

SUN

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 6
NASSAU COUNTY**

**FIA CARD SERVICES, N.A. SUCCESSOR IN
INTEREST TO MBNA AMERICA BANK, N.A.,**

Petitioner,

**RETURN DATE: 4/21/09
SEQUENCE NO.: 001**

- against -

INDEX NO.: 04958/09

KAREN F. FAUCERA,

Respondent.

The following papers read on this petition (numbered 1)

Notice of Petition and Verified Petition 1

The Petitioner commenced this proceeding pursuant to **Civil Practice Law and Rules ("CPLR") §7510** to confirm an arbitration award against the Respondent (the "Award"), rendered on June 23, 2008 and delivered on June 24, 2008, for credit card indebtedness in the sum of \$20,428.43. The petition is unopposed.

In reviewing this application, the Court refers to and adopts the standards set forth by the Civil Court of the City of New York in **MBNA America Bank, N.A. v. Nelson**, 15 Misc.3d 1148(A), and **MBNA America Bank, N.A. v. Straub**, 12 Misc.3d 963. Although this Court is not bound by these decisions, the Court finds that they set forth a meaningful framework for scrutinizing applications to confirm arbitration awards arising out of consumer credit card debt. In view of the recent credit crisis, the urgency of such scrutiny is apparent.

As a preliminary matter, the Court must consider whether or not this proceeding has been properly brought. The proceeding was timely commenced on March 19, 2009. *See CPLR §7510; Federal Arbitration Act ("FAA"), 9 U.S.C. §9* (application to confirm an arbitration award must be made within one year of the delivery of the award). According to the Affidavit of Service sworn to on March 23, 2009, service of process was effected pursuant to **CPLR §308(2)** by delivery of the Notice of Petition, Petition and

Request for Judicial Intervention to "Jane Doe," purportedly the "co-tenant" of respondent, at 3654 Lynn Lane, Wantagh, NY 11793. "Jane Doe" is described as a white, 37 year-old, female with brown hair, approximately 5"5' tall and weighing 150 lbs. According to the Affidavit of Service, "Jane Doe" confirmed that the address was the respondent's residence and that respondent was not in the military service. The delivery to "Jane Doe" was followed by a mailing within twenty days to respondent's last known address (which was the same address used for **CPLR §308(2)** delivery).

On its face, the proof of personal service described above meets the requirements of **CPLR §308(2)**. Concerns remain, however, regarding whether or not the Respondent has received actual notice of this proceeding, particularly insofar as the person served is unidentified and apparently unrelated to respondent, and the assertions of non-military status lack documentary support. These concerns do not, in themselves, defeat the petition, but they do provoke closer scrutiny of the remainder of the application.

Petitioner has plead that it is a National Banking Association authorized to sue in any court [**12 U.S.C. §24; State Nat'l Bank of Conn. v. Laura**, 45 Misc.2d 430], and that it has standing to bring the action as the original obligee under the subject credit card agreement. Attached to the petition is a barely legible form entitled "Credit Card Agreement" which names MBNA AMERICA BANK, N.A. as the lender. Although the caption indicates that FIA CARD SERVICES, N.A. is "Successor in Interest" to MBNA AMERICA BANK, N.A., petitioner has not substantiated that relationship. The Court is aware of such relationship, however, by virtue of documentation submitted in previous Article 75 proceedings by this petitioner. Accordingly, without making a formal finding on petitioner's capacity to bring this proceeding, the Court shall overlook this evidentiary deficiency in order to reach the merits of the application.

Based upon the precepts of the **CPLR** and **FAA**, the **Straub** decision articulated four requirements for confirmation: (1) "a written agreement to arbitrate must be included within the petition," (2) "the binding nature of the credit card agreement must be established by the petition," that is, if the agreement is not signed by the party to be charged, there must be some objective evidence establishing that the party intended to be bound by its terms; (3) "the petitioner must show that service of notice of the arbitration session and notice of the award was in compliance with New York's statute," and (4) the Court must consider, if provided, any "information about the parties' prior forays into the judicial arena or actions within the arbitration process." 12 Misc.3d 963 at 965-968. For example, in determining whether or not there was an agreement to arbitrate, the Court must consider whether or not the respondent appeared in the arbitration, or whether there was any prior proceeding to stay arbitration.

The Petition herein includes a copy of a written agreement entitled “Credit Card Agreement”. The Credit Card Agreement includes arbitration provisions, which purport to apply unless the credit card holder has been given an opportunity to reject arbitration, and has chosen to do so.

The above, on its face, constitutes a written agreement to arbitrate. However, insofar as the Credit Card Agreement is undated and unsigned, and consists of a general form which lacks specific reference to the Respondent, the Court requires additional evidence that the Credit Card Agreement was the actual agreement between the parties, and was binding upon the Respondent. The evidence must establish that the Respondent received actual or constructive notice of the terms and conditions of the Credit Card Agreement, including the arbitration provisions, and that Respondent manifested an intent to be bound by such terms, which may be shown by Respondent’s use of the credit card after such notice. *See Nelson*, 15 Misc.3d 1148(A), citing **Kurz v. Chase Manhattan Bank USA, NA**, 319 F.Supp.2d 457, 463, **Geha v. 55 Orchard Street, LLC**, 29 AD3d 735, **Straub**, 12 Misc.3d at 967 and **Citibank (South Dakota), N.A. v. Martin**, 11 Misc.3d 219, 223.

In this case, petitioner has submitted no such evidence. There is no affidavit by a party competent to testify that a Credit Card Agreement, in the form attached to the petition, governed the respondent’s account and was sent to respondent on a particular date in the regular course of business. Further the petition lacks documentary support readily available to the petitioner, such as copies of monthly credit card statements sent to respondent, demonstrating respondent’s use of the credit card after receipt of the Credit Card Agreement. *See Nelson*, 15 Misc.3d 1148(A), citing **Martin**, 11 Misc.3d at 223. The Court notes, however, that the Award itself indicates that Respondent filed a response to petitioner’s claim with the National Arbitration Forum. The Court may consider this as relevant to the question of respondent’s agreement to arbitrate (but is not evidence of his acceptance of the other terms of the Credit Card Agreement).

The failure to attach monthly credit card statements, or other proof demonstrating the derivation of the amount due, manifests a fatal deficiency in petitioner’s application. The application provides no basis for review of the arbitration award. Without submission of the calculations used by the arbitrator to arrive at the final award, the specific claims submitted by Petitioner for arbitration, and the claims ruled upon by the arbitrator, the Court cannot determine whether or not the award was rational and within the bounds of the arbitrator’s authority. *See Nelson*, 15 Misc.3d 1148(A) and cases cited therein. Accordingly, the petition for confirmation must be denied.

In light of the above, the Court need not decide whether or not the third and fourth requirements of **Straub** [12 Misc.3d 963] have been satisfied. The Court notes, however, that petitioner includes no proof of service of the notice of the arbitration session and does not attach a copy of the notice to arbitrate. In Petitioner's favor, the Court notes that the Award itself attests to the proper service of the arbitration claim and to the filing of a response by the respondent. Whether this overcomes the defect in petitioner's proof need not be determined at this time. The Award also contains an Acknowledgement and Certificate of Service of the Award upon the parties. Finally, as noted above, the Award attests to participation by respondent in the arbitration proceeding, at least to the extent of filing a response.

Based upon the foregoing, it is

ORDERED, that the petition to confirm the Award is **denied**.

Dated:

June 17, 2009

Diana Winston
J.S.C.

ENTERED

JUN 29 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**