

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRUSTEES OF THE NEW YORK CITY
DISTRICT COUNCIL OF CARPENTERS PENSION
FUND, WELFARE FUND, ANNUITY FUND,
AND APPRENTICESHIP, JOURNEYMAN
RETRAINING, EDUCATIONAL AND
INDUSTRY FUND, TRUSTEES OF THE NEW
YORK CITY CARPENTERS RELIEF AND
CHARITY FUND, THE NEW YORK CITY AND
VICINITY CARPENTERS LABOR-
MANAGEMENT CORPORATION, and THE
NEW YORK CITY DISTRICT COUNCIL OF
CARPENTERS,

Petitioners,

– against –

BAYWOOD CONCRETE CORP.,

Respondent.

OPINION AND ORDER

17 Civ. 1800 (ER)

Ramos, D.J.:

This case arises out of a collective bargaining agreement (“CBA”) between the parties. Trustees of the New York City District Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, and Apprenticeship, Journeyman Retraining, Educational and Industry Fund, together with Trustees of the New York City Carpenters Relief and Charity Fund, the New York City and Vicinity Carpenters Labor Management Corporation, and the New York City District Council of Carpenters (collectively, “Petitioners”) commenced this action to confirm an arbitration award issued against Baywood Concrete Corp. (“Respondent”). The action was filed under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (“ERISA”),

29 U.S.C. § 1132; Section 301 of the 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. In addition to confirmation of the arbitration award, Petitioners seek attorneys’ fees and costs. Before the Court is Petitioners’ request that their Petition be reviewed as an unopposed motion for summary judgement to confirm the arbitration award. Doc. 8. To date, Respondent has not opposed the motion or otherwise appeared in this action. For the reasons stated below, Petitioners’ motion is GRANTED.

I. Factual Background¹

During the relevant time period, Respondent was a member of the Association of Concrete Contractors of New York, Inc. (the “Association”). Pet. ¶ 9; *id.* at Ex. A. Members of the Association are bound by the CBA between the Association and the New York City District Council of Carpenters (the “Union”). CBA, Doc.1 at Ex. B. The CBA went into effect on July 1, 2011 and is in force until May 31, 2017. *Id.* Under the CBA, Respondent was required to contribute to certain fringe benefit funds for each hour of work performed by its covered employees. CBA art. XI § 1; Pet. ¶ 11. In order to ensure compliance, the CBA provided that the funds had the right to audit Respondent’s books and records. CBA art. XI § 8(b); Pet. ¶ 12. A dispute arose when Respondent refused to permit the funds to audit its books and records for the period from January 1, 2010 to August 23, 2016. Pet. ¶ 17.

¹ The following facts are drawn from Petitioners’ Petition to Confirm an Arbitration Award (“Pet.”) and attached exhibits. Doc. 1.

The CBA includes an arbitration clause, which provided that in the event that a “dispute or disagreement arise between the parties hereto . . . concerning any claim arising from payments to the Fund of principal and/or interest which is allegedly due, either party may seek arbitration of the dispute before the impartial arbitrator” CBA art. XI § 13. The CBA further provided that arbitrator’s award is “final and binding” and the cost of arbitration “shall be included in the award and shall be borne by the losing party.” *Id.* The CBA also bound employers to the “Funds Collection Policy,” which defined when there was “presumptive evidence of delinquency,” and states that “[a]ttorneys’ fees shall be assessed against a delinquent employer, at the same hourly rate charged to the Funds for such services . . . for all time spent by Collection Counsel in collection efforts.” Pet. at Ex. C § IV(12); *Id.* at § V(6). Furthermore, the CBA required a delinquent employer to pay, in addition to any unpaid contributions, “interest on the unpaid contributions determined at the prime rate of Citibank plus 2%,” plus “an amount equal to the greater of—(1) the amount of the interest charges on the unpaid contributions as determined [] above, or (2) liquidated damages of 20% of the amount of the unpaid contributions;” plus “reasonable attorney’s fees and costs of the action;” and “such other legal or equitable relief as the court deems appropriate.” CBA art. XI § 8(f).

II. Procedural Background

Petitioner initiated an arbitration proceeding before the designated arbitrator, Roger E. Maher. Pet. ¶ 18. The arbitrator sent Respondent a Notice of Hearing by regular and certified mail on June 11, 2016. *Id.*; Pet. at Ex. D. On August 23, 2016, after the arbitration hearing, the arbitrator issued an Opinion and Default award. Pet. at Ex. E. Noting that Respondent “had legally sufficient notice of this proceeding and the claims against it,” and that Respondent had not appeared or submitted any request for an adjournment or extension of time to appear, the arbitrator found “[u]pon the substantial and credible evidence” that Respondent was in violation

of the CBA for its failure to permit the funds to examine its book and records. *Id.* at 2. The arbitrator awarded Petitioner a sum of \$1,932,470.85, consisting of a principal sum of delinquent contributions of \$1,390,148.93, total interest of \$261,892.13, liquidated damages of \$278,029.79, court costs of \$400.00, attorneys' fees of \$1,500.00, and the arbitrator's fee of \$500.00, with interest to accrue at the rate of 5.5% from the date of the award. *Id.* at 2–3. Respondent has failed to pay any portion of the award. Pet. ¶ 21.

On March 10, 2017, Petitioners filed a Petition to confirm the arbitration award. Pet., Doc. 1. Petitioners also ask the Court to award attorney's fees and costs in the amount of \$2,800.00. *Id.* at 7; *id.* at Ex. F. On March 15, 2017, Respondent was served with the Summons and Petition. Affidavit of Service, Doc. 7. Respondent has not appeared in this action.

III. Legal Standard

A. Federal Arbitration Act

Confirmation of an arbitral award normally takes the form of a summary proceeding that converts a final arbitration award into a judgment of the court. *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d at 110 (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984)). The court is required to grant the award unless it is vacated, modified, or corrected. *Id.* (quoting 9 U.S.C. § 9). Hence, an application for a judicial decree confirming an award receives “streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court.” *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008).

In order to promote the goals of arbitration, which consist of “settling disputes efficiently and avoiding long and expensive litigation [,] “[a]rbitration awards are subject to very limited review.” *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12

(2d Cir. 1997) (quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993)) (internal quotation marks omitted) (alteration in original). It is not necessary that the arbitrator explain the rationale for the award; 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 & Co.*, 462 F.3d at 110 (quoting *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117, 121 (2d Cir. 1991)) (internal quotation marks omitted). In short, as long as there is “a barely colorable justification for the outcome reached[.]” a court should enforce an arbitration award—even if it disagrees with it on the merits. *Landy Michaels Realty Corp. v. Local 32B–32J, Serv. Employees Int’l Union, AFL–CIO*, 954 F.2d 794, 797 (2d Cir. 1992) (internal citation and quotation marks omitted).

B. Summary Judgment Standard

An unanswered petition to confirm an arbitration award is to be treated “as an unopposed motion for summary judgment.” *D.H. Blair & Co.*, 462 F.3d 95, 110 (2d Cir. 2006); *see also Trs. for The Mason Tenders Dist. Council Welfare Fund, Pension Fund, Annuity Fund & Training Program Fund v. Earth Constr. Corp.*, No. 15 Civ. 3967 (RA), 2016 WL 1064625, at *3 (S.D.N.Y. Mar. 15, 2016) (“A district court should treat an unanswered petition to confirm or vacate as an unopposed motion for summary judgment and base its judgment on the record.”) (internal quotation and alterations omitted). Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a). “An issue of fact is ‘genuine’ if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Senno v. Elmsford Union Free Sch. Dist.*, 812 F. Supp. 2d 454, 467 (S.D.N.Y. 2011) (citing *SCR Joint Venture L.P. v. Warshawsky*, 559 F.3d 133, 137 (2d Cir.

2009)). A fact is “material” if it might affect the outcome of the litigation under the governing law. *Id.*

The party moving for summary judgment is first responsible for demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the burden of proof at trial would fall on the movant, that party’s “own submissions in support of the motion must entitle it to judgment as a matter of law.” *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 618 (2d Cir. 1998). Conversely, “[w]hen the burden of proof at trial would fall on the nonmoving party, it ordinarily is sufficient for the movant to point to a lack of evidence to go to the trier of fact on an essential element of the nonmovant’s claim.” *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009) (citing *Celotex Corp.*, 477 U.S. at 322–23). If the moving party meets its burden, “the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment.” *Jaramillo v. Weyerhaeuser Co.*, 536 F.3d 140, 145 (2d Cir. 2008) (citing *Celotex Corp.*, 477 U.S. at 322–23).

In deciding a motion for summary judgment, the Court must “construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.” *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir. 2004)) (internal quotation marks omitted). Even if a motion for summary judgment is unopposed, courts are required to “review the motion . . . and determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law.” *Vermont Teddy Bear Co. v. I-800 Beargram Co.*, 373 F.3d 241, 246 (2d Cir. 2004) (quoting *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir. 1993)) (internal quotation marks omitted). “[W]hen a nonmoving party

chooses the perilous path of failing to submit a response to a summary judgment motion, the district 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." *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001).

IV. Discussion

A. Confirmation of the Arbitration Award

The Court has conducted a limited review of the CBA and the arbitration award. The arbitrator was acting within the scope of his authority, as granted to him by the CBA. *See* CBA art. XI § 13; *see also Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, Apprenticeship, Journeyman, Retraining, Educ. & Indus. Fund v. Paladin Const. Corp.*, No. 12 Civ. 1533 (PAE), 2013 WL 2530781, at *4 (S.D.N.Y. June 10, 2013) (confirming arbitration award against employer that failed to provide fringe benefits due under a CBA). The arbitrator concluded that the "uncontroverted testimony and evidence established that the Respondent was bound to a Collective Bargaining Agreement" with Petitioners, and that it refused to allow the funds to inspect its books and records in violation of the CBA. Pet. at Ex. E, at 2. Accordingly, there is much more than a "barely colorable justification for the outcome reached." *Landy*, 954 F.2d at 797; *see also Trustees of New York City Dist. Council of Carpenters Pension Fund v. DeJil Sys., Inc.*, No. 12 Civ. 005 (JMF), 2012 WL 3744802, at *3 (S.D.N.Y. Aug. 29, 2012) ("Where, as here, there is no indication that the arbitration decision was made arbitrarily, exceeded the arbitrator's jurisdiction, or otherwise was contrary to law, a court must confirm the award upon the timely application of any party."). Thus, based on the record provided, together with the appropriate narrow level of review, the Court finds that there is no disputed material issue of fact and confirms the arbitration award.

B. Attorney's Fees and Costs

The CBA provides that, “[i]n the event that formal proceedings are instituted before a court of competent jurisdiction by the trustees of a Benefit Fund or Funds to collect delinquent contributions to such Fund(s), and if such court renders a judgment in favor of such Fund(s), the Employer shall pay[,]” among other things, “reasonable attorney’s fees and costs of the action.” CBA art. XI § 8(f). The express provisions of the Funds Collection Policy also provides for an award of attorney’s fees against a delinquent employer for time spent by counsel in collection efforts. Pet. at Ex. C § V(6).

“As a general matter, the starting point in analyzing whether claimed attorneys’ fees are reasonable is the lodestar—the product of a reasonable hourly rate and the reasonable number of hours required by the case.” *1199/SEIU United Healthcare Workers E. v. S. Bronx Mental Health Council Inc.*, No. 13 Civ. 2608 (JGK), 2014 WL 840965, at *10 (S.D.N.Y. Mar. 4, 2014) (quoting *Millea v. Metro–N. R. Co.*, 658 F.3d 154, 166 (2d Cir.2011)) (internal quotation marks omitted). “[C]ourts have routinely awarded attorney[’]s fees in cases where a party merely refuses to abide by an arbitrator’s award without challenging or seeking to vacate it through a motion to the court.” *Alliance Workroom Corp.*, No. 13 Civ. 5096 (KPF), 2013 WL 6498165, at *6 (quoting *Abondolo v. H. & M.S. Meat Corp.*, No. 07 Civ. 3870 (RJS), 2008 WL 2047612, at *4 (S.D.N.Y. May 12, 2008)) (collecting cases). Given that Respondent has not abided by the arbitration award and has failed to participate in either this action or the arbitration itself, the Court finds an award of attorney’s fees and costs is appropriate.

In order to support their request for attorney’s fees, Petitioners must submit “contemporaneous time records that specify, for each attorney, the date, the hours expended, and the nature of the work done.” *Id.* (quoting *New York State Ass’n for Retarded Children, Inc. v.*

Carey, 711 F.2d 1136, 1148 (2d Cir. 1983)). Petitioners were represented by the law firm of Virginia and Ambinder, LLP (“V & A”). Petitioners have submitted copies of V&A’s contemporaneous billing records, and seek \$2,730 for 12.3 total hours of work related to the drafting and filing of the Petition at the following rates: \$300 per hour for an of counsel, \$225 per hour for a law clerk, and \$100 per hour for a legal assistant. Pet. ¶¶ 27–31; *id.* at Ex. F. Courts within this District have found fees at similar rates for a greater number of attorney hours involving similar matters to be reasonable. *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. Strong Partitions Inc.*, No. 13 Civ. 6648 (PKC), 2014 WL 1275696, at *4 (S.D.N.Y. Mar. 25, 2014) (awarding \$4,532.50 in attorney’s fees representing 25.40 hours of work performed at rates ranging from \$90 to \$250 per hour); *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, Apprenticeship, Journeyman Retraining, Educ. & Indus. Fund, Charity Fund v. Anthem Contracting Inc.*, No. 11 Civ. 9167 (JGK), 2013 WL 2111285, at *3 (S.D.N.Y. May 16, 2013) (awarding \$3,548 in attorney’s fees for 20 hours of work at rates ranging from \$90 to \$250 per hour). Petitioners have satisfied their burden in demonstrating that the attorneys’ fees and costs they seek to recover are reasonable; therefore, the Court grants Petitioners attorneys’ fees in the amount of \$2,730.00, along with costs in the amount of \$70, totaling \$2,800.00.

V. Conclusion

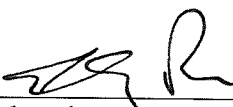
For the reasons stated above, Petitioners’ motion for summary judgment is GRANTED. The arbitration award is confirmed and the Clerk of the Court is directed to enter judgment in favor of Petitioners in the amount of \$1,932,470.85 against Respondent, pursuant to the arbitration award, with interest to accrue at the rate of 5.5% from August 23, 2016—the date of

the arbitration award—through the date of judgment. The Court also GRANTS Petitioners' request for attorney's fees and costs in the amount of \$2,800.00.

The Clerk of the Court is respectfully directed to close the case.

It is SO ORDERED.

Dated: July 26, 2017
New York, New York



Edgardo Ramos, U.S.D.J.