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Slip Copy, 2015 WL 1916817 (N.Y.City Civ.Ct.), 2015 N.Y. Slip Op. 50636(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2015 WL 1916817 (N.Y.City Civ.Ct.))

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.

Civil Court, City of New York,
New York County.
COUNTRY–WIDE INSURANCE COMPANY, Petitioner,
v.
NEW CENTURY ACUPUNCTURE P.C.a/a/o William Dew, Respondent.

No. 029970/14.
April 1, 2015.

Jaffe & Koumourdas appeared for Country–Wide Insurance Company.

Law Offices of Gary Tsirelman appeared for New Century Acupuncture P.C. a/a/o William Dew.

MICHAEL L. KATZ, J.

***1** This proceeding arises out of an arbitration in which respondent New Century Acupuncture P.C. ("New Century") sought reimbursement from petitioner Country–Wide Insurance Company ("Country–Wide") for healthcare services which New Century allegedly provided to its assignor, William Dew, following a motor vehicle accident which occurred on May 23, 2011.

A hearing on this claim, together with seven similar claims, was held on May 20, 2014 before Michael Rosenberger, an arbitrator designated by the American Arbitration Association ("AAA"). [FN1] Country–Wide argued that New Century's claim for no-fault benefits should be dismissed on the grounds, *inter alia*, that New Century was fraudulently incorporated. Specifically, it claimed that New Century falsely represented in its certificate of incorporation that it was owned or controlled solely by licensed professionals. *See, generally, State Farm Mut. Auto Insurance Co. v. Mallela*, 4 NY3d 313 (2005).

FN1. Five of the parallel claims are the subject of nearly identical motions filed under Index Numbers 029968/14, 029971/14, 029972/14, 029973/14, and 029974/14.

Country–Wide contends that New Century was actually owned or co-owned and controlled by an individual named Andrey Anikeyev, who pleaded guilty on February 15, 2013 to conspiracy to commit mail fraud and health care fraud, in violation of Title 18, United States Code, Section 371. [FN2] As part of his plea, Mr. Anikeyev was required to forfeit his right to a number of bank accounts, including a bank account under New Century's name.

FN2. Mr. Anikeyev acknowledged on the record before the Hon. J. Paul Oetken, a Judge of the United States District Court, Southern District of New York, that he had "submitted bills through mail to various insurance companies for acupuncture services which [he] knew were false. Some of these mailings were to insurance companies located in Manhattan, New York. These bills requested payments for health care services for time periods in excess of the actual time period the patient spent with acupuncturist." He further admitted that he committed these actions "with intent to obtain money from various insurance companies which was not rightfully [his]."

In the Arbitration Award, issued on May 28, 2014 in favor of New Century, the arbitrator noted that Dr. Kondranina, the disclosed owner of New Century, had not been charged by any governmental agency with any crimes. He further found that there was no evidence showing Dr. Kondranina knew Mr. Anikeyev was in possession of the bank account or that Dr. Kondranina gave a substantial

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portion of his profits to Mr. Anikeyev.[FN3]

> FN3. The arbitrator considered factors discussed in *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 42 Misc.3d 30 (App. Term, 2nd Dep't 2013) in determining whether or not Mr. Anikeyev, who is not a licensed acupuncturist, had exercised substantial control over the professional corporation.

The arbitrator thus concluded that Country–Wide failed to meet its burden of showing by clear and convincing evidence that New Century is actually owned by Mr. Anikeyev.

Country–Wide then pursued an appeal through AAA's Master Arbitration process in which it argued, *inter alia*, that Arbitrator Rosenberger failed "to disclose a relationship, direct or indirect, with New Century Acupuncture PC and its attorneys [which] mandates vacatur." Specifically, Country–Wide alleged that the arbitrator "is or was" a named partner of Rapuzzi Palumbo & Rosenberger, P.C., a law firm which "is closely related to" the firm of Gabriel & Shapiro, P.C., which has represented and continues to represent New Century in other no-fault proceedings.[FN4]

> FN4. There is no dispute that New Century was represented by the Tsirelman Law Firm (and not by Gabriel & Shapiro) in the arbitration at issue in this proceeding.

The master arbitrator, Victor D'Ammora, issued a Master Arbitration Award dated August 26, 2014, upholding the Arbitration Award, finding that "[t]here is nothing in the record before me to indicate that Arbitrator Rosenberger's decision was arbitrary, capricious, or incorrect as a matter of law." He further determined that "[t]he issue of any possible bias or fraud by Arbitrator Rosenberger cannot be raised for the first time in this Master Arbitration and will not be considered."

***2** Country–Wide then filed the instant petition in which it seeks an order pursuant to CPLR §§ 7511(b)(1)(i) and 7511(b)(1)(iii) vacating the Master Arbitration Award and permanently staying the arbitration of New Century's claim against Country–Wide for no-fault benefits on the ground that the Master Arbitrator exceeded his authority by confirming the Arbitration Award.

Country–Wide argues, *inter alia*, that the Award must be vacated based on Arbitrator Rosenberger's failure to disclose his past and/or present relationship with New Century and its attorneys.

It is well settled that

> [t]he judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are better informed of the prevailing ethical standards and reputations within their business.

Matter of J.P. Stevens & Co., Inc. V. Rytex Co., 34 N.Y.2d 123, 128 (1984), quoting *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) (White, J., concurring).

However, the parties' role in this process "can only be achieved if, prior to the commencement of the arbitration, the arbitrator discloses to the parties all facts which might reasonably cause one of them to ask for disqualification of the arbitrator." *Matter of J.P. Stevens & Co., Inc. v. Rytex Co., supra* at 128.

Therefore, "it is incumbent upon an arbitrator to disclose any relationship which raises even a suggestion of possible bias' (citation omitted)." *Matter of Kern v. 303 East 57th Street Corp* . 204 A.D.2d 152, 153 (1st Dep't 1994), *lv to app denied*, 84 N.Y.2d 210 (1994). *See also, Matter of Soma Partners, LLC v. Northwest Biotherapeutics Inc.*, 41 AD3d 257 (1st Dep't 2007), app. dism'd, 9 NY3d 942 (2007); *Matter of Catalyst Waste–to–Energy Corp. of Long Island v. City of Long Beach*, 164 A.D.2d 817, 820 (1st Dep't 1990),

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app. dism'd, 76 N.Y.2d 1017 (1990).

The failure of an arbitrator to disclose facts that might give rise to an inference of bias mandates vacatur of the arbitrator's award. *See, Matter of Soma Partners, LLC v. Northwest Biotherapeutics Inc., supra; Matter of Morgan Guaranty Trust Company of New York v. Solow Building Co., LLC,* 279 A.D.2d 431 (1st Dep't 2001).

New Century argues that this Court, like the master arbitrator, should decline to review the allegation that the arbitrator failed to disclose a potential bias because Country–Wide failed to raise any objection at the initial arbitration. *See, Matter of J.P. Stevens & Co., Inc. v. Rytex Co., supra* at 129, which held that "a party to an arbitration may [not] sit idly back and rely exclusively upon the arbitrator's disclosure" where that party has "actual knowledge of the arbitrator's bias, or of facts that reasonably should have prompted further, limited inquiry."

However,

> [w]hile such responsibility to ascertain potentially disqualifying facts does rest upon the parties, the major burden of disclosure properly falls upon the arbitrator. After all, the arbitrator is in a far better position than the parties to determine and reveal those facts that might give rise to an inference of bias. Further, the very nature of the arbitrator's quasi-judicial function, particularly since it is subject to only limited judicial review, demands no less a duty to disclose than would be expected of a Judge (citations omitted)."

***3** *Matter of J.P. Stevens & Co., Inc. v. Rytex Co., supra* at 129. *See also, Matter of Milliken Woolens, Inc. v. Weber Knit Sportswear,* 11 A.D.2d 166 (1st Dep't 1960), *aff'd,* 9 N.Y.2d 878 (1961).

There is no evidence that Country–Wide was aware of a potential conflicting relationship before or at the time of the hearing, nor is there any indication that Country–Wide possessed sufficient facts that reasonably should have prompted it to conduct a further inquiry .[FN5] Therefore, the issue of the arbitrator's potential bias is properly before this Court.[FN6]

> FN5. Country–Wide does not dispute that it was aware that Gabriel & Shapiro represented New Century in various matters, including several cases involving Country–Wide's current counsel. However, there is no evidence that either Country–Wide or its counsel was aware of any connection between the arbitrator and Gabriel & Shapiro.
>
> FN6. This Court rejects New Century's argument that this Court must assume that it is a proven fact that Mr. Rosenberger had no conflict simply because AAA (which requires arbitrators to disclose their affiliations) scheduled the hearing.

New Century alternatively argues that there is no basis to vacate the Arbitration Award absent any evidence that Mr. Rosenberger ever directly represented New Century in any matter. It contends that Country–Wide has, at most, established a remote or mere occasional association between the arbitrator and the law firm of Gabriel & Shapiro. *See, Tricots Liesse (1983), Inc. v. Intrex Industries, Inc.,* 284 A.D.2d 226, 227 (1st Dep't 2001), *lv to app. denied,* 97 MY2d 606 (2001); *Matter of Chernuchin v. Liberty Mutual Insurance Company,* 268 A.D.2d 521, 522 (2nd Dep't 2000).

Here, however, there is considerable evidence that the arbitrator had more than a remote or occasional association with Gabriel & Shapiro, which has and continues to represent New Century in various no-fault proceedings.

There is no dispute that Mr. Rosenberger co-published an article in the *New York Law Journal* in 2013 with Jason A. Moroff, a partner at Gabriel & Shapiro, who apparently represented New Century

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at a AAA hearing as recently as May 28, 2014, the same day Mr. Rosenberger issued the Arbitration Award at issue in this proceeding.

There is also no dispute that the arbitrator's law firm, Rapuzzi Palumbo & Rosenberger, shared space with Gabriel & Shapiro at 3361 Park Avenue in Wantagh, New York. Moreover, New Century does not refute Country–Wide's representation that Rapuzzi Palumbo & Rosenberger is listed on the New York Division of Corporations Database under the "current entity name" of Gabriel & Shapiro, P.C.

Finally, there is no dispute that Gabriel & Shapiro's current website is located at www.rprlawfirm.com, an address which appears to strongly suggest an affiliation or continuing connection with the law firm of Rapuzzi Palumbo & Rosenberger.

New Century contends that these factors merely show that Rapuzzi Palumbo & Rosenberger was "taken over" by Gabriel & Shapiro. However, New Century has failed to submit any documents clarifying the nature and circumstances of the alleged takeover or merger of the firms at issue. Moreover, New Century has failed to submit an affidavit from any attorney at Gabriel & Shapiro (which would presumably be amenable to assisting its client in this matter) attesting that Mr. Rosenberger has severed all financial and professional ties with that firm.

Therefore, based on the papers submitted and after hearing oral argument, this Court finds that the failure of the arbitrator to disclose his connection to Gabriel & Shapiro and to provide Country–Wide with a timely opportunity to reasonably ask for his disqualification based on a potential bias, mandates vacatur of the Arbitration Award.

***4** Accordingly, it is

ORDERED and ADJUDGED that the Petition is granted, and the Arbitration Award is vacated.

This constitutes the decision and order of this Court.

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