

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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TRUSTEES OF EMPIRE STATE CARPENTERS  
ANNUITY, APPRENTICESHIP, LABOR-  
MANAGEMENT COOPERATION, PENSION,  
AND WELFARE FUNDS,

Petitioners,

**JUDGMENT**  
CV 15-5688 (ADS)(ARL)

- against -

ALL COUNTY PAVING CORP.,

Respondent.

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An Order of Honorable Arthur D. Spatt, United States District Judge, having been filed on September 7, 2016, adopting in its entirety the July 27, 2016 Report and Recommendation of United States Magistrate Judge Arlene R. Lindsay, granting the Petitioners' petition to confirm and enforce the arbitrator's award, and directing the Clerk of Court to enter judgment in favor of the Petitioners in the amount of \$17,049.21, and to close this case, it is

**ORDERED AND ADJUDGED** that Petitioners' petition to confirm and enforce the arbitrator's award is granted; that Petitioners are awarded \$17,049.21; and that this case is hereby closed.

Dated: Central Islip, New York  
September 8, 2016

DOUGLAS C. PALMER  
CLERK OF THE COURT

By: /s/ James J. Toritto  
Deputy Clerk

United States District Court  
Eastern District of New York

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Trustees of Empire State Carpenters Annuity, Apprenticeship,  
Labor-Management Cooperation, Pension and Welfare Funds,

Petitioners,

-against-

**ORDER**  
15-cv-5688(ADS)(ARL)

All County Paving Corp.,

Respondent.

-----X  
**APPEARANCES:**

**Virginia & Ambinder, LLP**  
*Attorneys for the Petitioners*  
40 Broad Street, 7<sup>th</sup> Floor  
New York, NY 10004  
By: Charles R. Virginia, Esq., Of Counsel

**NO APPEARANCES:**

**All County Paving Corp.**  
*Respondent*

**SPATT, District Judge:**

On October 1, 2015, the Petitioners, namely, the Trustees of the Empire State Carpenters Annuity, Apprenticeship, Labor-Management Cooperation, Pension and Welfare Funds (the “Funds”), commenced this action by filing a petition to confirm an arbitration award (the “Petition”).

The Petition alleges that the Respondent All County Paving Corp. (the “Respondent”) failed to remit contributions to the Funds as it was required to do under the terms of a governing collective bargaining agreement. According to the Petition, the parties’ dispute over unpaid contributions was arbitrated before one J.J. Pierson, who held a hearing and, on August 26, 2015, issued a written award (the “Arbitration Award”) in favor of the Funds. The Petition asserts that the Respondent is bound

by the Arbitration Award but has failed to abide by it. Accordingly, the Petition seeks to have the Court confirm and enforce the Arbitration Award.

On November 9, 2015, the Clerk of the Court noted the Respondent's default.

On November 12, 2015, the Funds filed a motion for a default judgment.

On November 13, 2015, the Court referred this matter to United States Magistrate Judge Arlene R. Lindsay for a recommendation as to whether the Petition should be granted, and if so, the relief to be granted.

On July 27, 2016, Judge Lindsay issued a Report and Recommendation (the "R&R"), recommending that the motion for a default judgment be granted, and that the Arbitration Award be confirmed in the amount of \$15,585.32, together with a sum of \$1,463.89 in attorneys' fees and costs, for a total award of \$17,049.21.

On August 2, 2016, the Funds filed proof of service of a copy of the R&R on the Respondent.

More than fourteen days have elapsed, and the Respondent has failed to file an objection or request an extension of its time to do so.

Thus, pursuant to the provisions of 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72, this Court has reviewed the R&R for clear error, and finding none, now concurs in both its reasoning and its result.

Accordingly, the July 27, 2016 Report and Recommendation is adopted in its entirety, and the Funds' Petition to confirm and enforce the Arbitration Award is granted. The Clerk of the Court is respectfully directed to enter judgment in favor of the Funds in the amount of \$17,049.21, and to close this case.

It is **SO ORDERED**.

Dated: Central Islip, New York  
September 7, 2016

/s/ Arthur D. Spatt  
ARTHUR D. SPATT  
United States District Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
TRUSTEES OF EMPIRE STATE CARPENTERS  
ANNUITY, APPRENTICESHIP, LABOR-  
MANAGEMENT COOPERATION, PENSION  
and WELFARE FUNDS,

Petitioners,

-against-

**REPORT AND  
RECOMMENDATION  
CV 15-5688 (ADS)(ARL)**

ALL COUNTY PAVING CORP.,

Respondent.

-----X  
**LINDSAY, Magistrate Judge:**

This matter was referred to the undersigned by District Judge Spatt for the purpose of issuing a report and recommendation as to whether the pending motion for a default judgment should be granted and, if so, the appropriate relief to be awarded to the petitioners. The petitioners have submitted a memorandum of law and the declaration of Elina Burke, along with exhibits in support of their motion. Despite having been served with the motion, the respondent has not submitted papers in opposition to the motion. Based upon the evidence submitted, the undersigned recommends that the motion be granted and the arbitration award be confirmed in the amount of \$15,585.32, plus attorneys' fees and costs in the amount of \$1,463.89, for a total award of \$17,049.21.

#### **BACKGROUND**

The petitioners, the trustees of the Empire State Carpenters Annuity, Apprenticeship, Labor-Management Cooperation, Pension and Welfare Funds, filed a petition to confirm an arbitration award on October 1, 2015 against All County Paving Corp. ("All County" or "respondent"). The petitioners seek to recover unpaid contributions and attendant damages owed

by the respondent pursuant to Section 502 (a)(3) of the Employees Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132 (a)(3), Section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185, and Section 9 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §9. All County was served with the summons and petition on October 6, 2015, by service on the Secretary of State. All County failed to answer or otherwise respond. On November 5, 2015, the petitioners moved for entry of default and that same day, the Clerk of the Court certified the respondent’s default based upon its failure to answer or otherwise appear in this action. On November 12, 2015, the petitioners moved for a default judgment to confirm and enforce the arbitration award they obtained against the respondent, the motion now before the Court.

#### DISCUSSION

While petitioners have moved for a default judgment in this matter, the Second Circuit has held that “default judgments in confirmation . . . proceedings are generally inappropriate.” *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 109 (2d Cir. 2006). In so holding, the Second Circuit advised district courts that they should treat an unanswered petition to confirm an arbitration award “as an unopposed motion for summary judgment,” since a petition to confirm an arbitration award is typically accompanied by a record. *D.H. Blair & Co.*, 462 F.3d. at 110. Nevertheless, where, as here, a respondent has failed to put forth a case in either the arbitration or the judicial phase of the dispute, “courts in this district have held that default judgments are appropriate in the context of a petition for confirming an arbitration award as ‘the distinction between moving for default judgment and moving for summary judgment is somewhat academic’ when the respondent failed to contest the claims at the arbitration hearing as well.” *In re Trustees of Bldg. Trades Annuity Fund v. Prof'l Plumbing of Staten Island Corp.*, No. CV

09-3812 ADS AKT, 2010 WL 6230530, at \*2 (E.D.N.Y. Nov. 17, 2010)(quoting *Laundry, Dry Cleaning Workers & Allied Indus. Health Fund, Unite Here!*, 2009 WL 704723, at \*3 (E.D.N.Y. Mar. 16, 2009)), adopted 2011 WL 1046856, at \*1 (E.D.N.Y. Mar. 17, 2011). This is so because treatment under either default judgment standards or as an unopposed summary judgment motion will focus on the allegations in the complaint. See *Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Management Cooperation, Pension and Welfare Fund v. LLF Construction Services, Inc.*, No. CV 14-0878 ADS SIL, 2014 WL 7739326, at \*1 (E.D.N.Y. Dec. 18, 2014), adopted 2015 WL 428085 (E.D.N.Y. Jan. 30, 2015). Thus, the undersigned will address the petitioners' application seeking damages and other relief in the context of a motion for a default judgment.

Federal Rule of Civil Procedure 55 establishes a two-step process regarding default judgments. First, the Clerk of the Court enters the party's default. Then, as here, a motion for a default judgment is made to the district court judge. A default constitutes an admission of all well-pleaded factual allegations in the complaint, except those relating to damages. See *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1993); see also *Joe Hand Promotions, Inc. v. El Norteno Restaurant Corp.*, No. 06 Civ. 1878, 2007 WL 2891016, at \*2 (E.D.N.Y. Sept. 28, 2007) (a default constitutes an admission of all well-pleaded factual allegations in the complaint and the allegations as they pertain to liability are deemed true). A default judgment entered on the well-pleaded allegations in the complaint establishes a defendant's liability. See *Garden City Boxing Club, Inc. v. Morales*, No. 05-CV-0064 (FB)(KAM), 2005 WL 2476264, at \*3 (E.D.N.Y. Oct. 7, 2005) (citing *Bambu Sales, Inc. v. Ozak Trading, Inc.*, 58 F.3d 849, 854 (2d Cir. 1995)). Guided by the standards set forth in *D.H. Blair*, the Court finds that the petitioners have set forth a legitimate claim under 9 U.S.C. § 9 and 29

U.S.C. § 185(a). 9 U.S.C. § 9 provides:

[i]f the parties in their [arbitration] agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration ... then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified or corrected.

*Trustees of Bldg. Trades Annuity Fund*, 2010 WL 6230530, at \*3 (citing 9 U.S.C. § 9). Here, the documentary evidence submitted by the petitioners provides the basis for the award.

The petitioners seek an order to confirm and enforce an arbitration award rendered pursuant to a collective bargaining agreement between the parties (the "CBA"). Pet. ¶ 7. The petitioners are trustees of a labor management cooperation established under section 302(c)(9) of the LMRA, 29 U.S.C. § 186(d)(9). *Id.* ¶ 5. The trustees are also fiduciaries of an ERISA funds within the meaning of Section 3(21) of ERISA, and the respondent is an employer within the meaning of section 3(5) of ERISA and Section 2(2) of the LMRA. *Id.* ¶¶ 4, 6.

All County was a signatory to the CBA, which provided that it would make contributions to the Funds for all work within the trade and geographical jurisdiction of the Union. *Id.* at ¶ 8, Ex. A. The CBA also provided that All County would be bound by and comply with the agreements, declarations of trust, plans and/or regulations of the fringe benefit funds and the labor management cooperation committees. *Id.*, Art. Sixteen, Section (a). The trustees of the Funds established a Joint Policy for Collection of Delinquent Contributions (the "Collection Policy"). *Id.*, Ex. B. Pursuant to that policy, the petitioners conducted an audit of the respondent for the period January 1, 2012 through December 14, 2014 and determined that it had failed to remit contributions in the amount of \$9,121.39. *Id.*, ¶¶ 14-15.

Thereafter, a dispute arose when All County failed to remit the contributions uncovered

in the audit. *Id.*, ¶ 16. The Collection Policy provides that, in the event an employer fails to remit contributions to the Funds, the matter shall be sent to arbitration. *Id.*, Exh. B, Art. 2.2. The Collection Policy further provides that the employer shall be liable for all costs incurred in collecting delinquent contributions, including, audit costs and arbitration fees. *Id.*, Exh. B, Art. 6.3.

The petitioner initiated an arbitration before the designated arbitrator, and upon notice to all parties, the arbitrator held a hearing and rendered an order dated August 26, 2015. Burke Decl. at ¶ 17, Ex. D. The arbitrator, J.J. Pierson, determined that All County was in violation of the terms of the CBA and ordered it to pay the Funds (i) \$9,121.39 in unpaid contributions; (ii) interest in the amount of \$1,373.25; (iii) liquidated damages of \$1,824.28; (iv) attorneys' fees of \$900.00; (v) audit costs of \$1,616.40 and (vi) the arbitrator's fee of \$750.00. *Id.* at ¶ 18, Ex. D. All County failed to abide by the award. *Id.*, ¶ 19.

"It is well established that courts must grant an [arbitrator's] decision great deference." *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003); see *Local 339 United Service Workers Union v. Advanced Ready Mix Corp.*, No. 12-CV-4811 (RRM)(VMS), 2013 WL 685447, at \*2 (E.D.N.Y. Feb. 24, 2013) (a court's review of an arbitration award is "severely limited so as not to frustrate the goals of arbitration – namely to settle disputes efficiently and avoid long and expensive litigation") (internal quotation marks and citations omitted). Thus, "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. The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitration decision can be inferred from the facts of the case." *D.H. Blair*, 462 F.3d 95 at

110 (internal quotation marks and citations omitted). “[I]n evaluating the petition to confirm the result of the arbitration, the Court need only ensure that the arbitrator had some grounds on which to grant the damages spelled out in the Award.” *Trustees of the Local 807 Labor Mgmt Health Fund v. Express Haulage Co.*, No. 07 CV 4211 (NG)(CLP), 2008 WL 4693533, at \*5 (E.D.N.Y. Oct. 23, 2008). “Only a barely colorable justification for the outcome reached by the arbitrators is necessary to confirm the award.” *D.H. Blair*, 462 F.3d 95 at 110 (citation omitted); *see also Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (holding courts are “severely limited” in their review of arbitration awards given that the purpose of arbitration, which is to settle disputes efficiently and to avoid costly litigation, should not be undermined). “[T]he federal policy in favor of enforcing arbitration awards is particularly strong with respect to arbitration of labor disputes,” *Supreme Oil Co. v. Abondolo*, 568 F. Supp. 2d 401, 405-06 (S.D.N.Y. 2008), and under the LMRA an arbitration award should be upheld as long as it “draws its essence from the collective bargaining agreement and is not merely an exercise of the arbitrator’s own brand of industrial justice.” *Beth Israel Med. Ctr. v. 1199/S.E.I.U. United Healthcare Workers E.*, 530 F. Supp. 2d 610, 614 (S.D.N.Y. 2008) (internal quotation marks and citations omitted).

Applying the foregoing principles, the undersigned concludes that the arbitration award provides for more than “a barely colorable justification for the outcome reached.” Although the respondent did not participate in the arbitration proceedings, the arbitrator stated that it had been properly served with notice of the arbitration. *Id.* at Ex. D. The arbitrator reviewed the CBA and heard testimony at the proceedings. *Id.* Based on the evidence presented, the arbitrator determined that the respondent was bound by the CBA and was required to make certain contributions to the Funds on behalf of the employees. Accordingly, the undersigned respectfully

reports and recommends that the motion be granted and the underlying arbitration award be confirmed in the amount of \$15,585.32, plus attorneys' fees and costs in the amount of \$1,463.89<sup>1</sup>, for a total award of \$17,049.21.

### OBJECTIONS

A copy of this Report and Recommendation is being electronically filed on the date below. Counsel for the petitioner shall serve a copy of this Report and Recommendation on the respondent upon receipt and shall file proof of service with the Court. Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the undersigned within 14 days of service. Failure to file objections within this period waives the right to appeal the District Court's Order. *See* 28 U.S.C. §636(b)(1); FED. R. CIV. P. 72; *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010); *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York  
July 27, 2016

\_\_\_\_\_/s/  
ARLENE R. LINDSAY  
United States Magistrate Judge

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<sup>1</sup>The petitioners seek and the undersigned recommends that they also be awarded \$1,463.89 in attorneys fees and costs. The undersigned has reviewed counsel for the petitioners contemporaneous time records and finds the hourly rate and time expended to be reasonable. In addition, the undersigned finds the request for an award of costs resulting from the court filing fee, the cost of service of the petition and summons and postage is reasonable. *See, e.g., Marshall v. Reisman*, No. 11-CV-5764 (ARR)(VVP), 2013 WL 1563335, at \*5 (E.D.N.Y. Mar. 25, 2013); *ACE Scaffolding Co.*, 2013 WL 1703588, at \*5.