P.L.K. Vending, Inc. v Chessa, LLC
2017 NY Slip Op 31455(U)
July 5, 2017
Supreme Court, New York County
Docket Number: 651644/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED, J.S.C.** **PART 2**
Justice

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P.L.K VENDING, INC,

Plaintiff,

- v -

CHESSA, LLC D/B/A PHOENIX PARK, MICHAEL GEDDES

Defendant.

---X

INDEX NO. 651644/2016

MOTION DATE

MOTION SEQ. NO. 002, 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this application to/for Stay/Vacate Arbitral Award

Upon the foregoing documents, it is

ordered that the motions are decided as follows.

In this special proceeding commenced by petitioner P.L.K. Vending, Inc. against respondents Chessa, LLC d/b/a Phoenix Park and Michael Geddes, respondents move (motion sequence 002): 1) pursuant to CPLR 5015, to vacate a money judgment entered against them by this Court dated July 6, 2016 and entered August 12, 2016; 2) pursuant to CPLR 3211(a)(8), to dismiss the petition based on lack of personal jurisdiction; and 3) pursuant to CPLR 7511, to set aside or modify the arbitration award issued against them on February 2, 2016. Additionally, the respondents move (motion sequence 003): 1) pursuant to CPLR 6223 and/or 5239, to vacate

petitioner's notice of levy and sale dated November 2, 2016 which seeks to attach and sell, inter alia, respondents' liquor license; and 2) pursuant to CPLR 5519 and 2201, staying the enforcement of petitioner's default judgment dated July 6, 2016 pending the determination of respondents' motion to vacate the said judgment. In signing the order to show cause relating to motion sequence 003, this Court stayed enforcement of, and execution on, the judgment against respondents pending the hearing of the application.

FACTUAL AND PROCEDURAL BACKGROUND:

On or about April 10, 2013, "claimant" P.L.K. Vending, Inc. ("PLK")[1] entered into two separate agreements with respondent Chessa, LLC d/b/a Phoenix Park ("Chessa") which provided PLK with the exclusive right to operate its coin operated music devices and coin operated amusement devices at Chessa's premises, a bar/restaurant located at 207 East 67th Street, New York, New York, for a period of five years. NYSCEF Doc. 5. The agreements, which were guaranteed by respondent Michael Geddes, provided, inter alia, that any disputes between the parties were to be resolved by arbitration and that the party prevailing at arbitration was entitled to recover arbitration fees. Id. After Chessa allegedly breached the agreements, PLK served a demand for arbitration on or about April 27, 2015. NYSCEF Doc. 4.

On January 19, 2016, an arbitration was conducted at National Arbitration and Mediation before Arbitrator Hal Neier. NYSCEF Doc. 6. The arbitrator found that Chessa entered into two agreements with PLK granting PLK the exclusive right to install and operate a jukebox and three amusement games at the premises operated by Chessa. Id. The terms of the jukebox and

[1]This Court notes that PLK, having brought the petition, should clearly be referred to as "petitioner" herein. However, given that this error appears to be inadvertent and no discernible prejudice is present, this Court will disregard the same. *See* CPLR 2001.

amusement games agreements were essentially identical, expiring in April of 2018. Id. The arbitrator found that Chessa breached the agreements on or about February 2, 2015, when it requested that PLK remove the jukebox and amusement games from the premises in advance of its renovation, and then refused to allow PLK to reinstall the equipment once Chessa had entered into an agreement with a competitor of PLK. Id.

The arbitrator determined that the agreements provided that PLK's liquidated damages were equal to 75% of the weekly minimum set forth in section A of each agreement (*i.e.*, $100 per device), multiplied by the number of weeks still remaining on the term of the agreement. He found that the liquidated damages provision was not disproportionate to a reasonable measure of PLK's actual damages for breach of contract, since the agreement was intended to provide PLK with a five-year income stream in exchange for Chessa's use of the equipment until April of 2018. Id. The arbitrator noted that:

> The liquidated damages provision approximates this expectation by multiplying the minimum guaranteed payment for each device (*i.e.*, $100) by the number of weeks remaining on the Agreements after the breach, and then multiplying that product by 75%. According to PLK, the $25 % [sic] "discount" takes into account the anticipated servicing and other costs to PLK associated with the ongoing use of the devices. I find that this calculation represents a reasonable estimate of PLK's actual contract damages, and not a penalty, insofar as it restores the benefit of the bargain to PLK, thereby placing PLK in the position it would occupy absent the breach.

Id.

Using these calculations, the arbitrator determined that Chessa owed a total of $63,299 in liquidated damages, including interest through the date of the award, attorneys' fees and expenses through the time of the confirmation of the award but excluding fees for the cost of arbitration, which the arbitrator noted were "TBD." Id. An invoice annexed as Exhibit 6 to the petition (NYSCEF Doc. 8) reflects that the arbitration costs were $11,256.67. The arbitrator did, however,

refuse to award $21,091 in claimed minimum damages for the amusement games on the ground that such fees were waived by PLK since it never sought to collect the same from Chessa from the time of the commencement of the agreements until the date of the breach. NYSCEF Doc. 4.

The arbitration award dated February 2, 2016 was mailed to the parties on February 17, 2016. NYSCEF Doc. 5.

On March 29, 2016, PLK commenced the instant special proceeding against respondents seeking to confirm the arbitrator's award. NYSCEF Doc. 1. The petition was unopposed. By order and judgment dated July 6, 2016 and entered August 12, 2016, this Court confirmed the arbitration award. NYSCEF Doc. 13.

Respondents Chessa and Geddes now move, 1) pursuant to CPLR 5015(a)(1), to vacate the judgment entered against them by this Court on August 12, 2016; 2) pursuant to CPLR 3211(a)(1), to dismiss the petition based on lack of personal jurisdiction; and 3) pursuant to CPLR 7511, to set aside or modify the arbitration award issued against them on February 2, 2016. Additionally, respondents move (motion sequence 003): 1) pursuant to CPLR 6223 and/or 5239, to vacate petitioner's notice of levy and sale dated November 2, 2016 which seeks to attach and sell, inter alia, respondents' liquor license; and 2) pursuant to CPLR 5519 and 2201, staying the enforcement of petitioner's default judgment dated July 6, 2016 and entered August 12, 2016 pending the determination of respondents' motion to vacate the said judgment.

LEGAL CONCLUSIONS:

The Respondents' Motion to Vacate Their Default (Mot. Seq. 002)

Initially, respondents argue that they are entitled to have the judgment entered against them on default vacated pursuant to CPLR 5015(a)(1). In order to vacate a default pursuant to CPLR

5015(a)(1), one must establish a reasonable excuse for the default as well as a meritorious claim. *See Matter of Delybe C. (Sonia S.),* 121 AD3d 467 (1st Dept 2014); *60 E. 9th St. Owners Corp. v. Zihenni*, 111 AD3d 511 (1st Dept 2013). The decision whether to grant such relief is within the discretion of the court. *See Travers v Kulynych*, 139 AD3d 611 (1st Dept 2016). In its discretion, this Court determines that respondents have failed to establish their entitlement to relief pursuant to this section.

Respondents assert that their reasonable excuse for failing to answer the petition is because they were not properly served with the same. They maintain that, although PLK served them with the notice of petition and petition, such service was improper because it was made by certified mail and not in accordance with the CPLR. However, paragraph 24 of each of the vending agreements executed by the parties provides, in pertinent part, that:

> (24) Except as hereinabove otherwise expressly provided, all notices required to be given hereunder by either of the parties to the other shall be in writing and shall be sent by first class mail addressed to the last know[n] residence or business address or such other part, except that demands for arbitration and motion papers, if any, including petitions or other applications to confirm the arbitrator's award, shall be in writing and shall be served by registered or certified mail return receipt requested, and such service shall be deemed sufficient.

NYSCEF Doc. 3, at par. 24.

Given the foregoing provision, it is evident that the parties agreed to be served by registered or certified mail at their "last know[n] residence or business address." Here, there is no dispute that the respondents were served with the notice of petition and the petition by certified mail, return receipt requested, on April 1, 2016. Ex. 1 to Aff. In Opp. The certified mail return receipt reflects that an individual at 206 East 67th Street, respondents' place of business, signed for the letter on

April 2, 2016. Id. Thus, service was sufficiently effectuated in accordance with the parties' agreements and this Court thus rejects the respondents' argument that they had a reasonable excuse for failing to oppose the petition.

CPLR 403(c) provides that "[a] notice of petition shall be served in the same manner as a summons in an action." However, as here, "parties to an arbitration agreement may prescribe a method of service different from that set forth in the CPLR (*see Matter of Andy Floors, Inc. [Tyler Constr. Corp.],* 202 AD2d 938 [1994])." *Matter of New York Merchant's Protective Co. v Mima's Kitchen, Inc.*, 114 AD3d 796 (1st Dept 2014). Thus, the parties, in their agreements, affirmatively assented to circumventing the requirements applicable to the service of a summons pursuant to the CPLR. Similarly, this eliminated the need for service of a "courtesy copy" of the notice of petition and petition on the respondents, which they claim should have been provided.

In support of their motion, respondents rely, inter alia, on *Country Wide Ins. Co. v Polednak*, 114 AD3d 754 (1st Dept 1985) in asserting that no jurisdiction was obtained over them in this proceeding. In that case, the Appellate Division dismissed a petition where it was served on respondent by certified mail. However, that case is clearly distinguishable, since, unlike here, the parties to the arbitration agreement therein did not agree to service by means other than those set forth in the CPLR.

Similarly, the respondents assert that they have meritorious defenses to petitioner's claim. They argue that, given the absence of proper service of the notice of petition, this Court lacks jurisdiction over this matter. However, for the reasons stated above, service was proper. Thus, the respondents' argument that the petition should be denied due to a lack of jurisdiction pursuant to CPLR 3211(a)(8) is without merit. Further, this argument is procedurally flawed since a judgment has already been entered on the petition.

The respondents further assert that the award was punitive, not proportionate to the actual damages, and violative of public policy. However, they overlook that the arbitrator carefully explained his calculation of the damages awarded, as set forth above, and specifically stated that the damages were not meant to constitute a "penalty" but only to provide PLK with the "benefit of the bargain." NYSCEF Doc. 6. Indeed, as noted above, the arbitrator refused to award $21,091 in claimed minimum damages to PLK on the ground that such fees were waived by petitioner. NYSCEF Doc. 4.

Respondent Geddes argues that he "had no opportunity to meaningfully review or negotiate the contract[s] and was told just to sign here while working behind the bar." Geddes Aff. In Supp. At par. 17. However, this conclusory excuse is patently deficient. Geddes does not set forth who told him to sign the contracts, whether he attempted to negotiate them, or why he executed them without reviewing them.

To the extent that respondents argue that the arbitration award should be vacated pursuant to CPLR article 75 based on legal and factual errors by the arbitrator, their contention is without merit. Arbitration awards are accorded "substantial deference" and are provided extremely limited judicial review. *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 475 (2006). An arbitration award will be upheld provided there is "even a barely colorable justification for the outcome reached." *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d at 479, *supra* at 479, *quoting Andros Compania Maritima, S.A. v Marc Rich & Co, A.G.*, 579 F2d 691 (2d Cir 1978). Here, as noted above, it is evident from the arbitration award that the arbitrator who rendered the award carefully analyzed the parties' arguments, the law governing the dispute, as well as liability and damages.

Thus, the respondents' motion pursuant to motion sequence 002 is denied in all respects.

The Respondents' Motion For a Stay (Mot. Seq. 003)

As noted above, the respondents move (motion sequence 003): 1) pursuant to CPLR 6223 and/or 5239, to vacate petitioner's notice of levy and sale dated November 2, 2016 which seeks to attach and sell, inter alia, respondents' liquor license and fixtures in respondents' premises; and 2) pursuant to CPLR 5519 and 2201, staying the enforcement of petitioner's default judgment dated July 6, 2016 and entered August 12, 2016 pending the determination of respondents' motion to vacate the said judgment.

In opposition to the motion, petitioner concedes that the notice of levy and sale is invalid insofar as asserted against respondents' liquor license, since such a license cannot be sold. However, petitioner maintains that the notice of levy and sale must otherwise be enforced as against the respondents and that the latter have failed to set forth any basis upon which such enforcement should be prohibited.

Since the motion to vacate the judgment is denied, all stays on the enforcement of the judgment against respondents are lifted. Petitioner may enforce its judgment based on the notice of levy and sale dated November 2, 2016 to the extent the enforcement is sought against fixtures and items other than the liquor license referred to in the notice of levy and sale. Ex. D to Respondents' Motion for a Stay.

In light of the foregoing, it is hereby:

ORDERED that the respondents' motion (mot. seq. 002) seeking, inter alia, to vacate the order and judgment dated July 6, 2016 and entered August 12, 2016 is denied in all respects; and it is further,

ORDERED that the respondents' motion (mot. seq. 003) seeking to stay enforcement of the order and judgment dated July 6, 2016 and entered August 12, 2016 is denied as moot given the decision and order of this Court in motion sequence 002, and petitioner may execute on the order and judgment pursuant to the notice of levy and sale dated November 2, 2016 except that the notice of levy and sale shall be of no effect with respect to respondents' liquor license; and it is further,

ORDERED that this constitutes the decision and order of the court.

7/5/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X] CASE DISPOSED		[ ] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[X] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] DO NOT POST		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE