Matter of Old Republic Ins. Co. v Countrywide Ins. Co.
2020 NY Slip Op 30426(U)
January 24, 2020
Supreme Court, Kings County
Docket Number: 506817/19
Judge: Wavny Toussaint
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of January, 2020.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

----------X

In the Matter of the Application of
OLD REPUBLIC INSURANCE COMPANY and
RYDER TRUCK RENTAL, INC.,

Petitioners,

- against -

COUNTRYWIDE INSURANCE COMPANY,

Respondent.

----------X

DECISION AND ORDER

Index No. 506817/19

The following papers numbered 1-8 read herein:	Papers Numbered	
Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4	5-7
Opposing Affidavits (Affirmations)	7	8
Reply Affidavits (Affirmations)	8	

Upon the foregoing papers, petitioners Old Republic Insurance Company ("Old Republic") and Ryder Truck Rental, Inc. ("Ryder") (collectively, "petitioners"), move, in motion sequence 001, pursuant to CPLR 7511, for an order vacating arbitration awards made on February 1, 2018 and March 5, 2019, in actions brought before Arbitration Forums, Inc. ("AF"). Respondent Countrywide Insurance Company ("Countrywide"), cross-moves, in

motion sequence 002 for an order (1), pursuant to CPLR 7510, confirming an arbitration award dated March 5, 2019 and (2) denying petitioners' motion to vacate.

Background and Procedural History

Old Republic insures co-petitioner Ryder, and Countrywide insures non-party Terry Floyd ("Floyd") , who was involved in a March 24, 2017 automobile accident in Kings County. Floyd commenced a resulting action, under Kings County Supreme Court index no. 514868/2017, on August 1, 2017, against Antonio Lopez Jr. ("Lopez") and Ryder for Lopez's allegedly negligent operation of a Ryder-owned truck.

Countrywide, in turn, commenced arbitration against Ryder Systems-FFS ("Ryder FFS") with AF on or about December 4, 2017, under their docket number 1068-13953-17-00 seeking $47,442.74 reimbursement, representing all payments Countrywide made for Floyd's medical treatment. Neither Ryder nor Ryder FFS responded. The AF arbitrator, in a February 1, 2018 decision, held both drivers were equally liable for the accident, as they each failed to keep a proper lookout for the other, and thus awarded Countywide $23,721.37 (the first award).

Apparently, Countrywide subsequently realized that Ryder and Ryder FFS are separate entities having different identification numbers listed with AF and commenced a second arbitration, this time against Ryder, on or about December 19, 2018, under docket number 1068-15373-18-00. Ryder appeared and sought deferment citing the pending bodily injury action in Supreme Court, Kings County where e-filed records show it filed an answer raising affirmative defenses. The arbitrator denied Ryder's deferment request on the ground that

ongoing litigation fails to present a jurisdictional issue "and should have been raised as a deferment request" (*see* exhibit B, annexed to petitioners' moving papers). The arbitrator awarded Countrywide $23,721.37 in a March 5, 2019 decision (the second award) which concluded that Countrywide had proven Ryder's 50% liability in the first award and presented proof of additional payments since the first award.

Ryder and Old Republic now move to vacate the February 1, 2018 and the March 5, 2019 arbitration awards, and Countrywide cross-moves to confirm the March 5, 2019 arbitration award.

Parties' Contentions

Petitioners argue for vacating the second award because the arbitrator's decision there was based solely on the first arbitration, which Ryder did not attend, as it was not properly notified, and which, it thus asserts, is not binding on it. Krystle Ladd, a Ryder claim representative, avers that Ryder never received a notice of intention to arbitrate from Countrywide since the notice incorrectly identified Ryder FFS, not Ryder, as respondent and adds that Ryder and Ryder FFS have different arbitration numbers with AF. Ryder contends that it was unable to mount a proper defense because it was not notified of the first arbitration. Petitioners also argue that the second hearing arbitrator improperly denied Ryder's deferment request and that it should have been granted because of the pending bodily injury action. Petitioners allege that Ryder did not make any contentions in the second action because it assumed that the arbitration would have been deferred.

Countrywide, in response, challenges the contention that Ryder FFS is a separate entity by noting that Ryder and Ryder FFS share the same address, as evidenced in both arbitration decisions. Hence, Countrywide submits that Ryder was apprised of the first arbitration date and is bound by the first arbitration decision. Countrywide observes that Ladd, who states that she is employed by Ryder, is silent as to whether she is also employed by Ryder FFS and is listed as the representative for both entities on the arbitration award decisions. Countrywide contends, in any event, that the second award is not irrational and does not clearly exceed a specifically enumerated limitation on the arbitrator's power. It further notes that the first decision was based on facts in the police report, and, thus, the conclusion therein as to liability would not change in the second hearing. Countrywide also cites Ryder's concession that its deferment request was based on an improper subsection, and was, therefore, properly denied.

Discussion

"The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in [CPLR] 7511" (CPLR 7510). Confirming an arbitration award is a prerequisite to entering judgment upon the award (CPLR 7514 [a]).

"Judicial review of an arbitrator's award is extremely limited" (*O'Neill v GEICO Ins. Co.*, 162 AD3d 776, 777 [2d Dept 2018]). "An arbitration award must be sustained if it has a rational basis . . . unless, *inter alia,* the arbitrator's findings contravene public policy" (*Snyder v Nationwide Mut. Ins. Co.*, 106 AD2d 388, 388 [2d Dept 1984]). However, where

as here, the arbitration is compulsory (*see* Insurance Law § 5105), the award "must satisfy an additional layer of judicial scrutiny—it 'must have evidentiary support and cannot be arbitrary and capricious'" (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011], quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Allstate Ins. Co. v. Motor Vehicle Accident Indemnification Corp.*, 150 AD3d 1098, 1099 [2d Dept 2017]; *Matter of Denhoff v Mamaroneck Union Free Sch. Dis.*, 101 AD3d 997, 998 [2d Dept 2012]).

Grounds to vacate an arbitration award include failure of an arbitrator to follow CPLR article 75 procedures unless the party applying to vacate the award continued with the arbitration with notice of defect and without objection (*see* CPLR 7511 [b] [1] [iv]; *Matter of Gassman Baiamonte Gruner, P.C. v Katz*, 164 AD3d 790, 791 [2d Dept 2018]; *Siegel v Landy*, 95 AD3d 989, 992 [2d Dept 2012]). If the court vacates the award, it may order a rehearing and determination of all or any of the issues, either before the same arbitrator or before a new arbitrator (CPLR 7511 [d]). "The party seeking to vacate the arbitration award has the burden of proving by clear and convincing evidence that the arbitrator committed misconduct" (*Matter of Allstate Ins. Co. v GEICO [Govt. Empls. Ins. Co.]*, 100 AD3d 878, 879 [2d Dept 2012]).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Matter of Executive Life Ins. Co. of N.Y.*, 103AD3d 631, 633 [2d

Dept 2013] [citation omitted]). The arbitrator is required to notify the parties of "the time and place for the hearing . . . in writing personally or by registered or certified mail" at least "eight days before the hearing (CPLR 7506 [b]), and prejudicial defects in giving notice may contribute to vacating the award (*see* Siegel, 95 AD3d at 992; Nadel & Assoc., P.C. v O'Neil, 50 AD3d 358 [1st Dept 2008]; *Matter of Connolly (Allstate Ins. Co.)*, 213 AD2d 787, 788 [3d Dept 1995]).

Here, both petitioners and respondent acknowledge that Ryder and Ryder FFS have different arbitration numbers. Indeed, Countrywide did not move to confirm the first award against Ryder FFS within the statutory one-year period but rather commenced a second arbitration, a tacit acknowledgment that its service on Ryder FFS did not adequately notify Ryder of the first arbitration hearing. Moreover, Ryder has shown, through Ladd's affidavit, that it was not properly notified (*see* Progressive Cas. Ins. Co. v Garcia, 140 AD3d 886, 887 [2d Dept 20116]; *Matter of Shefa Brucha Inc./Hazlachh Supply, Inc. (Topaz Elecs)*, 233 AD2d 276, 276 [1st Dept 1996] [fact that party was not served with arbitration notice may be proven by competent evidence from a witness with personal knowledge]). Hence, that branch of petitioners' motion to vacate the February 1, 2018 award merits being granted.

However, Ryder unconvincingly argues for vacating the second arbitration decision denying deferment, as adjournments generally fall within the sound exercise of an arbitrator's discretion pursuant to CPLR 7506 (b) and will only be disturbed when abused (*see Matter of Gassman Baiamonte Gruner, P.C.*, 164 AD3d at 791 [2d Dept 2018]; *see also Matter of Bevona (Superior Maintenance Co.)*, 204 AD2d 136, 139 [1st Dept 1994]). Refusing to

grant an adjournment constitutes misconduct when it results in failing to hear pertinent and material evidence and effectively excluding an entire issue (*see* Gassman, 164 AD3d at 791; *Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350, 352 [1st Dept 2006]). Ryder has not met its burden of showing by clear and convincing evidence that the arbitrator abused his discretion in denying deferment. Ryder, in this regard, acknowledges that "the deferment may have been requested under the wrong section . . ." (Petition, ¶ 15). Ryder also acknowledges that it was unprepared to offer any contentions after the deferment denial because it anticipated that its request would be granted.

Ryder's additional argument that the second award should be vacated because the arbitrator apparently relied on the first award, where Ryder allegedly did not receive notice of that arbitration and it was not a party therein, is likewise unavailing. Ryder unquestionably received notice of the second arbitration hearing and concededly failed to offer any contentions in defense. "An arbitrator may hear and determine a controversy upon the evidence produced, notwithstanding the failure of a party to appear" (*Matter of Fiduciary Ins. Co. v American Bankers Ins. Co. of Florida*, 132 AD3d 40, 45 [2d Dept 2015]; *see also* CPLR 7506 [c]). Consequently, Ryder cannot now argue that the arbitrator should not have considered any evidence merely because it failed to appear. Moreover, the second arbitration decision notes that the arbitrator considered the police report in addition to the prior decision. Therefore, the arbitrator, under the circumstances, did not abuse his discretion in granting the arbitration award, and the branch of petitioners' motion to vacate the March 5, 2019 arbitration award is denied.

Countrywide has cross-moved to confirm the March 5, 2019 award, and "[u]pon denying a motion to vacate or modify an arbitration award, the court must confirm the award" (*Matter of Mercury Cas. Co. v Healthmakers Med. Group, P.C.*, 67 AD3d 1017 [2d Dept 2009] citing CPLR 7511[e]). Accordingly, it is

ORDERED that the branch of petitioners' motion (motion sequence 001) pursuant to CPLR 7511, for an order vacating the first arbitration award, made on February 1, 2018 is granted; and it is further

ORDERED that the branch of petitioners' motion (motion sequence 001) pursuant to CPLR 7511, for an order vacating the second arbitration award, made on March 5, 2019 is denied; and it is further

ORDERED that the branch of Countrywide's motion (motion sequence 002) for an order, pursuant to CPLR 7510, confirming the March 5, 2019 arbitration award is granted. This constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT
J.S.C.

KINGS COUNTY CLERK
FILED
2020 JAN 31 AM 9:19