American Tr. Ins. Co. v Comfort Choice Chiropractic, PC
2023 NY Slip Op 31522(U)
May 4, 2023
Supreme Court, Kings County
Docket Number: Index No. 503023/2022
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

COMFORT CHOICE CHIROPRACTIC, PC, a/a/o Nancy Bayona,

Defendant.

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DECISION / ORDER
Index No. 503023/2022
Motion Seq. No. 1
Date Submitted: 4/27/23

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion to dismiss the complaint

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	12-19
Affirmation in Opposition……..	22
Reply	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant Comfort Choice ("Defendant/Movant") moves for an order pursuant to CPLR 3211(a)(2), dismissing plaintiff's claim against it, for lack of subject matter jurisdiction. Defendant also seeks costs and attorney' fees, as asserted in its counterclaims.

Defendant's assignee (Nancy Bayona) sustained injury as a result of a motor vehicle accident which occurred on February 12, 2019. She was a passenger in a taxi insured by plaintiff. Subsequent to the accident, she received chiropractic care from defendant, and defendant submitted four claims to plaintiff seeking no-fault reimbursement as an assignee of Ms. Bayona. Each claim was for $4,767.63. The services were rendered from March 8, 2019 to 9/4/19. No explanation is offered for defendant's division of the claims into four equal amounts. Plaintiff denied the claims, asserting that the

treatment was not medically necessary and that defendant billed above the permissible amount (a "fee schedule" defense). These defenses were based upon the peer review report of David Trimboli, M.D. Defendant then filed for arbitration with the American Arbitration Association.

Both parties submitted their documents, including but not limited to Dr. Trimboli's peer review report, the defendant's rebuttal peer review prepared by Marcelo Quiroga, M.D. to the arbitrator. An arbitration hearing was held for all four claims on the same date, 7/16/21, before the same arbitrator, Alana Barran, Esq. Thereafter, the arbitrator rendered four decisions in favor of defendant/movant. Arbitrator Barran ruled that the bills were not excessive and that plaintiff failed to sustain its burden of proof to sustain its defense based on the fee schedule. She also determined that the peer review of Dr. Trimboli "failed to set forth a sufficient factual basis and medical rationale for his opinion that the disputed services were not medically necessary and therefore has not established, prima facie, a lack of medical necessity for those services rendered by applicant. The burden has not shifted to the Applicant and has nevertheless been rebutted. Therefore, the claim is granted." The arbitrator allowed the entire amount of the four claims, $4,767.63 each. Copies of the awards are at Documents 15-18.

Plaintiff then appealed to a Master Arbitrator. Master Arbitrator Burt Feilich, Esq. affirmed the awards in their entirety in November of 2021. Copies of the decisions are not provided, but defendant does not dispute that they were issued, and that they affirm the arbitrator's awards. Plaintiff filed the action at bar shortly thereafter, on January 31, 2022, seeking a *de novo* review of the affirmances. Defendant/movant then filed this motion seeking dismissal of this matter, arguing that pursuant to N.Y. Ins. Law, §5106 (c) "where the amount of such master arbitrator's award is five thousand dollars or greater, exclusive

of interest and attorney's fees, the insurer on the claimant may institute a court action to adjudicate the dispute de novo". In this case, the Master Arbitrator affirmed the four awards to defendant in the amount of $4,767.63 each.

Defendant/movant also asserts, citing, *Sansiviero* v *Royal Globe Ins. Co.,* 109 AD2d 840 [2d Dept 1985], *Demos* v *Maryland Cas. Co.,* 89 AD2d 1006 [2d Dept 1982], that when a Master Arbitrator's award is less than five thousand dollars, dismissal of plaintiff's claim is proper. Plaintiff opposes the motion, and argues that its complaint should not be dismissed on jurisdictional grounds, as the five-thousand-dollar requirement for *de novo* review applies to the total amount awarded to the claimant. Plaintiff opines that Ins. Law § 5106 envisions that the injured party would bring the "whole dispute" to arbitration, as was the norm at the time the statute was enacted. "It [the statute] does not envision splitting the dispute into separate claims by assignee providers but envisions treating the dispute as an entire claim." Plaintiff states that the four bills submitted by the defendant should not be treated as separate claims, but as one claim, as they arose out of the same accident, for services to the same person, and were submitted by the same provider. If treated together, the $5,000 threshold has been met and therefore, plaintiff may then properly request *de novo* review of the arbitrator's and Master Arbitrators' decisions.

Discussion

It has been held that "the award of the master arbitrator shall be binding except for the grounds of review set forth in article seventy-five of the CPLR and where the amount of such master award is five-thousand dollars or greater, the insurer or claimant may institute a court action to adjudicate the dispute de novo." In the case at bar, this Court finds that the services performed by the provider were provided over a course of several months, in the same facility and involved the same assignee, and the only reason the

services were divided into four claims is because the provider chose to do so. The same arbitrator and Master Arbitrator conducted the arbitrations, and, with regard to the arbitrator Alana Barran, Esq., all four were conducted on the same date. The parties did not provide the Master Arbitrator's awards, but presumably they were on the same date as well. Thus, there is no reason not to combine the four claims submitted by the provider so that they may be considered as a single dispute.

While Insurance Law § 5016 contemplates "an award by an arbitrator" not "an award or awards by an arbitrator," which has been upheld by the First Department in *American Transit Ins. Co. v Health Plus Surgery Ctr., LLC,* 192 AD3d 497 [1st Dept 2021], the facts in that case are different than those here. In that case, the plaintiff sought to combine the claims of multiple providers who submitted claims for one assignee, for a surgery performed on one date. The court affirmed the Supreme Court's dismissal of the complaint, and concluded that "the medical services provided to plaintiff's insured were separate and distinct from each other, were billed separately and should not be combined to meet the $5,000 threshold for de novo review" citing *Imperium Ins. Co v Innovative Chiropractic Servs., P.C.*, 43 Misc 3d 137(A) [App Term 1st Dept 2014]. There is no appellate authority in the Second Department to the contrary.

Accordingly, it is ORDERED that the defendant's motion to dismiss the complaint herein is denied.

This shall constitute the decision and order of the court.

Dated: May 4, 2023

ENTER:

Hon. Debra Silber, J.S.C.