Ezrasons, Inc. v Quitman Mfg. Co., Inc.
2005 NY Slip Op 30566(U)
December 29, 2005
Supreme Court, New York County
Docket Number: 109825/2005
Judge: Marilyn Shafer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Cb

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

PRESENT: HON. MARILYN SHAFER *Justice* **PART 36**

---x,

EZRASONS, INC.,
Petitioner,
-against-

QUITMAN MANUFACTURING COMPANY, INC
Defendant.

---x

INDEX NO. 109825/2005

MOTION DATE

MOTION SEQ. NO. 1

SHAFER, M J

This case involves a classic "battle of the forms."

Petitioner Ezrasons, Inc. (Ezrasons) seeks to compel arbitration of a contract for the sale of 2812 dozen boxer shorts, which contract was allegedly entered into with defendant Quitman Manufacturing Company, Inc. (Quitman). CPLR 7503 (a).

According to Ezrasons's demand for arbitration, Ezrasons is a supplier, and Quitman is a wholesale distributor, of garments.

The petition alleges the following relevant facts: the boxer shorts in issue were ordered by Quitman for a Christmas program with one of Quitman's customers. Quitman issued a purchase order to Ezrasons for the goods on June 10, 2003. After some negotiations, Ezrasons accepted Quitman's order, and issued its confirming sales contract, dated August 20, 2003.

Quitman's purchase order was silent with respect to the issue of arbitration. Ezrasons's contract contained an arbitration clause, which stated, in relevant part:

001

[* 2]

> 10. <u>Arbitration</u>: Any controversy arising out of or relating to this contract or any modification or extension thereof, including arbitration (sic) before a panel of three arbitrators in New York city ... in accordance with the rules then obtaining of the American Arbitration Association or the General Arbitration council of the Textile and Apparel Industries as the party instituting arbitration proceedings shall elect.
> 11.<u>Future Transactions</u>: Except to the extent that a future transaction is governed by a signed contract between the parties, the printed terms and conditions of this contract including, without limitation, the provision for arbitration, shall apply to all future transactions.

Ezrasons claims that it sold Quitman the agreed quantity of boxer shorts pursuant to the terms of the August 20 contract, that it made complete delivery of the goods pursuant to the contract, and that it has completed performance under the contract. Quitman is alleged to have received and accepted the goods, without complaint, and without asserting any claims against Ezrasons based on these goods. Quitman has failed or refused to pay $63,864.51 owed to Ezrasons in connection with these goods. In an unrelated transaction between these same parties, Quitman issued an invoice, or debit memo, to Ezrasons in the amount of $91,148.18, and has demanded payment from Ezrazons for the difference of approximately $27,000.

Ezrasons claims that the parties' dispute is subject to the arbitration clause contained in Ezrasons contract.

Quitman asserts that it never signed that contract, or any other contract with

[* 3]

Ezrasons. Quitman claims that its purchase order does not contain any provision authorizing or requiring the parties to arbitrate any disputes, and that it has never agreed, either orally or in writing, to arbitrate this, or any other disputes, with Ezrasons. Nor have the parties ever participated in any arbitration proceedings during their eight or nine years doing business together, according to Quitman.

The obligation to arbitrate pursuant to a written agreement is governed by CPLR 7501, which states, in relevant part:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable ....

There is no requirement, however, that a written agreement calling for the parties to arbitrate their disputes needs to be signed by the party against whom enforcement is sought:

> The statute it should be noted simply requires "A written agreement" to arbitrate. There is no requirement that the writing be signed "so long as there is other proof that the parties actually agreed on it" (Citation omitted).

Crawford v Merrill Lynch, Pierce, Fenner & Smith, Inc., 35 NY2d 291, 299 (1974).

Ezrasons claims that the proof of the parties' actual agreement exists in the broad arbitration provision included in each of Ezrasons's contracts and invoices with Quitman, in Quitman's acceptance of the same contract terms in previous transactions without objection, and by Quitman's acceptance of textile broker sales notes, which contained arbitration clauses, in the past.

[* 4]

As further evidence of an actual agreement, Ezrasons offers a copy of an email allegedly sent to Quitman by its production manager on August 21, 2003. That email states:

> ENCLOSED HEREWITH PLEASE FIND SALES CONTRACT #1733 FOR XMAS PROGRAM PO#12005 AS AN ATTACHMENT.
> PLS CONFIRM UPON RECEIPT AND ACKNOWLEDGE THE SAME BY RETURN EMAIL/FAX.

Quitman denies that it ever received Ezrasons's contract, and argues that the parties' relationship is governed by the terms of its own written purchase orders, which did not include an arbitration clause. There is no evidence that Quitman either received this email, or responded to it.

"Arbitration will be compelled only where there is a clear, unequivocal written agreement to arbitrate." *Just In-Material Designs, Ltd. v I.T.A.D. Associates, Inc.*, 94 AD2d 103, 105 (1st Dept 1983), *affd* 61 NY2d 882 (1984). This is because, by agreeing to arbitrate a party waives many of its procedural and substantive rights. "[I]t would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent." *Matter of Marlene Indus. Corp.* (*Carnac Textiles, Inc.*), 45 NY2d 327, 334 (1978)(citations omitted).

Marlene involved an oral contract to purchase textiles. Neither party contended that they had discussed dispute resolution when the contract was entered into. Petitioner immediately sent a "purchase order" to respondent, who in turn sent back an

"acknowledgment of order." The purchase order did not contain an arbitration clause, but stated that it did not become effective unless signed by respondent, and that its terms could not be superceded by an unsigned contract. The acknowledgment of order did contain an arbitration clause, in the midst of 13 lines of small type "boilerplate," and instructed petitioner to sign and return one copy. When a dispute arose, respondent moved for arbitration, and petitioner moved for a stay. Relying on Uniform Commercial Code § 2-201 (2), the Appellate Division held that Marlene had retained the form containing the arbitration clause without objection, and was therefore bound by the clause. The Court of Appeals reversed, distinguishing between UCC § 2-201 (2), which only applies when determining whether a contract exists in the first instance, and UCC § 2-207 (2), used for determining the terms of a contract which is admitted to exist.

Between merchants, UCC§ 2-201 creates an exception to the statute of frauds by providing that a merchant has 10 days from acceptance of a writing in confirmation of a contract to object to the terms of the contract.

Where there is no dispute as to whether or not a contract exists, UCC § 2-207 works to resolve what is commonly known as a "battle of the forms." Under this section, as between merchants, additional or different terms become a part of the contract unless they materially alter it. *Marlene* held that an arbitration clause materially alters a contract for the sale of goods, and will not become a part of the contract unless both parties explicitly agree to it. The existence of an arbitration agreement "should not depend solely upon the conflicting fine print of commercial forms which cross one another but never

[* 6]

meet." *Ibid.*

In the present case, there is no evidence that the parties discussed dispute resolution in the negotiations alleged to have taken place after Quitman issued its purchase order in June 2003. The copy of Ezrasons's contract, attached as exhibit A to its petition, appears to be a boilerplate contract, printed in 6 point type. Although Ezrasons requested Quitman's written confirmation of the contract containing the arbitration clause, there is no evidence that such assent was forthcoming.

Applying the holding in *Marlene* to the present case, the court finds that the parties agreed to all of the material terms of the contract for the sale of boxer shorts, that the arbitration clause contained in Ezrasons's contract was an additional term that materially altered the contract, and that Quitman never agreed to this material, additional term. Thus, there was no agreement to arbitrate the instant contract for the sale of boxer shorts.

Ezrasons's evidence of custom and usage, and the parties' prior dealings, have been reviewed by the court. However, given the holding in *Marlene*, such dealings, even if accepted as true, do not satisfy Ezrasons's burden of proving a clear indication of an intent to arbitrate this particular agreement.

Accordingly it is

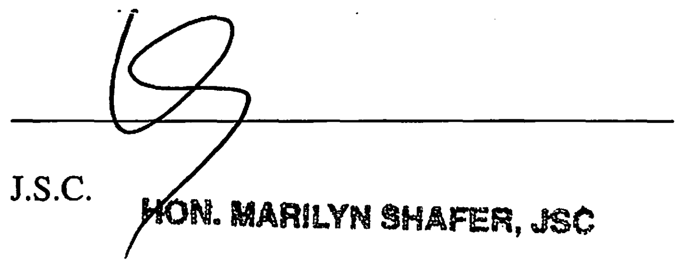
ORDERED that the petition to compel arbitration is denied; and it is further

ORDERED that the cross motion to permanently stay arbitration is granted.

[* 7]

Dated: 12/29/05

ENTER:



J.S.C.

FILED
JAN 12 2006
COUNTY CLERK'S OFFICE
NEW YORK