Country-Wide Ins. Co. v Bay Needle Care Acupuncture, P.C.
2016 NY Slip Op 31757(U)
September 2, 2016
Supreme Court, New York County
Docket Number: 653461/2015
Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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COUNTRY-WIDE INSURANCE COMPANY, Index No. 653461/2015

Petitioner

- against - DECISION AND ORDER

BAY NEEDLE CARE ACUPUNCTURE, P.C., a/a/o MONIQUE SCOTT,

Respondent

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LUCY BILLINGS, J.S.C.:

Petitioner insurer seeks to vacate an arbitration award dated March 31, 2015, by a subordinate arbitrator and dated July 7, 2015, by a Master Arbitrator, on the grounds that the initial arbitrator exceeded his authority or executed it so imperfectly that he made no final and definite award, and therefore the Master Arbitrator's affirmance of that award is likewise flawed. C.P.L.R. § 7511(b)(1)(iii). The arbitration arose from a motor vehicle collision involving a vehicle insured by petitioner and driven by Monique Scott, to whom respondent acupuncture practice claims it provided health care services for which it sought reimbursement from petitioner under New York Insurance Law §§ 5102(a), 5103(a), 5106(a). Petitioner's defenses at the arbitration included Andrey Anikeyev's ownership, operation, or control of respondent when Anikeyev was unlicensed to perform the health care services respondent provided, disqualifying it from receiving insurance payments for those health care expenses that arose from a motor vehicle collision under Insurance Law §§

5102(a), 5103(a), and 5106(a). 11 N.Y.C.R.R. § 65-3.16(a)(12); State Farm Mut. Auto. Ins. Co. v. Mallela, 4 N.Y.3d 313, 320-21 (2005); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d 30, 42 (App. Term 2d Dep't 2013).

Respondent concedes that, because this arbitration was compulsory, an award in excess of the arbitrator's authority includes an award that is not supported by the evidence presented, is arbitrary, or is erroneous as a matter of law. C.P.L.R. § 7511(b)(1)(iii); N.Y. Ins. Law § 5106(c); 11 N.Y.C.R.R. § 65-4.10(a); City School Dist. of the City of N.Y. v. McGraham, 17 N.Y.3d 917, 919 (2011); Motor Veh. Acc. Indem. Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 214, 223 (1996). According to petitioner's own account, however, petitioner failed to present evidence that Anikeyev owned, operated, or controlled respondent or was unlicensed to perform the health care services respondent provided. N.Y. Bus. Corp. Law §§ 1507(a), 1508(a); N.Y. Educ. Law § 8210; 11 N.Y.C.R.R. § 65-3.16(a)(12); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 42-43, 45-46.

I. PETITIONER'S DEFENSES TO COVERAGE

First, petitioner has shown only that Anikeyev pleaded guilty to health care billing fraud and mail fraud against a federal agency during 2008-2012, 18 U.S.C. § 371, and as part of the terms of his plea agreed "to forfeit all right, title, and interest in the funds seized from the six accounts listed," which included respondent's account. Pet. Ex. F, at 22. This

conviction and agreement show neither that Anikeyev engaged in the unlicensed performance of health care services, nor that he owned or controlled any interest in the seized funds he agreed to forfeit or in the entity that held those funds. N.Y. Bus. Corp. Law §§ 1507(a), 1508(a); N.Y. Educ. Law § 8210; 11 N.Y.C.R.R. § 65-3.16(a)(12); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 42-43, 45-46.

Petitioner then claims that respondent bore the burden to show its corporate structure's compliance with New York Business Corporation Law §§ 1507(a) and 1508(a) and Education Law § 6507(4)(c), as well as 11 N.Y.C.R.R. § 65-3.16(a)(12). These statutes set forth the requirements of ownership, operation, and control by a licensed health care provider embodied in the regulation. One Beacon Ins. Group, LLC v. Midland Med. Care, PC, 54 A.D.3d 738, 740 (2d Dep't 2008); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 42-43. Neither the regulation nor any of the statutes affirmatively places the burden on a health care provider seeking reimbursement to show that the provider meets the licensing requirements for a professional corporation. 11 N.Y.C.R.R. § 65-3.16(a)(12) does not dictate that, to be eligible for reimbursement, a health care provider must meet applicable licensing requirements to perform its services. Instead, the regulation dictates only that a "provider . . . is not eligible for reimbursement . . . if the provider fails to meet any . . . licensing requirement," suggesting that a party seeking to show the failure to meet any

requirement bears the burden to do so. 11 N.Y.C.R.R. § 65-3.16(a)(12) (emphasis added). See One Beacon Ins. Group, LLC v. Midland Med. Care, PC, 54 A.D.3d at 740.

State Farm Mut. Auto. Ins. Co. v. Mallela, 4 N.Y.3d at 321-22, on which petitioner heavily relies, is consistent with this interpretation, placing the burden on petitioner insurance carrier to "look beyond the face of licensing documents to identify willful and material failure to abide by state and local law," id. at 321; One Beacon Ins. Group, LLC v. Midland Med. Care, PC, 54 A.D.3d at 740, and "demonstrate behavior tantamount to fraud." Id. at 322. See Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 41. If petitioner has specified reasons for believing respondent may be ineligible for benefits as an unlawfully incorporated professional corporation, petitioner may obtain disclosure of respondent's certificate of incorporation, shareholders, management agreements, if any, with unlicensed nonprofessionals, and financial information to show respondent's ineligibility. One Beacon Ins. Group, LLC v. Midland Med. Care, PC, 54 A.D.3d at 740-41; Midborough Acupuncture, P.C. v. State Farm Ins. Co., 21 Misc. 3d 10, 12-13 (App. Term 2d Dep't 2008); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 41-42. Much of this information likely is publicly accessible from databases via the New York State Departments of State and Education websites. Even were the burden on respondent, however, to present that information showing respondent's lawful incorporation as a

professional corporation in the first instance, petitioner nowhere specifies how respondent failed to meet that burden at the arbitration.

II. THE INITIAL ARBITRATOR RATIONALLY RULED ON PETITIONER'S DEFENSE BASED ON THE EVIDENCE PRESENTED.

At the arbitration, petitioner raised the defense that respondent was "fraudulently incorporated," which the initial arbitrator proceeded to determine. Pet. Ex. A, at 2. See Countrywide Ins. Co. v. DHD Med., P.C., 86 A.D.3d 431, 431 (1st Dep't 2011). While the arbitrator concluded that, if petitioner was to establish conduct "tantamount to fraud," it must be by clear and convincing evidence, like the court the arbitrator found that petitioner had "not demonstrated behavior tantamount to fraud" by any evidence. Pet. Ex. A, at 3. He found: "There is nothing in the plea or 'Information,'" referring to the United States Attorney's Superseding Information, "regarding Mr. Anikeyev's ownership or control of applicant acupuncture practice." Id.

Petitioner itself has labelled its defense as "fraudulent incorporation," even though the defense more accurately raises the issue of the health care provider's ineligibility to receive reimbursement. Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 40-41; Tahir v. Progressive Cas. Ins. Co., 12 Misc. 3d 657, 663 (Civ. Ct. N.Y. Co. 2006). See 11 N.Y.C.R.R. § 65-3.16(a)(12). Petitioner's misnomer actually exposes the fallacy in its evidence. Petitioner has attempted to use Anikeyev's health care billing fraud and mail fraud to

demonstrate that Anikeyev owned, operated, or controlled respondent and, if he did, that he was unlicensed to perform the health care services respondent provided, when that fraud demonstrates neither element of petitioner's defense. N.Y. Bus. Corp. Law §§ 1507(a), 1508(a); N.Y. Educ. Law §§ 6507(4)(c), 8210; 11 N.Y.C.R.R. § 65-3.16(a)(12); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 42-43, 45-46.

The arbitrator may have rationally concluded that "fraudulent incorporation" per se, as labelled by petitioner, is "tantamount to fraud," State Farm Mut. Auto. Ins. Co. v. Mallela, 4 N.Y.3d at 322; Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 40, and thus requires a standard of proof equivalent to the standard fraud requires. CDR Creances S.A.S. v. Cohen, 23 N.Y.3d 307, 320 (2014); Field v. BDO USA, LLP, 129 A.D.3d 497, 497 (1st Dep't 2015); M Entertainment, Inc. v. Leydier, 71 A.D.3d 517, 519 (1st Dep't 2010); Guerrand-Hermes v. Guerrand-Hermes, 30 A.D.3d 339, 340 (1st Dep't 2006). If the defense petitioner has raised, however, is more accurately respondent's ineligibility for reimbursement, because a person unlicensed to perform its services owned, operated, or controlled respondent, then the less demanding standard of proof, a preponderance of the evidence, may apply. Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 42 Misc. 3d at 40-41. See Country-Wide Ins. Co. v. TC Acupuncture, P.C., 140 A.D.3d 643, 643-44 (1st Dep't 2016).

Had the arbitrator applied this standard, a preponderance of

the evidence, urged by petitioner, perhaps realizing it mischaracterized its defense as entailing fraud, or were the court to apply this standard now, however, petitioner's evidence still falls far short. As set forth above, according to the arbitrator, and based on the court's own assessment of the evidence petitioner has presented, its evidence may show fraud, but does not show that a person unlicensed to perform respondent's services owned, operated, or controlled respondent.

III. CONCLUSION

Consequently, the court denies the petition to vacate the initial arbitrator's award dated March 31, 2015, and the Master Arbitrator's award dated July 7, 2015, and confirms both awards. C.P.L.R. § 7511(b)(1)(iii) and (e); Blumenkopf v. Proskauer Rose LLP, 95 A.D.3d 647, 648 (1st Dep't 2012); Larsen & Toubro Ltd. v. Millenium Mgt., Inc., 45 A.D.3d 453, 453-54 (1st Dep't 2007). Although the initial arbitrator may have rationally applied the standard of clear and convincing evidence given petitioner's own characterization of its defense as entailing fraud, petitioner's own evidence amply supports both arbitrators' conclusion that petitioner failed to establish respondent's ineligibility for reimbursement, even by a preponderance of the evidence. See New York State Correctional Officers & Police Benevolent Assn. v. State of New York, 94 N.Y.2d 321, 327-28 (1999); Country-Wide Ins. Co. v. TC Acupuncture, P.C., 140 A.D.3d at 643-44. Respondent may enter a judgment for $4,094.00, plus interest at 2% per month from December 7, 2012, until payment; attorney's

fees pursuant to 11 N.Y.C.R.R. § 65-4.6(b), plus $130.00, 11 N.Y.C.R.R. § 65-4.10(j); and $115.00 in arbitration filing fees. C.P.L.R. § 7514(a).

DATED: September 2, 2016

LUCY BILLINGS, J.S.C.

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