 127 S.Ct. 34, (2006), (citations omitted).

When a court is asked to review an arbitrator's decision, made in a compulsory no-fault arbitration proceeding, the court must affirm the award if there is evidentiary support and the award was neither arbitrary nor capricious. *Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur.*, 89 NY2d 214, 220-222 (1996). It is well settled that an "arbitrary action is without sound basis in reason and is generally taken without regard to facts". *Pell v. Board of Educ of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 313 NE2d 321, 356 NYS2d 833 (1974). These standards govern both a master arbitrator's review of the original arbitration award and the court's review of the master arbitrator's award. *Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207, 211, 429 NE2d 755, 445 NYS2d 77 (1981).

Petitioner has not sustained its burden of proof as there is no evidence before the court that the award was arbitrary or capricious, nor is there proof that the award lacks evidentiary support. Contrary to petitioner's fanciful claims, the arbitrators' decisions here, are not only in keeping with an arbitrator's power, within the meaning of CPLR §7511, the outcome reached is based upon sound reasoning and is supported by the voluminous factual record.

On February 15, 2016, respondent Excel Surgery, in response to Country-Wide's request for specific verification information, stated that it is an ambulatory surgical center and does not have custody and control of the doctor's medical records, nor did it have the MRI films. Excel Surgery did, however, provide copies of the MRI reports of the cervical, lumbar, left shoulder, right shoulder, the NF-3, and its certificate of accreditation.

Thereafter, on March 4, 2016, Country-Wide acknowledged receipt of respondent's February 15, 2016 letter and requested an NF-3, verification of the Primary Care owner, and the license for John Kouvaras. On March 14, 2016, Excel Surgery again promptly responded,

providing a revised NF-3, the New Jersey license number for Dr. John Kouvaras, and the applicant's license and accreditation information.

Country-Wide sent the identical request on April 1, 2016. On April 11, 2016, Excel Surgery responded, acknowledging receipt of the April 1, 2016 letter, asserting that it had fully complied with the Country-Wide's requests on February 15 and on March 14, 2016. (NYSCEF Doc. No. 3, p.3). The arbitrator also referenced the post examination under oath verification requests, which he found Excel Surgery had fully complied with on January 29, 2016, noting that these requests were promulgated, prior to the presentation of the instant claim. Specifically, Arbitrator Hill found, that on January 29, 2016, counsel for Excel Surgery responded to Country-Wide's verification request, with an extensive letter providing approximately 400 pages of documents, objecting only to the request for agreements between the applicant and third parties and the real estate holding company. (NYSCEF Doc. No. 3, p. 4).

It was this conduct that led the lower arbitrator to conclude that Country-Wide had abused the claims process, noting that "[i]nstead of itemizing or identifying what verification remained outstanding, if any in their opinion, [Country-Wide] simply and misleadingly requested the same documents as their original post examination under oath verification requests or simply just referenced the post examination under oath requests and directing [Excel Surgery] to respond." (NYSCEF Doc. No. 3, p.4).

In concluding that the claim was verified on March 14, 2016, the lower arbitrator reasoned; "on numerous occasions, [Excel Surgery] stated that they do not maintain the medical records of the physicians who conduct surgeries at its facility, a perfectly sensible and realistic response. Requesting a letter of medical necessity (a medical record of the surgeon couched in another name) is simply calculated to prevent the claim from being verified and nothing

whatsoever to do with obtaining reasonable verification. This is an abuse of the claims practice and evidencing harassment of [Excel Surgery] either designed or simply resulting in claims never being verified." (NYSCEF Doc. No. 3, p.4).

The lower arbitrator concluded that Country-Wide had until April 19, 2016 to process the claim and noted that Country-Wide's conduct raises the issue of what effect the untimely denial of the claim, on June 15, 2016, has upon the insurer's defense of policy exhaustion, noting that the policy was exhausted by a payment on June 9, 2016. (NYSCEF Doc. No. 3, pp.4 and 5).

Based on this factual analysis, the lower arbitrator then undertook a detailed review of the statutes and case law concerning issues of the priority of payments rule and policy exhaustion, ultimately concluding that "an Arbitrator may award claims in excess of policy limits, at a minimum, in those instances where the respondent insurer acted in gross disregard of the claims process as I find in this case." (NYSCEF Doc. No. 3, pp.5-8).

This court finds that the lower arbitrator correctly analyzed the issues presented and the finding that Country-Wide cannot assert policy exhaustion as a valid denial of the claim presented, must be affirmed. Indeed, Country-Wide failed to demonstrate that the payments which led to the depletion of policy benefits were made in compliance with 11 NYCRR §65-3.15. See *Nyack Hospital v. General Motors Acceptance Corp.*, 8 N.Y.3d 294 (2007); See also *New York Presbyterian Hospital v. Allstate Ins. Co.*, 12 A.D.3d 579, 580 (2nd Dept. 2004).

In affirming the lower arbitrator's award in its entirety, the master arbitrator noted the well settled grounds for review as set forth in *Matter of Richardson v. Prudential Property & Casualty Co.* 230 A.D. 2d 861; *Mott v. State Farm Insurance Company,* 55 N.Y. 2d 224. (NYSCEF Doc. No. 6, p.3). In support of its Petition, Country-Wide asserts the identical

arguments that were rejected by the arbitrators and has simply failed to sustain its heavy burden to vacate the arbitration award.

Country-Wide argues that the arbitration awards should be vacated because the arbitrators exceeded their powers, awarding an amount in excess of the New Jersey fee schedule. The record demonstrates that the fee schedule defense was considered by the arbitrators and properly rejected because Country-Wide failed to submit the requisite affidavit to support its claim. (NYSCEF Doc. No. 3, p.8).

Additionally, the master arbitrator noted that the "lower arbitrator further determined that [Country-Wide] failed to submit any credible evidence to support its fee schedule defense and as such awarded the amount claimed". (NYSCEF Doc. No. 6, p.3). The arbitrators did not exceed their powers when they rejected Country-Wide's fee schedule defense. (NYSCEF Doc. No. 6, p.3). See *Kingsbrook Jewish Medical Ctr. v. Allstate Ins. Co.*, 2009 Slip Op. OP 00351; see also *First Occupational Therapy, PLLC v. Country-Wide Ins. Co.*, 2010 NY Slip Op. 50149 (U); 26 Misc. 3d 135(A) (A carrier's fee schedule defense seeking reductions must be supported by competent and admissible medical proof.).

Petitioner also claims that the award should be vacated as it is in excess of the policy limits. Petitioner contends that because the policy limits were completely exhausted at the time the award was rendered, the arbitrators exceeded their authority. To establish that an arbitrator has "exceeded his power" within the meaning of CPLR §7511(b) (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) (i)." *Elul Diamonds Co. Ltd. v. Z Kor Diamonds, Inc.*, 50 AD3d 293, 854 NYS 2d 391, 392 (1st Dept. 2008).

Given the standard of review and the analysis the master arbitrator undertook when affirming the award, this court cannot say that there is "no justification for the outcome reached". See, generally, *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471, 479, 813 NYS2d 691, 846 NE2d 1201 (2006), cert. dismissed 548 U.S. 940 (2006). To the contrary, the lower arbitrator's award and the master arbitrator's decision confirming the award in its entirety, were made after an exhaustive review of the case file and the applicable case law, with a view toward upholding the strong public policy embedded in the no fault laws. (NYSCEF Doc. Nos. 3 and 6).

Petitioner has simply failed to demonstrate that the award violates "strong public policy". Petitioner's arguments in favor of vacatur of the awards are made in a vacuum without acknowledging or attempting to explain its conduct in reviewing Excel Surgery's claim which the arbitrators determined to be a gross disregard of the claims process. Moreover, the arguments advanced in support of its Petition here, violate the history and purpose of New York State's enactment of the No-Fault Law which is to ensure the prompt and expeditious payment of claims (see *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 284 [1997]).

There is no provision in the no-fault regulations which grants a claimant or carrier the right to ignore a verification request or a response to a verification request., See *Westchester Co. Med. Ctr. v. New York Central Mut. Fire Ins. Co Dept.*, 26 A.D.2d 553, 692 N.Y.S.2d 664 (2nd 1999); *Media Neurology, P.C. v. Country-Wide Ins. Co.*, 21Misc.3d 1101A, 873 N.Y.S.2d 235, (Civ. Ct. Kings County 2008); *Canarsie Chiropractic, P.C. v. State Farm Mut. Auto Ins. Co,* 27 Misc.3d 1228(A), 911 N.Y.S.2d 691 (Civ. Ct. Kings County 2010). Here, there is no reason to vacate the arbitration award because the findings of both the lower and master arbitrators are fully supported by the factual record and the relevant no fault regulations and case law interpreting those provisions. In advancing the generic argument that the award

must be vacated because it was rendered after the policy limits had been fully exhausted is a gross misrepresentation of the factual record and relevant case law. Moreover, the cases cited by Country-Wide in support of its specious argument, are factually distinguishable from the present case, as the lower arbitrator fully explained. (NYSCEF Doc. No. 3, pp. 5-9).

Contrary to Country-Wide's claims, the arbitrator relying on priority of payment regulation NYRRC 65-31.15, did not disregard the policy limits when he issued an award granting Excel Surgery's claims, as he specifically found that "where the respondent-insurer failed to timely deny the claim after abusing the claims process by endless verification requests for the same material", Country-Wide's actions provide a basis to preclude it from asserting policy exhaustion as a valid defense to the claim. (NYSCEF Doc. No. 3, p.9). There is no basis to vacate the arbitration awards rendered in this matter.

In addition to seeking confirmation of the arbitration award, Excel Surgery seeks an award of reasonable attorney's fees pursuant to 11 NYCRR 65-4.10(j)(4), reflecting the time spent defending this matter. Country-Wide has not opposed this request.

In *Matter of Country-Wide Ins. Co. v. Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407, 78 NYS3d 321 (1st Dept. 2018) the court held that the Supreme Court has authority to award attorney's fees in an action that is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10(j)(4), which, in pertinent part, provides: "The attorney's fee for services rendered in connection with ... a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter" (see also *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 51 N.Y.S.3d 93 [2d Dept. 2017], recalling and vacating *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 139 AD3d 947, 32 N.Y.S.3d 584 [2d Dept. 2016]).

Based on a review of the record, the court awards Excel Surgery $5,000.00 as reasonable attorney's fees, reflecting the time and expense respondent incurred defending this matter, which is amply reflected in the voluminous documents submitted in opposition to petitioner's motion and in support of its cross motion. (NYSCEF Doc. Nos. 13-38).

Accordingly, it is hereby,

ADJUDGED that the Petition to vacate the Master Arbitrator's and the Lower Arbitrator's Awards is denied and the Petition is dismissed; and it is further

ORDERED and ADJUDGED that Respondent's cross motion seeking an Order pursuant to CPLR §7510, is granted and the award is confirmed; and it is further

ADJUDGED that Respondent Excel Surgery Center LLC a/a/o Anthony Marcelle, having an address at ______________________________, do recover from Petitioner Country-Wide Insurance Company, the amount of $3,105.16, plus interest at the statutory rate of 2% per month from December 25, 2016, pursuant to 11 NYCRR 65-3.9, as computed by the Clerk in the amount of $______________, plus attorney's fees in the amount of $5,000.00, together with costs and disbursements in the amount of $______________ as taxed by the Clerk, for the total amount of $______________ and that Respondent have execution therefore.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

12/12/2018
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION	
		GRANTED	DENIED	GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE