SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 23

Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court

UNITED STATES MERCHANTS PROTECTIVE CO., INC.,

Petitioner,

-against-

160 BEACH 116TH REALTY CORP, d/b/a OCEANVIEW HOTEL and JOHN J. BAXTER,

Respondents.

INDEX NO: 612569/2020

MOTION SEQ. No. 1 - MG

The following papers were read on this motion:

(1) Notice of Petition/Petition/Exhibits
(2) Affidavit in Opposition
(3) Reply

Petitioner seeks an Order confirming the arbitration award issued in this action pursuant to CPLR §§ 7510 and 7514. Respondent JOHN BAXTER opposes, claiming that he was not served at his listed address with the Notice of Arbitration. He does not contest that 160 BEACH 116th REALTY CORP. was served. BAXTER does not make a motion to vacate the award.

In his opposition he does not state a valid defense to the claims, but an excuse as to why he was unable to pay. He offers no defense for the corporate defendant.

It is well settled that, as a matter of general policy, disposition of cases should be had by a determination on the merits of the action and not by way of a default [*Benadon v. Antonio*, 10 AD2d 40, 197 NYS2d 1 (1st Dept 1960)]. After entry of a default judgment, however, to obtain vacatur of said judgment the movant is required to demonstrate that the default is excusable, in addition, allege facts showing a meritorious defense to the underlying action [*Wall v. Bennett*, 33 AD2d 827, 305 NYS2d 728)]. In

the instant case, the defendant failed to establish a meritorious defense. The papers submitted in support of the instant motion fails to establish a potentially meritorious defense for BAXTER.

Respondent BAXTER's Affidavit, which offers only a bald denial of service, is in opposite of the objective evidence to the contrary [*Thermasol, Ltd. v. Dreiske*, 78 A.D.2d 838, 838-39, 433 NYS2d 166 (1980), affd, 52 NY2d 1069, 420 N.E.2d 401 (1981)].

The Court notes that BAXTER does not deny that the corporate defendant received notice, nor does he deny that he was served with the initial Demand for Arbitration, as well as the Notice of the Award, yet did nothing in a timely manner to vacate it. Based on this additional proof, and lack of potentially meritorious defense, the Court does not find that a Traverse hearing is warranted to examine the service to this defendant. In light of all of the evidence and documents presented the Court finds that this claim appears to be no more than a tactic in attempt to stave off payment of his just debts.

Courts have upheld the service of a Demand for Arbitration by an agreed upon alternative method of service [*New York Merchants Protective Co., Inc. v. Backyard Party Tent Rental, Inc.*, 34 Misc. 3d 55 (App. Term, 2d Dept. 2011) (upholding service of a demand for arbitration by ordinary mail where the parties had agreed to arbitrate before an arbitration company that had a rule providing for the service by mail of any papers to initiate an arbitration); *Smith v. Positive Productions*, 419 F. Supp. 2d 437, 446 (S.D.N.Y. 2005) ("New York law which requires notice by registered mail or personal service, is inapplicable. The parties expressly agreed in the January Agreement arbitration clause that the AAA's Rules would govern the arbitration.")]. Proof that an item was properly mailed creates a presumption that the item was received by the addressee [*Trusts & Guarantee Co. v. Barnhardt*, 270 N.Y. 350, 352 (1936)].

Pursuant to CPLR § 7511 an arbitrator's award shall be vacated if the Court finds that a party's rights were prejudiced by an award where the arbitrator exceeded his jurisdiction, was corrupt or impartial, where the award exceeds the arbitrator's authority or was imperfectly executed, or where a final and definite award was not made [*State Insurance Fund v. Aetna Casualty and Surety Co.*, 89 NY2d 1053 (1997)]. An arbitration

award must be vacated regardless of its fairness or desirability if award is in excess of the powers of the arbitrator [*Simons v. Publishers' Assen of New York City*, 94 NY2d 362 (1950)]. The award is not without a factual basis and can be supported by the record [*Carinsi v. Friedman*, 301 AD2d 600 (2nd Dept 2003); *Friedman v. Gleeson*, 300 AD2d 404 (2nd Dept. 2002)]. The respondent has not established any of the statutory grounds for vacatur.

The Petition is Granted. CPLR §§ 7510, 7514. The Arbitration Award of October 8, 2020 in the sum of $18,034.80 with costs, disbursements and interest is Granted. As the respondent does not contest the detailed evidence supporting the request for attorneys fees, the request for an award of $2,500.00 for such fees is also Granted.

It is **SO ORDERED**.

HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: JUN 0 3 2021