

American Tr. Ins., Inc. v Surgicore Surgical Ctr. LLC
2020 NY Slip Op 30294(U)
February 3, 2020
Supreme Court, New York County
Docket Number: 650771/19
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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AMERICAN TRANSIT INSURANCE, INC.,
Petitioner,

Index No. 650771/19

-against-

SURGICORE SURGICAL CENTER LLC, also
known as SURGICORE LLC A/O LENNIE
HEERALALL,

Respondent.

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JOAN A. MADDEN, J.:

In this Article 75 proceeding, petitioner American Transit Insurance Co. (“American Transit”) seeks to vacate the master arbitration award dated November 12, 2018 (“the Award”) denying petitioner review of the no-fault arbitrator’s determination on the ground that its request for review was untimely. Respondent Surgicore Surgical Center LLC (“Surgicore”) oppose the petition, and seek to confirm the Award.

Background

The arbitration underlying this dispute arose out of a motor vehicle accident that occurred on June 16, 2016, in which the assignor Lennie Heerallall allegedly was injured. Surgicore filed an arbitration proceeding with the American Arbitration Association (“AAA”), seeking no-fault benefits from American Transit, asserting that the services it provided Mr. Heeralall were medically necessary and casually related to the accident. By an award dated August 22, 2018, the no-fault arbitrator awarded the \$21,390.22 for a surgical fee.

The AAA’s transmittal letter to the parties accompanying the no-fault arbitrator’s award, dated August 23, 2018, states that:

By direction of the Arbitrator we herewith transmit to you the duly executed award. Please be advised that pursuant to the New York State Department of Financial Services regulation at 11 NYCRR 65-4.10 (d)(2), a party's request for review by a master arbitrator must be mailed or delivered to the AAA's Master Arbitration administrative office within 21 calendar days of the mailing of the award. The date of mailing of this award is the date set forth above in this letter.¹

By letter dated September 11, 2018, American Transit requested review of the arbitration award by a AAA Master Arbitrator (“the Master Arbitrator”) on various grounds.

In opposition, Surgicore argued, *inter alia*, that the review sought by American Transit was untimely as American Transit did not send its request for review by September 13, 2018 deadline, based on the 21-day time frame as required by no-fault regulations and cited in the August 23, 2018 letter transmitting the no-fault award. Specifically, Surgicore maintained that timeliness is measured from the date when American Transit placed its request for review in the custody of the US Postal Service, and that the request was not mailed until September 14, 2018.

In support of its position, Surgicore attached an envelope addressed to its counsel’s law firm with a September 12, 2018 date, which Surgicore asserted was “a self generated postage marker” from American Transit’s counsel’s office; an undated certified mailing receipt addressed to Surgicore’s law firm with the same article number as the envelope; and a print out from the

¹By award dated August 27, 2018, the no-fault arbitrator also awarded Surgicore \$517.89 in fees for surgical injections. That award was accompanied by a transmittal letter dated August 27, 2018 containing the identical language as the August 23, 2018 letter, except that it referred to August 27, 2018 as the date of the mailing of the award. It appears that American Transit also sought the Master Arbitrator’s review with regard to later award, and the Master Arbitrator found it to be untimely despite that based on the September 14, 2018 mailing date, even though the second award is dated August 27, 2018. However, as American Transit does not appear to challenge the finding of untimeliness with respect to the later award, the court does not reach this issue.

US Postal Service website with the tracking history indicating that envelope arrived at a "Mid NY Distribution Center on September 14, 2018."

In the Award dated November 12, 2018, the Master Arbitrator found that he had no discretion to review the no-fault award as the request for review was untimely. He wrote:

11 NYCRR 65-4.10(d)(2) states, "[t]he request for review by a master arbitrator shall be in writing and shall be delivered or mailed to the designated organization's master arbitration administrative office within 21 calendar days of the mailing of the award."

I find the award was dated August 22, 2018. AAA mailed the award on August 23, 2018. Respondent did not place the requisite request for master arbitration review in the custody of [the United States Postal Service] until September 14, 2018 at which time the same was untimely. Respondent offered no explanation as to the reason for delay.

American Transit now seeks to vacate the Award, asserting that the Master Arbitrator exceeded his authority, and violated the applicable regulations by finding its request for review untimely and by failing consider the merits of its request. As for the timeliness of its request, American Transit argues that it mailed its request for the Master Arbitrator's review to the AAA and sent a copy of such request to counsel for Surgicore on September 12, 2018, which is one day before the date it was due to be mailed under 11 NYCRR 65-4.10(d)(2), and that Surgicore misrepresented to the Master Arbitrator that the request was untimely. In support of this argument, American Transit relies on the evidence submitted to the Master Arbitrator by Surgicore, including the envelope addressed to Surgicore's counsel, which it argues shows timely mailing based on the September 12, 2018 postage date, and the print out of the US Postal Service tracking history relied on by Master Arbitrator to find that the request was mailed on September

14, 2018. American Transit argues that contrary to Master Arbitrator's finding, the print out shows when the request was delivered to a postal service midtown distribution center, which is an intermediate postal facility, and not when the request was mailed, which American Transit contends was on September 12, 2018 from lower Manhattan.

American Transit alternatively argues that the Master Arbitrator improperly relied on 11 NYCRR 65-4.10(d)(2), and that in July 2001, the New York Insurance Department repealed, in part, that portion of the no-fault regulation requiring the master arbitrator to deny review based on the failure to comply with the 21-day deadline. American Transit also argues that any issue of untimeliness was rendered moot when AAA calendered its request for master arbitrational review.

In opposition, Surgicore argues that there is no basis for vacating the Award under the narrow standard of review provided by CPLR 7511, and that contrary to American Transit's position, "the no-fault regulations prescribe that upon the delivery of demand for master arbitration review, the master arbitrator must initially determine if a request for review was timely made," citing Lamed Medical P.C. v. Travelers Ins.Co., 10 Misc.3d 1064(A) (Civ. Ct. Kings Co. 2005). Furthermore, Surgicore asserts that the failure to timely demand review by a master arbitrator in accordance with 11 NYCRR 65-4.10(d)(2), is a "fatal jurisdictional defect."

In reply, American Transit argues that it timely mailed the demand for review and asserts that Surgicore did not deny that it misrepresented that the demand was not timely.² It also argues that the arbitrator's award should be vacated as it was based on a mistake by the Master

²American Transit also argues that Surgicore is in default as it submitted an affirmation in opposition as opposed to an answer as it argues is required by CPLR 402. However, the court finds that Surgicore's affirmation in opposition is a sufficient response to the petition.

Arbitrator.

Discussion

The award of a master arbitrator in a dispute over a no-fault claim is binding except for the grounds for vacating an award under CPLR 7511.³ See Insurance Law § 5106(c); 11 NYCRR § 65-4.10(h)(1)(I). “[J]udicial review of arbitration awards is extremely limited.” Wein & Malkin LLP v. Helmsley-Spear, Inc., 6 NY3d 471, 479, cert dismissed, 548 US 940 (2006)(citation omitted). Under CPLR 7511, an arbitration award may be vacated on the following three grounds: (1) it violates a strong public policy; (2) it is irrational; or (3) it clearly exceeds a specifically enumerated limitation on the arbitrator's power. Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York, 94 NY2d 321, 326 (1999); Hackett v Millbank, Tweed, Hadley & McCloy, 86 NY2d 146 (1995).

At issue here is 11 NYCRR § 65-4.10(d)(2)(3), which provides that:

(2) The request for review by a master arbitrator shall be in writing and shall be mailed or delivered to the designated organization's master arbitration administrative office within 21 calendar days of the mailing of the award. The request shall include a copy of the award in issue and shall state the nature of the dispute and the grounds for review. A request by an applicant for benefits shall be accompanied by a filing fee of \$75, payable by check or money order to the designated organization. A request by an insurer shall be accompanied by a filing fee of \$325, payable by check or money order to the designated organization. The failure of a party to enclose the appropriate filing fee with a timely request for review shall result in a denial of the request for review by a master arbitrator if such payment is not made within 28 calendar days of the mailing of the award.

(3) The applicant for master arbitration review shall send, by certified mail, a copy of its

³When a master arbitrator awards an amount of \$5,000 or more, the insurer or the claimant may institute a court action to adjudicate the dispute de novo. See Insurance Law § 5106 (c); 11 NYCRR § 65-4.10(h)(1)(ii). However, when, as here, the master arbitrator denies a request for review on a procedural ground and issues no monetary award, there is no right to such de novo review, which, in any event, is not sought by petitioner. See General Acc. Fire and Life Ins. Co. v. Avionitis, 156 AD2d 424, 426 (2d Dept 1989).

filing papers to the opposing party at the same time that it submits the request for review to the designated organization.

(emphasis supplied)

Based on the above provision and the record before the Master Arbitrator, it cannot be said that Award denying American Transit's request for review as untimely was irrational or exceeded the Master Arbitrator's authority. Notably absent from the record is any proof showing that the request was mailed to the AAA before September 14, 2018, such as an affidavit of mailing stating the dates or mailing procedure within petitioner's firm. The only evidence petitioner relies on was with respect to mailing to counsel for Surgicore, and this evidence is ambiguous at best. Moreover, proof that postage was affixed on September 12, 2018 is not proof of mailing on the date. And, while there is no evidence as to whether AAA was timely served with the request for review, as the regulation requires that opposing party (here Surgicore) be served at the same time that it submits the request for review to the [AAA]" provides a rational basis for the Master Arbitrator's finding.

In addition, the subject regulation requiring that a request for review of a no-fault arbitrator's award "be mailed or delivered ...within 21 calendar days of mailing the award," provides a rational basis for the Master Arbitrator's denial of review based on his finding that American Transit failed to comply with this requirement. See Lamed Medical P.C. v. Travelers Ins.Co., 10 Misc.3d 1064(A). And, contrary to American Transit's argument, in light of this mandatory deadline, the amendment to section 65-4.10(c)(4)⁴ omitting language expressly

⁴ The amended regulation, with the omitted language in brackets, provides:

(c) Scope of master arbitration review.

requiring the master arbitrator to deny a request for review which fails to comply the time limits provided under § 65-4.10(d)(2), does not render the Award irrational. Nor did the Master Arbitrator exceed his authority in interpreting the provision and applying it to deny American Transit’s request for review. See 11 NYCRR § 65-4.10(f)(providing that “the master arbitrator shall interpret and apply the procedures of this section insofar as they relate to his powers and duties.”).

Finally, the calendaring of American Transit’s request for the master arbitrator’s review does not render the request timely.

Conclusion

In view of the above, it is

ORDERED that the petition is denied; and it is further

ORDERED and ADJUDGED that the Award is confirmed.

DATED: February 3, 2020



J.S.C.

HON. JOAN A. MADDEN
J.S.C.

(4) If the master arbitrator determines that subdivision (a) [or subdivision (d)(1) or (2)] of this section has not been complied with, the master arbitrator shall, in lieu of rendering an award, deny the request for review. The procedural requirements contained in this section applicable to a master award, shall also be applicable to a denial of request for review, but such denial shall not provide a basis for an application for de novo review under Insurance Law § 5106(b).