Choy v Verizon N.Y. Inc.
2009 NY Slip Op 31625(U)
July 16, 2009
Supreme Court, New York County
Docket Number: 602752/2006
Judge: Paul G. Feinman
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SCANNED ON 7/22/2009
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN, Justice — PART 12

Choy

- v -

Verizon

INDEX NO. 602752/06

MOTION DATE 4/8/09

MOTION SEQ. NO. 04

MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED
JUL 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/16/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
---X
DANIEL S. J. CHOY, M.D. and DANIEL S.J. CHOY, M.D., P.C., d/b/a the LASER SPINE CENTER,
Plaintiff,

against

VERIZON NEW YORK INC. and VERIZON INTERNET SERVICES INC.,
Defendants.
---X

Index Number 602752/2006
Submission Date April 2, 2009
Mot. Seq. No 004

DECISION AND ORDER

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JUL 22 2009
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NEW YORK

Papers considered in review of this motion to compel arbitration:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Plaintiff's Affidavit in Opposition	2
Plaintiff's Memorandum of Law	3
Defendant's Reply Affirmation	4

PAUL G. FEINMAN, J.:

Plaintiffs, Daniel S.J. Choy, M.D. and Daniel S.J. Choy, M.D., P.C., doing business as the Laser Spine Center (hereinafter collectively referred to as "Choy"), originally brought suit in August 2006 against defendants Verizon New York Inc. ("Verizon NY") and Verizon Internet Services Inc. ("Verizon Internet") for an alleged breach of contract as well as gross negligence and willful misconduct. (Mot. Ex. A, D). Verizon Internet now moves to compel arbitration pursuant to the "Verizon Online Terms of Service" agreement allegedly entered into by the parties. Verizon NY has not appeared on the motion.

According to the amended complaint, on about December 19, 2005, Choy, a long-established medical office, contacted Verizon to request that its phone, fax, and DSL services provided by Verizon be transferred from Choy's original business address at East 77th Street to its new business address at East 80th Street, effective December 31, 2005. (Mot. Ex. D [hereinafter "Amended Complaint"] ¶¶ 8, 12).[1] Choy allegedly gave "numerous warnings that continuous telephone, fax and e-mail service were essential to plaintiffs' business" (Pl. Memo of Law in Opp. p. 2). Choy claims that, on December 21, 2005, Verizon disconnected the services at East 77th Street, namely the local telephone number and toll-free number, the fax and DSL lines, rather than transferring them to the new address at East 80th Street. (Amended Complaint ¶¶ 14,15). As a result, Choy avers that "[p]eople were led to believe that Choy had died or retired, or that Laser Spine Center had gone out of business." (*Id.*). Choy was then provided a temporary telephone number, but claims to have continued to call and request, on a daily basis, that Verizon re-connect their original services prior to their move (Amended Complaint ¶¶ 16,17). According to Choy, Verizon did not respond to their requests until January 3, 2006, when two Verizon employees came to the new office, but failed to resolve the issue (Amended Complaint ¶18). According to Choy, the office only recovered proper phone service on January 18, 2006, and DSL services on January 23, 2006, at great cost to their business. (Amended Complaint ¶¶ 20, 22-32).

Choy commenced this action on August 7, 2006, by filing a summons and complaint against Verizon Communications, Inc. (Mot. Ex. A). On May 15, 2007, a stipulation was entered into whereby defendants Verizon New York, Inc. and Verizon Internet Services, Inc. replaced

[1]The complaint does not make clear which Verizon office was contacted.

defendant Verizon Communications, Inc., and an amended complaint was thereafter filed and served naming the proper defendants (Mot. Ex. C, D). Verizon NY subsequently filed an answer to the amended complaint. Verizon Internet did not answer, but filed a motion to compel arbitration which was granted on default on August 21, 2007, but vacated without opposition on December 1, 2008 (County Clerk's File).

Verizon Internet moves again to compel arbitration, based on the contractual agreement between the parties requiring arbitration (Mot. Ex. E, Verizon Online Terms of Service ¶ 15). It argues that plaintiffs were advised of the Terms of Service in a standard form email which was dated January 6, 2006 (Mot. Ex. F). It submits a copy of the email, addressed to "Marlene Hersey" at an aol.com address, which in the third paragraph includes the statement that a customer's use of Verizon services constitutes acceptance of the terms (Mot. Ex F). Verizon Internet argues that this email, along with a hard copy of the Terms of Service contained in a Fulfillment Kit mailed to Choy at the time service was initiated, was sufficient to apprise plaintiffs that they were governed by the Terms of Service, including the mandatory arbitration provision. (Mot. Schechter Aff. ¶ 7, citing Roberson Affid.). Verizon Internet argues that plaintiffs may not argue that they did not have notice of the arbitration provision, as it was part of the Terms of Service which they agreed to abide by at the time they commenced using Verizon Internet's services.

In a motion to compel arbitration pursuant to CPLR 7503, the court must address two threshold questions. First is to determine if there exists a "substantial question whether a valid agreement was made or complied with." (CPLR 7503[a]). Second is whether the motion was made in a timely fashion (*Id.*). "The threshold question of whether a matter is subject to arbitration must be determined from the terms of the agreement containing the arbitration

clause." (*A.F.C.O. Metals v Local Union 580 of the Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL-CIO*, 87 NY2d 222, 226 [1995]). The agreement to arbitrate must be "express, direct, and unequivocal." (*A.F.C.O.*, at 226, quotation, citation omitted). When a disputed issue of fact exists as to whether or not an agreement containing an arbitration clause has been ratified by the parties to the contract, "a trial or evidentiary hearing is required" (*Burbank Broadcasting Co. v Roslin Radio Sales, Inc.*, 99 AD2d 976 [1st Dept 1984] [holding that when, on application to stay arbitration, an issue of fact exists as to whether or not a party has agreed to be bound by a contract, an evidentiary hearing must be held]).

The question before this court is whether the two parties can be found to have reached an agreement at all. Verizon Internet relies on the non-notarized statement of a Group Manager in the Legal Compliance section for VerizonOnline, which handles DSL, FiOs, dedicated internet access, and certain other products (Mot. Roberson Affid. ¶ 1). Her unsworn statements, which are not in admissible form, are that she reviewed the records and determined that the plaintiffs "initiated service" with Verizon in "about January of 2006," and that a standard form email was sent at that time to confirm the initial order for DSL and to refer the customer to the Terms of Service (Mot. Roberson Affid. ¶ 2). A hard copy of the Terms of Service was also mailed at the same time (Mot. Roberson Affid. ¶ 3).

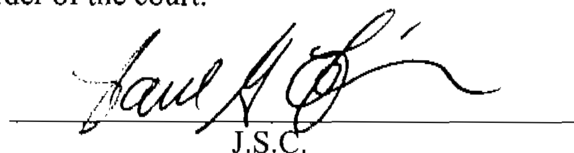
Neither Verizon Internet, nor plaintiffs, proffer any evidence of an agreement between the parties *prior to January 6, 2006*, which is after the date of the alleged breach of contract. Although plaintiffs ares not the movant, it would have been in their interest to have presented evidence of DSL services provided by Verizon prior to the alleged breach of contract on December 21, 2005. For its part, Verizon Internet submits what appear to be partially relevant documents that are dated *after* the breach allegedly occurred. Even then, the parties dispute

whether the confirmation email that included notification of the terms of service was sent to Choy or to Marlene Hersey in an individual capacity. In any event, Verizon Internet has not conclusively established its right to compel arbitration.

When an issue exists as to whether or not the exists a valid instrument mandating arbitration to which both parties have agreed, a trial is required (CPLR 7503 [a]; *see Wander Iron Works, Inc. v Wilaka Constr. Co.*, 38 AD2d 529 [1st Dept 1971]; *RLC Electronics, Inc. v American Electronics Laboratories, Inc.*, 39 AD2d 757 [2d Dept 1972]). Accordingly it is

ORDERED that all parties shall appear for a conference on August 12, 2009 at 9:30 a.m., at which time any outstanding discovery items shall be addressed.

This constitutes the decision and order of the court.



Dated: July 16, 2009
New York, New York

J.S.C.

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