

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-60684-CIV-SINGHAL

VERSO ISRAEL, LLC, a Florida limited
liability company,

Plaintiff,

v.

PAI PRODUCTION ADAM INVESTMENT,
LTD., an Israeli corporation,

Defendant.

ORDER

THIS CAUSE is before the Court upon Defendant PAI Production Adam Investment, Ltd.'s ("Defendant" or "PAI") Motion to Vacate and Set Aside Default and Default Final Judgment ("Motion to Vacate Default Final Judgment") (DE [21]) and Defendant's Motion to Vacate Partial Arbitration Award (DE [22]). These motions are fully briefed and ripe for review. For the reasons set forth below, the Motion to Vacate Default Final Judgment and the Motion to Vacate the Partial Arbitration Award are denied.

I. Background

Verso, PAI, and non-party Opticana had various agreements and arrangements between them to market eyewear products in Israel. Eventually, the relationship between Opticana, PAI, and Verso devolved and resulted in the filing of various claims by and between the three parties in connection with their tripartite relationship and related business ventures. Verso was first to file suit on August 11, 2020, when it filed a Complaint against Opticana in Israel (the "Israeli Proceedings"). At some point, PAI was added as a party to those proceedings.

Despite the existence of the Israeli Proceedings, Verso elected to simultaneously pursue separate, but apparently related, claims as to only PAI in an arbitration in Florida (the “U.S. Arbitration Proceedings”). PAI, at least until it said it was compelled to, did not participate in the U.S. Arbitration Proceeding. It did not participate because, it says, it did not want to prejudice its claims in the Israeli Proceedings.

Verso nevertheless proceeded with the U.S. Arbitration Proceedings. Ultimately, it obtained a Partial Award after presenting an unopposed Motion for Summary Judgment (the “Partial Award”) on June 23, 2022. The Partial Award was later confirmed by this Court in a Default Judgment (the “Default Judgment”).

On May 26, 2023, Verso moved for a further award on the issue of damages. By then, a separate Israeli Court had accepted the Default Judgment in the interest of international comity. PAI was thus compelled to appear in the U.S. Arbitration Proceedings to oppose Verso’s Request for Damages. After it appeared, PAI ordered the transcript from the hearing on Verso’s motion for summary judgment. After doing so, it then filed the underlying motions at issue in this order.

II. Motion to Vacate Partial Arbitration Award

PAI seeks to vacate the Partial Award on the basis that Verso used fraud and undue means to secure it. But PAI did not engage in due diligence to identify the fraud and then timely move to vacate the award. Moreover, and as Verso points out, PAI does not provide any support for its claim that Verso used undue means to secure the Partial Award. Accordingly, PAI’s motion is denied.

A district court “may,” in its discretion, vacate an arbitration award “upon the application of any party to the arbitration” if “the award was procured by corruption, fraud, or undue means.” *NuVasive, Inc. v. Absolute Med., LLC*, 71 F.4th 861, 878 (11th Cir.

2023) (citing 9 U.S.C. § 10(a)(1)). To determine whether an award should be vacated based on fraud, courts in this circuit conduct a three-part test that was first delineated in *Bonar v. Dean Witter Reynolds, Inc.* and then applied in *NuVasive*:

First, the moving party “must establish the fraud by clear and convincing evidence”; second, “the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration”; and third, “the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration.”

NuVasive, 71 F.4th at 878 (citing *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988)). Here, because PAI failed to exercise due diligence in discovering the fraud, it cannot pass this test.

The FAA requires that “[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. § 12. In *NuVasive*, the Eleventh Circuit first recognized that the three-month window in section 12 may be equitably tolled. See *NuVasive*, 71 F.4th at 875. But it cautioned that equitable tolling is an extraordinary remedy that is typically applied sparingly. See *id.* It is only “appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” *Arce v. Garcia*, 434 F.3d 1254, 1260 (11th Cir. 2006) (internal quotation marks omitted). Reasonable diligence is due diligence. *NuVasive*, 71 F.4th at 876 (citing *Holland v. Florida*, 560 U.S. 631, 653 (2010)).

For PAI’s motion to vacate to be timely, it must either have brought its motion within three months of the Partial Award or make a showing that the three-month window should be equitably tolled. Here, the Partial Award was issued in February 2022 and then amended in June 2022. Since PAI did not file its motion to vacate until October 2023, its only hope of its motion being timely is for the Court to find that the appropriate

circumstances exist to grant the extraordinary remedy of equitably tolling the three-month window. PAI, however, has failed to demonstrate that it conducted reasonable diligence to warrant such a remedy for its untimely filing.

According to PAI, the fraud underlying its motion to vacate is that “Verso and its counsel knowingly made material misrepresentations to the Arbitration Tribunal at the Hearing” on Verso’s motion for summary judgment.¹ (DE [22] at 16). PAI claims that it only discovered the fraud in June 2023 after it ordered the transcript of the hearing. Upon reviewing the transcript alongside all the parties’ filings in the Israeli Proceedings, PAI claims it was first able to identify the alleged material misrepresentations made by Verso and its counsel. Accordingly, PAI claims the three-month window should be equitably tolled until June 2023.²

The problem with PAI’s argument is that it does not adequately explain why, through the exercise of reasonable due diligence, it could not have discovered the fraud prior to PAI ordering the transcript of the summary judgment hearing. Even though PAI did not participate in the hearing, both the February 2022 Partial Award and the June 2022 Amended Partial Award were sent to PAI on the date they were issued by the International Centre for Dispute Resolution of the American Arbitration Association. See (DE [41] at 3); (DE [22-2] at 27).³ Thus—for over a year—PAI was aware of the Partial

¹ The hearing took place over zoom on November 2, 2021. (DE [22-4]) (Transcript of Hearing).

² PAI received the transcript on June 29, 2023, after it made an appearance in the U.S. Arbitration Proceedings and ordered a transcript of the summary judgment hearing. See (DE [22] ¶ 82). PAI filed the Motion to Vacate Arbitration Award on October 4, 2023. (DE [22]). Ninety (90) days after June 29, 2023, is September 27, 2023, the date in which PAI filed its Motion to Vacate Default Judgment (DE [21]). (DE [50] at 6 n.8). PAI argues the Motion to Vacate Arbitration Award is timely either because its Motion to Vacate Default Judgment was filed within ninety days of June 29, 2023, or because it needed some time to review the transcript of the summary judgment hearing against all the documents and files from the Israeli Proceedings to discover the fraud. Since the Court finds that PAI is not entitled to equitable tolling, it need not decide whether the motion to vacate is timely under either of these arguments.

³ Nowhere in its briefing does PAI dispute this point or claim that it did not timely receive the awards after they were issued.

Award and the findings underpinning the decision. Instead of exercising reasonable due diligence and seeking to investigate the arbitration panel's basis for the decision, PAI sat on its rights for over a year. Such inaction cannot support a finding of due diligence, especially when PAI does not explain why it could not discover any apparent fraud from the face of the Partial Award itself.

PAI's only counterargument to these facts is that it could not make an appearance in the U.S. Arbitration Proceedings before it ultimately did without prejudicing its position in the Israeli Proceedings. But there are some obvious issues with this response. First, even if this were true, it still does not explain why PAI could not discover the fraud from the face of the Partial Award and the Amended Partial Award that it received in 2022. The Motion to Vacate Partial Arbitration Award discusses the findings contained in the Partial Award that PAI believes are incorrect. See (DE [22] ¶ 77). Upon timely reviewing the award and observing the apparent incorrect findings, a party exercising reasonable due diligence would have promptly investigated the evidence presented to the arbitration panel that would have allowed them to arrive at those findings. PAI, however, never explains why it failed to do this and conduct this reasonable due diligence.

The second issue is that PAI never adequately explains how it would prejudice its rights in the Israeli Proceedings by participating in the U.S. Arbitration Proceedings. Instead, it merely states, rather conclusory, that "PAI could not have discovered the fraud earlier because it was proceeding under Israeli Law that it understood precluded it from participating in the US Arbitration Proceedings without prejudicing its position in the Israeli Proceedings." (DE [22] at 17). PAI never explains why or how the Israeli Law precluded it from making an appearance. Without more context on Israeli law, the court is not positioned to rule that PAI is correct.

PAI's only apparent justification⁴ for not participating in the U.S. Arbitration Proceedings is because the Israeli Tribunal determined that, throughout all the relevant proceedings, there is a

real fear of conflicting determinations - such as a situation where this court will determine that the Tripartite Agreement is valid and hence each party has rights in the brand and therefore no trademark infringement occurred, while in arbitration it will be determined that PAI has no rights in the brand and violated the PAI Agreement.

(DE [22-5] ¶ 28) (Order of the Israeli Court, dated April 28, 2021). Even if this finding was true, nowhere in the Israeli Court's order does it state that if PAI participates in the U.S. Arbitration Proceedings it would prejudice its position in the Israeli Proceedings. In fact, the Israeli Tribunal seemed to implicitly tell PAI that it should defend itself in the arbitration because it chose not to issue an order preventing Verso from advancing the U.S. Arbitration Proceeding. (DE [22-5] ¶¶ 45-46) (“[F]or the avoidance of doubt, there is no order preventing Verso from advancing the Arbitration Proceeding - and each party shall act as it deems most appropriate in this regard.”). In light of the Israeli Court's order and the fact that PAI offers no true explanation for why proceeding in the U.S. Arbitration Proceeding would prejudice its position in the Israeli Proceeding, the Court finds PAI has not adequately demonstrated that it engaged in reasonable due diligence to warrant equitable tolling. Without such a finding, PAI has not timely filed its Motion to Vacate Partial Arbitration Award. The Court is therefore left with no choice but to deny it.

III. Motion to Vacate Default Final Judgment

On November 1, 2022, this Court entered a default final judgment against PAI for failing to appear or respond in this action. (DE [20]). In this motion, PAI argues that the

⁴ The Court says “apparent” because PAI does not make this argument itself. The Court, on its own, had to review the entire Israeli Court order in an attempt to find some sort of justification for PAI's position that Israeli Law precluded it from making any sort of appearance—even a limited one to protect its rights in Israeli Proceeding—in the U.S. Arbitration Proceedings.

default judgment should be vacated because it was never served with the Petition in this case. Though the Court agrees with PAI that it was not properly served, it waived this argument by failing to timely raise the issue. PAI's Motion to Vacate Default Final Judgment is therefore denied.

Under Federal Rule of Civil Procedure 60, a district court can grant relief from a final judgment when the judgment is void. Fed. R. Civ. P. 60(b)(4). Where a court lacks personal jurisdiction over a defendant, it has no power to render a judgment against a defendant. *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1299 (11th Cir. 2003). One way the Court obtains personal jurisdiction over a defendant is through valid service of process. When a defendant is not properly served, the court has no power to render judgment and the judgment is void. *Id.* (citing *Varnes v. Local 91, Glass Bottle Blowers Ass'n*, 674 F.2d 1365, 1368 (11th Cir. 1982) (finding a judgment void under Rule 60(b)(4) where the defendant was not properly served)). This is true even when a defendant has actual notice of the filing of the suit. *Abele v. City of Brooksville, FL*, 273 F. App'x 809, 811 (11th Cir. 2008) (citing *Prewitt Enter., Inc. v. OPEC*, 353 F.3d 916, 925 (11th Cir. 2003)).

A foreign corporation may be served in a judicial district of the United States by "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process." (citing Fed. R. Civ. Pro. 4(h)). The defendant has the initial burden of challenging the sufficiency of service and "must describe with specificity how the service of process failed to meet the procedural requirements of Fed. R. Civ. P. 4." *T-12 Entm't, LLC v. Young Kings Enterprises, Inc.*, 36 F. Supp. 3d 1380, 1391-92 (N.D. Ga. 2014). If the defendant carries this burden, plaintiff must then demonstrate a prima facie case of

proper service of process. *Fru Veg Mktg., Inc. v. Vegfruitworld Corp.*, 896 F. Supp. 2d 1175, 1182 (S.D. Fla. 2012). “If the plaintiff can establish that service was proper then the burden shifts back to the defendant to bring strong and convincing evidence of insufficient process.” *Id.* (citation and internal quotation marks omitted).

In this case, Verso ostensibly served PAI on April 7, 2022. (DE [6]). The proof of summons returned to the Court states that the summons was served on Moshe Noy, who indicated that he was “authorized to accept service . . . as registered agent for PAI.” (DE [6]). Notably, in the next paragraph, the process server provided additional information, stating, in relevant part that “Moshe Noy advised that he was the manager of Omer Adam and that he was authorized to accept on his behalf.” (DE [6]). On this basis, the Clerk entered a Clerk’s Entry of Default on May 10, 2022. (DE [8]).

But as PAI pointed out in its motion, Moshe Noy has no affiliation with PAI. Moshe Noy is not now and has never been an employee, officer, manager, general agent, or registered agent of PAI. (DE [21-1] ¶¶ 10-14). Instead, he is simply Omer Adam’s manager. Moshe Noy was not even authorized to accept service on behalf of Omer Adam, even assuming service on Omer Adam would have been proper as to PAI. Put simply, PAI was never properly served, rendering the default judgment this Court entered vulnerable of being void.

But the defense of insufficient service of process can be waived, particularly when the party asserting it delays in raising it. When a defendant knowingly and intentionally is aware of improper service but chooses to not promptly bring it to the Court’s attention, the defendant waives its right to object at a later date. *See, e.g., In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1299 (11th Cir. 2003); *see also Atlantic Corp. of Wilmington, Inc. v. TBG Tech Co., LLC*, 2022 WL 18495889, at *3 (S.D. Fla. Dec. 1, 2022). Verso

claims that PAI engaged in such behavior and failed to promptly present this issue to the Court. The Court agrees.

At the very least, almost a year before PAI brought this motion, its Israeli counsel was aware that Verso had sought confirmation of its arbitration award here in federal court. (DE [28-5] at 5) (certified translation of a November 16, 2022 hearing in Israel). At a November 2022 hearing in the Israeli Proceedings, PAI's counsel stated that it was aware that a judgment was rendered certifying the arbitration award and that a final judgment was issued as well.⁵ That means, at minimum, PAI was aware of the insufficient service of process claim yet sat on its rights for ten months before bringing this motion. Courts have found waiver of insufficient service of process for delays far less than that, particularly when, as here, PAI does not offer an excuse for its delay. *See, e.g., Atlantic Corp. of Wilmington, Inc.*, 2022 WL 18495889, at *3. PAI has thus waived its defense of insufficient service of process.⁶ Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant PAI's Motion to Vacate Default Final

⁵ At the hearing, PAI's counsel stated:

Now we heard from my colleague that on October 31, 2022, judgment was rendered certifying the arbitration award and my friend honestly stated that the judgment was probably released a bit later. I am no expert on American law, but we are talking about an event that happened after the motion was submitted here, and apparently is not final yet. It can still be appealed, we weren't there, this is something that happened now.

(DE [28-5] at 5).

⁶ In its Reply in support of its Motion to Vacate Default Final Judgment, PAI appears to broaden its lack of personal jurisdiction argument. Citing *Baragona v. Kuwait Gulf Link Transp. Co.*, 594 F.3d 852, 855 (11th Cir. 2010), PAI appears to argue that in addition to the Court not having personal jurisdiction over PAI because it was not properly served, the Court generally lacks personal jurisdiction over PAI because it is not within the substantive reach of the Court. To the extent PAI was in fact trying to make this argument, since it was not raised in its Motion to Vacate Default Final Judgment the Court will not consider it. *See United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994) ("Arguments raised for the first time in a reply brief are not properly before a reviewing court." (citation omitted)); *see also United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002) (Court need not address issue raised for first time in reply brief), cert. denied, 539 U.S. 951 (2003).

Judgment (DE [21]) and Motion to Vacate Arbitration Award (DE [22]) are **DENIED**.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 29th day of July 2024.



RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished counsel via CM/ECF