

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK HOTEL & MOTEL TRADES
COUNCIL, AFL-CIO,

Petitioner,

-against-

CF 43 HOTEL, LLC; 250 WEST 43 OWNER,
LLC; 250 WEST 43 OWNER II, LLC; 250 WEST
43 OWNER III, LLC, d/b/a CARTER HOTEL,

Respondents.

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16 Civ. 5997 (RMB)

DECISION & ORDER
(Arbitration)

I. Background

On July 27, 2016, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (“LMRA”), the New York Hotel & Motel Trades Council, AFL–CIO (“Petitioner” or “Union”) filed a petition to confirm two labor arbitration awards rendered against Respondents, CF 43 Hotel, LLC, 250 West 43 Owner, LLC, 250 West 43 Owner II, LLC, and 250 West 43 Owner III, LLC (collectively, “Respondents” or “Hotel Carter”). (Petition, dated July 27, 2016 (“Pet.”), ¶ 1.)¹ The first award dealt with liability and was dated July 28, 2015 (“Liability Award”). (*Id.* ¶ 2.) The second award related to damages (in the amount of \$858,180.84) and was dated February 17, 2016 (“Remedy Award,” and together with the Liability Award, “Awards”). (*Id.*)

The Awards determined, among other things, that: (i) arbitrator and Impartial Chairperson (“IC”) Ira Drogin had jurisdiction to hear and determine the Union’s claim under the

¹ Respondents are “employers” under Section 2(2) of the LMRA, 29 U.S.C. § 152(2). (*Id.* ¶ 5.) The Union represents the Hotel Carter’s employees pursuant to a collective bargaining agreement titled the Industry Wide Agreement (“IWA”), effective July 1, 2012. (*Id.* ¶¶ 6, 10.)

New York State Worker Adjustment and Retraining Notification Act (“WARN Act”), N.Y. Labor Law §§ 860 et seq.; (ii) the Hotel Carter violated the New York State WARN Act by, among other things, failing to provide 90 days advance notice of closing to the Union and all of the Hotel Carter’s employees; (iii) the Hotel Carter is liable for severance and unused leave pay not yet paid to any eligible employee; and (iv) the Hotel Carter is obligated to make payment to the affected employees in the total amount of \$858,180.84. (Pet., Ex. C (Liability Award), at 4, 11.)

On or about August 21, 2014, Respondents purchased the Hotel Carter (on West 43rd Street in Manhattan) for approximately \$190 million. (Id. ¶ 11.) As part of the purchase, Respondents signed assumption agreements with the Union, dated December 12, 2014 and January 14, 2015 (“Assumption Agreements”), in which “[t]he Hotel agrees that, effective as of the date of the closing, it has assumed, adopted and is bound by all of the terms . . . of the IWA and those agreements and practices supplementing the IWA.” (Id. ¶ 12; Ex. B (Assumption Agreements), at 2, 4.) The Hotel Carter also agreed that “[e]ffective immediately any and all disputes between the parties . . . shall be subject to the grievance arbitration provisions of the IWA.” (Id. ¶ 14; Ex. B, at 2, 4.)

The IWA contains an arbitration clause which provides, among other things, that: “All complaints, disputes or grievances arising between the parties hereto involving . . . any acts, conduct or relations between the parties . . . which shall not have been adjusted by and between the parties involved shall be referred to a permanent umpire(s) to be known as the Impartial Chairperson, and his/her decision shall be final and binding upon the parties hereto.” (Pet., Ex. A (IWA), art. 26(A).) **It also provides that “[a]ny questions regarding arbitrability, substantive, procedural, or otherwise, or regarding the Impartial Chairperson’s**

jurisdiction or authority, shall be submitted to the Impartial Chairperson in accordance with this Article.” (Id.) (emphasis added).

On or about December 19, 2014, “thirty-one Hotel employees received notices stating that they would be temporarily laid off as of January 3, 2015.” (Pet. ¶ 13.) On March 24, 2015, “The Hotel physically closed its doors for renovations . . . laying off the Hotel’s remaining twenty-five employees.” (Id. ¶ 15.) **It is undisputed that no WARN Act notice was ever given to any employee or to the Union. No employees were recalled, and the Hotel Carter remained closed as of July 28, 2015.** (Pet., Ex. C at 7) (emphasis added).

On March 19, 2015, the Union filed a grievance pursuant to Article 26 of the IWA regarding “the Hotel’s failure to give proper notice to Hotel employees prior to the Hotel’s closing and for severance pay.” (Pet. ¶ 16.) Three arbitration hearings were held before IC Drogin, i.e., on March 23, March 27, and June 10, 2015. (Pet. ¶ 17.) The Union and the Hotel Carter appeared at the hearings and presented documentary and testimonial evidence. (Id.) On July 8, 2015, the Union and the Hotel Carter each submitted written post-hearing briefs to IC Drogin. (Id.) And, as noted, on July 28, 2015, IC Drogin rendered the Liability Award, and on February 17, 2016, he rendered the Remedy Award.

At the arbitration, the Hotel Carter challenged IC Drogin’s jurisdiction to decide the Union’s WARN Act claims, arguing that an agreement to arbitrate those statutory claims must be “clear and unmistakable,” and that the IWA “does not expressly provide for arbitration of WARN Act claims.” (Pet., Ex. C at 3.) The Union countered that IC Drogin had jurisdiction to hear and determine its WARN Act violation claims and that the IWA “arbitration clause has been construed as being very broad in its reach” and to include WARN Act claims. (Id., Ex. C at 2-3.)

IC Drogin determined that he, in fact, had jurisdiction to hear and determine the Union's claim(s) that the Hotel Carter violated the WARN Act. (Id., Ex. C at 4.) He also determined that the Hotel Carter was liable for WARN Act violations "by failing to provide 90 days advance notice of closing to the Union and all of the Hotel's employees," and that the Hotel Carter was liable for "severance and unused leave pay not yet paid to any eligible employee." (Id., Ex. C at 11.) IC Drogin ordered the Hotel Carter to pay \$858,180.84 to the affected employees and to the Union employee benefit funds.² (Pet. ¶¶ 22-25.) Pursuant to Article 26 of the IWA, the Union "delivered" the Liability and Remedy Awards to the Hotel Carter by e-mail on July 29, 2015 and February 17, 2016, respectively. (Id. ¶¶ 20, 26; Pet., Exs. E & G.)

On September 19, 2016, more than 90 days after delivery of the Liability and Remedy Awards, the Hotel Carter filed a pre-motion letter with this Court as a prelude to its motion to dismiss the Petition on the basis, among others, that IC Drogin lacked jurisdiction to decide the Union's WARN Act claims. (Letter from Arthur J. Robb to Hon. Richard M. Berman, dated Sept. 19, 2016, at 1.) "[A]ny [collective bargaining agreement] requirement to arbitrate [statutory claims] must be particularly clear," according to the Hotel Carter, and the IWA "does not provide for arbitration of statutory WARN Act claims." (Id.) The Hotel Carter's pre-motion letter was filed (late): 418 days after the Liability Award was delivered and 215 days after the Remedy Award was delivered.

² The Award directed Respondents to pay: "\$52,007.01 to the Union on behalf of Hotel employees for severance pay; \$13,001.75 to the relevant employee benefit funds on behalf of Hotel employees for severance pay; \$595,272.57 to the Union on behalf of Hotel employees for notice liability; \$197,899.51 to the relevant employee benefit funds on behalf of Hotel employees for notice liability." (Pet. at 7.) IC Drogin ordered that "[s]uch payments shall be sent to the Union for distribution." (Id., Ex. F at 2.)

On January 19, 2017, the Union filed a motion to confirm the Awards. (Pet'r Mot. to Confirm Awards, dated Jan. 19, 2017), arguing that: **(1)** the Hotel Carter is barred by the statute of limitations from contesting the Awards because they failed timely to move to vacate the Awards within 90 days of delivery, pursuant to N.Y. C.P.L.R. 7511(a) (Id. at 12); **(2)** because the parties "submitted the issue of arbitrability to IC Drogin pursuant to the IWA without reservation, the arbitrator's jurisdictional finding should be confirmed" (Id. at 14); **(3)** the Awards should be confirmed also because IC Drogin "carefully grounded his holdings and relief in the expansive provisions of the IWA as well as industry practice" (Id. at 6); and **(4)** the "Court should grant attorneys' fees and costs to the Union because . . . there is no justification for the Hotel's refusal to abide by the Awards" (Id. at 21-22).

On February 21, 2017, the Hotel Carter filed its Opposition and Cross-Motion to Dismiss the Petition, contending that: **(1)** the statute of limitations does not bar the Hotel Carter's argument that IC Drogin lacked jurisdiction because the Hotel Carter "never agreed to submit statutory WARN Act claims to arbitration, as evidenced by the text of the IWA," and "unless the Union can demonstrate an agreement to arbitrate this dispute, the statute of limitations issue is not even reached" (Resp'ts Mem. of Law in Opp'n to Pet'r Mot. to Confirm and in Supp. of Resp'ts Cross-Mot. to Dismiss, dated February 21, 2017 ("Resp'ts Mem."), at 9); **(2)** IC Drogin should have declined to adjudicate the Union's WARN Act claims because the IWA does not provide a "clear and unmistakable . . . agreement to arbitrate statutory claims" (Id. at 10); **(3)** the Hotel Carter did not raise any substantive objection (i.e., apart from (2) above) to confirmation of the Awards; and **(4)** even if the Union prevails in its Petition to confirm the Awards, the Union's

request for attorneys' fees should be denied because "the arguments raised [by the Hotel] are well-founded, and could not, by any stretch, be characterized as sanctionable" (*Id.* at 13).³

According to Petitioner, to date, "the Hotel has failed and refused, and continues to refuse, to comply with the Awards, and to pay the amounts owed." (Pet. ¶ 27.)

For the reasons stated below, the Court grants Petitioner's motion to confirm the Awards and for legal fees [#27] and denies Respondents' cross-motion to dismiss [#30].

II. Legal Standard

"[G]rounds for vacating an arbitration award may not be raised as an affirmative defense after . . . the appropriate statute of limitations governing applications to vacate an arbitration award has lapsed" Local 802, Associated Musicians of Greater N.Y. v. Parker Meridien Hotel, 145 F.3d 85, 89 (2d Cir. 1998). "[A] defendant who fails to challenge an arbitration award within the applicable 90 day statute of limitations forfeits any affirmative defenses in response to a petition to confirm that award." Porter v. Thompson Roofing & Sheet Metal Co., 242 F.3d 367 (2d Cir. 2000).

Where the parties agree to submit the arbitrability question itself to arbitration, the court gives "considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); see also Contec Corp. v. Remote Sol., Co., 398 F.3d 205, 208 (2d Cir. 2005) ("[W]hen, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such

³ On March 7, 2017, the Union filed a Reply, and on March 14, 2017, the Hotel also filed a Reply. And, on June 6, 2017, the Union submitted billing entries (timesheets) supporting its request for attorney's fees in the amount of \$42,273 and expenses in the amount of \$2,984.48 and which the Court has reviewed. (Letter from Barry N. Saltzman to Hon. Richard M. Berman, dated June 6, 2017, at 1.)

issues to an arbitrator.”); N.Y. Hotel & Motel Trades Council, AFL-CIO v. Hotel Nikko of N.Y., Inc., 1991 WL 168284, at *4 (S.D.N.Y. Aug. 22, 1991) (quoting George Day Constr. Co. v. United Bhd. of Carpenters and Joiners of Am., 722 F.2d 1471, 1476 (9th Cir. 1984)).

Where a dispute is resolved through arbitration in accordance with a collective bargaining agreement, “[j]udicial review of a labor-arbitration decision pursuant to such an agreement is very limited.” Roy v. Buffalo Philharmonic Orchestra Soc’y, Inc., --- F. App’x ---, 2017 WL 951461, at *1 (2d Cir. Mar. 9, 2017) (quoting Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504, 509 (2001)). “As long as the arbitrator’s award ‘draws its essence from the collective bargaining agreement,’ and is not merely ‘his own brand of industrial justice,’ the award is legitimate.” United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36 (1987).

When a challenger refuses to abide by an arbitrator’s decision without justification, attorney’s fees and costs may be awarded. Int’l Chem. Workers Union (AFL-CIO), Local No. 227 v. BASF Wyandotte Corp., 774 F.2d 43, 47 (2d Cir. 1985). “[B]ad faith supporting an award of attorneys’ fees may be . . . demonstrated by showing that a defendant’s obstinacy in granting a plaintiff his clear legal rights necessitated resort to legal action with all the expense and delay entailed in litigation.” Int’l Union of Petroleum & Indus. Workers v. W. Indus. Maint., Inc., 707 F.2d 425, 428 (9th Cir. 1983) (internal quotation and citation omitted).

III. Analysis

(1) Statute of Limitations

The Union contends that the Hotel Carter is barred from challenging the Awards because it failed to move to vacate or modify either Award within 90 days after delivery. See Parker Meridien Hotel, 145 F.3d at 89. That is, the Hotel Carter failed to challenge the Awards by

moving to vacate or modify them on or before October 28, 2015 in the case of the Liability Award, and May 18, 2016 in the case of the Remedy Award.⁴ See supra p.4. The Hotel Carter’s “failure to move to vacate the award within the three month time provided precludes [it] from later seeking that relief when a motion is made to confirm the award.” Florasynth, Inc. v. Pickholz, 750 F.2d 171, 175 (2d Cir. 1984).

The Hotel Carter’s argument that “subsequent Second Circuit authority hold[s] that Parker Meridien does not preclude a later assertion” that the IC lacked jurisdiction (Resp’ts Mem. at 8 (citing Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n, AFL-CIO v. Custom Air Sys., Inc., 357 F.3d 266, 268 (2d Cir. 2004)), is not persuasive. In Custom Air Systems, for example, the United States Court of Appeals for the Second Circuit dealt with “a novel issue: whether under Parker Meridien, an arbitral award can be confirmed against a non-signatory absent a threshold finding that the non-signatory was indeed an alter ego of a party to the arbitration agreement.” Custom Air Sys., 357 F.3d at 267-68; see also Porter, 242 F.3d at 367 (“We agree with the district court that [respondent] waived its affirmative defense that there was no valid agreement to arbitrate.”).

(2) The Impartial Chairperson Had Jurisdiction to Resolve This Dispute

Assuming, arguendo, that the statute of limitations were not a bar to the Hotel Carter’s claims, the Court would nevertheless confirm IC Drogin’s determination that he had jurisdiction to arbitrate the parties’ dispute. This issue was properly submitted to the arbitrator pursuant to

⁴ The Liability and Remedy Awards were delivered to the Hotel Carter on July 29, 2015 and February 17, 2016, respectively. The Hotel Carter’s first “challenge” to the Awards, in its pre-motion letter to this Court, dated September 19, 2016, was filed on September 19, 2016, 418 days after delivery of the Liability Award and 215 days after delivery of the Remedy Award. In either case, it was well past the 90-day statute of limitations. See supra p.4.

the IWA.⁵ See First Options of Chicago, 514 U.S. at 943 (where “parties agree to submit the arbitrability question itself to arbitration . . . the court should give considerable leeway to the arbitrator”). Respondents concede that “the IWA . . . provides that questions of substantive arbitrability are to be submitted to the arbitrator in the first instance.” (Resp’ts Mem. at 8.)

As the Petitioner points out, IC Drogin “analyzed and rejected the Hotel’s jurisdiction challenge, . . . relying on contract language, party practice and direct arbitral precedent on this issue.” (Pet’r Mot. at 9.) He (properly) determined that he had broad jurisdiction under the IWA to decide disputes over the “terms and conditions of employment, ‘subject to the IWA and applicable law,’” including the WARN Act. (Pet., Ex. C (Liability Award), at 4.) IC Drogin stated in rendering the Liability Award, that he had previously decided WARN Act claims. (Pet., Ex. C at 2 (“There is arbitral precedent on this very issue from this Office that this Office has jurisdiction to hear claims of violations of Federal, and State WARN Act Claims.”).) IC Drogin held that “[t]he Union’s grievance that the Hotel violated the WARN Act . . . falls squarely within the jurisdiction the parties have granted to [the IC] under their Agreement.” (Id. at 2); see Contec Corp., 398 F.3d at 211.

In view of IC Drogin’s ruling, the Court does not find persuasive the Hotel Carter’s argument that the IWA does not provide a clear and unmistakable agreement to arbitrate statutory claims, including WARN Act claims. (Resp’ts Mem. at 10 (citing Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80 (1998))); see also Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Machines, Local Union No. 550, Int’l Bhd. of Teamsters, 167 F.3d 764,

⁵ The IWA provides broadly that “[a]ny questions regarding arbitrability, substantive, procedural, or otherwise, or regarding the Impartial Chairperson’s jurisdiction or authority, shall be submitted to the Impartial Chairperson in accordance with this Article.” (Pet., Ex. A (IWA), art. 26(A)); see also supra n.2.

767 (2d Cir. 1999); Butler Mfg. Co. v. United Steelworkers of Am., AFL-CIO-CLC, 336 F.3d 629, 634 (7th Cir. 2003).

(3) The Court Confirms the Awards

The Court unequivocally confirms the Liability and Remedy Awards. See Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 212 n.8 (2d Cir. 2002) (“we will confirm the award if we are able to discern any colorable justification for the arbitrator’s judgment”). As noted, IC Drogin relied upon express contract language, party practice, industry common law, and steadfast judicial authority in rendering the Awards. (Pet’r Mot. at 11.) He carefully reviewed the factual basis for holding the Hotel Carter liable for failure to provide WARN Act notice and for unjustifiably withholding severance pay owed by the Hotel Carter to its employees. (Id. at 10.)⁶ The Liability and Remedy Awards easily meet the standard for confirmation. “Where, as here, a dispute is resolved through arbitration in accordance with a CBA, judicial review of a labor-arbitration decision pursuant to such an agreement is very limited.” Roy v. Buffalo Philharmonic Orchestra Soc’y, Inc., 2017 WL 951461, at *1 (2d Cir. Mar. 9, 2017); see also N.Y.C. Dist. Council of Carpenters Pension Fund v. Star Intercom & Constr., Inc., 2011 WL 5103349, at *4 (S.D.N.Y. Oct. 27, 2011).

(4) The Union is Entitled to Attorney’s Fees and Costs

The Court awards attorney’s fees and expenses to Petitioner in the amount of \$45,257.48 (\$42,273 in attorney’s fees and \$2,984.48 in expenses) to be paid by Respondents. See Int’l Chem. Workers Union, 774 F.2d at 47. While the IWA does not provide explicitly for attorney’s fees, such an award is appropriate where, as here, “opposing counsel acts in bad faith,

⁶ Apart from the Hotel Carter’s arguments regarding IC Drogin’s jurisdiction, which are here rejected, the Hotel Carter does not delineate any other persuasive reasons why IC Drogin’s Awards were allegedly deficient.

vexatiously, wantonly, or for oppressive reasons. As applied to suits for the confirmation and enforcement of arbitration awards . . . when a challenger refuses to abide by an arbitrator’s decision without justification, attorney’s fees and costs may properly be awarded.” Local 2006, Retail, Wholesale & Dep’t Store Union, United Food & Commercial Workers v. Basic Wear, Inc., 2017 WL 1944124, at *1 (S.D.N.Y. May 9, 2017) (internal quotation omitted). Because the Hotel Carter failed to comply with the Awards and presented no timely justification for contesting the Awards, Petitioner is entitled to reasonable attorneys’ fees and expenses incurred in pursuit of this Petition. See In Matter of Arbitration Between P.M.I. Trading Ltd. v. Farstad Oil, Inc., 2001 WL 38282, at *4 (S.D.N.Y. Jan. 16, 2001). Courts routinely award attorney’s fees to a petitioner seeking to confirm an arbitration award where the respondent fails timely to move for vacatur or modification of the award. See, e.g., DigiTelCom, Ltd. v. Tele2 Sverige AB, 2012 WL 3065345, at *7 (S.D.N.Y. July 25, 2012) (where attorneys fees were “peculiarly appropriate in the context of a challenge to an arbitration award which appears to be a largely dilatory effort.”); P.M.I. Trading, 2001 WL 38282, at *4 (where “not only are [respondent]’s arguments incorrect, but they were not raised in a timely fashion”); Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.), 753 F. Supp. 86, 92 (S.D.N.Y. 1990) (where respondent’s arguments “appear to have been motivated by a desire to forestall complying with the award, a problem courts have encountered before in dealing with litigants who lose in arbitrations.”).⁷

Here, the Hotel Carter did not challenge the Awards by moving to vacate or modify the Awards in a timely fashion and/or by presenting colorable arguments to the arbitrator or to this Court. The Hotel Carter appears to have been motivated by a desire not to comply with the

⁷ As noted, the Court has reviewed the Union’s timesheets submitted on June 6, 2017, and finds that the Union has substantiated reasonably requested attorney’s fees and expenses in the total amount of \$45,257.48.

Awards. The Hotel Carter has inexcusably failed to comply with the IC's directive to pay \$858,180.84 to the affected employees and to the Union employee benefit funds. (Pet. ¶¶ 22-25.)

IV. Conclusion & Order

For the foregoing reasons, Petitioner's motion to confirm the Awards [#27] is granted, and Respondents' cross-motion to dismiss [#30] is denied. The Hotel Carter is ordered **forthwith** to pay to the Union the sum of \$858,180.84 plus prejudgment interest at a rate of nine percent per annum from February 17, 2016 to the date of this Decision and Order (and post judgment interest thereafter). See N.Y. City Dist. Council of Carpenters v. Metro Furniture Servs. LLC, 2012 WL 4492384, at *5 (S.D.N.Y. Sept. 28, 2012).

The Hotel Carter is further ordered forthwith to pay to the Union the sum of \$45,257.48 for its attorney's fees and expenses.

These payments by the Hotel Carter of \$858,180.84 (plus prejudgment and post judgment interest) and of \$45,257.48 (plus post judgment interest) shall be made by July 14, 2017. The Court will entertain a proper application for sanctions, including contempt if these payments are not timely made. See Franco v. Allied Interstate LLC, 2015 WL 7758534, at *5 (S.D.N.Y. Nov. 30, 2015); see also Adams v. N.Y. State Educ. Dep't, 630 F. Supp. 2d 333, 336 (S.D.N.Y. 2009).

The Clerk of Court is respectfully requested to enter judgment in favor of the Union in the amount of \$858,180.84, and in the amount of \$45,257.48 for attorney's fees and expenses, plus interest as outlined above.

A conference is scheduled for counsel and the parties on July 18, 2017 at 9:30 a.m., to assess compliance with this Decision and Order.

Dated: New York, New York
June 14, 2017

Handwritten signature of Richard M. Berman in black ink, consisting of the letters 'RMB' in a stylized, cursive font.

RICHARD M. BERMAN, U.S.D.J.