

<b>Fishman v Queens Blvd. 40th Owners Corp.</b>
2015 NY Slip Op 30067(U)
January 15, 2015
Supreme Court, New York County
Docket Number: 154430/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
MICHAEL FISHMAN, as Trustee and THE TRUSTEES  
OF THE BUILDING SERVICE 32BJ HEALTH FUND,  
BUILDING SERVICE 32BJ PENSION FUND,  
BUILDING SERVICE 32BJ THOMAS SHORTMAN  
TRAINING AND SCHOLARSHIP FUND, BUILDING  
SERVICE 32BJ LEGAL FUND and THE BUILDING  
SERVICE 32BJ SUPPLEMENTAL RETIREMENT  
AND SAVINGS FUND,

Index No. 154430/12

**DECISION/ORDER**

Petitioners,

-against-

QUEENS BLVD. 40<sup>TH</sup> OWNERS CORP.,

Respondent.

-----X

HON. CYNTHIA 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>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Michael Fishman, as Trustee and the Trustees of the Building Service 32BJ Health Fund, Building Service 32BJ Pension Fund, Building Service 32BJ Thomas Shortman Training and Scholarship Fund, Building Service 32BJ Legal Fund and Building Service 32BJ Supplemental Retirement and Savings Fund (hereinafter collectively referred as the “petitioner” or the “Funds”) commenced the instant proceeding seeking to confirm an arbitration award against respondent Queens Blvd 40<sup>th</sup> Owners Corp. (“respondent” or “Queens Blvd”), which was

granted without opposition in August 2012. Respondent now moves for an Order (1) pursuant to CPLR § 317 vacating the default judgment entered against respondent; (2) pursuant to CPLR §§ 2201 and 5240 staying all actions and proceedings taken to enforce the default judgment; and (3) remanding this matter for arbitration. For the reasons set forth below, respondent's motion is denied.

The relevant facts are as follows. Respondent was party to a collective bargaining agreement (the "Agreement") with Service Employees International Union, Local 32BJ ("Union") and executed an assent to be bound to the industry Agreement negotiated between the Union and the Realty Advisory Board on Labor Relations, Inc. ("RAB"). The Agreement provides, in relevant part, that respondent is obligated to make periodic contributions to petitioner Funds and that if respondent fails to make the required payments to the petitioner Funds, "the Trustees may in their sole and absolute discretion take any action necessary, including but not limited to immediate arbitration and suits at law, to enforce such...payments, together with interest and liquidated damages as provided in the Funds' trust agreements, and any and all expenses of collection, including but not limited to counsel fees, arbitration costs, fees and court costs." The Agreement provides for arbitration as a mechanism for resolving disputes that arise under the Agreement and that "[i]f a party, after due written notice, defaults in appearing before the Arbitrator, an award may be rendered upon the testimony of the other party."

By Notice of Intent to Arbitrate, dated May 3, 2011, the petitioner Funds demanded arbitration over a dispute concerning the respondent's missed payments from 2005 through May 2011. Petitioner alleges that the Notice of Intent to Arbitrate was sent to respondent by regular

mail to the address supplied by the RAB as per the Agreement. By Notice of Hearing dated July 20, 2011, the Office of the Contract Arbitrator advised respondent of the nature of the dispute and that the hearing was scheduled for August 19, 2011 at 2:00 p.m. Additionally, the Notice of Hearing provided the address of the hearing and was served upon the respondent by certified mail, return receipt requested, and was signed for by respondent on July 27, 2011.

Respondent did not appear at the arbitration hearing. Thus, the Arbitrator rendered an award based upon the evidence before him. Specifically, the Arbitrator found the respondent delinquent in its contributions and awarded the petitioner the total amount of \$58,829.30. When respondent failed to pay the amount owed, the petitioner commenced a proceeding pursuant to Article 75 of the CPLR to confirm the arbitration award. The Notice of Petition and Petition were served upon respondent by certified mail. In August 2012, this court granted the petition to confirm the award on default. Respondent now moves for an Order (1) pursuant to CPLR § 317 vacating the default judgment confirming the arbitration award entered against it; (2) pursuant to CPLR §§ 2201 and 5240 staying all actions and proceedings taken to enforce the default judgment; and (3) remanding this matter for arbitration.

As an initial matter, respondent's motion for an Order pursuant to CPLR § 317 vacating the default judgment confirming the arbitration award entered against it is denied. Pursuant to CPLR § 317,

A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

“[T]o support a determination granting relief under CPLR 317, a party must...demonstrate, and the Court must find, that the party ‘did not receive actual notice of the summons and complaint in time to defend the action.’” *Wassertheil v. Elburg, LLC*, 94 A.D.3d 753, 754 (2d Dept 2012)(citing *393 Lefferts Partners, LLC v. New York Ave. at Lefferts, LLC*, 68 A.D.3d 976, 977 (2d Dept 2009)). “The mere denial of receipt of the summons and complaint is insufficient ‘to establish lack of actual notice for the purpose of CPLR 317.’” *Wassertheil*, 94 A.D.3d at 754 (citing *Matter of Rockland Bakery, Inc. v. B.M. Baking Co., Inc.*, 83 A.D.3d 1080, 1081-82 (2d Dept 2011)). *See also Coyle v. Mayer Realty Corp.*, 54 A.D.3d 713 (2d Dept 2008)(“[t]he mere denial of receipt of a summons and complaint was insufficient to rebut the presumption of proper service created by the affidavit of service.”)

Here, respondent’s motion for an Order pursuant to CPLR § 317 vacating the default judgment confirming the arbitration award entered against it is denied on the ground that respondent has failed to establish that it did not receive actual notice of the petition in time to defend the proceeding. In support of its motion, respondent has provided the affidavit of Modesta Medrano, its Property Manager, who has affirmed that respondent did not receive the Notice of Petition and Petition to Confirm the Arbitration Award. However, Ms. Medrano’s affidavit is merely conclusory and is insufficient to establish lack of actual notice for the purpose of CPLR § 317. As an initial matter, the affidavit fails to set forth any details about the office procedures that are followed in connection with the receipt of mail. Further, it does not articulate any credible reason why the Notice of Petition and Petition somehow did not reach respondent. Indeed, Ms. Medrano has not contested the address to which the Petition was sent. Moreover, petitioner has provided the affidavit of service which establishes that the petition was sent to

respondent by certified mail.

Respondent's attempt to remedy its evidentiary deficiencies by producing a second affidavit of Ms. Medrano with its reply papers which discusses respondent's office procedures that are followed in connection with the receipt of mail is improper as it is well-settled that evidence submitted for the first time in reply will not be considered by the court. *See Migdol v. City of New York*, 291 A.D.2d 201 (1<sup>st</sup> Dept 2002) ("The affidavit...submitted with appellant's reply papers was properly rejected by the motion court since it sought to remedy these basic deficiencies in appellant's prima facie showing rather than respond to arguments in plaintiff's opposition papers.") In any event, Ms. Medrano's second affidavit still does not establish lack of actual notice of the Article 75 proceeding for the purpose of CPLR § 317 as it does not rebut the presumption of proper service created by petitioner's affidavit of service.

As this court has denied that portion of respondent's motion for an Order vacating the default judgment entered against it, the remaining portions of respondent's motion for an Order (1) pursuant to CPLR §§ 2201 and 5240 staying all actions and proceedings taken to enforce the default judgment; and (2) remanding this matter for arbitration are denied as moot.

Accordingly, respondent's motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 11/15/15

Enter: \_\_\_\_\_

CK  
J.S.C.

CYNTHIA S. KERN  
J.S.C.