

**Matter of P.L.K. Vending, Inc. v Third Ave. & St
Marks Inc.**

2014 NY Slip Op 32838(U)

November 3, 2014

Supreme Court, New York County

Docket Number: 652038/14

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

P.L.K. VENDING, INC.,

Petitioner,

Index No. 652038/14

-against-

DECISION/ORDER

THIRD AVE & ST MARKS INC. d/b/a CONTINENTAL
GRAND SALOON,

Respondent.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	_____

Petitioner previously applied to the Court for an Order confirming the award of the arbitrator made in the above entitled proceeding, dated June 24, 2014. The court granted petitioner's application to confirm the arbitration award without opposition on August 12, 2014. Respondent has brought the present motion to vacate its default in answering the petition to confirm the arbitration award and to vacate and/or modify the arbitration award. As will be explained more fully below, the motion is denied in its entirety.

The relevant facts are as follows. The petitioner is in the business of operating coin

operated phonographs and amusement devices in the New York metropolitan area. In 2007, petitioner and respondent entered into a written agreement which provided the petitioner with the exclusive right to operate its coin operated music device at respondent's business premises located in New York City for a period of four years. The agreement provided that all disputes would be submitted to arbitration in accordance with the rules and regulations of the American Arbitration Association and that the agreement would be governed by New York law. After a dispute arose between the parties, petitioner commenced an arbitration proceeding against respondent. After a hearing was held before the arbitrator, the arbitrator rendered an award on June 24, 2014. Petitioner then brought a petition to confirm the award.

To vacate a default, the defaulting party must demonstrate a reasonable excuse and a meritorious claim or defense. *Brown v. Suggs*, 38 A.D.3d 329 (1st Dept 2007). In the instant case, the court finds that respondent has not demonstrated a reasonable excuse for its default. Initially, respondent argues that it has a reasonable excuse for its default based on the fact that service of the petition in this action was improper as it was made by certified mail, return receipt requested on an employee of respondent. However, this method of service was specifically authorized by the contract between the parties which provides for service of the petition by certified mail, return receipt requested. Moreover, because the contract specifically provided for this type of service, there was nothing improper in an employee at the premises signing the receipt.

Respondent next argues that its default was excusable because respondent's principal did not become aware that he actually needed to respond to the petition until he had an opportunity to obtain counsel who could explain to him that he actually needed to respond. The court finds that

this is not a reasonable excuse.

Even assuming *arguendo*, that there was a reasonable excuse, respondent has failed to establish that it has a meritorious defense to this proceeding. Respondent argues that it has a meritorious defense on the ground that the arbitrator acted in manifest disregard of the law in violation of the Federal Arbitration Act (the “FAA”). If the FAA applied to the arbitration agreement between the parties, then the provisions of the FAA would determine the grounds for vacating an arbitration award, rather than CPLR §7511. *See Matter of Uram v. Garfinkel*, 16 A.D.3d 347 (1st Dept 2005). However, this court finds that the FAA does not apply to this dispute.

The FAA governs agreements which “which evidenc[e] a transaction involving commerce.” 9 U.S.C. §2. The First Department recently held that the FAA does not only apply to activities which involve the flow of interstate commerce. *Cusimano v. Schnurr*, 120 A.D.3d 142, 147 (1st Dept 2014). “Rather, as long as there is economic activity that constitutes a general practice ‘bearing on interstate commerce in a substantial way,’ the FAA is applicable.” *Id.* at 148.

In the present case, the court finds that the FAA does not apply to the arbitration agreement between the parties as the economic activity which is the subject of the agreement does not constitute an economic activity which has a “bearing on interstate commerce in a substantial way.” The agreement between the parties involves petitioner’s exclusive right to operate its coin operated music device at respondent’s business premises located in New York City for a period of four years. This right to operate a coin operated music device in respondent’s business in New York City does not bear on interstate commerce in a substantial way. As a

result, it is the CPLR rather than the FAA which governs as to whether there are any grounds to vacate or modify the arbitration award in this matter.

Respondent has not even attempted to argue that the arbitration award should be vacated or modified pursuant to CPLR § 7511. Even if it had made such an argument, the court finds that there is no basis for modifying or vacating the arbitration award pursuant to the CPLR. A party aggrieved by an arbitration award may move to vacate the award pursuant to Article 75 of the CPLR. Specifically, CPLR § 7511(a) states that “[a]n application to vacate or modify an award may be made by a party within ninety days after its delivery to him.” Pursuant to CPLR § 7511(b),

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

- (i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

A petition to vacate an award pursuant to CPLR § 7511(b)(1)(iii) will be granted only when one of the following circumstances is shown: (1) the arbitrator has exceeded a specifically enumerated limitation on his authority; (2) the decision is totally irrational; or (3) the award is violative of a strong public policy. See *Board of Education of the Dover Union Free School District v. Dover-Wingdale Teachers' Ass'n*, 61 N.Y.2d 913 (1984). “Courts are reluctant to disturb the decisions of

arbitrators lest the value of this method of resolving controversies be undermined.” *Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986). “Even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice.” *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (1999).

In the present case, respondent has failed to establish any basis for vacating the award pursuant to the CPLR. It has failed to establish that the award violates any strong public policy, is irrational or exceeds any specifically enumerated limitation on the arbitrator’s power. The court notes that there is no basis for respondent’s contention that the arbitrator incorrectly awarded attorneys fees as it was not requested in the demand for arbitration. As established in petitioner’s papers, it made an application before the arbitrator pursuant to CPLR § 3123 for legal fees incurred on the ground that the respondent had refused to properly admit the genuineness of the agreement between the parties.

Based on the foregoing, the motion to vacate the default is denied in its entirety. This constitutes the decision and order of the court.

Dated: 11/3/14

Enter: _____

CK

J.S.C.

CYNTHIA S. KERN
J.S.C.