At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of September, 2013.

PRESENT:

HON. CAROLYN E. DEMAREST,

Justice.

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CHELSEA AUCTIONS INC.,
TATIANA GOROBETZ,

Petitioner,

-against-

SOUTH SHORE ALARMS INC.

Respondent(s).

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DECISION AND ORDER

Index No. 503925/2012

The following papers read herein: Papers Numbered

Notice of Motion/Cross Motion	5, 8
Affidavits in Support and in Opposition/Exhibits	9-15
Affidavits in Reply/Exhibits	16-18

In this special proceeding to stay arbitration, respondent South Shore Alarms Inc. moves to dismiss the petition for a stay of arbitration (the "Petition") based on lack of personal jurisdiction. Petitioners Chelsea Auctions Inc. and Tatiana Gorobetz cross-move for default judgment on the grounds that respondent never answered the Petition and untimely moved to dismiss it.

BACKGROUND

The underlying dispute arises out of a contract for the installation, monitoring, and servicing of an alarm system at petitioner Chelsea Auctions Inc.'s place of business. The contract between respondent and Chelsea Auctions was signed by Tatiana Gorobetz. Gorobetz also signed a personal

guarantee. Paragraph 26, titled "LEGAL ACTION," states, in part, that:

> Any action or dispute between the parties, including issues of arbitrability, shall, at the option of either party, be determined by arbitration administered by the Arbitration Services, Inc., under its Commercial Arbitration Rules www.natarb.com. The commencement of any action, proceeding, or arbitration and service of legal process or papers in any action, proceeding or arbitration between the parties may be served by prepaid First-Class Mail delivered to the U.S. Post Office or overnight by Federal Express or UPS to the party's address in this agreement or other address provided by a party in writing to other party.

The last page of the contract, contains a provision that reads "The undersigned personally guarantees subscriber's performance of this agreement and agrees to arbitrate any dispute as provided for in this contract," followed by Gorobetz's signature. On October 26, 2012, respondent served on petitioners a demand for arbitration (the "Demand for Arbitration") claiming a breach of contract. An affidavit of service submitted by respondent indicates that service was made by first-class mail.

Petitioners filed the instant Petition on November 21, 2012, seeking to stay arbitration on the grounds that the provision in the contract governing arbitration only "mentions arbitration in passing" and because petitioners were unaware that the arbitration provision existed, among other arguments. On May 8, 2013, respondent moved to dismiss the petition for lack of personal jurisdiction because petitioners failed to serve a notice of petition with the Petition and because petitioners failed to serve a notice advising respondent that the underlying action is subject to electronic filing, as required by NYCRR 202.5-bb. On May 21, 2013, petitioners cross-moved for default judgment, arguing that respondent's time to answer had expired, and the motion to dismiss was therefore untimely.

DISCUSSION

Respondent argues that the Petition must be dismissed because a notice of petition was never served. CPLR 306(b) requires that, following commencement by filing, service of a notice of petition or order to show cause be made not later than 15 days after expiration of the statute of limitations,

when such statute of limitations is under four months. CPLR 403 states that a "notice of petition shall specify the time and place of the hearing on the petition". Where the notice of petition does not specify the "time and place of the hearing" as required by CPLR 403 (a), "the notice therefore fail[s] in its essential purpose of apprising respondent that a judgment [is] sought against it and that, at a stated time and place, it must appear to answer the petition. Accordingly, personal jurisdiction over respondent [is] not acquired" (*Common Council of City of Gloversville v Town Bd. of Town of Johnstown*, 144 AD2d 90, 92 [3d Dept 1989]; *see also Dibenedetto v Nationwide Associates, Inc.*, 297 AD2d 740, 741 [2d Dept 2002], finding that "the notice of petition did not include the proper amended return date and therefore was jurisdictionally defective").

It is not disputed that while petitioners served a copy of the Petition on respondent, a notice of petition was never served or even filed. The failure to serve a notice, which should have specified the time and place of the hearing, is a jurisdictional defect. As the Court does not have jurisdiction over respondent, the Petition is dismissed.

CPLR 306-b provides that dismissal shall be without prejudice. However petitioners' argument that they should be given an opportunity to amend the Petition is unavailing as any petition brought now would be untimely. CPLR 7503(c), governing arbitration, requires that "an application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded." As the statute of limitations governing applications for stays of arbitration is under four months, petitioners were required to serve a notice of petition within 15 days of the expiration of that statute of limitations (*see* CPLR 306-b), or, in other words, 35 days after service of the demand for arbitration. Well over 35 days have elapsed since October 26, 2013, the date

respondent avers that the demand was served, by first class mail.[1] Moreover, a review of the contract reveals that it unequivocally provides for arbitration if elected by either party, a provision that was repeated directly above Gorobetz's signature, and, thus, petitioners' contentions that the contract did not provide for arbitration or that they were somehow unaware of such provisions are without merit.

In light of the foregoing, respondent's motion to dismiss is granted. Petitioners' cross motion is dismissed as moot.

This constitutes the decision and order of the Court.

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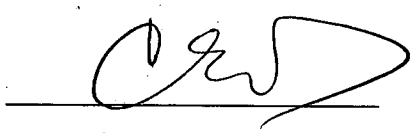

Carolyn E. Demarest
J. S. C.

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[1] Petitioners argue that service of the demand for arbitration was defective because respondent sent it by first class mail and not with a return receipt, as specified by the CPLR. While CPLR 7503(c) provides that service of the notice of intention to arbitrate "shall be served in the same manner as a summons or by registered or certified mail, return receipt requested," parties may contract to select a different method of service *(see Matter of Knickerbocker Ins. Co.*, 28 NY2d 57, 64 [1971] ("It is old law that arbitration agreements may provide for methods of service other than in common-law form appropriate to litigation."). The consequence of improper service under 7503(c) is to toll the time period by which the other party must apply to stay arbitration (*see Matter of Initial Trends*, 58 NY2d 896 [1983]). Moreover, when service of an arbitration notice is effected by mail, the time to apply for a stay begins to run upon receipt of the notice (*see Knickerbocker*, 28 NY2d at 64; *Matter of Andy Floors, Inc.* 202 AD2d 938, 939 [3d Dept 1994]).

Here, the contract expressly states that service of a commencement of arbitration proceedings could be made by first class mail. Moreover, it is undisputed that petitioners received the demand by at least November 21, 2013, the date they filed the Petition. Accordingly, even if the statute of limitations were tolled to begin on that date, well over 35 days have passed., and any renewed petition and accompanying notice of petition would be untimely.