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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES DICKEY, INC.,

Plaintiff,

v.

ALTERRA AMERICA INSURANCE COMPANY; and DOES 1 through 20, inclusive,

Defendants.

Case No. 5:15-cv-00963-ODW (DTB)

ORDER DENYING PLAINTIFF'S MOTION TO VACATE APPRAISAL [58]

I. INTRODUCTION

Before the Court is Plaintiff James Dickey, Inc.'s motion to vacate a November 18, 2016 appraisal award in the amount of $27,237.28. (ECF No. 58.) For the following reasons, the Court **DENIES** Plaintiff's motion.[1]

II. FACTUAL BACKGROUND

Two years into this case, the parties are well aware of the facts. Plaintiff purchased an inland marine insurance policy from Defendant Alterra Insurance Company with an effective date of October 1, 2013. (First Am. Compl. ("FAC") ¶ 8, ECF No. 30.) On April 4, 2014, certain Snap-On brand tools covered under the policy were stolen. (FAC ¶¶ 9, 11.) The parties were subsequently unable to agree on the

[1] After considering the papers submitted by the parties, the Court deemed this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

value of the stolen tools, and thus Defendant moved to compel an appraisal under the policy. (*See* Mot., ECF No. 32; Policy 12, ECF No. 16-5.) The Court granted Defendant's motion after Plaintiff failed to timely oppose it. (Order 2, ECF No. 35.)

The appraisal provision in the relevant policy calls for each party to nominate an appraiser and then for the appraisers to agree on an "impartial umpire." (Policy 12.) At that point, the two appraisers each render their appraisal. (*Id.*) If the appraisers' proposed awards do not match, the umpire steps in. (*Id.*) When the umpire and one of the parties' appraisers agree on an award in writing, the award becomes final. (*Id.*)

Plaintiff nominated Eugene Twarowski as its appraiser and Defendant nominated David Smith. (Smith Decl. ¶¶ 2–3, ECF No. 62-12; McCarthy Decl. ¶ 2, ECF No. 62-13.) Sometime in mid-July, the parties' appraisers agreed that Bo McCarthy would serve as umpire. (Smith Decl. ¶ 5.) On September 12, 2016, McCarthy provided the parties with a disclosure statement indicating that he had worked with Twarowski on an appraisal approximately five years prior; Twarowski had served as the public adjuster[2] and he (McCarthy) had served as "[a]ppraiser for the [i]nsurance company." (McCarthy Decl. ¶¶ 3–5; Twarowski Decl., Ex. B, ECF No. 58-1.)

On October 20, 2016, the appraisers formally recognized that McCarthy's services would be necessary after they conferred and could not reach an agreement on the value of the tools. (Smith Decl. ¶ 9.) On November 7, 2016, the appraisers held a conference call with McCarthy during which McCarthy proposed that they set up an in-person meeting to review the record and further discuss the contested issues. (Smith Decl. ¶ 10.) Later that night, Twarowski sent an email to Smith and McCarthy suggesting dates for the meeting and making them aware that he might bring a witness. (Twarowoski Decl., Ex. D.) In response, McCarthy sent an email to both

[2] McCarthy actually wrote that Twarowski was the "Owner's Appraiser" but later noted that this was incorrect—Twarowski was the public adjuster. (McCarthy Decl. ¶ 5.)

parties' appraisers indicating that he would expect them to "put on witnesses or bring any documents that strengthen [their] position" to the meeting. (*Id.*)

On November 14, 2016, Defendant's attorney wrote a letter to Twarowski, Smith, McCarthy, and Plaintiff's attorney requesting that Plaintiff identify any witness it intended to bring to the meeting and provide a "detailed explanation" of what topics the witness intended to discuss. (Twarowski Decl., Ex. F.) On November 15, 2016, Twarowski wrote an email to Smith, McCarthy, and Defendant's attorney indicating that he would not be bringing any witness to the meeting. (Twarowski Email, ECF No. 62-5 ("I am not calling any witness to testify at the panel meeting.").)

On November 17, 2016, the appraisers and McCarthy met to discuss the competing appraisals. (McCarthy Decl. ¶ 7.) Both sides presented their positions: Defendant's appraiser argued that depreciation should be applied to the tools and Plaintiff's appraiser argued that depreciation should not be applied to the tools. (*Id.*) McCarthy agreed with Defendant's appraiser that some measure of depreciation should be applied to the tools. (*Id.* ¶ 8.) At that point, Plaintiff's appraiser requested the meeting be "adjourned so that he could have more time to gather additional evidence" about "how Snap On prices had risen year over year." (Twarowski Decl. ¶ 11.) McCarthy denied Twarowski's request for what amounted to a continuance, informing Twarowski that the meeting would not be adjourned and that the appraisal would be completed "that day." (McCarthy Decl. ¶ 9.) Taking into account the tools' allegedly excellent condition, McCarthy determined that they should be depreciated at a rate of two percent per year, for a total of 14 percent depreciation. (*Id.* ¶ 8.) Accordingly, he reduced the total value of the tools by 14 percent for a final award of $27,237.28. (Award, ECF No. 62-8.)

On November 18, 2016, McCarthy and Smith signed an "Appraisal of Insurance Claim Award Form" finalizing the $27,237.28 award. (*Id.*) Plaintiff provided Defendant with a copy of the finalized award on November 28, 2016, via

email. (*Id.*) Defendant satisfied the award in full on December 7, 2016. (Hellenkamp Decl. ¶ 16, ECF No. 62-14.)

On June 2, 2017, Plaintiff filed a motion to vacate the appraisal award. (Mot., ECF No. 58.) Plaintiff asserts that McCarthy failed to disclose his previous relationship with the law firm Morris, Polich, and Purdy LLP ("MPP") that represents Defendant in this matter. (*Id.* at 4.) Plaintiff asserts that this relationship biased McCarthy, causing him to disallow the presentation of its witness and to deny its request for a continuance. (Mot. 5–6; Reply 3, ECF No. 63.) To support this claim, Plaintiff submits a declaration from Twarowski indicating that, "During discussions of the panel on November 17, 2016, umpire Bo McCarthy acknowledged in my presence that he had in the past done work for the Morris Polich firm . . . . Bo McCarthy had not previously disclosed his relationship with the Morris Polich firm." (*See* Twarowski Decl. ¶ 10.)

The "work" Twarowski references is a 2010 appraisal between "Dr. and Mrs. Kramer" and Allstate Insurance Company ("the Kramer appraisal"). (Henry Decl. ¶ 2, ECF No. 58-2.) In that appraisal, McCarthy served as Allstate's appraiser, Stephen Huchting—who at that time worked for MPP—served as counsel for Allstate, and Twarowski served as the public adjuster.[3] (*Id.* ¶ 3; McCarthy Decl. ¶ 5.) As noted above, McCarthy disclosed the fact that he worked on this case with Twarowski; however, he did not disclose MPP's involvement in the case.

III. DISCUSSION

A. Whether California Law or the Federal Arbitration Act Governs

As an initial matter, the parties dispute whether California law or the Federal Arbitration Act ("FAA") governs this motion. Plaintiff asserts that California law governs, while Defendant asserts that the FAA governs. (Opp'n 9, ECF No. 62; Reply 2.) Defendant is correct that the FAA governs this motion.

[3] Huchting left MPP at the end of 2015, well before the appraisal process got underway. (Hellenkamp Decl. ¶ 19.)

Generally, the FAA governs where the relevant arbitration clause arises in a contract involving interstate commerce. 9 U.S.C. §§ 1, 2; *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013). Insurance policies, like the one at issue here, involve interstate commerce. *Sir Taj Hotel, LLC v. Essex Ins. Co.*, No. LACV1307519JAKPJWX, 2016 WL 6645793, at *3 (C.D. Cal. Feb. 3, 2016) (collecting cases). Therefore, the only remaining question is whether the policy's appraisal clause constitutes an arbitration clause as defined by the FAA.

Thirty years ago, in *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987), the Ninth Circuit addressed the issue whether appraisals should be considered arbitrations and thus be subject to the FAA. There, the court indicated that the correct procedure for making such a determination is to examine the relevant state law, which in that case was (and in this case is) California law, to determine whether appraisals are the functional equivalent of arbitrations. *See A-1 A-Lectrician, Inc. v. Commonwealth Reit*, 943 F. Supp. 2d 1073, 1078 (D. Haw. 2013) (citing *Wasyl*, 813 F.2d at 1582). The court concluded that under California law, appraisal is the functional equivalent of arbitration. 813 F.2d at 1582. The court's reasoning was surprisingly simple: the definition of an arbitration "agreement" under California Code of Civil Procedure section 1280 expressly includes "appraisals and similar proceedings." *Id.* Having concluded that appraisals and arbitrations are functionally equivalent under California law, the court applied the FAA to analyze the appraisal at issue. *Id.*

Wasyl remains good law in this circuit. *A-1 A-Lectrician*, 943 F. Supp. 2d at 1079 n.2; *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n as Tr. for Trust No. 1*, 218 F.3d 1085, 1089 (9th Cir. 2000) (applying *Wasyl*). Further, at least one court in this district recently applied the FAA to adjudicate a motion to vacate appraisal. *See Sir Taj*, 2016 WL 6645793, at *5. As such, the Court applies the FAA.

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B. Whether the Motion is Timely

Defendant argues that Plaintiff's motion is untimely under § 12 of the FAA, 9 U.S.C. § 12. Section 12 provides, in relevant part, that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." In this case, the award was delivered by email on November 28, 2016. Therefore, any motion to vacate the award was due on or before February 28, 2017. Plaintiff submitted the instant motion on June 2, 2016, more than three months after the statutory deadline. As such, Plaintiff's motion is untimely and must be denied unless one or more tolling principle applies.

The Ninth Circuit recently held that tolling principles apply to § 12 of the FAA. *Move, Inc. v. Citigroup Glob. Markets, Inc.*, 840 F.3d 1152, 1156 (9th Cir. 2016). However, tolling is not warranted here. First, Plaintiff has not presented any evidence suggesting that he was prevented by inequitable circumstances from filing before the statutory deadline. Second, Plaintiff's appraiser, Twarowski, clearly and unequivocally indicates in his declaration that he discovered McCarthy's nondisclosure at the parties' November 17, 2016 meeting, months before the statutory deadline. (Twarowski Decl. ¶ 11.) In sum, the Court finds that tolling principles do not apply to this case and that Plaintiff, a represented and sophisticated party, should not be allowed to avoid the statutory deadline imposed by § 12 of the FAA. Accordingly, Plaintiff's motion is time barred.[4]

[4] The result would be the same under California law. In California, motions to vacate an appraisal must be filed within "100 days after the date of service of a signed copy of the award upon the petitioning party." *See* Cal. Code Civ. Pro. §§ 1280, 1288; *see also Louise Gardens of Encino Homeowners' Ass'n, Inc. v. Truck Ins. Exch., Inc.*, 82 Cal. App. 4th 648, 661 (2000) (affirming the trial court's decision denying a motion to vacate appraisal filed after the § 1288 deadline). Applying California's 100-day rule, Plaintiff's motion was due on March 8, 2017, still some three months before Plaintiff's June 2, 2017 filing. It is also worth noting that McCarthy would not have been required to disclose his prior dealings with MPP under California law. Disclosure is required only where the award in the previous case was "rendered within five years prior to the date of the proposed nomination or appointment [of the appraiser/arbitrator]." *See* Cal. Civ. Pro. § 1281.9. The Kramer appraisal concluded on June 13, 2011, when "the award was rendered," and McCarthy was not nominated or appointed in this matter until at least July 2016, over five years later. (Henry Decl. ¶ 4; Smith Decl. ¶ 5.)

C. Plaintiff's Motion Fails to Allege a Ground For Vacatur Under 9 U.S.C. § 10(a)

Beyond denying Plaintiff's motion as untimely, the Court would alternatively deny Plaintiff's motion because it does not sufficiently allege a ground for vacatur under 9 U.S.C. § 10(a). Section 10 provides four grounds for vacatur: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. Of the four grounds, only grounds two and three appear to be implicated here.

To establish "evident partiality," the party moving to vacate must put forth "specific facts" showing that the appraiser "failed to disclose to the parties information that creates a reasonable impression of bias" or, in the alternative, that the appraiser was actually biased against it. *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 645–46 (9th Cir. 2010); *see also Carlini Enters., Inc. v. Paul Yaffe Design, Inc.*, No. 813CV01671ODWRNBX, 2016 WL 4374940, at *3 (C.D. Cal. Aug. 12, 2016).

Plaintiff alleges facts going to both theories of "evident partiality." The Court first examines Plaintiff's claim as one involving non-disclosure. As both parties more or less acknowledge, McCarthy failed to adequately disclose his previous work with MPP before the panel's November 17, 2016 meeting. Courts have recognized that an appraiser/arbitrator's previous work for one of the parties "may" provide the "impression of bias" required to vacate an award. Nonetheless, courts have generally vacated awards based on "an impression of bias" only where the previous work was

substantial, ongoing, and for one of the parties. In other words, not the circumstances present here, where the previous work involved a single appraisal five years ago for the party's law firm. *See, e.g*, *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146, 149 (1968) (determining that the "evident partiality standard" was satisfied where a neutral arbitrator in a dispute between a contractor and subcontractor failed to disclose that he had past dealings with the contractor over a period of four or five years); *Schmitz v. Zilveti*, 20 F.3d 1043, 1044, 1049 (9th Cir. 1994) (vacating an award based on "evident partiality" where the arbitrator's law firm had represented the parent company of a party "in at least nineteen cases during a period of 35 years[,] the most recent representation end[ing] approximately 21 months before [the] arbitration was submitted"). The Court finds that the connection alleged is too distant, too attenuated, and too insubstantial to create the necessary "impression of bias." *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) ("courts have rejected claims of evident partiality based on long past, attenuated, or insubstantial connections between a party and an arbitrator").

Plaintiff also alleges that McCarthy showed actual bias in his decisions to disallow the testimony of its witness and to deny its requested continuance.[5] To begin, the evidence is clear that Plaintiff voluntarily withdrew its witness on November 15, 2016, in advance of the panel's meeting. (Twarowski Email, ECF No. 62-5.) Plaintiff has not pointed to any evidence suggesting that McCarthy kept the witness from testifying, or did so with an improper motive. *See U.S. Life Ins. Co. v. Superior Nat. Ins. Co.*, 591 F.3d 1167, 1175 (9th Cir. 2010) (noting that appraisers/arbitrators have "wide discretion" to "exclude evidence, how and when they see fit"); *United Paperworkers Int'l Union, AFL–CIO v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (explaining that an appraiser/arbitrator's refusal to hear evidence must

[5] Due to the nature of the alleged bias, the Court need not separately analyze the other possible ground for vacatur, 9 U.S.C. § 10(a)(3).

be the result of "bad faith or be so gross as to amount to affirmative misconduct" to warrant vacatur).

Plaintiff next alleges that McCarthy showed actual bias when he denied Plaintiff a continuance. At the time of the November 17, 2016 meeting, the parties had already been litigating this case, based almost entirely on the value of the stolen tools, for well over a year. As such, Plaintiff had ample time before the meeting to gather any and all information relating to the tools' value. Furthermore, Twarowski's declaration makes clear that he knew ahead of time that depreciation would be discussed at the meeting. (Twarowski Decl. ¶ 6 ("The appraisal panel had a telephonic conference wherein the umpire requested that the appraisers meet with the umpire 'in person' to discuss the issues *relative to depreciation*." (emphasis added)). In light of these facts, the Court finds that McCarthy's decision to deny the continuance was reasonable and does not amount to bias. *See Fordjour v. Washington Mut. Bank*, No. C 07-1446 MMC(PR), 2010 WL 2529093, at *5 (N.D. Cal. June 18, 2010) ("The expeditious resolution of disputes requires that arbitrators be provided with broad discretion and great deference in their determinations of procedural adjournment requests." (citing *Bisoff v. King*, 154 F. Supp. 2d 630, 637 (S.D.N.Y. 2001))); *see also id.* ("if there exists a reasonable basis for the arbitrator's considered decision not to grant a postponement, no misconduct will be found" (citing *El–Dorado School Dist. # 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 848 (8th Cir. 2001))). Therefore, the Court finds that Plaintiff's motion must alternatively be denied because it fails to adequately allege a ground for vacatur under 9 U.S.C. § 10(a).

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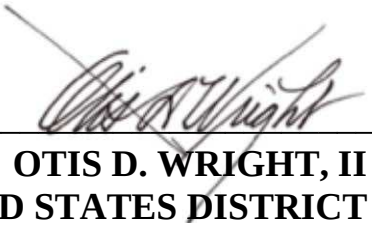
IV. CONCLUSION

In light of the foregoing, the Court **DENIES** Plaintiff's motion. (ECF No. 58.)

IT IS SO ORDERED.

July 14, 2017



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE