

Business Fin. Servs., Inc. v Elmundo 419 Food Corp.
2019 NY Slip Op 32488(U)
August 22, 2019
Supreme Court, New York County
Docket Number: 653167/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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BUSINESS FINANCIAL SERVICES, INC., d/b/a
BFS CAPITAL,

Index No.
653167/2019

Petitioner,

-against-

Decision and
Order

ELMUNDO 419 FOOD CORP. d/b/a FINE
FARE SUPERMARKET/FINE FARE and
FAYEZ AYESH,

Mot. Seq. 1

Respondents.

Pursuant to Article 75 of the Civil Practice Law
and Rules and the Federal Arbitration Act, 9 U.S.C.
§9, to Confirm Arbitration Award

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HON. EILEEN A. RAKOWER, J.S.C

Petitioner Business Financial Services Inc., d/b/a BFS Capital (“Petitioner”) seeks to confirm an arbitration award (“Award”) that was rendered by the American Arbitration Association Commercial Arbitration Tribunal on July 18, 2018 in an arbitration proceeding between Petitioner and Respondents Elmundo 419 Food Corp. d/b/a Fine Fare Supermarket/Fine Fare (“Elmundo”) and Fayez Ayesh (“Ayesh”) (collectively, “Respondents”). No opposition is submitted.

The Award

The Award awarded Petitioner (1) “damages in the amount of \$267,446.48 caused by breach of the Agreements by Respondent Elmundo” and (2) additional damages in the sum of \$14,417.31, representing attorneys fees and expenses (\$9,008.56), the AAA’s fees in this arbitration (\$2,915.00) and the Arbitrator’s compensation (\$2,493.75). The Award further provided:

To implement the foregoing, Respondent Elmundo as the breaching party and/or Respondent Ayesh as guarantor of the obligations of Elmundo under the Agreements shall pay Claimant the total amount of \$281,863.78. If such total amount is not paid in full within 20 business days from the date of this Award, the unpaid amount shall, until payment is made in full, bear simple interest from the date of this Award at the rate of 6% per cent per annum. The Award is in full settlement of all claims and contributions submitted to this Arbitration. All claims and counterclaims not expressly granted herein are hereby denied.

Applicable Standard

“It is well settled that judicial review of arbitration awards is extremely limited.” *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 479 (2006). “An arbitration award must be upheld when the arbitrator ‘offers even a barely colorable justification for the outcome reached.’” *Wien*, 6 N.Y.3d at 470-480 (internal citations omitted). CPLR §7510 states, “The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511.” CPLR §7511 provides four grounds on which an application to confirm an arbitration award may be denied: fraud; partiality by the arbitrator; the arbitrator exceeding his or her authority; and a failure to follow the procedures of CPLR Article 75.

Discussion

The Petition is granted to the extent that it seeks to confirm the Award as against Elmundo. Despite proper service, Elmundo does not oppose Petitioner’s application to confirm the Final Arbitration Award, and therefore there are no facts alleged that fall within the four grounds set forth in CPLR 7511.

The Petition is denied to the extent that it seeks to confirm the Award as against Ayesh because Petitioner has not shown proper service upon him.

Where service of process cannot be made with “due diligence” by personal delivery pursuant to CPLR § 308(1), or by the deliver and mail alternative under

CPLR § 308(2), CPLR § 308(4) permits service of process “by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by ... mailing the summons to such person at his or her last known residence . . . or actual place of business.”

Here, Petitioner’s Affidavit of Service states that the process server “posted” the Petition to Ayesh’s residence after he made one attempt to serve him on June 14, 2019 at which time there was “no answer.” The process server wrote, “I gained access through the gate behind a construction crew. The defendant’s name was not on the directory for access code or ringing his house; but neither are many residents.” Petitioner also provides an Affidavit of Mailing, attesting that on June 17, 2019, the Petition was mailed to Ayesh. The process server’s one attempt to serve Ayesh is insufficient to satisfy the due diligence requirement for substituted service under CPLR § 308(4). *Spath v. Zack*, 36 AD3d 410, 412-13 (1st Dep’t 2007). Furthermore, to the extent that the Petition was also mailed to Ayesh, the Affidavit of Mailing does not comport with the requirements of CPLR § 312-a.

Wherefore, it is hereby

ORDERED that the Petition is granted only to the extent that the arbitration award rendered by the American Arbitration Association Commercial Arbitration Tribunal on July 18, 2018 in favor of Petitioner Business Financial Services, Inc., d/b/a BFS Capital as against Respondent Elmundo 419 Food Corp. d/b/a Fine Fare Supermarket/Fine Fare is hereby confirmed; and it is further

ORDERED AND ADJUDGED that Business Financial Services, Inc., d/b/a BFS Capital has judgment and can recover against Respondent Elmundo 419 Food Corp. d/b/a Fine Fare Supermarket/Fine Fare in the amount of \$281,863.78, together with simple interest from July 18, 2018 at the rate of 6% until the date of entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of the Petition which seeks to confirm the arbitration award against Respondent Fayez Ayesh is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: August 22, 2019



Eileen A. Rakower, J.S.C.