

SCAN

SHORT FORM ORDER

mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Petitioner(s),

MOTION DATE: 3/12/03

INDEX No.: 246/03

-against-

MOTION SEQUENCE NO: 1

XXX

JORGE D. VIGO

Respondent(s).

The following papers read on this motion to vacate arbitrator's award:

Notice of Motion/ Order to Show Cause.....	1-5
Answering Affidavits.....	6,7
Replying Affidavits.....	8
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, it is ordered that this motion by petitioner for an order pursuant to CPLR 7511 vacating the arbitration award of Nancy Hughes dated December 7, 2002, and directing that the matter be arbitrated before another arbitrator is granted.

The petition alleges that: "The Respondent, [Jorge D. Vigo], served a Demand for Arbitration dated November 20, 2001, for underinsured motorist benefits [Petitioner's Exhibit A]. [and that] The arbitration hearing was setup and scheduled by the American Arbitration Association ('AAA') for December 6, 2002, before Arbitrator Nancy Hughes." The petition further alleges that: "On December 6, 2002, no one from our office [i.e., James P. Nunemaker, Jr. & Associates, Attorneys for Petitioner] appeared at the hearing due to law office failure on our part."

The petition goes on to allege that: "The arbitration hearing apparently went forward on December 6, 2002, without anyone from our office present. [and that] The arbitrator then issued an award

dated December 7, 2002, in which the arbitrator awarded the Respondent the full \$75,000 available under the [State Farm] policy [Petitioner's Exhibit C]." It is furthermore alleged that: "In that award, the arbitrator failed to consider any evidence previously submitted by [State Farm] in its defense." It is also alleged that: "In the present case, the arbitrator, by refusing the request for an adjournment, foreclosed [State Farm] from presenting material and pertinent evidence."

With respect to said evidence, the petition alleges that: "Specifically, the arbitrator did not consider two (2) physical examinations of the Respondent which were conducted by doctors selected by [State Farm]." The report of Dr. Marlon Seliger, dated January 7, 2002, and the report of Dr. Seth B. Paul, dated March 16, 2002, are annexed as Petitioner's Exhibit D along with cover letters showing that copies of the reports were sent to counsel for the respondent and the AAA. The petition alleges in conclusion that "the refusal to grant the adjournment amounts to misconduct on the part of the arbitrator requiring that the arbitration award be vacated and that a new arbitrator be assigned to this matter. The court agrees.

The Appellate Division, Second Department, has held that: "The failure of an arbitrator to grant an adjournment is an abuse of discretion constituting misconduct within the meaning of CPLR 7511 (b) (1) (i) if it results in the foreclosure of the presentation of pertinent and material evidence" (*Insurance Co. of N. Am. v St. Paul Fire & Marine Ins. Co.*, 215 AD2d 386, 387; *Omega Contracting, Inc. v Maropakos Contracting, Inc.*, 160 AD2d 942). In this case, the reports of Dr. Marlon Seliger and Dr. Seth B. Paul were clearly material to the issue of "serious injury" and should have been considered by the Arbitrator even in the absence of the appearance by counsel for the petitioner at the hearing.

Accordingly, the arbitrator's award dated December 7, 2002 is hereby vacated and the matter is remanded to the American Arbitration Association for a new hearing before another arbitrator.

Dated: JUN 2 2003


ENTERED S.C.

statefarm.june

JUN 05 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE