UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ENVIRONMENTAL CHEMICAL CORPORATION, :

Plaintiff, :

-against- :

COASTAL ENVIRONMENTAL GROUP, INC. :

Respondent. :
---x

REPORT AND RECOMMENDATION

18 Civ. 3082 (GHW) (GWG)

GABRIEL W. GORENSTEIN, United States Magistrate Judge

Invoking section 10 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), petitioner Environmental Chemical Corporation ("ECC") seeks to vacate an arbitration award entered in favor of respondent Coastal Environmental Group, Inc. ("Coastal"). Coastal cross-moves to confirm the award, arguing that ECC's grounds for vacatur are without merit.[1] For the following reasons, the motion to vacate should be denied and the arbitration award should be confirmed.

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[1] Notice of Motion to Vacate Award, filed Apr. 9, 2018 (Docket # 5) ("Pet. Not. Mot."); Memorandum of Law in Support of Motion to Vacate Award, filed Apr. 9, 2018 (Docket # 6) ("Pet. Mem."); Declaration of Patrick J. Greene, Jr., in Support of Petition to Vacate Arbitration Award, filed Apr. 9, 2018 (Docket # 7) ("Greene Decl."); Notice of Cross-Motion, filed May 18, 2018 (Docket # 19) ("Respt. Not. Cross-Mot."); Declaration of David Westermann, Jr., filed May 18, 2018 (Docket # 20); Memorandum of Law in Opposition to Motion to Vacate Arbitration Award and in Support of Cross-Motion to Confirm the Award, filed May 18, 2018 (Docket # 21) ("Respt. Mem."); Reply Memorandum of Law in Further Support of Notice of Motion to Vacate Award, filed June 8, 2018 (Docket # 25) ("Pet. Reply Mem."); Declaration of Patrick J. Greene, Jr. in Further Support of Petition to Vacate Arbitration Award, filed June 8, 2018 (Docket # 26) ("Greene Reply Decl."); Affidavit of Richard Silva, filed June 22, 2018 (Docket # 27); Reply Declaration of David Westermann, Jr., Esq., filed June 22, 2018 (Docket # 28) ("Westermann Reply Decl."); Reply Memorandum of Law in Support of Cross-Motion to Confirm Arbitration Award, filed June 22, 2018 (Docket # 29).

I. BACKGROUND

This case arises out of debris collection and removal efforts on Fire Island, New York, following Hurricane Sandy in October 2012. See Petition to Vacate Arbitration Award, filed Apr. 6, 2018 (Docket # 1) ("Pet."), ¶ 11. In the spring of 2013, the United States Army Corps of Engineers (the "USACE") awarded ECC a "Task Order" — that is, a work authorization issued pursuant to a standing contract between the parties — to collect and remove storm debris generated by Hurricane Sandy in exchange for payment based upon a stated price per volume of debris removed. Id. ¶¶ 11-12; Order for Supplies or Services, dated Feb. 27, 2013 (annexed as Ex. 34 to Greene Decl.) (the "Task Order"). ECC in turn subcontracted with Coastal to perform the required debris collection and removal, leaving for itself the provision of administrative and site support services. Pet. ¶ 13; Partial Final Award, dated Jan. 9, 2018 (annexed as Ex. 1 to Greene Decl.) ("Arbitration Award" or "Arb."), at 1.

The work did not proceed as planned, however, and both ECC and Coastal incurred unexpected costs in completing the cleanup efforts. See Arbitration Award at 2-3. ECC maintained that these extra costs resulted from Coastal's mismanagement of the cleanup efforts, while Coastal attributed these costs to USACE's failure to prepare a certain cleanup site, bad weather, and an overestimate of the total debris to be removed. Id. After the cleanup efforts were completed, ECC contended that its extra costs exceeded the payments it owed Coastal under the parties' contract, and accordingly, refused to make any additional payments to Coastal. Pet. Mem. at 6; Respt. Mem. at 2-3. On June 6, 2016, Coastal commenced arbitration against ECC, claiming that "it was not fully paid for its work at the project." Pet. ¶ 15. On January 9, 2018, the Arbitrator, Sayward Mazur, issued a decision granting Coastal an award of $2,083,588.88. Id. ¶ 17.

A. The Relevant Contracts and Required Work

On February 25, 2013, USACE awarded ECC a Task Order for the cleanup of storm debris strewn across 17 hamlets and villages on Fire Island, New York, following Hurricane Sandy. Pet. ¶ 11; Arb. at 1. The Task Order provided that USACE would pay ECC "based upon stated unit prices measured by the volume of debris material" removed from public and private property and transferred to final disposal sites. Pet. ¶ 12; Task Order at 2-3. It also required ECC to perform 80% of the contract using local contractors and 75% of the work using qualified small businesses. Task Order at 2. In accordance with this provision, ECC subcontracted with Coastal — "a certified small business, locally-based enterprise" — to perform "virtually all of the cleanup work, reserving for itself performance of certain administrative and site support services" as expressed in a "Continuing Services Agreement" ("CSA or Subcontract"). See Continuing Services Agreement, dated Feb. 25, 2013 (annexed as Ex. 37 to Greene Decl.); Memorandum of Understanding, dated Feb. 25, 2013 (annexed as Ex. 35 to Greene Decl.); Work Authorization Form, dated Mar. 7, 2013 (annexed as Ex. 36 to Greene Decl.); see also Arbitration Award at 1. The CSA contained a provision requiring that any claim arising out of or relating to the agreement or work under the agreement be decided by arbitration. Pet. ¶ 14; CSA § 12.4.

The Task Order incorporated a proposal by Coastal to ECC to cleanup an estimated 9275 tons of manmade waste and debris, and 1980 cubic yards of vegetative debris. Arb. at 2. Based on this estimate, Coastal proposed a total cleanup cost of $9,887,955.00. Id. After ECC added $101,748.22 in administrative and other costs, the Task Order provided for an expected lump sum payment of $10,184,55.97, from USACE to ECC. Id.

The Task Order envisioned that a cleanup team "would sweep through the various

cleanup areas picking up and sorting debris, including that of four houses to be demolished, and, using small, wheeled, motorized and hand equipment, cart the debris to several temporary debris-storage & reduction sites ('TDSRs')." Id. The cleanup team would then load the debris from the TDSRs onto barges, which would transport the debris to mainland sites. Id. At the mainland sites, a crew would off-load the debris from the barges and load it into trucks which would bring the debris to "'tipping points' where a truckload measurement of debris actually removed, in cubic yards or tons, would be made for payment purposes, at the stipulated Unit Prices, and the debris then trucked off to its various permanent resting places." Id.

Under the Task Order, ECC (and therefore Coastal) agreed to complete the cleanup of all debris within a 30-day period, starting March 1, 2013, and ending April 1, 2013. Id. "The April 1, 2013 deadline was imposed by USACE [because] April 1st marked the perceived start of the nesting season of the Piping Plovers residing on Fire Island's beaches." Id.

B. Problems With Cleanup Efforts and Subsequent Adjustments to the Contract Sum

Unbeknownst to Coastal, ECC, and USACE, the total amount of debris that would be removed was "ultimately much less . . . than USACE estimated." Arb. at 3. Using the original estimate, "USACE issued a warning notice [on March 8, 2013] to ECC complaining about lack of production in accordance with projections, and on March 24, 2013, USACE complained that manpower levels were below what it believed were needed." Id. at 2-3. Coastal disclaimed responsibility for the lack of production, contending that "it was properly manning the job given the actual volume and availability of work," and blaming "the lack of TDSR[s]," and "bad weather" as the principal cause of delays, disruptions, and productivity losses. Id. at 3. For reasons the parties do not agree on, on March 18, 2013, ECC hired additional subcontractors to supplement Coastal's workforce. Id. The work was completed on March 31, 2013. Id.

Ultimately, Coastal billed ECC only $4,956,517.40 for its debris collection and removal efforts, a significantly lower figure than the initial estimates of $9,887,955. Id. at 3. ECC, in turn, paid Coastal only $4,090,230.91, leaving a disputed amount under its subcontract with Coastal of $866,286.49. Id. at 6.

Additionally, on account of the delays, work disruptions, and "the imbalanced costs of overhead and/or general conditions attributable to [the] substantial under-run of work incurred by both Coastal and ECC," the parties submitted several Requests for Equitable Adjustment ("REA") claims to USACE during the course of the work seeking additional monies. Id. at 3. Because Coastal did not have a separate contract with USACE, it submitted its REAs to ECC, which would then submit an REA to USACE that generally incorporated Coastal's claims. Id. "In all, there were five such [REAs] from Coastal to ECC, at least four of which were similarly, contemporaneously adopted and submitted by ECC to USACE." Id. In its final REA, Coastal sought to recover $1,935,642.00 in extra costs incurred due to unexpected circumstances. Id. at 8. ECC sought $3,950,000.00 in its final REA, of which a portion reflected ECC's own extra costs as well as Coastal's REA claim. Id. at 9.

Following extensive negotiations, "ECC and USACE settled the REA[s] for the sum of $3,200,000.00." Id. at 7. Under the CSA between ECC and Coastal, section 9.3, Coastal was entitled to "such portion of the additional compensation received by ECC from Client on account of such matters as is equitable under all of the circumstances." ECC contended that "[b]y virtue of ECC's supplementation of Coastal's forces, . . . it incurred costs of $3,178,424.86," and therefore asserted that it did not owe any further amounts to Coastal "for unpaid contract balances, . . . or which might otherwise be due to Coastal by reason of the REA settlement." Arb. at 4.

C. Arbitration & Post-Arbitration Submissions

On June 6, 2016, claiming "it was not fully paid for its work," Pet. ¶ 15, Coastal filed a demand for arbitration with the American Arbitration Association ("AAA") as provided in the CSA. See Construction Arbitration Rules Demand for Arbitration, dated June 6, 2016 (annexed as Ex. 32 to Greene Decl.) ("Coastal Arb. Demand"). The Arbitration Demand listed David Westermann, Jr., and his law firm, as Coastal's representatives. Id.; accord Greene Decl. ¶ 27. On June 29, 2016, ECC responded to the demand for arbitration. Arbitration Answering Statement and Counterclaim or Joinder/Consolidation Request, dated June 29, 2016 (annexed as Ex. 33 to Greene Decl.). "As part of the process for arbitrator selection," the parties submitted "the names of witnesses and related parties through a website operated by the [AAA]." Greene Decl. ¶ 29. "On August 8, 2016, the AAA issued a list of 10 potential arbitrators for review." Id. ¶ 31. After receiving comments from the parties about the 10 potential arbitrators, "[t]he AAA appointed Sayward Mazur of the law firm Schiff Hardin, LLP." Id. ¶ 32. This selection process included an extensive conflict review, aided by the parties' submissions. Id. ¶¶ 29-36.

Starting in November 2016, the parties conducted discovery according to "agreed upon procedures for the arbitration." Id. ¶¶ 38-39. ECC sought discovery of "contracts with third-parties and other documents related to the [Task Order] and this arbitration," specifically aiming to discover cost records. Id. ¶¶ 38, 41-42. The parties disputed whether Coastal had sufficiently produced its costs records, but ECC ultimately dropped the issue after Westermann "asserted that all of Coastal's responsive cost records had been produced." Id. ¶ 42.

The arbitrator held hearings throughout the summer of 2017. Pet. ¶ 16. The arbitration centered on two claims:

First, how much had Coastal earned with respect to certain unit price items

> (referred to as CLINs) and, second, how much additional compensation, if any, was Coastal due as a result of a settlement between ECC and the USACE that was embodied in a modification to the [Task Order] issued by the USACE.

Greene Decl. ¶ 7.

As to the first issue, ECC argued at the arbitration that "it had expended $3,178,424.86" supplementing the work performed by Coastal, id. ¶ 8, and it sought "to offset that sum against any liability it otherwise ha[d] to Coastal for unpaid contract balances," Arb. at 4. In support of its argument, ECC "relied upon Term 6.2 of the [the parties' CSA]" to argue that the contract imposed on Coastal the burden of measuring the "actual costs and/or savings" attributable to unforeseen changes. Greene Decl. ¶ 8. Because, ECC claimed, "Coastal did not keep detailed records of exactly what work it had performed," ECC maintained that Coastal did not meet its burden and therefore ECC's figure — $3,178,424.86 — controlled. Id. ¶¶ 9-10; Arb. at 4. Coastal, in turn, argued that ECC bore the burden of maintaining records detailed enough to justify its asserted costs. Greene Decl. ¶ 9. Ultimately, the arbitrator held

> that ECC was capable of maintaining records showing what actual work each of its subcontractors was performing, but did not do so. It had the burden of proving the fairness and reasonableness of [its] backcharge. Its methodology in this arbitration of backcharging Coastal simply based on a total cost of all subcontractors engaged by ECC, which clearly included some work outside the scope of Coastal's subcontract, is not acceptable.

Arb. at 5.

With respect to the second issue, ECC argued that "despite a number of requests by ECC for 'auditable' proof of Coastal's costs, which ECC maintains were necessary to support the quantum of [Coastal's REA] claim, Coastal failed and refused to furnish same, thereby prejudicing the lump sum settlement amount." Id. at 4. The arbitrator rejected this argument, finding that ECC "has given no alternative theories or evidence documenting either the

methodology used by the government [to calculate the REA amount], nor any credible version of the chronology and content of the negotiations, other than vague and conclusory testimony that the 'veracity' of Coastal's claims was 'discussed' during negotiations." Id. at 8. The arbitrator also found that "USACE never seriously challenged the numbers or required cost substantiation of either ECC's or Coastal's claim" and that any "intimations" that Coastal's proof of costs associated with its REA was inadequate "were merely self-serving to ECC's negotiating position vis-a-vis Coastal, and did not reflect any requests made by the [USACE]." Id. The arbitrator stated that, as a result, "ECC is estopped in this arbitration from disputing the merits or the quantum of Coastal's REA except to the extent, if any, that it has presented cogent evidence that the government disputed and disallowed same." Id. at 12. Since the arbitrator did not find ECC had met this burden, the arbitrator concluded "that the settlement (REA Change Order) should be divided" among the parties, according largely to Coastal's calculations of each parties' share, which the arbitrator found were more accurate. Id. The arbitrator relied on section 9.3 of the CSA as the basis for this ruling. See id. at 7-8.

On January 9, 2018, the arbitrator issued his findings in a "Partial Final Award," awarding Coastal the sum of $2,083,588.88, accounting for amounts due as part of the REA settlement and still owing under the parties's subcontract. Arb. at 13.

Following issuance of the Partial Final Award, Coastal "submitted a request for counsel fees and costs." Greene Decl. ¶ 22. Attached to its request were two agreements indicating that, prior to the arbitration, "all of the proceeds of Coastal's agreement with ECC had been fully assigned to Signature Bank," id.; see also Assignment of Proceeds and Grant of Security Interest, dated May 5, 2015 (annexed as Ex. 13 to Greene Decl.), and also indicating that Signature Bank would "take over all efforts to prosecute and collect all amounts due and owing with respect to

the [Subcontract] and retain any net amounts recovered from ECC," Claim Prosecution Agreement, dated Dec. 17, 2015 (annexed as Ex. 14 to Greene Decl.), at 2 (Exs. 13, 14 to Greene Decl. collectively referred to as "Assignment Agmt.").

D. Procedural History

On April 6, 2018, ECC filed this petition to vacate the arbitration award. See Pet. The petition made a number of challenges: (1) that the award was "procured by fraud and undue means," because Coastal concealed Signature Bank's role in the arbitration, Pet. ¶ 32; (2) that "concealment of Signature Bank's role in the arbitration" impeded ECC's ability "to conduct a full and meaningful conflict review," id. ¶¶ 37-38; (3) that Coastal's "improper withholding of relevant evidence" prevented the arbitrator from "consider[ing] a number of issues pertinent to the dispute," id. ¶¶ 41-42; and (4) that the "arbitrator exceeded his authority" by making a finding on estoppel that "fail[ed] to draw its essence from the contract," and which "was never briefed by the parties and was never raised at any point during the hearings," id. ¶¶ 47-49. On May 18, 2018, Coastal cross-moved to confirm the award. Respt. Not. Cross-Mot.

II. GOVERNING LEGAL STANDARDS

Section 9 of the FAA provides that parties to an arbitration agreement may apply to a court "for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. "The role of a district court in reviewing an arbitration award is 'narrowly limited' and 'arbitration panel determinations are generally accorded great deference under the [FAA].'" Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 103 (2d Cir. 2013) (quoting Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2d Cir. 1997)). "This deference promotes the twin goals of arbitration, namely settling disputes efficiently and

avoiding long and expensive litigation. Consequently, the burden of proof necessary to avoid confirmation of an arbitration award is very high, and a district court will enforce the award as long as there is a barely colorable justification for the outcome reached." Id. at 103-04 (internal citations and quotation marks omitted).

"Normally, confirmation of an arbitration award is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court . . . .'" D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (quoting Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984)). A petition to confirm should be "treated as akin to a motion for summary judgment based on the movant's submissions." Id. at 109. The FAA provides that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions." 9 U.S.C. § 6. Thus, "[u]nder the FAA, the petition itself should be treated as a motion to confirm the award." In re Certain "Default" Motions, 2015 WL 968125, at *5 (E.D.N.Y. Feb. 27, 2015) (citing 9 U.S.C. § 6); see also id. ("[A] petition represents the procedural device that should be used to resolve these cases.") (footnote omitted). As a result, "a court may decide the merits of a petition to confirm or vacate an arbitration award based solely on the papers submitted by the parties in support of their motions." Companion Prop. & Cas. Ins. Co v. Allied Provident Ins., Inc., 2014 WL 4804466, at *2 (S.D.N.Y. Sept. 26, 2014) (citations and internal quotation marks omitted).

"A reviewing court is required to grant a petition to confirm an arbitration award 'unless the award is vacated, modified, or corrected as prescribed in [9 U.S.C. §§ 10 and 11].'" TapImmune, Inc. v. Gardner, 2015 WL 4111881, at *3 (S.D.N.Y. July 8, 2015) (quoting 9 U.S.C. § 9) (alteration in original). Section 10 of the FAA sets forth four circumstances that justify vacating an award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).[2] Additionally, a court may set aside an arbitration award if it was rendered in "'manifest disregard of the law' to such an extent that '(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators . . . [was] well defined, explicit, and clearly applicable.'" Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126, 129 (2d Cir. 2003) (omission in original) (quoting DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997)); accord Wells Fargo Advisors, LLC v. Soliman, 2015 WL 4619821, at *3 (S.D.N.Y. Aug. 4, 2015).

"[A] party seeking to vacate an arbitration award bears the burden of proof, 'and the showing required to avoid confirmation is very high.'" A & G Coal Corp. v. Integrity Coal Sales, Inc., 565 F. App'x 41, 42 (2d Cir. 2014) (summary order) (quoting D.H. Blair, 462 F.3d at 110); see also Beljakovic v. Melohn Props., Inc., 542 F. App'x 72, 73 (2d Cir. 2013) (summary order) ("The showing required to avoid summary confirmation of an arbitration award is high.") (quoting Willemijn Houdstermaatschappij, BV v. Standard Microsys. Corp., 103 F.3d 9, 12 (2d Cir. 1997)).

[2] 9 U.S.C. § 11 provides for the modification of an award, which is not at issue here.

III. DISCUSSION

ECC raises essentially two grounds for vacatur of the arbitration award. First, ECC contends that the arbitration "was conducted under false pretenses because the attorneys who nominally represent Coastal failed to reveal the fact that Coastal had fully assigned all claims to Signature Bank and that the attorneys actually represented Signature Bank — not Coastal." Pet. Mem. at 1. This "deception" allegedly "tainted all aspects of prosecution of the arbitration including arbitrator selection, identification of potential arbitrator bias, identification of real party in interest (and the potential need to add parties), discovery disputes and the questioning of witnesses." Id. Second, ECC claims the arbitrator applied the equitable doctrine of estoppel "sua sponte," resulting "in an award that was beyond the arbitrator's authority and that failed to draw from the essence of the contract." Id. at 2. We conclude that neither claim has merit and that ECC has failed to meet the high bar for vacatur of the award.

A. Role of Signature Bank

ECC contends that the Award should be vacated under § 10(a)(1) ("corruption, fraud, or undue means"), Pet. Mem. at 11; under § 10(a)(2) ("evident partiality"), id. at 21; or under § 10(a)(3) ("refusing to hear evidence pertinent and material to the controversy"), id. at 22, because Coastal concealed that its attorneys were "retained by Signature Bank to represent only Signature Bank's interests," id. at 11. We turn first to ECC's claims of fraud.

1. Corruption, Fraud, or Undue Means — 9 U.S.C. § 10(a)(1)

A party moving to vacate an arbitration award on grounds of "fraud or undue means" must "adequately plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration." Odeon Capital Grp.

LLC v. Ackerman, 864 F.3d 191, 196 (2d Cir. 2017) (citing Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 34-35 (2d Cir. 1951)); accord Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr. (Kolel I), 878 F. Supp. 2d 459, 464 (S.D.N.Y. 2012), aff'd, 729 F.3d 99 (2d Cir. 2013). "In order to vacate an award on [this] ground, the Second Circuit has held that it must be 'abundantly clear' that the award was the product of fraud, corruption, or undue means." Kolel I, 878 F. Supp. 2d at 464 (quoting Karppinen, 187 F.2d at 34). Here, it is not "abundantly clear" that the award was the product of fraud inasmuch as ECC has not established either of the first two elements of the fraud test.

(a) Fraudulent Activity

"Fraud" is "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment." Black's Law Dictionary 775 (10th ed. 2014); accord Connaughton v. Chipotle Mexican Grill, Inc., 29 N.Y.3d 137, 142 (2017) (fraud under New York law requires a plaintiff to show "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury") (internal quotation marks omitted) (quoting Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (1996)); accord Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 402 (2d Cir. 2015).

As an initial matter, we reject ECC's assertion that the lawyers who appeared for Coastal in the arbitration did not actually represent Coastal. See Pet. Mem. at 1 ("the attorneys actually represented Signature Bank — not Coastal"). ECC provides no evidence that Westermann did not in fact represent Coastal for purposes of presenting Coastal's case to the arbitrator. It is undisputed that Westermann filed an arbitration demand on behalf of Coastal. See Coastal Arb.

Demand. Thus, ECC has marshaled evidence only that Westermann represented not only Coastal but also Signature Bank. See Assignment Agmt.

ECC notes that Coastal's arbitration demand form "did not identify Signature Bank's interests or the true status of Westermann and [his firm] as attorneys for Signature Bank." Pet. Mem. at 7. However, it points to no false statement on the form or to any obligation in the rules of the arbitration that such a disclosure be made. In sum, ECC points to no affirmative misrepresentation by Westermann or anyone associated with Coastal as to Signature's role.

To the contrary, Coastal apprised ECC's counsel prior to arbitration of Westermann's role as Signature Bank's counsel and Coastal's co-counsel in the case. Specifically, Coastal's attorney Larry Hollander wrote to ECC attorney Alexander Saunders authorizing "ECC and [its counsel's office] to communicate directly with David Westermann, Esq., attorney for Signature Bank, Coastal's bank and largest creditor. You are authorized to effectively treat Mr. Westermann as co-counsel in this matter. This authorization is unlimited and includes all information connected with any settlement discussions and arbitration/mediation procedures." Letter from Larry B. Hollander to Alexander X. Saunders, dated Feb. 2, 2016 (annexed as part of Ex. 12 to Greene Decl.) ("February 2 Letter") (emphasis added). In other words, Westermann was identified as an attorney for both Signature Bank and Coastal. Thus, when Westermann signed the arbitration demand as Coastal's representative, after having earlier told ECC's attorneys that Westermann was "attorney for Signature Bank, Coastal's bank and largest creditor," February 2 Letter, ECC was already aware of Westermann's role as counsel for both Signature Bank and Coastal.

If that were not enough, ECC attorneys repeatedly referred in writing to Westermann's role as Signature Bank's counsel, as well as to Signature Bank's financial interest and

involvement in the arbitration. In one letter, for instance, ECC counsel Saunders wrote to Westermann, stating "You have disclosed that you represent the bank creditor of Coastal and yet, we have seen none of the records that a lending institution would require to issue a loan. If the missing records are not forthcoming, we will have no option but to issue a subpoena to the bank you represent." Letter from Alexander X. Saunders to David Westermann, Jr., dated Apr. 26, 2017 (annexed as Ex. 30 to Greene Decl.) (emphasis added) ("April 26 Letter"). Similarly, ECC counsel Greene wrote in an email to Westermann, "We have not even received copies of financial statements that were clearly created and must have been supplied to the bank that is paying your bills as a condition for their loan(s)." Email from Patrick J. Greene, Jr., to David Westermann, Jr., dated Apr. 26, 2017 (annexed as Ex. B to Westermann Reply Decl.) ("April 26 Email"), at 2 (emphasis added). And in a third communication, Greene explains to Coastal attorney Allen Ross that "[t]his message follows our conversation in which you indicated that the bank's attorney [i.e., Westermann] has requested that you declare an impasse in the mediation. It also briefly responds to a lengthy submission by the bank's attorney that preceded the request." Email from Patrick J. Greene, Jr., to Allen J. Ross, dated May 23, 2016 (annexed as part of Ex. 12 to Greene Decl.) ("May 23 Email"), at 1. These communications show not only that ECC was aware that Westermann represented the bank, but also suggest that they knew that the bank had a significant financial interest in the outcome of the litigation.

With evidence so palpably at odds with their factual contention, ECC argues that this evidence "must be stricken and disregarded" under Fed. R. Evid. 408 because some of the communications were "exchanged . . . during settlement discussions." Pet. Reply Mem. at 13. Only the statement made in the May 23 Email cited above, however, was "made during compromise negotiations about the claim," Fed. R. Evid. 408(a)(2). The statements in the April

26 Letter and April 26 Email were made by ECC to obtain discovery from Coastal. Additionally, the April 26 Letter and May 23 Email come from ECC's submissions to this Court. See April 26 Letter; May 23 Email. In any event, Rule 408(a) of the Federal Rules of Evidence arguably does not apply because the communications are not being offered to prove or disprove the validity or amount of the "claim" that was being negotiated as part of the settlement and are not being used to "impeach" a witness. And even if none of these communications were considered, the February 2 Letter would be sufficient to show that Coastal engaged in no "fraudulent activity."

In light of the fact that there were no false disclosures or material omissions, the first element of a motion to vacate on the basis of fraud has not been met.

(b) Due Diligence

Even if it could be said that there was a false disclosure or material omission, ECC's motion would still fail because the information it did receive would have allowed it to uncover the purported fraudulent activity if it had acted with reasonable diligence.

To vacate an arbitration award for fraud under section 10(a)(1), "the party relying on [section 10(a)(1)] must first show that he could not have discovered [the concealed evidence] during the arbitration, else he should have invoked it as a defense at that time." Karppinen, 187 F.2d at 35; accord Salzman v. KCD Fin., Inc., 2011 WL 6778499, at *3-4 (S.D.N.Y. Dec. 21, 2011) (petitioner could not show "that had he exercised due diligence, he could not have discovered the alleged fraud prior to the award."); Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co., 415 F. Supp. 133, 138 (D.N.J. 1976) ("Karppinen suggests that the focus under [§] 10(a) is upon whether the protesting party had an opportunity to discover and reveal the purported fraud at the arbitration hearing.").

Here, ECC knew (1) that Westermann represented Signature Bank; and (2) that the Bank was financially involved and interested in the litigation. It was thus obviously free to seek to obtain information through the arbitration discovery process about the precise nature of the relationship. Its failure to do so means that it did not act with the "due diligence" required by case law. Odeon Capital Grp. LLC , 864 F.3d at 196. We thus reject ECC's assertion that it acted reasonably by doing nothing to pursue this question. See, e.g., Greene Reply Decl. ¶¶ 4-5. Accordingly, ECC has not shown that the award should be overturned on the basis of fraud and thus there is no reason to vacate the decision under section 10(a)(1) of the FAA.

2. Evident Partiality — 9 U.S.C. § 10(a)(2)

In order to vacate an award based on "evident partiality or corruption in the arbitrators," 9 U.S.C. § 10(a)(2), a court must find that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Scandinavian Reins. Co. Ltd. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 72 (2d Cir. 2012) (internal quotation marks omitted) (quoting Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984)). While "proof of actual bias is not required," id., the party seeking vacatur need establish "something more than the mere 'appearance of bias,'" Morelite, 748 F.2d at 83 (citation omitted), or "objective facts inconsistent with impartiality," Scandinavian Reins. Co., 668 F.3d at 72. "[T]he interest or bias [of the arbitrator] . . . must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative." Sanford Home for Adults v. Local 6, IFHP, 665 F. Supp. 312, 320 (S.D.N.Y. 1987) (omission in original) (citations and internal quotation marks omitted); accord Kolel I, 878 F. Supp. 2d at 464.

ECC contends that had the arbitrator known of Signature Bank's role in the arbitration — putting aside our conclusion that it was aware of such role — the arbitrator could have run a

"full and meaningful conflict review." Pet. Mem. at 22. ECC notes that its research "reveals that Schiff Hardin, LLP represented a creditor in a bankruptcy proceeding in which Signature Bank was also a creditor." Id. It then argues that "[i]t is unknown whether a full internal conflict search by Schiff Hardin, LLP, would have revealed additional conflicts." Id. ECC does not contend that the arbitrator had a conflict by virtue of his firm's representation of a creditor in a bankruptcy proceeding in which Signature Bank happened to also be a creditor. ECC merely suggests that "it is unknown" what a conflicts check would reveal. The burden of showing "something more than the mere appearance of bias," Morelite, 748 F.2d at 83 (citation and internal quotation marks omitted), or "objective facts inconsistent with impartiality," Scandinavian Reins. Co., 668 F.3d at 72 (citation and internal quotation marks omitted), however, "rests upon the party asserting bias," id. (citation and internal quotation marks omitted). By raising only the specter of potential but totally unknown conflicts, ECC has not met this burden. Thus, ECC has not established grounds for vacatur under section 10(a)(2) of the FAA.

3. Refusing to Hear Pertinent Evidence — 9 U.S.C. § 10(a)(3)

To succeed on a claim that the arbitrator "refus[ed] to hear evidence pertinent and material to the controversy," 9 U.S.C. § 10(a)(3), the party seeking vacatur must establish that the evidentiary decision violated fundamental fairness, Tempo Shain Corp., 120 F.3d at 20. Otherwise, the decision "will not be opened up to evidentiary review." Rai v. Barclays Capital Inc., 456 F. App'x 8, 9 (2d Cir. 2011) (summary order) (internal quotation marks omitted) (quoting Tempo Shain, 120 F.3d at 20). "This provision is narrowly construed so as not to impinge on the broad discretion afforded to arbitrators to decide what evidence should be presented." Kolel I, 878 F. Supp. 2d at 465 (internal quotation marks omitted) (quoting Rai v.

Barclays Capital, Inc., 739 F. Supp. 2d 364, 371 (S.D.N.Y. 2010), aff'd, 456 F. App'x at 8 (2d Cir. 2011)).

ECC does not contend that the arbitrator refused to hear or excluded any particular piece of evidence. See Pet. Mem. at 22-24. We therefore find no basis for vacating the decision under section 10(a)(3). To the extent ECC argues that section 10(a)(3) was violated because it could not present evidence to the arbitrator that should have been disclosed to it, ECC cites no case law in support of this strained interpretation of section 10(a)(3) and we are aware of none. Section 10(a)(3) restricts a federal court to vacating an arbitration award where "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of the party have been prejudiced." 9 U.S.C. § 10(a)(3) (emphasis added). Here, there has been no such showing.

B. Scope of Arbitrator's Authority

ECC's challenge to the scope of the arbitrator's authority derives exclusively from the arbitrator's invocation of "estoppel" at one point in his decision. Before explaining ECC's claim, however, we first state the law governing a claim that an arbitrator exceeded his powers.

1. Governing Law

A party seeking vacatur based on a claim that the arbitrators "exceeded their powers," 9 U.S.C. § 10(a)(4), confronts a high barrier to success. The Second Circuit has "consistently accorded the narrowest of readings to the FAA's authorization to vacate awards pursuant to § 10(a)(4)." Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir. 2003) (citation and internal quotation marks omitted). A court's inquiry "looks only to whether the arbitrator had the power, based on the submissions or the arbitration agreement, to

reach a certain issue, and does not consider whether the arbitrator decided the issue correctly." Ecopetrol S.A. v. Offshore Expl. & Prod. LLC, 46 F. Supp. 3d 327, 341 (S.D.N.Y. 2014) (internal quotation marks omitted) (quoting Thule AB v. Advanced Accessory Holding Corp., 2009 WL 928307, at *2 (S.D.N.Y. Apr. 2, 2009)). Put another way, courts ask "whether the arbitrators acted within the scope of their authority, or whether the arbitral award is merely the arbitrators own brand of justice." Banco de Seguros, 344 F.3d at 262 (alterations, citation, and internal quotation marks omitted). "[I]n other words, 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' a court's conviction that the arbitrator has 'committed serious error' in resolving the disputed issue 'does not suffice to overturn his decision.'" ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2d Cir. 2009) (quoting United Paperworkers Int'l Union AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987)). "[A]n arbitrator may exceed her authority by, first, considering issues beyond those the parties have submitted for her consideration, or, second, reaching issues clearly prohibited by law or by the terms of the parties' agreement." Jock v. Sterling Jewelers Inc., 646 F.3d 113, 122 (2d Cir. 2011).

2. Analysis

ECC challenges the arbitrator's determination of "how much additional compensation, if any, was Coastal due as a result of [the] settlement between ECC and the USACE," Greene Decl. ¶ 7. See Pet. Mem. at 28. In making that determination, the arbitrator looked to section 9.3 of the CSA between ECC and Coastal. Section 9.3 provides in relevant part:

> With regard to claims arising from differing conditions, changes directed by the Client [the USACE] or others, or which otherwise are not solely the fault of ECC, Subcontractor [Coastal] shall be entitled to such portion of the additional compensation received by ECC from the Client on account of such matters as is equitable under all of the circumstances. Subcontractor and ECC agree to work

> jointly to prosecute all change orders and claims against the government as appropriate, and . . . to be bound by Client's determination and by the determination in any proceeding in which the Client is involved . . . .

CSA § 9.3 (emphasis added).

The arbitrator found that Coastal's methodology of calculating what proportion of the REA was owed to Coastal "more accurately comports with the language and intent of § 9.3 of the subcontract and more fulsomely represents the record." Arb. at 9. Accordingly, the arbitrator adopted Coastal's methodology with only slight adjustments. Id. at 12. The arbitrator rejected ECC's attempts to dispute Costal's REA," finding that ECC was "estopped in this arbitration from disputing the merits or the quantum of Coastal's REA except to the extent, if any, that it has presented cogent evidence that the government disputed and disallowed same." Id. In other words, because ECC submitted Coastal's cost claims to USACE without substantive changes and received settlement proceeds from the USACE based on those costs claims, the arbitrator concluded it would be inequitable for ECC to afterward claim that Coastal did not have a legitimate basis for its costs — unless ECC could show that USACE adjusted the settlement downward due to a dispute over the basis for Coastal's costs. The arbitrator found "that [ECC] has submitted no such cogent evidence" that USACE disputed and disallowed Coastal's REA submission and that the evidence reflected "that the settlement (REA Change Order) should be divided as calculated and set forth" in the partial award decision. Id. Thus, the arbitrator rejected ECC's attempt to reduce Coastal's share of the settlement by disputing Coastal's claimed costs.

ECC takes issue with the arbitrator's decision to refuse to allow it to challenge the "merits or quantum" of Coastal's REA. ECC claims that because the arbitrator's application of the equitable doctrine of estoppel (1) "ignored" contractual provisions requiring "that Coastal

provide audited indirect rates or utilize a 15% markup" and "prohibit[ing] . . . total cost claims," and (2) "was never briefed by the parties and was never raised at any point during the hearings," the Arbitrator "clearly overstepped the provisions of the Subcontract [resulting] in an award that did not draw its essence from the Subcontract." Pet. Mem. at 28.

With regard to the first argument, section 9.3 of the Subcontract provides that Coastal "shall be entitled to such portion of the additional compensation received by ECC from the Client [i.e., USACE] on account of [claims arising from changed conditions] as is equitable under all of the circumstances." In applying the equitable doctrine of estoppel to prevent ECC from disputing Coastal's cost basis, the arbitrator acted precisely as provided in section 9.3, which mandates that Coastal was entitled to "such portion of the additional compensation received by ECC from the Client . . . as is equitable under all of the circumstances." ECC does not explain how the arbitrator's decision departs from this mandate. ECC instead tries to obfuscate the source of the arbitrator's authority by making arguments regarding other provisions in the contract — namely sections 6.2 and 9.11. See Pet. Mem. at 26-27.

These provisions, however, did not prevent the arbitrator from using equitable principles in adjudicating the dispute as was specifically permitted by section 9.3 To start with, the CSA provides that section 9.3 governs disputes where USACE imposed the conditions preceding the submission of an REA, as is the case here. According to the first subsection of section 6 of the CSA, which sets forth in broad terms Coastal's right to submit REAs (i.e., "Change Orders"), "[e]quitable adjustments for Changes that are Gov[ernment] Client-imposed, will be made in accordance with Term 9 of this Agreement." Within "Term 9" of the CSA, the only subsection that relates to client-imposed changes is section 9.3. See CSA § 9. Section 9.3 governs "claims arising from differing conditions, changes directed by the Client [e.g., USACE] . . . or which

otherwise are not solely the fault of ECC." Here, ECC concedes that the dispute between the parties related to USACE-imposed changes. See Greene Decl. ¶ 11 ("[t]he second predominant issue in the arbitration was the determination of additional compensation, if any, due to Coastal for the fact that the actual quantities of materials to be removed was less than estimated by the USACE and due to disruptions to the work allegedly caused by the failure of the USACE to provide certain sites for gathering and handling material."). Thus, section 9.3 was the governing provision.

Section 9.11 did not apply since it relates only to the subcontractor remedies "set forth at subsections 9.8, 9.9, and 9.10," which are provisions setting forth the subcontractor's "exclusive remedies for delay, disruption, acceleration, or similar issues relating to schedule or timely performance . . . , regardless of cause." Because the dispute between the parties did not relate to a remedy sought for timely performance, but arose from USACE's faulty estimate of the materials needing to be removed — i.e., a "differing condition[]," CSA § 9.3 — the dispute does not come within the scope of issues covered by section 9.11.

The other provision cited by ECC, section 6.2, governs "Change Order proposals." CSA § 6.2. Here, the arbitrator was not confronted with a dispute over such "proposals," but rather a dispute over how to divide the USACE-ECC settlement, and thus he could conclude that section 6.2's provisions would not apply.

The above discussion already goes far beyond what is necessary to judge whether the arbitrator exceeded the scope of his authority. Under case law,"[t]he arbitrator's rationale for an award need not be explained." D.H. Blair, 462 F.3d at 110 (citation omitted). Indeed, all it takes to confirm an award is that there is "a ground for the arbitrator's decision [that] can be inferred from the facts of the case." Id. (citation and internal quotation marks omitted). ECC's challenge

on the ground that "[t]he Arbitrator performed no analysis relative to these contract provisions outlining how Coastal's claim was to be submitted or whether Coastal's claim was an improper total cost claim," Pet. Mem. at 28, is meritless. A court "need only find 'a barely colorable justification for the outcome reached' to confirm the award." Mandell v. Reeve, 2011 WL 4585248, at *3 (S.D.N.Y. Oct. 4, 2011) (citation and internal quotation marks omitted), aff'd, 510 F. App'x 73 (2d Cir. 2013). Having found a contractual basis for the award, we reject ECC's argument that the award must be overturned because the contractual language was misapplied. See ReliaStar, 564 F.3d at 86 ("as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator has committed serious error in resolving the disputed issue does not suffice to overturn his decision.") (citation and internal quotation marks omitted); McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co., 858 F.2d 825, 832 (2d Cir. 1988) (so long as arbitrators have jurisdiction over a matter, "any subsequent construction of the contract and of the parties' rights and obligations under it" is for the arbitrators to decide).

ECC also argues that estoppel "was never raised at any point during the hearings." See Pet. Mem. at 28; see also id. at 29 ("ECC had no opportunity to brief this issue or submit any arguments and Coastal had never argued for application of any variety of estoppel."); Greene Decl. ¶ 19 ("the legal concept of estoppel had not been raised . . . on any briefing"). But ECC points to no case law that prevents an arbitrator from reaching an issue raised in an arbitral proceeding merely because the parties did not brief it. In any event, Coastal explicitly raised the issue of estoppel in its pre-hearing statement, in which it argued that "ECC is equitably estopped from contradicting the factual assertions it certified as part of its REA to the USACE to induce the REA settlement." See Pre-Hearing Statement of Claimant, dated May 2, 2017 (annexed as

Ex. 7 to Greene Decl.), at 15. It argued for estoppel again in its post-hearing statement. See Post-Hearing Statement of Claimant, dated Nov. 2, 2017 (annexed as Ex. 8 to Greene Decl.), at 25 ("ECC is estopped from asserting its offset based on its claim against the USACE in its REA"). Indeed, ECC itself also raised the issue of equity, arguing that "[f]or [an] allocation [of the settlement] to be 'equitable' it would take into account the amount of money actual[ly] spent and the relative legitimacy of the claims presented; yet, in this proceeding Coast[al] steadfastly refused to prove its actual costs and avoided valuing its actual damages at all." Respondent Environmental Chemical Corporation's Reply Post-Hearing Statement, dated Nov. 28, 2017 (annexed as Ex. 6 to Greene Decl.), at 1; see also id. at 2 ("Coastal argues for an equitable allocation of the payments by the Corps. . . . The second part of an equitable allocation would be for Coastal to demonstrate that the costs it incurred exceeded the estimated and/or reasonable costs for performing the work it performed — for which Coastal offers no proof."). We thus reject ECC's argument for vacatur of the arbitration award on this ground.

IV. CONCLUSION

For the foregoing reasons, the motion to vacate the arbitration award (Docket # 5) should be denied and the cross-motion to confirm the award (Docket # 19) should be granted.

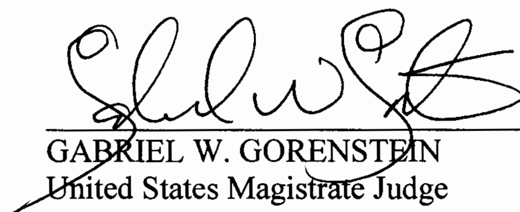
PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), (b), (d). A party may respond to any objections within 14 days after being served. Any objections and responses shall be filed with the Clerk of the Court, with copies sent to the Hon. Gregory H.

Woods at 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections or responses must be directed to Judge Woods. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; Fed. R. Civ. P. 6(a), 6(b), 6(d); Thomas v. Arn, 474 U.S. 140 (1985); Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., 596 F.3d 84, 92 (2d Cir. 2010).

SO ORDERED.

Dated: New York, New York
September 14, 2018



GABRIEL W. GORENSTEIN
United States Magistrate Judge