

ASH

At a term of the Appellate Term of the Supreme Court
of the State of New York for the 2nd, 11th & 13th Judicial Districts

OCT 13 2009

MICHAEL L. PESCE, P.J.
JOSEPH G. GOLIA
MARSHA L. STEINHARDT, JJ.

SEPTEMBER 17, 2009 TERM
2008-01968 Q C

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DAVIS ALARMS, INC.,

Appellant,

-against-

Lower Court #
30148/08

DIAMOND CUTTERS, INC.
and YONA HERSHKOWITZ,

Respondents.

-----X

The above named appellant having appealed to this court from a **DECISION** of the **CIVIL COURT, CITY OF NEW YORK, QUEENS COUNTY** dated **AUGUST 21, 2008**, deemed an appeal from a **JUDGMENT** of the same court, entered **OCTOBER 16, 2008** and the said appeal having been **submitted** by **GENE W. ROSEN, ESQ.** counsel for the appellant and **NO BRIEF SUBMITTED** for the respondents and due deliberation having been had thereon; it is hereby,

ORDERED AND ADJUDGED that the judgment is reversed without costs and judgment is directed to be entered confirming the arbitrator's award of \$5,043.06.

Pesce, P.J., Golia and Steinhardt, JJ., concur.

GENE W. ROSEN, ESQ.
KIRSCHENBAUM & KIRSCHENBAUM, P.C.
200 GARDEN CITY PLAZA, #500
GARDEN CITY, NEW YORK 11530

DIAMOND CUTTERS, INC.
36 WEST 47TH STREET, ROOM 1603
NEW YORK, NEW YORK 10036

ENTER:



PAUL KENNY
CHIEF CLERK
APPELLATE TERM

YONA HERSHKOWITZ
1220 43RD STREET
BROOKLYN, NEW YORK 11219

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 2nd, 11th and 13th JUDICIAL DISTRICTS

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PRESENT : PESCE, P.J., GOLIA and STEINHARDT, JJ.
-----X

DAVIS ALARMS, INC.,

Appellant,

-against-

OCT 13 2009

NO. 2008-1968 Q C

DECIDED

DIAMOND CUTTERS, INC.
and YONA HERSHKOWITZ,

Respondents.
-----X

Appeal from a decision of the Civil Court of the City of New York, Queens County (Diccia T. Pineda-Kirwan, J.), dated August 21, 2008, deemed from a judgment of the same court entered October 16, 2008 (see CPLR 5520 [c]). The judgment, in effect, modified an arbitrator's award by reducing the amount awarded to petitioner from the sum of \$5,043.06 to the principal sum of \$3,993.06, and confirmed the award as modified.

ORDERED that the judgment is reversed without costs and judgment is directed to be entered confirming the arbitrator's award of \$5,043.06.

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Petitioner commenced the instant special proceeding to confirm an arbitrator's award. Respondents had failed to appear at the arbitration, and the arbitrator had issued an award in favor of petitioner against respondents jointly and severally in the total sum of \$5,043.06, which included attorney's fees in the sum of \$1,050. The Civil Court modified the award by deducting the amount of attorney's fees awarded to petitioner, on the ground that the parties' agreement provided for the payment of legal fees only in the event there was "litigation between the parties." The court reasoned that petitioner was not entitled to attorney's fees since it opted to arbitrate the dispute rather than to litigate it.

On appeal, petitioner contends that the Civil Court was not authorized to modify the award under the circumstances presented. We agree. CPLR 7510 states that "[t]he court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." No party moved to vacate or modify the award pursuant to CPLR 7511, and the criteria for modifying the award pursuant to CPLR 7511 (c) are not met in this case.

"Once a case is referred to arbitration, 'all questions of fact and of law are within the judicially unreviewable purview of the arbitrator'" (Matter of Raisler Corp. [New York City Hous. Auth.], 32 NY2d 274, 282 [1973], quoting Matter of S & W Fine

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Foods [Office Empls. Intl. Union, Local 153, AFL-CIO], 8 AD2d 130, 131 [1959], affd 7 NY2d 1018 [1960]). Since the Civil Court was without authority to modify the arbitrator's award on the proffered ground (see also New York Merchants Protective Co., Inc. v Salloom Import & Export Corp., 18 Misc 3d 129[A], 2007 NY Slip Op 52458[U] [App Term, 2d & 11th Jud Dists 2007]), we reverse the judgment and direct that judgment be entered confirming the arbitrator's award of \$5,043.06.

We note that no issue has been raised on this appeal concerning the Civil Court's implicit denial of petitioner's demand for the additional attorney's fees incurred in maintaining this proceeding.

Pesce, P.J., Golia and Steinhardt, JJ., concur.