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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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TRIAL/IAS, PART 40
NASSAU COUNTY

THE LAW OFFICES OF THOMAS F. LIOTTI, LLC and THOMAS F. LIOTTI, ESQ.,

Petitioner(s),

Index No.: 001728-2015

-against-

Motion Seq. No.: 002
Motion Submitted: 7/17/15

FARZAD DAVOUSIASL,

Respondent(s).

x

The following papers read on this motion:

Order to Show Cause/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply.....X

Respondent moves this court, by order to show cause, to vacate a judgment and for leave to oppose a panel of arbitrators' calculations. Petitioner opposes the motion.

Petitioner law firm represented Respondent in a matrimonial action. Respondent chose to arbitrate the amount of Petitioner's outstanding fee, and an arbitration was held. By award dated May 19, 2014, the arbitrator panel found Petitioner was entitled to a fee of $34,565.13 with no amount to be refunded to Respondent. The panel determined that Respondent acknowledged receiving Petitioner's bills, did not object to any specific charges, and that the charges themselves were reasonable.

After receiving the award, Petitioner moved this court, pursuant to CPLR §7510,

to confirm the award. The court received no opposition to the motion. By short form order, dated April 2, 2015, this court granted Petitioner's unopposed motion. Petitioner was directed to settle a judgment on notice, which was done, but the judgment has not yet been signed. Respondent now moves to renew that order, arguing that opposition was, in fact, submitted and should be considered. Annexed to Respondent's moving papers herein is a copy of "Opposition to Plaintiff's Order to Show Cause" with a date-stamp of March 27, 2015. The rest of the stamp is too faded to read, but it does appear as if it is a court stamp. On June 10, 2015, this court signed Respondent's order to show cause and granted a temporary stay, pending a hearing on the within motion, enjoining Petitioner from going forward with any collection activity. That stay remains in effect[1].

To successfully renew a judgment pursuant to CPLR § 2221(e), Defendant must base his motion upon new facts not offered on the prior motion that would change the prior determination, and must set forth a reasonable justification for the failure to present such facts on the prior motion. *Worrell v. Parkway Estates, LLC*, 43 A.D.3d 436-37 (2nd Dept. 2007). Herein, Respondent points to the opposition papers that the court did not consider on the prior motion as new evidence. As it appears the failure to consider the papers was a court error, renewal will be granted and the court will reconsider confirming the award.

In opposition to confirming the award, Respondent argues he "prepared and attempted to file the Demand for a Trial De Novo". While it appears Respondent served

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[1]Respondent sought oral argument on the within application. Oral arguments did not occur as, after reviewing the papers, the court was convinced the issues were sufficiently briefed and that a decision could be rendered without further input from counsel.

the demand upon Petitioner, same was never filed with the court. Respondent claims it was not filed with the court through "law office failure" and "confusion as to where to file the demand". Respondent claims "attempts" were made.

"[J]udicial review of arbitration awards is extremely limited" *(Sheriff Officers Ass'n, Inc., ex rel. Ranieri v. Nassau County*, 113 AD3d 620 [2d Dept 2014] *quoting Wien & Malkin LLP v. Helmsley–Spear, Inc.*, 6 NY3d 471, 479 [2006]). In determining any matter arising under CPLR article 75, "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute" (CPLR 7501). Accordingly, it is " 'not for the courts to interpret the substantive conditions of the contract or to determine the merits of the dispute' " *(Matter of United Fedn. of Teachers, Local 2, AFT, AFL–CIO v. Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 82–83 [2003], *quoting Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. Barni*, 51 NY2d 894 [1980]). "An arbitration award must be upheld when the arbitrator 'offer [s] even a barely colorable justification for the outcome reached' " (*Wien & Malkin LLP v. Helmsley–Spear, Inc.*, 6 N.Y.3d at 479, *quoting Matter of Andros Compania Maritima, S.A.* [*Marc Rich & Co., A.G.*], 579 F2d 691, 704 [2d Cir 1978]).

The Court of Appeals has recognized "three narrow grounds that may form the basis for vacating an arbitrator's award—that it violates public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" *(Matter of Shenendehowa Cent. Sch. Dist. Bd. of Educ. (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL–CIO, Local 864)*, 20 NY3d 1026, 1027 [2013]; *see Matter of New York City Tr. Auth. v. Transport Workers Union of Am., Local 100*, 14 NY3d 119, 124 [2010]).

Herein, Respondent offers no specifics, in either the opposition to the prior motion or in the current motion, as to what are his objections to the arbitrators' award. Except for the language in the order to show cause that Respondent wishes to challenge the arbitrators' calculations, nothing else is offered in opposition of confirming the award. Instead, the crux of Respondent's argument is that this court should accept law office failure as an excuse for the failure to timely file the demand for a trial de novo, and then grant the trial.

22 NYCRR 137.8(a) states:

> A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding

The 30 day time limit is absolute, and the court has no discretion to relax it. (*Gold, Stewart, Kravitz, Benes, LLP v. Crippen*, 109 A.D.3d 519 [2nd Dept. 2013]. In relying on *Mahl v Rand*, 11 Misc.3d 1072(A)[N.Y.City Civ.Ct. 2006], Respondent argues this court can accept efforts made by Respondent as being compliant with 22 NYCRR 137.8(a), and allow the trial de novo. In *Mahl*, a client, acting *pro se*, went to the civil court a number of time, post-arbitration, in an attempt to file a request for a trial de novo. The clerks in the civil court informed the client the trial de novo could not be filed in the court, but offered no suggestion as to where it could be filed. The *Mahl* court pointed out that the client's efforts to commence the trial de novo were "confirmed", and considered the document the client was attempting to file as a cross petition to the request to confirm the

arbitrator's award.

This case is distinguishable from *Mahl* for a number of reasons. First, the client in *Mahl* was acting *pro se*, and *pro se* litigants are given a certain amount of leeway. Herein, respondent has been represented by counsel, and, in fact, it was counsel who served the demand for a trial de novo upon Petitioner, but never upon a court. Second, even if the court were to grant Respondent and counsel herein the same leeway given to a *pro se* litigant, the *Mahl* client actually made confirmed attempts to file the request for a trial de novo with a court. Respondent herein has established no such efforts. The court rule is very clear that the trial de novo must be commenced "in a *court* of competent jurisdiction" (emphasis added). There is no evidence Respondent ever tried to file the request with a court, except for the within motion practice long after the 30 days expired. Respondent states this error was the result of law office failure and confusion. For law office failure to qualify as a reasonable excuse, counsel must provide "detailed allegations of fact explaining the law office failure," *HSBC Bank USA Nat. Ass'n v. Wider*, 101 A.D.3d 683 (2nd Dept. 2012), citing *Cantor v. Flores*, 94 A.D.3d 936. Respondent's papers are devoid of any such details. Just citing the phrase "law office failure" is not enough.

Accordingly, it is hereby

ORDERED, that Respondent's motion to renew is GRANTED; and it is further

ORDERED, that upon renewal, the court's April 2, 2015 order remains unchanged. The arbitrators' award is confirmed; and it is further

ORDERED, that the stay granted on June 10, 2015 enjoining Petitioner from

pursuing collections efforts is VACATED.

Re-submit judgment on notice.

This constitutes the Decision and Order of the Court.

Dated: August 10, 2015
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.

ENTERED

AUG 11 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE