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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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POLICY ADMINISTRATION SOLUTION, INC.,

Plaintiff, Index No. 652273/2014

- against -

QBE HOLDINGS, INC.,

Defendant.

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Hon. C. E. Ramos, J.S.C.:

Plaintiff Policy Administration Solutions, Inc. ("PAS") moves to vacate or modify the arbitration award entered by American Arbitration Association ("AAA") Arbitrator Peter Brown (the "Award"), pursuant to CPLR 7511(b)(1) and CPLR 7511(c)(2). Defendant QBE Holdings, INC. ("QBE") moves to confirm the Award, pursuant to CPLR 7514.

For the reasons set forth below, the Court vacates the Award pursuant to CPLR 7511(b)(1)(I) and denies QBE's motion to confirm the Award.

Background

In July 2014, PAS commenced an action for breach of contract against QBE in the New York State Supreme Court, New York County (Affirmation of Jaffe ["Jaffe Aff."], Ex. C). QBE moved to compel arbitration pursuant to an agreement between the parties (*id.* at ¶ 10). This Court granted QBE's motion to compel on December 15, 2014, and entered an order to that effect (NYSCEF Doc. No. 87).

In January 2015, PAS commenced an arbitration proceeding

before Arbitrator Brown at the AAA, claiming that QBE breached certain contracts for the provision of computer software and software maintenance services (*see* Jaffe Aff. at ¶ 11, Ex. D). QBE maintained that the agreements were not enforceable because they were not executed or contained inauthentic signature (*see id.* at Ex. E).

In June 2015, James Shea, the former Chief Financial Officer of QBE, and Eugene Fallon, a former QBE consultant, were named in a two-count federal indictment for committing wire fraud and conspiracy to commit wire fraud against QBE (*see id.* at Ex. I). The indictment alleged a scheme to defraud QBE by entering into sham contracts and sending fraudulent invoices for sham third-party vendor services (*see id.*). Mr. Shea and Mr. Fallon allegedly controlled bank accounts that received money transmitted by QBE in payment of the fraudulent invoices (*see id.*). Further, Mr. Shea allegedly forged signatures on contracts between QBE and entities controlled by Mr. Fallon, the sham third-party vendor (*see id.*).

On October 30, 2015, the Assistant United States Attorney prosecuting the criminal action against Mr. Shea and Mr. Fallon advised the presiding judge that Mr. Shea and Mr. Fallon had separately agreed to plead guilty to one criminal count to engage in wire fraud (*id.* at Ex. K). The parties also requested that the court cancel Mr. Shea's criminal trial and schedule a time to

take Mr. Shea' plea (*id.*). Samuel Braverman, Esq. is Mr. Shea's criminal counsel and also represented Mr. Shea in the arbitration proceeding (*id.* at ¶ 28).

Thereafter, arbitrator Brown conducted a four-day hearing from November 2 through 5, 2015 (*id.* at ¶ 20). During the arbitration hearing, QBE called Mr. Shea as a witness to challenge the authenticity of his signature on an agreement between PAS and QBE (*see id.* at Ex. H, pp. 942-59). QBE maintained that this agreement was not enforceable because Mr. Shea's signature was not authentic (*see id.*). On November 4, 2015, Mr. Shea was called to testify but repeatedly asserted his Fifth Amendment privilege(*id.* at Ex. H, pp. 960-62, 974-75). During cross-examination, he refused to testify about matters related to the indictment or concerning Mr. Fallon (*see id.* at Ex. H, p. 952). It is undisputed that at the hearing QBE never disclosed to Arbitrator Brown or PAS that Mr. Shea had reached a plea deal with federal prosecutors on October 30, 2015, three days prior to the hearing (*id.* at ¶ 24). In response to questions regarding to FBI's investigation over Mr. Shea, Arbitrator Brown properly stated "[e]veryone is presumed innocent until proved guilty" (*id.* at Ex. H, p. 191). On November 13, 2015, one week after the arbitration hearing, Mr. Shea formerly entered his guilty plea to one count of the indictment, pursuant to the plea agreement (*id.* at ¶ 31, Ex. L).

On February 2, 2016, QBE requested permission to submit additional material, (*see* Affirmation Of Foley ["Foley Aff."], Ex. R). PAS emailed Arbitrator Brown in response to QBE's request (*see id.*) and mentioned Mr. Shea and Mr. Foley's entry of guilty pleas. On the same day, by email, Arbitrator Brown denied QBE's application to make an additional post-hearing submission (*id.*). On March 29, 2016, Arbitrator Brown issued the Award, in which he denied all of PAS's claims and all of QBE's counterclaims, and ordered that PAS bear the cost of the related fees (Jaffe Aff., Ex. A). Mr. Shea's guilty plea was not mentioned in the Award (*see id.*).

Discussion

PAS moves to vacate the Award because of QBE's failure to disclose Mr. Shea's plea during the arbitration proceeding, which impacted the scope of questions Arbitration Brown permitted PAS to ask Mr. Shea, and constitutes fraud or misconduct in procuring the Award under CPLR 7511(b)(1)(i). Alternatively, PAS also moves to vacate or modify the Award pursuant to CPLR 7511(c)(2), because Arbitrator Brown entered the Award by determining an issue not submitted for arbitration, which concerned an unrelated confidential agreement.

QBE moves to confirm the Award, because the plea deal was relevant only to the arbitrator's assessment of witness credibility, QBE had no duty to disclose Mr. Shea's plea deal,

and the arbitrator did not make a determination outside the scope of his authority.

One issue is whether QBE's failure to inform Arbitrator Brown and PAS at the hearing that Mr. Shea had entered a plea agreement constituted fraud or misconduct in procuring the Award and prejudiced PAS's rights.

Courts may vacate an arbitration award pursuant to CPLR 7511(b)(1)(i), where there is "fraud or misconduct in procuring the award" that prejudices the rights of a party who participated in the arbitration. Furthermore, parties in an arbitration have the right to cross-examine witnesses (CPLR 7506[c]).

In an arbitration, the parties and their attorneys have an affirmative duty to provide the arbitrator with facts that enable the arbitrator to make an informed decision (*see Kalgren v Central Mut. Ins. Co.*, 68 AD2d 549, 552-553 [1st Dept 1979]). The facts needed to be disclosed are those, if credited, would likely produce a different result in an arbitration (*see e.g. Bevona v Supervised Cleaning & Maintenance Co.*, 160 AD2d 605, 606 [1st Dept 1990]).

The lack of candor may constitute misconduct under CPLR 7511(b)(1)(i)(*see Kalgren*, 68 AD2d at 553). In *Kalgren*, the claimant, a passenger in a car accident, filed for benefits under two insurance policies with two different insurers, Government Employees Insurance Company ("GEICO") and Central Mutual

Insurance Company ("Central") (*id.* at 550). The claimant commenced arbitration against Central following Central's disclaimer of coverage (*id.*). However, GEICO paid the claimant on her claim before the arbitration hearing against Central (*id.*). The claimant did not disclose to the arbitrator or Central that GEICO had made payment on her claim (*id.*).

The court stated that

> "[w]hile their lack of candor may fall short of outright fraud, it does constitute the type of misconduct that warrants further proceedings before the arbitrator. It is not the function of this court to conjecture as to what result the arbitrator could or would have reached has he known of the prior payment by GEICO. Suffice it to say that the arbitrator should have been apprised of GEICO's payment to [the claimant] before he was required to make an informed determination in this dispute" (*id.* at 553).

The court vacated the award on the ground that the failure of the party to inform the arbitrator of GEICO's payment constituted misconduct (*id.* at 553).

Here, QBE and its attorneys' failure to inform Arbitrator Brown and PAS of Mr. Shea's plea agreement constitutes misconduct under CPLR 7511(b)(1)(i). Notwithstanding the fact that the formal plea had not yet been entered, the failure to introduce evidence as to Mr. Shea's plea agreement clearly caused arbitrator Brown to limit the scope of questions he permitted PAS to ask Mr. Shea. This Court concludes that it is reasonable to assume that may have changed the result of the arbitration proceeding and clearly deprived PAS its right to examine Mr.

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Shea. For example, QBE maintained that at least one contract between the parties was not enforceable because Mr. Shea's signature on the contract was not authentic. During the hearing, it was presented that Mr. Shea was under federal indictment for committing wire fraud against QBE, his former employer, which included allegations that he forged QBE contracts in order to receive payments from QBE for sham third-party vendor services. On direct and cross-examination, Mr. Shea pled his Fifth Amendment right in refusing to answer most substantive questions and Arbitrator Brown articulated the presumption of innocence.

Mr. Braverman represented Mr. Shea in the criminal and QBE in the arbitration proceeding and neither the arbitrator nor PAS were informed by him of the plea agreement.

QBE and its attorneys had an affirmative duty to inform the arbitrator and PAS of Mr. Shea's plea agreement concerning a scheme to defraud QBE, in which Mr. Shea was accused of forging signatures on contracts between QBE and third-party vendors. Mr. Shea agreed to plead guilty to committing wire fraud against QBE before the arbitration hearing, and he testified in the arbitration hearing that he did not sign one of the disputed agreements between QBE and PAS. The issue of the authenticity of Mr. Shea's signature and purported forgery of the signature on the agreement was directly related to Arbitrator Brown's decision on whether the disputed contract was enforceable against QBE.

PAS's cross-examination of Mr. Shea might have produced additional information that may have resulted in a different award if the scope of questions that PAS was permitted to ask by PAS were not so limited. Moreover, as aforesaid, Arbitrator Brown presumed Mr. Shea was innocent during the arbitration hearing. PAS was also a third-party vendor of QBE.

PAS was denied a fair opportunity to develop its argument on issues such as who might have forged the signature on the contracts and whether Mr. Shea had any incentive to forge the signature of the disputed agreement. Therefore, QBE's lack of candor constitutes misconduct in procuring the award under CPLR 7511(b)(1)(i), that warrants remanding this matter back to the arbitrator.

Accordingly, it is hereby

ORDERED that the motion to vacate arbitration award is granted, and the matter remanded to Arbitrator Brown for further proceedings.

DATED: October 21, 2016

ENTER:

J.S.C.

CHARLES E. RAMOS