Matter of Rakower Law, PLLC v Yusifov
2019 NY Slip Op 33041(U)
October 7, 2019
Supreme Court, New York County
Docket Number: 657500/2017
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

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INDEX NO. 657500/2017

In the Matter of

MOTION DATE 09/17/2019

RAKOWER LAW, PLLC,

MOTION SEQ. NO. 001, 003

Petitioner,

- v -

NAUM YUSIFOV, SVETLANA YUSIFOV, and NICK'S PRODUCE CORP.,

DECISION, ORDER, and JUDGMENT

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128 were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this proceeding pursuant to CPLR 7510 to confirm an arbitration award in a fee dispute between an attorney and its clients, the respondent clients, in effect, cross-petition pursuant to 7511(b)(2)(ii) to vacate the award on the ground that the dispute was not arbitrable. They further contend that they did not receive notice of either the arbitration proceeding, itself, or the arbitration award until a judgment was entered against them in this proceeding, and that their application to vacate the award thus was timely and properly made in the context of this proceeding. The petitioner attorney, Rakower Law, PLLC, seeks to confirm the award and opposes the cross petition. The petition is denied, the cross petition is granted, and the arbitration award is vacated.

In July 2014, the respondents retained the petitioner to defend them in an action in the United States District Court for the Eastern District of New York, entitled *Jacob's Village Farm Corp. v Yusifov* (14 Civ 4109 [PKC] [MDG]) (hereinafter the federal litigation). In this regard, the

parties executed an engagement letter that provided that "[t]he scope of [the petitioner's] Retention is expressly limited to the [federal litigation], and any expansion of that scope shall be the subject of a separate engagement letter." The engagement letter also contained a provision that any fee disputes thereunder would be submitted to arbitration. It is undisputed that the respondents paid the petitioner the sum of $70,000 in satisfaction of all of their obligations under that retainer, save the sum of $64.09.

While the petitioner's representation of the respondents in the federal litigation was ongoing, the respondents allegedly requested the petitioner to undertake additional legal work on their behalf. These matters included a defamation action, entitled *Nick's Produce Corp. v Jacob's Village Farm Corp.*, commenced in the Supreme Court, Kings County, under Index No. 500936/15, two family offense proceedings commenced in the Family Court, Kings County, under Docket Nos. O-18359-14 and O-17952-14, and a confession of judgment procedure, entitled *Smith & Krantz, LLP v JAS Family Trust*, commenced in the Supreme Court, Kings County, under Index No. 506844/14. The respondents executed no additional retainer agreements or letters of engagement with respect to these matters. The petitioner billed the respondents the aggregate sum of $33,877.22 with respect to these matters, and charged the respondents $3,977.76 in late fees, for a total of $37,854.98.

Although the respondents made several written promises to pay the amounts due, they never did. On or about August 12, 2016, the petitioner requested a fee arbitration pursuant to the New York Attorney-Client Fee Dispute Resolution Program, seeking to recover legal fees allegedly owed by the respondents. The petitioner mailed the intention to arbitrate to the respondents at 2549 East 28th Street, Brooklyn, New York 11235. The New York County Lawyers' Association convened an arbitration panel and noticed the parties for an arbitration hearing to be conducted on October 4, 2017. Although the petitioner emailed an informal hearing notice to the address that it had on file for the respondent Nick's Produce Corp., the respondents did not appear at the arbitration hearing. In its October 13, 2017 award, a panel of

arbitrators, acting under the auspices of the New York County Lawyers' Association, awarded $40,464.22 to the petitioner following the respondents' default in appearing at the arbitration hearing or contesting the claims in the demand for arbitration.

By order to show cause dated December 22, 2017, the petitioner initiated the instant proceeding to confirm the arbitration award (SEQ 001). With respect to service upon the individual respondents, the petitioner caused copies of the order to show cause, the petition, and all supporting papers to be delivered to a person at an apartment building in Staten Island, and thereafter mailed them to an address at that building as well. With respect to the corporate respondent, the petitioner caused copies of the papers to be delivered to the Secretary of State in Albany and mailed to the East 28th Street address in Brooklyn. No opposition or response to the petition was submitted by any party. By order dated February 27, 2018, this court granted the petition on default, confirmed the award, and directed the Clerk of the court to enter judgment in the sum of $40,4664.22, plus costs. On April 4, 2018, the Clerk entered judgment in favor of the petitioner and against the respondents, jointly and severally, in the total amount of $41,792.54.

On February 28, 2019, the respondents moved to vacate the judgment and the order upon which it was based (SEQ 002). They asserted that the individual respondents were not properly served with process because, although they owned the Staten Island apartment where service was purportedly effected, they did not actually reside there; rather, the individual respondents averred that they actually resided in Florida at the time service was attempted, and that only their grown children resided at the Staten Island apartment. The respondents further contended that the person to whom the papers were personally delivered at the apartment building did not even reside in the apartment in which their children resided, but was a next-door neighbor. The respondents conceded that the corporate respondent was properly served by delivery to the Secretary of State. They contended however, that inasmuch as the corporate respondent was not served by personal delivery to an officer, director, manager, or cashier, and

did not receive actual notice of the commencement of the proceeding in time to defend it, vacatur of the judgment was warranted against it pursuant to CPLR 317. On May 10, 2019, the parties stipulated, on the record, to vacate the February 27, 2018 order and the April 4, 2018 judgment, and to permit the respondents to answer or move with respect to the petition. The respondents, however, agreed to waive the issue of improper service of process as a ground for denial or dismissal. By order dated May 10, 2019, the court disposed of the respondents' motion to vacate their default in accordance with the stipulation.

The respondents now, in effect, cross-petition to vacate the award. The petitioner opposes the cross petition. Inasmuch as the matter is not arbitrable, and the respondents did not waive the issue of arbitrability by failing to appear at the arbitration hearing because they did not have proper notice of that hearing, the cross petition to vacate the award must be granted, and the petition to confirm the award must be denied.

In the first instance, although "[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him" (CPLR 7511[a]), that time limit does not bar the respondents' motion here. Usually, where a proceeding to confirm an award is made within 90 days of the award, a respondent must cross-petition to vacate the award within that 90-day period (*see Matter Lyden v Bell*, 232 AD2d 562 [2d Dept 1996]). That scenario presumes, however, that the respondents were already in receipt of the award. The word "delivery," as used in CPLR 7511(a), means the actual receipt of an arbitration award (*see Matter of Lowe [Erie Ins. Co.]*, 56 AD3d 130 [4th Dept 2008]). Here, although the petitioner commenced this proceeding to confirm the award within 90 days of the date that the award was rendered, the respondents explained that a copy of the award was never actually delivered to them, and that they only learned about the default judgment against them, and the existence of the underlying arbitration award, when their bank accounts were restrained.

A party who neither participated in the underlying arbitration nor was properly served with a notice of intention to arbitrate may seek to vacate an arbitration award pursuant to CPLR

7511(b)(2)(ii) on the ground that "a valid agreement to arbitrate was not made." Here, the respondents did not participate in the underlying arbitration precisely because they were not actually served with a notice of intention to arbitrate, inasmuch as all of them had vacated the Brooklyn address prior to the petitioner's and arbitrator's attempted service of the notice, and the corporate respondent had ceased doing business.

22 NYCRR 137.2 provides

> "(a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.
>
> "(b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for this Part, and that the client agrees to resolve fee disputes under this Part.
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> "(c) The attorney and client may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to de novo review. Such consent shall be in writing in a form prescribed by the Board of Governors.
>
> "(d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the Board of Governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part."

These Court rules concerning fee arbitration thus make arbitration mandatory only if the client requests it or a retainer agreement contains an arbitration clause, not where the attorney unilaterally seeks it. Here, the respondents never requested arbitration, and there is no retainer agreement between the parties containing a fee arbitration clause that would trigger the applicability of the Court's arbitration rules in connection with the disputed fees. There is no dispute that the petitioner and the respondents entered into a retainer agreement in connection with the federal litigation, and that the agreement contained an arbitration clause as to the fees. Nonetheless, the fees that were the subject of the arbitration here were incurred subsequent to

the disposition of the federal litigation and were generated in connection with other matters for which the respondents informally requested representation or that they claim they never asked for, such as the Family Court dispute. Moreover, the retainer agreement made clear that it applied only to the federal litigation, and that new agreements were necessary to bind the parties with respect to any other matters for which the respondents sought representation. Hence, the dispute is not arbitrable.

Usually, the issue of arbitrability is for the court (*see Matter of Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 45 [1997]). Here, the respondents did not consent to arbitrate, and no statute or court rule requires the respondents to arbitrate the fee dispute (*see generally People of State of N.Y. v Coventry First, LLC*, 13 NY3d 108 [2009]; *cf. Matter of Smith Barney Shearson, Inc. v Sacharow*, 91 NY2d at 45-46 [where parties consent to arbitrate before AAA, they also consent to abide by AAA's rules that authorize the arbitrator, rather than the court to determine the issue of arbitrability]). Nonetheless, the issue of arbitrability may be waived by participating in an arbitration without either raising the issue before the arbitrator or seeking a permanent stay of arbitration pursuant to CPLR art 75 on that ground (*see Matter of Peckerman v D & D Assocs.*, 165 AD2d 289, 295-296 [1st Dept 1991]).

Here, however, the respondents did not participate in the arbitration and were not provided with notice of the arbitration hearing in accordance with CPLR 7506(b), which requires the arbitrator to "notify the parties in writing personally or by registered or certified mail" of the hearing date at least eight days prior thereto (*see Matter of Nadel & Assoc., P.C. v O'Neil,* 50 AD3d 358 [1st Dept 2008]; *Matter of Ostreicher v Ostreicher*, 217 AD2d 629 [2d Dept 1995]). As such, the petitioner may not argue that the respondents waived the issue of arbitrability by participating in the arbitration without raising that issue (*cf. Matter of RRN Assocs. v DAK Elec. Contr. Corp.*, 224 AD2d 250 [1st Dept 1996] [party who received notice and participated in arbitration waives right to challenge award on the ground that there was no agreement to arbitrate]). In fact, only a party who did not participate in the arbitration and did not receive

notice of intention to arbitrate may assert that no valid arbitration agreement was made (*see Matter of Meisels v Uhr*, 79 NY2d 526, 538 [1992]; *Matter of Grasso*, 72 AD3d 1463, 1465 [3d Dept 2010]; *see also Matter of Brijmohan v State Farm Ins. Co.*, 92 NY2d 821, 822 [1998]; *Matter of Silverman [Benmor Coats],* 61 NY2d 299, 309 [1984]; *cf. Matter of Spears v New York City Transit Auth.*, 262 AD2d 493, 494 [2d Dept 1999] [by failing to appear at the arbitration hearing, respondents did not waive claim that an award was rendered in excess of limits fixed by subject insurance policy, since "a limitation on the arbitrator's power will not be waived if the party relying on it asserts it . . . in opposition to an application for confirmation"] [internal quotation marks omitted]). Crucially, a party's failure to appear at an arbitration hearing because of improper or insufficient service of the notice of intention to arbitrate cannot be deemed a waiver of any claim that the dispute was not arbitrable.

The court notes, however, that the disposition of this proceeding is without prejudice to the petitioner's timely commencement of a plenary action against the respondents to recover the attorneys' fees that remain in dispute.

Accordingly, it is

ORDERED that the petition to confirm the arbitration award is denied (SEQ 001); and it is further,

ORDERED that the respondents' cross petition to vacate the arbitration award is granted (SEQ 003); and it is,

ADJUDGED that the arbitration award rendered on October 13, 2017 by the New York County Lawyers' Association in the matter entitled *Yusifov v Rakower Law, PLLC*, Docket No. 2017-072 is vacated.

This constitutes the Decision, Order, and Judgment of the court.

10/7/2019
DATE

JOHN J. KELLEY, J.S.C.

HON. JOHN J. KELLEY
J.S.C.

SEQ 001 CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

SEQ 003 CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE