

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-

MEMORANDUM & ORDER
15-CV-3820 (JS) (GRB)

LILCO CONSTRUCTION, INC. and LILCO
CONSTRUCTION CORPORATION,

Respondents.

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APPEARANCES

For Petitioners: Elina Burke, Esq.
Charles R. Virginia, Esq.
Nicole Marimon, Esq.
Virginia & Ambinder, LLP
40 Broad Street, 7th Floor
New York, NY 10004

For Respondents: No appearance

SEYBERT, District Judge:

Pending before the Court is Magistrate Judge Gary R. Brown's Report and Recommendation ("R&R"), recommending that this Court confirm the subject arbitration award, award Petitioners interest, costs, and attorneys' fees, and compel Respondents and their officers to make available all books and records necessary for Petitioners to conduct an audit. (R&R, Docket Entry 14.) For the following reasons, the Court ADOPTS Judge Brown's R&R in its entirety.

BACKGROUND

This action was commenced on June 30, 2015, by petitioner Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Management Cooperation, Pension and Welfare Funds ("Petitioners" or the "Funds"). Petitioners, employer and employee trustees of multiemployer labor-management trust funds and a labor management cooperation committee, allege that respondents LILCO Construction Inc. and LILCO Construction Corporation (collectively, "Respondents") failed to make contributions to the Funds in contravention of a collective bargaining agreement (the "CBA"). (Am. Pet., Docket Entry 5, ¶¶ 4-5, 7-13.) Petitioners allege that arbitration was initiated pursuant to the CBA, and the arbitrator awarded Petitioners the sum of \$146,465.71 (the "Award"). (Am. Pet. ¶¶ 16-18.) Petitioners aver that Respondents have "failed to abide by the Award." (Am. Pet. ¶ 19.)

On June 23, 2016, the undersigned referred Petitioner's Amended Petition to Confirm Arbitration Award (the "Amended Petition") to Judge Brown for an R&R on whether the Amended Petition should be granted. (Docket Entry 13.) On June 30, 2016, Judge Brown issued his R&R recommending that the Court: (1) confirm the Award; (2) award Petitioners judgment against Respondents in the sum of \$146,465.71, along with (a) interest of 0.75% per month on delinquent contributions from the date of the Award through the

date of judgment, (b) interest on attorneys' fees incurred in connection with the arbitration at 10% per year from the date of the Award through the date of judgment, and (c) attorneys' fees and costs totaling \$1,323.40; and (3) issue an Order compelling Respondents and its officers to make available to Petitioners or their authorized representatives all books and records that Petitioners deem necessary to conduct an audit. (R&R at 3.)

DISCUSSION

In reviewing an R&R, a district court "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). If no timely objections have been made, the "court need only satisfy itself that there is no clear error on the face of the record." Urena v. New York, 160 F. Supp. 2d 606, 609-10 (S.D.N.Y. 2001) (internal quotation marks and citation omitted). Objections were due within fourteen days of service of the R&R.

The time for filing objections has expired, and no party has objected. Accordingly, all objections are hereby deemed to have been waived. Upon careful review and consideration, the Court finds Judge Brown's R&R to be comprehensive, well-reasoned, and free of clear error, and it ADOPTS the R&R in its entirety.

CONCLUSION

Judge Brown's R&R (Docket Entry 14) is ADOPTED in its entirety. The Award is CONFIRMED and Petitioners are awarded:

(1) judgment against Respondents in the sum of \$146,465.71;
(2) interest of 0.75% per month on delinquent contributions from the date of the Award through the date of judgment; (3) interest on attorneys' fees incurred in connection with the arbitration at 10% per year from the date of the Award through the date of judgment; and (4) attorneys' fees and costs totaling \$1,323.40. Respondents are directed to make available to Petitioners or their authorized representatives all books and records that Petitioners deem necessary to conduct an audit within ninety (90) days of the date of this Memorandum and Order.

Petitioners are directed to serve a copy of this Memorandum and Order on Respondents and file proof of service on ECF. The Clerk of the Court is directed to enter judgment accordingly and mark this case CLOSED.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: October 24, 2016
Central Islip, New York

Report and Recommendation Upon Referral of a Petition To Confirm Arbitration Award to Magistrate Judge Brown

Case Name and Docket Number: ***Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Management Cooperation, Pension and Welfare Funds v. Lilco Constr. Corp., No. 15-CV-3820 (JS)(GRB).***

Having reviewed all of the moving papers, I hereby find as follows:

Service of Process and Default

The record reflects that proper service was made on respondent. [DE 9]

According to the record, no answer, motion or other appearance was filed on behalf of respondent. [DE 10]

Confirmation of the Award

According to the Amended Petition to Confirm the Arbitration Award, this is an action under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132(a)(3), section 301 of Labor Management Relations Act of 1947 (“LMRA”), 29 U.S.C. § 185, and section 9 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 9, to confirm and enforce the arbitration award. DE 5.

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 & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (citing 9 U.S.C. § 9) (internal quotation marks omitted). As a result, “courts must grant an arbitrator’s decision great deference.” *Trs. of Empire State Carpenters Annuity, Apprenticeship, Labor-Mgmt. Cooperation, Pension & Welfare Funds v. HVH Enter. Corp.*, 2014 WL 923350, at *3 (E.D.N.Y. Mar. 10, 2014) (citation omitted) (brackets omitted); *see also Nat’l Football League Players Ass’n v. Nat’l Football League Mgmt. Council*, 523 F. App’x 756, 760 (2d Cir. 2013) (same). A court’s review of an arbitration award pursuant to a collective bargaining agreement “is very limited.” *Major League Baseball Ass’n v. Garvy*, 532 U.S. 504, 509 (2001). The arbitrator’s reasoning for an award does not require an explanation, “and the award should be confirmed if a ground for the arbitrator’s decision can be inferred from the facts of the case. . . . Only a barely colorable justification for the outcome reached by the arbitrator is necessary to confirm the award.” *D.H. Blair*, 462 F.3d at 110 (internal quotation marks and citations omitted); *see also A&G Coal Corp. v. Integrity Coal Sales, Inc.*, 565 F. App’x 41, 43 (2d Cir. 2014). Even though the Court may not have all of the material that the arbitrator based his decision on “the Court need only ensure that the arbitrator had some grounds on which to grant the damages spelled out in the [a]ward.” *In re Certain -Default- Motions Brought o/b/o Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Mgmt. Coop., Pension & Welfare Funds*, No. CIV.A. 13-6364 ADS G, 2015 WL 968125, at *5 (E.D.N.Y. Feb. 27, 2015), *report and recommendation adopted*, No. 13-CV-6364 ADS GRB, 2015 WL 1247085 (E.D.N.Y. Mar. 18, 2015), and, No. 14-CV-2893 JS GRB, 2015 WL 1396475 (E.D.N.Y. Mar. 25, 2015) (citation omitted). Since a petition to confirm an arbitration award is generally accompanied by a record, the Second Circuit has instructed that the court treat an unanswered petition “as akin to a motion for summary judgment based on the movant’s submissions.” *D.H. Blair*, 462 F.3d at 109-10. Thus, the court may decide the merits of a petition to confirm an arbitration award based solely on the petition and accompanying submissions. *Id.*

Based upon examination of the unanswered Petition and motion papers, I find that petitioners have demonstrated that there are no genuine issue of material fact precluding summary judgment as to all portions of the arbitrator’s award as the arbitrator’s decision drew its essence from the collective bargaining agreement and provides more than “a barely colorable justification for the outcome reached.” *D.H. Blair*, 462 F.3d at 110.

Damages

Petitioners seek to (1) confirm the Arbitration Award in all respects, and be awarded (2) judgment against respondent for \$146,465.71 pursuant to the Arbitration Award, (2) interest of 0.75% per month on the delinquent contributions from the date of the Arbitration Award through the date of judgment, (3) interest on attorneys’ fees from the Arbitration at 10% per year from the date of the Arbitration Award through the date of judgment, (4) attorneys’ fees and costs of \$1,323.40, and (5) an order to compel respondent and its officers to make available to petitioners or authorized representatives any and all books and records petitioners deem necessary to conduct an audit. DE 5. Based upon a review of the Petition, motion papers, declaration and other documentary evidence, *see Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Mgt Cooperation, Pension and Welfare Funds v. Gregory*, 2015 WL 1611307, at *6 (E.D.N.Y. Apr. 10, 2015) (relying on petitioners’ submissions to support confirmation of unanswered arbitration award and calculate damages), I find that petitioners have established that the arbitrator’s award should be confirmed, and the following be awarded:

<u>X</u> Principal Damages from Arbitration Award [DE 5]	\$ <u>146,465.71</u> ¹
1. Principal deficiency: \$114,212.55	
2. Interest: \$5,924.80	
3. Liquidated Damages: \$24,678.36	
4. Attorneys’ Fees: \$900.00	
a. Interest on \$900.00 attorneys’ fees at 10% per year from date of Arbitration Award through the date of judgment [Arbitration Award 2, DE 5] ²	
5. Arbitrator’s Fees: \$750.00	
<u>X</u> Pre-Judgment Interest of 0.75% per month on the delinquent contributions from date of Arbitration Award through the date of judgment [DE 5 (citing Ex. B, Art. 2.1(C)) ³	
<u>X</u> Attorneys’ Fees	\$ <u>850.00</u> ⁴
1. Associate’s Lodestar: \$225.00/ hour * 2.8 hours = \$630.00	
2. Legal Assistant’s Lodestar: \$100.00/hour*2.2 hours = \$220.00	
<u>X</u> Costs	\$ <u>473.40</u> ⁵
1. Filing Fee: \$400.00	
2. Service of Process: \$70.00	
3. Postage: \$3.40	
TOTAL SUM	\$ <u>147,789.11</u>

X **Injunctive Relief:** award judgment in favor of the petitioners ordering respondent and its officers to make available to the petitioners or other authorized representatives any and all books and records petitioners deem necessary to conduct an audit.⁶

¹ *In re Certain -Default- Motions*, 2015 WL 968125, at *10 (E.D.N.Y. Feb. 27, 2015) (confirming similar principal damages from arbitration award for causes of action under ERISA, LMRA, and FAA).

² *See, e.g., Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor-Mgmt. Cooperation, Pension & Welfare Funds v. HVH Enter. Corp.*, No. 13-CV-2769 JS ARL, 2014 WL 923350, at *4 (E.D.N.Y. Mar. 10, 2014); *Trustees of Empire State Carpenters Annuity, Apprenticeship, Labor Mgmt. Co-op., Pension & Welfare Funds v. Blueridge Contracting, Inc.*, No. 13-CV-0044 ADS ARL, 2014 WL 795626, at *3 (E.D.N.Y. Feb. 27, 2014).

³ *In re Certain -Default- Motions*, 2015 WL 968125, at *10 (awarding interest of 0.75% per month).

⁴ *Id.* (authorizing attorneys’ fees of up to \$2,125.50).

⁵ *Local 335 United Serv. Workers Union, Int’l Union of Journeymen and Allied Trades v. Twin Cnty HVAC/Refrigeration LLC*, No. CV 14-5612 (ADS)(GRB), DE 10 (E.D.N.Y. Feb. 22, 2016), *report and recommendation adopted*, DE 13 (E.D.N.Y. Mar. 28, 2016) (awarding costs of \$515.00 in a petition to confirm arbitration award); *see also In re Certain -Default- Motions*, 2015 WL 968125, at *11 (awarding costs up to \$550.00).

Conclusion

Based on the foregoing, the undersigned respectfully recommends that the District Court (1) confirm the Arbitration Award in all respects, and petitioners be awarded (2) judgment against respondent for \$146,465.71 pursuant to the Arbitration Award, (2) interest of 0.75% per month on the delinquent contributions from the date of the Arbitration Award through the date of judgment, (3) interest on attorneys' fees from the Arbitration at 10% per year from the date of the Arbitration Award through the date of judgment, (4) attorneys' fees and costs of \$1,323.40, and (5) an order to compel respondent and its officers to make available to petitioners or authorized representatives any and all books and records petitioners deem necessary to conduct an audit.

Objections

A copy of this Report and Recommendation is being provided to petitioner's counsel via ECF. Furthermore, the Court directs petitioners (1) to serve copies of this Report and Recommendation by overnight mail to respondent at the last known addresses, and (2) to file proof of service on ECF within two days. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14) days will preclude further review of this report and recommendation either by the District Court or Court of Appeals.** *Thomas v. Arn*, 474 U.S. 140, 145 (1985) (“[A] party shall file objections with the district court or else waive right to appeal.”); *Caidor v. Onondaga Cnty.*, 517 F.3d 601, 604 (2d Cir. 2008) (“[F]ailure to object timely to a magistrate’s report operates as a waiver of any further judicial review of the magistrate’s decision.”).

/s Gary R. Brown

United States Magistrate Judge

June 30, 2016

Date

⁶ See, e.g., *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, Apprenticeship, Journeyman, Retraining, Educ. & Indus. Fund v. Mountaintop Cabinet Mfr. Corp.*, No. 11 CIV. 8075 JMF, 2012 WL 3756279, at *5 (S.D.N.Y. Aug. 29, 2012); *Arbitration between New York City Dist. Council of Carpenters Pension Fund v. Joy Contractors Inc.*, No. 10 CIV. 5180 DLC, 2010 WL 4273264, at *3 (S.D.N.Y. Oct. 29, 2010).