SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 6
NASSAU COUNTY

CACH, LLC,

Petitioner,

SUBMISSION DATE: 06/19/09
SEQ. NO. 001

- against -

INDEX NO.: ~~7143~~/09
7134

JOSEPH A. VISCUSO,

Respondent.

The following papers read on this petition (numbered 2):

Notice of Verified Petition.....1
Affidavit in Opposition to Petitioner's Petition.....2

Petitioner brings this proceeding pursuant to **Civil Practice Law and Rules ("CPLR") §7510** to confirm an arbitration award against respondent (the "Award"), rendered on July 31, 2008 under the auspices of the National Arbitration Forum and delivered on or after August 1, 2008, for credit card indebtedness plus interest and fees in the total amount of $66,747.48.

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 April 14, 2009. *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 May 5, 2009, service of process was effected pursuant to **CPLR §308(2)** by delivery to respondent's wife and additional mailing to the respondent's residence. The Court finds that this proof is sufficient.

The Court notes that petitioner has submitted no competent evidence concerning its standing to bring this proceeding, as successor in interest to MBNA Bank, N.A. ("MBNA"), the issuer of the retail installment credit card account. There is no documentary evidence to substantiate counsel's claim that petitioner purchased the debt and acquired all rights thereunder by assignment. Insofar as respondent has not raised this defense in his opposition, however, the Court deems it waived. *See* **CPLR §3211(e).**

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 three requirements for confirmation: (1) submission of a written agreement containing a provision authorizing arbitration; (2) proof that the agreement was binding upon the cardholder; i.e., that the cardholder agreed to the terms, including arbitration, either in writing or by conduct; and (3) proof of proper service of notice of the arbitration proceeding and of the award. The Court must also consider, if provided, any supplemental information about the history of the parties' activities within the judicial arena and the arbitration process. 12 Misc.3d 963 at 965-968.

Later decisions have clarified the third requirement articulated in **Straub** and progeny. In **MBNA America Bank, N.A. v. Stehly** [19 Misc.3d 12], the Appellate Term for the 2nd and 11th Judicial Districts held that proper service of the notice of arbitration pursuant to the procedural rules of the forum is a question for the arbitrator, as incidental to the conduct of the arbitration proceeding, and is not subject to judicial review. **Id.,** at 14. A claim of non-compliance with the notice requirements of **CPLR 7506(b),** however, may be reviewed by the Court pursuant to **CPLR 7511(b)(1)(iv)**. *See also* **FIA Card Services, N.A. v. Thompson,** 18 Misc.3d 1146(A). Insofar as respondent herein has not challenged petitioner's compliance with any procedural requirements, nor denies having received adequate notice of all proceedings or service of the award, the Court need not consider the matter further.

More crucial to the proceedings at bar is that the **Stehly** decision also raised issues regarding the first and second **Straub** requirements; i.e, that the petitioner prove the existence of a binding arbitration agreement. Acknowledging that proof of a written agreement to arbitrate, which is binding upon the respondent, is necessary to confer subject matter jurisdiction upon the Court pursuant to **CPLR §7501**, the Appellate Term in **Stehly** nonetheless held that "the validity of that agreement is a matter which must be raised either pursuant to an application to stay arbitration (CPLR 7503[b]), at the

arbitration itself, or, if respondent has neither participated in the arbitration nor was served with an arbitration notice, by an application to vacate or modify the award (CPLR 7511[b][2])." **Stehly**, 19 Misc.3d at 14. Where the respondent had defaulted both in the arbitration and in the proceeding to confirm the award, he was deemed to have waived the right to challenge the agreement's validity. The Appellate Term held that it was improper for the lower court to deny confirmation based upon the petitioner's failure to establish a valid arbitration agreement. **Stehly** supports the general proposition that, in an uncontested proceeding to confirm an arbitration award pursuant to **CPLR §7510**, the Court may not inquire into the validity of the arbitration agreement. *See* **Thompson,** 18 Misc.3d 1146(A).

Citing **Stehly**, Petitioner argues that respondent has waived any challenge to the validity of the agreement because, having received notice of the arbitration, respondent failed to seek a stay of arbitration, appear at the arbitration, or move to vacate or modify the Award pursuant to **CPLR §7511.** First, the Court is not bound by the holding in **Stehly**. *See* **People v. Garcia**, 21 Misc.3d 732 (opinions of the Supreme Court, Appellate Term are not binding on the Supreme Court: they are merely persuasive authority). *See also* **The New York State Constitution, Article 6 § 8**. Second, the facts of **Stehly** are distinguishable. Here, although respondent did not appear in the arbitration, he did submit opposition to the instant petition in which he disputes that he individually, as distinct from his business corporation, Vista of New York, Inc. aka Vista Construction, entered into a binding credit card account agreement with petitioner's predecessor.

Nonetheless, petitioner's argument finds support in the mandatory language of **CPLR §§7510** and **7511**. **CPLR §7510** states that: "[t]he Court *shall* confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." (Emphasis supplied.) **CPLR §7511(b)** sets forth the limited and exclusive grounds upon which an arbitration award may be vacated or modified. *See* **Domotor v. State Farm Mut. Ins. Co.**, 9 A.D.3d 367. A party who was served with notice of the arbitration may only challenge the award upon the grounds set forth in **CPLR §7511(b)(1)**; namely: (i) corruption, fraud or misconduct in procuring the award; (ii) partiality of the arbitrator; (iii) that the arbitrator exceeded his authority or failed to make a final and definite award; or (iv) a procedural failure that was not waived. Such party who does not move to stay arbitration within twenty days, is thereafter "precluded from objecting that a valid agreement was not made or has not been complied with." **CPLR §7503(b).** The ground that a valid agreement to arbitrate was not made can only be asserted by a party who neither participated in, nor was served with notice of, the arbitration. **CPLR §7511(b)(2).** Absent a basis for vacatur or modification of the award under **CPLR §7511**, the award *must* be confirmed. **CPLR §7510; CPLR §7511(e)**.

Insofar as respondent was served with notice of the arbitration, he appears to fall within the class of persons who may not challenge the validity of the agreement to arbitrate. Nonetheless, the Court does not believe that, under the circumstances of this case, it is barred from inquiry into the existence of an agreement between petitioner and respondent. In the context of an untimely motion to stay arbitration, the Court of Appeals has held that "this rule barring judicial intrusion into the arbitral process operates only when an agreement to arbitrate exists." **Matarasso v. Continental Cas. Co.,** 56 NY2d 264, 267. The statute is directed only toward parties to that agreement. **Id.** The failure of a non-signatory to apply for a stay of arbitration does not bind the non-signatory to the arbitration or preclude an objection on the basis that a valid agreement was not made. **Glasser v. Price,** 35 AD2d 98 (cited with approval in **Matarasso**). A non-party to an arbitration agreement was not intended to be thrust into the arbitration process by the service of an arbitration notice. **Id.**

The Court cannot determine, on the evidence presented, whether or not respondent was a party to an agreement with MBNA (petitioner's predecessor). In evaluating the proof offered by petitioner, the Court notes that special proceedings are governed by the standards applicable to summary judgment motions, and that, in order to prevail, a petitioner must submit proof in evidentiary form. *See* **Thompson,** 18 Misc.3d 1146(A), citing **Matter of Port of New York Auth. [62 Cortlandt St. Realty Co.],** 18 NY2d 250, 255, *cert denied sub nom.* **McInnes v. Port of New York Auth.**, 385 U.S. 1006, *et al.* Here, petitioner's application is supported by nothing more than a petition verified by counsel, along with its attachments. There is no affidavit or verification by a party with personal knowledge of the facts alleged. On that basis alone, the petition may be denied. **Id.**

Further scrutiny of the application reveals additional deficiencies. As proof of a written agreement to arbitrate, petitioner submits only a photocopy of a general form of Credit Card Agreement issued by MBNA America Bank, N.A. (the "Credit Card Agreement"), portions of which are illegible or cut off. The Credit Card Agreement is undated and unsigned, and lacks specific reference to the respondent, or to any other obligor on the credit card account. (Nor does the agreement reflect the specific terms agreed to, including interest rate and account fees.) There is no affidavit or documentary evidence that the Credit Card Agreement was the actual agreement between the petitioner and respondent, or that 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. Such intent may be shown by respondent's use of the credit card after such notice, but petitioner submits no monthly credit card statements, or other proof demonstrating respondent's use of the card. *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.

The Court finds that petitioner has failed to establish, *prima facie,* the existence of an agreement between MBNA and respondent. Accordingly, the Court need not consider the sufficiency of respondent's opposition. **Winegrad v. New York Univ. Medical Center,** 64 NY2d 851. Nonetheless, respondent's denial of responsibility for the debt, although conclusory, provokes further inquiry.

In a sworn affidavit, respondent claims that "[t]he MBNA account in question was opened as and maintained as a business account for my business, Vista of New York, Inc./Vista Construction," and that "the arbitration provisions of the agreement pertain solely to the business and not to me personally." [Affidavit in Opposition of JOSEPH A. VISCUSO, sworn to on June 12, 2009 ("Viscuso Affidavit") ¶¶ 3, 6.] The Court notes that the language appears carefully worded and that respondent does not actually deny that he, individually, was a named cardholder or guarantor on the account.

In addition, respondent asserts that "[a]ny liability regarding the MBNA account was discharged in bankruptcy" [Viscuso Affidavit ¶ 4.] In support of his contention, respondent submits a copy of the Final Decree in bankruptcy of Vista of New York, Inc. aka Vista Construction dated May 31, 2006, together with a copy of the Chapter 7 Voluntary Petition (the "Bankruptcy Petitioner") and schedules thereto. [Attachment to Viscuso Affidavit.] The schedule of unsecured claims lists a debt to MBNA in the amount of $36,769.00, affirmed on October 14, 2005 by JOSEPH VISCUSO as President of Vista of New York, Inc. This debt is roughly contemporaneous and close in amount to the debt claimed in the arbitration proceeding. [*See* Petition, Exh. A – Claim filed April 29, 2008, stating a principal balance of $38,956.40, with last payment on October 31, 2005.] Insofar as there is no account number stated in the bankruptcy schedule, however, the Court cannot confirm that the debt discharged in bankruptcy was the same debt, on the same account, as the debt upon which the Award was granted.

Respondent's opposition raises several questions that must be addressed in any subsequent or renewed application. Was the subject MBNA account (the account upon which the Award was granted) in the name of the Corporation, the respondent in his individual capacity, or both? Was this debt discharged in bankruptcy? Did the petitioner have sufficient basis to proceed against respondent in his individual capacity, notwithstanding the bankruptcy of the Corporation? For example, did respondent incur personal responsibility for the debt either by writing or conduct? Did respondent guarantee the debt, or can petitioner demonstrate that respondent was the "alter-ego" of the Corpora-

tion? Alternatively, did petitioner, thwarted by the Corporation's bankruptcy, knowingly commence an arbitration against a non-liable individual?

At this time, and on the record before it, the Court cannot confirm or vacate the Award. Accordingly, it is

ORDERED, that the petition is **vacated**, with leave to renew upon proper proof within thirty (30) days of entry of this Order.

Dated: August 18, 2009

J.S.C.