SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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RIVERSIDE CENTER SITE 5 OWNER LLC,EL AD US HOLDING, INC.

Petitioners,

- v -

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.,

Respondent.

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INDEX NO. 655252/2021

MOTION DATE 12/02/2021

MOTION SEQ. NO. 002

DECISION + ORDER, JUDGMENT ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 2, 11, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 134, 135, 136, 137, 138, 139, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210

were read on this motion to/for VACATE ARBITRAL ORDERS.

The petition to vacate two interim arbitration awards (one dated June 1, 2021 and another dated October 8, 2021) is denied and the cross-motion to confirm these awards is granted.

Background

In this proceeding, petitioners complain about two orders issued by a Federal Arbitration Association ("FAA") panel. The first order, dated June 1, 2021, required petitioners to post $7.5 million in prehearing security. The second, dated October 8, 2021, awarded respondent $390,000 in sanctions arising out of petitioners' refusal to post the security after ample opportunities to comply.

The underlying arbitration concerns the amounts that petitioners allegedly owe respondent. Petitioners procured general liability and workers' compensation insurance coverage

from respondent and the parties entered into a payment agreement relating to that coverage. According to respondent, petitioners are responsible for losses within their deductible and payment of premium and any losses are funded through a depletion of the cash collateral account. Another collateral part of the agreement involves respondent extending credit to petitioners by deferring loss payments.

Respondent contends that petitioners defaulted under the payment agreement. It asserts that it issued a collateral call on March 15, 2019 and that this shortfall has only increased as time has passed. Respondent also claims that petitioners owe over $1.5 million in premiums. It asserts it drew down on a related letter of credit to address the alleged shortfall and petitioner unsuccessfully sought a preliminary injunction in New York County Supreme Court. The arbitration followed and respondent argues it made clear at the outset that it would seek prehearing security.

Petitioners maintain that the collateral calls were made without any justification and that respondent refused to provide backup to support the need for the collateral. They complain about both orders issued by the FAA panel and insist they were deprived of their due process rights. Petitioners question how prehearing security could be granted without discovery and that the sanctions were inappropriate because they are essentially punishment for seeking judicial review of the initial prehearing security order.

Respondent claims that petitioners have routinely ignored the arbitral panel's orders, so much so that the panel has held petitioners in default. Respondent insists that petitioners have refused to post the $7.5 million in prehearing security as ordered by the panel on June 1, 2021. Respondent also points out that on October 8, 2021 (after this proceeding was commenced), the

panel issued an interim award requiring petitioners to pay $390,000 in legal fees. Respondent characterizes this proceeding as an attempt to undermine the panel's authority.

Service

As an initial matter, the Court agrees with respondent's argument that petitioner failed to timely serve the instant petition. The docket reveals that the petition (NYSCEF Doc. No. 1) was filed on August 30, 2021 but (as respondent points out) that petition is heavily redacted to the point where it is nearly impossible to appreciate the full extent of the allegations asserted by petitioners. Respondent then filed a notice of rejection (NYSCEF Doc. No. 12).

Petitioners admit that they served respondent with the petition "in exactly the same form that it was filed" (NYSCEF Doc. No. 134 at 14). They contend respondent is manufacturing an issue where none exists and that the alleged defects do not render service untimely. However, the entire purpose of a pleading is to give respondent notice of the allegations. It is not sufficient for petitioners to argue that respondent knew generally what the case was about and force it to review a petition with page after page of redactions.

The instant situation is readily different from the case cited by petitioners, *United Services Auto. Ass'n v Kungel*, 72 AD3d 517, 899 NYS2d 190 [1st Dept 2010]). In that case, the First Department found that serving the petition and notice of petition one day prior to purchasing an index number was a procedural defect that did not justify dismissing the petition as untimely (*id*.). Here, the issue was not a mere procedural defect; petitioner served an indecipherable petition on respondent and asserts this was acceptable. This Court disagrees. While the applicable FAA restrictions may have required petitioners to *file* a redacted petition, that does not mean it was permissible to avoid serving an unredacted petition on respondent. In

any event, as described below, the merits of this dispute do not compel the Court to grant the petition.

The June 1, 2021 Order

Turning to the merits, the Court declines to vacate the June 1, 2021 prehearing security order. The order noted that the panel considered the parties' briefs and conducted a full day of oral argument on May 26, 2021 before requiring petitioners to post the prehearing security (NYSCEF Doc. No. 162). The panel emphasized that "[Petitioners] will have the opportunity to present substantive defenses on the merits of the claims at the final hearing in this matter to be held in May, 2022" (*id.*). A panel conducting an arbitration under FAA rules is permitted to direct the posting of prehearing security even where there has not yet been a full hearing (*On Time Staffing, LLC v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 784 F Supp 2d 450, 455 [SD NY 2011] [holding that the applicable FAA rules permit a panel to require the posting of prehearing security and that such an order does not constitute misconduct]). "Courts in this Circuit have firmly established the principle that arbitrators operating pursuant to such provisions have the authority to order interim relief in order to prevent their final award from becoming meaningless" (*Br. Ins. Co. of Cayman v Water St. Ins. Co., Ltd.*, 93 F Supp 2d 506, 516 [SD NY 2000] [observing that prehearing security was permitted in an underlying FAA arbitration]). Moreover, a panel is afforded great deference in how to evaluate whether prehearing security is appropriate—it can decide the issue on the papers and need not hold oral argument (*id.* at 517).

The Court rejects petitioners' claim that this order somehow violates their due process rights. The fact is the parties agreed to handle disputes in arbitration and *during that arbitration* respondent asked for prehearing security. The panel considered the parties' written submissions and held an entire day of oral argument before granting that request, something that the panel

was entitled to do. That petitioners do not like this order is not a basis for this Court to intervene. Whatever this Court thinks about petitioners' substantive arguments about the prehearing security is also irrelevant. The panel was entitled to make this decision and this Court is satisfied that petitioners were afforded a meaningful opportunity to make their case. And, as respondent argues, it is owed in excess of $20 million so $7.5 million in prehearing security is not a shocking or excessive order.

Petitioners' reliance on *Matter of Home Indem. Co. v Affiliated Food Distributors, Inc*. (96 CIV. 9707 (RO), 1997 WL 773712 [SD NY 1997]) does not compel a different outcome. In that case, the court was concerned that the panel had improperly barred a party from defending itself by precluding discovery of files dispositive to the dispute (*id*.). The prehearing security order here explicitly stated that petitioners would have a chance to dispute the claims on the merits at the hearing. This is not a situation where petitioners are prevented from adequately defending themselves at an arbitration; in fact, the actual hearing has not yet taken place. This Court declines to assert itself into this dispute where it appears the parties have had every opportunity to litigate all manner of issues.

The October 8, 2021 Order

After this proceeding commenced, the panel issued another order (which was included in petitioner's supplemental petition). This order considered respondent's motion for sanctions based on petitioners' repeated failure to comply with the panel's orders (NYSCEF Doc. No. 85).

The panel noted that "The [Petitioners] were first ordered by the Panel on June 1, 2021 to post Pre-hearing Security in the amount of $7.5 million in the form ordered on or before June 30, 2021. On July 26 the Panel, having reconsidered [Petitioners]' position, reaffirmed its Prehearing

Security order, requiring that [Petitioners] post the $7.5 million ordered, on or before August 9, 2021. [Petitioners] again failed to comply.

"Having further afforded the [Petitioners] the opportunity to propose equivalent alternative security (see Order # 5), [Petitioners] refused yet again, instead seeking a 'stay' and declining to participate in oral argument. Having been afforded multiple opportunities to have their positions considered (and reconsidered), the Panel issued Order # 6 directing the Claimant to specify the scope of appropriate sanctions in light of "…[Petitioners]' non-compliance and default" (*id.*).

The panel observed it considered a "full round of briefing" and respondent's request for the full entirety of the claim (over $20 million) and legal fees of over $1 million (*id.*). The panel concluded that petitioners were to pay $390,000 which it deemed "as appropriate reimbursement of attorney's fees incurred which we conclude are attributable to [Petitioners'] default including its repeated failure to comply with the Panels['] multiple Prehearing Security orders including those of June 1, June 26, August 18, September 1" (*id.*).

This Court sees no basis to disturb this order. The panel rationally concluded that a sanction was appropriate in light of petitioners' apparent refusal to comply with the panel's orders. To the extent that petitioners claim that the panel is punishing them for seeking the appropriate judicial review of the various orders, that argument is completely without merit. Petitioners could have commenced this proceeding by order to show cause and sought a temporary restraining order relieving them of their obligation to post the prehearing security. Instead, they proceeded by notice of petition and continued to ignore the panel's orders. In other words, although the ultimate relief sought in this proceeding might absolve them of their

obligation to post the security, petitioners did not do anything to justify ignoring the panel's orders as this proceeding progressed (and the parties adjourned the return date).

An arbitration panel must be permitted to preside over an arbitration and issue sanctions where it deems appropriate. It is not this Court's role to second-guess every decision, especially interim decisions. Even if this Court were to closely scrutinize this order, the sanctions are entirely reasonable. Petitioners were ordered to do something and they flat-out ignored the panels' orders. And the sanctions imposed are relatively minor compared to the amount sought by respondent—respondent sought the entire amount at issue in the arbitration (over $20 million).

Summary

Clearly, petitioners do not like how the underlying arbitration is proceeding. They evidently disagree with various orders issued by the panel. Unfortunately, petitioners are not permitted to run to court every time they want an interim order issued by the panel to be reversed. While there are situations in which this Court can intervene, such circumstances are extremely limited.

Here, the panel issued two rational orders that were within its power to furnish. One was for prehearing security, a commonly accepted tool a panel can utilize. The amount of this security was far less than what respondent seeks in the arbitration. When petitioners decided to ignore the panel's orders about posting the security, the panel found it appropriate to issue a second order for sanctions. That decision was entirely reasonable under the circumstances and the amount of the sanctions was also reasonable.

Petitioners freely entered into an agreement that required disputes to be handled in arbitration. Mere disagreements with certain interim decisions by the panel are not a basis to

seek court review. After all, "[t]he purpose of arbitration is to provide a speedy and inexpensive determination, without the extended delays inherent in a court proceeding" (*Br. Ins. Co. of Cayman*, 93 F Supp 2d at 516 [internal quotations and citation omitted]). This Court has no interest in acting as an appellate court for every interim order issued by the panel.

Accordingly, it is hereby

ADJUDGED that the petition to vacate the June 1, 2021 and October 8, 2021 orders issued by the arbitral panel is denied and the cross-motion by respondent to confirm these two awards is granted, petitioners must post the prehearing security in the method prescribed by the arbitration panel on or before January 6, 2022 and the Clerk is directed to enter judgment accordingly in favor of respondent and against petitioners in the amount of $390,000.00 plus interest at the rate stated in the panel's order (4.5%) from October 25, 2021 along with costs and disbursements upon presentation of proper papers therefor.

12/6/2021
DATE

ARLENE BLUTH, J.S.C.

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