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

PRESENT: Hon John A. Milla PART 11

Index Number : 602320/2008

ARJENT SERVICES LLC

VS

PALERMO, LENORA

Sequence Number : 002

VACATE

INDEX NO. _____

MOTION DATE 2-11-10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision/order.

FILED

JUL 16 2010

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: July 13 2010

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 11

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ARJENT SERVICES, LLC,

Petitioner,

-against-

LENORA PALERMO,

Respondent.

Index No. 602320/08

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Joan A. Madden, J.:

Respondent Lenora Palermo moves, pursuant to CPLR 5015 (a)(1), to vacate a stay of an arbitration, which was ordered by this court in an Order and Judgment dated January 23, 2009. Affirmation in Opposition, Ex. C. Respondent also requests, upon vacature of the Order and Judgment, an order compelling petitioner Arjent Services, LLC (Arjent Services) to arbitrate the matter.

Respondent commenced the arbitration before the Financial Industry Regulatory Authority (FINRA), claiming that Arjent Services, as her broker/dealer, committed various misdeeds in servicing her account. Notice of Motion, Ex. A, Statement of Claim. Arjent Services petitioned this court to stay the arbitration in August 2008.

This court granted the stay on respondent's default. Respondent now seeks to vacate the stay, claiming that she has a

reasonable excuse for the default, and a meritorious defense to the motion.

"A party seeking to vacate a judgment on the basis of excusable fault must demonstrate both a reasonable excuse and a meritorious defense." *Benson Park Associates, LLC v Herman*, 73 AD3d 464, 465 (1st Dept 2010); *see also Gal-Ed v 153rd Street Associates, LLC*, 73 AD3d 438 (1st Dept 2010). Law office failure is a reasonable excuse *(Tejeda v Woodycrest Realty, L.L.C.*, 57 AD3d 338 [1st Dept 2008]), as long as the excuse is not conclusory. *Gal-Ed v 153rd Street Associates, LLC*, 73 AD3d 438, *supra*; *see also DeRosario v New York City Health & Hospitals Corp.*, 22 AD3d 270 (1st Dept 2005).

Respondent offers the excuse that her initial attorney, Efrom J. Gross (Gross), failed to appear at the hearing on the petition because of heavy traffic he encountered on the way to court, causing him to arrive at 10:00 A.M. for a 9:30 A.M. calendar call. Respondent offers Gross's affidavit to that effect. Notice of Motion, Ex. G.

As an explanation as to why this motion was not brought sooner after the default, respondent refers to a libel action against Benjamin Lapin, her non-attorney representative in the FINRA arbitration, which was commenced by parties to the arbitration whom respondent had brought in after her initial Statement of Claim was made. Respondent chose to wait until the

conclusion of that action before moving to lift the stay, so as not to open herself up to possible further liability. The libel action was dismissed by an order of this court, dated June 30, 2009 (Notice of Motion, Ex. E).

Arjent Services argues that, before respondent's attorney failed to make the hearing, he had already failed, despite several adjournments, to serve an answer to the petition as required by CPLR 402, so that his failure to appear at the final hearing was largely irrelevant. Arjent Services also questions respondent's attorney's veracity, claiming that, if he really arrived at 10:00 A.M., he should have been available for a second call for the petition, or could have called from his cell phone. Argent Services also questions the lag in time between the end of the libel case, and the bringing of this motion.

Respecting the "strong public policy of this State to dispose of cases on their merits" (*Dokmecian v ABN AMRO North America, Inc.*, 304 AD2d 445, 445 [1st Dept 2003]), this court finds respondent's excuse for failing to appear for the argument of the petition amounts to excusable law office failure. *See e.g. Rugieri v Bannister*, 22 AD3d 299 (1st Dept 2005), *affd as mod* 7 NY3d 742 (2006)(failure to appear at oral argument law office failure). Further, respondent's attorney's failure to timely appear in court is not part of a "willful and systematic failure" to cooperate with the legal system. *Ciao Europa, Inc. v*

Silver Autumn Hotel Corp., Ltd., 270 AD2d 2, 3 (1st Dept 2000); *Burgos v Allcity Insurance Co.*, 272 AD2d 195 (1st Dept 2000)(reasonable excuse for default not willful). Finally, the delay in making the present motion does not require an explanation, as CPLR 5015 (a) (1) allows for a year in which to bring the motion, and provides no punishment for failure to do so before that time.

The next question is that of a meritorious defense to the petition. There is no question that, as a member of FINRA, Arjent Services has an obligation to arbitrate disputes with its customers. The issue here is whether respondent was Arjent Services' customer. Arjent Services claims that respondent does not have a meritorious defense because the facts show that she was never a customer of Arjent Services, having been only a customer of a separate entity, Arjent, Ltd. (Arjent, Ltd.).

With regard to the establishment of a meritorious defense, "[a] defendant is not required to establish its defense as a matter of law; it need only set forth sufficient facts to make out a prima facie showing of a meritorious defense." *Quis v Bolden*, 298 AD2d 375, 375 (2d Dept 2002). Support for a meritorious defense requires a sufficient evidentiary showing. *See e.g. Price v Boston Road Development Corp.*, 56 AD3d 336 (1st Dept 2008).

As an initial matter, this court discounts Arjent Services

contention that the motion is insufficient as failing to be supported by an affidavit of merits from respondent. Such an affidavit is not necessary where an attorney's affidavit "serve[s] as a vehicle to submit documentary proof" (*Chase Manhattan Automotive Finance Corp. v Allstate Insurance Company*, 272 AD2d 772, 774 [3d Dept 2000]), as in this case.

Respondent claims that her right to arbitrate her dispute arises initially from a brokerage agreement which she entered into with Vertical Capital Partners (VCP) in July 2009. VCP subsequently changed its name to Arjent, Ltd. Later, as a result of what respondent characterizes as either a de facto merger of Arjent, Ltd. with Arjent Services, or a succession between Arjent, Ltd. and Arjent Services, along with the turning over of respondent's account to Arjent Services by Arjent, LLC., respondent claims that she became a customer of Arjent Services, which was then bound to arbitrate under FINRA rules.

Respondent contends that Arjent Services can be reached under a theory of piercing the corporate veil. As a result, Arjent Services goes to great lengths, through the affidavit of Robert DePalo, Arjent Services' Chairman, to prove that Arjent Services is not an alter ego of Arjent, Ltd., and that Arjent, Ltd.'s corporate "veil" cannot be pierced to reach Arjent Services.

However, respondent's stronger argument is that Arjent

Services took over respondent's Arjent, Ltd. account, bringing with it the obligations of the agreement between respondent and Arjent, Ltd. The facts lead to such a conclusion.

Arjent Services claims that Arjent, Ltd. withdrew as respondent's broker/dealer, and that respondent was requested to fill out a new form opening a new account with Arjent Services. It is apparently uncontested that respondent never completed that form. However, from the language of the documents presented by respondent (Notice of Motion, Exs. M, N and O), it appears that respondent was only being asked to approve a "change" in her account number, rather than open a wholly new account. In a letter dated February 1, 2008, a company called RBC Dain Correspondent Services (RBC), as a party who "provides your broker-dealer ARJENT SERVICES, LLC, with clearing and execution services," informed respondent that "THE MOST IMPORTANT THING TO KNOW IS THAT YOUR ACCOUNT NUMBER(S) WILL CHANGE EFFECTIVE MARCH 3." *Id.*, Ex. M. In another, dated March 27, 2008, RBC wrote to respondent that it "would like to thank you for recently opening an account with ARJENT SERVICES, LLC and to inform you of your new account number." *Id.*, Ex. N. In this letter, RBC reiterated that "**Effective Monday March 3, 2008, this new account number replaced the one you were given when you opened your account** [emphasis in original]." *Id.*

In the form provided to respondent, Arjent Services wrote

that respondent would find enclosed "account documents required for us to properly administer and *maintain* your account in connection with ARjent Limited's *transfer of accounts* to ARjent Services, LLC ... [emphasis supplied]." *Id.*, Ex. O. Regardless of whether respondent executed the new form, it is apparent that the Arjent Services account was merely a continuation of respondent's long-standing Arjent, Ltd. account, and that Arjent Services was taking on the obligations of Arjent, Ltd., including the fact that respondent was to continue as an established customer with Argent Services.

As a result of the foregoing, this court finds that respondent has made a prima facie showing of a meritorious defense to the petition. It is irrelevant that respondent only had $1,071.59 in her account at the time that Arjent Services took over her account. Therefore, the vacatur of respondent's default in answering the petition is granted.

On a petition to stay an arbitration, the petitioner must show that there is an agreement to arbitrate which "expressly and unequivocally encompasses the subject matter of the particular dispute [internal quotation marks and citation omitted]." *Gerling Global Reinsurance Corp. v Home Insurance Company*, 302 AD2d 118, 123 (1st Dept 2002). Arjent Services does not dispute that such an agreement is part of FINRA's Code. As the facts show that respondent's account continued with Arjent Services,

respondent is Arjent Services, customer, and Arjent Services is obligated to arbitrate respondent's dispute before FINRA. Consequently, respondent's motion to compel arbitration is granted.

Accordingly, it is

ORDERED that the part of respondent Lenora Palmero's motion which seeks to vacate the default judgment rendered by this court on January 23, 2009 is granted, and the said Order and Judgment is vacated; and it is further

ORDERED that, upon vacatur of the Order and Judgment, the part of respondent's motion seeking to compel petitioner to arbitrate the parties' dispute before FINRA is granted, and the parties are directed to proceed with the arbitration.

Dated: July 13, 2010

J.S.C.