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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHLOMO S. HAGLER, J.S.C. PART 17
Justice

Index Number : 115505/2010
FLORES, CLAUDIA
vs.
ALLSTATE INSURANCE COMPANY
SEQUENCE NUMBER : 002
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

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

THIS MOTION/ORDER TO SHOW CAUSE
IS DECIDED IN ACCORDANCE WITH
THE ATTACHED ORDER.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: 1/16/13

SHLOMO S. HAGLER, J.S.C.
_____, J.S.C.

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 17

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CLAUDIA FLORES, Individually, and as Mother and Natural Guardian of LUIS DIEGO ROJAS, an infant,
Petitioner,

-against-

ALLSTATE INSURANCE COMPANY,
Respondent.

INDEX NO.: 115505/10

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Petitioner Claudia Flores ("Flores" or "petitioner") moved by notice of petition and petition to vacate and/or modify an arbitration award dated November 17, 2010 ("Award") pursuant to CPLR § 7511. (See Exhibit "A" to the Petition). Flores essentially argued that the Award should be vacated for four (4) reasons: (1) the arbitrator exceeded his authority by granting Allstate two adjournments to permit it to locate a witness, Susan Kingston ("Kingston"), the driver of the vehicle that struck the infant, Luis Diego Rojas ("child" or "Rojas"), (2) based on the arbitrator's statement that the child's "hospital stay was basically uneventful and was mainly observation," the petitioner argued that the arbitrator did not read the hospital records which, in part, indicated more serious medical treatment, (3) the arbitrator should have awarded more than the policy limits of $100,000, and (4) the arbitrator miscalculated the Award as he applied the child's 50% comparative negligence before the set-off of $50,000. Respondent Allstate Insurance Company ("Allstate" or "respondent") opposed the petition.

By interim decision and order dated September 23, 2011 ("Interim Order"), the Hon. Emily Jane Goodman, J.S.C. rejected petitioner's first three arguments, and held in abeyance the fourth argument as to "the arbitrator's method of calculation" as well as directed the parties to

submit briefs on the above issue. The parties complied, but the case was mistakenly marked "disposed" as a result of the entry of the Interim Order, and the remaining issue was never decided. As a result, petitioner now moves to restore this proceeding to the active calendar for a determination of the remaining issue. Respondent partially opposes the restoration arguing that Justice Goodman had previously decided the first three issues and the matter should be limited to determining the remaining issue. In reply, petitioner acknowledges that the restoration should be limited to resolution of the above fourth argument as Justice Goodman has decided all other issues.

Background

The facts were recited in the Interim Order and for sake of brevity will not be repeated herein. However, this Court will recite the following brief facts that are needed to determine the remaining issue. The child was injured as a result of an accident that occurred on September 18, 2008. The underlying third-party carrier subsequently tendered to petitioner their policy of $50,000. Thereafter, petitioner submitted a demand for arbitration against respondent seeking recovery of the under-insurance policy limits of $100,000. Allstate's policy contained a standard New SUM Endorsement which included a voluntary arbitration clause providing the petitioner with the "option" to resolve the matter through arbitration. (See, Exhibit "A" to respondent's opposition papers to the underlying petition, at 12). After a hearing, the arbitrator found the child was 50% comparatively negligent. The arbitrator awarded a gross sum of $100,000. He then first subtracted 50% of $100,000 for the child's comparative negligence and then applied the set-off of $50,000, which resulted a net award of $0.

Vacature/Confirmation of an Arbitration Award

There is a strong public policy in New York State favoring arbitration as an efficacious method of dispute resolution. This policy is especially pronounced in the context of commercial matters as arbitration is routinely relied upon for expeditious resolutions of disputes by arbitrators with practical knowledge of the subject area. *(Matter of Goldfinger v Lisker*, 68 NY2d 225 [1986].) Courts are reluctant to set aside arbitration awards even when arbitrators err in deciding the law or facts "lest the value of this method of resolving controversies be undermined." (68 NY2d at 231.) The policy favoring arbitration gives rise to judicial deference because "it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." (Id.) Consistent with this strong public policy, there are few grounds for vacating or modifying arbitration awards and they are narrowly applied.

It is well settled law that courts must confirm an arbitration award pursuant to CPLR § 7510, unless there are grounds to vacate or modify the award pursuant to CPLR § 7511. CPLR § 7511(b)(1) enumerates the following grounds for vacating an award where the parties participated in the arbitration:

(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 [or her] 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 in this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

The grounds for modifying an award are set forth in CPLR § 7511(c) as follows:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

Where a dispute has been arbitrated pursuant to an agreement between the parties, the award may not be set aside unless it violates a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. (*Matter of Town of Callicoon [Civil Serv. Empls. Assn., Town of Callicoon Unit]*, 70 NY2d 907, 909 [1987]); *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123 [2010].)

Moreover, **if** the parties are subject to compulsory arbitration, the award must also satisfy further judicial scrutiny in that it "must have evidentiary support and cannot be arbitrary and capricious." (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011] quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY 2d 214, 223 [1996].) (See also *Mount St. Mary's Hosp. of Niagara Falls v Catherwood, 26 NY2d 493[1970]).* The hearing officer's determination as to the credibility of witnesses is entitled to deference and is "largely unreviewable because the hearing officer observed the witnesses." (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]). The judicial review, therefore, may partially implicate application of both Article 75 and 78 of the CPLR.

Modification of Award based on Miscalculation

As stated above, one ground for modification of an arbitration award is the "miscalculation of figures." (CPLR § 7511[c][1]). Simply stated, where the arbitrator made a computational error, the courts may modify the award to correct such an error. However, where the error involved the arbitrator's exercise of judgment or discretion and was not a computational

error, it is not grounds for modification of the arbitration award. (*Matter of Morris White Fashions, Inc. [Susquehanna Mills, Inc.]*, 295 NY 450 [1946]; *Matter of Ververs & Schueller Co. [Emory Mach. & Tool Co.]*, 190 AD2d 1079 [4th Dept 1993]). Indeed, an arbitrator's "conscious, substantive [decision], made on the merits" does not constitute grounds for modification of an award. *(Matter of Leombruno [City of Glens Falls]*, 110 AD2d 996 [3rd Dept 1985]).

In this case, the arbitrator was faced with a substantive decision as to the proper method of calculation of the child's 50% comparative fault and the $50,000 set-off. The methods of calculating these two variables were discussed and decided by the Court of Appeals in *Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288 (1998), and are known as "settlement-first" and "fault-first." In the settlement-first approach, the set-off of $50,000 is first deducted from the gross award of $100,000 and then the child's 50% comparative fault is applied, which results in a net award of $25,000. In the fault-first approach, the child's 50% comparative fault is first applied to the gross award of $100,000 and then the $50,000 set-off is deducted, which results in a net award of $0. The Court of Appeals adopted the settlement-first approach as it better encouraged parties to settle their differences and advanced the primary purpose of General Obligations Law 15-108. (*Id.* at 296). The arbitrator selected the fault-first approach in calculating the Award.

While this Court is obligated by *stare decisis* to follow the Court of Appeal's settlement-first approach, and it would be reversible error to calculate it in a contrary manner, courts are reluctant to set aside arbitration awards even when the arbitrator errs in deciding the law"lest the value of this method of resolving controversies be undermined." *(Matter of Goldfinger v Lisker*, 68 NY2d 225, 231 [1986].) Moreover, Article 75 of the CPLR does not

provide grounds to either vacate or modify the Award under such circumstances as the arbitrator did not make a computational error, but rather made a substantive decision to calculate the Award utilizing the fault-first approach. However, **if** the parties were subject to compulsory arbitration, then the award must also satisfy further judicial scrutiny of Article 78 of the CPLR in that it must have evidentiary support and cannot be arbitrary and capricious. Article 78 is not implicated herein as it is uncontroverted that the arbitration was optional (and selected by petitioner) and not compulsory.

Conclusion

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied and the proceeding is dismissed. The clerk shall enter a judgment accordingly.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: January 16, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.