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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**NEW YORK MERCHANTS PROTECTIVE
CO., INC.**

**Motion Sequence #1
Submitted February 24, 2009
XXX**

Petitioner,

-against-

INDEX NO: 22487/08

EDDIE RIVERA,

Respondent.

The following papers were read on these petitions:

Notice of Petition and Petition (#1).....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Petitioner, NEW YORK MERCHANTS PROTECTIVE CO., INC. (hereinafter referred to as "NY MERCHANTS"), moves, pursuant to CPLR §7510, for an Order confirming the Award of the Arbitrator, dated November 4, 2008, and directing that judgment be entered thereon. An Affidavit of Service reflects that respondent, EDDIE RIVERA (hereinafter referred to as "RIVERA") was duly served with the instant petition and supporting papers. Indeed, respondent opposes the petitioner's application to confirm the Arbitrator's Award, which is determined as follows:

The underlying action in this matter involves an agreement entered into between petitioner and respondent on April 2, 2008 (hereinafter referred to as the "Agreement"). Respondent, RIVERA, signed the Agreement in his individual capacity on behalf of a non-existent business entity, to wit: Café Havana Bar & Grill. On April 22, 2008, respondent breached the Agreement by failing to make the payment due on that date or any payments due thereafter. As a result, pursuant to the Agreement, petitioner served its demand for arbitration, on the respondent on October 14, 2008. Respondent failed to answer the demand for arbitration and thus, in accordance with the arbitration rules that respondent consented to by signing the Agreement with the Petitioner, the respondent was deemed to be in default.

The duly appointed Arbitrator, Allan J. Pullin, in his decision and Award dated November 4, 2008, and affirmed on November 5, 2008, determined that respondent owed the petitioner the sum of \$30,116.60, with interest from April 22, 2008, in the sum of \$1,355.25 as provided in the Agreement between the parties, plus attorneys fees of \$9,000.00, together with costs of arbitration proceeding in the sum of \$301.16, for a total of \$40,773.01, and the costs and disbursements of this action (hereinafter referred to as the "Award"). Said Award was delivered to the petitioner and to the respondent, by the Arbitrator on November 5, 2008. This petition, having been brought within one year of the aforesaid delivery of the Award to petitioner, seeks to confirm the Arbitrator's Award.

In opposition, respondent, RIVERA, argues that the petition, as well as the Award should be dismissed because petitioner failed to demand arbitration from the corporate entity and instead only sought to arbitrate its claims from the personal guarantor. Respondent also argues that there is no proof of service of the Demand for Arbitration

upon EDDIE RIVERA. Further, RIVERA argues that pursuant to the Agreement, the National Arbitration Association was required to arbitrate the dispute, not Arbitration Services, Inc. Respondent also argues that even if this Court affirms the Award, petitioner's request for attorneys fees, as well as the attorneys fees awarded by the Arbitrator must be denied, because not only did the Arbitrator erroneously award an additional \$9,000.00 in legal fees when there was a contingency fee agreement in place between petitioner and its counsel, but also that petitioner failed to annex a copy of his firm's retainer agreement to the petition, thus providing no documentary proof of the attorneys' fees claimed.

In reply, petitioner asserts that respondent can no longer apply to vacate or modify the Arbitrator's Award because more than 90 days have elapsed since the delivery of the Award to him. Petitioner further maintains that as the respondent fails to present any grounds for which the Award should be vacated or modified, the Award should be confirmed. As to respondent's argument that the petitioner should proceed against the corporation prior to filing a claim against RIVERA personally, petitioner argues that in the absence of any disclosure at the time the parties entered into the contract that RIVERA was acting on behalf of a corporate principal, respondent became personally liable under the contract. Petitioner argues that because respondent has failed to disclose the corporate entity he alleges he purportedly signed on behalf of, he is personally liable. Further, petitioner argues that even if the proper corporate entity had been disclosed, respondent is still liable because he personally guaranteed the contract. Petitioner additionally submits that respondent was properly served with the demand for arbitration and that Arbitration Services, Inc. possessed jurisdiction to arbitrate because it was the

"successor by merger with national Arbitration Inc." which was doing business as Arbitration Services, Inc. Finally, petitioner claims that the award of attorneys fees at the arbitration was properly within the discretion of the arbitrator and the arbitrator made a determination on the claim so that a retainer agreement was not required in order to be awarded attorneys fees.

The Law

The law of this state favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties (*Matter of Smith Barney Shearson Inc. v Sacharow*, 91 NY2d 39, 666 NYS2d 990, 689 NE2d 884 [C.A.1997]; *Mobil Oil Indonesia Inc. v Asamera Oil (Indonesia) Ltd.*, 43 NY2d 276, 401 NYS2d 186, 372 NE2d 21 [C.A. 1977]). A court may not substitute its judgment for that of the arbitrator with respect to the interpretation of facts or the application of remedies (*Matter of Kern v Krackow*, 309 AD2d 650, 765 NYS2d 790 [1st Dept. 2003], *lv app den.* 1 NY3d 505 [2004]). Arbitrators may do justice and are not bound, absent provision to the contrary in the arbitration agreement, by principles of substantive law or rules of evidence (*Board of Education of Dover Union Free School Dist. v Dover-Wingdale Teachers' Assn.*, 95 AD2d 497, 467 NYS2d 270 [2nd Dept. 1983], *affd* 61 NY2d 913 [1984]; *Lentine v Fundaro*, 29 NY2d 382, 328 NYS2d 418, 278 NE2d 633 [C.A. 1972]; *cf.*, *Aeneas McDonald Police Benev. Assn. Inc., v City of Geneva*, 92 NY2d 326, 680 NYS2d 887, 703 NE2d 745 [C.A. 1998]).

Discussion

Where, as here, the Arbitrator decided the issues of respondent's personal breach of the contract and his ensuing personal guarantee of the contract, the service of the demand for arbitration and the matter of attorneys' fees, petitioner's motion to confirm the Arbitrator's award is herewith granted. Under all of the circumstances of this case, this Court rejects the respondent's claims that the Arbitrator was without authority to issue, or exceeded his powers when he issued the Award.

Based on the foregoing, it is hereby

ORDERED, that the Petition to confirm the Arbitrator's Award of November 4, 2008 is granted; and it further

ORDERED, that the Clerk of the Court shall enter judgment pursuant to CPLR §5021 upon the submission of a proposed judgment to the County Clerk which complies with the mandates of CPLR §5018.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 29, 2009



WILLIAM R. LaMARCA, J.S.C.

TO: Kirschenbaum & Kirschenbaum, PC
Attorneys for Petitioner
200 Garden City Plaza, Suite 500
Garden City, NY 11530

Valdas Duoba, Esq.
Attorney for Respondent
2005 Brentwood Road
Brentwood, NY 11717

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**