

Ameriprise Ins. Co. v Zwanger-Pesiri Radiology Group, LLP
2020 NY Slip Op 33044(U)
September 16, 2020
Supreme Court, New York County
Docket Number: 365854/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY **PART** IAS MOTION 23EFM

Justice

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AMERIPRIZE INSURANCE COMPANY

INDEX NO. 365854/2019

Petitioner,

MOTION DATE N/A

- V -

MOTION SEQ. NO. 001

ZWANGER-PESIRI RADIOLOGY GROUP, LLP,
a/a/o Luis Ramirez

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Petitioner Ameriprise Insurance Company (“Petitioner”) brings this special proceeding pursuant to CPLR 7511 to vacate an arbitration award. Respondent Zwanger-Pesiri Radiology Group LLP (“Respondent”) opposes the petition.

BACKGROUND

Petitioner is the insurer for Deborah and Bernard Johnson. On March 12, 2016, their daughter, Samantha Johnson, drove the insured vehicle, a 2015 Toyota Corolla (the “Corolla”), from the insured’s house to visit her boyfriend, Paul Wells. After Samantha fell asleep, Paul drove the Corolla without her permission to a bar, where he consumed alcoholic beverages until 3:00 am and exited the bar.

A fight between two females broke out in the parking lot and grew to incorporate many other people. In attempting to leave, Paul Wells allegedly entered and started the Corolla but immediately exited to assist his friend, Ronald Ashley. According to the police accident report and the deposition testimony of those involved, the altercation ended with Ronald Ashley entering

the Corolla and intentionally running over four individuals, Bryan Dewar, Luis Ramirez (assignor herein), Dylan Mullen, and Paul Wells, before crashing the Corolla into a nearby store.

Mr. Ramirez received an MRI from Respondent, who submitted the \$878.67 bill to Petitioner. Petitioner denied the claim, stating that Mr. Ramirez' injuries would not be covered because the Corolla was operated without the insured's permission and Ronald Ashley intentionally used the Corolla to cause bodily injury and therefore did not qualify as an "accident". Respondent then commenced the underlying arbitration proceeding with the American Arbitration Association.

Arbitrator Ben Feder found in favor of Respondent herein, determining that, pursuant to 11 NYCRR § 65-1.1, Mr. Ramirez was an eligible injured person because he was a "person who sustains personal injury arising out of the use or operation of the insured motor vehicle in the State of New York while not occupying another motor vehicle." (NYCEF Doc No. 4 at 3.) In support, Arbitrator Feder cited to *State Farm Mutual Automobile Insurance Company v Langan*, 16 NY3d 349 [2011], a case in which the driver of a vehicle intentionally struck and killed a pedestrian, for the proposition that the Court intended innocent third-party victims to be eligible for no-fault benefits regardless of which policy the claim is filed under. (*Id.* at 4.)

Petitioner appealed, arguing that Arbitrator Feder "improperly extended the Court of Appeals decision in [*Langan*].” (NYSCEF Doc No. 5 at 2.) However, Master Arbitrator Victor J. D'Ammora agreed with Arbitrator Feder's analysis and conclusions and found that the award "should not be disturbed in accordance within the standards [of review].” (NYSCEF Doc No. 6 at 3.)

DISCUSSION

“It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator ‘offer[s] even a barely colorable justification for the outcome reached.’” (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480 [2006] [internal citations omitted].) “In cases of compulsory arbitration, this court has held that CPLR article 75 ‘includes review of whether the award is supported by evidence or other basis in reason.’ This standard has been interpreted to import into article 75 review of compulsory arbitrations the arbitrary and capricious standard of article 78 review. In addition, article 75 review questions whether the decision was rational or had a plausible basis.” (*Matter of Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 211 [1981] [internal citations omitted].)

Here, Petitioner has not met its burden to demonstrate that the award was arbitrary and capricious and without sound basis in reason. Arbitrator Feder based his award on an extensive record consisting of multiple depositions, briefs, and insurance documents and found that Mr. Ramirez was an eligible injured person because he was a pedestrian struck by an insured motor vehicle. Arbitrator Feder used *Langan* as an example of a case wherein an innocent victim of an intentional vehicular attack was entitled to no fault benefits. In opposition, Petitioner argued, as it does herein, that the Arbitrators misapplied *Langan* by holding that it applied to all innocent and injured third-parties seeking coverage under any policy, rather than it only applying to innocent and injured third-parties seeking coverage under their own policies.

However, Arbitrator Feder addressed Petitioner’s argument, stating:

First, I note that the *Langan* decision post-dates [the cases relied on by Petitioner herein] and is his [sic] decision by the highest court in the State of New York. Second, I do not read the holding in *Langan* as narrowly as does the Respondent. The clear intent of the holding in *Langan* is to provide no-fault benefits to innocent 3rd parties who did not intentionally cause the accident regardless of which policy the claim is filed under.

Given the standard of review and the review and analysis undertaken by the Arbitrators in reaching the subject award, this court cannot say that the award was issued without sound basis in reason or without regard to facts. Notably, in support of its own interpretation of *Langan*, Petitioner does not cite any specific caselaw that postdates *Langan*.

In addition, Respondent seeks an award of reasonable attorneys' fees pursuant to 11 NYCRR 65-4.10[j][4], reflecting the time spent defending this matter. Petitioner has not opposed the request.

In *Matter of Country-Wide Ins. Co. v Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407 [1st Dept 2018], the court held that the Supreme Court has authority to award attorney's fees in an action that is an appeal from a master arbitration award pursuant to 11 NYCRR 65-4.10[j][4], which, in pertinent part, provides: "The attorney's fee for services rendered in connection with ... a court appeal from a master arbitration award and any further appeals, shall be fixed by the court adjudicating the matter." (See also *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017].) The court finds that Respondent is entitled to attorneys' fees under 11 NYCRR 65-4.10[j][4]. However, Respondent has not yet provided sufficient proof of its attorneys' fees and costs incurred in the arbitrations and this appeal. Accordingly, Advanced is directed to submit proof and calculations of its attorneys' fees and costs within fifteen (15) days of service of a copy of this order with notice of entry. Upon receipt of the requested documents, a further order and judgment will be entered directing judgment against Petitioner. In the event that Respondent fails to produce such documents, its counterclaim for attorneys' fees will be dismissed.

CONCLUSION

ORDERED and ADJUDGED that Ameriprise Insurance Company's Petition to vacate the award regarding AAA Case Number 17-17-1080-0478 is denied and the Petition is dismissed; and it is further

ORDERED and ADJUDGED that pursuant to CPLR 7511 the award is confirmed.

Upon receipt of proof of Respondent's attorneys' fees and costs, a further order and judgment will be entered directing judgment in favor of Respondent and against Petitioner.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

09/16/20
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

REFERENCE

FIDUCIARY APPOINTMENT



W. FRANC PERRY, J.S.C.