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

PRESENT: FEINMAN PAUL G. FEINMAN PART 52

Justice

SOFTWARE FOR MOVING, INC

- v -

LA ROSA DEL MONTE EXPRESS INC

INDEX NO. 603001/07

MOTION DATE 1-16-08

MOTION SEQ. NO. 2

MOTION CAL. NO. 21

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

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).

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

Dated: 4/14/08

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
SOFTWARE FOR MOVING, INC.,
Petitioner,

against

LA ROSA DEL MONTE EXPRESS, INC.,
Respondent.
----------X

Index Number 603001/2007
Mot. Seq. No. 002
Cal. No. 21
Submission Date 1-16-08
DECISION, ORDER & JUDGMENT

Papers considered in review of this motion to vacate a default judgment:

Papers
Order to Show Cause and Affidavits Annexed 1
Defendant's Affirmation in Opposition and Exhibits 2

PAUL G. FEINMAN, J.:

Pursuant to CPLR 5015, petitioner moves by Order to Show Cause signed by another justice of this Court on January 8, 2008 to vacate the default judgment entered against it by Decision and Order dated December 5, 2007 and filed with the County Clerk on December 13, 2007. Upon vacatur, the petitioner moves pursuant to CPLR 2221(e) for renewal of the Court's prior Order and Judgment compelling the parties to participate in arbitration. The new basis for denial of the cross-motion is the December 7, 2007 Decision and Order of the United States District Court for the Northern District of Illinois, Eastern Division which stayed the arbitration proceedings and transferred the federal action to the Southern District of New York. For the reasons set forth below, the petitioner's motion to vacate the Decision, Order and Judgment of December 5, 2007 entered on default is granted. Having vacated the default judgment, the Court further grants the branch of the petitioner's Order to Show Cause which seeks renewed consideration of respondent's cross-motion to compel arbitration. Upon renewal, the cross-

motion which is deemed a cross-petition to compel arbitration is denied. Accordingly, the petition to stay arbitration is deemed withdrawn and the cross-petition to compel is denied and dismissed in its entirety.

Factual & Procedural Background

This special proceeding brought pursuant to CPLR Article 75 has a slightly convoluted history in part caused by the petitioner having proceeded simultaneously in both the federal and state courts and in part by a change of counsel by petitioner in the instant proceeding that was not properly effected prior to the December 5, 2007 appearance in this Court.

Petitioner Software for Moving, Inc. (SFM) and Respondent La Rosa Del Monte Express, Inc. (La Rosa) are parties to a New York Arbitration pending before Richard Mandel of the American Arbitration Association regarding a contract dispute arising from software and licensing agreements (Aff. in Opp. to O.S.C., Ex. A). It was respondent who sought arbitration pursuant to two alleged arbitration agreements, by serving a demand on petitioner on about February 12, 2007 (Aff. in Opp. to O.S.C., ¶ 5; Ex. B, C).

On April 3, 2007, petitioner filed a lawsuit against respondent in the United States District Court for the Northern District of Illinois, Eastern Division seeking resolution of the parties' contract dispute (Aff. in Opp. to O.S.C., ¶ 11). Respondent filed a motion to dismiss the complaint on about April 30, 2007 (Aff. in Opp. to O.S.C., ¶ 15). On or about June 8, 2007, SFM filed a motion to stay arbitration (Aff. in Opp. to O.S.C., ¶ 15). La Rosa then filed a cross-motion to compel arbitration (Aff. in Supp. of O.S.C., Ex. A).

While the competing motions to stay and compel arbitration in the federal action were *sub judice*, petitioner commenced the instant special proceeding on or about September 7, 2007

to stay the arbitration demanded in February 2007. Before signing the Order to Show Cause on September 7, 2007, this Court heard oral arguments on the issue of whether it should issue a temporary restraining order. The Court denied petitioner's request for a temporary restraining order due to the untimeliness of petitioner's application but set a full briefing schedule for the petition. In addition, the Court gave specific instructions for submitting opposition and reply papers, and ordered the parties to appear for oral argument on October 31, 2007 (Aff. in Opp. to O.S.C., Ex. M).

In the meantime, on October 1, 2007, Arbitrator Mandel ordered that the arbitration be stayed "pending further order by a court of competent jurisdiction resolving the issue of whether the parties' dispute is properly a subject to arbitration" (Aff. in Opp. to O.S.C., Ex. N). Then, on or about October 10, 2007, respondent submitted what it termed a cross-motion, seeking to compel arbitration, or in the alternative, to obtain expedited discovery and a hearing (Aff. in Opp. to O.S.C., Ex. Q). October 10, 2007 was the deadline for opposition papers by respondent set forth in the September 7, 2007 Order to Show Cause.

On their own accord, the parties drafted a stipulation dated October 18, 2007 which specifically referenced respondent's cross-motion and extended petitioner's time to file and serve reply papers and adjourned the oral argument of the petition to December 5, 2007.
The petition to stay arbitration had been rendered less urgent by Arbitrator Mandel's October 1, 2007 order staying further proceedings (Aff. in Supp. of Not. of Mot., ¶ 4).

At the December 5, 2007 appearance in this Court, petitioner was represented by new counsel, however, new counsel was unable to present either the court or opposing counsel with an appropriate notice of consent to change counsel (Transcript of December 5, 2007 at pp. 1 -5,

Aff. in Opp. to O.S.C., Ex. W). Nor had prior counsel moved to be relieved. Petitioner sought to withdraw its petition to stay the arbitration and did not file any opposition to the cross-motion to compel arbitration. By its Order dated December 5, 2007 and filed with the County Clerk's office on December 13, 2007, this Court granted the petitioner's request to withdraw its petition to stay arbitration. It also deemed respondent's cross-motion a cross-petition to compel arbitration, and granted it without opposition. A default judgment was entered against petitioner SFM. The parties were ordered to appear for arbitration before Arbitrator Mandel.

On December 7, 2007, the federal court issued an opinion that in essence granted SFM's motion to stay arbitration.(O.S.C., Ex. A). The federal court also granted La Rosa's motion to transfer the action to the Southern District of New York (O.S.C., Ex. A). This left the parties in the untenable position of having competing orders from the federal and state courts regarding the same arbitration proceeding.

On January 8, 2008, while this Court was on holiday, petitioner returned to the ex parte motion part with an Order to Show Cause to vacate the default judgment which granted respondent La Rosa's cross-motion to compel arbitration. In this Court's absence, another justice of the Supreme Court stayed enforcement of this Court's judgment compelling arbitration and set the matter down before this Court on January 18, 2008. In addition to seeking vacatur of the December 5, 2007 default judgment, petitioner seeks renewal of respondent's cross-motion to compel arbitration (Aff. in Supp. of O.S.C., ¶ 16). Petitioner also seeks to strike the unauthorized addition of the name of Shlomo Kogos from the caption of respondent's moving papers (Aff. in Supp. of O.S.C., ¶ 28). Respondent opposes the instant Order to Show Cause (Aff. in Opp. to O.S.C.).

Parties Contention

Petitioner first argues that respondent's cross-motion was procedurally deficient (Aff. in Opp. of O.S.C., ¶¶ 11-13). It contends that the cross-motion was never filed with the motion support office and/or was never entered into the Court system. Petitioner submits a copy of the motion list for this action, which does not include the filing of the cross-motion at issue (Aff. in Supp. of O.S.C., ¶ 12; O.S.C., Ex. B). Petitioner further objects to the court's conversion of respondent's purported cross-motion into a petition to compel arbitration (Aff. in Supp. of O.S.C.; O.S.C., Ex. C).

Petitioner next argues that the default should be vacated because it has a reasonable excuse and a meritorious defense for the default (Aff. in Supp. of O.S.C., ¶16). Petitioner asserts that its attorney inadvertently failed to timely serve and file the required opposition, and that "this scenario falls squarely within the parameters of law office failure" (Aff. in Supp. of O.S.C., ¶ 17). Petitioner further states that the papers were in fact drafted by its new attorney, Mr. Grossman on or around December 3, 2007, but for reasons unknown to petitioner, they were never served or filed with the court (Aff. in Supp. of O.S.C., ¶ 17; O.S.C., Ex. D). According to petitioner, its meritorious defense to respondent's cross-motion is that there was never an agreement between the parties to submit their disputes to arbitration, and argues that respondent is unable to produce competent evidence to prove otherwise (Aff. in Supp. of O.S.C., ¶ 18).

Finally, petitioner contends that respondent unilaterally changed the caption of the action without first obtaining court approval to amend the pleadings to include Shlomo Kogos as a party (Aff. in Supp. of O.S.C., ¶ 26-27). Petitioner argues that since Mr. Kogos is not a party to this action and respondent improperly included his name on the caption, the court should order the

name stricken from the caption (Aff. in Supp. of O.S.C., ¶ 28).

In opposition, respondent argues that petitioner is being represented by unauthorized counsel, and that pursuant to CPLR 321(a), counsel does not have the authority to pursue the current motion before the court (Aff. in Opp. to O.S.C., ¶¶ 2, 33, 35-37). Respondent also argues that petitioner's claim that respondent's cross-motion is procedurally deficient is wholly without merit as those papers were filed with the appropriate office and the proper motion fee of $45.00 was paid (Aff. in Opp. to O.S.C., ¶ 20; Ex. R).

Legal Analysis

I. Validity of Respondent's Original Cross-Motion

Petitioner's contention that the court should not have rendered a decision on respondent's cross-motion because it was procedurally deficient lacks factual support in the record. According to the date stamp of the Case Management Office, respondent's notice of cross-motion was filed with the court on October 10, 2007 (Aff. in Opp. To O.S.C. Ex P).

Respondent further submits a copy of the check dated October 10, 2007, in the amount of $45.00 made payable to the Clerk of the Court as proof of payment of the motion fee, and an affidavit of service averring that the notice of cross-motion was mailed to petitioner's then counsel, Mr. Katz, on October 10, 2007. According to the documents respondent submits, Mr. Katz, received service of the cross-motion and requested an extension of time in which to serve reply and opposition papers. Indeed the parties negotiated a stipulation dated October 18, 2007 that specifically referenced the cross-motion. The arguments made by petitioner regarding the perceived procedural defects of the respondent's cross-motion are no more valid now then they were when rejected on the record on December 5, 2007. The various stamps on the originals in

the Court's own file along with respondent's submissions serve as sufficient proof that the cross-motion to compel arbitration was filed with the Court, and served in accordance with the Court's instructions. Thus, the cross-motion at issue was properly before the court.

Respondent's submission of the cross-motion is not indicated on the motion list for this action because per this court's instructions on September 7, 2007, all original opposition and reply papers and affidavits of service were to be filed with the Part 52 Clerk, and *not* with the motion or trial support offices of the County Clerk. The purpose of this direction was to insure that the Court had all *original* copies of all appropriate papers with *original* signatures before the court appearance given that the courtroom is located at 80 Centre Street and files sometimes are temporarily misplaced in transit between buildings. The Court was clear about this at the time of the signing of the petitioner's Ordert to Show Cause on September 7, 2007. Moreover, these arguments were specifically raised and addressed by the Court on December 5, 2007 and the record is clear that petitioner's counsel had knowledge of and copies of the cross-motion in sufficient time.

Furthermore, by unilaterally deciding to withdraw its petition, the Court did not become divested of personal jurisdiction over the parties and the Court was free to consider the relief sought by respondent which had been properly filed and serve with notice.

II. Motion to Vacate Default Judgment

A party seeking to vacate a default judgment must demonstrate both a reasonable excuse and the existence of a meritorious defense (CPLR 5015 [a][1]; *Eugene Di Lorenza, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]). While courts should not excuse a "pattern of willful default and neglect" (*Joseph v GMAC Leasing Corp.*, 44 AD3d 905 [2d Dept. 2007]), it is

within the trial court's sound discretion to determine what constitutes a reasonable excuse (*Grutman v Southgate At Bar Harbor Home Owners' Assn.*, 207 AD2d 526, 527 [2d Dept. 1994]).

Under appropriate circumstances, law office failures are generally excused (*Gironda v Katzen*, 19 AD3d 644, 645 [2d Dept. 2005]; *see Nilt Inc. v New York State Dept. of Motor Vehicles*, 35 AD3d 937, 938 [3rd Dept. 2006]). However, courts are clear that law office failure may be a reasonable excuse only where it is supported by "detailed and credible submissions" (*Hageman v Home Dept. U.S.A., Inc.*, 25 AD3d 760, 761 [2d Dept. 2006]). A plaintiff's counsel's detailed and credible excuse of law office failure is adequate excuse for plaintiff's default (*see Henry v Kuveke*, 9 AD3d 476, 479 [2d Dept. 2004]). Under some circumstances, even misplacement of motion papers can constitute excusable law office failure *(Mut. Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept. 2007]).

In this case, the transcript of the December 5, 2007 appearance before this Court makes clear that there was some confusion as to the identity of who was authorized to represent the petitioner and whether counsel was authorized to bind the corporation. That issue has now been satisfactorily addressed by the Affidavit of respondent's President, Shlomo Kogos dated January 2, 2008. Petitioner's counsel promptly sought to vacate the default after it was entered. Petitioner proffers a copy of a drafted affirmation in opposition to the cross-motion, prepared by its former counsel, that was inadvertently never filed or served. While it is sometimes necessary to hold parties responsible for their lawyer's failures (*see Andrea v Arnone, et al*, 5 NY3d 514, 521 [2005]), there is nothing in the record to indicate that this petitioner willfully abandoned the underlying proceeding. Indeed petitioner had incoming counsel appear on December 5, 2007,

even if counsel appeared without having made a formal substitution. Apparently, on November 19, 2007, petitioner's new counsel contacted respondent and requested an extension to file reply papers to the cross-motion, which request was denied by respondent.

Despite the delay in opposing respondent's cross-motion to compel arbitration, the record reflects that petitioner was actively attempting to move this proceeding along, and although the process may have been hindered by petitioner's changes of counsel and another action being litigated in federal court on the same issues it is clear that petitioner never intended to abandon his position that the arbitration should not go forward because there was no agreement to arbitrate. It appears that one of petitioner's several attorneys in this matter may have failed petitioner by failing to either timely submit papers or failing to properly effect a substitution of counsel, but under the particular circumstances of this case the Court is persuaded that law office failure constitutes a reasonable excuse.

Petitioner has also made a strong showing as to the merits of its defense. For purposes of vacating the default judgment, the petitioner need not establish that it will actually prevail on the cross-petition to compel, but only that it has a viable and meritorious defense. The law is settled that whether a dispute is properly subject to arbitration is an issue to be determined in the first instance by the courts (*Primex Int'l Corp v Walmart Stores, Inc.*, 89 NY2d 594, 598 [1997]). There must be a "clear, unequivocal and extant agreement to arbitrate the claims" (*Sisters of St. John the Baptist, Providence Rest Convent v Phillips R. Geraghty, Inc.*, 67 NY2d 997, 999 [1986]). Absent evidence of a party's unequivocal intent, the court will not order that party to

submit to arbitration[1] (*see Primavera Laboratories, Inc.*, 297 AD2d 505 [1st Dept. 2002]; *but see, Schubtex, Inc. v Allen Snyder, Inc.*, 49 NY2d 1, 5 [1979] [reversing the lower court's decision to arbitrate because the evidence adduced at trial was insufficient as a matter of law to support a finding of an agreement to arbitrate]). Here, petitioner adamantly refutes entering an agreement with respondent to arbitrate. While respondent submits a number of unsigned arbitration agreements, it has not made any showing that there was indeed an agreement to arbitrate between the parties. The general law in New York is that an arbitration agreement need not be signed by the parties if there is sufficient evidence to demonstrate the parties' intent to arbitrate [*Liberty Mgt. & Constr. Co. v Fifth Ave. & Sixty-Sixth Street Corp.*, 208 AD2d 73, 77 [1st Dept. 1995]). Thus, there is a factual dispute which a Court of competent jurisdiction must resolve prior to the arbitration proceeding.

It bears noting that even if the petitioner was unable to provide a reasonable excuse for its delay in opposing the cross-motion, vacatur would still be warranted under the circumstances of this case. New York case law makes clear that the grounds for vacatur enumerated in CPLR 5015 are not exclusive (*In re Estate of Culberson*, 11AD3d 859, 861 [3rd Dept. 2004]). A court has inherent power to vacate its own judgment for "sufficient reason and in the interest of substantial justice" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Pelaez v Westchester Med. Ctr.*, 15 AD3d 375, 376 [2d Dept. 2005]). Given that petitioner's delay does

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[1] New York arbitration decisions are subject to preemption by the Federal Arbitration Act, 9 U.S.C.S. § 1 to the extent that they require a court to apply more stringent standards to ascertain whether the parties had an agreement to arbitrate than to determine whether they entered into a similarly situated agreement not involving arbitration (*Kahan Jewelry Corp. v Venus Casting, Inc.*, 17 Misc. 3d 684 [Sup. Ct., N.Y. County 2007]).

not appear to have been willful, that petitioner clearly lacked an intent to abandon the action, that there is no real prejudice to the defendant caused by petitioner's delay in opposing the cross-motion and that there is a strong public policy in favor of resolving cases on the merits (*see Burgess v Brooklyn Jewish Hosp.*, 272 AD2d 285 [2d Dept. 2000]), the petition to vacate the default judgment should be granted.

III. Cross-Petition on its Merits

The default judgment compelling arbitration having been vacated, the Court must now turn to the motion for renewal. Upon renewal the cross-motion to compel arbitration is deemed a cross-petition to compel and it is denied and dismissed.

Petitioner argues that the "[p]ursuant to the Supremacy Clause of the United States Constitution and in the interests of comity, it is respectfully submitted that the decision of the [federal court] controls the issue of the arbitration between the parties.

The Court's December 5, 2007decision on the cross-petition was rendered on default, and, in the absence of opposition papers, the Court accepted as conceded all the allegations of the respondent. The federal court in Illinois had a full and fair opportunity to address the issues presented in this cross-petition and rendered a determination on the merits on December 7, 2007 granting a stay of the arbitration. It transferred the federal action to the Southern District of New York. The parties were the same, the issues were the same, and that action was filed prior to this action. Accordingly, this cross-petition, on its merits, should be dismissed on the grounds that it is duplicative of another action pending. CPLR 3211(a)(4). This avoids the prospect of conflicting resolutions of the same dispute while affording the parties a full opportunity to be heard on the merits.

IV. Motion to Strike the Name Shlomo Kogos

Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared ... (CPLR 1003). Generally, unless there has been a waiver, the failure to obtain leave of court in compliance with the statute is a jurisdictional defect requiring dismissal of the action against the joined party (*Crair v Brookdale Hosp. Med. Ctr.*, 259 AD2d 586, 589 [2d Dept., 1999]; *Ospina v Vimm Corp.*, 203 AD2d 440, 440-441 [2d Dept.], *lv denied* 84 NY2d 802 [1994]; *Gross v BFH Co.*, 151 AD2d 452 [2d Dept. 1989]). Such failure to obtain leave of court also has the effect of rendering service upon the added party a nullity (*see Shivers v International Serv. Sys.*, 220 AD2d 357, [1st Dept. 1995]). Further, courts have sanctioned counsels for unilaterally amending the caption of an action without leave of court (*see DeRosa v Chase Manhattan Mortgage Corp.*, 15 AD3d 249 [1st Dept. 2005]).

In this case, respondent sought to join Shlomo Kogos, President of SFM, as a party to this action by unilaterally adding him as a plaintiff in its cross-motion to compel arbitration. Generally, changing the caption to add an entirely new party to the action without leave of court is not permitted (*but cf. e.g., Ober v Rye Town Hilton*, 159 AD2d 16, 21 [2d Dept. 1990] [the court allowed a change in the caption where a new corporate defendant was not being added, but as the court noted, "it is the *name* of the party rather than the party itself that has been changed"]; *but see also, Dunbar v Madison Sq. Gardens, L.P.*, 18 Misc. 3d 1131A [Sup. Ct., Kings County 2008]). Respondent does not dispute that it did not obtain leave of court prior to purportedly joining Mr. Kogos as a party to this action. In fact, respondent does not address this argument in its opposition papers. Respondent named both SFM and Shlomo Kogos in its demand for arbitration. However, respondent made no attempt to obtain leave of court in order to amend the

caption of the lawsuit to add Mr. Kogos as a party in his individual capacity. Moreover, Mr. Kogos did not engage in any conduct sufficient to constitute a waiver of his right to object to the improper joinder. Therefore, the branch of the petition that seeks to strike the name Shlomo Kogos from the caption is granted.

Accordingly, it is

ORDERED that the motion to vacate this Court's December 5, 2007 Decision, Order and Judgment entered on default is granted; and it is further

ORDERED and ADJUDGED that the petition filed by petitioner seeking a stay of arbitration is permitted to be withdrawn; and it is furhte

ORDERED that the cross-motion filed by respondent on October 10, 2007 is deemed a cross-petition by respondent to compel arbitration; and it is further

ORDERED that the motion by petitioner to renew this court's granting of the respondent's cross-respondent is granted and upon renewal the cross-petition is denied and dismissed pursuant to CPLR 3211(a)(4); and it is further

ORDERED and ADJUDGED that the respondent's cross-petition to compel arbitration is dismissed pursuant to CPLR 3211(a)(4); and it is further

ORDERED and that the branch of the motion that seeks to strike the unauthorized addition of Shlomo Kogos as a petitioner, to the caption is granted; and it is further

ORDERED that movant shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court.

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

Dated: April 14, 2008

New York, New York J.S.C.