

**Country-Wide Ins. Co. v AAAMG Leasing Corp.**

2022 NY Slip Op 33096(U)

September 13, 2022

Supreme Court, New York County

Docket Number: Index No. 652286-2022

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Country-Wide Insurance Company

INDEX NO. 652286-2022

- v -

MOT. DATE

AAAMG Leasing Corp.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for vacatur

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). \_\_\_\_\_

Replying Affidavits

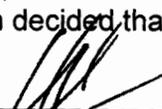
NYSCEF DOC No(s). \_\_\_\_\_

In this Article 75 proceeding, petitioner Country-Wide Insurance Company (“Country-Wide”) seeks an order pursuant to CPLR § 7511(b) vacating an arbitration award and the subsequent master arbitration award. The petition has been submitted without opposition. Petitioner has filed an affidavit of service with the court demonstrating that the motion was served upon the respondent, AAAMG Leasing Corp. (“AAAMG”) by delivering a copy of the petition to Amy Lesch, a clerk in the office of the Secretary of State of the State of New York pursuant to BCL § 306. Despite such service, AAAMG has not submitted opposition to the petition. Therefore, the petition is considered on default.

The underlying arbitration award, dated January 21, 2022, resolved a dispute arising from a car accident that took place on May 26, 2017. As a result of the accident, Rodney Steadman (“Steadman”) allegedly sustained injuries and sought medical attention, including healthcare services from AAAMG. Steadman appeared for an Orthopedic IME at Countrywide’s request which was performed by Dr. John Vitolo, MD (“Vitolo”). Based upon the IME, Vitolo determined that Steadman had reached maximum medical improvement and that he was not in need of further treatment. AAAMG billed Country-Wide for the medical treatment under a theory of no-fault benefits. Country-Wide denied payment of the bill, arguing that it should not have to pay for any treatment that Steadman received after the IME was performed because it had concluded that no further treatment was necessary and because the policy was exhausted.

The parties proceeded to arbitration before Hersh Jakubowitz (“Jakubowitz” or the “arbitrator”) who determined that Country-Wide did not meet the evidentiary burden to establish a lack of causation and that maximum medical improvement did not apply to no-fault benefits. Accordingly, the arbitrator awarded AAAMG \$1,680.00 plus interest and attorney’s fees. Country-Wide appealed the arbitrator’s decision, and on March 31, 2022, the matter came before master arbitrator, Robin D. Weisman (“Weisman” or “master arbitrator”). After review of the arbitration award, Weisman decided that the

Dated: 9-13-22

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one:  CASE DISPOSED     NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is  GRANTED  DENIED     GRANTED IN PART     OTHER
- 3. Check if appropriate:  SETTLE ORDER     SUBMIT ORDER     DO NOT POST
- FIDUCIARY APPOINTMENT     REFERENCE

award was not arbitrary, capricious, or incorrect as a matter of law and affirmed the award in its entirety.

In the petition, Country-Wide asks the Court to vacate the arbitration award and the master arbitration award pursuant to CPLR 7511(b)(1)(iii) because the petition was timely and because the arbitrators exceeded their power, and the award was so imperfectly executed that a final and definite award upon the subject matter submitted was not made.

## DISCUSSION

Pursuant to CPLR § 7511(b)(1)(iii), an arbitration award shall be vacated on the application of a party who participated in the arbitration if the court finds that the rights of that party were prejudiced by an arbitrator making the award who exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. Generally, judicial review of arbitration awards is extremely limited (*Wien & Malkin LLP v. Helmsley-Spear, Inc.* 6 NY3d 471 [2006]). An arbitration award will only be set aside if it is completely irrational, violative of a strong public policy, or exceeds a limitation on the arbitrator's power (*Obot v. New York State Dep't of Correctional Servs.*, 637 NYS2d 544 [4th Dept 1996] *aff'd* 653 NYS2d 883 [1996]). The deference given to arbitral awards is such that even a misapplication of the law will not be a sufficient basis for vacatur under CPLR § 7511 (*Matter of Douglas v. New York City Dept. of Educ.*, 34 NYS3d 340 [Sup Ct New York County 2016]; *Matter of Associated Teachers of Huntington v. Board of Educ., Union Free School Dist. No. 3, Town of Huntington*, 33 NY2d 119 [1973]).

However, when an arbitration award is the result of a compulsory arbitration, courts will review the award with closer scrutiny (*State Farm Mut. Auto Ins. Co. v. Arabov*, 767 NYS2d 905 [2d Dept 1980]; *see Furstenberg v. Aetna Casualty & Surety Co.*, 49 NY2d 757 [1980]). An award in a compulsory arbitration proceeding must have evidentiary support and cannot be arbitrary and capricious (*Motor Vehicle Accident Indemnification Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]). The burden of proof that an arbitration award should be vacated rests on the party moving to vacate (*Matter of New Penn Motor Express, Inc. v. GEICO Gen. Ins. Co.*, 2011 NY Slip Op 32138(U) [Sup Ct Nassau County 2011]).

An arbitrator exceeds his power when he directs payments in an arbitration award that exceed the no fault policy cap of an insurance company (*Brijmohan v. State Farm Ins. Co.*, 92 NY2d 821 [1998]; *Countrywide Ins. Co. v. Sawh*, 272 AD2d 245 [1st Dept 2000]). However, in order for this policy exhaustion argument to succeed, the award must be for a claim that was complete and filed after the full amount of the policy has been exhausted (*Nyack Hosp. v. General Motors Acceptance Corp.*, 8 NY3d 294 [2007]). A claim is complete when the party filing that claim has provided all necessary information to verify the claim (*id.*). Once a complete claim has been filed, if there is still sufficient money as part of the policy to pay that claim, the insurance company has a duty to maintain that sum of money (*Alleviation Medical Services. P.C. v. Allstates Ins. Co.*, 55 Misc. 3d 44 [App. Term, 2d Dept. 2017]). If it fails to do so, a court may direct the insurance company to pay in excess of the policy limit. (*Nyack Hosp. v. General Motors Acceptance Corp.*, 8 NY3d 294 [2007]).

Country-Wide first argues that the arbitration award should be vacated because the filing of its petition was timely. An aggrieved party may make "an application to vacate or modify an award within ninety days after its delivery to him" (CPLR § 7511[a]). The petition was filed on July 1, 2022. Country-Wide claims that it did not receive the arbitration award until April 4, 2022. Therefore, the petition was filed 88 days after receipt of the award and therefore is timely.

Country-Wide then argues that the arbitration award and the master arbitration award should be overturned because Jakubowitz was arbitrary and capricious in awarding AAAMG the amount of its claim when the claim was denied due to Steadman's "failure to appear for two Independent Medical Exams." However, Country-Wide made no such argument concerning a failure to complete a condition precedent to coverage at the arbitration. Rather, it relied on Vitolo's professional opinion that Steadman had reached the maximum medical improvement and that he was not in need of further medical

treatment. Country-Wide relied on the IMEs that it had performed to make its arbitration arguments, so an argument that it did not get the opportunity to perform IMEs is erroneous. Therefore, this argument is dismissed.

Next, Country-Wide argues that the arbitration award and the master arbitration award should be overturned because Jakubowitz exceeded his power when he awarded a payment in excess of the policy limit, and Weisman subsequently exceeded her power as master arbitrator when she affirmed such a payment in excess of the policy limit. In support of this assertion, Country-Wide submits the conciliation submission from the original arbitration and its master arbitration brief. The conciliation submission includes a payout ledger dated August 19, 2020, that lists the total PIP payout as \$49,702.88. However, the sum of all the delineated payments that are part of the ledger combined with the offsets demonstrates a total of \$47,882.14. The master arbitration brief also contains a payout ledger dated January 26, 2022. This ledger and the delineated payments add up to over \$50,000.00.

Assuming *arguendo* that a policy exhaustion argument can be asserted at any time, petitioner's argument fails as to the original arbitration award. For a policy exhaustion argument to succeed, the award must be for a claim that was complete and filed after the full amount of the policy has been exhausted. Therefore, in order for Country-Wide's argument to succeed, it must demonstrate that it had no obligation to pay AAAMG's claim prior to the exhaustion of the policy. Here, Jakubowitz denied Country-Wide's policy exhaustion argument at arbitration because he found that the payout ledger that Country-Wide submitted only demonstrated payments of \$47,882.14, which would allow for the \$1,680.00 award without exhausting the policy. After consideration of the conciliation submission proffered by Country-Wide, the court agrees with Jakubowitz. Therefore, Jakubowitz was not arbitrary or capricious in awarding AAAMG its claim amount of \$1,680.00 and did not exceed his power based upon the documentation before him.

Petitioner's argument also fails as to the master arbitration award. Country-Wide claims that a policy exhaustion argument can be asserted at any time but cites no authority to support such a claim. Country-Wide argues that Weisman should have considered the new payout ledger that it submitted with its master arbitration brief. It argues that the master arbitration brief demonstrated that, at the time of the master arbitration, it had paid out claims totaling over the policy limit of \$50,000. However, Country-Wide had an obligation to pay AAAMG after the award was rendered in the initial arbitration. While Country-Wide was not "precluded by 11 NYCRR 65-3.15 from paying other legitimate claims subsequent to the denial of respondent's claims" but prior to the arbitration (*Allstate Prop. & Cas. Ins. Co. v. Northeast Anesthesia & Pain Mgt.*, 51 Misc.3d 149[A] [1st Dept. 2016]), it was precluded from using the payment of other legitimate claims in order to construct a policy exhaustion argument against AAAMG after AAAMG had an arbitration award in its favor (*see Alleviation Medical Services. P.C. v. Allstates Ins. Co.*, 55 Misc. 3d 44 [App. Term, 2d Dept. 2017]). At the time that the arbitration award granted AAAMG \$1,680.00, Country-Wide had an obligation to AAAMG.

Country-Wide points to two cases to support its assertion that it was permitted to continue paying out legitimate claims after the initial arbitration award. In the first case, *Harmonic*, the Appellate Term, First Department, reversed a civil court decision that denied an insurance company's cross motion for summary judgment based upon a policy exhaustion argument (*Harmonic Physical Therapy, P.C. v. Praetorian Ins. Co.*, 47 Misc3d 137[A] [App. Term 1st Dept. 2015]). However, this case is distinct because in *Harmonic*, the appellate court found that the policy exhaustion argument was a successful argument when it was first used as a defense, at the first step of litigation in the civil court (*see Id.*). Comparatively, here, the policy exhaustion argument failed when it was first used at the arbitration level.

In the second case, *Allstate*, the Appellate Term, First Department, reversed and remanded the civil court's denial of a petition to vacate an arbitration award based upon a policy exhaustion argument (*Allstate Prop. & Cas. Ins. Co. v. Northeast Anesthesia & Pain Mgt.*, 51 Misc.3d 149[A] [1st Dept. 2016]). However, this case is distinct because in *Allstate*, the Appellate Term found that there were "triable issues as to whether the \$50,000 policy limit had been exhausted by payments of no-fault benefits to respondent and other health care providers before petitioner was obligated to pay the claims at issue"

(see *Id.*) In comparison, here, Country-Wide was obligated to pay AAAMG after the initial arbitration was completed, and the policy had not been exhausted prior to the completion of the arbitration.

The AAAMG claim was complete after the initial arbitration and before some of the other claims that Country-Wide paid out. If Country-Wide failed to hold money to pay a complete claim, a court may direct the insurance company to pay in excess of the policy limit.

Based on the foregoing, petitioner has failed to establish that the subject policy was exhausted when AAAMG's claim was complete and filed. Therefore, the petitioner has failed to establish a *prima facie* case for vacatur of the arbitration award. Consequently, the petition must be denied. "Upon the denial of a motion to vacate or modify, [a court] shall confirm the award" (CPLR § 7511[e]). Therefore, the arbitration award is confirmed.

In accordance herewith, it is hereby

**ORDERED** that the petition is denied in its entirety; and it is further

**ORDERED** that the arbitration award and master arbitration award are confirmed in their entireties.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: \_\_\_\_\_

9-13-22  
New York, New York

So Ordered: \_\_\_\_\_

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