

**JP Morgan Chase Bank v Reibenstein**

2005 NY Slip Op 30190(U)

June 27, 2005

Supreme Court, New York County

Docket Number: 0123682/2002

Judge: Ronald A. Zweibel

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

PRESENT: NON. RONALD A. ZWEIBEL  
RONALD A. ZWEIBEL Justice

PART 50

JP Morgan Chase BK

INDEX NO.

123682/02

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -

Marie Reibestein

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

Notice 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 is decided in accordance with the accompanying Decision, Order & Judgment.

ENTER:

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel for the losing representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: PT. 500 JUN 27 '05

Ronald A. Zweibel  
**NON. RONALD A. ZWEIBEL** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50Q

-----X  
JP MORGAN CHASE BANK as Successor in :  
Interest to TAPPAN ZEE NATIONAL BANK :  
OF NYACK, :

Petitioner, : Index Number 123682/02  
Decision, Order & Judgment  
-against- :

MARIE REIBENSTEIN, :

Respondent. :

-----X

ZWEIBEL, J.:

Petitioner JPMorgan Chase Bank ("Chase") moves this Court for an Order and Judgment staying arbitration on the grounds that the claims asserted in the demand for arbitration are not arbitrable because of respondent's failure to comply with conditions precedent to arbitration that are expressly set forth in Article 2(b) of the written lease between petitioner and respondent. Respondent Marie Reibenstein ("Reibenstein") opposes staying arbitration. According to respondent the issue of arbitrability has twice been previously decided by this Court and is res judicata, a plain reading of the lease calls for arbitration "in the event of any disagreement or dispute between the parties" and the petition does not state a cause of action upon which relief can be granted. Respondent also cross-moves for contractual damages for petitioner's contracts with and/or licenses to the companies on the Automatic Teller Machines ("ATM") on the leasehold premises, which are illegally licensed and not permitted under the lease, in the sum of \$1,000,000.00 and for

a percentage of future gross income of the ATM's or in the alternative for the immediate removal of the ATM's. In a separate motion, respondent moves for pre-arbitration discovery. In a reply to the Cross-motion, Chase argues that the lease was modified on December 29, 1993, after the decision in the prior actions. Accordingly, the Court's prior actions were interpreting different lease terms. Chase further argues that the issues presented to and determined by the Courts in the prior actions are not the same as the issues raised in the instant action. Both of the prior actions involved disputes relating to the costs of tenant improvements. The provision relating to tenant improvements was removed from the lease in the 1993 modification. Chase also claims that the cross-petition should be dismissed on the grounds that respondent fails to cite any provision of the lease that prohibits Chase from contracting with third parties with respect to ATM machines and that any dispute with respect to the ATM's, pursuant to Article 14 of the lease is to be submitted to arbitration. Additionally, Chase opposes pre-arbitration discovery.

The Court has considered all the affidavits, exhibits, memoranda of law and arguments of counsel made to this Court in reaching this decision. For purposes of this decision, Motion Sequences 1 and 2 are consolidated into this decision.

#### Background

Chase is a banking corporation organized and existing under

the laws of the State of New York with offices at 270 Park Avenue, New York, New York 10017. Reibestein is an individual who resides at Ridge Road, Valley Cottage, New York 10989.

Chase, as successor in interest to Tappan Zee National Bank of Nyack, leases premises at Route 303 and Ridge Road, Valley Cottage, New York, for use as a bank branch. The lease dated October 1, 1963, was for an initial term of 20 years and grants the tenant three ten year options to extend the lease.

Prior to 1993, there were two court proceedings relating to the tenant's exercise of its renewal options. At the time of the prior actions, Article 2(b) of the lease provided in relevant part as follows:

In the event the lease term is extended, as is provided for hereinabove, rental for the extension or extensions shall, be not less than \$6,600 per annum, and shall provide a net return of 8 percent per annum of the agreed then value of the land, building(s) and improvements, which are the subject of this lease, excluding such improvement costs and building costs as are paid for by the Tenant.

When the tenant exercised its first renewal option in 1982, the landlord and tenant followed the appraisal procedure set forth in Article 2(b) of the lease. After the appraisal was completed, the landlord demanded arbitration challenging the amount assigned for "tenant improvements" in the appraisal. The Court (Helen Freedman, J.) held that the tenant's application to stay arbitration was "untimely" and that the landlord should be

permitted to contest the amount assigned to tenant improvements before the appraisers.

Similarly in the 1993 proceeding, respondent contested the \$198,045.10 claimed by the bank for tenant improvements. In its answer to the petition in 1993, respondent maintained:

Paragraph 2(b)'s appraisal procedure is only concerned with the tenant's appraisal versus the landlord's appraisal and does not mention nor take into account the deduction from the Appraiser's amount of the alleged tenant Improvements. The only option the landlord has to contest claimed tenant improvements is in the paragraph 14 procedure.

In a decision dated November 9, 1993, Justice Milton Williams held, inter alia, that the issue of whether the landlord was barred from contesting the claimed tenant improvements by failing to comply with Article 2(b) notice requirements should be submitted to arbitration.

Thereafter, the parties executed a modification of the lease intended to eliminate the disputes and demands for arbitration relating to tenant improvements. By agreement dated December 29, 1993, the lease was extended to October 31, 2003 and Articles 2(b) and 14 were modified in writing. Article 2(b) was modified to provide that rent for the next renewal term would be six percent of market value rather than eight percent of market value, excluding improvement costs and building costs paid for by the tenant. The parties expressly agreed in the lease modification that the rent for the third renewal option would be determined by the appraisal

procedure set forth in Article 2(b). Accordingly, Article 2(b) of the lease, was amended, as follows:

In accordance with Article 1 of the lease, Tenant has the option to further extend the term of the Lease for another ten (10) years commencing November 1, 2003 and expiring October 31, 2013 (the "Third Renewal Term"). The rental for the Third Renewal Term is to be determined in accordance with the provisions of Article 2(b) of the Lease. The first sentence of said Article 2(b) is hereby deleted in its entirety and the following sentence is inserted in its place and stead:

"In the event that the lease term is extended for the Third Renewal Term (November 1, 2003 to and including October 31, 2013), the rental payable by the Tenant during the Third Renewal Term shall be an amount equal to six (6%) percent of the agreed then value of the land, building(s) and improvements, which are the subject of this lease. Evaluation shall be made as follows: when Tenant sends Landlord notice of intent to extend term, Tenant shall in said notice advise Landlord of value as appraised by Tenant. Within 15 days after the postmarked date of said notice, Landlord must either accept Tenant's Evaluation or submit by Certified Mail, Return Receipt Request, directed to Tenant's then principal office address, a request for Tenant's appraiser to confer with Landlord's appraiser within 5 days of postmarked date of Landlord's notice, the conference to be at the leasehold site, at which conference the two appraisers shall designate and agree upon a third appraiser. Thereafter, the three appraisers, within 10 days from the date of their conference at the leasehold site, shall send by Certified Mail, Return Receipt Request, to both Tenant and Landlord at their then respective principal office addresses or residence addresses, the appraisal of the aforesaid asset, determined by the third appraiser, which appraisal shall be binding upon both Tenant and Landlord. The fee charged by the third party appraiser shall be paid for one-half by

Landlord and one-half by Tenant."

By letter dated September 23, 2002, Chase notified respondent that it was exercising its option to extend the lease for an additional ten years to October 31, 2013, pursuant to Article 2(b), as amended. Pursuant to Article 2(b), Chase advised respondent in the notice that the value appraised by Chase was \$490,000.00 and requested that respondent either accept Chase's evaluation or serve a request for Tenant's appraiser to confer with respondent's appraiser. Respondent, however, failed to either accept Chase's evaluation or to request that Chase's appraiser confer with respondent's appraiser at the leasehold site as required by Article 2(b) of the lease, as amended.

Instead of complying with the appraisal procedure mandated by Article 2(b), respondent served a demand for arbitration and notice of intention to arbitrate citing Article 14 of the lease. Chase received respondent's demand for arbitration on October 25, 2002.

The instant proceedings ensued as a result.

During the course of the proceedings, respondent finally obtained its own appraisal. While the lease does not require Chase to provide its appraisers's report to the landlord, Chase agreed to exchange appraisal reports. On December 6, 2002, the parties exchanged copies of their respective appraisal reports. Thereafter, the Court and the parties attempted to settle this case.

When it became apparent that the case was not being settled, the parties agreed in a written stipulation dated February 5, 2003, to proceed in accordance with the contract and that a third party appraiser would be appointed. The third party appraiser would be Lawrence J. Panico, an appraiser proposed by the Landlord. After questioning Mr. Panico about his appraisal methods and accusing the attorney for Chase of somehow prejudicing him, the Landlord's attorney objected to Mr. Panico's acting as the third appraiser.

Thereafter, the Landlord's appraiser and Chase's appraiser conferred and agreed upon a third appraiser, Scott James Shedler of Lawrence & Shedler Appraisal Service, another appraiser proposed by the Landlord. In an extensive report dated January 5, 2004, Mr. Shedler set forth his opinion that the market value of the property is \$535,000.00 and would result in a \$32,100.00 rent for the final option period.<sup>1</sup>

Pursuant to the terms of the Lease, this third appraisal is "binding upon both Tenant and Landlord." Accordingly, the annual rent for the Third Renewal Term is six percent of the appraised value, i.e., \$32,100.00. The Court of Appeals has held that, absent fraud, bias or bad faith on the part of the appraiser, the appraiser's opinion of market value is final by agreement of the

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<sup>1</sup>Despite agreeing to be bound by the third appraisal in the modification of the contract, respondent raises a laundry list of objections to the third appraisal which she claims she should be allowed to argue in an arbitration proceeding pursuant to the arbitration clause in the original lease.

parties and, therefore, not subject to review. The agreement made by the parties made the third appraiser the judge (or arbitrator) of last resort.

The Court notes that the market value of \$535,000.00 determined by the third appraiser is supported by both the Letter of Intent signed by the Landlord and Chase during negotiations for the Third Renewal Term and the appraisal of Heritage Valuation & Consulting, Inc., Chase's appraiser.

In 2001, the Landlord, represented by counsel, and Chase negotiated a rent for the Third Renewal Term that included additional adjacent land to be used as a parking lot. The parties agreed that the rent for the additional parcel would be \$1,000.00 per month or \$12,000.00 annually. The parties agreed that the total annual rent for the third Renewal Term, as amended to include the adjacent parcel, would be \$41,000.00 for the first five years of the renewal term and \$45,100.00 for the last five years of the renewal term. Accordingly, the parties agreed that the rent for the Third Renewal Term would be \$29,000.00 for the existing premises plus \$12,000 for the additional parcel, for a total of \$41,000.00.

Chase was allegedly prevented by local regulations from obtaining the necessary approvals to use the adjacent parcel for parking. The parties, therefore, did not execute the lease modifications that would have included the additional parcel.

In 2002, Chase hired Heritage Valuation & Consulting, Inc. to appraise the premises to determine the rent for the Third Renewal Term. In an extensive report dated August 28, 2002, Heritage Valuation & Consulting, Inc. rendered its opinion that the market value of the leased premises is \$ 490,000.00.

#### Discussion

Basically, respondent argues that the matter should be sent to arbitration so that respondent may challenge the third appraisal despite the "binding" language in the lease modification because the third appraisal is not in its favor. "An appraisal proceeding... is entitled to every reasonable intendment and presumption of validity, provided the appraisers ...have substantially complied with the terms of the submission" (Glickman v. North River Ins. Co., 86 A.D.2d 760 [4<sup>th</sup> Dept. 1982], quoting Gansevoort Corp. v. Palatine Ins. Co., 11 Misc.2d 518, 522 [Sup. Ct. N.Y. Co. 1957], aff'd 7 A.D.2d 720 [1st Dept. 1958], app. den. 6 N.Y.2d 705 [1959]). However, in The Matter of Penn Central (Conrail), 56 N.Y.2d 120 (1982), the Court of Appeals recognized that Conrail's claim of defects in the appraisal award could not stand as Conrail had stipulated to several of the facts which it now claimed were in error and that a dissatisfied party who participated in the selection of the appraiser, which respondent did, has no greater right to challenge the appraiser's evaluation than he would have to attack an award rendered by an arbitrator

(see Matter of Dimson [Elghanayan], 19 N.Y.2d 316, 325 [1967]). However, since the issue for arbitration is resolved by the third appraisal, nothing remains with respect to that amount for an arbitration.

In the instant case, the basic agreement and the modification of the lease was carefully negotiated by their lawyers over an extended period of time. It provided for an appraisal of value by persons other than the arbitrators and that if a third appraisal was necessary, that appraisal would be binding on all the parties. According to petitioner, the modification was entered into to avoid the exact situation here, namely, the need for arbitration. Thus, the question before the Court is only whether the disputes over the appraisals are resolvable in arbitration.

The Court has examined the lease and the modification and finds that the power to reject the appraisal should be limited and the appraisal issue should be excluded from arbitration because any differing interpretation of the agreement would be unreasonable. The main agreement contains a broad arbitration agreement which also applies to the lease modification in question. The lease modification sets forth the procedure for obtaining a binding valuation of the property for purposes of establishing the rent.

The parties each had their own appraiser appraise the property. Because the appraisals were far apart, the parties were unable to reach an agreement on the proper value of the property.

The modification states that the third appraiser's valuations are binding on the parties. Pursuant to the modification, the parties selected a third appraiser. He appraised the property. His appraisal of the property's value fell somewhere between the amount of the parties' respective appraisals. Despite extensive settlement negotiations, respondent still was not satisfied with the amount offered by petitioner which was slightly above the amount reached by the third appraiser and still demands arbitration.

It is indisputable that under a broad and general arbitration clause the intent of the parties as disclosed by the agreement is a matter for the arbitrators to interpret. Similarly, indisputable is that whether the parties agreed to arbitrate and what they agreed to arbitrate is a matter for the courts. When reasonable minds could not differ as to the expressed intent, the Court must determine what was to be submitted to arbitration. Where there is room for reasonable disagreement, the question, like any other arising under the contract, is for the arbitrators.

Applying these elementary principles to this matter, it cannot be disputed that if the contract said in haec verba that the valuation of the appraiser was not subject to arbitration and was final and binding, that would not be subject to interpretation by the arbitrators and they would have no power to effect any change. It is clear to this Court that when the lease and the modification

are read and understood, this is exactly what was meant, and any differing interpretation would be unreasonable. The contracts cannot be read without concluding that the primary object of the contracting parties was to set the value of the rental property, and to do this on the basis of a carefully worked out mathematical formula without the intervention of any tribunal. It was only in the event that one party or the other sought to deviate from the formula set out that arbitration could be invoked to compel the party to adhere to it. The provision for appraisal was an inherent part of the formula. It cannot be maintained that it was intended that the arbitrators were to sit as a court of review of the appraiser's valuations. The third appraiser was not meant to merely offer the arbitrator's an advisory opinion. To hold such would be entirely contrary to the meaning of the agreements.

Moreover, "[a]ppraisers have broad discretion as to their methods and sources of information and may determine 'which of the myriad factors are relevant to a particular valuation and how such factors impact the valuation of the parcel of land, without interference or direction from the court' (or the arbitrators) absent an agreement expressly identifying such factors " (Vitale v. Friedman, 245 A.D.2d 14 [1<sup>st</sup> Dept. 1997] [citations omitted], lv. den. 92 N.Y.2d 801 [1998]). "[A]ppraisal is not an exact science and ... the determination of an appraiser is to be upheld as long as the appraiser proceeds in good faith and without bias or fraud"

(Olympia & York 2 Broadway Co. v. Produce Exch. Realty Trust, 93 A.D.2d 465, 468 [1<sup>st</sup> Dept. 1983]; see Perbinder v. Jakobovitz, 239 A.D.2d 294 [1<sup>st</sup> Dept. 1997]; Rice v. Ritz Associates, Inc., 88 A.D.2d 513, 514 [1<sup>st</sup> Dept. 1982], aff'd. 58 N.Y.2d 923, rearg. den. 59 N.Y.2d 762 [1983])). There was no showing otherwise. The only basis for setting aside the appraisal is fraud, bias or bad faith. Respondent's disagreements with the methods and factors considered by the third appraiser in this case falls outside the parameters of the lease and the lease modification, and do not raise an issue for this Court or a basis for arbitration under the lease. The parties to the lease submitted the question of value to the third appraiser for final determination, not to the courts or the arbitrators, and in the absence of any allegation of the operation of any of these factors, the appraisal should stand (see Moore v. Eadie, 245 N.Y. 166 [1927])). The third appraiser was not limited to use only the valuation technique respondent wanted.

Accordingly, this Court finds that the lease and modification leave no room for any interpretation that the parties' expressed intent was to prevent the third appraiser's findings from being subject to any review. As the matter sought to be arbitrated is not arbitrable, the motion to stay arbitration of the issue of valuation as set by the appraisal method is granted.

Additionally, the Court notes that the law of the case doctrine that respondent relied on is unavailing in this Court as

the issue of whether the third appraisal was binding on respondent pursuant to the lease modification was never previously in dispute as the modification did not exist at the time of the prior determinations (see e.g. Obrycki v. Elliott, 130 A.D.2d 563, 564 [2<sup>nd</sup> Dept. 1987]). In any event, the issue of arbitration appears to be moot as respondent has received the relief she requested in her Demand for Arbitration.

As to the cross-petition, respondent argues that petitioner breached the lease by subletting or assigning its lease to allow for ATM's. Petitioner claims that this claim should be denied for a failure to state a cause of action and states that the issue of whether the ATM's utilized by petitioner are illegally licensed and not permitted under the lease, as well as any damages that ensued from this alleged breach of the lease, is arbitrable and should be arbitrated pursuant to Article 2(b) of the written lease between the parties. According to petitioner, it maintains full possession of the premises and therefore, has not assigned nor subletted the premises. Petitioner's relationship with the ATM Networks is one of a subscription to a communications network, and appears to be similar to its relationships with other communication companies, such as telephone carriers and Internet service providers. The ATM Networks merely permit customers to communicate with the Bank and other banks, by providing access to their accounts nation-wide (see generally Fleet Bank NA v. Burke, 23 F.Supp.2d 196, 198 [D. Conn.

1998]; Treasurer v. The Philadelphia National Bank, 682 F.Supp. 269, 270-2 [D.N.J. 1998]). Accordingly, respondent's papers are insufficient to bring this issue properly before this Court at this time and the parties should proceed to arbitration on this issue.

Finally, respondent demands the production of all documents evidencing the remuneration received by petitioner through its ATM transactions as well as petitioner's contracts with third parties relating to such remuneration. Basically, respondent seeks discovery of the profits earned by the petitioner through its operation of ATM's. Petitioner opposes such discovery.

With respect to this application for Court ordered discovery in aid of arbitration, CPLR 3102(c) provides that "(b)efore an action is commenced, disclosure to aid ... in arbitration may be obtained, but only by court order." The Court of Appeals in Desapio v. Kuhlmeier, 35 N.Y.2d 402 [1974] reiterated:

Generally courts may not order discovery in aid of arbitration, unless the movant has demonstrated 'extraordinary circumstances'

(Desapio v. Kuhlmeier, at 406, quoting Application of Katz (Barkin), 3 A.D.2d 238, 239 [1<sup>st</sup> Dept. 1957]; see also In re Flood, 157 A.D.2d 780 [2<sup>nd</sup> Dept. 1990]). Thus, while the Court is empowered to order disclosure in aid of arbitration (CPLR 3102(c)), this power, it has been held, should be sparingly exercised (Matter of Katz (Barkin), 3 A.D.2d 238). The test is necessity rather than convenience and disclosure is not justified except where it is

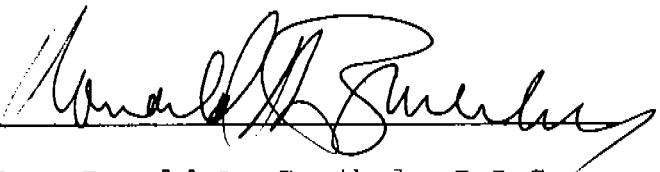
absolutely necessary for the protection of the rights of a party (see Hendler & Murray v. Lambert, 147 A.D.2d 442, 443 [2<sup>nd</sup> Dept. 1989] citing International Components Corp. v. Klaiber, 54 A.D.2d 550, 551 [1<sup>st</sup> Dept. 1976]).

Respondent has failed to make a showing of necessity sufficient to require discovery. Respondent's request for discovery is overbroad and her papers fail to set forth a sufficient basis for discovery of petitioner's confidential business information and contracts. The information demanded by respondent is not necessary to the resolution of the issues nor does it clarify the relevant issues. The motion for discovery is denied.

Accordingly, it is ORDERED that petitioner's motion for pre-arbitration discovery is denied. The petition to stay arbitration is granted as to the appraiser's valuation of the property and the cross-petition is denied and dismissed as the issue of the ATM's as a breach of contract is an issue for arbitration under the lease and not for this Court.

This constitutes the Decision, Order and Judgment of this Court.

ENTER:

A handwritten signature in black ink, appearing to read "Ronald A. Zweibel", written over a horizontal line.

Hon. Ronald A. Zweibel, J.S.C.

Dated: June 27, 2005