Cere v Subway Intl. B.V.
2011 NY Slip Op 32250(U)
August 16, 2011
Sup Ct, NY County
Docket Number: 111998/10
Judge: Martin Schoenfeld
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SCANNED ON 8/18/2011

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Schoenfeld, Justice

PART 28

Index Number : 111998/2010

CERE, ORNELA

VS.

SUBWAY INTERNATIONAL B.V.

SEQUENCE NUMBER : 003

VACATE DEFAULT JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3, 4-5
Answering Affidavits — Exhibits	6-8, 9
Replying Affidavits	10, 11

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to vacate default and dismiss petition is granted. See accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/16/11

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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CERE, ORNELA

Petitioner,

-against-

SUBWAY INTERNATIONAL B.V.

Respondent.

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MEMORANDUM DECISION AND JUDGMENT

Index No.: 111998/10

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

For Petitioner:
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For Respondent:
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On November 29, 2010, this Court granted Ms. Cere's (Petitioner) Article 75 Petition to Vacate a Final Arbitration Award on default. Thereafter, on December 13, 2010 Respondent, Subway International B.V. (Subway) moved this Court to vacate the default and to dismiss the Petition, arguing that the Court lacks personal jurisdiction. For the reasons set forth below, the Court finds that it does lack personal jurisdiction. Therefore, the default is vacated and the Petition is dismissed.

BACKGROUND

Petitioner and Respondent participated in a complex arbitration proceeding before Arbitrator Edna Sussman of the International Centre for Dispute Resolution in New York City. At the four day hearing in March 2010, both parties produced a vast amount of exhibits and many

witnesses.[1] The arbitration concerned a franchise agreement between Petitioner and Respondent for a Subway restaurant in Athens, Greece. Respondent demanded arbitration pursuant to the franchise agreement, asking for a determination that the agreement had been terminated and for compensation for fees owed and breach of the agreement. Petitioner made numerous counterclaims also seeking compensation. On August 2, 2010, the arbitrator found that the franchise agreement had been terminated and awarded compensation to both parties, with Petitioner receiving the bulk of the monetary award.[2] According to Petitioner's papers, her attorney[3] received a copy of the decision on August 3, 2010.

On September 10, 2010 Petitioner filed this Article 78 Petition asking that the arbitration award be vacated, arguing, among other things, bad faith on the part of the arbitrator. At that time, Petitioner sent copies of the Notice of Petition and accompanying papers to Subway's arbitration counsel via Federal Express.

On November 29, 2010, the Court, not having received opposition papers from Respondent, granted the Petition to Vacate the Arbitration Award on default and instructed that an order be settled upon notice by Petitioner to Respondent and to the International Centre for Dispute Resolution. Thereafter on December 13, 2010 Respondent filed a motion to vacate the

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[1]Petitioner's arbitration was one of several concerning failed Subway franchises in Greece heard by arbitrators at the International Centre for Dispute Resolution. One of these cases with similar facts was conducted simultaneously with Petitioner's case before Arbitrator Sussman.

[2]Subway was awarded monies for outstanding royalties and advertising fees totaling 1,080.56 Euros. The arbitrator granted Ms. Cere a total of 40,519.44 Euros for one of her counterclaims and for expenses for copying and translation of exhibits. The parties were instructed to split the administrative and arbitrator fees.

[3]Petitioner's attorney, Ms. Manolis, is not admitted to practice in New York and Ms. Ceres has filed the Petition *pro se*.

default and asked that the Court dismiss the Petition, arguing that service was not proper and therefore, that the Court did not have personal jurisdiction. Petitioner acknowledges that there was a "defect" concerning her first attempt at service by Federal Express,[4] but believes that she "cured" this defect by re-serving the papers via State Marshal on Respondent's counsel on November 22, 2010. According to the State Marshal's statement, he brought the papers to Doctor's Associates at 325 Bic Drive in Milford, Connecticut and attempted twice to leave the papers with attorneys from the legal department. Both times the attorneys refused to accept service, at least once indicating that the papers needed to be sent to corporate headquarters in Amsterdam. On the second attempt, the Marshal left the papers with a receptionist.

DISCUSSION

Review of an arbitration award is a special proceeding which "must be commenced in a manner sufficient to confer personal jurisdiction." *Application of Country Wide Ins. Co.,* 114 A.D.2d 754 (1st Dept. 1985); CPLR § 7502(a). To commence a special proceeding, the notice of petition must be served "in the same manner as a summons in an action." *Id.*; CPLR 403(c). Neither service by Federal Express nor service on a party's attorney is sufficient to confer jurisdiction. *Country Wide*, 114 A.D. 2d at 754 (sending moving papers by certified mail to party's arbitration attorneys was "improper" and "insufficient to confer requisite personal jurisdiction" in an Article 75 special proceeding); *Star Boxing, Inc. v. Daimlerchrysler Motors Corp.*, 17 A.D.3d 372 (2d Dept. 2005) (mailing Article 75 petition by ordinary mail to law firm

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[4]The other franchisee whose case was heard at the same time as Petitioner's before the same arbitrator filed a similar Motion to Vacate the Arbitration Award in this court, also sending the Notice of Petition by Federal Express. Justice Alice Schlesinger dismissed that case finding that such service was insufficient to commence a special proceeding. *Bletas v. Subway Int'l BV*, Index No. 111997/10, dated 11/10/10 (N.Y. Co.).

that represented party at arbitration was insufficient service); *Eagle Insurance Company v. Republic Western Insurance Co.*, 21 Misc.3d 1121(A) (N.Y. Sup. Ct. 2008).

Here, as Petitioner concedes, initial service of the Petition via Federal Express was "defective," and, therefore, did not confer personal jurisdiction on this Court. *INA/Aetna v. American Mut. Ins. Companies*, 115 A.D.2d 640 (2d Dept.1985). Petitioner argues, nevertheless, that she "cured" this defect by re-serving the Petition via a State Marshall on November 22, 2010. Personal service on a corporation, however, must be made "to an officer, director, managing or general agent or cashier or assistant cashier" or an authorized agent of the corporation. CPLR § 311. Service is not proper if made to the corporation's attorneys, even to the attorneys who represented the corporation at the time of the arbitration. *Country Wide*, 114 A.D.2d at 754; *Star Boxing*, 17 A.D.3d at 372; *Queens Community Medical Centers v. Eveready Insurance Company*, 7 Misc.3d 1010(A) (Civ. Ct. Kings County 2005). Here, the Marshal brought the notice of petition to Doctor's Associates in Milford, Connecticut, attempted to give them to attorneys from the law department, and when they refused, left the papers with a receptionist. Even assuming the attorneys represented the Respondent, the Marshal's conduct did not constitute proper service of the notice of petition. *Star Boxing*, 17 A.D.3d at 372. Thus, the court does not have personal jurisdiction.

Moreover, even if the Marshal's attempt could be considered to have cured the defective service, it came too late. Under CPLR 7511(a) an application to vacate an arbitration award must be made within 90 days of delivery to the party or party's counsel. Delivery date is the day a party or her agent receives the decision. *See In The Matter of the Arbitration between Brenda Lowe (Erie Insurance Co.)*, 56 A.D.3d 130, 131 (4th Dept. 2008). Here, Petitioner's counsel

received the award on August 3, 2010. Her second attempt to serve her papers on Respondent was on November 22, 2010, which by the Court's calculations is almost three weeks past the 90 day deadline to commence the Petition.[5]

The Court notes in passing that despite today's ruling, Petitioner, who obviously feels very passionate about this case, may still have her day in court. Even though the 90 day period to move to vacate has expired, Petitioner will have the opportunity to make her arguments for vacating the award when Respondent moves to confirm the award.[6] *Karlan Const. Co. v. Burdick Associates Owners Corp.*, 166 A.D.2d 416, 417 (2d Dept. 1990) (citing *State Farm Auto Ins. Co. V. Fireman's Fund ins. Co*, 121 A.D.2d 529 (1986)).

Therefore, in accordance with the foregoing, it is

ORDERED that Respondent's motion to vacate the default is granted; and it is further

ADJUDGED that the Petition is dismissed.

J.S.C.

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: New York, New York
August 16, 2011

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[5]The Court also notes that CPLR 205(a), although applicable to Article 75 petitioners, *Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003), does not help Petitioner here. Section 205(a) allows tolling of the statute of limitations where an action was filed timely but was dismissed for "a curable reason" such as "failure to exhaust an administrative prerequisite." *Id.* at 115. Section 205(a) explicitly exempts "a failure to obtain personal jurisdiction over the defendant" as such a "curable" reason.

[6]In fact, Respondents have indicated that they have initiated a parallel proceeding in the United States District Court for the District of Connecticut, in which they are asking the court to confirm the arbitration award.