

<b>Chock Full O'Nuts Corporation v NRP LLC I</b>
2005 NY Slip Op 30146(U)
December 15, 2005
Supreme Court, New York County
Docket Number: 0105256/2001
Judge: Barbara Kapnick
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

0105256/2001

CHOCK FULL O'NUTS

VS  
NRP LLC I

INDEX NO.

105256/01

MOTION DATE

MOTION SEQ. NO.

009

MOTION CAL. NO.

SEQ 9

CONFIRM/REJECT REFEREE REPORT

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

Notico of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

DEC 23 2005

Dated: 12/15/05

**BARBARA R. KAPNICK, C.  
J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

*Referenc*

FOR THE FOLLOWING REASON(S):

\* Please re-refer to  
Special Referee  
Marian Lewis -

Supreme Court  
60 Centre Street, New York, New York 10007

See Decision  
of Dec 15, 2005

Special Referee Clerk, Room 119

**Information Sheet**

To be attached to a copy of order and filed in Room 119  
Special Referee Selection Program

Date: Dec. 15, 2005

Title of Action: Chock Full O'Nuts Corporation and Stahl Midtown  
Properties LLC v. NRP LLC I and Christine, Inc.,

Index No. 105256/01

Issues: See order dated: Dec 15, 2005

Estimated Length of Time Needed for Hearing: ~~1 to 2 hours~~ a hearing  
may not be necessary

**Attorneys**

**Names, Address and Telephone Numbers**

**for Plaintiff:**

Alfred Litman, Esq. (212)213-5577  
Litman & Jacobs  
276 Fifth Avenue, Suite 604  
New York, New York 10001

**for Defendants:**

Fran M. Jacobs, Esq. (212)692-1000  
Duane Morris LLP  
380 Lexington Avenue  
New York, New York 10168

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 12

-----X  
CHOCK FULL O'NUTS CORPORATION,

Plaintiff,

-and-

STAHL MIDTOWN PROPERTIES LLC,

Intervenor-Plaintiff,

-against-

NRP LLC I and CHRISTINE, INC.,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

**DECISION/ORDER**  
Index No. 105256/01  
Motions Seq. Nos.  
009 and 010

Motions sequence numbers 009 and 010 are consolidated for disposition.

Plaintiff Chock Full O'Nuts Corporation ("Chock") and its assignee, intervenor-plaintiff Stahl Midtown Properties LLC, ("Stahl"), commenced this action against its landlord, defendant NRP LLC I ("NRP"), and sub-tenant, defendant Christine, Inc. seeking a judgment declaring, inter alia, that it effectively renewed its net Lease for the commercial property located at 1420 Broadway, New York, New York.

Defendant NRP asserted counterclaims against the plaintiff and intervenor-plaintiff and a cross-claim against defendant Christine, Inc. for an order of ejectment and for damages arising from their 'wrongful' holding over at the premises following the expiration of the Lease term.

By Decision dated December 23, 2002 and resulting Order dated May 22, 2003, this Court (i) granted summary judgment dismissing the complaints of plaintiff and intervenor-plaintiff on the condition that defendant NRP enter into a direct Lease with defendant Christine, Inc., (ii) granted summary judgment in favor of defendant NRP on its counterclaims, and (iii) referred the issue of the amount of damages sustained by defendant NRP as a result of the holdover of plaintiff and intervenor-plaintiff in the subject property from March 13, 2001, following the expiration of the Lease term, to May 30, 2003, to a Special Referee to hear and report with recommendations.

The Order was affirmed by the Appellate Division, First Department in a Decision dated October 26, 2004 (11 A.D.3d 385), which held, inter alia, that "Chock Full O'Nuts and Stahl were subject to liability for holdover damages, based upon their failure to discharge their lease obligation to remove their subtenant at the expiration of the base lease (*see Stahl Assocs. Co. v. Mapes*, 111 A.D.2d 626, 629, ...[1985])." Id. at 386.

The matter was referred on October 23, 2003 to Special Referee Marian Lewis who heard testimony from eight witnesses over eight sessions held from November 7, 2003 through May 13, 2004. The matter was ultimately submitted on August 31, 2004 to the Special Referee, who issued a 13-page Report dated September 23, 2004 determining, inter alia, that the annual fair market net rent was \$325,279.00.

The Referee further found that defendant NRP had suffered damages of \$718,324.44, minus the sum of \$399,193.55 already paid by intervenor-plaintiff to defendant NRP pursuant to a *pendente lite* order which set use and occupancy at the monthly rate of \$15,000.00 commencing March 13, 2001. Special Referee Lewis thus recommended that the court find that NRP sustained damages in the total sum of \$319,130.89, together with interest to be calculated from April 15, 2002.

The intervenor-plaintiff now moves (under motion sequence number 009) for an order pursuant to CPLR § 4403 and 22 NYCRR § 202.44(a) rejecting the Report of the Special Referee on the ground that the recommendations made in the Report are unsupported by the record and contrary to New York law.

Defendant NRP opposes the motion and moves (under motion sequence number 010) for an order confirming the Referee's Report, and directing that judgment be entered in favor of NRP and jointly and severally against Chock and Stahl in the amount of \$319,130.89, together with interest to be calculated from April 15, 2002, and that execution be had thereon.

Generally, New York courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented. Courts will confirm a Referee's report to the extent that the record substantiates his findings and they may reject findings not supported by the record (citations omitted).

Matter of the Holy Spirit Assn. for the Unification of World Christianity v. Tax Commission of the City of New York, 81 A.D.2d 64, 70-71 (1st Dep't 1981), rev'd on other grounds, 55 N.Y.2d 512 (1982). See also, European American Bank & Trust Co. v. H. Frenkel, Ltd., 163 A.D.2d 154 (1st Dep't 1990); Kardanis v. Velis, 90 A.D.2d 727 (1st Dep't 1982).

The intervenor-plaintiff argues that the record herein does not substantiate the Referee's findings with respect to the fair market value of the property. Specifically, the intervenor-plaintiff contends that the Referee improperly took valuations that were based on the price per square foot paid for the 'usable' area of comparable retail properties and applied those valuations in determining the value of the subject property's 'gross' area, including the non-usable portion of the property.<sup>1</sup>

NRP argues in opposition to the motion that the intervenor-plaintiff should be estopped from challenging the Referee's conclusion as to the size of the premises because it previously alleged in its Complaint that each floor consisted of 2,290 square feet, dimensions which are larger than those found by the Referee, and should be estopped from challenging the valuation of the property because it annexed in connection with the prior motion an appraisal from Cushman & Wakefield which valued the fair market rental of the building at \$516,000.00 per year.

---

<sup>1</sup> According to the intervenor plaintiff, only 4,875 out of 6,547 square feet in the gross area of the subject premises constitutes usable space.

However, while the Referee was free to consider the entire record, including the aforesaid appraisal, this Court finds that the Referee properly ruled the prior submission did not constitute a formal judicial admission and correctly allowed Stahl to introduce further evidence as to the fair market value of the premises, since that issue was not directly raised or considered by this Court on summary judgment and was expressly deferred for consideration at a full hearing.

NRP further argues that the Referee properly calculated the size of the property based on gross area since the landlord was deprived of the value of the entire demised premises, including the building and the land upon which it is situated, during the holdover period, and not just the usable area.

However, NRP does not dispute that the only testimony offered by both sides' experts regarding the value of comparable properties was based on usable, rather than gross, square footage. Thus, it appears that the valuation was based on a comparison of non-analogous spaces. Accordingly, based on the papers submitted and the oral argument held on the record on February 23, 2005 this Court finds that the Referee should have computed the property's fair market rental value based on the same criteria used to compute the value of the comparable properties. This matter shall, therefore, be remanded to Special Referee Lewis, who is requested to issue a Supplemental Report calculating the fair market rental

value of the property based solely on the usable area of the premises.

The intervenor-plaintiff next argues that the Report should be rejected on the ground that the Referee, in determining fair market rental value for the premises, improperly applied the concept of 'highest and best use'. Stahl argues that the concept, which is routinely applied in condemnation proceedings to determine compensation to an owner for the permanent loss of property, is inapplicable to holdover proceedings, including the instant case. See, Beacway Operating Corp. v. Concert Arts Society, Inc., 123 Misc.2d 452 (Civ. Ct., N.Y. Co. 1984) in which the Court declined to apply the "most advantageous use" standard in a holdover proceeding.

However, the Court in Beacway Operating Corp., supra at 454 further held that "[a]ll the facts and circumstances which a buyer and seller would consider in connection with the purchase and sale of a piece of property are relevant and material in arriving at a determination as to its market value' (Sparkill Realty Corp. v. State of New York, 254 App Div 78, 82, affd 279 N.Y. 656,...)" Certainly, fair market value of a holdover is determined, at least in part, "with reference to an asset's most advantageous use." See, Omabuild Corp. v. Copacabana Nightclub Inc., N.Y.L.J., July 21, 1994, p. 23, col. 1 (Civ. Ct., N.Y. Co.).

Accordingly, this Court finds that it was appropriate for the Special Referee to consider the 'highest and best use' (or 'most advantageous use') in determining the fair market rental value of the property.

Stahl alternatively argues that the Referee incorrectly based the fair market rental value on the 'highest and best use' for the second and third floors of the property even though she found that those floors cannot legally be used under the existing Certificate for Occupancy for anything other than storage, toilets and a dressing room.

The intervenor-plaintiff contends that the Referee's valuation of the property's second and third floors should, therefore, be rejected in its entirety or, at a minimum, reduced (i) by \$25 per square foot for the third floor to reflect the extremely limited uses permitted by the existing Certificate of Occupancy, or (ii) by \$220,000.00 to take into account what the intervenor-plaintiff's expert estimated at the hearing to be the cost of obtaining a new Certificate of Occupancy.

NRP contends that the "highest and best use" of the premises is also the current use of the premises; i.e., rental to a single user.

It appears that NRP must undertake to obtain a new Certificate of Occupancy, to replace the current Certificate of Occupancy,

which was issued in 1961 and does not reflect the current use. However, there is no dispute that despite the limitations on legal use which exist under the current Certificate of Occupancy, Chock and Stahl have collected \$254,000.00 plus taxes per year from Christine under its Sublease, and collected said amount during the holdover period at issue.


Thus, the Special Referee properly found that there was no basis to reduce NRP's recovery on this ground.

Accordingly, this matter is re-referred to Special Referee Lewis only for the purposes of issuing a supplemental report on the limited issue delineated herein.

Upon service of a copy of this order with notice of entry, the Special Referee Clerk (Room 119) shall arrange a date for the re-reference to Special Referee Lewis.

This constitutes the decision and order of this Court.

Date: December 15, 2005

  
Barbara R. Kapnick  
J.S.C. **FILED**  
DEC 23 2005

**BARBARA R. KAPNICK** COURT CLERK  
J.S.C. **FILE**