SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK Justice PART 2

Key Power

-v-

Viacom Corp.

INDEX NO. 603447/02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying memorandum decision.

SCANNED MAY 02 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/29/03

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

In the Matter of the Arbitration of
Certain Controversies between

KEY POWER, INC.,

Petitioner,

- and -

VITCOM CORPORATION,

Respondent.

Index No.: 603447102

DECISION/ORDER

Louis B. York, J.S.C.:

Petitioner Key Power, Incorporated, and respondent Vitcom Corporation executed the contract in dispute in March of 2000. Pursuant to the contract, petitioner was to provide telecommunication services to respondent; and, respondent was to pay petitioner for the services. Paragraph six of the contract stated that petitioner would submit weekly invoices to respondent by fax, and would send monthly call detail records by e-mail, floppy or CD-Rom.[1] Respondent was to make payment in full to petitioner each week within two days of receiving the faxed invoices.

Petitioner provided services to respondent from April 7 and November 1, 2000. Petitioner commenced the arbitration to resolve a dispute that arose when respondent allegedly stopped making payments under the service contract. Respondent

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[1] Call detail records list the time, date and duration of the calls for which petitioner charged respondent.

states that it made payments to petitioner of over $1.2 million despite the absence of invoices. It is not clear whether respondent argues that it made these payments after the contract dispute arose, in an attempt to resolve it; whether respondent refers to payments from before August 2000 -- when, according to petitioner, respondent stopped making payments; or, whether respondent argues that it made $1.2 million in payments for the period from August - November 2000, when petitioner states that no payments were made.

The arbitrator issued an award on March 22, 2002. The award finds that, under the contract between petitioner and respondent, respondent owes petitioner $204,199.82. Finally, under the award respondent and petitioner shared the $3,750.00 arbitration fees and $12,750.00 administrative fees and expenses. Based on these latter figures, petitioner had to reimburse respondent $2,625.00 based on its overpayment of administrative fees and expenses. The total amount due to petitioner under the award, then, is $201,574.82. Petitioner currently applies to this court for an order confirming the arbitration award, which it annexes to the petition as exhibit B.

Respondent opposes the motion. Respondent states that petitioner sent three weekly invoices and after that did not send any more invoices. In addition, respondent alleges, petitioner did not send any call detail records to respondent. According to respondent, the arbitrator improperly ignored the requirement that petitioner provide respondent with invoices and call detail records as a prerequisite to payment. Respondent states that the records were crucial and without them Vitcom could not adequately evaluate the bills. Respondent claims that by dispensing with this requirement, the arbitrator essentially rewrote the contract; and that, in doing so, rendered a decision that is completely irrational.

The court grants the petition and confirms the award of the arbitrator. Initially, the court notes that "it is the strong public policy of this State to favor the resolution of disputes in arbitration . . . ." The Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner, 243 A.D.2d 1, 9, 671 N.Y.S.2d 905, 910 (1st Dept. 1998). Accordingly, the proper standard of review is a broad one:

> A court is bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies, and cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. . . . Even where an arbitrator makes errors of law or fact, a court may not undertake to conform the award to [its] sense of justice. An arbitrator's award will be confirmed if any plausible basis exists for the award.

Azrielant v. Azrielant, 301 A.D.2d 269, - , 752 N.Y.S.2d 19, 24 (1st Dept. 2002)(citations and internal quotation marks omitted); see New York State Correctional Officers and Police Benevolent Ass'n, Inc. v. State, 94 N.Y.2d 321, 326, 704 N.Y.S.2d 910, 913 (1999). Thus, even if the court disagrees with the conclusions of the arbitrator, there is a strong predisposition to uphold the award unless it is entirely irrational and without plausible interpretation.

Petitioner's counsel alleges that its client alleged to the arbitrator that, although the contract stated that it would provide faxed invoices and call detail records, the original agreement was modified by the course of dealing of the parties. Counsel also alleges that petitioner submitted evidence and presented testimony to the arbitrator supporting its position. Allegedly, the evidence showed that respondent ultimately monitored its usage and prepaid for services a week in advance; and that, in addition, the parties dispensed with the requirement, set forth in paragraph five of the written

agreement, that respondent provide a letter of credit. Moreover, counsel alleges that at arbitration, respondent made the identical arguments it raises here, and that the arbitrator considered and rejected them.

Respondent argues that it was irrational for the arbitrator to reject its arguments; for, by doing so, the arbitrator essentially rewrote the contract and subverted the parties' intentions. However, "[t]he fact that the arbitrator considered the past practice of the parties in interpreting the disputed provisions of the agreement did not render the arbitrator's decision irrational." City of Watertown v. Watertown Professional Firefighters' Ass'n-Local # 191, 280 A.D.2d 893, 894, 720 N.Y.S.2d 436, 436 (4th Dept.), lv denied, 96 N.Y.2d 711, 727 N.Y.S.2d 697 (2001). The law is clear that "[a]n existing contract may be modified later by subsequent agreement, oral or written. That the original agreement has been so modified may be proved by circumstantial evidence--by showing the conduct of the parties." Estate of Prime, 184 Misc.2d 796, 799-800, 710 N.Y.S.2d 810, 813 (Surrogate's Ct. Erie County 2000). Accordingly, courts have repeatedly found that a contract has been modified based on the conduct of the parties. See, e.g., Rosenbera v. Beth Israel Medical Center, 247 A.D.2d 283, 283, 669 N.Y.S.2d 40, 41 (1st Dept.), lv denied, 92 N.Y.2d 803, 677 N.Y.S.2d 73 (1998); see also CGM Construction Inc. v. Miller, 263 A.D.2d 831, 832-83, 693 N.Y.S.2d 763, 764-65 (3rd Dept. 1999)(despite provision in contract requiring written change orders, court properly found that conduct of parties modified the contract).

In the case at hand, respondent has not presented any evidence, other than the contract itself, to show that the arbitrator's finding was irrational. Moreover, by its own concession, respondent made well over one million dollars in payments to petitioner

despite the failure of petitioner to provide respondent with invoices and call detail records. Respondent alleges that this fact shows its good faith under the agreement, and this may well be true. However, it also provides a reasonable basis for the arbitrator to find that the parties had waived the requirement that invoices and call detail records be sent prior to payment. At any rate, even if the arbitrator had misconstrued or disregarded the plain meaning of the contract or misapplied substantive legal principles, the court would be bound to uphold the interpretation unless it were completely irrational. See Albanv Countv Sheriffs Local 775 of Council 82, AFSCME, AFL-CIO, on Behalf of Garrett Hughes v. Countv of Albanv, 63 N.Y.2d 654, 656, 479 N.Y.S.2d 513, 514 (1984). Here, as already stated, respondent has not shown that the award was so "totally irrational" as to warrant vacatur. In re Wicks Construcion, Inc., 295 A.D.2d 527, 528, 744 N.Y.S.2d 452, 454 (2nd Dept. 2002).

The court notes that, in general, the parties provided minimal explanation and little evidence to support their contentions here. As stated above, respondent inadequately explained the significance and/or timing of its alleged $1.2 million in payments. Moreover, other than the arbitration award, the verified petition of petitioner, the affidavit in opposition of respondent, and the contract, the court has before it no evidence. The court had to evaluate the arbitrator's decision based largely on the statements of counsel and of the parties. In light of the extremely deferential standard of review with which courts consider the decisions of arbitrators -- and of the fact that courts often confirm arbitrators' awards without evidentiary records before them -- this deficiency is primarily to the disadvantage of respondent, who has a high burden of proof in opposing the application.

Therefore, it is

ORDERED that the petition is granted and the award of the arbitrator is confirmed; and it is further

ORDERED and ADJUDGED that petitioner shall have judgment against respondent in the amount of $201,574.82, plus interest at the statutory rate of 9% per annum from March 22, 2002, the date of the award, to the date of entry of this order, for a total of $_____, as taxed by the Clerk, and thereafter at the statutory rate of 9% per annum.[2]

ENTERED:

DATED: 4/29/03

Louis B. York, J.S.C.

LOUIS B. YORK

[2] The court gratefully acknowledges the assistance of Beth Herstein, his principal law assistant, for her assistance in the preparation *of* this opinion.