Matter of Interview, Inc. v Fuller
2014 NY Slip Op 32469(U)
September 18, 2014
Supreme Court, New York County
Docket Number: 653330/2013
Judge: Michael D. Stallman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

---X

In the Matter of the Arbitration

between

INTERVIEW, INC. and
BRANT PUBLICATIONS, INC.,

Petitioners,

- and-

VICTORIA FULLER,

Respondent.

---X

Index No.:
653330/2013

Decision

HON. MICHAEL D. STALLMAN, J.:

Petitioners Interview, Inc. (Interview) and Brant Publications, Inc. (BPI) seek to confirm the final arbitration award of Arbitrator Ralph S. Berger, dated September 20, 2013, against respondent Victoria Fuller. Pursuant to CPLR 7511, Fuller cross-moves for an order vacating the award and remanding the matter to the American Arbitration Association for reassignment to a new arbitrator.

[* 2]

I.

According to the petition, BPI owns Interview, which publishes the popular culture magazine, *Interview*. (Petition ¶ 12.) Fuller was the Vice President and Associate Publisher of *Interview*. In December 2006, Fuller allegedly went on medical leave, and allegedly received short-term disability benefits.

On February 16, 2007, Fuller demanded arbitration against Interview and BPI before the American Arbitration Association, alleging that she had not been paid commissions, in violation of an employment agreement, made as of August 15, 2002, between Fuller and Interview (Employment Agreement). (DeLarco Affirm., Ex 1 [Demand for Arbitration].) The arbitration demand also claimed that Interview and BPI anticipatorily breached their short-term disability policy.

Fuller returned to the office on March 2, 2007, and Interview terminated Fuller's employment on March 27, 2007.

On June 15, 2007, Fuller commenced an action in federal court, alleging violations of the Family Medical Leave Act of 1993 (FMLA) (the FMLA action). In the FMLA action, Fuller also alleges discrimination based on disability, including the failure to provide reasonable accommodations, and retaliation,

in violation of New York State and New York City Human Rights laws. The FMLA action seeks damages for, among other things, lost past and future earnings. (Delarco Opp. Affirm., Ex 2 [complaint].)

On November 6, 2009, Fuller amended her arbitration claim against Interview and BPI. (*See* DeLarco Affirm., Ex 3 [Proposed Amended Claim].) First, Fuller asserted that she was entitled to commissions from January 1, 2007 until March 27, 2007, in the amount of $30,307 (the Commissions Claim). Fuller maintained that her short-term disability benefits should have included "100% of normal earnings" while she was out on medical leave. However, Fuller maintained that she was not paid any commissions while she was out on medical leave.

Second, Fuller alleged that she was wrongfully terminated in violation of the Employment Agreement (the Breach of Employment Agreement Claim). According to the amended claim for arbitration, Interview terminated Fuller for submitting allegedly fraudulent expense reports from 2005 and 2006, "seeking company reimbursement in the hundreds of dollars for personal charges, consisting primarily of receipts for taxis and meals." (*Id.* ¶ 38.) Fuller maintained that the people who submitted the allegedly fraudulent reports were provided higher salaries for providing this information, and that they

[* 4]

themselves committed fraud. She contended, in her amended claim for arbitration, that her receipts were appropriate and routine, and that Interview violated its own practice by not allowing her to correct or resubmit her expense reports.

In addition to the two main claims, Fuller also alleged additional breaches of the Employment Agreement, "including but not limited to interfering with Fuller's ability to perform her job, by refusing to allow Fuller to carry out any of her job related tasks while on leave, contrary to the customary practice at Interview." (Proposed Amended Claim ¶¶ 49-52.) Fuller was allegedly forbidden from contacting Interview employees or clients while on leave, was undermined in her job responsibilities and authority, and was locked out of her office upon her return, which Fuller claimed were material breaches of the Employment Agreement.

Ralph S. Berger, Esq., (Arbitrator Berger) was appointed as the arbitrator. By a letter dated September 18, 2012, Kenneth Kirschner, Esq. entered an appearance as co-counsel for Interview and BPI. (Rich Affirm., Ex 515.) By a letter dated September 19, 2012, Arbitrator Berger disclosed: (1) that he knew Kirschner, from when they were students in college; (2) that Kirschner appeared before Berger in employment and arbitration cases; (3)

that in 2001, Berger and Kirschner served on a panel of arbitrators in an employment case; and (4) that he and Kirschner occasionally saw each other at alumni functions and had socialized together. (Rich Opp. Affirm., Ex 515.) Berger wrote, "These disclosures do not affect my impartiality in the instant matter in any way." (*Id.*)

By letter dated September 24, 2012, Fuller's attorney objected to Kirschner's participation in the arbitration. (*Id.*) The letter states, in pertinent part, "Should he not withdraw or be removed as counsel for Respondents, I most regretfully view that I must ask you, Mr. Berger, to recuse yourself." (*Id.*) Following an exchange of letters, Kirschner withdrew as co-counsel in the arbitration by letter dated October 17, 2012. (*Id.*) By a letter of the same date, Fuller's attorney stated, "I am withdrawing my objection to the participation of the arbitrator, Mr. Berger, based on Mr. Kirschner's agreement to withdraw as counsel. It is my understanding that his associate, Mr. DeLarco, who it has been represented has no association with Mr. Berger, will substitute for him." (DeLarco Affirm., Ex 5.)

Six days of hearings were held in April 2013 and on May 2, 2013. Among the witness who testified were Fuller's former assistants, Nadia Uddin, Joshua Homer, Marie LaFrance, and Adrien Bellezza; Interview's Chief

Executive Officer, Sandra Brant; Interview's Chief Financial Officer, Deborah Blasucci; and Fuller herself. (*See* Rich Opp. Affirm., Ex 502 [hearing transcripts].) The hearings generated approximately 2,000 pages of transcript.

In their post-hearing brief, Interview and BPI requested attorneys' fees. Fuller's post-hearing brief did not include such a request; neither did Fuller's counsel object to Interview and BPI's fee request.

On September 20, 2013, Arbitrator Berger issued a twenty-two page opinion and award. (Verified Petition, Ex A [Opinion & Award].) The Award states, in relevant part:

> "1) The Respondents, Interview, Inc. and Brant Publications, Inc., had 'cause' to terminate the employment of the Claimant, Victoria Fuller.
>
> 2) The Respondents are the prevailing party in this proceeding and are awarded the sum of $318,820.50 in attorneys' fees and $11,910.48 in related costs.
>
> 3) The Respondents are also awarded $625.00 in fees of the American Arbitration Association and $29,500 in fees of the Arbitrator. The administrative filing and case service fees of the American Arbitration Association, totaling $6,000.00, shall be borne as incurred.
>
> 4) The amounts awarded to the Respondents in paragraphs 2 and 3 above are to be paid by the Claimant to the Respondents within 30 days of the date of this Award.
>
> 5) The Claimants' claim for commissions for the months of February and March 2007 is denied without prejudice.

6) This Award is in full settlement of all claims submitted to this arbitration. All claims not expressly granted are hereby denied."

(*Id.*)

Regarding Fuller's Commissions Claim (which was denied without prejudice), the Opinion states,

"The Respondents assert that, because the issue is pending in an action in the United States District Court for the Southern District of New York arising under the Family Medical Leave Act ('FMLA'), the New York State Human Rights Law, and the New York City Human Rights Law, the undersigned should not decide this issue. The Respondents reason that there is a risk of inconsistent judgments if the commission issue is decided in this case. The Claimant does not address the deferral issue in her brief.

In that the issue regarding the payment of commissions to the Claimant is inextricably intertwined with the FMLA claim filed by the Claimant currently pending in District Court, and because there is a risk of an inconsistent judgment, the undersigned will not make an award concerning the lost commissions issue. This determination is without prejudice to any related proceeding."

(Opinion, at 20.)

On September 25, 2013, Interview and BPI commenced this special proceeding to confirm the Award. Fuller opposes the petition and cross-moves to vacate the Award.

II.

"It is well settled that judicial review of arbitration awards is extremely limited. An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the

> outcome reached. Indeed, we have stated time and again that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice."

(*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006] [internal citations, quotation marks, and emendation omitted].)

"Courts may vacate an arbitrator's award only on the grounds stated in CPLR 7511(b)." (*Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005].) Here, Fuller contends that the Award should be vacated on the grounds that the arbitrator committed misconduct; that the arbitrator was partial; that the Award is indefinite; and that the arbitrator exceed his power, in that the Award was totally irrational and violates public policy. (CPLR 7511 [b] [1] [i], [ii], [iii].)

A.

> "Pursuant to CPLR 7511(b)(1)(i), an arbitration award may be vacated if the court finds that the rights of a party were prejudiced by 'corruption, fraud or misconduct in procuring the award.' A refusal by an arbitrator to hear pertinent material evidence may constitute misconduct under CPLR 7511(b)(1)(i). The party seeking to vacate the arbitration award has the burden of proving by clear and convincing evidence that the arbitrator committed misconduct."

(*Matter of Allstate Ins. Co. v GEICO [Govt. Empls. Ins. Co.],* 100 AD3d 878, 879 [2d Dept 2012] [internal citations omitted]; *see e.g. Matter of Disston Co.*

[Aktiebolag], 176 AD2d 679, 679 [1st Dept 1991].) "Arbitrators need only receive evidence that is 'pertinent and material,' and such determination will only be set aside if it deprives a party of a fundamentally fair hearing." (*Kaminsky v Segura*, 26 AD3d 188, 189 [1st Dept 2006].)

Fuller claims that she was not permitted to offer proof that Interview's allegations of Fuller's fraud were pretextual, and that Fuller's reimbursements were consistent with company policy. Fuller maintains that Arbitrator Berger excluded deposition testimony and documents obtained from a federal lawsuit brought by another employee, Alfred Mayor, alleging that he was wrongfully terminated. Fuller contends that what was obtained from Mayor's lawsuit would show that "Blasucci lied about the reason for Mayor's termination and fabricated a claim that two people witnessed Mayor's alleged wrongdoing." (Rich Reply Affirm. ¶ 24.) In addition, Fuller claims that Arbitrator Berger excluded evidence regarding the expense reports of Interview's Chief Financial Officer, Deborah Blasucci. She also contends that Arbitrator Berger improperly refused to consider her evidence that would show that the witnesses lacked credibility.

At the arbitration hearing, Fuller argued that her attorney should be permitted to question Blasucci about material obtained from Mayor's lawsuit,

which Fuller's attorney argued established an "identical modus operandi." (Rich Opp. Affirm., Ex 502 [Tr.], at 1672.) The hearing transcript states, in relevant part:

> "THE ARBITRATOR: Mr. Rich, get to the part that any of this is relevant in this matter.
>
> MR. RICH: It's relevant that it goes to modus operandi. It goes to motive, that the motive is financial. And it also goes to impeachment . . .
>
> MR. DeLARCO: My response is it's not relevant. It muddies the waters. He's basically trying to try another case outside of this case. The Maher [*sic*] case is a completely separate case, an age discrimination case. It has absolutely no probative value whatsoever.
>
> THE ARBITRATOR: This doesn't come in. None of it comes in. We're not using this forum to relitigate and debate what took place in another matter. None of this comes in. Call the witness [Blasucci] back in."

(Tr. at 1674-1675.)

As to Blasucci's expense reports, Fuller argued that he should be entitled to probe into whether Blasucci herself adhered to company policy:

> "MR. RICH: First of all, the relevance of Ms. Blasucci's expense reports are, we haven't gotten a policy. We've gotten lots of statements of what policy is and procedure is and what's proper and not proper. And Ms. Blasucci, in her deposition testimony, states that she followed the proper procedure.
>
> And it turns out that her expenses are, if one would call – her expenses are egregiously lacking in documentation. And

when it goes to the question as to whether or not there was a breach, what are the standards that constitute a breach. And one of the ways we can establish what the standard is, is seeing someone else.

And certainly, the CFO is a valid person to look to a standard. . . .

* * *

MR. DeLARCO: Number one, this case is not about violating procedure. This case is about theft. This case is about material dishonesty. We have not taken the position that Ms. Fuller was terminated because she violated procedure, number one.

Number two, this case is not about Ms. Blasucci and whether or not she allegedly violated procedure. This is not her contract. She was not terminated. It has absolutely nothing to do with it.

So once again, you are asking to have a mini trial within a trial, to try to prove something that's completely not relevant to the issues at hand.

* * *

THE ARBITRATOR: All right, I think it's time for a ruling.

First of all, this stipulation regarding evidence from one forum being utilized in another forum, refers to evidence. It does not refer to document requests.

This document request does not in [*sic*] come in this proceeding. I am not going to be put in a position where we need to decide whether this was complied with, this document request, fully or partially or anything of the sort. This is not an argument to be put before me, first.

Second, I've spent a lot of time studying the parties' submissions. There is no allegation of disparate treatment in the Amended Claim, which I granted you leave to file, Mr. Rich. . . You did not allege that your client was being treated differently than other executives.

[* 12]

> We are not here to find out what the terms and conditions of Ms. Blasucci's employment were. We are not going into this line of questioning. Move on."

(Tr. at 1765-1766.)

Fuller has not demonstrated, by clear and convincing evidence, that Arbitrator Berger committed misconduct. "[A]bsent provision in the arbitration clause itself, an arbitrator is not bound by principles of substantive law or by rules of evidence." (*Matter of Silverman [Benmor Coats],* 61 NY2d 299, 308 [1984].) Arbitrator Berger's evidentiary rulings were "at most unreviewable error of law and did not constitute misconduct. . . ." (*Matter of Merrill Lynch, Pierce Fenner & Smith [Dougherty & Co.–Lazard & Laidlaw—Matthews & Wright]*, 198 AD2d 181 [1st Dept 1993].)

B.

"A party seeking to set aside an arbitration award for alleged bias of an arbitrator must establish his claim by 'clear and convincing proof [internal citation omitted].'" (*Matter of Infosafe Sys. [International Dev. Partners]*, 228 AD2d 272, 272-273 [1st Dept 1996].) Partiality may be in the form of actual bias, or the appearance of bias "from which a conflict of interest may be inferred." (*New York Rests. Exch. v Chase Manhattan Bank,* 226 AD2d 312, 315 [1st Dept 1996].)

Fuller alleges that Arbitrator Berger's claim that he is impartial is "subject to serious question," given the result of the award and some actions which took place during the proceedings. For example, Fuller argues that Arbitrator Berger was biased because he found that Fuller was evasive in her testimony and that he gave Interview more "leeway" during the proceedings. And, although Kirschner withdrew from the hearing, she believes that he was still connected to the proceedings in some way, and able to influence Arbitrator Berger's award.

Nothing in the record indicates that Arbitrator Berger was in any way prejudiced or that there was "evident partiality" on Arbitrator Berger's part due to his relationship with Kirschner. (*See e.g. Milliken & Co. v Tiffany Loungewear*, 99 AD2d 993, 995 [1st Dept 1984] ["Nothing in the record of this proceeding demonstrates that Tiffany was in any way prejudiced or that there was 'evident partiality' on the part of the arbitrator merely because of the existence of some past insubstantial business dealings between Milliken and Shasha's company"].) Fuller merely speculates about Arbitrator Berger's bias, based on her dissatisfaction with his actions during the proceeding and ultimate determination. Arbitrator Berger's assessment of the parties' credibility is not bias. Therefore, Fuller does not "meet the high burden of

showing" alleged bias. (*Batyreva v N.Y.C. Dept. of Educ.*, 95 AD3d 792, 792 [1st Dept 2012].)

Because Fuller failed to present any clear and convincing evidence of actual bias or the appearance of bias, she failed to establish vacatur of the award pursuant to CPLR 7511 (b) (1) (ii) on the grounds of partiality.[1]

C.

An arbitration award is indefinite or nonfinal for purposes of CPLR 7511 "only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy." (*Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992].)

> "[A] distinction must be drawn between an arbitrator's failure, on the one hand, to dispose of the controversy submitted, and his failure, on the other, to consider all of the issues of fact and law that a court would have to consider in order to properly dispose of the same controversy. The former renders an award not final and definite, and thus subject to vacatur under CPLR 7511 (b) (1) (iii); the latter amounts to a mere error of fact or law not judicially reviewable [internal citations omitted]."

(*Matter of Guetta [Raxon Fabrics Corp.]*, 123 AD2d 40, 45 [1st Dept 1987].)

---

[1] The Court notes that Arbitrator Berger immediately disclosed that he knew Kirschner and disclosed the extent of their interaction. The Court also notes that Fuller waived her objections when Kirschner withdrew as counsel. As the Court held in *Matter of Namdar [Mirzoeff]* (161 AD2d 348, 349 [1st Dept 1990]), "[a] party who proceeds with an arbitration with actual knowledge of bias on the part of an arbitrator or facts that should have prompted further inquiry, waives his objection to the arbitration."

Fuller argues that the Award should be vacated pursuant to CPLR 7511 (b) (1) (iii) because Arbitrator Berger did not make a determination with respect to the Commissions Claim. The Opinion states, in pertinent part:

> "C. Claim for Commissions
>
> The Respondents take the position that while the Claimant was on disability leave, the Claimant did not earn commissions as set forth in her Agreement. The Claimant was denied commissions totaling $29,381.00 for the months of February and March, 2007. The Claimant argues that commissions formed part of her regular compensation and should have been paid, both under the Agreement and New York Labor Law Article 6.
>
> The Respondents assert that, because the issue is pending in an action in the United States District Court for the Southern District of New York arising under the Family Medical Leave Act ("FMLA"), the New York State Human Rights Law, and the New York City Human Rights Law, the undersigned should not decide this issue. The Respondents reason that there is a risk of inconsistent judgments if the commission issue is decided in this case. The Claimant does not address the deferral issue in her brief.
>
> In that the issue regarding the payment of commissions to the Claimant is inextricably intertwined with the FMLA claim filed by the Claimant currently pending in District Court, and because there is a risk of an inconsistent judgment, the undersigned will not make an award concerning the lost commissions issue. This determination is without prejudice to any related proceeding."

(Opinion, at 19-20). Although Arbitrator Berger stated in the Opinion that he would not make an award on the Commissions Claim, the fifth determination of the Award itself states that the Commissions Claim was "denied without

prejudice." (Award, at 23.)

As a threshold matter, Interview and BPI's argument that Fuller waived any right to object to Arbitrator Berger's denial of her Commissions Claim because Fuller did not raise it in her post-hearing brief. (Petitioners' Opp. Mem. at 9 n 5.) The record indicates that, at the hearing, Fuller's counsel disagreed with Interview and BPI's position that Arbitrator Berger should not decide the Commissions Claim due to the risk of inconsistency with the federal action. (Tr. 110-111.) Interview and BPI cited no cases for the proposition that Fuller may not raise lack of finality or indefiniteness of this determination of the Award under these circumstances.

Fuller states that the Commissions Claim was "clearly one arising under the Employment Agreement, and, therefore subject to the arbitration provision." (Fuller Mem., at 5.) Fuller further argues that, while all of her contractual claims had some degree of overlap with her statutory claims, "none of these areas of overlap, however, were unique to [her] claim for unpaid commissions." (*Id.* at 7.) Even if there was some degree of overlap, as Fuller argues, Arbitrator Berger was not exempt from deciding the contractual issues that were brought in front of him.

As Interview and BPI indicate, Fuller contends that Interview and BPI's

[* 17]

failure to pay her commissions violated not only the Employment Agreement, but also the FMLA. (*See* Rich Opp. Mem. at 41.) Fuller's attorney stated at the hearings that payment of the commissions was "within the damages that are sought" in the federal action." (Tr. at 110.) Interview and BPI also argue that the Award is "final" because the Commissions Claim was denied without prejudice.

Papapietro v Pollack & Kotler (9 AD3d 419, 420 [2d Dept 2004]) is instructive. In *Papapietro*, the plaintiff sought to vacate a confession of judgment related to legal fees for services that the defendants rendered to the plaintiff. The parties were directed to submit the fee dispute to arbitration. The arbitration panel rendered an award in the defendants' favor, but expressly stated that it did not consider the "'issue of the confession of judgment', which it deemed was pending before the Supreme Court." (*Id.*) The Appellate Division, Second Department affirmed the Supreme Court's order vacating the award on the ground that it was not a final and definite award. The Appellate Division reasoned,

> "a determination of whether the defendants were entitled to an award for attorneys fees cannot be made, in this instance, without considering whether they violated 22 NYCRR 1400.5 in obtaining the confession of judgment, as such a violation would result in forfeiture of any unpaid fees. Although the issue could have been addressed by the Supreme Court prior to the submission of the

[* 18]

> fee dispute to the arbitration panel, *it also would have been proper for the panel to address the issue in reaching its determination.*"

(*Id.* at 420 [emphasis supplied].)

Here, like the arbitrator panel in *Papapietro*, Arbitrator Berger expressly declined to consider a claim submitted to him in arbitration, which he deemed should be decided by the court. Arbitrator Berger did not decide any issues of fact or law in order to determine the Commissions Claim on the merits. Arbitrator Berger heard evidence about the commissions yet did "not resolve the controversy submitted." (*Matter of Westchester County Corr. Officers Benevolent Assn., Inc. v Cheverko*, 112 AD3d at 842; (*Matter of Guetta [Raxon Fabrics Corp.]*, 123 AD2d at 45.) Even assuming, as Interview and BPI argued, that Fuller would not be entitled to any commissions if she did not prevail in the FMLA action, it would have been proper for Arbitrator Berger to decide whether Fuller was owed commissions while she was on leave, under the terms of the Employment Agreement.

Field v BDO USA, LLP (2013 WL 3833739 [Sup Ct, NY County 2013]) is distinguishable. There, the court rejected the petitioner's argument that the arbitrator exceeded the scope of his power when he decided not to decide a claim and instead denied it without prejudice. The court reasoned that it was

within the arbitrator's power to decide, under JAMS rules, whether a controversy was arbitrable. Here, unlike *Field*, the ground asserted here is that the Award is indefinite and not final. Arbitrator Berger did not decline to decide the Commissions Claim because he thought that the Commissions Claim was not arbitrable. Arbitrator Berger did not determine that the Commissions Claim did not fall within the scope of the parties' agreement to arbitrate, or that he otherwise lacked power or authority to arbitrate the Commissions Claim.

Thus, the fifth determination of the Award is vacated.

D.

Pursuant to CPLR 7511 (b) (1) (iii), an award may be vacated by the court only if the award is "violative of strong public policy, it is totally or completely irrational, or if it manifestly exceeds a specific, enumerated limitation on the arbitrator's power." (*Matter of Erin Constr. & Dev. Co., Inc. v Meltzer*, 58 AD3d 729 [2d Dept 2009].) The person moving to vacate the award has a heavy burden of proving by clear and convincing evidence, that the award is irrational. (*Muriel Siebert & Co. v Ponmany*, 190 AD2d 544, 544 [1st Dept 1993].)

[* 20]

1.

Fuller argues that the first, second and sixth determinations of the Award were totally irrational. An award is irrational when there is no proof whatever to justify the award." (*Gaymon v MTA Bus Co.*, 117 AD3d 735 [2d Dept 2014]; *Matter of Peckerman v D & D Assoc.*, 165 AD2d 289, 296 [1st Dept 1991].)

a.

The first determination of the Award states that Interview and BPI had cause under the Employment Agreement to terminate Fuller. The Opinion explains, in relevant part:

> "The Arbitrator has carefully reviewed the record evidence and assessed the credibility of the witnesses presented. After having done so, the undersigned finds that in this case, four of Claimant's assistants each testified that the Claimant directed them to submit for reimbursement as business expenses what they knew to be personal expenses. (Uddin Tr. 217, 226; LaFrance Tr. 315-316; Bellezza T. 390-392; Homer Tr. 533-534). Their testimony is consistent and credible. They lack the ulterior motives for fabricating testimony that the Claimant attempts to attribute to them. Moreover, their testimony is corroborated by documentary evidence. Based on this testimony, it is clear that the Claimant would direct the assistants to link these expenses to items in her calendar, and would direct them to enter false explanations for those expenses.
>
> More specifically, each of the assistants gave the following consistent explanations of the instructions that they had received from the Claimant. . .
>
> The Claimant's explanation that she had given her personal

receipts to her assistants in error (Tr. 888-890) must be weighed against the testimony of the four assistants. While the Claimant maintains it was inadvertent, she admits that she submitted twenty-eight receipts for taxi trips totaling $215 that were taken for personal reasons. Furthermore, it is undisputed that she certified, in writing, the accuracy of her expense reports. The Claimant's explanation is simply not believable.

The Claimant did not make a credible witness. A review of her testimony shows that it is replete with contradictions (e.g., whether and to what extent she trained her assistants) and, for the most part, was evasive (e.g., whether her therapy appointments were regularly scheduled).

The undersigned concludes that the weight of the credible evidence establishes that the Claimant knew she was submitting personal expenses for reimbursement from her employer. This constitutes intent, and thus the Claimant breached her obligations to the Respondents by engaging in "theft" and "or other acts of material dishonesty" in violation of the Agreement. (Respondents' Ex. M § 6.1(a)). When an employee "submits a false claim...to gain some economic or personal benefit from the employer it is...akin to theft". DISCIPLINE AND DISCHARGE IN ARBITRATION 299 (Norman Brand & Melissa Biren, eds., 2d ed. 2008).

The Arbitrator is cognizant of the fact that the total amount of money received by the Claimant as a result of false submissions is relatively insignificant compared to the size of Claimant's salary, and her responsibilities. However, the amount at stake is not the issue. When the Claimant engaged in the falsification of claims, and directed her subordinates to participate in this misconduct, she both violated the Agreement and breached the element of trust necessary to maintaining an employment relationship."

(Opinion, at 14-17.)

Arbitrator Berger set forth a plausible basis for the determination that

[* 22]

Fuller was terminated for cause. (*Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002] ["An arbitrator's award will be confirmed 'if any plausible basis exists for the award'"].) The parties were able to address Fuller's expenses and, after considering the evidence, Arbitrator Berger found that Fuller directed assistants to enter false explanations for the expenses. The arbitrator found that there was intent, and that therefore Fuller breached her obligations to Interview by engaging in theft. Arbitrator Berger rationally articulated in his award why he believed that Fuller committed fraud and why it was proper for her to be terminated for cause. Arbitrator Berger concluded that the relatively small amount of impermissible expenses did not militate against her termination.

Although Fuller argues that the testimony of her assistants was biased, it is well settled that "[an arbitrator's] determinations of credibility . . . are largely unreviewable because the [arbitrator] observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures – all the nuances of speech and manner that combine to form an impression of either candor or deception [internal quotation marks and citation omitted]." (*Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 420 [1st Dept 2013].) Arbitrator Berger had the authority to determine what weight, if any, should be given to the evidence. (*Matter of Board of Educ. of Byram Hills*

Cent. School Dist. v Carlson, 72 AD3d 815, 815 [2d Dept 2010].) Fuller's arguments suggesting that this Court scrutinize the witnesses' testimony and documentary evidence, are without merit.

b.

The sixth determination of the Award states, "All claims not expressly granted are hereby denied." The Opinion states, in pertinent part:

"B. Allegations of Breach of the Agreement

> The record is clear that prior to taking her disability leave, the relationship between the Claimant and the Respondents was deteriorating. In November, 2006, the Claimant met with both Sandra Brant and Blasucci to discuss Claimant's performance. On December 5, 2006, two days before she began her disability leave, Sandra Brant sent the Claimant an email expressing her displeasure with the way the Claimant was handling a client matter.
>
> The Claimant argues that, when she took her leave, the Respondents breached the Agreement by undermining her position and mandating that she have no contact with any of Interview's clients. In addition, the Claimant contends that when the Claimant returned from her leave the Respondents permitted Hamilton, her subordinate, to act in a disrespectful and insubordinate matter towards her.
>
> The undersigned finds that these allegations, whether true or not, do not constitute an actionable breach of contract. In the period in question, the Claimant took disability leave at a time when her relationship with her superiors was on shaky ground. While on leave, the Claimant received her full base salary. As such, she cannot argue that she was damaged financially by the Respondents' actions. In addition, in order to receive disability benefits, the Claimant submitted medical documentation stating that she could not work during her leave (Claimant's Ex. 28) and

[* 24]

> told Mascaro that she felt "incoherent". Moreover, the Claimant never contacted Brant, Blasucci or Mascaro to request the opportunity to work from home. Her return to work on March 2, 2007 constituted a complete surprise to the Respondents.
>
> With respect to the Claimant's relationship with Hamilton, the Claimant argues that the Respondents breached the contract by permitting Hamilton to be insubordinate. Again, even if true, this would not constitute a breach of the Agreement.
>
> The Claimant cannot be heard to complain that the Respondents may have looked for reasons to terminate her. This claim must also fail for as discussed above, when Blasucci began her investigation, she uncovered sufficient evidence to justify terminating the Claimant for cause."

(Opinion, at 18-19.)

At the arbitration, Fuller contended that, before she was terminated, Interview and BPI had materially changed Fuller's duties and had significantly "lowered her rank", which Fuller contended amount to a breach of the Employment Agreement. Here, Fuller maintains that Arbitrator Berger "intentionally omitted the numerous and most serious acts that formed the basis of Fuller's claim for breach based on the lowering of her rank and authority." (Fuller Opp. Mem. at 43.)

Fuller's arguments are unpersuasive. To the extent that Fuller appears to contend that Arbitrator Berger disregarded the cases that Fuller cited for the proposition that a material change in duties and rank constitutes breach of an employment agreement, Arbitrator Berger was "not bound by principles

of substantive law or rules of evidence." (*Hunter v Glenwood Mgt.*, 156 AD2d 310, 311 [1st Dept 1989].) Arbitrator Berger was entitled to apply his own "sense of law and equity to the facts . . . ." (*Matter of Erin Constr. & Dev. Co., Inc. v Meltzer*, 58 AD3d at 730.) Arbitrator Berger found that there was no breach of contract because she received her full salary while on leave, and therefore did not sustain any damages.

Whether Arbitrator Berger focused "only on the most minor incidents" does not render the Award totally irrational. "The path of analysis, proof and persuasion by which the arbitrator reached this conclusion is beyond judicial scrutiny." (*Matter of Peckerman*, 165 AD2d at 296 [internal quotation marks and citations omitted].)

c.

The second determination of the Award states that Interview and BPI were prevailing parties entitled to attorneys' fees and related costs against Fuller. The Opinion states,

> "At the conclusion of the hearing, the undersigned noted that the prevailing party was entitled to an award of attorneys' fees and costs under the Agreement. (Respondents' Ex. M § 11.2). . . . Having found that the Respondents had 'cause' to terminate the Claimant, the undersigned finds that the Respondents are the prevailing party in this arbitration proceeding."

(Opinion, at 21.) The fourth determination directs Fuller to pay the attorneys' fees, related costs, and arbitration fees within 30 days of the date of the

Award.

Fuller argues,

> "The Arbitrator was only able to conclude that Petitioners were prevailing parties because the Arbitrator failed to consider Ms. Fuller's claim for unpaid commissions . . . Had the Arbitrator found in Ms. Fuller's favor on those claims–as he should have–it would have been impossible for him to award attorneys' fees, costs, and expenses to Petitioners, as Petitioners would not have been the prevailing party in the Arbitration."

(Fuller Opp. Mem., at 6.)

The Court agrees. On its face, the Opinion states that Interview and BPI were prevailing parties in the entire arbitration proceeding because there was cause for Fuller's termination, even though the Commissions Claim was left undecided. Arbitrator Berger offered no colorable justification to support his conclusion that petitioners were the prevailing parties. (*Cf. Kudler v Truffelman*, 93 AD3d 549 [1st Dept 2012] [arbitrator's award of attorney fees was not warranted, where there was no clearly prevailing party in arbitration].)

There is also an apparent discrepancy between the Opinion and Award in the amount of costs and expenses awarded to Interview and BPI as prevailing parties. In the Opinion, Arbitrator Berger found that $42,035.48 in costs and expenses were reasonable (Opinion, at 21), but the amount of related costs stated in the Award is $11,901.48. (Award, at 23.) The issues of the amount of costs and expenses, and the apparent discrepancy, must be

remanded to Arbitrator Berger. Accordingly, the second determination of the Award is vacated, along with so much of the fourth determination that directs Fuller to pay the attorneys' fees and related costs within 30 days of the date of the Award.

2.

"[C]ourts will only intervene in the arbitration process in those 'cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator.'" (*Matter of Santer v Board of Educ. of East Meadow Union Free School Dist.,* 23 NY3d 251, 261 [2014] [citations omitted].) "'Stated another way, the courts must be able to examine an arbitration agreement or an award on its face without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement.'" (*New York City Tr. Auth. v Transport Workers Union of America, Local 100, AFL-CIO*, 99 NY2d 1, 7 [2002], quoting *Matter of Sprinzen*, 46 NY2d 623, 631 [1979].)

Fuller describes in great lengths why the award should be vacated as being inconsistent with public policy. She believes that Arbitrator Berger ignored the applicable federal, state and city laws which require that reasonable accommodations be made for people with disabilities. She alleges

that Arbitrator Berger ignored the strong public policy mandating Interview's obligations under federal, state and city laws to provide reasonable accommodations to employees with disabilities. Fuller continues that Interview did not engage with her in an interactive process to provide a reasonable accommodation. Fuller writes, Arbitrator Berger "excluded any legal argument incorporating these strong public policy norms under city, state and federal law . . . ." (*Id.* at 49.) Fuller cites to the State and City Human Rights Laws to demonstrate that she should have been given a reasonable accommodation while out on leave.

Fuller's arguments regarding vacating for public policy lack merit. Fuller's attorney apparently contends that discrimination based on disability would amount to breach of her Employment Agreement, in that "her contract had to be carried out in compliance with the obligations under disability laws just like any valid contract has to be carried out in a legal way." (Fuller Opp. Mem. At 48.) However, Fuller's amended claim for arbitration asserted claims sounding in breach of contract, that is, breach of the Employment Agreement (*See* DeLarco Affirm., Ex 3]), as opposed to claims that are statutory in nature.

More importantly, Fuller does not appear to argue that public policy prohibited, in an absolute sense, Arbitrator Berger from deciding the matters

submitted to him or prohibited the relief granted. Federal, state, and city discrimination statutes did not prohibit Arbitrator Berger from finding that Fuller had engaged in "theft" and "or other acts of material dishonesty" in violation of the Employment Agreement, that Fuller could be terminated for cause for those acts, and that there was no other breach of the terms of the Employment Agreement. Neither did the discrimination statutes prohibit the relief granted in the Award, i.e., Fuller's termination for acts of "theft" or "or other acts of material dishonesty."

E.

Fuller alleges that Arbitrator Berger failed to address her claim for "unpaid salary during the time she was suspended without pay prior to her termination." (Fuller Opp. Mem., at 6.) She further notes that Interview and BPI "lacked any authority to suspend Ms. Fuller without pay under the terms of the Employment Agreement." (*Id.* at 17.) However, although Fuller made a claim for commissions from her return to work on March 2, 2007 through her date of termination, this separate and additional claim for unpaid salary or additional compensation was not a part of her amended claim. Therefore, Arbitrator Berger was not expected to resolve these issues. "[A]n arbitrator's authority extends to only those issues that are actually presented by the parties." (*See e.g. Matter of Joan Hansen & Co., Inc. v Everlast World's*

Boxing Headquarters Corp., 13 NY3d 168, 173 [2009].)

In addition, the majority of Fuller's reply papers attempt to inform the Court about motions for summary judgment made in federal court after the arbitration award was rendered. Because these motions, or any information which came after the award, were not a part of the arbitration proceedings and raised before Arbitrator Berger, such information may not be considered as possible grounds for vacating the award. (*See Stephens v Prudential Ins. Co. of Am.*, 278 AD2d 16 [1st Dept 2000] [public policy ground not raised in the arbitration proceeding does not constitute ground for challenging arbitration award]; *see also Matter of G.K. Las Vegas Ltd. Partnership v Boies Schiller & Flexner LLP*, 96 AD3d 538 [1st Dept 2012] [arguments were not sufficiently brought to the attention of the arbitrator].)

III.

As discussed above, the second and fifth determinations of the Award are vacated, along with so much of the fourth determination that directed Fuller to pay Interview and BPI attorneys' fees and related costs within 30 days.

However, that does not mean that the entire Award must be vacated. "An award which is valid in part will be sustained to the extent that it is proper, provided that the valid and invalid portions are not inextricably intertwined."

(*Johnston*, 161 AD2d 125, 129 [1st Dept 1990], citing 8 Weinstein–Korn–Miller ¶ 7511.10.) Fuller failed to demonstrate any valid grounds to vacate the first, third, and sixth determinations of the Award, as well as so much of the fourth determination that directed Fuller to pay the arbitration fees within 30 days of the date of the Award. These determinations are not inextricably intertwined with the vacated determinations of the Award. Therefore, these parts of the Award are confirmed.

Pursuant to CPLR 7511 (3) (d) "[u]pon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed." In addition, the Court has the discretion to remand the matter to the same or different arbitrator. (*East Ramapo Cent. School Dist. v East Ramapo Teachers Assn.*, 108 AD2d 717, 717 [2d Dept 1985].) Here, because there was no form of misconduct on the part of Arbitrator Berger, and due to the fact that Arbitrator Berger already heard the evidence presented, the matter should be remanded to Arbitrator Berger. (*See Johnston,* 161 AD2d at 129 ["since there was no misconduct, and due to the protracted and complex nature of the testimony, there is no reason the remand should be to a different arbitrator"].)

Upon resubmission to Arbitrator Berger, a full hearing de novo is not required, but Arbitrator Berger "may reconsider the matter on the basis of the

[* 32]

prior hearing and such additional evidence as he may require." (*Matter of Livingston [Banff, Ltd.]*, 13 Misc 2d 766, 767 [Sup Ct, NY County 1958]), citing *Matter First Nat. Oil. Corp. [Arrieta]*, 2 Misc 2d 225, 234 [Sup Ct, Queens County], *affd* 2 AD2d 590 [2d Dept 1956] ["Inasmuch as this court is satisfied that the indicated errors were unintentional and not culpable, the proceeding is remitted to the same arbitrators for the purpose of reconsidering the amount of damages in light of the testimony already before them, supplemented by such other relevant and material proof as they may require"].)

The Court has considered Fuller's remaining contentions, including the allegations that Interview and BPI have now lost the right to arbitrate, and finds them without merit.

IV.

The petition is granted in part, to the extent that the first, third, and sixth determinations of the Award, as well as so much of the fourth determination that directed Fuller to pay the arbitration fees within 30 days of the date of the Award, are confirmed, and the petition is otherwise denied.

Fuller's cross motion is granted in part, to the extent that the second and fifth determinations of the Award are vacated, along with so much of the fourth determination that directed Fuller to pay Interview and BPI attorneys'

fees and related costs within 30 days, and the matter is remanded to Arbitrator Berger on those issues only, and the cross motion is otherwise denied.

Settle order and judgment.

Dated: September 18, 2014
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN