

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 651999/2010
SWISS CENTER, INC.
VS.
608 COMPANY, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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**

U N F I L E D J U D G M E N T

This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Dated: 4/4/11


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----x
SWISS CENTER, INC.

Plaintiff,

-against-

608 COMPANY, LLC

Defendant.
-----x

BARBARA R. KAPNICK, J.:

DECISION/ORDER/JUDGMENT

Index No. 651999/10

Motion Seq. Nos.

001 and 002

Motion sequence nos. 001 and 002 are consolidated for disposition herein.

Plaintiff Swiss Center, Inc. ("Swiss Center") is a wholly owned subsidiary of 608 Fifth Avenue Partners, LLC (referred to as the "New Owner") and the Lessee of 608 Fifth Avenue, New York, New York (the "Premises"), under a lease agreement dated March 1, 1964 (the "Ground Lease"). Under the terms of the Ground Lease, Swiss Center is authorized to rent the Building to tenants and to keep all rentals received. 608 Company, the Ground Lease's Lessor, is only entitled to a flat rental fee under the Ground Lease.

In 1998, during the Ground Lease's Second Renewal Period, Swiss Center's stock was purchased by the New Owner. In 2009, Swiss Center exercised its option to renew the lease for the Third Renewal Period and the parties began negotiating the rental price

for this Renewal Period, as required under the Ground Lease. During these negotiations, 608 Company's negotiators were James Korein, a principal of 608 Company, and Brian R. Corcoran ("Corcoran") of Cushman & Wakefield, Inc.

When negotiations failed to result in an agreement, 608 Company demanded arbitration to resolve the dispute pursuant to Article 26 of the Ground Lease. Section 26.02 provides, in relevant part,

[t]he party desiring such arbitration . . . shall give written notice to that effect to the other party and shall in such notice appoint a disinterested person of recognized competence in the field involved as one of the arbitrators Within fifteen (15) days thereafter, the other party shall by written notice to the original party appoint a second disinterested person of recognized competence in such field as an arbitrator The arbitrators . . . thus appointed shall appoint a third disinterested person of recognized competence in such field, and such three arbitrators . . . shall as promptly as possible determine such matter, . . .

By letter dated November 1, 2010, 608 Company informed Swiss Center that it had selected Brian Corcoran as its "disinterested" arbitrator.

Swiss Center objects to Corcoran's appointment and, on November 16, 2010, commenced this action for a judgment declaring that "the third disinterested person' must be an attorney of recognized competence in the field of real estate law."

Swiss Center now moves by Order to Show Cause (motion seq. no. 001) for an order:

- A) disqualifying Corcoran as 608 Company's appointed arbitrator because he is not "a disinterested person" as required by Section 26.02 of the Lease;
- B) staying the arbitration proceeding initiated by defendant because defendant has not complied with the requirement that it appoint "a disinterested person" as its party appointed arbitrator;
- C) staying defendant from initiating further arbitration proceedings pending the determination of this action; and
- D) permitting plaintiff to obtain expedited discovery, including but not limited to taking Corcoran's deposition testimony in order to determine, i) the scope of Corcoran's relationship to, communications with, and activities on behalf of 608 Company, ii) the identity of all individuals with whom Corcoran has spoken about serving as the "disinterested arbitrator" in this dispute; and iii) the substance of any such communications.

Swiss Center argues that Corcoran's intimate involvement with negotiations regarding the very substantive issues to be resolved in arbitration renders him inherently not "disinterested." Corcoran, plaintiff points out, has acted as 608 Company's advocate

and advisor throughout this process, and has interviewed other potential arbitrators and discussed the matter with them, making him unqualified under the terms of the lease.

Further, because the arbitrators who do eventually hear this dispute will have to interpret portions of the Ground Lease, Swiss Center argues that the Court should declare that in order to have "recognized competence in the field," the appointed arbitrators must be attorneys with experience and competence in real estate.

Defendant 608 Company agreed by letter to the Court dated December 1, 2010 to hold the arbitration in abeyance pending disposition of the instant order to show cause and its own motion to dismiss plaintiff's Complaint (motion seq. no. 002) pursuant to CPLR 3211(a)(7) and 404(a).

Procedural Objections

In its motion to dismiss, 608 Company argues that the appropriate method for Swiss Center to seek a stay of arbitration is to institute a special proceeding pursuant to CPLR 7503(b) on the grounds, *inter alia*, that "a valid agreement . . . has not been complied with." Swiss Center has instead commenced a declaratory

judgment action pursuant to CPLR 3001 by filing this Complaint.¹

CPLR 3001 provides, in relevant part, that

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

"[I]t is generally recognized that no limitation is inherent in [CPLR 3001] which would prevent the widest reasonable use of" declaratory relief. (*Maguire v Monaghan*, 206 Misc 550, 555 [Sup Ct NY Co 1954], *aff'd* 285 AD 926 [1st Dept 1955]).

Article 75 of the CPLR limits its availability to arbitrable controversies and directs that the first application arising out of such controversy, which is not made by motion in a pending action, should be made by special proceeding (CPLR 7502[a]).

There is no dispute that the instant action was the first application arising out of the parties' arbitration agreement and, as such, a petition pursuant to Article 75 would have been the

¹ With its opposition to 608 Company's motion to dismiss, Swiss Center submits an Amended Complaint, dated December 10, 2010, which added a cause of action seeking a declaratory judgment disqualifying Corcoran and declaring that 608 Company must select a neutral arbitrator as its "disinterested" arbitrator.

appropriate method for Swiss Center to seek the instant relief. However, declaratory relief can be properly sought in an Article 75 petition, (see, e.g., *Gunter v Gunter* 47 Misc2d 861 [Sup Ct, NY Co 1965]), and CPLR 2001 permits the Court to disregard this type of defect or irregularity "if a substantial right of a party is not prejudiced" .

Accordingly, the Amended Complaint is hereby converted to a Petition for a stay of arbitration pursuant to Article 7503(b); and for a declaration that, pursuant to CPLR 3001, 1) Corcoran is not a "disinterested arbitrator" as that term is used in the arbitration clause, and 2) the "third disinterested person" must be an attorney of recognized competence in the field of real estate law.

"Disinterested Arbitrator"

It is well-settled that courts have "the inherent powers to disqualify an appointed arbitrator before an award has been rendered, such as where the appointment of the particular arbitrator was in violation of the parties' reasonable arbitration clause..." (5 NY Jur Arbitration and Award 139). Disqualification, however, is an "extraordinary relief [which] should only be employed where 'there exists a real possibility that injustice will result.'" (*Bronx-Lebanon Hospital Center v Signature Medical*

Management Group, L.L.C., 6 AD3d 261, 261 [1st Dept 2004], quoting *Matter of Lipschutz [Gutwirth]*, 304 NY 58, 64 [1952]).

"The proper standard of review for the disqualification of an arbitrator 'is whether the arbitration process is free of the appearance of bias' (citations omitted)." (*Matter of Excelsior 57th Corp.* [Kern] 218 AD2d 528, 530 [1st Dept 1995]).

According to the Petition, in accordance with Section 20.01 of the Ground Lease, Swiss Center exercised its option to renew by letter. Thereafter, the parties engaged in negotiations in an attempt to reach an agreement as to the "fair market value" of the Premises. During these negotiations, 608 Company selected Corcoran, an appraiser from Cushman & Wakefield, as its advisor and negotiator. Swiss Center's position in negotiations and in the Petition is that the "fair market value" advocated by Corcoran was unreasonable and unrealistic.

Swiss Center asks this Court to disqualify Corcoran by finding, in advance of arbitration, that he is not "disinterested" as required by the Ground Lease arbitration clause because of his prior advocacy on behalf of 608 Company. Specifically, Swiss Center alleges that in order to be "disinterested," any arbitrator appointed must be "neutral."

In briefs to the Court on both Swiss Center's Order to Show Cause and 608 Company's motion to dismiss, and at oral argument, the parties submitted various dictionary definitions of the term "disinterested," each urging the Court to adopt and apply the definition it propounded.

608 Company has argued that the Court should treat the Ground Lease's arbitration provision as calling for "traditional tripartate arbitration" as discussed in *Matter of Astoria Med. Group (Health Ins. Plan)* (11 NY2d 128, 134 [1962]), where the Court stated that "[a]rising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral,' at least in the sense that the third arbitrator or a judge is." In *Astoria Medical*, however, the Court expressly noted that the parties had placed no limitations on the party-appointed tripartate arbitrators, finding that "had the parties intended that their appointees be completely impartial or *disinterested*, they could have readily so provided." (11 NY2d at 135 [emphasis added]). Of course, the parties here have so provided.

The Court's "role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of

the language of the contract, there is no need to look further." (*Evans v Famous Music Corp*, 1 NY3d 452, 458 [2004]). Where, on the other hand, the "interpretation of a contract term is susceptible to varying reasonable interpretations and intent must be gleaned from disputed evidence or from inferences outside the written words," resolution of such ambiguity is for a finder of fact. (*Time Warner Entertainment Co. v Brustowsky*, 221 AD2d 268 [1st Dept 1995]).

The existence of a disagreement about the "plain meaning" of a particular word, however, will not necessarily render the word ambiguous for purposes of construing the contract. "That one party to the agreement may attach a particular, subjective meaning to a term that differs from the term's plain meaning does not render the term ambiguous." (*Graev v Graev*, 46 AD3d 445, 451 [1st Dept 2007], *rev'd and remitted* 11 NY3d 262 [2008]).

Here, the term "disinterested" is not ambiguous merely by virtue of the parties' desire to apply slight variations in meaning that would in some way benefit their respective ultimate positions in the underlying dispute. The word has a plain and concise meaning, susceptible to interpretation without resort to outside sources.

Further, New York courts have had several occasions to address what constitutes a "panel of disinterested arbitrators." (*Matter of Milliken Woolens [Weber Knit Sportswear]*, 11 AD2d 166, 169 [1st Dept 1960], *aff'd* 9 NY2d 878 [1961]; *Matter of Cross Props. [Gimbel Bros.]*, 15 AD2d 913, 915 [1st Dept 1962], *aff'd* 12 NY2d 806 [1962]; *Matter of Toby Kessler [Motor Veh. Acc. Indem. Corp.]*, 49 Misc2d 547, 551 [Sup Ct, Queens Co 1966]).

In the *Milliken Woolens* case, the Appellate Division, First Department held that two arbitrators should have been disqualified, "because appellant was not accorded that complete impartiality and indifference which it was entitled to expect from a disinterested board of arbitrators." (11 AD2d at 169). The first arbitrator, an attorney, had been on the staff of the same law firm with respondents' counsel up to a time two and a half years before the arbitration, and the law firm representing respondents and the arbitrator's law firm had served as co-counsel in a number of matters, one of which was pending at the time of the arbitration. The second arbitrator also should have been disqualified, the court held, because he had, for many years, engaged in a regular course of business transactions with respondent companies, purchasing textiles from them on behalf of an affiliate of his own company, which conduct could "not be regarded as the casual and occasional

dealings which might be expected where arbitrators are chosen because of familiarity with an industry." (11 AD2d at 170).

In *Cross Properties*, the court noted that "[t]he type of relationship which would appear to disqualify is one from which it may not be unreasonable to infer an absence of impartiality, the presence of bias or the existence of some interest on the part of the arbitrator in the welfare of one of the parties." (15 AD2d at 914). In that case, the court declined to vacate an arbitration award and disqualify an arbitrator where the arbitrator was affiliated with a real estate company that had done some business with respondent, noting that the "transactions between them were isolated and involved nothing of such a nature as would cause [the arbitrator] to act other than with the requisite impartiality." (15 AD2d at 914).

In the *Kessler* case, an arbitrator, who was also an attorney, had previously disclosed his representation of two clients in actions against the respondent and the fact that he had previously served as counsel for an insurance company and expected to be retained by an insurance company in the not too distant future. Based on those disclosures, the court stated that "it would appear that the arbitrator was an advocate in the traditional sense who would be presumed to have no interest other than that of an

attorney in the outcome of negligence or insurance litigation." (49 Misc2d at 550). Later, however, the arbitrator revealed that he had become the President of an Insurance Company which was, by operation of law, a member of the respondent corporation, and affected financially by any claims paid by the respondent. The court found that under these circumstances, "the arbitrator could not fulfill his duties to the corporation of which he was president and at the same time accord that complete impartiality and indifference which the petitioners were entitled to expect from a disinterested arbitrator." (49 Misc2d at 551).

Here, the fundamental issue for arbitration will be the "fair market value" of the Premises, which will then be used to calculate the rental rate pursuant to the Ground Lease. During negotiations between the parties, Corcoran was hired by 608 Company to evaluate the property's fair market value and act as its chief negotiator.

While 608 Company would have the Court find, as the *Kessler* court did, that Corcoran is "presumed to have no interest other than that of an attorney in the outcome of negligence or insurance litigation," (49 Misc2d at 550), that is not the case here. Unlike in *Kessler*, Corcoran did not simply advocate his client's position; rather, he was hired and paid by 608 Company to value the property and acted, essentially, as an expert for 608 Company. Corcoran

then advocated for his own position, which was consistent with the interests of his client, in negotiations with Swiss Center. Presumably, if Corcoran's determination had varied from the interests of 608 Company, he would not have been asked to represent them in negotiations or to act as their party-appointed arbitrator. This kind of prior involvement with the issues integral to those with which the panel of "disinterested arbitrators" will be faced, is not the sort of "casual and occasional dealings which might be expected where arbitrators are chosen because of familiarity with an industry (citations omitted)." (*Milliken Woolens*, 11 AD2d at 170).

Accordingly, the Court finds that Corcoran is not qualified to serve as a "disinterested arbitrator" as that term is used in the Ground Lease.²

Qualifications of the Third Arbitrator

In its Amended Complaint/Petition, Swiss Center seeks an order declaring that the third arbitrator must be an attorney "of recognized competence in the field of real estate law." According to Swiss Center, there are a number of issues of contract interpretation that will have to be interpreted by the arbitrators,

² That portion of Swiss Center's Order to Show Cause permitting it expedited discovery as to Corcoran is rendered moot as a result of his disqualification.

and an evidentiary hearing will be required, both of which require an attorney to be appointed.

608 Company moves to dismiss this portion of the Amended Complaint/Petition (motion seq. no. 002), contending that the issue of the third arbitrator's qualifications is "arbitrable." 608 Company points to section 26.02(b) of the Ground Lease, which provides that if the two party-appointed arbitrators are unable to agree on the third arbitrator, the dispute shall be submitted to a third entity, such as the American Arbitration Association, to make the appointment, and argues that the qualifications of the third arbitrator are properly determined by the two party-appointed arbitrators, not the Court.

To the extent that Swiss Center seeks an order declaring that the Ground Lease requires the third arbitrator be an attorney "of recognized competence in the field of real estate law," the issue is properly raised before arbitration pursuant to CPLR 7503(b) and 3001.

Regardless, however, the Court cannot grant the relief sought by Swiss Center. Not only does the Ground Lease make absolutely no reference to legal training or experience as a qualification or

condition of appointment for the third arbitrator, but the Lease is clear and unambiguous as to the requisite qualifications.

Section 26.02 of the Ground Lease mandates that each of the disinterested arbitrators appointed be a "person of recognized competence in the field involved" in the arbitration. Although Swiss Center contends that Section 26 is ambiguous because it doesn't deal separately with arbitration and appraisal, this is not an ambiguity. Rather, the Ground Lease sets forth that the methods for appraisal be the same as those for resolving any other issue by arbitration. The fact that the parties' arbitrable dispute also involves issues of appraising the Premises certainly does not render the section ambiguous, as Swiss Center urges.

In the instant dispute, 608 Company has demanded arbitration by letter dated November 1, 2010, "of the fair market value . . . for the purposes of establishing the net rent per annum for the renewal term of the Lease commencing on May 1, 2011." Pursuant to the clear language of Section 26.02, the arbitrators appointed must have "recognized competence in the field involved," i.e. the determination of the "fair market value" of rent for commercial real estate in midtown Manhattan.

While Swiss Center argues that expertise in substantive and procedural issues are necessary because the arbitrators will be called upon to determine the legal rights of the parties under the Ground Lease, it is well settled that, "[u]nless the arbitration agreement provides otherwise, an arbitrator is not bound by principles of substantive law or by rules of evidence, but 'may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be.'" (*Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002], quoting *Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 308 [1983], *lv den* 99 NY2d 509 [2003]).

Further, "the method for selecting arbitrators and the composition of the arbitral tribunal [are] left to the contract of the parties." (*Matter of Lipschutz [Gutwirth]*, *supra* at 61-62).

Accordingly, Swiss Center has asserted no grounds - either in law or from the parties' own contract - for the Court to impose the additional qualification of being a lawyer upon the parties' arbitrators.

Accordingly, it is

ORDERED that the Amended Complaint is hereby converted to a Petition and this action to a special proceeding pursuant to

Article 75 of the CPLR; and it is further

ORDERED that plaintiff Swiss Center's Order to Show Cause is granted to the extent of disqualifying Brian R. Corcoran as an arbitrator in the underlying arbitration, and staying arbitration until 608 Company appoints a "disinterested person" as its party-appointed arbitrator, and is otherwise denied as moot; and it is further

ORDERED and ADJUDGED that the portion of Swiss Center's Petition which seeks a judgment disqualifying Corcoran and declaring that 608 Company must select a neutral arbitrator as its "disinterested person" is granted; and it is further

ORDERED and ADJUDGED that that branch of Swiss Center's Petition, which seeks a judgment declaring that the third arbitrator must be an attorney "of recognized competence in the field of real estate law," is denied and dismissed; and it is further

ORDERED and ADJUDGED that the parties proceed to arbitration as soon as 608 Company, LLC selects a "disinterested" arbitrator, and that respondent's counsel shall serve a copy of this judgment upon the arbitral tribunal.

This constitutes the decision, order and judgment of the Court.

Dated: 4/4, 2011


Hon. Barbara R. Kapnick, J.S.C.

U N F I L E D J U D G M E N T
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