Civil Court of the City of New York
County of Queens
Part 32

D&W CENTRAL STATION FIRE ALARM CO., INC.,

Plaintiff(s),

against

26-44 BOROUGH, INC. D/b/a CASINO NY , and BEDROS SARKISSIAN,

Defendant(s),

Index Number 45563/2007
Motion Cal # 16,17 **Motion Seq. #**

Papers Submitted to Special Term on September 6, 2007.

DECISION/ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion by the plaintiff D&W CENTRAL STATION FIRE ALARM CO, INC. ("D&W") for an order confirming the arbitration award dated March 6, 2007 and a cross-motion by defendant 26-44 BOROUGH, INC. ("Borough") for an order vacating the arbitration.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service...	1
Notice of Cross-Motion-Affirmation-Exhibits-Service	2
Reply Affirmation-Service.....	3

Defendant claims that he never signed the within agreement to purchase services from the plaintiff, that he never personally guaranteed the debt, nor did he agree to arbitrate the within dispute. For the reasons that follow, this Court rejects defendant's contentions, and confirms the arbitration award:

To grant a petition to confirm an arbitration award on a credit card debt, a court must require the following: (1) submission of the written contract containing the provision authorizing arbitration; (2) proof that the cardholder agreed to arbitration in writing or by conduct; and (3) a demonstration of proper service of the notice of the arbitration hearing and of the award. In addition, the court must consider any supplementary information advanced by either party regarding the history of the parties' actions. Arbitration is favored in New York State as a means of resolving disputes, and courts interfere as little as possible with agreements to arbitrate (*see*

Matter of Smith Barney Shearson v Sacharow, 91 NY2d 39, 49 [1997]; *Dazco Heating & A.C. Corp. v C.B.C. Indus.*, 225 AD2d 578, 579 [2d Dept. 1996]). There is, however, a substantial countervailing consideration: "by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State" (*Matter of Marlene Indus. Corp. [Carnac Textiles]*, 45 NY2d 327, 333 334 [1978]). For that reason, "a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes'" (Matter of Waldron [Goddess], 61 NY2d 181, 183 [1984] *quoting Schubtex, Inc. v Allen Snyder, Inc.*, 49 NY2d 1, 6 [1979]; *see TNS Holdings v MKI Sec. Corp.* 92 NY2d 335, 339 [1998]). "The agreement must be clear, explicit and unequivocal" (*Matter of Waldron [Goddess], supra*; *see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]; *Matter of Miller*, 835 NYS.2d 728 [2d Dept. 2007]).

An arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract. *(See God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP, supra*).

In terms of the personal guarantee, the defendant failed to raise a triable issue of fact in opposition by his conclusory assertions that he did not sign the guarantee. (*See Beitner v Becker*, 34 AD3d 406 [NY App. Div. 2006]). "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (*Banco Popular N. Am. v Victory Taxi Mgmt.*, 1 NY3d 381, 384 [2004]; *see Acme American Repairs, Inc. v Uretsky*, 39 AD3d 675 [2d Dept. 2007]; *North Fork Bank Corp. v Graphic Forms Assocs.*, 36AD3d 676 [2d Dept. 2007]; *Bronsnick v Brisman*, 30 AD3d 224 [1st Dept. 2006]; *JP Morgan Chase Bank v Gamut-Mitchell, Inc.*, 27 AD3d 622, 623 [2d Dept. 2006]; *Peyton v State of Newburgh, Inc.*, 14 AD3d 51, 54 [1st Dept. 2004]). The Court notes that the agreement is signed in printed letters, while defendant's affidavit is signed in cursive, thereby affording the Court no opportunity to reliably compare the signatures, and thereby providing no evidence to substantiate the defendant's claim that he did not sign.

Even were the agreement unsigned, the Court would nevertheless be constrained to enforce its terms. The Statute of Frauds, which requires that a personal guarantee be reduced to writing, was designed to guard against the peril of perjury; to prevent the enforcement of

unfounded fraudulent claims. But, as Professor Williston observed: "The Statute of Frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly, made" (4 Williston, Contracts [3d ed.], § 567A, pp. 19-20).

The doctrine of part performance, codified in General Obligations Law 5-703(4), is based upon the equitable principle that it would be fraud to allow the party asserting the Statute of Frauds to escape performance after permitting the other party seeking to enforce the agreement to perform in reliance upon the agreement (*see Messner Vetere Berger McNamee, Schmetterer Euro RSCG, Inc. v Aegis Group PLC*, 93 NY2d 229, 235 [1999]). It is uncontroverted that the plaintiff installed an alarm system in the defendant's premises, and performed monitoring services. The fact that the defendant's business was forced to close when the premises went into foreclosure, in no way militates in favor of permitting the defendant to avoid its obligations under executory contracts. It would be inequitable, after the plaintiff performed in reliance upon the contract, to permit the defendant, after accepting performance without objection, to assert the lack of a signed written agreement (*see Morris Cohon & Co. v Russell*, 23 NY2d 569 (NY 1969); *Cole v Macklowe*, 40 AD3d 396 [1st Dept. 2007]; *Concordia Gen. Contr. v Peltz*, 11 AD3d 502 [2d Dept. 2004]).

In *Matter of Kennelly v Mobius Realty Holdings* LLC, 33 AD3d 380 [1st Dept. 2006], cited by defense counsel as support to defendant's position in this matter, the defendant claimed that the signature was either a forgery or was obtained through fraud in the execution. The court found that the purchaser's affidavit sufficiently detailed the circumstances constituting the alleged fraud under CPLR §3016(b). Implicit in its decision was a finding that the circumstances surrounding the transaction smacked of fraud. Such is not the case at bar, wherein defendant denies signing the agreement, but makes no assertions of forgery or fraud as to the signature that appears on the contract in question, including the personal guarantee. In addition, defendant does not claim that it did not receive the services claimed, that an alarm system was not installed on its premises on October 4, 2006, or that it objected to the invoice dated January 17, 2007 covering services from November 1, 2006 through November 30, 2006, which included an advance payment credit to the defendant of $500.00 .

Thus, the Court finds that the defendant by its signature and by its conduct accepted the agreement to arbitrate that it was properly served with the demand for arbitration in conformity with the rules of the arbitration forum. Defendant failed to stay arbitration, and was served properly with a copy of the award.

Accordingly, the arbitration award of $14,498.77 is granted, along with reasonable attorney's fees of $750.00. The judgment clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

Date: 12-13-07

HON. THOMAS D. RAFFAELE
Judge, Civil Court