

**New York Merchants Protective Co., Inc. v RW Adart  
Poly, LLC**

2010 NY Slip Op 32880(U)

October 7, 2010

Supreme Court, Nassau County

Docket Number: 8919/10

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

*Present:*

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 3  
NASSAU COUNTY

NEW YORK MERCHANTS PROTECTIVE CO., INC.,

Petitioner,

-against-

RW ADART POLY, LLC,

Respondent.

ORIGINAL RETURN DATE:07/06/10  
SUBMISSION DATE: 08/24/10  
INDEX No.: 8919/10

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Petition.....	1
Cross-Motion.....	2
Answering Papers.....	3
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Petition pursuant to CPLR Article 75 seeking confirmation of an Arbitration Award dated April 12, 2010, in the sum of \$14,786.15, plus additional counsel fees in the amount of \$1,500.00, is granted in part and denied in part as set forth below. The amount of petitioner's reasonable attorneys' fees incurred in this special proceeding shall be set down for a hearing.

Application by respondent for an order (I) vacating the subject Arbitration Award, pursuant to CPLR 7511(b); (ii) modifying the Arbitration Award, pursuant to CPLR 7511( c); (iii) granting supervised disclosure on the limited issue of attorneys' fees, pursuant to CPLR 3104; and (iv) staying these proceedings pending the completion of discovery is granted as to a limited modification of the Arbitration Award as set forth below and denied as to all other relief sought.

First, the Court must address procedural issues. Although petitioner seeks confirmation of an Arbitration Award within a new special proceeding rather than in the special proceeding under Index # 19967/08 in which respondent's first application was made (CPLR 7502(a)(iii); *Matter of Gleason (Michael Vee Ltd.)*, 96 NY2d 117 [2001]), the Court will disregard this procedural defect pursuant to CPLR 103(c) (*In re Wicks Construction, Inc.*, 295 AD2d 527 [2d Dept. 2002]).

Furthermore, the responsive document to a petition is an answer. Although respondent has failed to serve an answer to the new petition, respondent's opposition appears to be fully set forth in its opposition papers. Accordingly, the Court will disregard this defect also (see *Tanalski v New York State Division of Human Rights*, 262 AD2d 117 [1st Dept. 1999]) and in the interest of judicial economy deem respondent's attorney's affirmation and exhibits, together with the reply affidavit of respondent's principal, to constitute respondent's answer and counter-petition.

The petition seeks confirmation of an Arbitration Award in the total amount of \$14,786.15. In its cross-moving papers in support of vacatur or modification of the subject arbitration award, respondent raises two objections: (1) the award of excessive attorneys' fees by the arbitrator; and (2) the arbitrator's alleged refusal to entertain respondent's counterclaim for fraud. Respondent also implies partiality toward petitioner by the arbitrator, because it uses the same arbitral forum for its numerous proceedings to confirm arbitration and is, therefore, a big client of Arbitration Services Inc., where the arbitration took place.

New York has a long and strong public policy favoring arbitration (*Matter of Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 49 [1997]). Judicial review of arbitration awards is extremely limited (see *Wien & Malkin, LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479, cert dsmd 548 US 940 [2006]; *MBNA American Bank, NA v Karathanos*, 65 AD3d 688 [2d Dept. 2009]). Courts will not second guess the findings of an arbitrator (*Liberty Mutual Ins. Co. v Sedgewick of New York*, 43 AD3d 1062, 1063 [2d Dept. 2007]). An arbitrator is not bound by principles of substantive evidence or rules of evidence (*Silverman v Benmoor Coats, Inc.*, 61 NY2d 299, 308 [1984]).

Respondent's objection regarding its claim of fraud is expressly addressed in the Arbitration Award herein. The arbitrator noted Albert Wolk's testimony that when he closed his business "NY Merchants harassed and threatened him to complete the terms of his contract." The arbitrator further notes Robert Wolk's testimony that he "signed up with NY Merchants to alleviate the harassment of his father," "he wouldn't sign an alarm contract for a ten year term," and "that the contract was altered and fraudulent and acquired by intimidation, harassment and threats against his father" (Amended Decision and Award, pp.2-3). The arbitrator concluded that respondent's "testimony of intimidation and threats" was "overstated," and that as a businessman Robert Wolk "was responsible for reading the contract and knowing its terms" (Amended Decision and Award, p.3). On this record, respondent's claim that the arbitrator refused to entertain its claim of fraud is erroneous; the arbitrator heard and denied the claim of fraud.

Respondent's implied objection on the basis of bias of the arbitrator must also be rejected. Respondent failed to meet its burden of demonstrating by clear and convincing evidence that any impropriety on the part of the arbitrator prejudiced its rights or the integrity of the arbitration process (*Hausknecht v Comprehensive Medical Care of New York, PC*, 24 AD3d 778, 780 [2d Dept. 2005]).

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Respondent's objection to the attorneys' fees awarded is based on the claim that the amount of \$8,630 is excessive and punitive, given the actual damages awarded of \$6,156.15. Attorneys' fees and disbursements are incidents of litigation which the prevailing party may not collect from the loser unless such an award is authorized by statute, court rule or agreement between the parties (see *US Underwriters Ins. Co. v City Club Hotel LLC*, 3 NY3d 592, 597-98 [2004]; *Hooper Associates, Ltd v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *Siamos v 36-02 35<sup>th</sup> Ave. Development, LLC*, 54 AD3d 842 [2d Dept. 2008]). Attorneys' fees may not be recovered in arbitration unless they are expressly provided for in the arbitration agreement or by statute (*Myron Associates, Inc. v Obstfeld*, 224 AD2d 504 [2d Dept.], lv app den 88 NY2d 807 [1996]; *Matter of MKC Development Corp. v Weiss*, 203 AD2d 573 [2d Dept. 1994]).

Here, while no statute or court rule authorizes the award of attorneys' fees made by the arbitrator, the parties' agreement provides, in pertinent part:

Should NYMP prevail in any litigation between the parties Lessee shall pay NYMP's legal fees. Any action or dispute between the parties, including issues of arbitrability, shall, at the option of either party, be determined by arbitration . . . .

Review of the Arbitration Award shows that the arbitrator considered the prior civil suit filed by respondent to stay arbitration, which suit was denied by the Hon. Bruce Cozzens (Petr's Ex. B). The arbitrator stated:

As for legal fees, the standard amount is not enough to cover claimant's expenses. Claimant was forced to respond to an unnecessary civil suit filed in Nassau County Supreme Court. I have reviewed papers submitted in the action and find that a great deal of legal work was done on behalf of claimant. I have reviewed counsel's statement and find their charges and rates reasonable. In the interest of substantial justice I award \$8,630 in legal fees.

The Court notes that petitioner originally sought, without explanation, attorneys' fees of \$5,000.00 in its statement of claim for arbitration. Thereafter respondent commenced the special proceeding under Index #19967/08 to permanently stay arbitration. Respondent's petition was denied and arbitration ensued. Consequently, it appears that the award of attorneys' fees in the amount of \$8,630.00, included the original prelitigation claim of \$5,000.00 and an additional request for at least \$3,630.00 arising out of the prior litigation.

As the parties' agreement provides only for legal fees when petitioner prevails in litigation, the original amount sought by petitioner of \$5,000.00 is not authorized. In contrast, the additional amount of \$3,630.00, which the arbitrator directly linked to the prior lawsuit where petitioner prevailed is proper. Furthermore, as respondent seeks vacatur or modification of the Arbitration Award pursuant to CPLR 7511, its objection may be considered at this time (cf. *Davis Alarms*,

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*Inc. v Diamond Cutters, Inc.*, 25 Misc 3d 130(A) [Sup. Ct., App. Term, 2009]; *New York Merchants Protective Co. Inc. v Salloom Import & Export Corp.*, 18 Misc 3d 129(A) [Sup. Ct., App. Term, 2007]).

Where the agreement of the parties failed to provide for attorneys' fees arising from arbitration but such fees were awarded in arbitration, the arbitrator exceeded the scope of his or her powers and modification of the Arbitration Award is proper (*Matter of MKC Development Corp. v Weiss; CBA Industries, Inc. v Circulation Management, Inc.*, 179 AD2d 615, 616 [2d Dept. 1992]). In such a case, the arbitrator has made an award upon a matter not submitted to him (CPLR 7511(c)(2)). Even an offset will be rejected where attorneys fees are not expressly provided for in the arbitration agreement (*Myron Associates, Inc. v Obstfeld*).

Based on the foregoing, the Court hereby grants respondent's request for modification of the Arbitration Award by denying the attorneys' fees sought in the demand for arbitration, thereby reducing the total attorneys' fees awarded to \$3,630.00. Under these circumstances, the Arbitration Award is modified to provide for total damages of \$9,786.15 and is hereby confirmed.

As petitioner has prevailed in part in this second special proceeding, according to the Agreement respondent "shall" pay its attorneys' fees. Accordingly, the amount of reasonable attorneys' fees incurred by petitioner solely in commencing this special proceeding and opposing respondent's counter-petition shall be set down for a hearing.

This matter is referred to the Calendar Control Part (CCP) for a hearing on the issue of attorneys' fees to be held on November 10, 2010 at 9:30 a.m. Plaintiff shall file and serve a Note of Issue, if not previously filed, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order.

The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer [JHO], or a Court Attorney/Referee, as he or she deems appropriate. A JHO or Court Attorney/Referee shall not be used however unless said JHO or Court Attorney/Referee has the power to hear and determine -- and not merely hear and report (see CPLR Article 43).

This decision constitutes the order of the court.

Dated: 10-7-10

HON THOMAS P. PHELAN  
*[Signature]*  
J.S.C.

**ENTERED**  
OCT 13 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE