

**Matter of Paramed Med. Sys., Inc. v New Primecare,
LLC**

2015 NY Slip Op 32234(U)

November 20, 2015

Supreme Court, New York County

Docket Number: 652578/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

PARAMED MEDICAL SYSTEMS, INC.,

Petitioner,

Index No. 652578/2015

-against-

DECISION/ORDER

NEW PRIMECARE, LLC,

Respondent.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Petition and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Petition and Affidavits Annexed.....	<u>2</u>
Affirmation in Opposition	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Petitioner brings the instant petition for an order pursuant to CPLR § 7510 confirming the May 14, 2015 final award (the "Award") issued in an arbitration proceeding between the named parties herein, conducted under the auspices of the American Arbitration Association ("AAA") in New York, New York. Respondent cross-moves for an order pursuant to CPLR § 7511 vacating the Award. For the reasons set forth below, the petition is granted and the cross-petition is denied.

The relevant facts are as follows. In 2010, respondent New Primecare, LLC ("Primecare"), which provided management services to non-party Doshi Diagnostic Imaging Service ("Doshi"), negotiated and agreed to a lease agreement (the "Lease") between the named parties for an open magnetic resonance imaging machine (the "MRO") to be used in one of

Doshi's radiology facilities. Primecare negotiated and agreed to the Lease after its owner visited the facilities in Genoa, Italy, where petitioner Paramed Medical Systems, Inc. ("Paramed") manufactured the MRO and spoke with representatives of Paramed. Primecare alleges that they informed Paramed that they needed an MRO that would be able to perform "stand up scans." Primecare further alleges that representatives of Paramed at the meeting in Genoa claimed that the MRO could perform "stand up scans."

Primecare made its first and only payment under the Lease on December 1, 2011. The MRO received accreditation from the American College of Radiology, a prerequisite to clinical use, on December 16, 2011. The MRO was thereafter used in one of Doshi's facilities. Doshi's employees encountered various problems with the MRO, including allegedly poor image quality and periodic shutdowns. Further, Primecare alleged that the MRO could not be used to perform "stand up scans." On August 21, 2012, Primecare informed Paramed that the MRO was no longer functioning. Paramed refused to repair the machine because Paramed was in default on its Lease payments. On September 7, 2012, Primecare informed Paramed that it was terminating the Lease.

Thereafter, Paramed initiated arbitration pursuant to the Lease's arbitration provision to recover the sum allegedly due and owing by Primecare. Primecare countered with claims for breach of contract, fraud and breach of warranties. An evidentiary hearing was held on October 27, 28, 29, and 30, 2014. Although the Lease's arbitration provision stated that any arbitration would be conducted under the Commercial Arbitration Rules of the American Arbitration Association (CAR), the arbitrator conducted the proceeding under the CAR, the Procedures for Large Complex Commercial Disputes and the International Commercial Arbitration

Supplementary Procedures (ICASP). On February 13, 2015, the arbitrator awarded Paramed the sum of \$456,932.52, in addition to attorneys' fees to be determined upon receipt of evidence of Paramed's attorneys' time records. On May 14, 2015, the arbitrator issued a final award for Paramed for the sums of \$456,932.52 for breach of the Lease, \$115,000.00 in attorneys' fees, and \$2,325.00 in administrative fees and expenses.

Paramed now brings the instant petition for an order confirming the Award. Primecare cross-moves for an order vacating the Award. Primecare argues that the Award should be vacated pursuant to CPLR §§ 7511(b)(1)(i) and (iv) due to an alleged procedural error of the arbitrator.

Pursuant to Article 75 of the CPLR, a party aggrieved by an arbitration award may move to vacate the award. Specifically, CPLR § 7511(a) states that "[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him." However, it is well settled that the determinations of an arbitration panel are not to be lightly set aside and "judicial review of an arbitration proceeding is extremely limited." *Frankel v. Sardis*, 76 A.D.3d 136, 139 (1st Dept 2010). Indeed, "[c]ourts may vacate an arbitrator's award only on the grounds stated in CPLR 7511(b)," which provides

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award;
or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was

not made; or
 (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Thus, "[e]ven in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice." *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (1999).

In the instant action, Primecare's cross-petition for an order vacating the Award is denied as it has failed to establish that the alleged procedural error of the arbitrator requires the court to vacate the Award pursuant to CPLR §§ 7511(b)(1)(i) or (iv). Primecare alleges that the arbitrator's decision to allow all of Paramed's witnesses to remain in the room while other Paramed witnesses were testifying constituted misconduct on the part of the arbitrator and was a failure to follow proper procedure. Primecare claims that this decision created a risk that non-testifying witnesses, including Paramed representatives who allegedly claimed at the Genoa meeting that the MRO was able to perform "stand up scans," would falsely conform their testimony to that of testifying witnesses. The arbitrator based his decision, in part, on the ICASP, which is silent on the issue of the presence of non-testifying witnesses during witness testimony.

As an initial matter, the arbitrator's decision did not constitute misconduct pursuant to CPLR § 7511(b)(1)(i). To vacate an award, a petitioner must show arbitrator misconduct "by clear and convincing proof." *Moran v. New York City Transit Authority*, 45 A.D.3d 484 (1st Dept 2007). Misconduct has been shown where an arbitrator refuses to hear material evidence or excludes an entire issue. *Campbell v. New York City Transit Authority*, 32 A.D.3d 350, 352

(1st Dept 2006). In the present case, Primecare has failed to show misconduct by clear and convincing proof. Primecare's primary argument is that the arbitrator's decision to apply ICASP rather than CAR and to allow Paramed's non-testifying witnesses to remain in the room during witness testimony constituted misconduct. However, Rule 25 of CAR leaves the decision whether to exclude non-testifying witnesses to the discretion of the arbitrator. Moreover, Primecare has failed to identify any New York law that requires the exclusion of non-testifying witnesses at an arbitration hearing. To the extent that Primecare argues that the arbitrator abused his discretion in allowing Paramed's non-testifying witnesses to remain in the room, such argument is unavailing as both ICASP and CAR leave the decision whether to exclude non-testifying witnesses to the discretion of the arbitrator and therefore this court will not second-guess the arbitrator's use of discretion or find that the arbitrator's use of discretion arose to the level of misconduct. Thus, Primecare has failed to show that the arbitrator's decision constituted misconduct pursuant to CPLR § 7511(b)(1)(i).

Further, the arbitrator's decision was not a failure to follow the procedure of Article 75 pursuant to CPLR § 7511(b)(1)(iv). Primecare has failed to identify any provision in Article 75 that would require the arbitrator to exclude non-testifying witnesses. Based on the foregoing, respondent's cross-petition is denied.

Accordingly, it is hereby ORDERED and ADJUDGED that the petition is granted and the arbitration Award rendered in favor of petitioner and against respondent is confirmed. Settle Order and Judgment.

Dated:

11/20/15

Enter:

CSK

J.S.C.

CYNTHIA S. KERN
J.S.C.