| **Ezrasons, Inc. v Quitman Mfg. Co., Inc.** |
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| 2007 NY Slip Op 34551(U) |
| February 23, 2007 |
| Supreme Court, New York County |
| Docket Number: 109825/05 |
| Judge: Marilyn Shafer |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 8

----------x,
EZRASONS, INC. INDEX NO. 109825/05

Petitioner,

-against-

QUITMAN MANUFACTURING COMPANY, INC.,

Respondent.
----------x



**MARILYN SHAFER, J:**

Petitioner moves to reargue this court's Decision and Order dated January 12, 2006, in which the court granted respondent's motion to permanently stay arbitration.

In the court's earlier decision, this court applied the holding in *Matter of Marlene Indus. Corp. (Carnac Textiles, Inc.)* (45 NY2d 327 [1978]) to find that the petitioner's inclusion of an arbitration clause in its shipping invoice did not constitute a binding clause in the forms which, together, spelled out the parties' agreement for the purchase of certain items of clothing.

Petitioner now moves to reargue, seeking to compel arbitration of the parties' dispute, claiming that *Marlene* was preempted by the Federal Arbitration Act, 9 USC § 2, et seq. (FAA).

In *Marlene,* the Court found that an arbitration clause that had been included in a confirmation invoice created a material alteration of the existing contract between merchants, absent explicit agreement by the recipient of the invoice, within the meaning of UCC 2-207. UCC 2-207 (2) applies where there is a consensus that a contract exists, but a disagreement as to what terms have been included in the contract. Under this section, additional terms are considered to be mere proposals for addition to the contract. Between merchants, the proposed additional terms become part of the contract, unless the proposed additional term is found to materially alter the contract. The Court in *Marlene* considered the public policy behind the

precedential case law, which required unequivocal assent to arbitration before imposing it upon a party, since arbitration involves the waiver of many substantive and procedural rights under state law:

> [I]t would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.

*Matter of Marlene Indus. Corp. (Carnac Textiles,Inc.),* 45 NY2d 327, 334 (1978) .

Under this "New York rule" an arbitration agreement in a commercial contract "should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet." *Id.* at 334 (citation and quotation marks omitted).

An arbitration clause, held the Court in *Marlene*, is a material addition to a contract, per se, which becomes part of the terms of the contract only if expressly assented to by both sides. *Id.*

The FAA provides that a written arbitration provision in a contract involving interstate commerce is valid and enforceable, except upon such grounds as exist in law or equity for the revocation of any contract. 9 USC § 2. Interpreting the clause "interstate commerce" in its broadest sense, where a contract containing an arbitration provision "affects" interstate commerce, disputes arising under the contract are subject to the FAA. *Matter of Diamond Waterproofing Systems, Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247 (2005). At least one federal court has found that the New York rule of per se materiality of an arbitration clause, as stated in *Marlene,* is inapplicable under the FAA, and that the party seeking to avoid arbitration must establish, by the preponderance of the evidence, that inclusion of the arbitration clause under circumstances similar to those present here, constitutes a material alteration as a matter of fact. *Aceros Prefabricados S.A.v TradeArbed, Inc.*, 282 F3d 92 (2nd Cir 2002).

New York courts are in agreement with the federal courts insofar as the reach of the FAA: where a contract is found to affect interstate commerce, the FAA preempts inconsistent state laws addressed to the enforceability of an arbitration agreement. *Matter of Diamond Waterproofing Systems, Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, (*supra*). However, even where preemption is found to exist, New York holds that preemption is directed only at those provisions of state law which actually conflict with the federal statute. *Matter ofJ.J's Mae, Inc. v H. Warshow & Sons, Inc.*, 277 AD2d 128 (1st Dept 2000). General principles of state contract law, such as a determination of whether the parties have entered into an agreement to arbitrate, have not been preempted. *Id.* The Court in *J.J.'s Mae* held that, even were it found that the per se rule in *Marlene* had been preempted by the FAA, the party seeking to enforce an arbitration term under these circumstances must establish the express awareness of the party against whom the clause is sought to be enforced. *Id.*

The original petition has not been attached to the motion to reargue. However, upon reargument, petitioner seeks to invoke the applicability of the FAA by alleging that this case involves "diversity" jurisdiction, since petitioner is a New York corporation, and respondent is a Pennsylvania corporation. While diversity jurisdiction may provide a sufficient jurisdictional basis for petitioner to prosecute its petition to stay arbitration in federal court, allegations of diversity between petitioner and respondent are insufficient to trigger the applicability of the FAA in this court.

Petitioner has failed to allege any facts which would tend to establish that the parties were engaged in interstate commerce, or that the parties' agreement affected interstate commerce. The FAA, therefore, is inapplicable to this case. Under the per se rule in *Marlene*, the arbitration clause included in petitioner's shipping invoice materially altered the parties'

agreement, without respondent's consent, and will not be enforced.

The motion to reargue is granted, and upon reargument, the court adheres to its original decision.

Dated: 2/23/07

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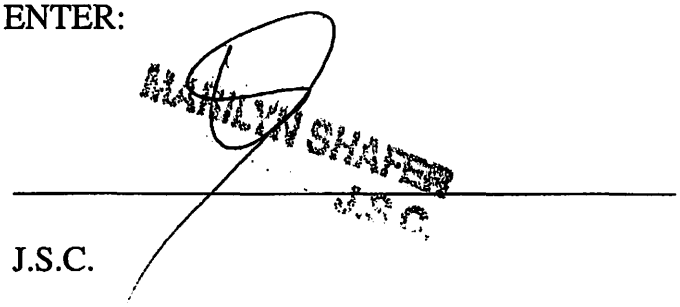

J.S.C.