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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 112291/2009

CHANDELIERS CREATIVE

VS

R SQUARED EDGE WB, LLC

Sequence Number : 002

REARGUMENT/RECONSIIDERATION

CAL #22

INDEX NO. 112291/09

MOTION DATE 5/7/10

MOTION SEQ. NO. 002

MOTION CAL. NO. 22

The following papers, numbered 1 to 3 were read on this motion to/for leave to reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 08 2010

COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 7/1/10

JUL 01 2010

BARBARA JAFFE
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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CHANDELIERS CREATIVE, INC.,

Petitioner,

-against-

R SQUARED EDGE WB, LLC,

Respondent.

---x

Index No. 112291/09

Motion Date: 5/7/10
Motion Subm.: 5/18/10
Motion Seq. No.: 002
Calendar No.: 22

DECISION AND JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:
Sam P. Israel, Esq.
Sam P. Israel, P.C.
1 Liberty Plaza
New York, NY 10006
212-201-5345

For respondent:
William R. Fried, Esq.
Kerry K. Jardine, Esq.
Herrick, Feinstein, LLP
Two Park Avenue
New York, NY 10016-9301
212-592-1400

By notice of motion dated April 12, 2010, respondent moves pursuant to CPLR 2221 for an order granting it leave to reargue a decision dated October 28, 2009, whereby another justice of this court granted petitioner's petition to confirm an arbitration award. Petitioner opposes the motion.

I. BACKGROUND

On August 15, 2006, petitioner and respondent entered into an agreement by which petitioner agreed to provide marketing services for respondent. (Affirmation of William R. Fried, Esq., dated Mar. 9, 2010 [Fried Aff.], Exh. A). In paragraph 16 of the agreement, the parties agreed that any controversy or claim arising therefrom would be settled "by arbitration in the City of New York, by submission to a single arbitrator, in accordance with the rules provided by the

American Arbitration." (*Id.*).

By letter dated March 18, 2009, petitioner's counsel sent respondent a "Demand for Arbitration" (Demand) advising that petitioner was filing a claim with Arbitration Services, Inc. (ASI). (*Id.*, Exh. C). By letter dated April 6, 2009 and addressed to petitioner's counsel, respondent's counsel rejected the Demand as the parties' agreement required the arbitration to be held pursuant to the rules of the American Arbitration Association (AAA). (*Id.*). The same day, petitioner's counsel advised respondent's counsel that while petitioner intended to comply with AAA's rules, the agreement was silent as to forum and it had thus selected ASI for the arbitration. (*Id.*).

By letter dated April 7, 2009 and addressed to petitioner's counsel, respondent's counsel argued that an arbitration conducted by ASI would not comply with AAA's rules. (*Id.*).

By email dated July 13, 2009, respondent's counsel asked Allan L. Pullin, an ASI arbitrator, whether ASI had closed its file on petitioner's complaint, observing that respondent had objected to the arbitration on the ground that it was not before the AAA. (*Id.*). Counsel received no response to the email. (Fried Aff.).

On August 3, 2009, arbitrator Pullin awarded petitioner $32,052.15 after an arbitration held by ASI. (Fried Aff., Exh. A). Pullin found that respondent had been properly served with notice of the arbitration and that it defaulted by failing to answer, and rendered the award after considering petitioner's complaint, affidavit, its counsel's affirmation, and its exhibits. (*Id.*).

On or about August 26, 2009, petitioner commenced a special proceeding to confirm the award. (*Id.*). Respondent opposed the petition, arguing that the petitioner had failed to adhere to the terms of the parties' arbitration agreement by not conducting the arbitration through the AAA

or honoring the choice of venue provision. (*Id.*, Exh. C). Respondent alleged that it had properly rejected petitioner's demand for arbitration on these grounds and that the arbitration was thus conducted in violation of the parties' agreement. (*Id.*).

By decision and order dated October 28, 2009 (prior order), another justice of this court granted the petition to confirm the award, finding, as pertinent here:

> Having reviewed the submission made by the parties, the court notes the following: first, despite the wording, or lack thereof, of the provision governing arbitration issues in the contract, it is clear to the court that the phrase "In accordance with the rules provided by the American Arbitration" references the rules of the [AAA]. Second, despite the arguments advanced by the parties, there is nothing contained within the submissions that demonstrate that the rules of the [AAA] differ in substance from the rules invoked by [ASI], or that an agreement to use the rules of the [AAA] require[s] the arbitration to take place before the [AAA]. In fact, no rules from either organization are annexed at all.
>
> Inasmuch as the papers are devoid of any evidence supporting the contention that the arbitration that was conducted was not done so in accordance with the rules promulgated by the AAA, there is no reason to invalidate the arbitration award on these grounds. Nor should the award be vacated on the grounds that the arbitration was not carried out in New York City. The papers indicate that the arbitration award was effectively granted on default. Despite having been noticed of the scheduled arbitration, and despite having written an objection to petitioner's counsel concerning the use of ASI, respondent never moved to challenge the venue under CPLR Article 75 prior to the scheduled arbitration date. Instead, they chose not to appear. When respondent failed to appear, the arbitrator, having reviewed the papers presented, issued an award in petitioner's favor.

(*Id.*, Exh. A). The court thus concluded that respondent had failed to establish a legal basis upon which to vacate the award, and directed petitioner to settle judgment in accordance with the decision.

On April 13, 2010, petitioner submitted a notice of settlement of the prior order.

II. CONTENTIONS

Respondent argues that the court overlooked its authority to take judicial notice of AAA's

rules, and that had it done so, it would have observed that the rules of the AAA and ASI are substantively different, that an agreement to arbitrate pursuant to AAA's rules means that AAA had exclusive jurisdiction over the arbitration, and that ASI lacked authority to apply or interpret AAA's rules. (Fried Aff.). It maintains that it was deprived of due process as a result of the failure to conduct the arbitration pursuant to the AAA rules, two of which it identifies. One provides that "when parties agree to arbitrate under [AAA] rules, or when they provide for arbitration by the AAA and arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration" (Fried Aff., Exh. E, R-2), and the other which provides a mechanism for the appointment of an arbitrator from a list of five (*id.*, E-4).

Petitioner argues that respondent's motion to reargue is untimely, having been made more than six months after the prior order was issued. (Affirmation of Sam P. Israel, Esq., dated Apr. 19, 2010 [Israel Aff.]). It also alleges that respondent failed to identify any substantive difference between the rules of the AAA and the ASI, that no rules were applied as no arbitration was held due to respondent's default, and that absent an arbitration, the venue of the arbitration is immaterial. Petitioner observes that having failed to seek a stay of the arbitration, respondent has waived its opposition, and that it is entitled to attorney fees for its repeated efforts to recover the money due under the parties' agreement. (*Id.*, Exh. 3).

In reply, respondent denies that its motion is untimely, observing that petitioner never served a copy of the order on it and did not move to settle the prior order until April 13, 2010. It argues that the differences in the rules are apparent and that notwithstanding its default, an arbitration was conducted as indicated by the arbitrator's award. Finally, respondent observes that petitioner failed to deny that respondent's due process rights were violated. (Reply

Affirmation dated May 5, 2010 [Reply Aff.]).

III. ANALYSIS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]), and shall be made "within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR 2221[d][3]).

Absent any proof that petitioner served respondent with a copy of the prior order with written notice of its entry, and assuming that petitioner's service of a notice of settlement constitutes such service, the motion is timely, having been made within 30 days of April 13, 2010.

While respondent asserts that the court should have taken judicial notice of the rules of the AAA and the ASI, there is no indication that it asked it to do so. (CPLR 4511[b] ["judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it"]; *JPMorgan Chase Bank, N.A. v Malarkey*, 65 AD3d 718 [3d Dept 2009] [rejecting plaintiff's argument that Supreme Court should have taken judicial notice of information derived from websites as plaintiff never requested that notice be taken]). Nor was the court required to take judicial notice of the rules. (*Cf* CPLR 4511[a] [defining when court must take judicial notice without request]; *see Sleasman v Sherwood*, 212 AD2d 868, 870 [3d Dept 1995] [trial court has discretion to take judicial notice of facts]; *Cole Fischer Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423 [1st Dept 1968], *affd* 25 NY2d 943 [1969] [same]).

Thus, having failed to demonstrate that the court was required to take judicial notice of the rules, respondent has not established that it overlooked any factual matters.

Petitioner is not, however, entitled to attorney fees absent a cross-motion and, in any event, it has not shown that respondent's conduct warrants sanctions in the form of attorney fees.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that respondent's motion for an order granting leave to reargue is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 1, 2010
New York, New York

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Present: HON. BARBARA JAFFE

SUPREME COURT OF THE STATE OF NEW YORK, HELD IN AND FOR THE COUNTY OF NEW YORK, AT THE COUNTY COURT HOUSE THEREOF, ON MAY 2010

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

----------X

CHANDELIERS CREATIVE, INC. **Index No. 09112291**

Petitioner,

-against-

R SQUARED EDGE WB, LLC,

Respondent.

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ORDER & JUDGMENT

Chandeliers Creative, Inc. ("Petitioner"), having instituted this action against respondent, R Squared Edge WB LLC (the "Respondent"), by serving and filing a notice of petition affirmed on August 20, 2010 ("the Petition") which sought to have the Court award judgment confirming an arbitration award, as was issued on August 5, 2009, in the amount of $32,052.16 (the "Arbitration Award," a true and correct copy of which is appended as Exhibit 2 hereto), and Respondent having filed an opposition affirmed on September 15, 2009, and Petitioner having filed a reply, affirmed on September 19, 2009 and argument having been heard by the Honorable Walter B. Tolub on October 9, 2009 and Petitioner having appeared by Sam P. Israel, P.C., by Sam P. Israel, Esq. and Respondent having appeared by the law firm of Herrick & Feinstein and due deliberation having been given to the submissions by all parties and the Court having found in favor of the Petitioner in a decision dated October 28, 2009 (the "Decision," a true and correct copy of which is appended as Exhibit 1 hereto),

NOW, upon the motion of Sam P. Israel, P.C., attorney for Petitioner, it is hereby

Adjudged

~~ORDERED~~, that the Petition is granted and that the Arbitration Award rendered in favor of petitioner and against respondent is confirmed, and it is further

ADJUDGED, that Petitioner Chandeliers Creative, Inc., having an address at 611 Broadway, Penthouse Level, Suite 900 New York, NY 10012 ~~does~~ recover from the

Respondent R Squared Edge WB LLC, having an address at 555 Madison Avenue, 12th Floor New York, New York 10022 in the amount of $32,052.15 and costs and as taxed by the clerk disbursements in the amount of _____, with further interest from August 3, 2009 as calculated by the clerk at the statutory rate in the amount of _____ for the total amount of _____ and that Petitioner shall have execution therefor. to October 28, 2009

Enter:

BARBARA JAFFE
J.S.C.

JUL 01 2010

FILED
JUL 08 2010
COUNTY CLERK'S OFFICE
NEW YORK