

MJG Med. Servs. PC v Old Republic Ins. Co.

2023 NY Slip Op 33128(U)

August 30, 2023

Supreme Court, New York County

Docket Number: Index No. 651650/2023

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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MJG MEDICAL SERVICES PC A/A/O KESNARE PARIS
ETTIENE

Petitioner,

INDEX NO. 651650/2023

MOTION DATE 10/09/2023

MOTION SEQ. NO. 001

- v -

OLD REPUBLIC INSURANCE COMPANY,

Respondent.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21

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

BACKGROUND

Kesnare Paris Ettiene (Assignor), a 57-year-old female, was involved in a motor vehicle accident on May 5, 2021. Assignor suffered injuries for which MJG Medical Services (Petitioner) provided a medical examination and shockwave therapy between June 10, 2021, and June 22, 2021. Respondent denied the claim based upon improper fee schedule and alleged the bills were mailed to the incorrect address. Respondent represents the policy thereafter became exhausted.

The amount in dispute is \$3,555.06.

The parties submitted to arbitration to resolve the underlying dispute regarding no fault benefits. Shawn Kelleher, the Lower Arbitrator, held a hearing on February 6, 2023, and issued a decision on the same day. The decision found in favor of Respondent. Specifically, the Lower Arbitrator found,

"[T]he medical provider is required to submit proof of mailing through evidence in admissible form. Such proof may include the verification of treatment form and/or an affidavit from a person or entity (1) with knowledge of the claim and how it was sent to the insurer or (2) who has relied upon the forms in the

performance of their business." *Viviane Etienne Med, Care*. 25 N.Y.3d at 507. Applicant submits proof of mailing that it sent the bill to Respondent's TPA at a PO Box in Cleveland, Ohio. Respondent submits an affidavit of Kimberly Burm who states that the proper address is an address in Lexington, Kentucky. As such, Applicant has failed to demonstrate "that the statutory claim forms were mailed to and received by the insurer" as the bills were sent to an improper address. *Viviane Etienne Med, Care*, 25 N.Y.3d at 506. Without proof that the bill was mailed to the proper address, Applicant cannot establish its prima facie entitlement to no-fault benefits. *Id.*

After carefully reviewing the evidence presented, I find in favor of Respondent. Respondent has demonstrated that \$50,000.00 in no-fault benefits have already been paid by the submission of the payment log noting all payments made under this policy. Further, Respondent has submitted a copy of the declarations page noting no additional personal injury protection benefits are available for claimant. As such, there is no further coverage available under the subject policy of insurance. The claim of applicant is denied.

Petitioner appealed to the Master Arbitrator on the grounds that the award by the Lower Arbitrator was not rationally based upon the evidence presented and was arbitrary and capricious.

On March 28, 2023, Jonathan Hill, the Master Arbitrator found in favor of Respondent.

The decision provided:

After reviewing the Applicant/Appellant's submission, the Respondent/Appellee's submission and the Arbitrator's decision which resulted in this appeal, I affirm the Arbitrator's award in its entirety. Initially I note that there has been some confusion and/or division among the Courts, individual Arbitrators and Master Arbitrators concerning the policy exhaustion issue since the Second Department's decision in *Alleviation Med Servs., P. C. v Allstate Ins. Co.* 2017 NY Slip Op 27097 (App Term 2nd Dept) which appears to contradict the First Department's finding in *Harmonic Physical Therapy, P. C. v Praetorian Ins. Co.*, 47 Misc3d, 137(A) (App Term 1st Dept. 2015). Although the Arbitrator in the instant matter failed to cite *Harmonic*, they did cite *Hospital for Joint Disease v Hertz Corp.*, 22 A.D.3d 724 (2d Dept. 2005) and several other Court decisions as being in support of their decision that an insurer is not required to pay a claim where a policy's limits have been exhausted. Further, that until the Court of Appeals decides to settle the policy exhaustion question, the choice of laws decision by the Arbitrator in the instant matter cannot be deemed incorrect as a matter of law or arbitrary or capricious. As to the Applicant/Appellant's request that the Respondent/Appellee should not be allowed to raise collateral estoppel as an issue on appeal, the request is moot as the Respondent/Appellee failed to

mention collateral estoppel in its appeal brief. Therefore, based on all of the aforementioned, the Arbitrator's award must be affirmed.

THE PETITION

On April 1, 2023, Petitioner sought to vacate the Master Arbitration award dated March 28, 2023, on the grounds that there was sufficient coverage remaining on the insurance policy when the billing was received, and as such policy exhaustion defense does not exist.

On August 8, 2023, Respondent filed opposition, seeking an order denying the petition and confirming the award. On August 10, 2023, the petition was fully submitted and the court reserved decision.

There is no basis to vacate the underlying award on the merits

As held by the Court of Appeals:

Judicial review of a master arbitrator's award "is restricted, by terms of the statute, to 'grounds for review set forth in article seventy-five' of the CPLR (except in those cases where the award is \$5,000 or more, and the applicant or insurer may seek *de novo* review in the courts)." (*Matter of Bamond v Nationwide Mut. Ins. Co.* 75 AD 2d 812, 813, 427 NYS2d 642, affd. 52 NY2d 957, 437 NYS2d 969, 419 NE 2d 872) CPLR 7511 allows a court to vacate an arbitrator's award and, by judicial construction, a master arbitrator's award on the application of either party if "the court finds that the rights of that party were prejudiced by:***(iii) an arbitrator, or agency or person making the award exceeded his power or ***that a final and definite award upon the subject matter submitted was not made." (CPLR 7511, subd. [b], par. 1, cl. [iii].)

Petrofsky (Allstate Ins. Co.), In re, 54 NY2d 207, 210 (1981).

The Lower Arbitrator provided a detailed basis for the award that was neither arbitrary nor capricious (*Rose Castle Redevelopment II, LLC v Franklin Realty Corp.* 183 AD3d 230). The Lower Arbitrator reviewed Petitioner's evidence and determined Petitioner failed to demonstrate that the claim forms were mailed to and received by Respondent, as the bills were sent to an improper address. Specifically, the lower arbitrator found, "Without proof that the bill was

mailed to the proper address, Applicant cannot establish its prima facie entitlement to no-fault benefits.” Petitioner did not address the issue with the mailing in the petition nor did Petitioner submit a reply to Respondent’s opposition, that raised the same issue.

Therefore, there was a “colorable justification” and a “plausible basis” for the award (*Id.*). It was within Lower Arbitrator’s discretion to determine which evidence in the record to rely on and give weight to. Neither the Master Arbitrator, nor this court, can weigh the evidence anew (*Matter of Bay Needle Care Acupuncture v Country-Wide Ins. Co.* 176 AD3d 806, 807).

Nor was it in error for the Master Arbitrator to confirm the award. The function of the Master Arbitrator in reviewing the decision below is to confirm that the decision was arrived at in a rational manner, that the decision was not arbitrary and capricious (11 NYCRR 65.17[a][1]) or incorrect as a matter of law (11 NYCRR 65.17[a][4]). The Master Arbitrator noted that the Lower Arbitrator considered all evidence and rendered a rational decision based on the record and Lower Arbitrator’s determination of which evidence was credible. The Master Arbitrator gave a lengthy and detailed analysis of the differences in the case law as it stands today in the First and Second Department. There is no basis to vacate the determination.

Wherefore, it is hereby

ORDERED the petition to vacate the arbitration award is denied; and it is further

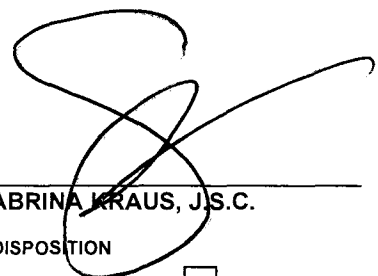
ORDERED and ADJUDGED that the award rendered in favor of Respondent as against Petitioner is confirmed; and it is further

ORDERED that, within 20 days from entry of this order, petitioner shall serve a copy of this order with notice of entry on defendant, and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes the decision and order of the court.

8/30/2023
DATE


SABRINA KRAUS, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE