SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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COUNTRY-WIDE INSURANCE COMPANY

DECISION/ORDER
INDEX NO. 654176/2019
Mot Seq No: 001

-against-

ST. BARNABAS HOSPITAL A/A/O KAROLINA DELA CRUZ

Present:
Hon. Lynn R. Kotler, J.S.C.

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Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
N/Motion, Affirmations, Exhibits	1-8,10-15

This is a petition to vacate a No-Fault Arbitrator's award, pursuant to CPLR § 7511(b)(1)(iii). Respondent opposes the petition. For the reasons that follow, the petition is denied.

The underlying award was rendered by Arbitrator Glen Wiener (the "Arbitrator") in the arbitration proceedings between petitioner Country-Wide Insurance Company ("CWI" or "petitioner") and the respondent St. Barnabas Hospital a/a/o Karolina Dela Cruz ("Barnabas" or "respondent"), AAA Case No. 17-18-1094-8693 and is dated February 5, 2015 and affirmed April 24, 2019 by a Master Arbitrator. The award is in favor of respondent for $4,999.99, plus interest from May 8, 2018. The arbitrator also awarded respondent attorney's fees equal to 20% of the total amount awarded with no minimum fee and the maximum fee capped at $1,360 and reimbursement of fees paid by respondent to American Arbitrator Association ("AAA"). The award at issue was delivered to both sides by the arbitrator less than one year ago (CPLR §7507), therefore this petition is timely.

According to the petition, the underlying arbitration proceedings arose out of an accident that occurred on December 5, 2015, involving a motor vehicle insured by CWI. Karolina Dela Cruz ("Dela Cruz"), respondent's assignor, was a passenger in that vehicle when it was struck by another vehicle. After the accident, Dela Cruz received healthcare services from Barnabas. Barnabas submitted medical bills to CWI for reimbursement, but CWI denied the claim. The matter then proceeded to arbitration on February 5, 2019. According to the award, CWI denied respondent's claim because "written notice was provided on 1/26/16, over 30 days after the date of accident". The Arbitrator, however, found in favor of respondent, stating: "any determination [CWI] first received notice on January 26, 2016 would be speculative at best."

Petitioner appeals to this court on the ground that the lower arbitrator exceeded his authority and that the Master Arbitrator erred in affirming the award. The parties herein are both represented by the attorneys that appeared before the Arbitrator.

Petitioner's attorney, Joseph LaRussa, Esq., states that prior to the commencement of the underlying arbitration, Barnabas' counsel, Kurt Lundgren, Esq., indicated to the Arbitrator that he intended to withdraw Barnabas' claim with prejudice. Attorney LaRussa claims, however, that the Arbitrator "stepped in and prevented [Barnabas] from withdrawing the matter, proceeding to begin the hearing and point out issues he had with CWI's defense." Petitioner argues that the Arbitrator exceeded his authority and showed a bias in favor of respondent. Meanwhile, respondent argues that the Arbitrator's preliminary opinion that petitioner's proof was lacking in merit merely prompted respondent to go forward with its case and was otherwise proper.

Further, petitioner alleges that the Arbitrator advised Barnabas to amend the amount in dispute from $5,999.65 to $4,999.99, thus preventing CWI from seeking a trial *de novo*. According to respondent, it was only after respondent expressed the concern that any determination made by the Arbitrator would likely to be appealed by petitioner that the Arbitrator suggested that respondent amend the claim amount to just below the $5,000.00 threshold.

Petitioner argues that the Arbitrator's encouraging Barnabas to amend the amount in dispute constituted misconduct.

Finally, petitioner argues that the Arbitrator wrongly determined that it failed to prove that it received untimely written notice of the underlying accident. Petitioner contends that after it showed that the first notice was received January 26, 2016, the burden of proof should have shifted to respondent to show that an earlier written notice was sent to CWI. Respondent contends that the issue in the arbitration was whether petitioner had successfully submitted a proper defense of lack of notice of the motor vehicle accident, therefore, petitioner had the burden of persuasion.

CWI pursued Master Arbitration on two separate grounds: that the award was not rationally based upon the evidence presented below and that it was arbitrary, capricious, or incorrect as a matter of law. The Master Arbitrator affirmed the lower arbitration award, stating:

> The arbitrator examined the evidence before him and made the factual finding that appellant had failed to prove its defense of not receiving a timely notice. The determination was one of fact and was not, in light of the evidence before the arbitrator, arbitrary and/or capricious.

Discussion

CPLR §7511 outlines the limited grounds for judicial review of an arbitrator's award. Pursuant to CPLR §7511(b)(1):

> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
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> (i) corruption, fraud or misconduct in procuring the award; or
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> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
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> (iii) an arbitrator, or agency or person making the award exceeded his 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 of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Petitioner now moves to vacate pursuant to CPLR § 7511(b)(1)(iii) on the ground that the Arbitrator exceeded his power. Though petitioner did not cite CPLR §7511(b)(1)(ii), petitioner also asserts that the Arbitrator was not impartial. For the reasons that follow, petitioner failed to meet its burden.

Pursuant to CPLR § 7511(b)(1)(iii), an arbitration award will be upheld unless the moving party can establish clear and convincing evidence that the arbitrator "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." *Greenky v. Aytes*, 138 AD3d 460 [1st Dept 2016]; *Muriel Siebert & Co., Inc. v. Ponmany*,190 AD2d 54 [1st Dept 1993]. An arbitrator exceeds his power when the "award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*In re Kowaleski (New York State Dept. of Correctional Services)*, 16 NY3d 85 [2010] quoting *Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL–CIO*, 6 NY3d 332 [2005]).

Petitioner argues that the Arbitrator exceeded his authority by failing to shift the burden to Barnabas to show that CWI had received an earlier, timely notice of the accident. The court disagrees. Respondent had the burden of proving that it sent its bills for reimbursement to petitioner and that payment was overdue. It was petitioner's burden, then, to establish its late notice defense in accordance with the no-fault regulations (*see i.e. Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 114 AD3d 33 [2d Dept 2013]). The Arbitrator's reasoning, that petitioner failed to demonstrate the late notice, was rational on this record. Indeed, the Arbitrator stated in relevant part:

> [T]here is no affidavit from a person with personal knowledge (such as a claims representative) attesting to when Respondent in fact learned of the loss and by what means. There is not even a printout of the claim's history. Without such evidence any determination Respondent first received notice on January 26,

> 2016 would be speculative at best. Respondent (sic) unsupported denial is determined not to be sufficient...

Further, this argument is a claim that the Arbitrator made a mistake of law. Assuming *arguendo* that the Arbitrator wrongly placed the burden on CWI, the petitioner has failed to demonstrate entitlement to the relief sought. Errors of law and misapplication of substantive law generally do not suffice to permit the court to disturb an arbitrator's decision. *In re Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530 [2010].

Next, the court will consider petitioner's improperly noticed request for relief pursuant to CPLR §7511(b)(1)(ii). Specifically, petitioner contends that the Arbitrator was not neutral because he advised Barnabas not to withdraw the matter when Barnabas had clearly expressed its intent to do so and that the Arbitrator had made up his mind before either side had an opportunity to present an argument. An arbitration award will not be vacated on claims of bias unless a court finds, by clear and convincing evidence, that "the rights of that party were prejudiced by...partiality of an arbitrator appointed as neutral." CPLR § 7511(b)(1)(ii). The mere inference of impartiality is insufficient to warrant interference with the Arbitrator's award. *Provenzano v. Motor Veh. Acc. Indem. Corp.*, 28 AD2d 528 [1st Dept 1967]. Here, there is no evidence to support petitioner's contention that the Arbitrator favored one side over the other.

There is no dispute that the Arbitrator advised Barnabas not to withdraw the claim. However, the Arbitrator's determination before the actual arbitration that petitioner's position was flawed or that respondent had a stronger position than petitioner does not establish the Arbitrator's partiality. *E. Arthur Tutein, Inc. v. Hudson Valley Coke & Products Corp.*, [1st Dept 1930] aff'd, 256 NY 530 [1931] (that arbitrator was strongly convinced of merits of party's claim does not establish bias). Indeed, there is no evidence on this record which would establish that the Arbitrator failed to properly consider petitioner's arguments or any proof that it submitted. Nor is there any evidence that the Arbitrator was biased against petitioner, petitioner's counsel and/or insurers in general.

The court also rejects petitioner's claim that the Arbitrator exhibited bias by suggesting that respondent amend its claim amount from $5,999.65 to $4,999.99. As respondent points out, it was well within its rights to amend the amount of its claim and consistent with its position of limiting the costs associated with continued litigation. Further, it is within the Arbitrator's discretion to permit amendment of the claimed amount and within respondent's right to change the amount sought in the arbitration. The function of arbitrators is to "find a just solution" to the controversy between the parties. *Lentine v. Fundaro*, 29 NY2d 382 [1972]. To that end, it is appropriate for an arbitrator to "fashion the remedy appropriate to the wrong." *Paver & Wildfoerster v. Catholic High School Assn.*, 38 NY2d 669 [1976].

Based upon the foregoing, the petition for an order vacating the Arbitrator's award dated February 5, 2015 and affirmed April 24, 2019 by a Master Arbitrator July 8, 2019 is hereby DENIED. The arbitration award in the matter of St. Barnabas Hospital/Karolina Dela Cruz and Country-Wide Insurance Company - AAA Case No. 17-18-1094-8693 is hereby CONFIRMED in all respects.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the petition is denied and this proceeding is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the arbitration award in the matter of St. Barnabas Hospital/Karolina Dela Cruz and Country-Wide Insurance Company - AAA Case No. 17-18-1094-8693, in favor of respondent St. Barnabas Hospital, against petitioner Country-Wide Insurance Company is hereby CONFIRMED in all respects; and it is further

ORDERED that the clerk shall enter a money judgment in favor of respondent St. Barnabas Hospital and against petitioner Country-Wide Insurance Company as follows:

a) $4,999.99, plus interest from May 8, 2018 at the rate of two per cent (2%) per month, simple, calculated on a pro rata basis using a 30-day month; together with

b) respondent attorney's fees equal to 20% of the total amount awarded with no minimum fee and the maximum fee capped at $1,360; together with

c) forty dollars ($40) to reimburse respondent for the fees paid to AAA.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 11/22/19

New York, New York

Hon. Lynn R. Kotler, J.S.C.