M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

In the Matter of the Arbitration Between LOCAL 8A-28A, OF THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, Petitioner, For a Judgment Pursuant to Article 75 of the Civil Practice Law and Rules Confirming an Arbitration Award -against- MIDTOWN NEON SIGN COMPANY AND MIDTOWN SIGN SERVICES, INC. a/k/a MIDTOWN SIGN COMPANY, Respondent.	Index No. 27371/2010 By: **ELLIOT, J.** Date: June 30, 2011 Motion Cal. Nos. 10 & 11 Motion Seq. Nos. 1 & 2 Motion Date: March 22, 2011

This is a special proceeding commenced by petitioner Local 8A-28A, of the International Union of Painters and Allied Trades, AFL-CIO (Union), pursuant to CPLR 7510 to confirm an arbitration award dated November 2, 2009, and to direct that judgment be entered thereon. Respondents Midtown Neon Sign Corp., incorrectly sued herein as Midtown Neon Sign Company (Midtown Neon), and Midtown Sign Services, Inc. incorrectly sued herein as Midtown Sign Services, Inc. a/k/a Midtown Sign Company (Midtown Sign Services) move pursuant to CPLR 7511 to vacate the arbitration award.

Respondent Midtown Neon, a now defunct sign designer and manufacturer, entered into a Collective Bargaining Agreement (CBA) with the Union on July 20, 2005. The CBA, by its terms covers: "All work done . . . in connection with the preparation . . . on all painted, pictorial of ornamental work and the erection and dismantle of same; on all designing and laying out of bunting, valances, flags, and banners; on all painting and renovating done on signs, poster boards, bulletins or framework connected with the same; on all building of frames and the covering of same, and on designing done or performed in connection with the foregoing" (CBA, Article I, Section1).

The CBA in Article I, Section 2, provides that "the employers shall not employ, directly or indirectly in and all establishments or shops owned or to be owned or controlled by the employer any employees in connection with the foregoing work who are not subject to this agreement." The CBA also provides that it is binding "upon the parties hereto, their successors and assigns, from the date of making thereof until June 30, 2009" (CBA, Article XXII). The CBA further provides for arbitration of "any dispute . . . as to the meaning, application, performance or operation of this agreement" (CBA, Article XXI, Sections A, B).

Respondent Midtown Neon was incorporated in 1952, and originally was based in Manhattan, New York. It was forced out of its lease and relocated to Queens, New York in 2007. According to Donna Miller, the daughter of the sole shareholder of Midtown Neon, Rita Miller, the cost of the relocation, including the build-out and acquisition of new

equipment and machinery, along with the onset of the recession, forced respondent Midtown Neon to close its doors in February of 2009, before the new facility became fully operational. At the time, respondent Midtown Neon laid off employee, Joseph Sweeney, the sole draftsman.

Donna Miller is a fifty-percent shareholder in respondent Midtown Sign Services, a New York corporation, incorporated on April 2, 2009. Her sister, Merryl Gaitan, owns the remaining 50 percent of the issued and outstanding shares of respondent Midtown Sign Services. Both Donna Miller and Merryl Gaitan had worked for respondent Midtown Neon, along with Merryl's husband, Alberto Gaitan, who is also an employee of respondent Midtown Sign Services. According to Donna Miller, respondent Midtown Sign Services only repairs and maintains existing signs, and unlike respondent Midtown Neon, neither manufactures signs, nor requires draftsmen. Donna Miller further avers that respondent Midtown Sign Services has never been a party to any collective bargaining agreement with the Union.

After he was laid off in February of 2009, Joseph Sweeney was contacted by his former supervisor, Alberto Gaitan, in March of 2009, to perform lay out work from home while laid off. Joseph Sweeney filed a grievance with the Union protesting his layoff and notifying it that respondent Midtown Neon was subcontracting work which was in violation of the CBA. Unable to resolve the dispute with Midtown Neon, the Union demanded arbitration. Joseph Sweeney was contacted again by Alberto Gaitan in April and May of 2009

to perform the same work for respondent Midtown Sign Services as he did for Midtown Neon. He did this work, but was not paid therefor.

An arbitrator, Wilson Ortiz, was appointed and respondents Midtown Neon and Midtown Sign Services were notified of the arbitration hearing. The hearing was initially scheduled for May 21, 2009, at which respondents did not appear. The second hearing date scheduled was June 23, 2009, and respondents again did not appear. On July 16, 2009, the hearing proceeded in the absence of respondents, but with the participation of grievant Joseph Sweeney, Union counsel and a Union representative, who was also a witness. Evidence submitted thereat included emails exchanged by Alberto Gaitan and grievant Joseph Sweeney. One email dated March 9, 2009, concerned a letter X layout to be done by Joseph Sweeney and another dated May 19, 2009 concerned a Joyce Leslie Interior Sign to be rendered with a pink background instead of a white background. In a reply email thereto, Joseph Sweeney sent a first rendering to Alberto Gaitan. Grievant Joseph Sweeney testified that Gaitan insisted upon having a purchase order for the work, a copy of which was submitted at the arbitration. According to Joseph Sweeney, he was never paid for the work.

The arbitrator found the following: Joseph Sweeney was laid off in violation of the CBA; respondent Midtown Neon continued to produce work for its customers as evidenced by grievant Joseph Sweeney's former supervisor Alberto Gaitan hiring him through Midtown Sign Services to perform work he previously completed as a union member; the two companies, respondents Midtown Neon and Midtown Sign Services,

function as one; and they could not complete work for the customers without the grievant Joseph Sweeney, and thus, his layoff was not because of lack of work.

The arbitrator rendered an award which found that grievant Joseph Sweeney was laid off in violation of the CBA, and directed that he was to be reinstated immediately with seniority and other benefits. Grievant Joseph Sweeney was also granted full back pay, reduced by the unemployment insurance benefits received by him, to be paid upon his reinstatement.

Petitioner Union seeks to confirm the arbitration award and respondents Midtown Neon and Midtown Sign Services seek to vacate the award.

Pursuant to CPLR 7510, an arbitration award shall be confirmed upon the timely application of a party unless the award is vacated or modified upon a ground specified in CPLR 7511 (*see Matter of Blamowski [Munson Transp.]*, 91 NY2d 190, 194 [1997]; *see also Matter of Lurie v Sobus*, 289 AD2d 578 [2001]). An arbitration award only may be vacated upon those grounds specified in CPLR 7511 (*see Matter of Blamowski [Munson Transp.]*, *supra*).

To be considered a valid notice of the intention to arbitrate, the notice must identify the agreement under which arbitration is sought and the name and address of the person serving the notice in addition to containing the statutory 20-day warning that failure to commence a proceeding to stay arbitration will preclude an objection to arbitration (CPLR 7503[c]; *see Matter of Blamowski [Munson Transp.]*, *supra*; *Matter of State Farm Mutual*

Auto Insurance Co. v Urban, 78 AD3d 1064 [2010]).

In this case, although notices of intention to arbitrate were served on both respondents, Midtown Neon and Midtown Sign Services (as evidenced by the fact that notices were sent to the addresses at which respondents were located, as well as the address of the law firm authorized to receive process for Midtown Sign Services, per the Department of State Division of Corporations' Entity Information), the notices did not contain the requisite 20-day warning language (*see Matter of Blamowski [Munson Transp.]*, *supra*; *see also Matter of Northern Assur. Co. of Am. v Bollinger*, 256 AD2d 580 [1998]). As such, respondents Midtown Neon and Midtown Sign Services may move to vacate on any of the grounds set forth in CPLR 7511 (*see Matter of Blamowski [Munson Transp.]*, *supra*).

The CPLR 7511 grounds respondents Midtown Neon and Midtown Sign Services rely upon in opposition to petitioner Union's motion to confirm and in support of their motion to vacate are that there is no agreement to arbitrate between respondent Midtown Sign Services and petitioner Union (CPLR 7511 [b] [2] [ii]), and the rights of both respondents Midtown Neon and Midtown Sign Services were prejudiced by grounds specified in paragraph one of CPLR 7511(b) (CPLR 7511 [b] [2] [i]). With regard to the latter, respondents Midtown Neon and Midtown Sign Services specifically argue that the award was procured by grievant Sweeney's fraudulent testimony (CPLR 7511 [b] [1] [i]), and that "a final and definite award upon the subject matter submitted was not made" since the award does not specify the amount of back pay to be paid (CPLR 7511[b] [1] [iii]).

Respondents Midtown Neon and Midtown Sign Services also contend that an issue of fact exists concerning whether the one-year statute of limitations for confirming the award expired (CPLR 7511 [b] [2] [iv]).

Contrary to the assertion of respondents Midtown Neon and Midtown Sign Services, there is no triable issue regarding the one-year statute of limitations. Rather, the evidence presented supports a finding that the Union's October 29, 2010 application to confirm the award was timely made within one year after the award's delivery to it on November 2, 2009, and the award has not been modified or vacated upon a ground specified in CPLR 7511 (CPLR 7510). Respondents present no evidence, other than surmise and conjecture, that the award was delivered to the Union on any other date prior to November 2, 2009.

Respondents Midtown Neon and Midtown Sign Services assert that the award should be vacated as to the latter, who was not party to any agreement with the Union. As noted, however, the CBA does cover "all establishments or shops owned or to be owned or controlled by the Employer [respondent Midtown Neon]," as well as, binds Midtown Neon's "successors and assigns." The arbitrator determined that because of the interrelated nature of respondents Midtown Neon and Midtown Sign Services, both companies are bound by the terms of the CBA and liable for its breach. Moreover, the arbitration provision in the CBA is extremely broad, and it was within the power of the arbitrator to consider the question of respondent Midtown Sign Services alter-ego liability and to determine that Midtown Sign

Services was so liable (*see generally TNS Holdings, Inc. v MKI Security Corp.*, 92 NY2d 335 [1998]; *see also Matter of Sbarro Holding, Inc. [Shiaw Tien Yuan]*, 91 AD2d 613 [1982]; *Glasser v Price*, 35 AD2d 98 [1970]). Furthermore, judicial review of an arbitrator's award is very limited (*see Pearlman v Pearlman*, 169 AD2d 825 [1991]), and the fact-findings of the arbitrator may not be second-guessed by a reviewing court (*see Matter of Liberty Mutual Insurance Co. v Sedgewick of New York*, 43 AD3d 1062 [2007]).[1]

Respondents Midtown Neon and Midtown Sign Services next assert that the award should be vacated based on fraud, pursuant to CPLR 7511 (b) (1) (i). Respondents Midtown Neon and Midtown Sign Services claim that the award was procured by misleading and fraudulent testimony given by grievant Joseph Sweeney that he was hired by respondents after his layoff to perform the same work had performed before his layoff. According to respondents Midtown Neon and Midtown Sign Services, they had no reason to hire Joseph Sweeney after he was laid off since Midtown Neon was no longer in business and Midtown Sign Services was not in the business of sign manufacturing. Respondents Midtown Neon and Midtown Sign Services rely on the same emails submitted at arbitration, but claim that Alberto Gaitan only contacted Sweeney to do a drawing of a sign with a different background color for Joyce Leslie, a former client of respondent Midtown Neon, as a favor to that former client. They also claim that Midtown Sign Services did not seek to employ Joseph Sweeney

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1. Additionally, courts must give deference to the decision reached, upholding same insofar as the mediator "offer[s] even a barely colorable justification for the outcome reached" (*Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F2d 691, 704 [2d Cir 1978]; *see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]).

as a draftsman, but instead tried to assist him by asking him to do some design work for Midtown Sign Services' own letterhead.

"To vacate an arbitration award on the ground of fraud, a party must establish by clear and convincing evidence the existence of fraud, that the fraud would not have been discoverable upon exercise of due diligence prior to or during the arbitration, and that the fraud materially related to an issue in arbitration." (*Imgest Fin. Establishment v Shearson Lehman Hutton*, 172 AD2d 291, 291, [1991]; *see also Matter of Gluck v Eastern Analytical Laboratories, Inc.*, 271 AD2d 532 [2000]; *Matter of Motors Ins. Corp. [Lewis]*, 221 AD2d 634 [1995]).

Here, respondents Midtown Neon and Midtown Sign Services failed to establish that the purported misstatements of grievant Joseph Sweeney about his interactions with Alberto Gaitan, and the character of the work he was asked to perform constituted fraud upon the arbitrator because the arbitrator did not need to rely upon the purported misstatements. The arbitrator had the opportunity to exercise due diligence during the arbitration to read copies of the March and May of 2009 emails exchanged by Joseph Sweeney and Alberto Gaitan regarding the Letter X layout and the Joyce Leslie Interior Signs for himself. Moreover, the arbitrator's finding, that Joseph Sweeney's work, that is, his sketches for the renovation of the signs of its customer, Joyce Leslie, and drafting of the redesign of letters for another sign (the Letter X layout), was covered under the CBA, had an evidentiary basis, and was rational (*see Matter of Liberty Mut. Ins. Co. v Sedgewick of*

N.Y., 43 AD3d 1062 [2007]; *see also Matter of DiNapoli v Peak Automotive, Inc.*, 34 AD3d 674 [2006]; *Matter of Hausknecht v Comprehensive Med. Care of N.Y., P.C.*, 24 AD3d 778 [2005]).[2]

Thus, respondents Midtown Neon and Midtown Sign Services failed to establish by clear and convincing evidence that petitioner Union procured its award by means of fraud or misconduct (*see Matter of Balis v Chubb Group of Ins. Cos.*, 50 AD3d 682 [2008]; *see also Matter of Mounier v American Tr. Ins. Co.*, 36 AD3d 617 [2007]; *Matter of Hausknecht v Comprehensive Med. Care of N.Y., P.C.*, *supra*).

Under CPLR 7511 (b) (1) (iii), an award can be vacated when the arbitrator executes his or her power in such an imperfect manner that the award is not "final and definite." An award is not "final and definite" when either "it leaves the parties unable to determine their rights and obligations . . . it does not resolve the controversy submitted, or . . . it creates a new controversy" (*Matter of Snyder-Plax v American Arbitration Assn.*, 196 AD2d 872, 874 [1993]). An award is final and definite if the computation of the award is "so clear and specific that the determination of the amounts owing . . . is merely an accounting calculation" (*Morgan Guar. Trust Co. of New York v Solow*, 114 AD2d 818, 822 [1985] [internal quotation marks omitted]).

In this case, contrary to the contention of respondents Midtown Neon and

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2. It appears that respondents are confusing the issue of credibility with that of fraud. It is also noted that, the fact that Midtown Sign Services requested that Joseph Sweeney do work as a favor for a former Midtown Neon client – a fact to which respondents admit – lends further credence to the determination by the arbitrator that the companies "function as one."

Midtown Sign Services, the subject award resolved the controversy that was submitted to arbitration. The award answered the questions of whether grievant Joseph Sweeney was laid off pursuant to the CBA and if not, what remedy would be imposed. The award, which found, inter alia, that grievant Joseph Sweeney was laid off in violation of the CBA, and directed that he was to be paid back pay (reduced by unemployment insurance payments received by him), did not leave matters open for future contention, and therefore, was final. All that remained to be done was merely an accounting calculation, that is, the amounts of back pay to be paid grievant Sweeney. Thus, the award was final and definite (*see Matter of Civil Serv. Empls. Assn. v County of Nassau*, 305 AD2d 498 [2003]; *see also Matter of Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO [State of New York]*, 223 AD2d 890 [1996]; *Morgan Guar. Trust Co. of N.Y. v Solow*, *supra*).

Respondents Midtown Neon and Midtown Sign Services, however, are correct in the assertion that the arbitrator exceeded his powers when he ordered that they immediately reinstate grievant Sweeney with seniority and other benefits since the CBA expired prior to issuance of the arbitrator's award (*see* CPLR 7511 [b] [1] [iii]; *see also Matter of Manhattan and Bronx Surface Transit Operating Authority [Transport Workers Union of America, AFL-CIO, Local 100]*, 227 AD2d 995 [1996]; *Manhattan and Bronx Surface Transit Operating Authority v Transport Workers Union of Am. AFL-CIO, Local 100*, 182 AD2d 624 [1992]). Thus, only that section of the award is vacated. In light thereof, with regard to the award of back pay, which was to be paid upon Joseph Sweeney's

reinstatement, same shall be paid until the end date of the contract, upon service upon respondents Midtown Neon and Midtown Sign Services of a copy of the judgment to be entered hereon, within a time frame to be specified therein.

Accordingly, the motion of respondents Midtown Neon and Midtown Sign Services is granted only to the extent that the section of the award directing that the grievant Joseph Sweeney be reinstated is vacated, and the motion is otherwise denied. Petitioner Union's petition to confirm the arbitrator's award is granted to the extent that the award, as modified herein, is confirmed.

Settle judgment.

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J.S.C.