

Cach, LLC v Scott
2012 NY Slip Op 33650(U)
August 30, 2012
Sup Ct, Bronx County
Docket Number: 0306023/2008
Judge: Lucindo Suarez
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PART 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

CACH, LLC

Index No. 0306023/2008

- against -

Hon. LUCINDO SUAREZ,

Justice.

SCOTT, EUGENNIE L.

The following papers numbered 1 to 5 read on this motion, VACATE ORDER/JUDGMENTNoticed on August 27, 2012 and duly submitted as No. 2 on the Motion Calendar of August 27, 2012

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3	
Answering Affidavit and Exhibits	4, 5	
Replying Affidavit and Exhibits		
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, respondent's motion to vacate the confirmation of an arbitration award is denied, in accordance with the annexed decision and order.

Dated: 08/30/2012

Hon.

LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X
CACH, LLC,

Petitioner,

DECISION AND ORDER

Index No. 306023/2008

- against -

EUGENNIE L. SCOTT,

Respondent.
-----X

PRESENT: Hon. Lucindo Suarez

Upon respondent's order to show cause signed August 14, 2012 and the affidavit and exhibits submitted in support thereof; petitioner's affirmation in opposition dated August 23, 2012 and the exhibits annexed thereto; and due deliberation; the court finds:

Petitioner Cach, LLC commenced this proceeding pursuant to CPLR 7510 to confirm an arbitration award entered against respondent Eugennie L. Scott in the amount of nineteen thousand four hundred eighty dollars and twenty-seven cents (\$19,480.27) and for an order directing entry of the judgment. By decision and order dated August 28, 2008, this court confirmed the award, and a judgment was entered on April 23, 2009 against respondent in the amount of twenty-three thousand ninety-two dollars and sixteen cents (\$23,092.16). Respondent did not appear for arbitration nor did she respond to the petition.

Respondent, who appears *pro se*, now moves to vacate the order confirming the arbitration award on the ground that she never received notice of the petition. Respondent also submits that (1) she never had a credit card contract with Maryland National Bank; (2) she never agreed to arbitration; (3) petitioner lacked standing to collect the award; (4) she owes no money to Maryland National Bank; (5) the National Arbitration Forum is no longer active due to fraudulent arbitration awards; and (6)

petitioner has waited over three years to collect on the judgment. Respondent submits her affidavit along with copies of a notice of garnishment and income execution, the judgment, and excerpts from the court's file for this proceeding. Petitioner opposes the application and submits copies of its motion to confirm the arbitration award, an affidavit for service of the petition, this court's order, and the judgment.

Although respondent fails to cite the CPLR provisions on which relief may be granted, it is apparent from the underlying papers relief may be granted pursuant to CPLR 5015 or 317.

To the extent that relief is predicated upon CPLR 5015(a)(4) (lack of jurisdiction), the motion fails. The affidavit of service of the petition, which is annexed to petitioner's opposition, reveals service was made pursuant to CPLR 308(4). Licensed process server Walid Ibrahim averred that he affixed the notice of petition, petition, and request for judicial intervention to the door of respondent's home and that he mailed copies of those documents to the same address.

An affidavit of service in appropriate form constitutes *prima facie* evidence that service was properly effectuated. See *Chinese Consol. Benevolent Ass'n v. Chan Tsang*, 254 A.D.2d 222, 679 N.Y.S.2d 54 (1st Dep't 1998). To raise an issue of fact with respect to service, defendant must set forth specific probative facts; unsubstantiated and conclusory denials of receipt are insufficient. See *Chinese Consol., supra*; *Rosario v. Beverly Rd. Realty Co.*, 38 A.D.3d 875, 833 N.Y.S.2d 166 (2d Dep't 2007). The mere denial of receipt of service without further elaboration is thus insufficient to dispute the "veracity or content" of such an affidavit. *Fairmount Funding v. Stefansky*, 235 A.D.2d 213, 214, 652 N.Y.S.2d 14, 14 (1st Dep't 1997). Moreover, "a properly executed affidavit of service raises a presumption that a proper mailing occurred." *Engel v. Lichterman*, 62 N.Y.2d 943, 944, 468 N.E.2d 26, 27, 479 N.Y.S.2d 188, 189 (1984). The court finds that respondent's affidavit contains only a general, conclusory denial of receipt of the petition, which was served at her residence. Respondent

offers no proof disputing the veracity of the statements contained in the process server's affidavit, *see Fairmount Funding v. Stefansky, supra*, nor does the affidavit contain "specific facts to rebut the statements in the process server's affidavits" sufficient to warrant a hearing. *Scarano v. Scarano*, 63 A.D.3d 716, 716, 880 N.Y.S.2d 682, 683 (2d Dep't 2009). Given the absence of a reasonable excuse, relief under CPLR 5015(a)(1) is also unavailable. *See M. R. v. 2526 Valentine LLC*, 58 A.D.3d 530, 871 N.Y.S.2d 131 (1st Dep't 2009); *Time Warner City Cable v. Tri State Auto, Inc.*, 5 A.D.3d 153, 772 N.Y.S.2d 512 (1st Dep't), *appeal dismissed*, 3 N.Y.3d 656, 816 N.E.2d 569, 782 N.Y.S.2d 696 (2004).

CPLR 317 affords an alternative basis for relief, *see Eugene Di Lorenzo, Inc. v. A. C. Dutton Lumber Co.*, 67 N.Y.2d 138, 492 N.E.2d 116, 501 N.Y.S.2d 8 (1986), upon a showing that respondent did not receive notice of the petition in time to defend and has a meritorious defense to the action. The affidavit of service demonstrates that respondent was not personally served. Respondent, though, has not demonstrated that she has a meritorious defense to the action.

A National Arbitration Forum Claim and a Notice of Arbitration were served upon respondent at her home on April 19, 2007. The forms identified MBNA America ("MBNA") and petitioner, as MBNA's successor-in-interest, as claimants in the arbitration proceeding. Respondent has not denied receipt of those documents nor has she denied that her credit card was issued by MBNA or that her cardholder agreement included a provision that required arbitration of the claim. *See* CPLR 7501. Questions as to the validity of the arbitration agreement should have been brought in an action to stay the arbitration under CPLR 7503(b), at the arbitration, or in an application to vacate or modify the award. *See Matter of MBNA Am. Bank, N.A. v. Stehly*, 19 Misc.3d 12, 855 N.Y.S.2d 814 (App. Term 2d Dep't 2008). Respondent defaulted in appearing for arbitration and she did not seek to vacate or modify the award within the time permitted by statute. *See* CPLR 7511; *Matter of Kunju v. MTA*, 94 A.D.3d 585, 942 N.Y.S.2d 350 (1st Dep't 2012). Respondent submits no documentary proof

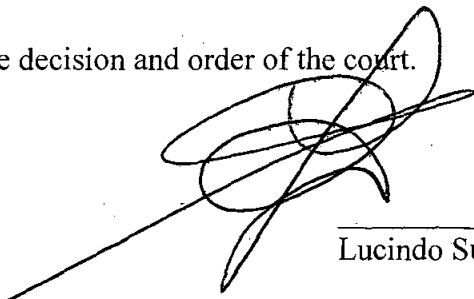
substantiating her claim of fraud, allegedly perpetrated by arbitrator Daniel P. Lund, Esq. and the National Arbitration Forum. *See Scollar v. Cece*, 28 A.D.3d 317, 812 N.Y.S.2d 521 (1st Dep't 2006). Similarly, respondent submits no documentary proof substantiating her allegation that the petitioner lacked standing to seek confirmation of the arbitration award. Respondent's defense of laches does not concern a defense to the proceeding but an objection to petitioner's purported delay in enforcing the judgment.

Accordingly, it is

ORDERED, that the motion by respondent Eugennie L. Scott to vacate the decision and order of the court dated August 28, 2008, which confirmed an arbitration award against respondent, is denied.

This constitutes the decision and order of the court.

Dated: August 30, 2012

A handwritten signature in black ink, appearing to read 'Lucindo Suarez', is written over a horizontal line. The signature is stylized with loops and a long trailing stroke.

Lucindo Suarez, J.S.C.