SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James E. d'Auguste** **PART 55**

Justice

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CBM TELECOMMUNICATIONS INC.,

Plaintiff,

- v -

PARKSIDE UTILITY CONSTRUCTION LLC,

Defendant.

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INDEX NO. 651662/2023

MOTION DATE 09/25/2024, 12/11/2024, 12/30/2024, 07/17/2025

MOTION SEQ. NO. 002 003 004 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 65, 68, 106, 110

were read on this motion to/for HEARING.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 65, 68, 106, 110

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 61, 63, 66, 69, 107, 111

were read on this motion to/for DEFAULT JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 62, 67, 70, 108, 112

were read on this motion to/for EXTEND - TIME.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 62, 67, 70, 108, 112

were read on this motion to/for LEAVE TO FILE.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 102, 103, 109, 113, 114

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

BACKGROUND

I. The Motions

On the return date of Motion Sequences 002, 003, 004, and 006 (the "Motions"), Special Master Andrew J. Lorin, Esq., heard arguments from counsel regarding the Motions. The parties agreed that Motion Sequence 002 (relating to a motion to quash subpoenas) had been mooted. The parties also concurred that the outcomes of Motion Sequences 003 and 004 (relating to motions for a default judgment and for permission to file an answer, respectively) are dependent on the Court's decision regarding Motion Sequence 006. Accordingly, Motion Sequence 006 was the focus of the parties' oral arguments, which were skillfully presented by all counsel. Now, based upon the recommendation of Special Master Lorin, and this Court's independent review of the record, the Court hereby enters the following determination.

II. The Underlying Contracts

In 2020, Frontier Communications ("Frontier") entered into an agreement (the "Frontier Agreement") with defendant Parkside Utility Construction LLC ("Parkside") to perform fiberoptic cab

le installation work in Connecticut and New York (the "Work"). NYSCEF Doc. No. 76. In connection with the Work, Parkside hired 12 subcontractors, including entering into two contracts (*viz*., the "Connecticut Contract" and "New York Contract") with Plaintiff CBM Telecommunications, Inc. ("CBM"). *Id*. Doc. Nos. 5; 6; 73 at 2. The Connecticut Contract included several provisions detailing CBM's performance obligations as well indemnity provisions requiring CBM to indemnify Parkside for losses or penalties caused by CBM's failure to comply with applicable law. *Id*. Doc. No. 5. The New York Contract allowed Parkside to

offset amounts owed to CBM thereunder against amounts owed by CBM to Parkside under the Connecticut Agreement. *Id.* Doc. No. 6 § 13(f).

III. Performance of Deficient Work and Assessment of the PURA Penalty

CBM performed work under the Connecticut Agreement from March 2021 through August 2022. *Id*. Doc. No. 73 at 3. In October 2021, Parkside provided the State of Connecticut's Public Utilities Regulatory Authority ("PURA") with assurances that its subcontractors would not use existing conduits to install Frontier's fiber optic cable. *Id*. Doc. No. 73 at 6. However, in February 2022, PURA discovered a specific instance in which Parkside continued this practice in November 2021. *Id*. PURA also found other violations in July 2022 at two locations, suggesting that Parkside and/or its subcontractors had attempted to deceive PURA by placing false empty conduits in trenches. *Id.* at 6-7.

On July 27, 2022, PURA issued to Frontier a Notice of Violation and Assessment of Civil Penalty, Order to Cease and Desist (the "PURA Notice"), pursuant to which PURA assessed a $5,000,000 penalty (the "Penalty") against Frontier. *Id*. at 7-8. PURA found that the conduct of Frontier and its contractors "have systematically failed to comply with applicable laws and, in doing so, have jeopardized the public safety" (*id.* at 4) and that there was "reason to believe that Frontier, directly and through its contractors, is responsible for several hundred violations …." *Id*. at 8.

Frontier did not challenge the Penalty and paid it on August 24, 2022. *Id*. at 3.

IV. Demands for Indemnification and Payment of Unpaid Invoices

On September 1, 2022, Frontier demanded that Parkside indemnify it pursuant to Section 17 of the Frontier Agreement. NYSCEF Doc. No. 95 at 10. Two weeks later, Parkside's parent company, Dycom Industries, paid Frontier $5 million. *Id.* at 8. In turn, Parkside, apportioning

the penalty among the subcontractors, demanded partial indemnification from CBM, pursuant to the indemnification provisions in the Connecticut Contract. Doc. No. 73 at 3. Specifically, Parkside sought from CBM $2,307,692 of the $5 million PURA penalty, minus the retainage of $356,885.86 for unpaid invoices submitted by CBM, for a total amount of $1,970,806.45. *Id.*

V. Commencement of this Action

CBM commenced this action against Parkside seeking relief under the New York Contract and the Connecticut Contract. NYSCEF Doc. No. 1. Parkside moved to compel arbitration of all claims. NYSCEF Doc. No. 6. On December 21, 2023, the Court compelled arbitration (the "Arbitration") under the arbitration provision in the New York Contract but maintained jurisdiction over CBM's claims for breach of the Connecticut contract between the parties. NYSCEF Doc. No. 18.

VI. The Arbitration

The Arbitration was a substantial proceeding under the auspices of a well-known arbitral forum, the American Arbitration Association. The arbitrator, Dennis C. Cavanaugh (the "Arbitrator"), considered the parties' pre-hearing briefs and Joint Stipulation of Facts and presided over a four-day evidentiary hearing that presented the live testimony of five witnesses and the admission into evidence of 82 exhibits. *Id.* Doc. No. 73. After the hearing, the Arbitrator reviewed the parties' post-hearing briefs and thereafter issued the Partial Final Award of Arbitrator on April 17, 2025 (*id.*) and the Final Award of Arbitrator on June 23, 2025 (NYSCEF Doc. No. 74) (collectively, the "Award").

At the commencement of the arbitration, the parties' counsel agreed as follows regarding the scope of the arbitration:

> [B]oth sides are presenting their claims and defenses with respect to whether or not the contractual indemnification under the Connecticut contract applies. Both

> sides are submitting their claims and defenses as to whether or not CBM breached the Connecticut contract. Both sides are presenting their claims and defenses as to whether or not Parkside is entitled to damages as a result of the contractual indemnification for breach of contract and asking the Arbitrator to determine what that amount is. Both sides are submitting claims and defenses as to what is owed by Parkside, if anything, under the New York Contract….

NYSCEF No. 73 at 2. Based upon, *inter alia*, these statements by counsel, the Arbitrator found that:

> The Parties acknowledge that a civil action is pending in N.Y. Supreme Court entitled, *CBM Telecommunications Inc. v. Parkside Utility Construction LLC*, Index No. 651662/2023 regarding the CT Contract and consent to go forward with and agree to participate in this arbitration and submit to this arbitration the disputes related to the amounts claimed by [Parkside] to be owed under the Connecticut Contract as well as amounts claimed by [CBM] under the New York Contract.

Id. at 2-3. Accordingly, although the Court maintained jurisdiction to adjudicate CBM's claims under the Connecticut Contract (NYSCEF Doc. No. 18), the parties agreed to submit those claims to arbitration.

After the evidentiary hearing, the Arbitrator rendered a nine-page Award which found that "[t]he preponderance of the expert testimony and credible fact testimony and documentary evidence shows that [CBM] failed to perform its full scope of work in accordance with … the CT Contract and the Frontier Agreement as incorporated into the CT Contract and in accordance with industry standards and regulatory laws." *Id.* at 5. Specifically, the Arbitrator concluded that:

> CBM damaged certain utility property, failed to expose other utility lines before performing a road crossing, installed fiberoptic cable in electrical conduit creating a public safety hazard and, in many cases, failed to report the incidents to the utilities involved and/or Parkside.

Id. Moreover, CBM's witnesses "acknowledged on cross-examination that when installing fiberoptic cable, an installer of fiberoptic cable is not supposed to use existing electrical conduit.

Id. at 5-6. While CBM asserted at the Arbitration that Parkside instructed CBM to use existing electrical conduits, the Arbitrator found that "CBM failed to establish by credible evidence the existence … of such a work direction." *Id.* at 6 n.1.

The Arbitrator concluded that the $5 million Penalty was "based on there being several hundred violations" of state regulations in the Work performed by Parkside's subcontractors. *Id*. The Arbitrator further found that Parkside was "legally obligat[ed]" to make the $5 million payment to Frontier and that "the evidence does not support a finding that the payment to Frontier for the PURA fine was voluntary." *Id*. at 6. And although CBM argued that it did not have an opportunity to appeal the Penalty, the Arbitrator rejected argument: "Based on the testimony and Parkside Ex. 20, 30, 31 … I find that CBM had an opportunity to appeal to PURA but did not do so." *Id.* at 6 n.2.

With respect to CBM's claims for breach of contract, the Arbitrator found that "[t]he testimony and documentary evidence confirm a billed but unpaid amount of" $242,622.22 under the New York Contract, and $117,916.60 under the Connecticut Contract, for a total "aggregate outstanding billing" amount of $356,885.86. *Id*. at 5.

While the Arbitrator found that "Parkside has established CBM's liability for breach of contract and contractual indemnity damages" (*id*. at 7), the Arbitrator disagreed with Parkside's calculation of damages. Instead, the Arbitrator based the damages awarded to Parkside upon the "actual, fair, and reasonable damages suffered by Parkside as a consequence of CBM's breaches of contract, including CBM's obligation to indemnify Parkside related to the PURA penalty/fine …." *Id*. at 8. The Arbitrator concluded that these consequential damages for CBM's breaches of the Connecticut Contract amounted to $375,000. It then subtracted the amount of $117,916.60 being withheld by Parkside under the Connecticut Contract for a net amount of $257,083.40. *Id*.

at 8. Pursuant to Section 13(f) of the New York Contract (*i.e.*, the offset provision), the Arbitrator awarded Parkside "an offset of the sum of $257,083.40 against the sum of $242,622.22 due [CBM] under the New York Contract, therefore the net Award to [Parkside] is $14,461.18, representing the excess damages after the offset." *Id.*

Lastly in this regard, pursuant to the Final Award, the Arbitrator concluded:

> In the NY Contract, there appears to be some conflict regarding CBM's entitlement to attorney's fees in the event of a breach by Parkside. Compare §§ 18 and 28. As to Parkside, however, the NY Contract is clear. I am required to award Parkside reasonable attorney's fees if I determine that Parkside was the prevailing party. Additionally, Section 2(i) of the CT Contract, provides for an award of attorney's fees for fines or penalties that may be incurred by Parkside due to CBM's failure to comply with provisions of law. For all the reasons set forth in my Partial Final Award, I find Parkside to be the prevailing party under the NY Contract and that CBM is obligated to indemnify Parkside for reasonable attorney's fees due to its failure to comply with the applicable law governing the CT Contract.

NYSCEF Doc. No. 74 at 1. Accordingly, the Arbitrator awarded Parkside attorney's fees in the sum of $182,653.57. *Id.* at 2. Thus, taken together, pursuant to the Award and Final Award, Parkside was awarded a total judgment in the amount of $197,114.75.

ANALYSIS

I. Applicable Standard

"Judicial review of arbitration awards is extremely limited." *Matter of CEO Bus. Brokers, Inc. v. 1431 Utica Ave. Corp.*, 187 A.D.3d 1185 (2d Dep't 2020). "A party seeking to overturn an arbitration award bears a heavy burden and must establish a ground for vacatur by clear and convincing evidence." *J-K Apparel Sales Co., Inc. v. Esposito*, 189 A.D.3d 1045, 1046 (2d Dep't 2020). "An award rendered after an arbitration conducted pursuant to the terms of a contract may only be vacated on the grounds set forth in CPLR 7511." *Matter of Atlantic Purch., Inc. v. Airport Props. II, LLC*, 77 A.D.3d 824, 825 (2d Dep't 2010). "When a party

participates in an arbitration, under CPLR 7511, the award may be vacated only if (1) the rights of the party were prejudiced by corruption, fraud or misconduct in procuring the award, or by the partiality of the arbitrator; (2) the arbitrator exceeded his or her power or failed to make a final and definite award; or (3) the arbitration suffered from an unwaived procedural defect." *Piller v. Eisner*, 173 A.D.3d 1035, 1036 (2d Dep't 2019).

"An arbitration award may be vacated on the ground that the arbitrator exceeded his or her power where the award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *CEO Bus. Brokers*, 187 A.D.3d at 1186 (internal quotes omitted). "An award is irrational only where there is no proof whatever to justify the award." *J-K Apparel*, 189 A.D.3d at 1046.

"Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the rule of overseers to conform the award to their sense of justice." *Douglas Elliman*, 220 A.D.3d at 947 (collecting authority).

II. CBM Has Failed to Establish That the Award Was Irrational

CBM's first argument to vacate the Award is that it was irrational for the Arbitrator to decide that Parkside was legally obligated to reimburse Frontier the $5 million Penalty, which reimbursement, CBM argues, was therefore voluntary. The Court disagrees.

As an initial matter, CBM has not argued that there was any sort of collusion between Frontier and Parkside intended to shift liability for the Penalty from Frontier to Parkside's subcontractors through their various indemnification obligations to Parkside. Indeed, Parkside

paid the $5 million to Frontier even though there was no certainty or even likelihood that it would be indemnified therefor by its subcontractors. And at oral argument it was revealed that Parkside has neither sought nor received indemnification from the other 11 subcontractors. In other words, although CBM has argued that Parkside's indemnification of Frontier in the sum of $5 million was "voluntary," there was a strong financial incentive for Parkside to *resist* indemnification if it believed it had legitimate grounds to do so.

Nor is there anything particularly odd or "irrational" about a contractor paying a state-imposed penalty without contest, let alone a penalty supported by a state entity's factual findings of deficient, noncompliant, and hazardous construction work. NYSCEF Doc. No. 75. In fact, CBM's work was held to be deficient not only by PURA but also by the Arbitrator, who weighed both fact and expert testimony and documentary evidence and found, as noted, that CBM "failed to perform its full scope of work in accordance with … the CT Contract and the Frontier Agreement as incorporated into the CT Contract and in accordance with industry standards and regulatory laws." NYSCEF Doc. No. 73 at 5. The Arbitrator found that "CBM damaged certain utility property, failed to expose other utility lines before performing a road crossing, installed fiberoptic cable in electrical conduit creating a public safety hazard and, in many cases, failed to report the incidents to the utilities involved and/or Parkside." *Id.*

Given the strong evidence of noncompliant and hazardous work by its own subcontractors, Parkside obviously had a good faith basis for believing that it did not have sufficient grounds to mount a good faith defense against the imposition of the Penalty and its liability therefor.

CBM further argues that the Award is irrational because it found that Parkside was liable to Frontier for breach of contract, not indemnification, and that "[t]he parties did not present this

legal or factual issue to the Arbitrator." However, the issues of indemnification and breach of contract are intertwined. Indeed, the parties framed the issue as whether Parkside's $5 million payment to Frontier was "voluntary," which would encompass an arbitral exploration of whether the payment was a bona fide legal obligation regardless of whether the obligation arose from breach of an indemnification covenant (if it remained unpaid), a performance covenant, or any other material contractual covenant. Far from taking CBM by surprise, CBM presented its "voluntary" argument multiple times throughout the Arbitration. *E.g.*, NYSCEF Nos. 85 at 2; 90 at 11-13.

Having considered CBM's "voluntary" argument, the Arbitrator rejected it:

> CBM argues that Parkside was not contractually obligated to reimburse Frontier for the PURA fine because Frontier and/or Parkside failed to satisfy certain conditions precedent contained in the indemnification provisions of Section 17 of the Frontier prime contract. However, this argument fails to recognize that the acts and omissions resulting in the PURA fine … amounted to a general breach of the clear and unambiguous performance obligations in the Frontier prime contract … thus, legally obligating Parkside to make Frontier whole as a consequence of breach of contract. *See Semac Electric Company, Inc. v. Skanska USA Building, Inc.*, 195 Conn. App. 695 (2020); *Hees v. Burke Const., Inc.*, 290 Conn. 1 (2009). Therefore, the evidence does not support a finding that the payment to Frontier for the PURA fine was voluntary.

NYSCEF Doc. No. 73 at 6. And to the extent that Arbitrator was implicitly ruling that, to be considered "involuntary" Parkside was required to litigate the issue with Frontier until judgment, even if Parkside did not believe in the merits of the litigation, the Court would not consider that implicit ruling irrational.

Regarding CBM's argument that Parkside's breach of contract liability to Frontier "would also have to fall under § 17(b)" of the Frontier Contract, the Court is "bound by an arbitrator's … interpretation of the contract …." *Douglas Elliman*, 220 A.D.3d at 947. Nonetheless, the Court does not find the Arbitrator's interpretations of §§ 17(b) and 17(d)

irrational. Indeed, even if the Court were permitted to substitute its judgment for the Arbitrator's, the Court would tend to agree with the Arbitrator that those contractual provisions would not preclude Parkside from recovering a portion of the Penalty from CBM.

In sum, although CBM, in its efforts to vacate the Award, has focused on the trees, at the forest level the pertinent issues are not difficult. The Arbitrator, like PURA, found that CBM performed noncompliant and substandard work that was part of the overall noncompliant and substandard work that caused Parkside to breach its contract with Frontier and caused PURA to impose the $5 million Penalty on Frontier. CBM has failed to demonstrate – let alone by clear and convincing evidence – that it was irrational for the Arbitrator to hold that CBM should be held responsible for the portion of the Penalty attributable to its deficient work.

Regarding that portion of the Penalty, CBM contends that the Award's allocation of the Penalty to CBM was irrational. The Court disagrees. The Arbitrator noted that the PURA Notice premised its $5 million fine "on there being several hundred violations." NYSCEF Doc. No. 73 at 7. The Arbitrator found that "CBM owns between 20-25 of the documented incidents/violations." *Id*. at 8. The Arbitrator held:

> It is fair and reasonable to conclude that the $5MM penalty for several hundred violations amounted to a penalty of no more than $16,666,67.00 per violation. Based on the regulatory provisions cited by the parties and the parties' contract language, I find that the actual, fair, and reasonable amount of damages suffered by Parkside as a consequence of CBM's breaches of contract, including CBM's obligation to indemnify Parkside related to the PURA penalty/fine, is $375,000.00 less the amount of $117,916.60 being withheld by Parkside under the CT Contract or a total of $257,083.40.

Id. Pursuant to the offset provision of the New York Contract, the Arbitrator awarded to Parkside a net award of $14,461.18, representing the excess damages after the offset of what CBM owed Parkside under the Connecticut Contract ($257,083.40) versus what Parkside owed CBM under the New York Contract ($242,622.22). *Id*.

Allocation of liability typically involves some element of estimation. The Court does not find it irrational (or even particularly unfair) that Arbitrator understood the term "several hundred" violations to equate to 300 violations, such that the $5 million Penalty could be allocated to 300 violations at $16,666.67 per violation. Indeed, the Arbitrator could have rationally interpreted the term "several hundred" violations to equate to 200 violations, in which case CBM would have been required to reimburse Parkside at the far higher rate of $25,000 per violation.

Lastly, CBM argues that the Arbitrator acted irrationally when it found that Parkside had prevailed in the arbitration and thus was entitled to $182,653 in reasonable attorneys' fees. In this regard, CBM argues that it, not Parkside, prevailed because "CBM prevailed on 100% of its counterclaims and prevailed on at least 85% of Parkside's claims," noting that "Parkside was awarded $375,000.00, which was 16.25% of the indemnity amount it sought, when using the $2,307,692.31." NYSCEF Doc. No. 114 at 10.

It is true that some aspects of the Award are fairly favorable to CBM. Nonetheless, given that CBM sought to avoid paying for *any* share of the Penalty, the Arbitrator's imposition of $375,000 for that liability certainly rationally supports a finding that Parkside prevailed in the Arbitration. Moreover, CBM's arguments that the Award actually favored CBM (as well the Arbitrator's reduction of Parkside's $273,980 attorneys' fee request by about one-third, *inter alia*, because of "certain vague billing entries, and [] billing not related to this arbitration" (NYSCEF Doc. No. 74)), undermines any conception that the Award was irrationally unfavorable towards CBM and thus ultimately supports the Court's decision to uphold the Award.

The Court has considered the other arguments of CBM and finds that they do not establish a basis under CPLR 7511 to vacate the Award.

Accordingly, for the foregoing reasons, it is hereby

ORDERED Motion Sequence 006 is denied and that Motion Sequences 002, 003, and 004 are denied as moot.[1]

1/12/2026
DATE

James d'Auguste, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[1] The Court appreciates the invaluable assistance of Special Master Andrew J. Lorin, Esq., in connection with this matter.