

Xiaoguang Jiang v American Express Co.

2023 NY Slip Op 34288(U)

November 20, 2023

Supreme Court, New York County

Docket Number: Index No. 653400/2019

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

Petitioner was directed to submit an amended summary of the dispute since his original claim failed to identify causes of action. Petitioner submitted an amended summary of the dispute on April 14, 2021. On June 8, 2021, Arbitrator Duggal issued Procedural Order No. 2, indicating that petitioner had failed to provide the legal basis on which he intended to reply and afforded petitioner yet another opportunity to submit the facts and legal basis for his claim, together with the alleged damages. Arbitrator Duggal advised petitioner to seek counsel if he so desired. Arbitrator Duggal granted respondent's request to file a dispositive motion and the motion to dismiss was submitted on July 30, 2021. On August 9, 2021, Arbitrator Duggal recused himself as arbitrator. After the matter was transferred to Arbitrator Maura Smith, petitioner was afforded an extension of time to submit opposition and a reply.

Arbitrator Smith dismissed petitioner's claims with prejudice, stating that:

"Claimant's cause of action for violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. (the "FCRA"), fails because Claimant did not satisfy the essential predicate required to support a FCRA claim, and while he subsequently filed a dispute with credit reporting agencies, failed to present evidence that demonstrates Respondent failed to comply with FCRA requirements. Likewise, Claimant's cause of action for violation of the Truth in Lending Act, 15 U.S.C § 1601, et seq. ("TILA"), fails as a matter of law, because business credit card transactions are expressly exempted from the protections of TILA. Finally, Claimant has failed to present evidence that American Express' debt collection efforts exceeded what are lawful, standardized, and routine debt collection practices. While Claimant presented evidence of his history of mental health issues and his reactions to American Express' collection calls, this evidence does not in any way alter the legal standard for assessing whether American Express' actions created an unreasonable risk of causing distress. Under Utah law, American Express' actions must be considered in light of the demeanor of a reasonable person, not the subjective mental state of the Claimant. Not only must the emotional distress suffered be severe; it must be such that a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case. The mere placement of collection calls does not satisfy the applicable standard for negligent infliction of emotional distress, and Claimant has failed to present any colorable evidence that American Express or its agents engaged in collection practices with the express purpose of inflicting emotional distress, which would be required to support a claim of intentional infliction of emotional distress."

In opposition to the motion, petitioner argues that the final order is invalid and should be dismissed as invalid because said Order was issued on November 18, 2021, one day after the deadline set forth by Procedural Order 4. He also urges this court to deny the motion seeking to compel arbitration on the basis that discovery is necessary into the "fraudulent monthly account statements" from respondent. Denial of the confirmation of the arbitration is also warranted, claims petitioner, in the interest of justice. Plaintiff also contends that, counsel for defendant has indicated that he represents American Express National Bank and not American Express Company, which is the named defendant in this action. Thus, he argues that all papers submitted on behalf of American Express National Bank should be disregarded, insofar as it is not a defendant in this action (NYSCEF Doc. No. 95, *Jiang's opposition*).

In reply, defendant argues that this court should reject plaintiff's untimely opposition papers, which were due on or before May 17, 2022, because they were filed after the return date of the motion, on May 25, 2022. To the extent the court considers the papers, defendant argues that the opposition papers nevertheless fail to set forth any reason why the final order should not be confirmed by the court. Defendant also argues that the argument that the arbitration award is invalid since the order was circulated on November 18, 2021, one day after the date set forth in the scheduling order is lacking in merit. Notwithstanding, if plaintiff took issue with this, his recourse would have been to commence an arbitral appeal. There is no basis to vacate an arbitration award on the ground that discovery is outstanding. Lastly, defendant argues that at no point did plaintiff take issue with the appearance of American Express National Bank nor did he indicate that he intended to sue some other entity. Defendant argues that American Express Company does not issue credit cards and, thus, was not involved with his account. Throughout this litigation, plaintiff has been on notice that American Express National Bank is the correct defendant in the action (NYSCEF Doc. No. 99, *reply*).

The court will not consider the subsequent submissions filed on Mot. Seq. 007, since these constitute an impermissible sur-reply.

CPLR 7510 provides that "[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, in relevant part, that "[t]he award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

- “(i) corruption, fraud or misconduct in procuring the award; or
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
- (iii) 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; or
- (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.”

Furthermore, CPLR 7511(c) provides the basis for modifying an award:

- “1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
- 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- 3. the award is imperfect in a matter of form, not affecting the merits of the controversy.”

As an initial matter, this court shall consider plaintiff's untimely opposition papers insofar as defendant has been afforded an opportunity to address the arguments raised therein. That said, upon consideration of the arguments advanced by plaintiff in opposition to Mot. Seq.

007, this court finds no basis for the denial of the motion seeking to confirm the final award. Notably, plaintiff does not seek to vacate or modify the award on any ground specified in CPLR 7511, and therefore, the court is obligated to confirm the award under CPLR 7510. (See *Matter of Granet & Assoc., Inc. v Thom Filicia, Inc.*, 159 AD3d 573, 573 [1st Dept 2018]; *Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 3 [1st Dept 2009]).

Plaintiff filed Mot. Seq. 008 seeking an Order vacating the final order. However, his application was filed well beyond 90-days after delivery of the final award; thus, pursuant to CPLR 7511(a) and 9 USC § 12, it is untimely (see CPLR 7511 [a]; *Matter of Kunju v MTA*, 94 AD3d 585, 585 [1st Dept 2012]; *Werner Enters. Co. v New York City Law Dept.*, 281 AD2d 253, 721 NYS2d 536 [2001]). The application is therefore denied.

Given the Court’s finding with respect to Mot. Seq. 007, the remaining motions are denied as moot and the action is hereby marked disposed. Accordingly, it is hereby

ORDERED and **ADJUDGED** that the motion of defendant (Mot. Seq. 007) seeking to confirm the Final Order dated November 18, 2021 (NYSCEF Doc. No. 93, *Final Award*), which dismissed plaintiff’s claims with prejudice is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ORDERED and **ADJUDGED** that the Clerk of the Court is hereby directed to enter judgment against plaintiff in favor of defendant; and it is further

ORDERED that plaintiff’s Mot. Seq. 008 is denied as untimely; and it is further

ORDERED that plaintiff’s Mot. Seq. 009 and 010 are denied as moot; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff, as well as the Clerk of the Court, who shall enter judgment accordingly.

November 20, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART