

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:14-CV-901-BO

CYBER IMAGING SYSTEMS, INC.,)
Plaintiff,)
v.)
EYELATION, INC.,)
Defendant.)
_____)

ORDER

This cause comes before the Court on plaintiff's motion to enforce the arbitrator's award. [DE 42]. The appropriate responses and replies have been filed, and the matter is ripe for ruling. For the reasons discussed below, plaintiff's motion is GRANTED.

BACKGROUND

This action stems from an October 26, 2009, agreement (the Agreement) between the parties relating to the development of virtual software for the selection, fitting, and sale of prescription safety eyeglasses. Plaintiff, Cyber Imaging Systems, Inc. (Cyber Imaging) is a software developer. Eyelation, Inc. (Eyelation) is a manufacturer of safety eyeglasses. Pursuant to the Agreement, Cyber Imaging would develop virtual try-on software for Eyelation to use in its safety eyeglasses sales business. Cyber Imaging was to receive a \$50,000 up-front payment and a \$10 royalty fee for each pair of glasses sold. The Agreement provided for a 10-year term—from October 26, 2009, to October 26, 2019—and also included a binding arbitration clause.

In 2012, a dispute arose between Eyelation and Cyber Imaging regarding their respective rights and obligations under the Agreement. As required by the Agreement, the dispute was submitted to binding arbitration. An arbitration hearing was conducted over six days in June and July 2013. In an award dated October 13, 2013, the arbitrator held, *inter alia*, that Cyber Imaging

was entitled to the royalty payments stemming from the sales of each pair of eyeglasses though September 2019. Eyclation was instructed to transmit each payment “within thirty days after the end of the month in which the revenues from such sales or licenses are received.” [DE 1–2 at 56].

Eyclation made the royalty payments when the orders were placed at the kiosk from January 2014 through August 2014. ¹[DE 40–1, pp. 6–10]. In October 2014, Eyclation stopped making payments. Cyber Imaging filed suit in Wake County Superior Court in December 2014, for specific performance of the arbitration award, breach of contract, and fraud, alleging that it was not receiving payments within 30 days of the underlying sales. Eyclation removed the case to federal court on the basis of diversity of citizenship. At the motion to dismiss stage, the Court granted defendant’s motion to dismiss two of plaintiff’s claims, but plaintiff’s claim for enforcement of the arbitration award survived. Defendant answered and claimed four counterclaims.

In November 2015, the Court entered an order confirming the arbitrator’s award and dismissing defendant’s first counterclaim, a declaratory judgment claim construed as a motion to correct under 9 U.S.C. § 11(c). [DE 41]. Subsequently, defendants voluntarily dismissed their remaining counterclaims.

In December 2015, plaintiffs filed the instant motion to enforce the arbitrator’s agreement, claiming that defendant had still not made all the required royalty payments, submitted the necessary royalty reports, or complied with requests for an audit. [DE 42, 43]. As a result of these actions, plaintiff also sought legal fees and interest.

¹ Eyclation also made the royalty payment when orders were placed at the kiosk before the arbitration, from 2011 to 2012. [DE 40–1, pp. 1–5].

DISCUSSION

I. Enforcement of the Arbitrator's Award

As the Court has already noted in this matter, “judicial review of an arbitration award must be an extremely narrow exercise.” *Long John Silver’s Rests., Inc. v. Cole*, 514 F.3d 345, 351 (4th Cir. 2008). In fact, it is “among the narrowest known to law.” *U.S. Postal Serv. v. Am. Postal Worker’s Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000). A district court is not authorized to review the merits of an arbitrator’s decision, but “is limited to determining whether the arbitrators did the job they were told to do— not whether they did it well, correctly, or reasonably, but simply whether they did it.” *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (quotation and citation omitted). The limited appellate review reflects a strong policy favoring arbitration as an alternative to litigation. *Id.* at 145. The parties to an arbitration have bargained for the arbitrator’s, rather than the court’s, decision, thus “the reviewing court’s task is to enforce the bargained-for decision of the arbitrator and not to evaluate the arbitrator’s factual findings or legal analysis.” *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Commc’ns Int’l Union*, 973 F.2d 276, 281 (4th Cir. 1992). “Any more probing review of arbitral awards would risk changing arbitration from an efficient alternative to litigation into a vehicle for protracting disputes.” *Wachovia Secs., L.L.C. v. Brand*, 671 F.3d 472, 478 n.5 (4th Cir. 2012).

Section 9 of the Federal Arbitration Act provides that a Court must grant an order confirming an arbitration award “unless the award is vacated, modified, or corrected as prescribed in section 10 and 11 of this title.” 9 U.S.C. § 9. Defendant’s earlier attempt to correct under 9 U.S.C. § 11(c) was dismissed as untimely. [DE 41]. As the award has not been vacated, modified, or corrected, it is hereby confirmed. *See* 9 U.S.C. § 9.

The Court notes specifically the following provisions of the arbitrator's award that are, along with the rest of the award, confirmed and should hereby be considered enforced by the Court:

- "Eyelation shall make these damage payments on a monthly basis, with payments to be made within 30 days after the end of each month." [DE 43-2, p. 11].
- "Eyelation shall maintain detailed and accurate records of all such sales and licenses and provide Cyber a statement of all such sales and licenses revenues on a monthly basis together with the monthly payment." [DE 43-2, p. 12].
- "Cyber shall have the right, upon reasonable notice and during normal business hours, not more than once in any 12 month period, to have independent accountants examine and audit, at Cyber's expense, Eyelation's records relating to the fees payable pursuant to this award." [DE 43-2, p. 13].
 - "In the event that the audit reflects an underpayment of ten percent or more of the amount that should have been paid to Cyber for the period audited, then the expense of the audit shall be borne by Eyelation." [DE 43-2, p. 13].

II. Attorney's Fees

Plaintiff also seeks reasonable attorney's fees. The Court finds that defendant's conduct has been vexatious. Accordingly, in its discretion, the Court awards attorney's fees since the filing of the complaint in the instant action to plaintiff. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975); *United Food & Commercial Workers, Local 400 v. Marval Poultry Co.*, 876 F.2d 346, 350 (4th Cir. 1989). Plaintiff has fourteen (14) days from the date this order is entered to file an affidavit containing information on the pertinent attorney's fees amounts, and defendant has ten (10) days from the date plaintiff files the affidavit to respond, if desired.


III. Interest

The Court finds that interest is not appropriate for the relief provided, so plaintiff's request for interest is denied.

CONCLUSION

For the foregoing reasons, plaintiff's motion is GRANTED in accord with the terms of this Order. [DE 42]. The arbitrator's award should hereby be considered CONFIRMED and ENFORCED. Plaintiff is awarded attorney's fees and is directed to file the necessary affidavit as described above. As enforcement of the award was the only remaining matter², the clerk is DIRECTED to close the case.

SO ORDERED, this 23 day of June, 2016.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

² Plaintiff brought three causes of action: (1) enforcement of the arbitration award, (2) breach of contract, and (3) fraud. The breach of contract and fraud claims have been dismissed. [DE 16]. Defendant brought four counterclaims: (1) declaratory judgment, (2) tortious interference with prospective economic advantage, (3) unfair competition and false designation of origin, and (4) unfair and deceptive trade practices. The declaratory judgment claim, construed as a motion to correct, was dismissed by the Court. [DE 41]. Defendant moved to dismiss its remaining counterclaims, and the Court entered an order doing so. [DE 51, 52]. Accordingly, no claims remain.