

**Matter of FIA Card Servs., N.A. v Stonehill**

2009 NY Slip Op 30775(U)

March 16, 2009

Supreme Court, Nassau County

Docket Number: 20154/08

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:  
HON. F. DANA WINSLOW,**

**Justice  
TRIAL/IAS, PART 6  
NASSAU COUNTY**

**In the Matter of the Arbitration Between  
FIA CARD SERVICES, N.A.  
F/K/A MBNA AMERICA BANK, N.A.,**

**Petitioner,**

**RETURN DATE: 1/14/09  
SEQUENCE NO.: 001**

**- against -**

**INDEX NO.: 20154/08**

**DAVID H. STONEHILL,**

**Respondent.**

**The following papers read on this petition (numbered 1)**

**Notice of Petition and Verified Petition ..... 1**

The Petitioner commenced this proceeding pursuant to **Civil Practice Law and Rules ("CPLR") §7510** to confirm an arbitration award against the Respondent (the "Award"), rendered on November 12, 2007 and delivered on November 13, 2007, for credit card indebtedness in the sum of \$29,933.63. The petition is unopposed.

In reviewing this application, the Court refers to and adopts the standards set forth by the Civil Court of the City of New York in **MBNA America Bank, N.A. v. Nelson**, 15 Misc.3d 1148(A), and **MBNA America Bank, N.A. v. Straub**, 12 Misc.3d 963. Although this Court is not bound by these decisions, the Court finds that they set forth a meaningful framework for scrutinizing applications to confirm arbitration awards arising out of consumer credit card debt. In view of the recent credit crisis, the urgency of such scrutiny is apparent.

As a preliminary matter, the Court must consider whether or not this proceeding has been properly brought. The proceeding was timely commenced on November 7, 2008. See **CPLR §7510; Federal Arbitration Act ("FAA"), 9 U.S.C. §9** (application to confirm an arbitration award must be made within one year of the delivery of the award). According to the Affidavit of Service sworn to on November 18, 2008, service of process

was effected pursuant to **CPLR §308(4)** after four attempts at personal service pursuant to **CPLR §308(1) or (2)**, at varying times including non-business hours and Saturdays. The Affidavit of Service also includes an assertion of non-military status, confirmed by a neighbor whose name and address is provided. In an Affidavit of Due Diligence dated December 2, 2008, counsel describes the efforts made to ascertain Respondent's current address. According to the Affidavit of Due Diligence, counsel's office searched various data bases and confirmed Respondent's residence address, but was unable to ascertain a valid place of employment.

The Court finds that the proof of personal service described above meets the requirements of **CPLR §308(4)**. Concerns remain, however, regarding whether or not the Respondent has received actual notice of this proceeding, particularly insofar as the assertions of non-military status, and the description of counsel's efforts to locate Respondent lack specificity and documentary support. These concerns do not, in themselves, defeat the petition, but they do provoke closer scrutiny of the remainder of the application.

Petitioner has plead and demonstrated that it is a National Banking Association authorized to sue in any court [**12 U.S.C. §24; State Nat'l Bank of Conn. v. Laura**, 45 Misc.2d 430], and that it has standing to bring the action as the original obligee under the subject credit card agreement. Although the name MBNA AMERICA BANK, N.A. appears in the credit card agreement, the name was subsequently changed to FIA CARD SERVICES, N.A. by revision of the Articles of Association effective June 10, 2006. *See* Claim Affidavit in Support of Petition for Confirmation of Arbitration Award, by Gary Springs, Operations Analyst, sworn to on August 1, 2008, Motion Exhibit E ("Affidavit in Support") and Motion Exhibits A and B. The Court notes that the Affidavit in Support is accompanied by a Certificate of Conformity, which is required for an affidavit signed and notarized outside of New York State. *See* **CPLR §2309(c)**.

The Court finds that the proceeding is viable and turns to the merits. Based upon the precepts of the **CPLR** and **FAA**, the **Straub** decision articulated four requirements for confirmation: (1) "a written agreement to arbitrate must be included within the petition," (2) "the binding nature of the credit card agreement must be established by the petition," that is, if the agreement is not signed by the party to be charged, there must be some objective evidence establishing that the party intended to be bound by its terms; (3) "the petitioner must show that service of notice of the arbitration session and notice of the award was in compliance with New York's statute," and (4) the Court must consider, if provided, any "information about the parties' prior forays into the judicial arena or actions within the arbitration process." 12 Misc.3d 963 at 965-968. For example, in determining whether or not there was an agreement to arbitrate, the Court must consider

whether or not the respondent appeared in the arbitration, or whether there was any prior proceeding to stay arbitration.

The Petition herein includes a copy of an agreement entitled the Goldoption Account Agreement (the "Credit Card Agreement") [Motion Exhibit C]. The Credit Card Agreement includes an arbitration section (the "Arbitration Section") which provides that all claims and disputes, including claims regarding the applicability of the Arbitration Section, shall be resolved by binding arbitration conducted by the National Arbitration Forum, pursuant to the procedural rules of that forum.

The above constitutes a written agreement to arbitrate. However, insofar as the Credit Card Agreement is undated and unsigned, and consists of a general form which lacks specific reference to the Respondent, the Court looks to the Affidavit in Support and Exhibits for evidence that the Credit Card Agreement was the actual agreement between the parties, and was binding upon the Respondent. The evidence must establish that the Respondent received actual or constructive notice of the terms and conditions of the Credit Card Agreement, including the Arbitration Section, and that Respondent manifested an intent to be bound by such terms, which may be shown by Respondent's use of the credit card after such notice. *See Nelson*, 15 Misc.3d 1148(A), citing *Kurz v. Chase Manhattan Bank USA, NA*, 319 F.Supp.2d 457, 463, *Geha v. 55 Orchard Street, LLC*, 29 AD3d 735, *Straub*, 12 Misc.3d at 967 and *Citibank (South Dakota), N.A. v. Martin*, 11 Misc.3d 219, 223.

In this case, the Affidavit in Support states that the Credit Card Agreement governs the Respondent's account and was sent to Respondent in the regular course of business. It states further that after delivery of the Credit Card Agreement, Respondent used the credit card for purchases and/or cash advances. The Court finds this to be conclusory and insufficient. The Affidavit in Support is vague regarding the date upon which the Credit Card Agreement, in the form attached, was sent to the Respondent, and the time period or periods during which Respondent used the credit card. Further, the petition lacks evidentiary support readily available to the petitioner, such as copies of monthly credit card statements. *See Nelson*, 15 Misc.3d 1148(A), citing *Martin*, 11 Misc.3d at 223.

The failure to attach monthly credit card statements, or other proof demonstrating the derivation of the amount due, manifests a further deficiency of petitioner's application. The application provides no basis for review of the arbitration award. Without submission of the calculations used by the arbitrator to arrive at the final award, the specific claims submitted by Petitioner for arbitration, and the claims ruled upon by the arbitrator, the Court cannot determine whether or not the award was rational and

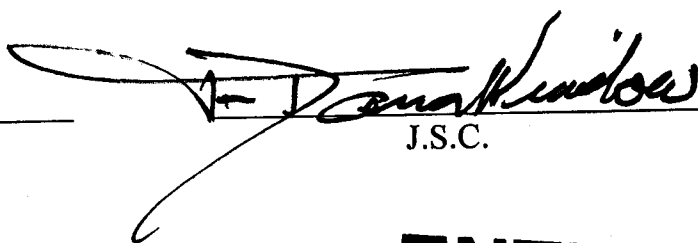
within the bounds of the arbitrator's authority. See **Nelson**, 15 Misc.3d 1148(A) and cases cited therein. Accordingly, the petition for confirmation must be denied.

In light of the above, the Court need not decide whether or not the third and fourth requirements of **Straub** [12 Misc.3d 963] have been satisfied. The Court notes, however, that petitioner's proof of service of the notice of the arbitration session is incomplete. The petition includes an Affidavit of Mailing and signed receipt indicating service of the Notice of Arbitration Claim and supporting documents by United Parcel Service overnight mail. However, the Affidavit of Mailing was signed and notarized in Maryland without an Affidavit of Conformity, as required by **CPLR §2309(c)**. Further, the petition does not attach a copy of the notice to arbitrate. In Petitioner's favor, the Court notes that the Award itself attests to proper service of the arbitration claim, including the Notice of Arbitration. Whether this overcomes the defect in Petitioner's proof need not be determined at this time. The Award also contains an Acknowledgement and Certificate of Service of the Award upon the parties.

Finally, the Court notes that Respondent did not appear in the arbitration [*see* Affidavit in Support], and no other proceeding was brought to the Court's attention which would require consideration herein.

Based upon the foregoing, it is

ORDERED, that the petition to confirm the Award is **denied**.

Dated: 3/16/09   
J.S.C.

**ENTERED**

APR 06 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE