Kucker Marino Winiarsky & Bittens, LLC v Neiman
2022 NY Slip Op 34241(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 656980/2021
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Kucker Marino Winiarsky & Bittens, LLC.

INDEX NO. 656980/2021

MOT. DATE

- v -

MOT. SEQ. NO. 002

Izzy Neiman a/k/a/ Israel Neiman

The following papers were read on this motion to/for ~~confirmation~~ vacatur

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

This is a motion by respondent Izzy Neiman a/k/a Israel Neiman ("Neiman") to vacate the court's order dated March 1, 2022 and the judgment entered on March 17, 2022 pursuant to CPLR § 5015. The March 1, 2022 order granted Kucker Marino Winiarsky & Bittens, LLC's ("Kucker Marino") petition to confirm an arbitration award on default in its favor. In granting the petition, the court confirmed the underlying arbitration award and subsequently issued a money judgment in the amount of $23,000 plus interest from the date of the arbitration in favor of Kucker Marino and against Neiman.

Neiman now argues that the order and judgment should be vacated pursuant to CPLR § 5015(a)(1) and (4) on the grounds of excusable default and because the court did not have jurisdiction over Neiman when the order and judgment were issued. Neiman argues that the court had no jurisdiction over him when it issued the order and judgment because service was "highly suspicious", and he wasn't given the proper amount of time to respond to the petition. He argues that there is excusable default for the same reasons, and also because he was not a party to the retainer agreement that was the subject of the underlying arbitration. Additionally, Neiman argues that the petitioner failed to serve additional notice or to verify the petition or provide an affidavit in compliance with CPLR § 3215, and thus, that its petition should have been denied. Finally, Neiman argues that the court should vacate the order and judgment due to the policy that cases should generally be decided on the merits.

Kucker Marino opposes the motion and argues that Neiman failed to demonstrate a reasonable excuse sufficient to vacate the judgment by law. It argues that service was proper, and that the respondent was given sufficient time to answer the petition pursuant to CPLR § 403. Kucker Marino also argues that it is too late for Neiman to raise arguments about the underlying retainer agreement, but assuming *arguendo* that such an issue could be confronted, there was a guaranty clause in the retainer agreement that Neiman signed and thus, Neiman is personally liable for any unpaid legal bills. Additionally, Kucker Marino asserts that CPLR § 3215 does not apply because the underlying order and

Dated: 12/8/22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

judgment were not based on a motion for default judgment, but rather were the subject of a special proceeding. Finally, Kucker Marino argues that Neiman cannot seek review of the arbitration award because he failed to request such relief in the notice of the motion, because he failed to seek to vacate the arbitration award within ninety days after its delivery to him, and because he did not seek a stay of the arbitration within twenty days after the service of the demand for arbitration upon him.

In reply, Neiman argues that he may seek review of the underlying arbitration award for three reasons: 1) he is seeking to vacate the judgment of the court which confirmed the arbitration award, and such vacatur would leave the award unconfirmed which "is functionally the same as vacated;" 2) a court may grant relief other that which is specifically asked for in the motion papers, and since a vacatur of the order confirming the arbitration award would then necessitate a review of that arbitration award, the court may as well consider vacatur of the arbitration award at this juncture; 3) his inaction in seeking to stay the arbitration or vacate the award at an earlier juncture should not bar him from seeking to vacate the arbitration award now because no notice of arbitration was served upon him, and even if it was, there was a never a prior agreement to arbitrate and he did not participate in the arbitration.

CPLR § 5015 states that

> "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct upon the ground of: excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or... lack of jurisdiction to render the judgment or order..." (CPLR § 5015[a][1] & [4]).

"Where... a defendant seeking to vacate a [judgment] raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), and seeks a discretionary vacatur pursuant to CPLR 5015 (a) (1), a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR § 5015(a)(1)" (*HSBC Bank USA, N.A. v Dalessio*, 137 AD3d 860 [2d Dept 2016]). Therefore, the court will first consider Neiman's CPLR § 5015(a)(4) argument.

The court will first consider Neiman's jurisdiction-based arguments. He first argues that the fact that the petition was served upon a "Jane" Neiman who is an unidentified person of suitable age and discretion raises questions as to whether service was proper. He also argues that Neiman wasn't given the proper amount of time to respond to the petition and therefore, that any order or judgment stemming from that petition must be vacated. Neiman argues that because Kucker Marino served the petition by delivering it to a person of suitable age and discretion at his last known residence and mailing the petition and associated documents, there is a 10-day delay in service and service is not complete until 10 days after Kucker Marino files the affidavit of service. Neiman argues that the affidavit of service was filed on December 27, 2021, so service was not complete until January 6, 2022. He states that the petition was marked submitted on January 18, 2022, but contends that he should have been given 30 days pursuant to CPLR §320 to respond, and that the petition should not have been marked submitted until February 5, 2022.

The court rejects Neiman's service argument for the reason that follow. Service upon an unidentified person of suitable age and discretion at the residence or place of work of a respondent is proper pursuant to CPLR § 308(2). Secondly, "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'" (*Jones v. Groom*, 2022 NY Slip Op 05952 [1st Dept 2022] *quoting Matter of de Sanchez*, 57 AD3d 452 [1st Dept 2008]). Neiman does not deny service or provide any proof that the person described as "Jane" Neiman did not or does not exist. All Neiman offers to the court is mere speculation, which is insufficient to establish improper service or even warrant a hearing on the issue.

Next, Neiman argues that there was no jurisdiction over him at the time that the order and judgment were issued because he wasn't given the proper amount of time to respond to the petition. This argument fails for two reasons. Firstly, jurisdiction and time to respond are two separate issues. Personal jurisdiction is complete upon proper service whereas time to respond dictates how long a party has to reply to a complaint or petition after service is completed (*see Yarusso v. Arbotowitcz*, 41 NY2d 516 [1977]; *Flick v. Stewart-Warner Corp.*, 76 NY2d 50 [1990]). Here, Neiman does not deny that he was properly served the petition and associated papers by delivery of those documents to a person of suitable age and discretion at Neiman's residence and by subsequent mailing of those documents. Therefore, personal jurisdiction was achieved. The court did have jurisdiction over Neiman when it issued the order and judgment.

Secondly, on the issue of proper time to respond, Neiman is incorrect in asserting that he was not given the proper amount of time to respond to Kucker Marino's petition. Neiman is correct in asserting that there is a ten-day delay in service because of the manner of service (*see Summit Jet Corp. v. Meyers*, 193 Misc. 2d 480 [2d Dept 2002]). However, the time to respond for a special proceeding is ruled by CPLR § 403, not by CPLR § 320 as Neiman asserts (*see Saddler Textiles, Inc. v. Winston Uniform Corp.*, 39 AD2d 845 [1st Dept 1972]; *American Home Assur. Co. v. Montilus*, 234 AD2d 543 [2d Dept 1996]). CPLR § 403 states that

> notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least eight days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least two days before such time.

Therefore, Kucker Marino could make the petition returnable 8 days after service was completed, to wit, January 14, 2022. Since Kucker Marino made the petition returnable January 18, 2022. Therefore, Neiman was given more than the requisite amount of time to respond. Moreover, the petition was served on Neiman in December 2021 and the court did not decide the petition until March 2022. Meanwhile, this motion was only brought September 2022. Neiman has not explained why he waited approximately nine months after being served with the petition to bring this application. Such a delay mitigates against any supposed reasonable excuse that Neiman may have. For these reasons, Neiman's CPLR § 5015(a)(4) argument that the court did not have personal jurisdiction to render an order and judgment fails.

Next, the court will consider Neiman's CPLR § 5015(a)(1) arguments. In order for a party to move to vacate a default pursuant to CPLR § 5015(a)(1), he must demonstrate that he had a reasonable excuse for default and a meritorious claim or defense (*See* CPLR 5015[a][1]; *Gray v. B.R. Trucking Co.*, 59 NY2d 649 [1983]). "What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court"(*Gecaj v. Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600 [1st Dept 2017]).

The court has already addressed Neiman's arguments relating to the manner of service and the return date of the petition. Neiman additionally argues that he had a reasonable excuse for his default in the underlying petition because the notice of petition was returned for correction as per the county clerk's notes, and thus "it is unclear" whether the served notice of petition had the correct dates for filing of opposition and the affidavit of service claims that a notice of pendency was served but there is no notice of pendency in this case, so there is a question of what was actually served.

Neiman's argument that the notice of petition was served on him may not have had the corrected return date fails because, it is speculative. Firstly, Neiman does not assert that there was a discrepancy between the date on the papers served to him and the date on the corrected and uploaded petition papers. Rather, he states that it is "unclear" whether the papers served had the corrected date. This is not sufficient to challenge the assumption of proper service created by Kucker Marino's filed affidavit of service. Assuming that Neiman was served with the petition and notice of the petition, any inconsisten-

cy in dates should have been obvious to him, and he should have raised the exact discrepancy in his motion. Assuming *arguendo* that the notice of petition that was served on Neiman did have an incorrect date for submission of opposition, Neiman should have provided such documentation to the court to demonstrate that the discrepancy led to an untimely answer. As it stands, Neiman has not demonstrated that a discrepancy even existed. Therefore, this argument also fails.

Neiman's remaining argument that he had a reasonable excuse for defaulting also fails. Neiman asserts that the affidavit of service claims that a notice of pendency was served upon him, but there is no notice of pendency in this case. Neiman asserts that this discrepancy creates a question of what was served and calls into question whether the service was actually proper. Once again, Neiman fails to assert a firm defense. Neiman had the opportunity to assert that he was never served the petition papers. He made no such assertion. He had the opportunity to assert actual discrepancies in the service papers that caused a misunderstanding and led to his default. He made no such assertions. Instead, he dwells in the space of generalized "questions" of proper service and hopes that the court will make the assumptions that he alludes to. These generalized assumptions are not sufficient to overcome the presumption of proper service created by Kucker Marino's filed affidavit of service. Therefore, this argument also fails. Neiman failed to demonstrate that he had a reasonable excuse for defaulting in the underlying CPLR § 7503 petition.

The court's consideration of Neiman's CPLR § 5015(a)(1) arguments could end here. However, assuming *arguendo* that the court could and should overlook the weak excuses that Neiman provides for his default in an effort to support the policy that "cases should be decided on the merits," his CPLR 5015(a)(1) arguments still fail (*Wattson v. TMC Holdings Corp.*, 135 AD2d 375 [1st Dept 1987]). Neiman argues that he has a meritorious claim to overturn the underlying arbitration award that was confirmed in the order and judgment for three reasons: 1) Kucker Marino failed to serve additional notice, verify the petition or provide an affidavit in compliance with CPLR § 3215; 2) the arbitration panel did not have jurisdiction over Neiman when it made the award; and 3) a notice of arbitration was never served upon Neiman, so he was unable to move to stay the arbitration or vacate the arbitration award and thus any result of the arbitration should be vacated.

Neiman's arguments of merit fail for the following reasons. The first argument that Kucker Marino failed to serve additional notice, verify the petition or provide an affidavit in compliance with CPLR § 3215 fails because this statute does not apply to an Article 75 petition to confirm an arbitration award. Neiman argues that the Article 75 petition resulted in an order and judgment that was a result of his default in answering the special proceeding. He argues that the judgment was therefore a default judgment and the petition ought to have followed the requirements set forth in CPLR § 3215. This argument has no basis in law. CPLR § 3215 demands further evidentiary and service requirements because the court is making a determination of fact without the response of the defaulting party (*see* CPLR § 3215). In comparison, in Article 75 cases, fact determination has already occurred in the arbitration and the court may not substitute its own factual findings or legal conclusions for those of the arbitrator, even when it believes the arbitrator's interpretation of the law or fact was erroneous (*Azrielant v. Azrielant*, 301 AD2d 269 [1st Dept. 2002]). The standards are incongruent and CPLR § 3215 does not apply to a CPLR § 7503 petition. Therefore, this argument fails.

Neiman next asserts that he has a meritorious argument for the vacatur of the arbitration award because the arbitration panel did not have jurisdiction over Neiman when it made the award. Neiman asserts that the retainer agreement that was the subject of the underlying arbitration was between Kucker Marino and non-party 456 Johnson, LLC. He states that he signed the retainer agreement in a representative capacity, not in a personal capacity. Therefore, the arbitration panel had no jurisdiction over him because he did not sign an agreement to be bound by arbitration nor did he appear in any arbitration proceeding pursuant to CPLR 7511(b)(2)(ii). This argument also fails.

Generally, if the person signing a contract does not intend to be held personally liable, there will be a title under the signature detailing his/her/their relationship to the client so as to distinguish him/her/themself from that client and to indicate that the signor is signing in a representative capacity.

Here, Neiman signed without a title. Additionally, the retainer agreement permitted Kucker Marino to pursue a claim against "claim against the directors and officers of the corporation or members of the entity in their individual capacities for the entire amount and the corporation or entity may reimburse the individuals for the amount paid." The arbitrator made a decision that the language of the retainer agreement allowed Kucker Marino to pursue payment from Neiman. "The grounds for vacating an arbitrator's award… 'are few in number and are narrowly applied'" (*Azrielant v. Azrielant*, 301 AD2d 269 [1st Dept 2022]). An arbitration award cannot be vacated on the grounds of mistake of law unless the award is "totally irrational" (*Matter of Henneberry v. ING Capital Advisers, LLC*, 10 NY3d 278 [2008]; *see Denson v. Donal J. Trump for President, Inc.*, 180 AD3d 446 [1st Dept 2020]). An arbitration award is not totally irrational where the arbitrator's findings were based on its own understanding of the facts (*Turkewitz v Fuchsberg & Fuchsberg,* 273 AD2d 149 [1st Dept. 2000]). The arbitration panel's finding that the language of the retainer agreement permitted Kucker Marino to pursue payment from Neiman is based on its own understanding of the retainer agreement, the language of that agreement, and the facts surrounding the agreement. The lack of title underneath Neiman's signature along with the language of the retainer agreement demonstrates that the arbitration panel's determination is not totally irrational. Therefore, the court is cannot disturb it. Therefore, the argument that the arbitration panel did not have jurisdiction over Neiman when it made the award fails.

Finally, Neiman argues that a notice of arbitration was never served upon him, so any result of the arbitration should be vacated. The arbitration was a fee dispute resolution arbitration through the New York County Lawyers' Association ("NYCLA"). Part 137.2 of Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York states, in relevant part that:

> (a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8. (b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for Part 137, and that the client agrees to resolve fee disputes under this Part. (c) The attorney and client may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to de novo review. Such consent shall be in writing in a form prescribed by the board of governors. (d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the board of governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part.

These rules demonstrate that without request or consent from the client, a NYCLA fee dispute arbitration cannot take place. Furthermore, the email from NYCLA dated June 22, 2021, in which it issued the arbitration award was sent to Neiman's email, "izzypda@gmail.com." If the arbitrator had Neiman's email address and was able to reach him to send out the arbitration award, it is only logical that they had his email to give him notice of the arbitration.

Here, Neiman had the burden of proof to demonstrate that he never received the notice of arbitration. However, he did not confront the NYCLA fee dispute arbitration rules and has not addressed the fact that NYCLA had his email. In fact, the only place where Neiman asserts that he did not receive notice of the arbitration is in the affirmation in reply of his attorney. This assertion is not made in the original motion papers and was not included in Neiman's own affidavit. The affirmation from counsel contains no firsthand knowledge regarding the claim and is insufficient to establish that the notice of arbitration never arrived (*see Miguel L. v. Ashley J.L.*, 177Ad3d 476 [1st Dept 2019]; *Northern Source, LLC*

v. Kousouros, 106 AD3d 571 [1st Dept 2013]). Therefore, Neiman has failed to prove that such notice of arbitration was never delivered upon him and has failed to demonstrate a meritorious claim for the vacatur of order, judgment and underlying arbitration award. Therefore, the motion is denied in its entirety.

In accordance herewith, it is hereby **ORDERED** that the motion to vacate is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/8/22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.