

**Country-Wide Ins. Co. v NYC Sports Acupuncture,
P.C.**

2020 NY Slip Op 30302(U)

January 14, 2020

Supreme Court, New York County

Docket Number: 654584/2019

Judge: Lynn R. Kotler

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

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COUNTRY-WIDE INSURANCE COMPANY

**DECISION, ORDER &
JUDGMENT**
INDEX No. 654584/2019
Mot Seq No: 001

-against-

NYC SPORTS ACUPUNCTURE, P.C.

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	1-6, 8, 9,11,12

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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 Lucille S. DiGirolomo (the "Arbitrator") in the arbitration proceedings between petitioner Country-Wide Insurance Company ("CWI" or "petitioner") and the respondent NYC Sports Acupuncture. P.C. ("NYC Sports" or "respondent"), under AAA Case No. 17-18-1107-4306. The award is dated February 15, 2019 and affirmed May 23, 2019 by a Master Arbitrator. The award is in favor of respondent for \$2,059.88, plus interest from October 9, 2018. The arbitrator also awarded respondent attorney's fees of 20% of the total amount of first-party benefits and any additional first-party benefits, plus interest subject to a maximum fee of \$1,360, and reimbursement of fees paid by respondent to the 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 February 17, 2018 involving a vehicle registered in New York State and insured by CWI. Daniel Buenano Dorado (“Dorado”), respondent’s assignor, allegedly sustained injuries in that accident. Following the accident, Dorado received medical treatment from NYC Sports. NYC Sports submitted medical bills to CWI for reimbursement, but CWI denied the claim. The matter then proceeded to arbitration on February 11, 2019. According to the award, CWI denied respondent’s claim because of “Assignor’s failure to appear for scheduled examinations under oath.” The Arbitrator, however, found in favor of respondent, stating:

Denial of coverage for the Assignor’s failure to appear for EUOs is a severe penalty. In order to prevail, [CWI] must establish, in admissible form, the proper mailing of the EUO notices and the Assignor’s non-appearances...

[CWI’s] timely submission fails to submit any proof of non-appearance. It is not until February 8, 2019 that [CWI] uploads the EUO transcripts... [W]hile [CWI] has submitted an affidavit of service, the party executing the document did not state that he or she actually mailed the letters....

The word “I” is not included in the affidavit and there is no showing of a standard office practice used to create a presumption of mailing... [CWI] did not upload the EUO transcripts until one business day before the hearing...

Petitioner states that the arbitrator erred in precluding CWI’s no-show defense and appeals to this court on the grounds that the lower arbitrator exceeded her powers. Petitioner further asserts that the Master Arbitrator incorrectly affirmed the lower arbitration award by holding that the Arbitrator reviewed the evidence in the matter, and it is not for the Master Arbitrator to review the same evidence and draw a different conclusion. Respondent’s position is that the Arbitrator stated a rational basis for her findings and for her determination to not allow late submissions. Respondent maintains that the Master Arbitrator did not err in his finding that the award was within the discretion of the Arbitrator.

The Arbitrator articulated two grounds for ruling against petitioner. First, she found that CWI failed to demonstrate that it properly noticed the EUO because there was insufficient evidence that the EUO scheduling letters were mailed to respondent's assignor. Petitioner does not address this issue in the petition. Second, the arbitrator found that petitioner did not provide evidence of Dorado's non-appearance at the EUO because the EUO transcripts were submitted one business day prior the hearing and therefore were untimely and in violation of the rocket-docket rule. Therefore, the transcripts were not considered by the Arbitrator.

Pursuant to 11 NYCRR 65-4.2(b)(3),

The designated organization shall, no later than five business days after receipt of the arbitration request, advise the respondent of such receipt. The respondent shall, within 30 calendar days after the mailing of such advice, provide all documents supporting its position on the disputed matter. Such documents shall be submitted to the applicant at the same time. The respondent may, in writing, request that the designated organization provide an additional 30 calendar days to respond based upon reasonable circumstances that prevent it from complying.

Petitioner does not allege that it timely filed the transcripts. Instead, petitioner asserts that it timely requested the EUOs and timely denied respondent's claim. With respect to the late submission of the transcripts, however, petitioner merely states that the arbitrator "refused to consider CWI's sworn statements that [Dorado] did not appear for his duly scheduled EUOs" and that decision led the arbitrator to the "counterfactual conclusion that CWI did not establish its EUO no-show defense."

CWI pursued Master Arbitration on the ground that the award was arbitrary and capricious or incorrect as a matter of law. The Master Arbitrator affirmed the lower arbitration award, stating in part:

.... [T]he arbitrator's determination not to receive evidence which violated the rocket-docket rule does not present any basis to vacate the award...the arbitrator [is] the master of what evidence to receive and how to weigh same."

Discussion

CPLR § 7511 outlines the limited grounds for judicial review of an arbitrator's award. Petitioner now moves to vacate pursuant to CPLR § 7511(b)(1)(iii). Pursuant to this provision, an arbitration award will be upheld unless the moving party can establish through clear and convincing evidence that the arbitrator "exceeded [her] 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 her 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 her authority by precluding its EUO no-show defense. Under 11 NYCRR 65-1.1, it is a breach of a condition precedent to coverage under the No-Fault policy for the assignor to not attend EUO. However, to sustain the denial of a claim on this basis, petitioner must prove that respondent's assignor was a no-show. Petitioner's evidence was submitted late. It is within an arbitrator's discretion to refuse to entertain any late submissions proffered by petitioner. *Glob. Liberty Ins. Co. v. Coastal Anesthesia Services, LLC*, 145 AD3d 644, 645 [1st Dept 2016] (citing *Matter of Mercury Cas. Co. v. Healthmakers Med. Group, P.C.*, 67 A.D.3d 1017 [2d Dept 2009]).

Further, the Master Arbitrator correctly determined that the arbitrator did not exceed her powers. The Master Arbitrator's role is not to conduct a *de novo* review of the matter originally presented to the arbitrator at the lower level. The Master Arbitrator's powers of review are limited to determining that the lower arbitrator's decision was rational and neither arbitrary, capricious nor incorrect as a matter of law. *Petrofsky v. Allstate Ins. Co.*, 54 NY2d 207, 209 [1981]

Based upon the foregoing, the petition for an order vacating the Arbitrator's award dated February 15, 2019 and affirmed May 23, 2019 by a Master Arbitrator is hereby DENIED. The arbitration award in the matter of NYC Sports Acupuncture. P.C./Daniel Buenano Dorado and Country-Wide Insurance Company - AAA Case No. 17-18-1107-4306 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 it is further


ORDERED that the arbitration award in the matter of NYC Sports Acupuncture. P.C. / Daniel Buenano Dorado and Country-Wide Insurance Company - AAA Case No. 17-18-1107-4306, in favor of respondent NYC Sports Acupuncture. P.C., 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 NYC Sports Acupuncture. P.C. and against petitioner Country-Wide Insurance Company as follows:

- a) \$2,059.88, plus interest from October 9, 2018 at the rate of two per cent (2%) per month; together with
- b) respondent's attorney's fees of 20% of the total amount of first-party benefits and any additional first-party benefits, plus interest subject to a maximum fee of \$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: 1/14/20

New York, New York


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