Country-Wide Ins. Co. v TC Acupuncture, P.C.
2017 NY Slip Op 32007(U)
September 1, 2017
Supreme Court, New York County
Docket Number: 653518/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

COUNTRY-WIDE INSURANCE COMPANY

-v-

TC ACUPUNCTURE, P.C. a/a/o Marie Vita

INDEX NO. 653518/2016
MOTION DATE
MOTION SEQ. NO. 001

The following papers, ~~numbered 1 to~~, were read on this ~~motion~~ petition to/~~for~~ Vacate arbitration awards

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~~ and adjudged that:

The court denies the petition to vacate arbitration awards and confirms them pursuant to the accompanying decision. C.P.L.R. § 7511(b)(1)(iii) and (e).

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

Dated: 9/1/17

Lucy Billings, J.S.C.
LUCY BILLINGS 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 46

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COUNTRY-WIDE INSURANCE COMPANY, Index No. 653518/2016

Petitioner

- against - DECISION AND ORDER

TC ACUPUNCTURE, P.C. a/a/o Marie Vita,

Respondent

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LUCY BILLINGS, J.S.C.:

Petitioner insurer seeks to vacate an arbitration award by a subordinate arbitrator dated January 13, 2016, and by a Master Arbitrator dated March 31, 2016, on the grounds that the decision by the initial arbitrator was irrational and unsupported by the evidence, and therefore the Master Arbitrator's affirmance of that award is likewise flawed. C.P.L.R. § 7511(b)(1)(iii). See 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). The arbitration arose from a motor vehicle collision involving a vehicle insured by petitioner and occupied by Marie Vita, 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), and 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); Allstate Ins. Co. v. Belt Parkway Imaging, P.C., 78 A.D.3d 592, 592 (1st Dep't 2010); Allstate Ins. Co. v. Belt Parkway Imaging, P.C., 33 A.D.3d 407, 408 (1st Dep't 2006); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 150 A.D.3d 192, 199-200 (2d Dep't 2017).

I. PETITIONER'S DEFENSES TO COVERAGE

A. Respondent's Ineligibility to Collect Insurance Payments

First, petitioner has shown only that on February 15, 2013, 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 forfeiture of all of his rights, title and interest in the Subject Property," which included respondent's account. Pet. Ex. E, at 35. This conviction and agreement in 2013 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 in 2011 when respondent provided the services for which it seeks reimbursement or even in 2013. 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., 150 A.D.3d at 202. Anikeyev's agreement to forfeit respondent's account

does not necessarily establish his control over respondent or even its funds, nor has petitioner otherwise so proved. In fact Anikeyev's lack of control may have been the basis for the billing fraud to which he pleaded guilty.

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. Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 150 A.D.3d at 202; One Beacon Ins. Group, LLC v. Midland Med. Care, PC, 54 A.D.3d 738, 740 (2d Dep't 2008). 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., 150 A.D.3d at 201. 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. Uptown Healthcare Mgt. Inc. v. Allstate Ins. Co., 117 A.D.3d 542, 543 (1st Dep't 2014); Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 150 A.D.3d at 201-02; 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). 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.

B. Respondent's Nonattendance at an Examination Under Oath

Second, petitioner raises respondent's failure to appear an examination under oath (EUO), initially and after petitioner rescheduled the EUO. Petitioner must request an EUO according to the procedures and timeframes required by the applicable regulations under Insurance Law Article 51. Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d 556, 562-63 (2008); Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312, 317-18 (2007); Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC, 82 A.D.3d 559, 560 (1st Dep't 2011). Upon receipt of a prescribed verification form to establish a claim, petitioner was required to request "any additional verification" needed to establish the claim within 15 days. 11 N.Y.C.R.R. § 65-3.5(b); Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d at 563.

II. THE INITIAL ARBITRATOR RATIONALLY RULED ON PETITIONER'S DEFENSES 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 3. See Countrywide Ins. Co. v. DHD Med., P.C., 86 A.D.3d 431, 431 (1st Dep't 2011). This defense had been previously determined by another arbitrator under the clear and convincing standard, but was reversed and remanded to a new arbitrator after that standard was held inapplicable. The initial arbitrator found that petitioner "has not proven that [respondent] is fraudulently

incorporated," by a preponderance of evidence. Pet. Ex. A, at 3.

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. Allstate Ins. Co. v. Belt Parkway Imaging, P.C., 33 A.D.3d at 408; Andrew Carothers, M.D., P.C. v. Progressive Ins. Co., 150 A.D. 3d at 199; 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., 150 A.D. 3d at 201-02.

Regarding the unattended EUO, while petitioner insists that it timely denied respondent's claim based on respondent's failure to attend a scheduled EUO, the initial arbitrator rejected petitioner's defense on the ground the requested verification was untimely. If "any requested verifications," such as an EUO,

> has not been supplied to the insurer 30 calendar days after the original request, the insurer shall, within 10 calendar days, follow up with the party from whom the verification was requested, either by telephone call . . . or by mail.

11 N.Y.C.R.R. § 65-3.6(b). Although respondent failed to appear

for an EUO April 3, 2012, petitioner did not mail its notice rescheduling the EUO until May, 18, 2012, well more than 10 calendar days later. Pet. Ex. B, at 14-16.

III. CONCLUSION

Consequently, the court denies the petition to vacate the initial arbitrator's award dated January 13, 2016, and the Master Arbitrator's award dated March 31, 2016, 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). Respondent may enter a judgment for $2,112.27, plus interest at 2% per month from January 9, 2014, until payment; attorneys' fees pursuant to 11 N.Y.C.R.R. § 65-4.6, including $195.00 for the arbitration, 11 N.Y.C.R.R. § 65-4.10(j), and for this proceeding as set forth below; $75.00 in arbitration filing fees; and costs as taxed by the Clerk under C.P.L.R. § 8201. C.P.L.R. § 7514(a). While respondent is entitled to reasonable attorneys' fees for this proceeding, N.Y. Ins. Law § 5106(a); 11 N.Y.C.R.R. § 65-4.10(j)(4); Unitrin Advantage Ins. Co. Kemper A. Unitrin Bus., 143 A.D.3d 536, 537 (1st Dep't 2016), respondent fails to support them with any contemporaneous records or billing rates. E.g., Community Counseling & Mediation Servs. v. Chera, 115 A.D.3d 589, 590 (1st Dep't 2014); Bruno Kearney Architects, LLP v. Rose, 104 A.D.3d 472, 472 (1st Dep't 2013); Matakov v. Kel-Tech Constr., Inc., 84 A.D.3d 677, 678 (1st Dep't 2011). See Katz Park Ave. Corp. v. Jagger, 98 A.D.3d 921, 922 (1st Dep't

2012). Because the petition required respondent's opposition, including its attorneys' time appearing in court, however, the court awards respondent $1,000.00 for attorneys' fees and any other associated expenses incurred in this proceeding.

DATED: September 1, 2017

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.