

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRYANT FAMILY VINEYARD,
Plaintiff,
v.
UNITED PARCEL SERVICE, INC.,
Defendant.

Case No. 16-cv-00125-JST

**ORDER GRANTING MOTION TO
DISMISS FOR INSUFFICIENT
PROCESS**

Re: ECF No. 14

Before the Court is Defendant United Parcel Service, Inc.’s (“UPS”) Motion to Dismiss Plaintiff Bryant Family Vineyard’s Petition to Vacate Arbitration Award for Insufficient Process. For the reasons stated below, the Court will grant the motion.

I. BACKGROUND

Plaintiff seeks in its petition to vacate an arbitration award resulting from its dispute with UPS over the alleged theft of 51 cases of wine. Plaintiff alleges in its petition that it is a “small winery with only a few employees [that] specializes in high-end wines,” and that it “only makes five to six large deliveries per year.” ECF No. 1-3 (“Petition”) at 6. It alleges that on November 4, 2013, UPS arrived for a pre-scheduled pickup of nine pallets of wine. Id. at 6-7. There is no dispute that the wine was picked up on November 4, but that the wine did not reach its intended destination. Id. at 7. The value of the shipment was \$130,050. Id.

The parties arbitrated the dispute and appeared before the arbitrator, Richard Collier, on July 21, 2015. Id. at 5. On August 28, 2015, the arbitrator issued an award of \$0 to Plaintiff and ordered the arbitration fees to be borne equally. Id.

The gravamen of Plaintiff’s petition here is that Mr. Collier was biased against Plaintiff by virtue of another, unrelated matter in which both Mr. Collier and Plaintiff’s attorney, James Rose, represented adverse parties that were participating in mediation. Mr. Collier brought the other

1 case to the parties' attention, and "the agreement was that this conflict would be waived so long as
2 the arbitration and subsequent award were completed prior to the resolution of the other matter
3 and that the Arbitrator could maintain neutrality through the process." Id. at 5. However, "[w]hile
4 the arbitration concluded prior to the mediation in the unrelated matter, the Award was not issued
5 until the day of the mediation, or in all likelihood, the Monday following the mediation's
6 conclusion." Id. at 5. In its opposition to the instant Motion to Dismiss, Plaintiff elaborates
7 further: "Mr. Rose agreed that Mr. Collier could arbitrate the UPS dispute, provided that he
8 remained neutral through the arbitration proceedings and that he would disqualify himself if the
9 George Estate matter became contentious or confrontational." ECF No. 17 at 2. However, after
10 the mediation in the unrelated case was completed at 8:15 p.m., "Mr. Collier and his client were
11 very unhappy about the outcome," and Mr. Collier sent Mr. Rose "an angry email that begins 'I
12 write to you in great consternation' which says that Mr. Collier's client felt Mr. Rose's clients had
13 been slandering her." Id. at 3. At that point, Plaintiff argues that Mr. Collier should have recused
14 himself from the arbitration in this case. Id.

15 **II. LEGAL STANDARD**

16 Courts lack jurisdiction over defendants who have not been properly served under the
17 Federal Rules of Civil Procedure. S.E.C. v. Ross, 504 F.3d 1130, 1138 (9th Cir.2007).
18 Accordingly, Rules 12(b)(4) and 12(b)(5) provide a mechanism by which a court may dismiss an
19 action for insufficiency of service of process. "Rule 12(b)(4) enables the defendant to challenge
20 the substance and form of the summons, and 12(b)(5) allows the defendant to attack the manner in
21 which service was, or was not, attempted." Bothwell v. Brennan, No. C-13-5439 JSC, 2014 WL
22 953500, at *2 (N.D. Cal. Mar. 6, 2014). "Once service is challenged, plaintiffs bear the burden of
23 establishing that service was valid." Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004). "If
24 the plaintiff is unable to satisfy this burden, the Court has the discretion to either dismiss the
25 action or retain the action and quash the service of process." Bothwell, 2014 WL 953500, at *2
26 (citing Stevens v. Sec. Pac. Nat'l Bank, 538 F.2d 1387, 1389 (9th Cir. 1976)). "While Rule 4's
27 requirements for the form and contents of the summons itself are construed liberally, requirements
28 for the manner of service are strictly interpreted." Verde Media Corp. v. Levi, No. 14-CV-00891

1 YGR, 2014 WL 3372081, at *2 (N.D. Cal. July 9, 2014).

2 **III. DISCUSSION**

3 UPS argues that Plaintiff’s petition must be dismissed because Plaintiff failed to properly
4 serve UPS pursuant to California Code of Civil Procedure §§ 1290.4(b) and 1288.¹ ECF No. 14-2
5 at 2-5. Cal. Civ. Proc. Code § 1290.4 states:

6 (a) A copy of the petition and a written notice of the time and place of the hearing
7 thereof and any other papers upon which the petition is based shall be served in the
8 manner provided in the arbitration agreement for the service of such petition and
9 notice.

9 (b) If the arbitration agreement does not provide the manner in which such service
10 shall be made and the person upon whom service is to be made has not previously
11 appeared in the proceeding and has not previously been served in accordance with
12 this subdivision:

11 (1) Service within this State shall be made in the manner provided by law for the
12 service of summons in an action.

13 (2) Service outside this State shall be made by mailing the copy of the petition and
14 notice and other papers by registered or certified mail. Personal service is the
15 equivalent of such service by mail. Proof of service by mail shall be made by
16 affidavit showing such mailing together with the return receipt of the United States
17 Post Office bearing the signature of the person on whom service was made.
18 Notwithstanding any other provision of this title, if service is made in the manner
19 provided in this paragraph, the petition may not be heard until at least 30 days after
20 the date of such service.

17 Cal. Civ. Proc. Code § 1288 states that “[a] petition to vacate an award or to correct an award shall
18 be served and filed not later than 100 days after the date of the service of a signed copy of the
19 award on the petitioner.”

20 UPS asserts that Plaintiff served UPS by e-mailing a copy to UPS’s counsel on December
21 10, 2015, which was 101 days after the date of service of the arbitration award. ECF No. 14-2 at
22 2-3. Plaintiff does not dispute that this method of service failed to comply with Cal. Civ. Proc.
23 Code § 1290.4(b)(1) and (2), or that service occurred beyond the 100 days permitted by § 1288.
24 Instead, it offers two arguments as to why service is proper. First, Plaintiff argues that the
25 arbitration was governed by UPS’s Tariff/Terms and Conditions of Service Effective January 23,
26 2014 (“2014 Tariff”), which contains an arbitration agreement and a provision incorporating the

27 _____
28 ¹ Pursuant to Cal. Civ. Proc. Code § 1286.4(a), a court may not vacate an arbitration award unless
“[a] petition or response requesting that the award be vacated has been duly served and filed.”

1 American Arbitration Association’s (“AAA”) Rules. ECF No. 17 at 4; see also ECF No. 17-1
2 (“2014 Tariff”) at 47. Those rules allow for service via e-mail. Therefore, the argument goes,
3 under Cal. Civ. Proc. Code § 1290.4(a), the petition was properly served. ECF No. 17 at 4.
4 Second, it argues that pursuant to California Code of Civil Procedure § 1010.6(a)(4), its time for
5 serving the petition was extended by two days as a result of the decision to serve the arbitration
6 agreement electronically. ECF No. 17 at 4 n.3. The Court addresses each of these arguments in
7 turn.

8 **A. Cal. Civ. Proc. Code § 1290.4 and the 2014 Tariff**

9 UPS’s 2014 Tariff’s arbitration provision is contained in section 50 of the agreement, and
10 states that any arbitration “shall be conducted by the American Arbitration Association (AAA) in
11 accordance with its Commercial Arbitration Rules and the Supplementary Procedures for
12 Consumer-Related Disputes (the ‘Rules’).” 2014 Tariff, ECF No. 17-1 at 47. Rule R-43 of the
13 AAA Commercial Arbitration Rules state that “(a) Any papers, notices, or process necessary or
14 proper for the initiation or continuation of an arbitration under these rules, for any court action in
15 connection therewith . . . may be served on a party by mail addressed to the party or its
16 representative,” and further that “(b) The AAA, the arbitrator, and the parties may also use
17 overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the
18 notices required by these rules. Where all parties and the arbitrator agree, notices may be
19 transmitted by e-mail or other methods of communication.” ECF No. 17-1 at 82. Plaintiff
20 therefore argues that the parties agreed, through the 2014 Tariff, to accept service by e-mail, and
21 that service of the petition was proper under Cal. Civ. Proc. Code 1290.4(a). ECF No. 17 at 5.

22 UPS responds by arguing that the 2014 Tariff is not applicable to the arbitration. ECF No.
23 22 at 2-5. It points to an earlier version of the tariff agreement dated July 8, 2013 (“2013 Tariff”),
24 and argues that the 2013 Tariff was applicable “because that was the Tariff in effect as of
25 November 4, 2013 — the date of the subject shipment.” Id. at 3. Indeed, both the 2013 and 2014
26 versions of the tariff agreement begin with an introduction that states: “In tendering a shipment for
27 service, the shipper agrees that the version of the Terms and the applicable Service Guide in effect
28 at the time of shipping will apply to the shipment and its transportation.” 2014 Tariff, ECF No.

1 17-1 at 10 (emphasis added); see also ECF No. 22-3 at 10 (“2013 Tariff”).

2 This point is important because the 2013 Tariff, unlike the 2014 version, does not include a
3 provision incorporating the AAA rules. Thus, under the 2013 Tariff, there would be no agreed-
4 upon alternative form of service that would be acceptable pursuant to section 1290.4(a).

5 Plaintiff offers two responses.² First, it argues that the 2013 Tariff states that “UPS
6 reserves the right to unilaterally modify or amend any portion of the Service Guide or the Terms at
7 any time without prior notice,” and that “the most current and controlling version of the Terms is
8 published at www.ups.com.” ECF No. 30 at 2 (quoting 2013 Tariff, ECF No. 22-3 at 10).
9 Plaintiff therefore seems to contend that by publishing the newer 2014 version of the tariff
10 agreement, UPS was exercising its right to modify the 2013 Tariff and replace it with the current,
11 controlling 2014 Tariff.

12 However, this argument does not refute UPS’s central conclusion. More specifically, UPS
13 is not arguing that the 2014 Tariff was not the most current and controlling agreement — on the
14 contrary, it cites to the 2014 Tariff’s introduction in support of its position. See ECF No. 22 at 3.
15 Rather, UPS contends that under both the 2014 and 2013 Tariff, the applicable terms to any given
16 shipment are the ones that were in effect at the time of that shipment. In this case, the applicable
17 terms are the 2013 Tariff.³

18 Second, Plaintiff argues that even if the 2013 Tariff applies, UPS’s participation in the
19 AAA arbitration means that it “is [e]stopped to [r]eject the AAA Rules.” ECF No. 30 at 3.
20 Plaintiff notes that the 2013 Tariff in fact contains no arbitration provision at all, but that the
21 parties nevertheless participated in and completed their arbitration proceedings. Id. at 1-3. It also
22 notes that the arbitrator stated that he was conducting the arbitration in accordance with the
23

24 ² Plaintiff requested and was granted leave to file a surreply. See ECF Nos. 26, 28.

25 ³ At oral argument, Plaintiff also asserted that the 2014 Tariff affirmatively stated that its terms
26 were applicable to a dispute regardless of the date of accrual of that dispute. Plaintiff cited to a
27 provision of the 2014 Tariff that states: “[A]ny controversy or claim, whether at law or equity,
28 arising out of or related to the provision of services by UPS, regardless of the date of accrual of
such dispute, shall be resolved in its entirety by individual (not class-wide nor collective) binding
arbitration.” ECF No. 17-1 at 46. As an initial matter, this provision does not state that all
provisions of the 2014 Tariff apply, but merely that the parties must submit to arbitration
generally. Further, the Court is not convinced that this provision operates to override the separate,
far broader provision that the applicable tariff is the one in effect at the time of shipment.

1 parties' agreement. Id. at 2-3. Plaintiff therefore argues that even if the 2014 Tariff does not
2 apply, UPS has "orally agree[d] to binding arbitration" by virtue of submitting to the arbitration
3 and the arbitrator's authority, and "is judicially estopped to deny its agreement to arbitrate." Id. at
4 3. Citing to Ninth Circuit and California law, it asserts that "a party's conduct may confer
5 authority upon the arbitrator over a dispute." Id. (citing Nghiem v. NEC Elec., Inc., 25 F.3d 1437,
6 1440 (9th Cir. 1994); Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics, 61 Cal.
7 App. 4th 672, 680 (1998)). The desired upshot of Plaintiff's argument is that UPS, through its
8 conduct, has implicitly agreed – or at least, is judicially estopped from now asserting that it did not
9 agree – to conduct arbitration in accordance with AAA rules.

10 This argument is unpersuasive. It is true that the Ninth Circuit has previously held that a
11 party may be bound to an arbitration award if its conduct indicates it agreed to arbitrate. See, e.g.,
12 Nghiem, 25 F.3d at 1440 (when a party "initiated the arbitration, attended the hearings with
13 representation, presented evidence, and submitted a closing brief," it has "submit[ted] to the
14 authority of the arbitrator" and "cannot suddenly change his mind and assert lack of authority");
15 Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1357 (9th Cir. 1983) ("We have long
16 recognized a rule that a party may not submit a claim to arbitration and then challenge the
17 authority of the arbitrator to act after receiving an unfavorable result."). But UPS is not trying to
18 avoid an unfavorable arbitration award – rather, it is Plaintiff who is doing that. UPS is not
19 contesting that it agreed to arbitrate; it is arguing that it is not bound by a particular arbitration
20 agreement that includes a provision incorporating the AAA rules regarding service. The
21 distinction is critical. For Plaintiff's service to be proper under Cal. Civ. Proc. Code § 1290.4(a),
22 it is not enough for the parties merely to have agreed to arbitrate generally; they must have agreed
23 to arbitrate pursuant to an agreement that "provide[s]" for "the manner" in which a petition to
24 vacate an award "shall be served." Plaintiff's cited case law does not hold otherwise.⁴

25 _____
26 ⁴ Plaintiff further suggests that the parties "participated in the AAA arbitration and thereby
27 conferred authority on the "American Arbitration Association . . . under its Commercial
28 Arbitration Rules," pursuant to Rule R-1(a). ECF No. 30 at 3. That rule states that "[t]he parties
shall be deemed to have made these rules a part of their arbitration agreement whenever they have
provided for arbitration by the American Arbitration Association (hereinafter AAA) under its
Commercial Arbitration Rules." ECF No. 17-1 at 66. Because the parties did not "provide for"

1 Additionally, UPS notes that it asserted at several points during the arbitration, including in
2 its Motion for Summary Judgment and its Trial Brief, that the 2013 Tariff applied to the shipment
3 at issue, apparently without any objection from Plaintiff. ECF No. 22 at 3, 5. At best, then, it
4 appears both parties failed to dispute which tariff agreement should apply to the arbitration
5 proceedings. This fact significantly undercuts Plaintiff’s argument that UPS should be estopped
6 from now taking its position that the 2014 Tariff does not apply.

7 In sum, Plaintiff has not demonstrated that its manner of service was proper under
8 California law.

9 **B. Cal. Civ. Proc. Code §§ 1288 and 1010.6(a)(4)**

10 UPS’s motion to dismiss must also be granted for the independent reason that Plaintiff’s
11 petition was not timely served under Cal. Civ. Proc. Code § 1288. As noted above, Plaintiff does
12 not dispute that its petition was served one day past the 100-day window established by Cal. Civ.
13 Proc. Code § 1288. Instead, it argues that its service deadline was extended by two days pursuant
14 to section 1010.6(a)(4), as a result of service of the final arbitration award being conducted by e-
15 mail.

16 Section 1010.6 sets out the process for serving documents electronically, and begins: “(a)
17 A document may be served electronically in an action filed with the court as provided in this
18 section, in accordance with rules adopted pursuant to subdivision (e).” Section 1010.6(a)(4) then
19 provides:

20 Electronic service of a document is complete at the time of the electronic
21 transmission of the document or at the time that the electronic notification of
22 service of the document is sent. However, any period of notice, or any right or duty
23 to do any act or make any response within any period or on a date certain after the
24 service of the document, which time period or date is prescribed by statute or rule
25 of court, shall be extended after service by electronic means by two court days, but
26 the extension shall not apply to extend the time for filing any of the following...

27 Cal. Civ. Proc. Code § 1010.6(a)(4) (emphasis added). Plaintiff argues that because the arbitration
28 award was served on the parties on August 31, 2015 by e-mail, section 1010.6(a)(4) gave it 102
29 days to serve its petition, or until December 11, 2015.

arbitration by the AAA under the 2013 Tariff, this rule does not apply.

