

Hart v Downing

2018 NY Slip Op 32145(U)

August 30, 2018

Supreme Court, New York County

Docket Number: 657175/17

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC

PART 47

Hart

-v-

Dowling

INDEX No. 657175/17

MOTION DATE

MOTION SEQ. No. 004

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____ No(s). _____

Answering Affidavits - Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Petitioners, who are former employees and investors of the corporate respondents, brought this petition pursuant to CPLR 7510 to confirm an arbitration award issued by the American Arbitration Association ("AAA") on November 21, 2017, which awarded petitioners compensatory and punitive damages based on respondents' violation of state wage statutes, breach of contract and fraud. By order dated February 23, 2018, this court granted the petition and judgment was entered on March 20, 2018 against all respondents except David W. Wagner, who notified the court that he had filed for bankruptcy. Respondent Michael H. Shaut now moves pursuant to CPLR 3211 to dismiss the petition (motion seq. #002) and pursuant to CPLR 5015 to vacate the judgment entered against him (motion seq. #004).

With respect to the motion to dismiss, petitioners argue as a threshold matter that the court should not even consider the motion because it was served after the return date of the petition and thus respondent Shaut waived the defenses raised in the motion. However, petitioners served the petition and notice of petition on respondent Shaut by "nail and mail" service on December 21, 2017, which was after the return date of December 19, 2017 stated in the notice of petition. CPLR 403(b) (requiring that the petition be served at least eight days before the time at which the petition is noticed to be heard). Although petitioners entered into a stipulation with some of the other respondents extending the return date of the petition to January 12, 2018, respondent Shaut was not a party to the stipulation and there is no indication that petitioners notified him of this extension by, for example, serving an amended notice of petition. Thus, respondent Shaut's late filing is excusable and the court will consider the motion on the merits.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____

Hon. Paul A. Goetz, JSC

- CHECK ONE: ... [] CASE DISPOSED [x] NON-FINAL DISPOSITION
CHECK AS APPROPRIATE: ... MOTION IS: [] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
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SUPREME COURT OF THE STATE OF NEW YORK
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In the motion to dismiss, respondent Shaut first argues that the petition must be dismissed pursuant to CPLR 3211(a)(8) because the court lacks personal jurisdiction. Personal jurisdiction is required in order to confirm an arbitral award in a New York court. Hereford Ins. Co. v. American Independent Ins., 136 A.D.3d 551 (1st Dep't 2016). Although petitioners bear the burden of showing that the court has jurisdiction over the respondent, on a motion to dismiss, petitioners need only demonstrate that facts "may exist" to exercise jurisdiction over the respondent. American BankNote Corp. v. Daniele, 45 A.D.3d 338, 340 (1st Dep't 2007). Here, petitioners have made such a showing by submitting evidence of numerous representations by the corporate respondents that their principal place of business is in New York. Affirmation of Ross D. Carmel (undated), Exhs. M-S. Given the arbitrator's finding that the individual respondents, including Shaut, dominated and controlled the corporate respondents to such an extent that the individuals are jointly and severally liable for the actions of the corporate entities, petitioners have sufficiently demonstrated that alter ego liability may confer personal jurisdiction over respondent Shaut. So. New Eng. Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 138 (2d Cir. 2010).

Respondent Shaut also argues that the court lacks subject matter jurisdiction over this proceeding because he never entered into an arbitration agreement with petitioners. In support, respondent Shaut points out that the arbitration agreements relied on by the petitioners were with the corporate respondents, and not with Shaut individually. Generally, questions regarding the arbitrability of claims are for courts to decide absent "clear and unmistakable evidence" that the parties intended to submit the question of arbitrability to the arbitrators. Smith Barney, Inc. v. Hause, 238 A.D.2d 104, 105 (1st Dep't 1997). Here, the arbitration clauses at issue provide that "[a]ny controversy between the parties" shall be submitted to arbitration which shall "be governed by the provisions of the Commercial Arbitration Rules of the American Arbitration Association." Carmel Aff., Exh. H, § 1.

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By specifically incorporating the AAA rules into the arbitration clause, the parties expressly agreed to submit the issue of arbitrability to the arbitrators. Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's, 66 A.D.3d 495 (1st Dep't 2009). Here, the arbitrator specifically addressed the argument that Shaut now raises and found that Shaut is bound by the arbitration agreements. Carmel Aff., Exh. H, § VII.c. The court must defer to the arbitrator's finding on this issue. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (2d Cir. 1995).

Finally, the court declines to address respondent Shaut's argument regarding improper service given that it was improperly raised for the first time in his reply brief. Erdy v. City of New York, 129 A.D.3d 546 (1st Dep't 2015). Accordingly, the motion to dismiss must be denied.

With respect to the motion to vacate, respondent Shaut argues that the judgment should be vacated pursuant to CPLR 5015(a)(4) based on lack of jurisdiction. However, the more appropriate provision to apply under these circumstances is CPLR 5015(a)(1), excusable default. As discussed above, respondent Shaut has provided a reasonable excuse for his default because the petition and notice of petition was served on him after the return date stated on the notice of petition. Respondent Shaut also has a meritorious defense to the petition to confirm, namely lack of personal jurisdiction. Accordingly, the judgment should be vacated on this basis.

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Hon. Paul A. Goetz, JSC

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Petitioners contend that respondent Shaut's motion is precluded by an order entered in the Northern District of Ohio in a case commenced by Shaut to vacate the arbitral award, captioned Michael H. Shaut v. Andrew Hatch, et al., Case No. 1:18-cv-420. That order granted the motion by the award creditors, the petitioners herein, to dismiss Shaut's motion based on improper service, timeliness and res judicata due to the judgment entered against Shaut in this matter. However, respondent Shaut does not seek to vacate the arbitral award, but rather the judgment entered thereon. Moreover, the dismissal of Shaut's motion was not on the merits and does not preclude Shaut from opposing the motion to confirm on the narrow grounds listed in CPLR 7511, as well as based on lack of personal jurisdiction. Pine Street Associates, L.P. v. Southridge Partners, L.P., 107 A.D.3d 95, 100 (1st Dep't 2013); NYCTL 1999-1 Trust v. 573 Jackson Ave. Realty Corp., 39 A.D.3d 267 (1st Dep't 2007). Likewise, petitioners' argument that the award must be confirmed under CPLR 7511(e) in light of the Ohio court's order dismissing Shaut's motion to vacate is unpersuasive as the Ohio court did not deny Shaut's motion to vacate but rather dismissed the motion on procedural grounds. In any event, petitioners' argument in this regard is more appropriately directed to the Ohio court which rendered the decision. Accordingly, it is

ORDERED that the motion to vacate the judgment is granted and the court's judgment filed on April 12, 2018 is vacated solely with respect to respondent Michael H. Shaut; and it is further

ORDERED that the motion to dismiss is denied and pursuant to CPLR 404(a), respondent Shaut may answer the petition within five days after service of this order with notice of entry.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/30/18

Hon. Paul A. Goetz, JSC

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