SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER **PART 6**
Justice

Lampert Capital Markets, Inc.,

Plaintiff,

- against-

David Martin Beach,

Defendant.

INDEX NO. 655278/2020
MOTION DATE
MOTION SEQ. NO. 2
MOTION CAL. NO.

Decision and Order

The following papers, numbered 1 to _____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answer — Affidavits — Exhibits _____	
Replying Affidavits	

Cross-Motion: Yes X No

Pro Se Defendant David Martin Beach ("Defendant") moves for an Order vacating the judgment on default for failure to appear and dismissing the case for lack of jurisdiction. Plaintiff Lampert Capital Markets, Inc. ("Plaintiff") opposes.

On October 14, 2020, Plaintiff commenced this special proceeding, seeking an Order pursuant to CPLR § 7510 confirming the arbitration award entered by the FINRA arbitrator dated October 15, 2019, granting $103,595.38 in compensatory damages, in favor of Plaintiff, in the case captioned *David Martin Beach v. Lampert Capital Markets Inc., Stewart Randy Lampert, and Brian Michael Schofield*, Number 18-03253. On November 17, 2020, this Court granted the Petition, stating that "[Defendant] has received notice and has not appeared in opposition to the action."

Parties' Contentions

Defendant argues that "[t]he Court lacks personal jurisdiction because the Summons and Complaint were not served properly." Defendant asserts that he did not receive the Judgment papers until December 2020, after calling Plaintiff's attorney. Defendant further asserts that he "did not file an answer to the Complaint with the court because of the following excusable default:

a. I never received the court papers.

> b. I received the court papers too late.
>
> c. Our youngest son developed epilepsy from an unknown illness a few years ago. Given the threat of COVID, our family has been in quarantine for most of 2020. We cannot risk our son being exposed to COVID as he is still on epilepsy medications and we desperately need to avoid any seizures."

Furthermore, Defendant argues that he has meritorious defenses, including: (a) violation of the duty of good faith and fair dealing; and (b) evidence that Plaintiff lied repeatedly during the FINRA arbitration.

In opposition, Plaintiff argues that the Order to Show Cause seeking to dismiss the action on lack of personal jurisdiction for failure to serve Summons and Complaint should be denied, since there was no Summons and Complaint filed in this case. Plaintiff asserts that "this action was commenced under this index number as a Petition to Confirm an Arbitration Award." Plaintiff argues that Defendant's argument that he was not served is not supported by the evidence. Plaintiff asserts that the Affidavit of Service of personal service of the Petition states that Defendant was personally served at his address on October 27, 2020, at 524 East 82nd Street, Apt 3, New York, New York 10028. Plaintiff further asserts that the address of service for Defendant matches the address Defendant used as his address on the Order to Show Cause (Motion Sequence 2). Additionally, Plaintiff argues that its attorney Robert Moses, Esq. was not served with the Order to Show Cause (Motion Sequence 2). Plaintiff contends that Defendant "drafted the Order to Show Cause with a directive to serve Adam Berman. However, Mr. Berman is not Plaintiff Lampert's Attorney with regard to the Petition." Plaintiff asserts that Mr. Berman was not even served.

Additionally, Plaintiff argues that Defendant "does not have a meritorious defense." Plaintiff asserts that Defendant's assertion that there was a "violation of good faith and fair dealing, and alleged lies during the FINRA arbitration, do not constitute a meritorious defense." Plaintiff contends that the "award was delivered to Defendant Beach on October 15, 2019." Plaintiff argues that CPLR 7511 states that party must make an application to vacate or modify an arbitration award within 90 days after the decision is rendered. Plaintiff asserts that Defendant has failed to make an application to vacate the award within the statute of limitations. Plaintiff argues that Defendant fails to set forth any "argument or evidence that the Arbitrators' conduct in this matter involved fraud, corruption, or misconduct." Plaintiff further argues that "[t]here is no argument that the Arbitration Award

exhibits 'manifest disregard of the law.'" Moreover, Plaintiff asserts that Defendant has not provided "the Court with the entire arbitration record."

Furthermore, Plaintiff argues, Defendant's assertion that there was a "violation of good faith and fair dealing, and alleged lies during the FINRA arbitration, do not constitute a meritorious defense." The parties do not dispute that an Arbitration was held in accordance with FINRA's governing rules. The parties also do not dispute that Defendant was present at the Arbitration and had an opportunity to testify and submit evidence, which he did. The Arbitration hearing was held over a period of several months and twelve hearing sessions and included witness testimony and presentation of over 150 pieces of evidence, as evidenced in the Affidavit of Plaintiff. *See* Exhibit "H". After hearing the testimony and considering the evidence, the Arbitrators rendered a "full and final resolution of the issues". As part of the resolution, the Arbitrators found that "Claimant's (Defendant) claims are denied in their entirety." The Arbitrators also found Claimant (Defendant) liable to Plaintiff and ordered that he pay Plaintiff the sum of $103,595.38 in compensatory damages. All issues were already heard and decided by the Arbitrators. Defendant's only remedy would have been to attempt to vacate the award. Defendant failed to meet his heavy burden of showing arbitrator misconduct or partiality by clear and convincing proof. Thus, the award should not be disturbed by the Court.

Proper Service

"An affidavit of service constitutes prima facie evidence of proper service and the 'mere denial of receipt of service is insufficient to rebut the presumption of proper service created by a properly-executed affidavit of service' (*Matter of de Sanchez,* 57 A.D.3d 452, 454, 870 N.Y.S.2d 24 [1st Dept. 2008] [internal quotation marks omitted])." *Ocwen Loan Servicing, LLC v. Ali*, 180 AD3d 591, 591 [1st Dept 2020], appeal dismissed, 36 NY3d 1046 [2021].

In Defendants Affidavit, Defendant denied that he "received the court papers." Defendant does not contend that the address listed on the Affidavit of Service was the incorrect address. Furthermore, Defendant lists the address from the Affidavit of Service as his address in the Order to Show Cause (Motion Sequence 2). Defendant's argument is insufficient to rebut the presumption of proper service.

Vacate Arbitration Award

Under CPLR § 7511(a), "an application to vacate or modify an award may be made by a party within ninety days after its delivery to him."

"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, "[t]he 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 that an arbitration award shall be vacated upon the motion of a party to the arbitration "if the court finds that the rights of that party were prejudiced by" certain enumerated grounds, including, "corruption, fraud or misconduct in procuring the award;" or "partiality of an arbitrator appointed as a neutral" and "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." CPLR § 7511(b)(1)(iii).

It is well settled that a party seeking to vacate an arbitration award bears the "heavy burden" of demonstrating that the award "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR § 7511(b)(1)." *Scollar v. Cece*, 28 A.D. 3d 317 [1st Dept 2006].

Even if service was proper, Defendant has failed to make an application to vacate or modify an award within the 90 day statute of limitations. According to the documents and the Affidavit of Plaintiff Lampert (See Exhibit "H") Defendant was informed of the procedures to be followed to challenge the award numerous times: at the conclusion of the Arbitration by the Arbitration Panel, in the Arbitration Award (See Exhibit "A"), in the Arbitration Award cover letter from FINRA dated October 15, 2019 (See Exhibit "G"), and again by email from FINRA dated October 17, 2019 (See Exhibit "I"). The latest that Defendant could have moved to modify or vacate the award would have been January 15, 2020, 90 days after October 17, 2019 and before any emergency order by the Governor was in effect. Therefore, Defendant's application, if considered as a motion to vacate the award, was not timely.

Wherefore it is hereby

ORDERED that Defendant's motion is denied.

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

Dated: April 20, 2021

ENTER: _____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION