Matter of Technology Ins. Co., Inc. v Progressive Max Ins. Co.
2017 NY Slip Op 32566(U)
December 5, 2017
Supreme Court, New York County
Docket Number: 652376/2017
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Matter of the Arbitration of Certain Controversies between TECHNOLOGY INSURANCE COMPANY, INC.,

Petitioner,

-against-

PROGRESSIVE MAX INSURANCE COMPANY,

Respondent.

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Index No. 652376/2017
Motion Seq: 001

DECISION, ORDER & JUDGMENT

HON. ARLENE P. BLUTH

The petition to vacate the arbitration decision is denied and this proceeding is dismissed.

Background

Petitioner is the worker's compensation insurance carrier for a bus company. This petition arises out of injuries suffered by an employee of petitioner's insured, Ilene Lacombe, as the result of a motor vehicle accident on December 4, 2012. Lacombe was on the job as a passenger on a school bus that collided with a car owned by respondent's insured Asia Smith. The school bus was operated by Lacombe's co-worker Ivan Tatarchuk. Lacombe's employer, Fortuna Bus Company, secured workers' compensation payment for Lacombe from petitioner.

The accident qualified for loss transfer arbitration because one of the vehicles involved in the accident– the school bus– weighed more than 6,500 pounds and was a vehicle for hire. At the arbitration, petitioner claimed that respondent's insured (Smith) was liable for the accident while respondent insisted that the school bus caused the crash. The arbitrator found that Smith was 50% responsible for the accident and that the school bus, operated by Lacombe's co-worker,

was 50% liable. The liability carrier for Fortuna Bus Company is Wesco Insurance Company, a subsidiary of petitioner. The arbitrator found that the damages totaled $46,121.32.

The arbitrator awarded petitioner only half of the total damages, reasoning that petitioner should have included Wesco as an additional respondent and that joint and several liability is not available in loss transfer proceedings. The arbitrator concluded that because respondent's insured was 50% liable, petitioner was entitled to 50% of the damages.

Petitioner seeks to vacate the arbitrator's decision on the ground that it misapprehended the law. Petitioner insists it could not have named Wesco as a respondent in the arbitration because workers' compensation laws bar petitioner from recovering against Wesco. Petitioner argues that it could not have sued Wesco in an "action at law." Petitioner concludes that because the injured Lacombe did not suffer a grave injury, neither her co-employee Tatarchuk nor her employer (Fortuna) could be found liable for the accident.

In opposition, respondent insists that the arbitrator must comply with the Superintendent of Insurance's procedures regarding arbitrations, including an FAQ section stating that joint and several liability does not apply to loss transfer arbitrations. Respondent maintains that loss transfer is a statutorily created claim and the common law doctrine of joint and several liability does not apply.

In reply, petitioner emphasizes its disagreement with the arbitrator's decision to apportion liability to a party that would be immune from any action arising out of this accident.

Discussion

"Courts may vacate an arbitrator's award only on the ground stated in CPLR 7511(b)" (*New York City Tr. Auth. v Transport Workers' Union of America, Local 100, AFL-CIO*, 6 NY3d

332, 336, 812 NYS2d 413 [2005]). The claim that an arbitrator exceeded his or her power "occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. Moreover, courts are obligated to give deference to the decision of the arbitrator" (*id.*).

Here, the question for this Court is whether the arbitrator's finding that joint and several liability does not apply to a loss transfer arbitration was rational. The Court finds that the arbitrator's decision was rational because petitioner failed to demonstrate that joint and several liability must apply in a loss transfer arbitration.

Petitioner theorizes that it could not recover against Lacombe's employer's insurance (Wesco) in an action at law because there was no grave injury. But that does not mean that joint and several liability applies in a loss transfer proceeding. As detailed by the arbitrator, in the Frequently Asked Questions section about New York Loss Transfer published by Arbitration Forums, it states that joint and several liability is not available in loss transfer arbitrations (*see* NYSCEF Doc. No. 3 at 2). Petitioner did not provide a sufficient reason to justify why it was irrational for the arbitrator to embrace this guidance.

Under petitioner's theory, it would be entitled to 100% of the awarded damages even if Lacombe's co-worker was 99% responsible for the accident. That makes no sense in a loss transfer arbitration. The point of joint and several liability is to ensure that a plaintiff– an injured person– in an *action at law* is fully compensated. The burden is placed on co-defendants, rather than plaintiffs, to locate absent defendants to sort out apportionment of damages. A loss transfer arbitration is a completely different setting. It is created pursuant to a statute and its purpose is to allow insurers the opportunity to recover expenses based on the liability of their insureds.

Here, the injured claimant received workers' compensation payments from petitioner because petitioner was hurt on the job due, in part, to her co-worker's actions. There is no reason to award all of the damages to petitioner when one of its insured's employees was 50% responsible for his co-worker's (Lacombe's) injuries. Otherwise, workers' compensation carriers could seek 100% of the damages issued in a loss transfer arbitration regardless of a covered employee's percentage of liability in an accident. While that would appear to be a lucrative business model, especially for a bus company's workers' compensation carrier, that does not comport with the purpose of a loss transfer arbitration. An employer's workers' compensation carrier should not be able to recover of all of its payments simply because a third-party is adjudged to be 1% negligent in an auto accident.

Petitioner's reliance on *Isabella v Hallock* (22 NY3d 788, 987 NYS2d 293 [2014]) does not compel a different outcome. That case dealt with whether a defendant could pursue a third-party contribution claim under the Vehicle and Traffic Law against a car owner where the driver's negligence was a cause of the plaintiff's injuries, but the driver was insulated from a lawsuit under the workers' compensation laws (*id.* at 797). It did not rule that joint and several liability applies in a loss transfer arbitration.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition to vacate the arbitrator's award is denied, this proceeding is dismissed, and the clerk is directed to enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.

Dated: December 5, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC

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