UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MASON TENDERS DISTRICT COUNCIL OF GREATER NEW YORK AND LONG ISLAND,

Plaintiff,

-against-

CIRCLE INTERIOR DEMOLITION, INC.,

Defendant.

07 Civ. 11227 (RMB) (THK)

REPORT AND RECOMMENDATION

TO: HON. RICHARD M. BERMAN, UNITED STATES DISTRICT JUDGE.
FROM: THEODORE H. KATZ, UNITED STATES MAGISTRATE JUDGE.

Plaintiff Mason Tenders District Council of Greater New York and Long Island ("Plaintiff" or "the Union"), brought this action against Defendants Circle Carpentry, LLC, Circle Interior Demolition, Inc., and Carlo Bordone, to confirm an arbitration award. Failing to effectuate service, Plaintiff voluntarily withdrew its action with respect to Circle Carpentry, LLC and Bordone. (See Declaration of Haluk Savci, Esq. in Support of Plaintiff's Proposed Findings with Respect to Damages, dated November 12, 2008 ("Savci Decl."), ¶ 13.) When Defendant Circle Interior Demolition, Inc. ("Defendant" or "CID") failed to appear in this action, an Order was issued entering judgment against it, on May 15, 2008, and the matter was referred to this Court for a determination on damages. (See Order, dated May 15, 2008 ("Order).) The Union contends that no inquest is necessary, because the damages represent "a liquidated amount or amount readily ascertainable by calculation." (See Letter of Haluk Savci,

Esq., dated Nov. 17, 2008.) Nevertheless, pursuant to the Court's directive, Plaintiff submitted an affidavit and other documentation to establish a factual basis for, and the legal authority in support of, its request for damages. Defendant failed to file any response or objections.

For the reasons that follow, this Court recommends that a judgment be entered in favor of the Union for $736,579.28, and that statutory interest, at the rate called for in 28 U.S.C. § 1961, be awarded from December 16, 2006, the date of the arbitration award.

BACKGROUND

I. Facts

On October 12, 2005, a Consent Judgment was entered against Metro Demolition Contracting Corp. ("Metro"), for payments required under various Union agreements. See Mason Tenders Dist. Council Welfare Fund v. Metro Demolition Contracting Corp., No. 04 Civ. 6629 (RMB), Judgment On Consent (S.D.N.Y. Oct. 21, 2005). Under the relevant ERISA provisions, the judgment awarded to Plaintiffs the liquidated amount of $732,631.15, which included: $555,722.34 for the balance of fringe benefit contributions, tier violation contributions, dues checkoffs, and PAC contributions owed for the audited period of January 1, 2003 through December 28, 2004; interest in the amount of $59,130.28; liquidated damages in the amount of $59,130.28; audit fees in the amount of $12,889.00; and reasonable attorneys' fees and costs as of September 30, 2005, in

the amount of $45,759.25. Id. at 2-3. The Judgment also stipulated that the Judgment shall be "binding upon plaintiffs and Defendant Metro . . . , and their respective assignees, administrators, affiliates, successors and assigns." Id.

Having received none of the payments required by the Consent Judgment, the Union then sought to recover under the Consent Judgment from CID, Circle Carpentry, LLC ("Circle"), and Barone. However, there was a dispute as to whether CID was a successor to, and/or an alter ego of, Metro. (See Savci Decl. ¶ 5.)

Circle had entered into an Independent Collective Bargaining Agreement ("CBA") with the Union for the period July 1, 2002 to June 30, 2005. (See Savci Decl. Ex. 1, MTDC Master Independent Collective Bargaining Agreement, signed July 1, 2002 ("CBA").) On July 7, 2005, the Union obtained written confirmation from Carlo Bordone, the owner of Circle, that he was also the owner of CID, and that CID was a "closely related company performing work within the Union's jurisdiction." (See Savci Decl. ¶ 3; Savci Decl. Ex. 1, Letter of Affiliation, dated July 7, 2005 ("Affiliation Letter").) The Affiliation Letter also confirmed that "[Circle and CID] are a single employer, are both bound to the Trade Agreement, . . . and are jointly and severally liable for each other's obligations and liabilities." (Id.) The CBA provided for "disputes arising between the parties involving questions of interpretation or application of any clause of this Agreement" to

be resolved by arbitration pursuant to Article X, Section 1. (See Savci Decl. Ex. 1, CBA at 34-35.) The CBA laid out the steps for pursuing grievances: that the Union and Employers "shall meet" and then if "the matter is not resolved . . . the Union may appeal the dispute to arbitration." (See id.)

Pursuant to the CBA, the Union submitted the following question to arbitration on January 6, 2006:

> Whether Circle Carpentry and Circle Interior Demolition, Inc. are liable, as successors and/or alter egos to Metro . . . the Company, and Carlo Bordone, in his individual and personal capacity, for all obligations owed by Metro to the Mason Tenders District Council . . . .

(See id. ¶ 6.) The arbitrator then sent the parties a letter requesting them to contact him within seven days to set a date for a hearing. (See Savci Decl. Ex. 3, Joseph A. Harris's Opinion and Award, dated December 16, 2006 ("Award"), at 1.) Having received no reply from Bordone, the arbitrator set a hearing date for March 22, 2006, of which Bordone was informed. (See id.) Bordone did not attend the hearing, but instead telephoned the arbitrator and requested an adjournment. (See id.)

After several more delays, a hearing was held on June 12, 2006, where the Union presented the majority of its case. (See id. at 2; Savci Decl. ¶ 8.) The parties agreed to continue the hearing on December 12, 2006. (See Award at 2.) However, Defendants' attorney withdrew as counsel on November 7, 2006, because she was unable to "gain cooperation" from Defendants. (See id.) Despite

the arbitrator's November 14 letter to Bordone, informing him of the December 12 hearing, Bordone did not attend or send representation; instead, he called the arbitrator on December 8 to say that there was "no point" in attending. (See id.) At the final hearing, the Union presented its remaining evidence, including documentation of its attorneys' fees and expenses. (See Savci Decl. ¶ 9.)

On December 16, 2006, the arbitrator issued a written opinion and Award finding Circle and CID liable as successors and/or alter egos to Metro, and Bordone liable "in his individual capacity" for Metro. (See Savci Decl. ¶ 10; Award at 3.) In making his determination, the arbitrator considered relevant provisions of the CBA and the fact that the CBA states, "the person signing on behalf of the Employer also agrees to be personally bound by and to assume all obligations of the Employer provided in this agreement." (See Award at 3-4.)

The arbitrator also considered the following: (1) the address for Metro is 55-14 Grand Avenue and the address for Circle is 56-20, which are "next door to each other," and "the entire property is owned by Carlo Bordone's father, Vincent, . . . the president of Metro"; (2) "Carlo Bordone V is President of Circle Carpentry and Vice President of Metro"; (3) at least one vehicle was registered to Circle but listed on Metro's "Roster of Vehicles"; and (4) Andej Chojnowski, Circle's superintendent, worked for Metro for several

years. (See Award at 4.) He thus concluded that "the undisputed evidence shows common ownership and supervision for [CID] and [Metro]. It also shows common use of permits, licenses, and equipment. The companies operate as alter egos." (Id.)

Ultimately, the arbitrator found Defendants to be jointly and severally liable for the Consent Judgment against Metro, and the arbitrator awarded MTDC the full amount of the Consent Judgment, $732,631.15, $2,000.00 in attorneys' fees, $1,948.13 for arbitration costs, and statutory interest on the liquidated amount to be applied from the date of the Award. (See id. at 5.)

In this action, filed on December 13, 2007, Plaintiff seeks to confirm the arbitration Award in the amount of $736,579.28, plus statutory interest commencing from the date of the Award, December 16, 2006.[1]

DISCUSSION

I. Confirming an Arbitration Award

The Union has characterized its current application as a motion for a default judgment. (See Savci Decl. ¶ 2.) However, "default judgments in confirmation/vacatur proceedings are generally inappropriate." D.H. Blair & Co. v. Gottdienier, 462

[1] "Section 301 of the Labor Management Relations Act (LRMA), 29 U.S.C. § 185, provides federal courts with jurisdiction over petitions brought to confirm labor arbitration awards." Local 802 Associated Musicians of Greater New York v. Parker Meridien Hotel, 145 F.3d 85, 88 (2d Cir. 1998); see Otis Elevator Co. v. Local 1, Int'l Union of Elevator Constructors, No. 03 Civ. 8862, 2005 WL 2385849, at *4 (S.D.N.Y. Sept. 23, 2005).

F.3d 95, 109 (2d Cir. 2006). Instead, an action to confirm an arbitration award should be treated as a motion for summary judgment because "[a] motion to confirm . . . an award is generally accompanied by a record, such as an agreement to arbitrate and the arbitration decision itself, that may resolve many of the merits or at least command judicial deference." Id. Even when the non-moving party fails to respond, the court may not grant the motion without "first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial." Id. at 109-110 (quoting Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004)); accord New York City Dist. Council of Carpenters Pension Fund v. Empire Interior Sys., Inc., No. 08 Civ. 4844 (DLC), 2008 WL 4449328, at *1 (S.D.N.Y. Oct. 1, 2008) (granting summary judgment where the non-moving party failed to respond to an arbitration confirmation and plaintiff demonstrated there was no question of material fact); see also Fed. R. Civ. P. 56(c).

Confirmation of an arbitration award is "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court, and the court must grant the award unless the award is vacated, modified, or corrected." D.H. Blair, 462 F.3d at 110 (internal citations and quotation marks omitted); see also Unite Here Nat'l Health Fund v. JY Apparels, Inc., 535 F. Supp. 2d 426, 429 (S.D.N.Y. 2008) (confirming an arbitration award

as the court found no reason to deny confirmation). In the Second Circuit, review of an arbitration award is extremely deferential. See Porzig v. Dresdner, Kleinwort, Benson, N.A. LLC, 497 F.3d 133, 139 (2d Cir. 2007); see also Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) ("Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation."). Accordingly, "[t]he arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." D.H. Blair, 462 F.3d at 110 (citations and internal quotation marks omitted). Confirming an award requires "[o]nly a barely colorable justification for the outcome reached." Id. (citation and internal quotation marks omitted).

The Union has sufficiently supported its Complaint and demonstrated there is no issue of material fact in dispute. Moreover, Defendant has offered no opposition and has not raised any questions of fact. Finally, there was a reasonable basis for the arbitrator's determination that Defendant is the alter ego of Metro, and is thus liable for the amount of the Consent Judgment, as well as the attorneys' fees and costs incurred in the arbitration, as permitted under Article X, Section 1(e) of the

CBA.[2] Therefore, as was implicit in the May 15, 2008 Order, the arbitration Award should be confirmed, and has effectively been confirmed by the District Court's Order entering judgment against Defendant.

II. Statutory Interest

In addition to the $736,579.28 awarded in arbitration, Plaintiff seeks interest under 28 U.S.C. § 1961 from the date of the Award, December 16, 2006. (See Savci Decl. ¶ 12.) The arbitrator decreed that Plaintiff should receive "statutory interest" on the Award, to be applied from the date of the Award through the date it was paid. (See Award at 5.) Section 1961, which governs post-judgment interest in federal court actions, reads, in relevant part, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C.. § 1961(a). However, there remains a question of whether statutory post-judgment interest can be applied from the date of an arbitration award, as the Plaintiff seeks, or whether it can only be applied after a judgment is entered in a district court.

The Federal Arbitration Act, 9 U.S.C. § 13, provides for an arbitration to be "docketed as if it was rendered in an action,"

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[2] An inquest is not required where the amount of damages is liquidated or susceptible of mathematical calculation. See Fed. R. Civ. P. 55(b); Greyhound Exhibitgroup, Inc. V. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992); Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974); Hinckley v. Westchester Rubbish, Inc., No. 04 Civ. 189, 2006 WL 2849841, at *4 (S.D.N.Y. Oct. 2, 2006).

and further provides for it to "have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13 (emphasis added).

Courts may disagree over whether the interest should be considered pre-judgment (prior to the district court confirmation) or post-judgment (treating the arbitration award as a judgment), but courts in the Second Circuit have consistently granted interest that commences on the date of the arbitration award. See, e.g., Waterside Ocean Nav. Co. v. Int'l Nav. Ltd., 737 F.2d 150, 154-55 (2d Cir. 1984) ("[D]istrict judges in the Southern District of New York have granted post-award, pre-judgment interest in . . . arbitration cases."); accord Laundry, Dry Cleaning Workers & Allied Indus. Health Fund, Unite Here! v. Jung Sun Laundry Group Corp., No. 08 Civ. 2771 (DLI) (RLM), 2009 WL 704723, at *7 (E.D.N.Y. Mar. 16, 2009); see also Fort Hill Builders, Inc. v. Nat'l Grange Mut. Ins. Co., 866 F.2d 11, 14-15 (1st Cir. 1989) (affirming the district court decision to analogize arbitration awards to judgments); Lundgren v. Freeman, 307 F.2d 104, 112 (9th Cir. 1962) ("It should be the rule, rather than the exception, that when arbitrators hand down an award the parties will comply with it . . . . [I]n the case of arbitration awards, the date of the award . . . should be the latest date when interest begins."). Furthermore,

"[t]here exists a presumption in favor of awarding [] interest, and the district court is vested with the discretion to make such an award." Laundry, Dry Cleaning and Allied Workers Joint Board, Unite/Here AFL-CIO v. Miron and Sons Linen Service, No. 05 Civ. 9487 (GBD), 2006 WL 3155650, at *2 (S.D.N.Y. Oct. 31,2006) (confirming an arbitration award applying a 9% prejudgment interest rate from the date of the award); see also Gierlinger v. Gleason, 160 F.3d 858, 873-74 (2d Cir. 1998) ("Awarding prejudgment interest . . . prevents the defendant employer from attempting to enjoy an interest-free loan for as long as it can delay paying out . . . and helps to ensure that the plaintiff is meaningfully made whole.") (internal citations and quotation marks omitted); Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 29 F.3d 79, 82-83 (2d Cir. 1994) (finding that the district court properly granted prejudgment interest).

Most courts apply a contractual pre-judgment interest rate subsequent to an arbitration award, see, e.g., Westinghouse Credit Corp. v. D'Urso, 371 F.3d 96, 102-04 (2d Cir. 2004)(applying the 15.5% contracted interest rate from date of arbitration award to date of judgment), or when there is none specified, apply "the statutory rate under New York law." Abondolo v. Sunshine Fresh, Inc., No. 07 Civ. 696 (DLC), 2007 WL 1888336, at *3 (S.D.N.Y. July 2, 2007) (applying the 9% interest rate under N.Y. C.P.L.R. §

5004).

In the instant case, Plaintiff's damages were ascertained on October 12, 2005, in the Consent Judgment. An arbitrator then determined, on December 16, 2006, that the current Defendants are liable for the damages contained in the Consent Judgment, plus statutory interest. Defendants failed to appear before the arbitrator and this Court, and have failed to submit any opposition to the damages request. They have unnecessarily delayed satisfying the 2005 Consent Judgment, causing Plaintiffs to bring this action, at added expense. Plaintiff is therefore entitled to interest dating from the Award date.

The arbitrator awarded "statutory interest" without specifying to which statute he was referring. However, the Union requests interest under 28 U.S.C § 1961. Since the rate of federal post-judgment interest is considerably less than the New York statutory interest rate of 9%, and is less than the interest rate provided in the CBA, awarding interest at the rate set forth in § 1961 is eminently reasonable.[3]

The Court therefore recommends granting statutory interest commencing on the date of the Award, December 16, 2006, at the rate set forth in 28 U.S.C. § 1961, which is "the rate equal to the

[3] The CBA provides that interest should be awarded on an arbitration award at the prime rate plus 2%. See CBA, Article X, Section 1(e). The prime rate in December 2006 was 8.25%. Thus, under the CBA, Plaintiff would be entitled to interest at a 10.25% rate.

weekly average 1-year constant maturity Treasury yield . . . for the calendar week preceding the date of the judgment." 28 U.S.C. § 1961(a). The rate for the week preceding the entry of the Award was 4.90%. See Federal Reserve Statistical Release, H.15(519), Selected Interest Rates, Dec. 11, 2006, available at http://www.federalreserve.gov/Releases/H15/20061211/h15.htm. Applying that rate to the judgment amount yields a daily interest rate of $98.88 ($736,579.28 x .049 ÷ 365).

CONCLUSION

For the reasons set forth above, this Court respectfully recommends that judgment be entered in favor of Plaintiff and against Defendant in the amount of $736,579.28, plus interest calculated in accordance with 28 U.S.C. § 1961(a), commencing on December 16, 2006 through the satisfaction of the judgment, at the daily rate of $98.88.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6(a) and (d) (2008). Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Richard M. Berman, United States District Judge, and to the chambers of the undersigned, Room 1660. Any requests for an extension of time for filing objections must be directed to Judge Berman. Failure to file objections will result

in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140, 145, 155, 106 S. Ct. 466, 470, 475 (1985); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

Respectfully submitted,

THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE

Dated: August 4, 2009
New York, New York