

<b>Alpha Phone, Inc. v Verizon Servs. Corp.</b>
2009 NY Slip Op 30577(U)
March 12, 2009
Supreme Court, New York County
Docket Number: 109207/08
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Marcy S. Friedman  
*Justice*

PART 57

Alpha Phone

INDEX NO. 109207/08

- v -

MOTION DATE \_\_\_\_\_

Verizon

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

1, 1a

SUPP. BRIEF.  
Replying Affidavits \_\_\_\_\_

2

3, 4

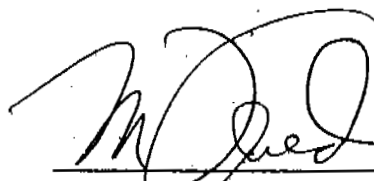
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 3/12/09

  
\_\_\_\_\_  
**MARCY S. FRIEDMAN** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x  
ALPHA PHONE, INC.

*Petitioner,*

Index No.: 109207/08

- against -

DECISION/ORDER

VERIZON SERVICES CORP.,

*Respondent.*

\_\_\_\_\_ x  
In this special proceeding, respondent Verizon Services Corp. (“Verizon”) moves to confirm an arbitration award. Petitioner Alpha Phone, Inc. (“Alpha Phone”) opposes confirmation and cross-moves for vacatur of the award, pursuant to CPLR 7511, on the ground of arbitral partiality.<sup>1</sup>

The underlying facts of this action are largely undisputed. Verizon and Alpha Phone entered into a contract, effective January 1, 2005, in which Verizon agreed to provide Alpha Phone with wholesale dialtone services. (See Ex. A to Verizon’s Letter Brief [Wholesale Advantage Services Agreement (“WASA”).] According to the contractual terms, the parties agreed to binding arbitration to resolve all disputes that arose out of the agreement. (*Id.*, § 18.) Billing disputes subsequently arose between the parties in which Verizon claimed that Alpha

\_\_\_\_\_ x  
<sup>1</sup>This proceeding was initially brought by Alpha Phone as a petition to compel arbitration and for an injunction in aid of arbitration. Verizon now moves for confirmation of the award. The designation of Alpha Phone and Verizon should follow the designation in the original caption. Alpha Phone thus remains the petitioner in this proceeding.

Phone had not paid its contract and tariff-based charges. Alpha Phone disputed the charges and alleged other breaches of the agreement.

During a September 11, 2008 conference call with the arbitrator and both parties, Verizon informed the arbitrator that it had paid Alpha Phone's share of the arbitration fees. (Alpha Phone's Cross-Motion, ¶ 3.) Alpha Phone asked the American Arbitration Association ("AAA") to remove the arbitrator but its request was denied by letter dated September 22, 2009. (*Id.*, ¶ 6.) On September 23, 2008, a day before the scheduled arbitration, Alpha Phone filed a separate petition (Index No. 112926/08) to disqualify the arbitrator and contemporaneously moved by Order to Show Cause for a temporary restraining order ("TRO") to stay the arbitration pending determination of the petition to disqualify. (Alpha Phone's Cross-Motion, Ex. 1.) That same day, this court denied Alpha Phone's request for a TRO based on its failure "to allege facts showing bias of the arbitrator." (*Id.*, Ex. 2.)<sup>2</sup> Accordingly, the parties proceeded to arbitration on September 23, 2008, and the arbitrator issued an award in Verizon's favor on October 28, 2008. (Verizon's Motion, Ex. 1.)

As an initial matter, the parties dispute whether the Federal Arbitration Act ("FAA") or New York law governs the enforcement of the arbitration award. The provisions of the contract on which the parties rely do not clearly state whether the FAA or state law is applicable to this proceeding. Verizon contends that the FAA applies and that the FAA imposes a more stringent standard than the CPLR by requiring a showing of "evident partiality" on the part of the arbitrator in order to vacate the award. (See Milliken & Co. v Tiffany Loungewear Inc., 99

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<sup>2</sup>This court issued the order to show cause and scheduled a control date of October 16, 2008. However, Alpha Phone voluntarily discontinued the petition, and sought to reserve its right to oppose confirmation of the award. (Aff. Of Martin Stein in Support of Alpha Phone's Cross-Motion, ¶ 9.)

[\* 4 ]

AD2d 993 [1<sup>st</sup> Dept 1984], app dismissed 63 NY2d 773.) However, the court need not reach this issue because even assuming arguendo that New York law applies, Alpha Phone does not establish a basis for vacatur under CPLR 7511.

Pursuant to CPLR 7511(b)(1)(ii), an arbitration award should be vacated if one party was prejudiced by “partiality of an arbitrator appointed as a neutral.” The “party seeking to vacate the ultimate award must meet a heavy burden.” (North Syracuse Cent. School Dist. v North Syracuse Educ. Assn., 45 NY2d 195, 200 [1978].)

There is authority that grounds for disqualification may exist where an arbitrator is given information regarding payment of fees. Courts have found an appearance of bias where there was evidence that a party was prejudiced or denied a fair hearing as a result of an arbitrator’s knowledge that that party had failed to pay its portion of the arbitration fees. Thus, in Coty Inc. v Anchor Constr. Inc. (2003 NY Slip Op 50013[U] [2003], affd 7 AD3d 438 [1<sup>st</sup> Dept 2004]), the court found that an appearance of bias existed where, within two days of learning that one party had paid the arbitration fees but the other party had not, “the panel produced a decision declaring that it would consider [the paying party’s] evidence alone and bar [the nonpaying party’s] participation in the proceeding.” (Id. at \*5.) Similarly, Matter of Grendi v LNL Constr. Mgt. Corp. (175 AD2d 775 [1<sup>st</sup> Dept 1991]) held that the arbitrators should have been disqualified where the petitioners were asked by the arbitration case administrator to pay the respondent’s share of the fees because respondent was unable to pay, the petitioners declined to agree, and their position was conveyed to the arbitrators by the case administrator. The court found that the petitioners “should not have been placed in a position where they would feel compelled to accede” to the request or face “adverse consequences.” (Id. at 777.)

\* 5 ]

However, there is “no per se rule that such communications [regarding fees] constitute misconduct . . . [and] the particular facts and circumstances of each case must be examined to reach an appropriate determination.” (Matter of Montague Pipeline Techs. Corp. v Grace-Lansing & Grace Indus., 238 AD2d 510 [2<sup>nd</sup> Dept 1997] [internal citations omitted]; Matter of Goldfinger v Lisker, 68 NY2d 225 [1986].)

Thus, courts have held that, in the absence of a factual showing of prejudice or unfairness, discussions with arbitrators concerning fees were insufficient, without more, to support a finding of an appearance of bias. (See Matter of Montague, 238 AD2d at 510.) Recently, in Matter of NTSE Communications Inc. v MCI Worldcom Intl. Inc. (17 Misc 3d 1130[A] [Sup Ct, New York County 2007]), this court held that the party claiming bias failed to establish “an appearance of impropriety or call[] into question the arbitrator’s impartiality” where that party only made “conclusory assertion[s] that the communication to the arbitrator [regarding fees] was prejudicial” and did not support its contention with any evidence of prejudicial misconduct, such as evidence that the nonpaying party was precluded from presenting its case at the arbitration. (Id. at \*3, \*5.)

Alpha Phone does not submit any evidence of an appearance of bias based on the communication to the arbitrator that Verizon paid Alpha Phone’s portion of the arbitration fees. Here, the arbitrator did not request payment of fees, but was merely informed that one party had paid its opposition’s share of the fees and would seek reimbursement subsequently. There is not any evidence that the arbitrator penalized Alpha Phone as a consequence of its non-payment. Alpha Phone also does not submit any authority that the arbitrator’s refusal to permit a stenographic record evidences bias. Accordingly, Alpha Phone does not make a showing

[\* 6 ]  
sufficient to warrant vacatur of the arbitration award.

It is accordingly hereby ORDERED that the cross-motion of Alpha Phone, Inc. to vacate the arbitration award dated October 28, 2008 is denied; and it is further

ORDERED that the award, dated October 28, 2008, rendered in favor of respondent Verizon Services Corp. and against petitioner Alpha Phone, Inc. is confirmed.

Settle judgment, and include a copy of the arbitration award and a copy of this order.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 12, 2009

  
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MARCY FRIEDMAN, J.S.C.