Matter of Kahan Jewelry Corp. v B.A. Gold Enters., Inc.
2014 NY Slip Op 31551(U)
June 18, 2014
Sup Ct, NY County
Docket Number: 653298/13
Judge: Michael D. Stallman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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In the Matter of the Application of
KAHAN JEWELRY CORP.

Petitioner,

Index No. 653298/13

- against -

B.A. GOLD ENTERPRISES, INC. and BORIS ARONOV,

Interim Decision and Order

Respodnents.

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HON. MICHAEL D. STALLMAN, J.:

Petitioner, a merchant in the metals trade industry, moves to compel respondents to an arbitration before the Bais Din of Boro Park, or before a Bais Din of petitioner's choosing (Motion Seq. No. 001). Respondents oppose the application, and they separate move to dismiss the petition, on the grounds that the parties had no written agreement to arbitrate, and that respondents were not properly served (Motion Seq. No. 002).

This interim decision and order addresses respondents' motion to dismiss.

BACKGROUND

According to petitioner Kahan Jewelry Corporation, respondents B.A. Gold Enterprises, Inc. and Boris Aronov placed orders for gold several times during 2008-2009, and "the transactions were not honored and [respondents] defaulted without payment." (Verified Motion to Compel Arbitration ¶ 13.)[1] Petitioner seeks an order compelling respondents to arbitrate before the Bais Din of Boro Park, or before a Bais Din of petitioner's choosing. According to petitioner's counsel, "[t]he many written confirmations (i.e. delivery tickets, pick up slips, invoices, etc.) that routinely accompanied and embodied the transactions between the parties, over the course of over five (5) years, constituted both an implied and express agreement to arbitrate." (Petitioner's Mem. at 4.)

According to an affidavit of service, two copies of the notice of motion, "verified motion", exhibits and other papers were served upon B.A. Gold Enterprises, Inc. by delivery to the New York Secretary of State on October 18, 2013. According to another affidavit of service, the notice of motion,

[1] This proceeding was originally commenced by a notice of motion and a "Verified Motion To Compel Arbitration," which was efiled as a petition. By a so-ordered stipulation dated December 2, 2013 (NYSCEF Doc # 29), the parties deemed the motion as a petition to compel arbitration. As respondents indicate, petitioner's "Verified Motion" was not initially, in fact, verified; petitioner subsequently efiled a verification (NYSCEF Doc # 36).

"verified motion", exhibits and other papers were personally delivered to Boris Aronov on October 21, 2013 at 9:10 PM.

Respondents now move to dismiss the petition on the ground that, among other things, they were not properly served. Petitioner opposes the motion.

DISCUSSION

"[Once jurisdiction and service of process are questioned, [petitioner] [has] the burden of proving satisfaction of statutory and due process prerequisites." (*Stewart v Volkswagen of America, Inc.*, 81 NY2d 203, 207 [1993].)

Respondents argue that service upon respondent B.A. Gold Enterprises, Inc. was not properly made via the delivery to the Secretary of State because its corporate name is, in fact, BA Gold Enterprises Inc., not "B.A. Gold Enterprises, Inc." Aronov, the president of BA Gold Enterprises Inc., avers, "I was never served with the Notice of Motion and supporting papers with which Kahan purported to commenced this proceeding. Rather, I received them only by certified mail, while BAG [BA Gold Enterprises Inc.] never received them at all." (Aronov Opp. Aff. ¶1.)

A notice of petition to compel a party to arbitration "shall be served in the same manner as a summons in an action." (CPLR 403 [c]; *see Matter of*

Country Wide Ins. Co. v Poledank, 114 AD2d 754 [1st Dept 1985].) Here, although service upon BA Gold Enterprises Inc. was purportedly made via the Secretary of State, respondents argue that the pleadings contained a misspelling of its corporate name, so as to render service upon the Secretary of State insufficient to obtain personal jurisdiction over it.

As respondents indicates, courts have ruled that service upon the Secretary of State was insufficient when the pleadings "misspelled and misstated the name of the intended corporate defendant." (*Pereira v Oliver's Rest.*, 260 AD2d 358 [2d Dept 1999]; *Henriquez v Inserra Supermarkets, Inc.*, 68 AD3d 927 [2d Dept 2009]; *see also Guarino v West-Put Contr. Co.*, 289 AD2d 290 [2d Dept 2001].) In *Pereira*, the intended corporate defendant was Ollivers Restaurant Corporation, but the defendant was named as "Oliver's Restaurant, Inc." In *Henriquez*, the intended corporate defendant was Paragon Management Group, LLC, but the defendant was named as "Paragon Management Group, Inc."

One court explained,

> "since the Secretary of State's obligation under Business Corporation Law 306 is to 'promptly send [the summons and complaint] ... to such corporation, at the post office address, on file in the department of state, specified for the purpose,' and there was no such address, the named defendant being nonexistent, defendant could not have received notice by plaintiff's chosen method of service."

(*Demitro v Garsan Reality, Inc.*, 24 Misc 3d 1205 (A) [Sup Ct, NY County 2009].)

Here, the Court is persuaded that the misspelling in the name of BA Gold Enterprises Inc. is similar to the misspellings in *Pereira* and *Henriquez*, and thus service upon the Secretary of State was insufficient to confer personal jurisdiction over BA Gold Enterprises Inc. Respondents point out that a search for "B.A. Gold Enterprises, Inc." in the Secretary of State's database of corporate/business entities yields no results for such an entity. (Aronov Opp. Aff., Ex B.) Although a search of the database under "BA Gold Enterprises Inc." would have yielded the information for the intended corporate defendant, the Secretary of State is under no obligation either to search various permutations of a corporate name or to mail multiple notices using such permutations.

Aside from service upon the Secretary of State, petitioner appears to assert that the motion papers and supporting exhibits were personally delivered to Boris Aronov, the president of BA Gold Enterprises Inc. Because Aronov denies personal delivery of these pleadings, the issue of whether personal jurisdiction was acquired over BA Gold Enterprises Inc. and Aronov, individually, must be sent for a traverse hearing.

Although respondents additionally argue that the parties had no written agreement to arbitrate, the Court may not reach the merits until the issue of personal jurisdiction is resolved. (*See e.g. Flame S.A. v Worldlink Intl. [Holding] Ltd.*, 107 AD3d 436 [1st Dept 2013] ["The court should have addressed the issue of personal jurisdiction before forum non conveniens because, if a court lacks jurisdiction over a defendant, it is 'without power to issue a binding forum non conveniens ruling as to' that defendant].)

CONCLUSION

Accordingly, it is ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court (or to hear and determine if counsel so stipulate in writing) the following individual issues of fact, which are hereby submitted to the JHO or Special Referee for such purpose:

1) the issue of whether personal jurisdiction was acquired over respondent B.A. Gold Enterprises, Inc.

2) the issue of whether personal jurisdiction was acquired over respondent Boris Aronov

and it is further

ORDERED that the powers of the JHO orSpecial Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter to an available JHO or Special Referee to hear and report as specified as above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 30 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (available at http://www.courts.state.ny.us/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized

by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320 [a]) and, except as otherwise directed by the assigned JHO or Special Referee, the trial of the issues specified above shall proceed day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO or Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this Court in any Order that may be issued together with this Order of Reference to Hear and Report, all other issues presented in respondents' motion to dismiss shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this Court thereon; and it is further

ORDERED that this motion to dismiss is ADJOURNED and RECALENDARED in IAS Part 21 to October 2, 2014 at 10 A.M. in contemplation of the traverse hearing.

Dated: June 18, 2014
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN