At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of October, 2017.

P R E S E N T:

HON. WAYNE P. SAITTA,
Justice.

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IN THE MATTER OF THE APPLICATION OF
GLASER & WEINER, LLP,

PETITIONER,

- against - Index No. 520932/16

SALOMAN GELBSTEIN AND YORL HOROWITZ,

RESPONDENTS.

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The following papers numbered 1 to 9 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Petition and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavit (Affirmations)	
Reply Affidavit (Affirmations)	6-7
Surreply Affidavit and Affirmation	8-9

Upon the foregoing papers, petitioner, Glaser & Weiner, LLP, (petitioner), seeks an order, pursuant to CPLR 7510 confirming the Final Award in the Nassau County Bar Association Arbitration Panel arbitration entitled *Glaser &*

Weiner, LLP v Saloman Gelbstein, Yoel Horowitz, and Joseph Freund, NCBA Case File No. 2016-5 (the Final Award), and directing entry of a judgment, pursuant to CPLR 7514, in petitioner's favor against respondents Salomon Gelbstein and Yoel Horowitz, jointly and severally, for $40,422.86 plus interest at 1.25% per month (15% per annum) from October 6, 2016. Respondent Yoel Horowitz (Horowitz) cross-petitions for an order dismissing the petition on the ground that he was never served with the Demand for Arbitration dated April 29, 2016 and was not personally served with the instant petition.

On March 15, 2010, respondents Salomon Gelbstein, Yoel Horowitz and non-party Joseph Freund retained petitioner to represent them in connection with the possible purchase of a licensed home health care agency. The retainer was signed by all three parties, including Horowitz, and states Horowitz's address as "87 South 9th Street, Brooklyn, NY." In the event of a dispute over legal fees, the retainer provides that

> ". . . any dispute arising out of or relating to this agreement and/or the legal services rendered hereunder, you and we hereby agree that such dispute shall be determined by binding arbitration before one arbitrator in Nassau County, New York, in a proceeding by and before, and in accordance with, the rules of the Alternative Dispute Resolution Tribunal of the Bar Association of Nassau County, Inc."

On April 29, 2016, petitioner commenced an arbitration proceeding by serving a demand for arbitration by certified mail, return receipt requested. Certified mail was sent to 87 South 9th Street, Brooklyn, NY, Horowitz's address listed on the retainer. Certified mail was also sent to "150 South 8th Street, Brooklyn, NY 11211" and "106 South 8th Street, #7B, Brooklyn, NY 11249." After respondent failed to answer or appear at the arbitration hearing on September 12, 2016, Arbitrator David J. Albanese issued a final award on October 6, 2016 for legal fees against respondents Horowitz and Gelbstein totaling $40,422.68 with interest.

Thereafter, petitioner commenced this special proceeding to confirm the final award. By order to show cause dated December 2, 2016, the court directed personal service be made upon respondents on or before December 13, 2016. A second order to show cause, signed on December 22, 2016, directed personal service upon Horowitz at "150 South 8th Street, Brooklyn, NY 11211" on or before January 13, 2017. The affidavit of service upon Horowitz in the court file states that on January 2, 2017, the order to show cause was served by personal delivery upon Matty Horowitz, wife of respondent Horowitz, at 417 Flushing Avenue, Apartment 3B, Brooklyn, NY 11205. The order to show cause was also served on January 4, 2017 by first class mail addressed to **"YOEL HOROWITZ"** at 417 Flushing Avenue, Apartment 3B, Brooklyn, NY 11205 in an envelope bearing the words "PERSONAL AND CONFIDENTIAL" without indicating on the outside that it was from an attorney or concerns an action against respondent Horowitz.

On or about March 30, 2017, Horowitz filed a cross petition to deny confirmation of the final award and dismiss the petition. Respondent Gelbstein did not answer the petition. Non-party Freund settled with petitioner and signed an affidavit of confession of judgment in petitioner's favor for the unpaid balance of $12,000.00.

Discussion

CPLR 308 (2) permits personal service upon a person other than the named party "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode" of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner. "CPLR 308(2) requires strict compliance and the plaintiffs have the burden of

proving, by a preponderance of the credible evidence, that service was properly effected" *(Kearney v Neurosurgeons of N.Y.*, 31 AD3d 390, 391 [2d Dept 2006]; *Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 980 [2d Dept 2011], *lv denied* 19 NY3d 810 [2012]; *McCray v Petrini*, 212 AD2d 676, 676 [2d Dept 1995]). "Ordinarily, a process server's affidavit of service constitutes prima facie evidence that the defendant was validly served" (*U.S. Bank, N.A. v. Peralta*, 142 AD3d 988, 988 [2d Dept 2016]; *see also, U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 1155 [2d Dept 2016]). A defendant's sworn denial of receipt of service, containing specific facts to rebut the statements in the process server's affidavit, generally requires a plaintiff to establish personal jurisdiction at a hearing by a preponderance of the evidence (*see U.S. Bank, N.A.*, 142 AD3d at 988–989). However, "[a] hearing is not required where the defendant fails to 'swear to specific facts to rebut the statements in the process server's affidavits'" *(U.S. Bank, N.A.*, 142 AD3d at 988 quoting *Simonds v. Grobman*, 277 AD2d 369, 370 [2d Dept 2000]).

Here, petitioner's affidavit of service states that the order to show cause was served by personal delivery upon a person of suitable age and discretion, Matty Horowitz, wife of respondent Horowitz. Service was made at 417 Flushing Avenue, Apartment 3B, Brooklyn, New York, an address where Horowitz admits to reside. Horowitz also admits receipt of the order to show cause but contends that it was not served upon him personally. Horowitz's affirmation does not deny specific facts contained in the process server's affidavit. The affirmation does not deny the identification of Matty Horowitz as his wife nor does he contest her description. As such, the court finds that service at his admitted residence upon a person of "suitable age and discretion" is sufficient to obtain jurisdiction over Horowitz pursuant to CPLR 308 (2).

Horowitz further argues that he has a reasonable excuse for his nonappearance at the arbitration because he was not served with the demand for arbitration. In addition, he offers what he characterizes as a meritorious defense, namely, that he had no dealings with petitioner in almost six years and that non-party Freund interacted with petitioner on Horowitz's behalf and has settled this claim. The cross petition only requests that the court deny the petition to confirm the final award and does not request vacating the final award. However, in interests of judicial economy, the court will address the grounds, enumerated in CPLR 7511 (b) (2), applicable to vacate an arbitration award where a party neither participated in the arbitration nor was served with a notice of intention to arbitrate.

CPLR 7511 (b) (2) provides in this regard that an "award shall be vacated if the court finds that:

> "(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one [i.e., of CPLR 7511 (b) (1)]; or
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> "(ii) a valid agreement to arbitrate was not made; or
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> "(iii) the agreement to arbitrate had not been complied with; or
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> "(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502."

Courts determine whether a valid agreement to arbitrate exists (*see Matter of Primex Intl. Corp. v. Wal–Mart Stores*, 89 NY2d 594, 598 [1997]; *Matter of County of Rockland (Primiano Constr. Co.)*, 51 NY2d 1, 6–8 [1980]; *Markowitz v Friedman*, 144AD3d 993, 996 [2d Dept 2016]). Once it is determined that the parties have agreed to

arbitrate the subject matter in dispute, the court's role has ended and it may not address the merits of the particular claims (*see Matter of Praetorian Realty Corp. [Presidential Towers Residence]*, 40 NY2d 897, 898 [1976]; *Matter of Prinze [Jonas]*, 38 NY2d 570, 577 [1976]; *Ferrella v Godt*, 131 AD3d 563, 565-566 [2d Dept 2015], *lv denied* 26 NY3d 913 [2015]). Issues regarding proper service of the demand for arbitration should be determined by the arbitrator as part of the arbitration proceeding (*see Matter of County of Rockland*, 51 NY2d 1, 8-9 [1980]; *Shah v Monpat Contr., Inc.*, 65 AD3d 541 [2d Dept 2009]).

Horowitz has not alleged any of the enumerated grounds for vacating an arbitration award in CPLR 7511 (b) (1),[1] nor are there any specific allegations about whether there was a valid agreement or whether there was compliance with the agreement. The parties had a retainer agreement signed by Horowitz agreeing to pay petitioner's legal fees incurred in connection with the possible purchase of a licensed home health care agency. The retainer also contained the provisions for arbitration. Horowitz, in his May 24, 2017 surreply, acknowledges his own signature

[1] CPLR 7511(b)(1) provides that

> an "[arbitration] award shall be vacated . . . if the court finds the rights of the party were prejudiced by:
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> "(i) corruption, fraud or misconduct in procuring the award; or
>
> "(ii) partiality of an arbitrator appointed as a neutral; . . . ; or
>
> "(iii) the arbitrator . . . exceeded his power or so imperfectly executed it that the final and definite award upon the subject matter submitted was not made; or
>
> "(iv) failure to follow the procedure of this article . . ."

on the retainer agreement and thus cannot deny that he accepted the retainer or that he agreed to arbitrate any fee disputes.

The retainer did not predetermine manner of service. Consequently, CPLR 7503 (c) applies and pertinently provides that a demand for arbitration must be served "in the same manner as a summon or by registered or certified mail, return receipt requested." In the final award, dated October 6, 2016, Arbitrator Abeshouse found that petitioner served Horowitz by certified mail, return receipt requested consistent with CPLR 7503 (c). Although Horowitz denies ever living at 87 South 9th Street, Brooklyn, New York, petitioner's demand for arbitration was served at the address known to petitioner, as shown in the retainer and acknowledged by Horowitz. Absent any demonstration of the conditions set forth in CPLR 7511 (b) (1), the court must confirm the award.

Horowitz's arguments with respect to a viable defense lack merit. To vacate a default in appearing at arbitration, Horowitz must demonstrate a reasonable excuse for his nonappearance and a potential meritorious defense (*Royal Leisure v TLAM, Inc.*, 107 AD3d 721, 721 [2d Dept 2013]). The basis for Horowitz's purported meritorious defense is the absence of interaction he had with petitioner over almost six years in comparison to non-party Freund. However, Horowitz acknowledges that non-party Freund dealt with petitioner "on my behalf . . ." Horowitz further alleges that non-party Freund settled the within claim with petitioner. The final award, though, contrary to Horowitz's allegation, clearly notes that the $38,192.23 principal amount had deducted

$12,000.00 pursuant to the settlement between petitioner and only Freund. Hence, Horowitz's allegation that the within claim was settled is without merit. Accordingly, it is

ORDERED and **ADJUDGED** that the petition of Glaser & Weiner, LLP. is granted and the Final Award of the Nassau County Bar Association Arbitration Panel entitled *Glaser & Weiner, LLP v Saloman Gelbstein, Yoel Horowitz, and Joseph Freund*, NCBA Case File No. 2016-5 is hereby confirmed; and it is further

ORDERED and **ADJUDGED** that the cross petition of Yoel Horowitz is dismissed; and it is further

ORDERED and **ADJUDGED** that a money judgment in favor of Glaser & Weiner, LLP against Salomon Gelbstein and Yoel Horowitz, jointly and severally, for $40,422.68 plus interest at the rate of 1.25% per month (15% per annum) from October 6, 2016 shall be entered.

This constitutes the decision, order and judgment of the court.

ENTER

J. S. C.
HON. WAYNE P. SAITTA
J.S.C.

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

2017 OCT 17 AM 11:15
KINGS COUNTY CLERK
FILED