

<b>Verizon N.Y. Inc. v Intergate Manhattan LLC</b>
2017 NY Slip Op 31731(U)
August 15, 2017
Supreme Court, New York County
Docket Number: 655176/2017
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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**VERIZON NEW YORK INC.,**

**Petitioner,**

**- against -**

**INTERGATE.MANHATTAN LLC,**

**DECISION AND ORDER  
Index No. 655176/2017  
Mot. Seq. Nos.: 001**

**Respondent.**

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**O. PETER SHERWOOD, J.:**

This is a petition to stay arbitration pursuant to CPLR 7503(b) and § 34 of the 2007 Declaration of Condominium. Verizon New York Inc. (Verizon) and Intergate Manhattan LLC (Intergate) own five commercial units in an office building at 375 Pearl Street. Verizon owns four units (the eighth, ninth, and tenth floors, and the cable vault unit) as well as 10.84% of the common interest of the building. Intergate owns the “Principal Unit” which comprises the remainder of the building and 89.16% of the common interest.

The condominium was created pursuant to a November 2007 Declaration of Condominium (as amended, the Declaration) which contains limitations on the sale of units. Units, except for the Principal Unit, may not be subdivided without the consent of the other owner. The Declaration has a specific provision giving the Owner of the Principal Unit the right to subdivide and sell subunits. According to Verizon, in or about 2011, the parties learned that the method set out in the Declaration for subdividing the Principal Unit was not allowed by law. Beginning at or about that time, they discussed options for amending the Declaration to create a new process into 2016, when Intergate served Verizon with a proposed amendment to the Declaration. Thereafter, Verizon demanded certain changes but no agreement was reached.

In July 2017, Intergate asserted the right to arbitrate before the AAA. Intergate asserted that Article 34H of the Declaration was a mutual mistake and does not comport with New York law, and that Verizon wrongfully refused to agree to a replacement clause. Intergate proposes a Second Amendment to the Declaration which changes the procedure for dividing the Principal Unit and makes other changes. Verizon declined to accept the changes. Intergate’s arbitration Notice and Statement of Claim asserts that Verizon does not object to subdivision of the Principal

Unit. It claims Verizon breached the contract and the implied covenant of good faith and fair dealing by refusing to consent and to cooperate with Intergate's efforts to sell new units, instead insisting on other unrelated amendments which would give Verizon additional rights. In its arbitration Notice and Statement of Claim, Intergate seeks a declaratory judgment, specific performance, and damages.

Verizon asserts various defenses, including that all of Verizon's actions were permitted and contemplated by the contract, that the proposed Second Amendment would be a major substantive change to the Declaration, regarding which Verizon has no obligation to accept, and that the claim for damages is barred by the Declaration. Verizon also argues that Intergate's claim is barred by the statute of limitations, as the claim is really one for reformation of the contract, which accrued more than six years ago when the contract was made.

### **Verizon's Motion**

Verizon argues that Intergate's demand for arbitration must be permanently stayed because there is no agreement to arbitrate this type of claim. Article 9 of the By-Laws provides for arbitration in three circumstances, including when arbitration is expressly required or permitted by the Declaration or By-Laws, and states that, except as expressly provided in the By-Laws or Declaration, "no dispute shall be referred to arbitration." Article 34H(ix) of the Declaration provides a process for amending the Declaration and By-Laws, and provides that "disputes as to whether any changes [to a proposed amendment to the Declaration and By-Laws] requested by the [Verizon] Units Owner are necessary . . . shall be resolved by expedited arbitration." This dispute is not about proposed changes to a proposed amendment to the Declaration.

Intergate contends that arbitration is appropriate because this claim is about a proposed amendment. Pursuant to the Declaration, Article 34H(ix), Intergate prepared an amendment to the Declaration and provided it to Verizon in May 2016. The Declaration gives Verizon the ability to request changes to a proposed amendment solely to ensure that Verizon retains the same level of protection as under the original Declaration. The changes proposed by Verizon in June 2016 would have provided Verizon with additional rights. By even making this request, Verizon is in breach of the Declaration. Article 34H was drafted with the intent that Verizon could not hold up amendment of the Declaration (and thus the division of the Principal Unit) by demanding additional rights or benefits. Verizon's breach of the Declaration and By-Laws by its refusal to

approve the amendment without getting additional rights, did not occur until June 2016. Accordingly, making this action timely.

### Discussion

CPLR 7502(b) provides that:

“If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court”

CPLR 7503(b) allows “a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation”

In determining whether to stay or compel arbitration, the court must resolve three narrow questions, namely, (1) whether the parties made a valid agreement to arbitrate; (2) if such agreement was made, whether the subject dispute falls within the scope of the arbitration agreement; and (3) whether the claim would have been barred by the limitation of time had it been asserted in State court (see, CPLR 7503 [a]; *Matter of County of Rockland [Primiano Constr. Co.]*, 51 NY2d 1, 7 [1980]). Only the first element is undisputed.

Article 34H(ix) provides that the “Declaration . . . shall be amended solely for the purposes of reflecting [the provisions of Art. 34H] and allowing [Verizon] to have at least the same level of protection . . . as [Verizon] currently has under this Declaration” (emphasis added). According to Article 34H, Intergate’s amendment must be accepted (assuming the proposed change does not propose changes outside the parameters of that section), except for any changes proposed by Verizon solely to maintain its rights. As there is a dispute about the efficacy of the second amendment and the changes proposed by Verizon, these issues fall squarely within the scope of the arbitration clause. While Verizon casts the claim as one for a time-barred reformation of the Declaration, the claim Intergate asserts is to require compliance with the contemplated process for amending the Declaration set forth in Article 34H(ix). It provides that “[t]he form of any proposed amendment . . . may be submitted at any time”.

Intergate is not seeking reformation of the Declaration in the arbitration. Rather, it is seeking to arbitrate a dispute as to whether the changes demanded by Verizon are necessary to

preserve the level of protection Verizon enjoys under the existing Declaration and By-Laws. Intergate's claim accrued in 2016 and is timely.

The motion to stay arbitration is denied, as the underlying claim is appropriate for arbitration under Article 34H(ix) of the Declaration. The arbitrator shall determine which, if any, of the claims or defenses are not arbitrable.

Accordingly, it is hereby

**ORDERED and ADJUDGED** that the petition to stay arbitration is DENIED and the parties are directed to proceed to arbitration as provided for in the Declaration of Condominium.

This constitutes the decision and order of the court.

**DATED: August 15, 2017**

**ENTER,**



**O. PETER SHERWOOD J.S.C.**