

Country-Wide Ins. Co. v Jimenez
2021 NY Slip Op 32581(U)
December 6, 2021
Supreme Court, New York County
Docket Number: Index No. 653046/2021
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY **PART** **23**

Justice

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COUNTRY-WIDE INSURANCE COMPANY

Petitioner,

INDEX NO. 653046/2021

MOTION DATE 06/22/2021

MOTION SEQ. NO. 001

- v -

JOSEPH JIMENEZ, M.D. A/A/O MANISH KUMAR,

Respondent.

**DECISION + ORDER ON
MOTION**

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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, 17, 18, 19

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

In this Article 75 proceeding, Petitioner Country-Wide Insurance Company seeks the vacatur of a no fault arbitration award dated November 19, 2020 and the master arbitration award, which affirmed the former, dated February 7, 2021. Respondent Joseph Jimenez, MD, counterclaims to confirm the awards and for attorneys' fees.

No fault arbitrator Aspir ruled in favor of Respondent, awarding him \$3,639.54. (NYSCEF Doc No. 3.) Specifically, Aspir found that a spreadsheet submitted by Petitioner, purportedly evidencing a general denial of all claims based on claimant Manish Kumar's failure to attend independent medical examinations, was an insufficient showing of timely, claim-specific denials entitling Petitioner to disclaim coverage. (*Id.* at 3; NYSCEF Doc No. 4 at 43, General Denial, and 48-71, spreadsheet.)

The master arbitrator affirmed the award in its entirety, stating that "the [lower] Arbitrator, after discussing the documents submitted, clearly stated why [Petitioner-herein]'s use of a global denial, instead of a specific denial, was insufficient to deny the [Respondent-herein]'s claim." (NYSCEF Doc No. 6 at 3.)

It is well settled that a party seeking to vacate an arbitration award carries a “heavy burden.” (*Scollar v Cece*, 28 AD 3d 317 [1st Dept 2006], citing *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999].) An arbitration award must be upheld when the arbitrator “offers even a barely colorable justification for the outcome reached.” (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006].)

When a court is asked to review an arbitrator’s decision made in a compulsory no-fault arbitration proceeding, the court must affirm the award if there is evidentiary support and the award was neither arbitrary nor capricious. (*Motor Vehicle Accident Indemnification Corp. v Aetna Cas. & Sur.*, 89 NY2d 214, 220-222 [1996].) It is well settled that an “arbitrary action is without sound basis in reason and is generally taken without regard to facts.” (*Pell v Board of Educ of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974].) These standards govern both a master arbitrator’s review of the original arbitration award and the court’s review of the master arbitrator’s award. (*Petrofsky v Allstate Ins. Co.*, 54 NY2d 207, 211 [1981].)

The court notes that in its petition, Petitioner first states that it seeks vacatur of the lower award because arbitrator Aspir exceeded his/her powers and that the award was so imperfectly executed that a final and definite award upon the subject matter submitted was not made, and that the master arbitrator erred in his affirmance. (NYSCEF Doc No. 1, Petition, at ¶ 2.) Petitioner next claims that “the lower arbitrator’s award was irrational, not supported by the evidence, and arbitrary and capricious” (*id.* at ¶ 16) before concluding that the awards should be vacated because “a final and definite award upon the subject matter was not made.” (*Id.* at ¶ 48.)

Regardless, Petitioner has not sustained its burden of proof, as there is no evidence before the court that the award was arbitrary or capricious, that it lacked evidentiary support, that the

arbitrators exceed their powers, or that a final and definite award was not made. The awards were clearly based upon sound reasoning and supported by both the voluminous factual record and existing caselaw, and Petitioner herein makes the same arguments duly considered and rejected by arbitrator Aspir. (*Compare* NYSCEF Doc No. 3 at 3-4, *citing Westchester Med. Ctr. v Lincoln Gen. Ins. Co.*, 60 AD3d 1045 [2d Dept 2009] *with* Petition at ¶¶ 18-25.)

Petitioner also makes the argument that the arbitration awards should be vacated pursuant to the doctrine of res judicata and, in support, submits a decision and order stemming from a separate action between the parties, *Country-Wide Insurance Company v Manish Kumar, et al*, Index No. 650017/2020. (NYSCEF Doc No. 7 at 5-6.) However, that decision, which granted a default judgment, does not preclude the determination of this matter, let alone serve as an independent reason to vacate the arbitration awards, as the Hon. Arlene Bluth “decline[d] to issue any declaratory language until the matter is resolved” and thereafter scheduled a remote conference. (*Id.*; *Thomas v City of New York*, 239 AD2d 180, 180 [1st Dept 1997] [“res judicata issues disallows other claims arising out of the same transaction or series of transactions, once a claim has been finally determined on the merits”]; *Active Chiropractic, P.C. v 21st Century Ins. Co.*, 58 Misc 3d 156[A], at *1 [App Term, 2d Dept, 11th & 13th Jud Dists 2018] [decision entering default but failing to make a statement declaring the rights of the parties has no preclusive effect because it is not a conclusive final determination].)

Petitioner’s argument that Respondent’s answer must be stricken because it is “procedurally improper” in the face of a petition (NYSCEF Doc No. 17, Reply) is likewise without merit. As provided in CPLR 402 [“Pleadings”], “[t]here shall be a petition . . . and an answer where there is an adverse party.” (*See also Government Employees Ins. Co. v Binns-Harty*, 2010

WL 887335 [Sup Ct, NY County 2010] [wherein respondent filed an answer to the petition to vacate the arbitration award].)

The arbitration awards are thus confirmed upon the court's denial of the petition to vacate them. (CPLR 7511[e].) Respondent is entitled to recover attorneys' fees for services rendered in this appeal from a master arbitration, which "shall" be fixed by this court. (Country-Wide Ins. Co. v TC Acupuncture P.C., 179 AD3d 414, 414 [1st Dept 2020], citing 11 NYCRR 65-4.10[j][4].) Therefore, this court fixes attorneys' fees of \$750.00 in favor of Respondent. (Country-Wide Ins. Co. v Comprehensive Medical Assist P.C., 2021 WL 2336766, at *3 [Sup Ct, NY County, June 7, 2021].) Accordingly, it is hereby

ORDERED and ADJUDGED that the petition to vacate the arbitration awards is denied and the petition is dismissed; and it is further

ORDERED and ADJUDGED that the award rendered in favor of Respondent and against Petitioner is confirmed; and it is further

ORDERED and ADJUDGED that Respondent recovers from Petitioner Country-Wide Insurance Company the amount of \$3,639.54, plus interest at the statutory rate of 2% per month from June 28, 2019 until the date of this order, as computed by the Clerk, together with costs and disbursements, and attorneys' fees in the amount of \$750.00, for a total amount of \$ _____, and that Respondent have execution therefor.

12/6/21
DATE


WILLIAM PERRY, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SUBMIT ORDER FIDUCIARY APPOINTMENT

CHECK IF APPROPRIATE: SETTLE ORDER INCLUDES TRANSFER/REASSIGN GRANTED IN PART REFERENCE