

DISTRICT COURT OF THE COUNTY OF SUFFOLK, FIRST DISTRICT

Present:

HON JAMES P. FLANAGAN
JUDGE

Return Date FEBRUARY 27, 2008

NEW YORK MERCHANTS PROTECTIVE CO., INC.

Petitioner

AGAINST

NEW YORK PRECISION EQUIPMENT, INC.

Respondent

Upon the following papers numbered 1 to 11 read
on this petition to confirm an arbitration award
Notice of petition, petition and affirmation 1, 2, 3 ;
Notice of cross petition, cross petition, and affirmation 4, 5, 6 ;
Affirmation in opposition 7 (petitioner) ;
Reply affidavit 8 (respondent) ;
Other Exhibits 9, 10, 11 ;

(and after hearing counsel in support of and opposed to the application) it is,

ORDERED that the petition is granted (UDCA § 206(b), CPLR § 7510) and the cross petition by respondent to vacate the arbitration award is denied. Petitioner also is awarded attorney's fees in the amount demanded, \$750. This proceeding is timely, petitioner has demonstrated its entitlement to confirmation of the arbitration award, and in its cross motion respondent has not shown a basis exists, even arguably, for denying petitioner the confirmation of its arbitration award and vacating the award.

In its cross petition, respondent seeks to vacate the award pursuant to CPLR § 7511(b)(1)(iii), which in pertinent part is that the arbitrator exceeded his power. Respondent asserts the arbitrator exceeded his power in that he "did not have a valid contract/agreement to arbitrate" (Cross petition, p 2, ¶ 9; Respondent's reply affidavit, p 1, ¶ 4). However, this ground to vacate can be raised only by a party who satisfies two criteria. First, the party did not participate in the arbitration, and second, the party was not served

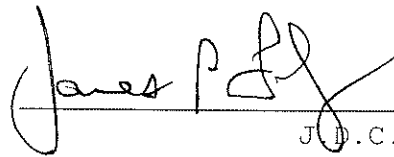
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with a notice to arbitrate (CPLR § 7511(b)(2)(ii)). Although respondent satisfies the first criterion, nonparticipation in the arbitration, it does not satisfy the second (see Respondent's reply affidavit, p 3, ¶ 16), and so it may not raise the absence of a valid agreement to arbitrate ground to vacate.

Respondent asserts in the alternative that the arbitration award should be vacated because it possesses an affirmative defense predicated on the statute of frauds (Affirmation of defense counsel for attorney's fees, 2/12/2008, ¶ 9). However, the existence of such a defense does not constitute one of the grounds for vacating an arbitration award available to respondent (see CPLR § 7511(b)(1)).

Accordingly, as noted earlier, the petition to confirm the arbitration award is granted and the cross petition is denied.

Dated: 3-27-08



J.D.C. #82

Order not to be published on line.

MAILED APR 01 2008