

**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 12-18-09  
SUBMITTED: 12-24-09  
MOTION NO.: 001-MOT D; STAYED

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ASTORIA FEDERAL SAVINGS AND LOAN  
ASSOCIATION, as successor to Greater New  
York Savings Bank,

RIVKIN RADLER LLP  
Attorneys for Plaintiff  
926 Rexcorp Plaza  
Uniondale, New York 11556

Plaintiff,

-against-

ROSENBERG CALICA & BIRNEY LLP  
Attorneys for Defendants  
100 Garden City Plaza, Suite 408  
Garden City, New York 11530

MEDFORD EQUITIES AND MEDFORD  
EQUITIES LLC,

Defendants.

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Upon the following papers numbered 1 16 read on this motion to stay; Notice of Motion and supporting papers 1-10; Notice of Cross Motion and supporting papers\_\_\_\_; Answering Affidavits and supporting papers 11-15; Replying Affidavits and supporting papers 16; it is,

**ORDERED** that the branches of the motion by the defendants which are for an order staying this action and directing the parties to proceed to arbitration are granted; and it is further

**ORDERED** that the motion is otherwise denied.

On June 24, 1988, the defendant Medford Equities, as landlord, entered into a lease with the plaintiff's predecessor in interest, the Greater New York Savings Bank, for a parcel of unimproved land located in the Town of Brookhaven, New York. A free-standing bank building with drive-up teller lanes was constructed on the premises in 1990. The initial term of the lease was 20 years, commencing on May 7, 1990, and terminating on May 13, 2010. The lease provided for one ten-year renewal term commencing immediately after the expiration date of the initial term. On September 30, 1997, the Greater New York Savings Bank merged with

the plaintiff, Astoria Federal Savings and Loan Association (hereinafter "Astoria"), who became the tenant. By a letter dated May 28, 2009, Astoria exercised its right to renew the lease pursuant to § 22.21 thereof. Section 22.21B sets forth the mechanism for establishing the fixed annual rent for the initial year of the renewal term. It provides, in pertinent part, as follows:

[N]o less than nine (9) months prior to the commencement of the first year of the Renewal Term, Landlord and Tenant shall agree upon the fixed annual rent for the first year of the Renewal Term and such fixed annual rent shall be the fixed annual rent payable hereunder for each year of the Renewal Term subject to the provisions for increases in the fixed annual rent set forth in subdivision C of this Section 22.21. The fixed annual rent shall be the then current fair market rent the Tenant would be required to pay for property comparable to the Land taking into consideration the other obligations of Landlord and Tenant under this Lease. If no such agreement is reached such fixed annual rent shall be decided by arbitration as provided herein.

Either party may serve notice on the other appointing, as an arbitrator, a real estate appraiser who is a duly qualified Member of the Appraisal Institute ("MAI") having not less than 10 years experience, in the New York metropolitan area, in such capacity ("Qualified MAI Appraiser") to determine such rental, and the other party shall, within 15 days, after service of such notice, appoint, by notice to the first party, a Qualified MAI Appraiser, to act as an arbitrator. If such other party does not appoint a Qualified MAI Appraiser within said 15 days, then the first party may, by notice to such other party, appoint a Qualified MAI Appraiser to act as an arbitrator. Within 30 days after the designation of the second arbitrator, the two arbitrators shall themselves appoint a third arbitrator to act as an arbitrator and if they are unable to agree on such third person within 10 days after the expiration of the 30 day period aforementioned such third arbitrator shall be selected by the Landlord and Tenant within 10 days thereafter or, in lieu of agreement, within such period of time, by the administrative judge of the Judicial District in which the Premises are located. The three arbitrators, after being duly sworn to perform their duties shall proceed to determine such fixed annual rental.

When the parties were unable to agree on the fixed annual rent for the initial year of the renewal term, each party appointed a qualified MAI appraiser to act as an arbitrator. By a letter dated October 14, 2009, the arbitrator appointed by Medford Equities proposed two MAI

appraisers as the third arbitrator, both of whom were rejected by the arbitrator appointed by Astoria. A disagreement ensued regarding whether the third arbitrator was required to be an MAI appraiser. After the two appraisers appointed by the parties prepared their reports, another dispute arose regarding the size of the parcel to be valued. Astoria's appraiser determined that the fair market rent for the property was \$103,208 using a 12,510 square foot parcel. Medford Equities' appraiser used a 63,955 square foot parcel to determine that the fair market rent was \$415,707.50. Astoria subsequently commenced this action for a judgment declaring that the fixed annual rent be calculated using a 12,510 square foot parcel and that the lease does not require the third arbitrator to be an MAI appraiser. Medford Equities moves for an order staying this action, directing the parties to proceed to arbitration, directing Astoria's appraiser to select a third MAI appraiser with Medford Equities' appraiser, and dismissing the complaint.

Arbitration is strongly favored under New York law. Any doubts about whether an issue is arbitrable will be resolved in favor of arbitration. It is, of course, for the court in the first instance to determine whether the parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. The court's inquiry ends, however, when the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate (**State of New York v Philip Morris Inc.**, 30 AD3d 26, 31 [and cases cited therein], *aff'd* 8 NY3d 574).

While the arbitration clause in the parties' lease does not encompass the entire agreement, the clear intent of the parties, as embodied in § 22.21B, is that the "fixed annual rent shall be decided by arbitration" if the parties cannot agree. This language is broad enough to encompass the parties' dispute regarding the size of the parcel to be valued. The court finds that there is a reasonable relation between the size of the parcel and the "current fair market rent [Astoria] would be required to pay for property comparable to the Land taking into consideration the other obligations of Landlord and Tenant under this Lease" (*see*, **Nationwide General Ins. Co. v Investors Ins. Co. of America**, 37 NY2d 91, 96). Once a reasonable relation between the subject matter of the dispute and the general subject matter of the underlying agreement has been found, any analysis of the scope of the substantive provisions of the parties' agreement is left to the arbitrator (**Id.** at 96; *see also*, **Board of Educ.** [Watertown Educ. Assn.], 93 NY2d 132, 143). Matters of contract interpretation are for the arbitrator to resolve (**Pearl Street Dev. Corp. v Conduit & Foundation Corp.**, 41 NY2d 167, 171; **Matter of Barbalious v Exterior Wall Systems**, 14 AD3d 508). Accordingly, the action is stayed, and the parties are directed to proceed to arbitration.

When interpreting contracts, the Court of Appeals has repeatedly applied the familiar and eminently sensible proposition of law that, when parties set down their agreement in a clear and complete document, their writing should be enforced according to its terms. In the context of real property transactions, commercial certainty is a paramount concern. When, as here, the instrument was negotiated between sophisticated, counseled business people negotiating

at arm's length, courts should be extremely reluctant to interpret an agreement as impliedly stating something that the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and, thereby, make a new contract for the parties under the guise of interpreting the writing. In the absence of ambiguity, courts look solely to the language used by the parties to discern the contract's meaning (*see*, **Vermont Teddy Bear Co. v 538 Madison Realty Co.**, 1 NY3d 470, 475).

The court finds that §22.21B of the parties' lease is unambiguous and does not require the third arbitrator to be a qualified MAI appraiser. Had the parties intended the third arbitrator to be a qualified MAI appraiser, they could easily have included language to that effect in the lease. They did not. Contrary to Medford Equities' contentions, the court finds that the doctrine of *ejusdem generis* is inapplicable. That rule applies when several classes of persons or things are enumerated followed by a collective term such as "other," "otherwise," or "etc." (McKinney's Cons Laws of NY, Book 1, Statutes §239, at 409). Such is not the case here. Moreover, it does not apply when, as here, the language used is clear (**Id.** at 409). The court finds that the applicable rule of statutory and contract interpretation in this case is *expressio unius est exclusio alterus*. That is to say, the specific mention of one person or thing implies the exclusion of other persons or things. Thus, when a law or contract expressly describes a particular act, thing, or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded (McKinney's Cons Laws of NY, Book 1, Statutes §240, at 411-412). Accordingly, the court finds that, by omitting the words "qualified MAI appraiser" from their description of the third arbitrator, the parties did not intend that the third arbitrator be a qualified MAI appraiser. The court also finds that, Medford Equities' contentions to the contrary notwithstanding, such a result is not commercially unreasonable or absurd.

Dismissal of the complaint is premature. A party may move to dismiss one or more causes of action asserted against him on the ground that the action may not be maintained because of "arbitration and award" (*see*, CPLR 3211[a][5]). However, when as here what is sought is merely to preclude litigation on the ground that there is an outstanding and unfulfilled obligation to arbitrate the dispute, the remedy is a motion to compel arbitration, which merely stays the litigation in deference to arbitration (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3211:21). Accordingly, the action is stayed, and the parties are directed to proceed to arbitration in accordance herewith.

Finally, the court finds that Medford Equities is not entitled to attorney's fees.

Dated: March 1, 2010

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J.S.C.