S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

UNIFIRST CORPORATION,

Plaintiff,

- against -

OCEAN AUTO CENTER, INC.,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 741/12

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits .....
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The respondent corporation moves pursuant to CPLR 308 and 5015(a)(4) together with the federal state constitutions to vacate, set aside and annul an April 26, 2012 default judgment entered by the Nassau County Clerk on May 4, 2012, and to dismiss the petition, or in the alternative, the respondent seeks pursuant to CPLR 5015(a)(1) to vacate, set aside and annul that default judgment because the respondent has an excusable default and meritorious defenses. The respondent asserts it was never served with process nor was it properly served with process, so the Court never obtained personal jurisdiction to award a default judgment. The respondent also seeks pursuant to CPLR 317 to vacate, set aside and annul that default judgment, and to grant leave to respond to respond to the petition because

the respondent lacked time to defend and it has meritorious defenses. The respondent further seeks pursuant to CPLR 7511(b)(2)(I) to vacate the arbitration award.

The corporate petitioner opposes the motion. The petitioner points to the affidavit of the process server, Osmund Tinglin, who states on February 4, 2012, at 12:49 P.M., he delivered the notice of petition, petition and request for judicial intervention to 'John' Shazad at 1981 Ocean Avenue, Brooklyn, New York, who acknowledged he was the managing agent for the respondent. Tinglin described Shazad as an approximately 26 year old, brown skin male with black hair standing five feet 7 inches tall and weighing approximately 165 pounds. Tinglin stated he completed service by mailing a copy of the summons and complaint in a stamped addressed envelope in an official depository under the care of the United States Post Office in New York on February 4, 2012 at the defendant's last known address in an envelope marked "personal and confidential" and not disclosing the sender's identity.

CPLR 317(a) provides:

> a person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318 ... who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.
> Thus, this statute is available only to a defendant who (1) was served by a method other than personal delivery, (2) moves to vacate the judgment within one year of learning of it (but not more than five years after entry), and (3) demonstrates a potentially meritorious defense to the action. By contrast, CPLR 5015(a)(1) is available to any defendant against whom a default judgment was entered, provided that the defendant can demonstrate both a reasonable excuse for the default and a potentially meritorious defense

Caba v. Rai, 63 A.D.3d 578, 580, 882 N.Y.S.2d 56 [1st Dept, 2009].

"When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015(a)(1) (***see Marable v. Williams***, 278 A.D.2d 459, 718 N.Y.S.2d 400; Taylor v. Jones, 172 A.D.2d 745, 746, 569 N.Y.S.2d 131)" (***Roberts v. Anka***, 45 A.D.3d 752, 753, 846 N.Y.S.2d 280 [2d Dept, 2007]).

> "The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (***Bankers Trust Co. of Cal. v. Tsoukas***, 303 A.D.2d 343, 756 N.Y.S.2d 92; ***see Wern v. D'Alessandro***, 219 A.D.2d 646, 647, 631 N.Y.S.2d 425; ***Frankel v. Schilling***, 149 A.D.2d 657, 659, 540 N.Y.S.2d 469). "A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2)" (***Bankers Trust Co. of Cal. v. Tsoukas***, 303 A.D.2d at 343–344, 756 N.Y.S.2d 92)

Roberts v. Anka, 45 A.D.3d at 754.

> While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing (***see Omansky v. Gurland***, 4 A.D.3d 104, 108, 771 N.Y.S.2d 501; ***Haberman v. Simon***, 303 A.D.2d 181, 755 N.Y.S.2d 596; ***Ananda Capital Partners, Inc. v. Stav Elec. Sys.***, 301 A.D.2d 430, 753 N.Y.S.2d 488; ***Stylianou v. Tsourides***, 73 A.D.2d 642, 422 N.Y.S.2d 748)

NYCTL 1998-1 Trust v. Rabinowitz, 7 A.D.3d 459, 460, 777 N.Y.S.2d 483 [1st Dept, 2004].

This Court determines the respondent proffers a conclusory denial by its president and owner in his June 12, 2012 affidavit regarding the service of the petition, notice of petition and request for judicial intervention. Hence, the respondent's submission is insufficient to dispute the veracity and content of the process server's affidavit, and a traverse is unnecessary under these circumstances. The Court has personal jurisdiction in this matter.

The respondent also fails to demonstrate both a reasonable excuse for its default and a meritorious defense as required under CPLR 317 and 5015.

> It is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding (see CPLR 7511[b], [c]) is extremely limited (***see Matter of Silverman [Benmor Coats]***, 61 N.Y.2d 299, 473 N.Y.S.2d 774, 461 N.E.2d 1261 [1984]; ***Azrielant v. Azrielant***, 301 A.D.2d 269, 752 N.Y.S.2d 19 [2002], ***lv. denied*** 99 N.Y.2d 509, 760 N.Y.S.2d 100, 790 N.E.2d 274 [2003]). Indeed, "[c]ourts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined" (***Matter of Goldfinger v. Lisker***, 68 N.Y.2d 225, 230, 508 N.Y.S.2d 159, 500 N.E.2d 857 [1986]; ***see also Kern v. Krackow***, 309 A.D.2d 650, 765 N.Y.S.2d 790 [2003], ***lv. denied*** 1 N.Y.3d 505, 776 N.Y.S.2d 221, 808 N.E.2d 357 [2004] [judicial intervention would contravene strong public policy of this State in favor of resolving disputes in arbitration as a means of conserving scarce judicial resources]). Accordingly, an award will not be overturned "unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power" (***Silverman***, 61 N.Y.2d at 308, 473 N.Y.S.2d 774, 461 N.E.2d 1261; ***Matter of Board of Educ. of Dover Union Free School Dist. v. Dover–Wingdale Teachers' Assn.***, 61 N.Y.2d 913, 474 N.Y.S.2d 716, 463 N.E.2d 32 [1984])...The arbitrators' interpretation of the issues and the scope of their authority is accorded substantial deference, and courts will not overturn that decision unless there is absolutely no justification for it (***see Matter of Roffler v. Spear, Leeds & Kellogg***, 13 A.D.3d 308, 310–311, 788 N.Y.S.2d 326 [2004]; ***United Transp. Union Local 1589 v. Suburban Tr. Corp.***, 51 F.3d 376, 379 [3d Cir.1995]). Therefore, the party seeking to upset an arbitration award bears a heavy burden (***see Lehman Bros., Inc. v. Cox***, 10 N.Y.3d 743, 853 N.Y.S.2d 530, 883 N.E.2d 355 [2008]; ***North Syracuse Cent. School Dist. v. North Syracuse Educ. Assn.***, 45 N.Y.2d 195, 200, 408 N.Y.S.2d 64, 379 N.E.2d 1193 [1978])

Frankel v. Sardis, 76 A.D.3d 136, 139-140, 904 N.Y.S.2d 18. [1st Dept., 2010].

CPLR § 7511(b)(2) provides:

> The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that: (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or (ii) a valid agreement to arbitrate was not made; or (iii) the agreement to arbitrate had not been

complied with; or (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

CPLR § 7511(b)(1) provides the following grounds:

> (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.

This Court determines the respondent fails to meet the burden of showing its rights were prejudiced by any ground in CPLR § 7511(b)(1) to vacate the July 18, 2011 arbitration award. The written award demonstrates the respondent was provided with notice of the arbitration, and an opportunity to be heard at it.

Accordingly, this motion by the respondent is denied.

So ordered.

Dated: **July 26, 2012**

ENTER:

J. S. C.

FINAL DISPOSITION