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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**MASON TENDERS DISTRICT COUNCIL OF
GREATER NEW YORK AND LONG ISLAND, on
behalf of itself and its constituent
Local Asbestos, Lead and Hazardous
Waste Local 78,**

Plaintiff,

- against -

**EMLO CORP., NASDI LLC, RIVER
CONTRACTING, INC., and DORE &
ASSOCIATES CONTRACTING, INC.,**

Defendants.

NASDI LLC,

Cross Claimant,

- against -

EMLO CORP.,

Cross Defendant.

14 Civ. 8898 (LLS)

**AMENDED
MEMORANDUM & ORDER**

The memorandum and order dated August 10, 2016 (Dkt. No. 45) is amended as follows.

Plaintiff Mason Tenders District Council of Greater New York and Long Island ("the Union") moves for summary judgment confirming arbitration awards against defendant Emlo Corp. ("Emlo"). For the reasons that follow, the motion is granted.

BACKGROUND

Both arbitration awards arise from the same events. Nasdi was the general contractor at a LaGuardia Airport jobsite, and

Emlo was a subcontractor. The case against Emlo seeks to enforce an arbitration award that found the company breached its collective bargaining agreement ("CBA") with the Union. The case against Nasdi seeks to enforce an arbitration award that found Nasdi jointly liable under the Emlo award because its CBA holds Nasdi liable for the actions of its subcontractors.

In June 2014, the Union sent arbitration demands to Emlo, Nasdi, and an arbitrator named in both CBAs. The arbitrator scheduled the hearing in the Nasdi arbitration for the morning of August 6 and the hearing in the Emlo arbitration for that afternoon. He sent notice to the parties.

Nasdi did not appear for its hearing, and the arbitrator proceeded in its absence. The Union presented documentary evidence and the live testimony of two witness. The arbitrator reserved judgment.

Emlo's owner and president, Emlo Kasapinov, appeared at its hearing and requested an adjournment to obtain counsel. The arbitrator granted the request and adjourned the hearing until September 9, 2014.

Emlo engaged Peter Kutil, Esq. of King & King LLP. On Friday, September 5, Mr. Kutil emailed the arbitrator to request an adjournment of the September 9 hearing, stating:

On August 22, 2014, Emlo filed an unfair labor charge with the National Labor Relations Board ("NLRB"). The charge is currently under investigation and Emlo requests that this

arbitration be adjourned pending the outcome of the NLRB investigation. Moreover, Emlo asserts the subject unfair labor charges are within the NLRB's sole and exclusive jurisdiction.

In addition, Emlo requests an adjournment to permit counsel to further investigate the Mason Tenders claims further and to prepare a defense for arbitration. Also, depending on the outcome of the NLRB charge, Emlo would like to file a counterclaim grievance against the Mason Tenders.

For these reasons, Emlo and its counsel, request that the arbitration be adjourned, at a minimum of 30 days.

Kutil Aff. Ex. C, Dkt. No. 39. The arbitrator denied the request on September 7.

At the September 9 hearing, Mr. Kutil renewed his request for an adjournment. He states:

On September 9, 2014, I renewed my request for an adjournment in person. I provided specific reasons for the request, stating that the notice of the arbitration was not detailed in that there was no indication of the requested relief. I recounted my client's and my efforts to interview potential Port Authority and Tully Construction witnesses. I stated that the requested 30 days is proper given the nature of the case and proceedings. The request was again denied. There was offer by the Union that they would agree to one week adjournment. I advised counsel and the arbitrator that a one week adjournment was not sufficient to prepare the case.

Kutil Aff. ¶ 14.

It is apparent that the request was notably non-specific, and left open the prospect that Emlo's ultimate desire was to postpone the arbitration until completion of the NLRB investigation, as urged in Mr. Kutil's September 5 letter. The arbitrator denied the requested 30-day adjournment. The arbitrator offered to adjourn the hearing for seven days, but Emlo rejected that and ordered Mr. Kutil not to participate any further in the proceedings. Mr. Kutil left the hearing,

directing an associate to remain and take notes. The Union presented documentary evidence and witness testimony. The arbitrator and the Union invited Mr. Kutil's associate to present a defense, but she did not.

The Union was granted leave to submit a written statement of damages in both cases, which it did three days after the September 9 hearing with a copy to Emlo. Emlo did not respond. On September 16, 2014, the arbitrator issued awards in both arbitrations, recounting the evidence and finding in favor of the Union.

DISCUSSION

The Second Circuit recently reiterated the limited scope of review of arbitration awards under collective bargaining agreements:

"[A] federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential--indeed, among the most deferential in the law." Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016) ("NFL"). A court is "not authorized to review the arbitrator's decision on the merits"; its role is simply to determine "whether the arbitrator acted within the scope of his authority as defined by the collective bargaining agreement." Id. at 536. Thus, as long as "the arbitrator was even arguably construing or applying the contract and acting within the scope of his authority and did not ignore the plain language of the contract," the award should ordinarily be confirmed. Id. (internal quotation marks omitted).

NYC & Vicinity Dist. Council of the United Bhd. of Carpenters v. Ass'n of Wall-Ceiling & Carpentry Indus. of NY, Inc., No. 15-1574-cv, --- F.3d ----, 2016 WL 3383737, at *6 (2d Cir. June 20,

2016) (brackets in original).

The Emlo Award

Emlo argues the award should be vacated because the arbitrator was "guilty of misconduct in refusing to postpone the hearing," Federal Arbitration Act (FAA) § 10(a)(3), 9 U.S.C. § 10(a)(3),¹ and that by doing so he prevented Emlo from presenting a defense.

Under the circumstances, the decision to proceed was well within the purview of the arbitrator's discretion. There was no showing sufficient to require the hearing to be postponed to hear the testimony of undisclosed witnesses on unidentified topics.² This distinguishes Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 17-18, 20-21 (2d Cir. 1997), the only precedent cited by Emlo, where a specific showing was made that the only witness who could testify for one party about the oral statements establishing a fraudulent inducement claim was temporarily unavailable due to a family illness. In the face of

¹ The arbitration was conducted under the Labor Management Relations Act, 29 U.S.C. §§ 141-187, not the FAA, but "the stringent standard for vacating an arbitration award is materially the same" under both acts. Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 754 F.3d 109, 112 n.4 (2d Cir. 2014).

² Two years later in its opposition to the present motion, Emlo still does not provide the name of any witness it would have called had the hearing been adjourned or describe the proposed testimony with specificity. See Tempo Shain Corp., 120 F.3d at 18 (noting the filing of the proposed testimony in the district court); see also NYKCool A.B. v. Pac. Fruit, Inc., 507 F. App'x 83, 88-89 (2d Cir. 2013) (confirming an arbitration award despite the arbitrator's refusal to permit an evidentiary hearing when the losing party did not identify how the hearing would have helped it).

that compelling justification, the arbitrators' refusal to delay was an obvious abuse of power. Id. at 20-21.

Emlo made no similar offer of proof. It rejected the offered seven-day adjournment and refused to participate further in the hearing.

The arbitrator acted within the scope of his authority. He was free to decline to subject the schedule of the hearing to the needs of Emlo's NLRB proceeding.

Accordingly, the Emlo arbitration award is confirmed.

CONCLUSION

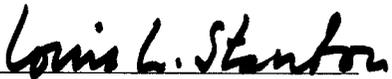
Plaintiff Mason Tenders District Council of Greater New York and Long Island's motion for summary judgment confirming the award against defendant Emlo Corp. (Dkt. No. 32) is granted.

Plaintiff's claims against defendants Nasdi LLC, River Contracting, Inc. and Dore & Associates Contracting, Inc. have been settled by order dated August 10, 2016. This leaves Nasdi's crossclaim against Emlo still to be adjudicated. See Fed. R. Civ. P. 54(b).

Those parties shall appear at a status conference on Friday, September 9, 2016 at 12 o'clock noon to discuss those matters.

So ordered.

Dated: New York, New York
August 10, 2016



LOUIS L. STANTON
U.S.D.J.