MBNA America Bank v. Wallace, Docket No. 588-12-06 Wmcv (Wesley, J., July 26, 2007).

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STATE OF VERMONT
WINDHAM COUNTY

MBNA AMERICA BANK NA,
Plaintiff,
v.
WINDHAM SUPERIOR COURT
DOCKET NO. 588-12-06 Wmcv

KATHRYN WALLACE,
Defendant.

DENIAL OF PETITION TO CONFIRM ARBITRATION AWARD

Plaintiff-creditor MBNA filed this petition to confirm and enforce an arbitration award of $7,776.85. However, MBNA failed to file anything to establish the existence of a written agreement containing an arbitration provision that was binding on Defendant-debtor Wallace. Moreover, MBNA's substitute service of the notice of the arbitration on an unknown person who refused to identify himself was inadequate under the arbitration rules, the civil rules, and principles of due process. Additionally, the notice of the arbitration award shows that it (and presumably anything else sent out by the arbitrator) was sent to Wallace at the *wrong* street address. While it is true that state and federal laws reflect a policy of favoring arbitration of commercial disputes and upholding arbitration awards where parties to commercial transactions have agreed to arbitrate, this does not mean that courts should turn a blind eye to credit industry practices that transgress the boundaries of due process. Accordingly, MBNA's petition to

confirm and enforce the award is **DENIED** and the award is **VACATED**.[1]

Existence of the Agreement

While not explicitly required by the Vermont Arbitration Act, the Federal Arbitration Act (FAA) specifies that an application to confirm an arbitration award must be accompanied by a copy of the parties' agreement to submit any dispute to arbitration. 9 U.S.C.A. § 13(a). Here, MBNA did not file an agreement with its application. It did subsequently attach a generic credit card agreement as an unauthenticated exhibit to a brief; notably, the standard arbitration provision therein states that the FAA will govern. Even more notable, however, is absence of admissible evidence to show that Wallace ever received or consented to be bound by this agreement.

[1] Although the parties have presented cross-motions for summary judgment, the Vermont Supreme Court has held that petitions to confirm should themselves be summarily treated as motions under V.R.C.P. 78. See *Springfield Teachers Assn. V. Springfield School Directors,* 167 Vt. 180, 186 (1997). Since the Court is deciding the petition without a hearing under V.R.C.P. 78(b)(2), the questions are essentially the same – are there any genuine issues of material fact in dispute and is it clear that one side is entitled to prevail.

At least two other courts have denied petitions to confirm awards where the debtor challenged the existence of an applicable agreement and MBNA failed to produce evidence of one. See *MBNA America Bank, N.A. v. Credit,* 132 P.3d 898, 900-02 (Kan. 2006) (noting a "national trend in which consumers are questioning MBNA and whether arbitration agreements exist"); *MBNA America Bank, N.A. v. Straub,* 815 N.Y.S.2d 450 (N.Y. Civ. Ct. 2006). Moreover, a debtor may raise lack of an arbitration agreement as a defense to a petition to confirm an arbitration award even if he or she did not timely move to vacate the award. *MBNA America Bank, N.A. v. Boata*, 893 A.2d 479 (Conn. Ct. App. 2006); see also *Straub*, 815 N.Y.S.2d at 455.[2]

[2] MBNA would be hard-pressed to make this argument in any case, since Wallace denies receiving the notice of the award and MBNA's own documentation shows it went to the wrong address.

Recognizing the unusual fashion in which credit card contracts are generally formed, the court in *Straub* set out exactly the method of proof it would expect of credit card companies to establish the existence of an applicable agreement in these types of cases: the credit card company must provide *both* (1) the written contract containing the provision authorizing arbitration, *and* (2) proof that the cardholder agreed to be bound by this contract, in writing or by conduct. 815 N.Y.S.2d at 452. In other contexts, these two steps will generally be one and the same because the existence of the written agreement can be established by simply producing the executed written document. With credit cards, however, the written agreement on which the creditor relies will generally not be an executed document, so the second step – establishing that this debtor implicitly agreed to be bound by the generic written agreement containing the arbitration provision – will generally require an affidavit from someone who can tie the debtor in question to the generic written agreement by testifying, based on personal knowledge, that the debtor received the written agreement and subsequently proceeded to use the credit card. 815 N.Y.S.2d at 453-54.[3] For a general discussion of the unique way credit card agreements are made and how that impacts what must be done to establish their existence, see also *MBNA America Bank, N.A. v. Nelson,* 15 Misc.3d 1148(A), 2007 WL 1704618 (N.Y. City Civ. Ct.

[3] The court in *Straub* relied to some degree on New York procedural rules, but these rules are not very different from ours. More importantly, the requirements set out in *Straub* are equally grounded in the FAA, which is fully applicable to agreements in Vermont. Based on the extremely well-reasoned analysis of the *Straub* holding, this Court finds it eminently persuasive and predicts that it will be adopted by the Vermont Supreme Court should the issues herein be squarely presented on appeal..

2007), unpublished slip op. at sect. V.B., pp. 7-11.

Citing *David L. Thelkeld & Co. v. Metallgesellschaft,* 923 F.2d 245 (2d Cir. 1991), MBNA claims that the holding in that case justifies its extreme position that no showing of an applicable written agreement is necessary at all. This argument takes *Metallgesellschaft* beyond the reach of its ruling, which did not involve the need to prove the arbitration agreement. *Metallgesellschaft*, which was based on preemption analysis, held that Vermont could not impose an additional requirement, beyond those of the FAA, that there be an explicit and prominent acknowledgment of the arbitration provision by the debtor, separate from the debtor's agreement to be bound by the rest of the contract. However, *Metallgesekkschaft* did not and could not render unnecessary the existence of a written agreement containing an arbitration provision and binding the particular debtor in question, since the existence and production of such an agreement is required by the FAA itself. See 9 U.S.C.A. §§ 2 & 13. "Federal public policy favors arbitration, but not at the price of fairness and common sense." *Stone v. Golden Wexler & Sarnese, P.C.,* 341 F.Supp.2d 189, 192 (E.D.N.Y. 2004).

Based on the language of 9 U.S.C.A. § § 2 & 13 and the persuasive logic of *Credit* and *Straub,* the Court concludes that MBNA's petition to confirm the arbitration award must be denied based on its failure to document the existence of a written agreement containing an arbitration provision which can be shown to be binding on Wallace.

Service

If MBNA's failure to establish the existence of a written agreement containing an

arbitration provision were the only problem here, the Court would simply deny the petition to confirm without prejudice, allowing MBNA the opportunity to document the existence of such an agreement if it could. Such an opportunity to cure would be superfluous, however, because MBNA's service of the notice of arbitration was insufficient under the applicable rules and principles of due process, resulting in an arbitration proceeding that was fundamentally flawed.

Assuming that Wallace can be shown to be bound by the generic written agreement containing an arbitration provision, that provision specifies that the arbitration will proceed under the Code of Procedure of the National Arbitration Forum (NAF). Rule 6(B) of the NAF Code lists the ways in which the notice of the arbitration claim may be served. One of these ways, see Rule 6(B)(4), is service in accordance with either the Federal Rules of Procedure or the procedural rules of the jurisdiction in which the agreement was made. Under both the Vermont Rules and the Federal Rules, service may be made by leaving copies at the defendant's dwelling house or usual place of abode, "with some person of suitable age and discretion then residing therein." V.R.C.P. 4(d)(1); see also F.R.C.P. 4(e)(2).

This was apparently what the process server tried to do in this case, but the server's unsworn proof of service reveals that the notice of arbitration was served on an unknown 5'7" white male at Wallace's address who refused to identify himself. Wallace stated in her Answer that she did not receive notice of the arbitration; and she also submitted an affidavit from her boyfriend stating that he did not receive the service and that he is 6'0" tall. Additionally, the arbitrators used an erroneous street address for Wallace, so that notices subsequently mailed out by the arbitrators, including the award itself, were sent to someone else's address.

"An elementary and fundamental requirement of due process in any proceeding which is

to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). Indeed, it is to meet this minimal requirement that the papers to be served must be left with a person of suitable age and discretion then residing therein – otherwise, the act of leaving them with a third person is not reasonably calculated to provide actual notice of the pending proceeding. When, as here, an unknown person answers the door and refuses to cooperate even to the point of identifying himself, how can he be deemed a person of suitable age and discretion then residing therein? Even more pertinently, how can he be considered reasonably likely to actually pass the papers along to the person who needs to receive them? The Court notes that the process service company apparently recognized this potential problem, because its invoice contained a warning that if the papers were left with someone who refused to identify himself, the client should consider whether further or alternative attempts to serve should be made.

Although the Court's scope of review on a petition to confirm an arbitration award is limited, it can and should include the question of whether the parties were afforded due process in the arbitration proceeding. Cf. *Springfield Teachers' Assoc. v. Springfield School Directors*, 167 Vt. 180, 184 (1997) (court does not review arbitrator's decision for errors of fact or law, but confines its review to whether there are statutory grounds to vacate or modify, and whether the parties were afforded due process). Here, the Court concludes as a matter of law based on the undisputed facts that the service of the notice of arbitration was not on a person of suitable age and discretion who resided in Wallace's home, that it was not reasonably calculated to provide Wallace with actual notice of the proceeding, and that it therefore violated both the procedural

rules and Wallace's due process rights. Accordingly, the arbitration award must be vacated; and if MBNA chooses to pursue its claim against Wallace through arbitration, it will need to start the process anew.

ORDER

MBNA's petition to confirm and enforce an arbitration award is **DENIED** and the award is **VACATED**.

Dated at _____, Vermont, this ____ day of _____, 2007.

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John P. Wesley
Presiding Judge