

Salem v Feldstein
2020 NY Slip Op 32052(U)
June 24, 2020
Supreme Court, Kings County
Docket Number: 517710/19
Judge: Wavny Toussaint
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At an IAS Term, Part 70 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 24th day of June, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X

MARK SALEM,

Petitioner,

- against -

DEBRA FELDSTEIN,

Respondent.

-----X

DECISION AND JUDGMENT

Index No. 517710/19

Mot. Seq. No. 1-2

The following e-filed papers read herein:

NYSCEF No.:

Notice of Petition, Petition, Amended Petition, Cross Motion,
Supporting Affirmations, and Exhibits Annexed _____
Answer to Amended Petition, Affirmations in Opposition
and Exhibits Annexed _____
Affirmation (Affidavit) in Opposition to Cross Motion _____

1, 3, 7-10; 17-26
11, 12-15
27-28

Upon the foregoing papers, petitioner Mark Salem (“Salem”) seeks an order confirming an arbitration award against respondent Debra Feldstein (“Feldstein”) and cross-moves for leave to further amend his amended petition (Mot. Seq. No. 1 and 2, respectively). Feldstein opposes.

Background

The underlying claim arises out of a legal fee dispute between the parties. On May 28, 2014, petitioner’s law firm, Salem & Shimko P.C., entered into a retainer agreement with respondent to “continue defending Client and two related corporations against a

lawsuit filed against them in Brooklyn and Queens.” The retainer agreement is signed by petitioner Salem for Salem & Shimko P. C. and by respondent Feldstein. The matter was set down for arbitration commenced by Feldstein pursuant to the Fee Dispute Resolution Program (*see* 22 NYCRR 137.0).

At the hearing before the arbitrator, Feldstein appeared pro se. The arbitrator denied Feldstein’s request to adjourn the hearing to permit her to retain counsel. By decision, dated August 27, 2018 (the “arbitration award”), the arbitrator found that by retainer agreement signed and dated May 28, 2014, Feldstein, on behalf of herself and two related corporations (Kings Overseas Corp and Kings Wear Inc.), engaged the law firm of Salem and Shimko, P.C. (the “firm”), of which Salem is a principal, in the defense of two previously commenced state-court actions. The arbitrator further found that Feldstein’s “request for arbitration . . . is void of any explanation whatsoever why she believes the attorney is not entitled to his fee[;] when questioned by the undersigned as to this[,] the client had no explanation.” The arbitrator awarded Salem the principal sum of \$6,925.26 in attorney’s fees.

On September 30, 2018, Feldstein commenced an action in the Suffolk County District Court (the “District Court”) against the firm pursuant to 22 NYCRR § 137.8 for a de novo review of the arbitration award. By decision/order, dated January 23, 2019, the District Court dismissed Feldstein’s action for lack of personal jurisdiction.

On August 22, 2019, Salem commenced the instant proceeding against Feldstein to confirm the arbitration award. His original petition was silent as to when the arbitration award was served on him. The omission was significant because under CPLR 7510 a petition to confirm an arbitration award must be filed “within one year after its delivery to [the petitioner].”

By order, dated November 20, 2019, this Court directed that the “[p]etition to confirm the [arbitration] award of the arbitrator [be] adjourned to 1/8/2020 for supplemental papers relative to the service of the arbitrator’s decision.” On December 4, 2019, Salem filed an amended petition which, similar to the original petition, failed to indicate when the arbitration award was served on him.

On January 1, 2020, Feldstein, by counsel, filed her opposition to the amended petition. She contended that the amended petition should be denied because, among other things, the arbitrator refused to adjourn the arbitration hearing to permit her to retain counsel.

In response to Feldstein’s opposition, Salem cross-moved for leave to further amend his amended petition to allege (in ¶¶ 13 and 15 thereof) that (1) “[u]pon information and belief, the Arbitrator’s award was delivered to [the] Petitioner within five days of August 27, 2018,” and (2) he “commenced this [proceeding] to confirm the arbitration award on August 22, 2019, which is within one year of the date the arbitration award was rendered and delivered to the Petitioner.” In opposition to Salem’s motion for leave to amend, Feldstein submitted her own affidavit, averring that the arbitrator had denied her adjournment of the arbitration hearing to permit her to retain counsel.

Feldstein further contends that petitioner Salem was not the proper party to the arbitration, as Salem & Shimko, PC was the party to the retainer agreement and sent out all of the subject invoices. Respondent Feldstein further contends that neither the petition nor the amended petition were properly verified, and that the petition was untimely.

Discussion

Turning to Salem's cross motion for leave to amend, such leave is to be "freely given" (CPLR 3025 [b]). "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008], *appeal withdrawn* 12 NY3d 804 and 813 [2009]). "A party seeking leave to amend a pleading need not make an evidentiary showing of merit, and leave to amend will be granted unless such insufficiency or lack of merit is clear and free from doubt" (*Calamari v Panos*, 131 AD3d 1088, 1089 [2d Dept 2015] [internal citations omitted]). "The burden of establishing prejudice is on the party opposing the amendment" (*Park v Home Depot U.S.A.*, 183 AD3d 645, [2d Dept 2020]).

Here, Feldstein has failed to show that she was prejudiced or surprised by the proposed second amended petition, or that it is patently devoid of merit or palpably insufficient. Contrary to her contention, the claim asserted in the proposed second amended petition relates back to the original petition which was timely filed (*see* CPLR 203 [f]; CPLR 7510).

Turning to the merits of the second amended petition, parties at an arbitration hearing have the right to be represented by an attorney, and this right "may not be

waived” (CPLR 7506 [d]). Here, proper procedure was not followed at the arbitration hearing because the arbitrator denied Feldstein the right to be represented by counsel. This failure to observe statutory procedure is prejudicial and constitutes a sufficient ground to preclude confirmation of the arbitration award (*see Sartiano v Becker*, 119 AD2d 656 [2d Dept 1986], *appeal dismissed* 68 NY2d 806 [1986]; *see also Nastasi v Artenberg*, 130 AD2d 469, 470 [2d Dept 1987]). Feldstein did not waive her right to counsel, after requesting it, by proceeding to arbitrate (*see CPLR 7506 [f]; Matter of Mikel v Scharf*, 105 Misc 2d 548, 556 [Sup Ct, Kings County 1980], *affd* 85 AD2d 604 [2d Dept 1981]). In light of this determination, respondent’s remaining contentions need not be addressed.

Conclusion

Accordingly, it is

ORDERED, that Salem’s cross motion is granted, and the second amended petition is deemed served on Feldstein; and it is further

ORDERED, that the arbitration award is vacated, the second amended petition is denied, and the proceeding is dismissed without costs or disbursements.

This constitutes the decision and judgment of the Court.

ENTER,



J. S. C.