

KITE MARITIME, INC.	*	CIVIL ACTION
- VERSUS -	*	NO. 97-3253
	*	SECTION T (2)
MASSAN SHIPPING INDUSTRIES, INC.	*	

ORDER AND REASONS

This suit arises from the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 207. Before the Court is a Motion for Confirmation of Default or, Alternatively, for Summary Judgment by plaintiff, Kite Maritime, Inc. (hereinafter "Kite") against defendant Massan Shipping Industries, Inc. ("Massan"). Also before the Court is Massan's Motion to Set aside Entry of Default. After reviewing the parties' submissions and relevant law, the Court GRANTS defendant's Motion to Set Aside Entry of Default and GRANTS plaintiff's Motion for Summary Judgment.

Background

On September 1, 1997, an arbitration in London resulted in a award to Kite against Massan in the amount of \$ 22,165.25 together with interest thereon at the rate of 7.5% from April 1, 1997 until September 1, 1997. The award was against Massan for the unpaid balance of a charter hire owed by the Algerian company to Kite. The award also included Kite's legal expenses which Kite

determined to be \$ 9,178.50 and interest at the rate of 7.5%. In addition, Kite disbursed, paid and advanced additional arbitration costs in the amount of \$ 917.22 which, pursuant to the award, Massan is obliged to pay.

According to Kite the total amount due is \$ 32,261.00. As of the filing of Kite's Motion for Summary Judgment, Massan had only paid \$ 11,428.96 leaving an outstanding balance of \$ 20,832.04 which Kite is now trying to collect.

Procedural History

On October 17, 1997, Massan was timely served by hand with the complaint. The summons clearly stated that an answer to the complaint was required within 20 days after service, exclusive of the day of service, otherwise a judgment by default would be taken against the defendant for the relief demanded in the complaint. To avoid a default judgment, the Answer was due on November 6, 1997 and when no Answer was received, a default against Massan was signed by the Clerk of Court of November 12, 1997 and entered against the company on November 13, 1997. Meanwhile, defendant filed an answer on November 12, 1997 which presumably overlapped with the Clerk's entry of default.

On November 20, Kite filed the motion to confirm the default and or for summary judgment and on November 26, Massan filed a motion to set aside the entry of default.

Kite moved this Court for an expedited hearing on December 4, 1997 which was granted and then rescinded when Massan advised the Court that it had tendered a settlement offer on December 1,

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1997, and requested the Court to hear the motion on the next Civil Motion day which was December 10, 1997. The motion was then set for December 10, 1997.

On December 4, Kite filed a Motion to Amend Confirmation of Default or, Alternatively, for Summary Judgment to recover legal fees and prejudgment interest associated with trying to enforce the London arbitration award.

On December 10, 1997, Massan filed a 3 paragraph opposition memorandum to Kite's Motion for Summary Judgment. On December 11, Massan filed a supplemental memorandum wherein it accepted all of Kite's Uncontested Material Facts except for IX which states:

Kite has incurred legal expenses in the amount of \$ 9,170.53 as a result of the arbitration proceeding.

Plaintiff's Statement of Uncontested Material Facts, IX, p. 2.

Law And Argument

A. Massan's Motion to Set Aside the Entry of Default

Massan argues in its Memorandum in Support of its motion that FRCP Rule 55 provides that a default may be issued "when a party fails to appear or otherwise plead". The company maintains that because it filed an answer before the entry of default, the default is improper and should be set aside.

While defendant did not adhere to the 20 day period for answering the complaint as required by Rule 4(a), the Court finds it plausible that the answer overlapped with the entry of default and if it occurred after entry it was still within a reasonable period. Owenby v. Gardner, 264 F. Supp. 424 (D.C. Ga. 1967) (where entry of default set aside for Secretary of Health, Education,

and Welfare who filed answer 3 days after Clerk of Court had entered default). Therefore the drastic measure of a default entry is not warranted and the entry of default is hereby set aside.

B. Motion for Confirmation of Default or Alternatively for Summary Judgment

Under 9 U.S.C. § 207, a party to the arbitration may apply, within three years after an arbitral award, to a court with jurisdiction to confirm the award as against any other party to the arbitration unless it finds one of the grounds for refusal or deferral of recognition (such as fraud, duress, contravention of public policy) specified in the Convention on the Recognition and Enforcement of Foreign Arbitral awards. 9 U.S.C. § 207.

Massan claims that the arbitration award provided that the costs would be determined by the arbitrator or the high court at a later time. Defendant's Memorandum in Opposition to Motion for Summary Judgment, December 10, 1997. Massan cites no provisions of the award or other documents to support this assertion. The pertinent provisions of the award which was submitted as Exhibit A in Kite's Supplemental Memorandum are as follows:

NOW I the said Bruce Harris, having taken upon myself the burden of this reference and having carefully and conscientiously read and considered these submissions and documents before me and having given due weight thereto, DO HEREBY MAKE, ISSUE AND PUBLISH this my FINAL AWARD as follows:

1. I FIND AND HOLD that the owners' claim succeeds in the sum of \$ 22,165.25 only;
2. I THEREFORE AMAND AND ADJUDGE that the charterers shall forthwith pay to the owners the said sum of \$ 22,165.25 (...sum spelled

out...) together with interest thereon at the rate of 7.50% (...figure spelled out...) from 1 April, 1997, until the date of this my Award.

3. I FURTHER AWARD AND DIRECT that the charterers shall bear and pay their own and the owners' costs of this reference (and the owners' said costs may be taxed before me or the High Court, in their option) AND that they shall bear and pay the costs of this my Award which I hereby tax and settle at the sum of L 565 (...figure spelled out...) PROVIDED that if, in the first instance, the owners shall have paid any amount in respect of the costs hereof, they shall be entitled to an immediate refund from the charterers of the sum so paid. GIVEN under my hand in London this 1st day of September, 1997. (signed by Bruce Harris, Sole Arbitrator)

Massan's assertion of a later determination is seriously misleading in light of the contents of the Award and is without merit. In Massan's December 11 memorandum, the company addresses a new angle and says that the only dispute is over Kite's legal expenses of \$ 9,178.53. Citing the Award, Massan refers to the sentence, "I further award and ..." with this interpretation: "Plaintiffs have not submitted the further award; therefore, this claim must fall on the facts. . . .to defendant's knowledge no further award has been issued." Defendant's Motion to File Supplemental Memorandum, December 11, 1997.

The Award is clear. The "further" language, in this completely unextraordinary context, means that in addition to the \$ 22,165.25 plus 7.5% from April 1, 1997 to September 1 that is owed to Kite, Massan must "further" pay the costs of the arbitrator's fee and the cost of the reference which includes the legal expenses, amounting to \$ 9,178.53. (Plaintiff's Motion for

Confirmation/Summary Judgment, Exhibit B, Declaration of Damages).

Kite amended its Motion for Summary Judgment to ask for an additional \$ 4,154.26 in attorney fees connected with trying to enforce the arbitration award. The Fifth Circuit allows for the award of attorney fees when a party refuses to abide by an arbitration decision and the refusal is without justification. International Association of Machinists & Aerospace Workers, District 776 v. Texas Steel Company, 639 F.2d 279 (5th Cir. 1981). The International Machinist Court held: "We refuse to countenance frivolous and wasteful judicial challenges to conscientious and fair arbitration decisions." *Id.* at 284 citing International Association of Machinists & Aerospace Workers, District 776 v. Texas Steel Company, 538 F.2d 1116, 1122 (5th Cir. 1976). This sanction is necessary in order that federal policy will not be frustrated by "dilatatory tactics that lead to wasteful and unnecessary litigation. Texas Steel, 639 F.2d at 284.

A party may attack an award for exceeding the arbitrator's jurisdiction. *Id.* However, with regard to the "intrinsic merits" of the dispute (such as the arbitrator's interpretation of the dispute or the proposed remedy), "refusal to abide by a decision based upon such grounds is without 'justification.'" *Id.*

Massan's counsel has been routinely lax in its handling of this action. Not only was the answer late, but the memorandum of opposition was filed 7 days late and even then was probably filed

due to this Court's telephone inquiry as to whether a settlement had been reached and if not, was counsel planning to file an opposition. Attempts to twist the ordinary meaning of a very ordinary award to present a totally different interpretation without offering contrary evidence suggests dilatory behavior. It is within this Court's discretion to grant plaintiff's request for attorney fees associated with enforcing this judgment because defendant appears (though it is not completely clear) to dispute the intrinsic merit of the award and offers no cogent reason for refusing to pay. However, the Court, at this time, declines to grant Kite's motion for fees associated with enforcement.

Accordingly,

The Court orders that the arbitral award be enforced and that defendant pay the balance of the monies it owes on the Award owed to Kite, the Award including: \$ 22,165.25 (Award) and interest thereon at the rate of 7.5% from April 1, 1997 until September 1, 1997; \$ 917.22 (Arbitrator costs); and \$ 9,178.53 for "costs of this reference" which are Kite's legal fees.

The Court denies Kite's motion for pre-judgment interest. In the event the award is not paid to Kite by January 31, 1998, the Court will reconsider the motion to assign the defendant all costs and attorney fees associated with enforcing the arbitral award and will also consider, sua sponte, other penalties.

New Orleans, Louisiana, this 22nd day of December, 1997.

G. Thomas Porteous, Jr.
United States District Judge

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