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

PRESENT: RICHARD B. LOWE III PART 56

Index Number : 603558/2005

US EAST COMPANY OF NEW YORK

vs

JPMORGAN CHASE BANK N.A.

Sequence Number : 006

STRIKE

INDEX NO. _____

MOTION DATE 9/13/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

FILED
OCT 17 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: October 11, 2007

RICHARD B. LOWE III
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

..... X

US EAST COMPANY OF NEW YORK, LTD.,

Plaintiffs, Index No. 603558/2005

-against-

JPMORGAN CHASE BANK, N.A.,

Defendants.

..... X

Hon. Richard B. Lowe, III:

This action arises from a dispute over alleged tortious interference with prospective business relations and breach of the implied covenant of good faith and fair dealing. JPMorgan Chase Bank[1] moves for an order to strike the jury demand from the note of issue filed by US East Company ("Plaintiff"/"US East").

BACKGROUND

The general facts of this matter were discussed in this Court's prior decision dated May 10, 2006 and shall not be repeated here, except to the extent necessary to decide this motion.

In 1998, US East and Chase Manhattan Bank executed a Master Agreement for Consulting Services (the "1998 Agreement"). In 2003, following the merger of Chase Manhattan Bank and JPMorgan, US East was requested to and did sign a new Master Agreement (the "2003 Agreement"). Unlike the 1998 Agreement, the 2003 Agreement contained a jury trial waiver provision. Illuminating the central issue of this motion is US East's contention that the 2003

[1]As a result of the merger between Chase Manhattan Bank and JPMorgan, the two entities became the single entity known as JPMorgan Chase Bank (hereinafter referred to as "Chase").

Agreement was never effective and that the 1998 Agreement is the binding Master Agreement between the parties. If the 1998 Agreement is binding, as US East contends, then no jury trial waiver is applicable. However, if the 2003 Agreement is binding, as Chase contends, then the jury trial waiver does apply and Chase's motion for an order to strike US East's jury demand from the note of issue shall be granted.

The Master Agreement set forth the general terms by which US East rendered services to Chase. Chase would request work from US East by executing a Task Order, which contained, among other things, the scope of the work requested, a pay rate, and an expiration date. Additionally, each Task Order contained a Master Agreement reference, by which the Master Agreement was incorporated into each Task Order.

After US East signed and returned the 2003 Agreement, the parties engaged in a series of exchanges where one sent the other documents "mistakenly" referencing the wrong Master Agreement. The following exchanges illustrate.

Despite receiving the signed 2003 Agreement, Chase continued to issue Task Orders referencing the 1998 Agreement. Chase claims that its computerized system which generated task orders was not updated to reflect the new Master Agreement.

In February 2004, Chase executed an amendment to the Master Agreement. The Amendment referenced the 1998 Agreement as the Master Agreement. Chase claims that the reference to the 1998 Agreement, rather than the 2003 Agreement, was a clerical error.

In June 2004, Chase issued a Request for Proposal ("RFP") to US East as well as other vendors. The RFP solicited proposals to be designated as a preferred vendor of information technology services. The proposals were required to identify any existing contracts with Chase.

In its response to the RFP, US East identified the 2003 Agreement as the contract between Chase and US East. US East claims its identification of the 2003 Agreement, rather than the 1998 Agreement, was a mistake.

In April 2005, Chase sent a Notice of Termination to US East informing US East that the "current" Master Agreement would be terminated on April 30, 2005. US East claims that the 1998 Agreement was the "current" Master Agreement, and Chase claims the contrary. In the alternative, US East argues that if the 2003 Agreement was the "current" Master Agreement, it terminated according to the terms of the notice. After the 2003 Agreement terminated, the 1998 Agreement was revived by outstanding Task Orders still referencing the 1998 Agreement.

This confusion culminated in the events on May 24, 2005, when Chase allegedly poached fourteen of US East's twenty-four employees while US East was still providing services to Chase pursuant to existing Task Orders.

Subsequently, US East brought the underlying action containing five causes of action: wrongful interference with prospective contractual relationships (first cause of action); breach of oral agreement (second cause of action); unjust enrichment (third cause of action); breach of the Master Agreement (fourth cause of action); and promissory estoppel (fifth cause of action). In this Court's decision dated May 10, 2006, Chase's motion to dismiss was granted to the extent that the second, third, and fifth causes of action were dismissed. In this motion, Chase moves to strike the jury demand from the note of issue of US East Company on the ground that the right to a jury trial was waived in the 2003 Agreement.

DISCUSSION

In moving for an order to strike the jury demand from the note of issue, Chase contends that contractual waivers of the right to trial by jury are valid and enforceable. As a general matter, a jury trial waiver is "valid and enforceable, unless adequate basis to deny enforcement is set forth by the challenging party" (*Fordham Univ. v Manufacturers Hanover Trust Co.*, 145 AD2d 332, 333 [1st Dept 1988]). US East does not dispute the proposition that waivers of the right to trial by jury are valid and enforceable. Indeed, US East concedes that the jury waiver would be enforceable if the 2003 Agreement were in effect, had not been terminated, and governed the parties' relations as of May 24, 2005 (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Strike Plaintiff's Jury Demand, at 9 n 3 [Mem in Opp]).

Chase contends that the 2003 Agreement, which contains a waiver of the right to trial by jury, is a valid and enforceable contract. In opposing Chase's motion to strike the jury demand, US East argues that Chase did not manifest its assent to the 2003 Agreement by failing to fulfill a purported delivery requirement, therefore, the 2003 Agreement was never effective. Namely, US East claims that "Paragraph 2 of the 2003 [] Agreement required that a 'fully executed' copy of the 2003 [] Agreement be 'sent' to US East" (Mem in Opp, at 9).

Here, US East must show that the parties agreed that delivery was essential to the making of the 2003 Agreement (*see Morgan Servs., Inc. v Abrams*, 21 AD3d 1284 [4th Dept 2005] [A contract is ineffective without delivery, if the parties agreed that delivery is essential to the making of a contract.]). US East cites the provision entitled "Facsimile Copies" as demonstrating that the parties agreed that delivery was essential to the making of the contract. In reality, the provision merely provides for the treatment of facsimiles of fully executed copies of

the Master Agreement. Paragraph 2 of the 2003 Agreement reads:

> **Facsimile Copies**
> The parties agree that facsimiles of *fully-executed* copies of this Agreement and any Task Orders shall be deemed originals for all purposes in connection herewith. All such facsimiles shall be *sent* to the following facsimile numbers (or to other facsimile number or numbers as may be from time to time hereinafter designated in writing by the parties)[.]

Thus, there is no merit to the claim that the 2003 Agreement contained a delivery requirement because the "Facsimiles Copies" provision cannot be interpreted as requiring delivery in order for the 2003 Agreement to be effective. Contrary to US East's contention, Chase was not required to send a fully executed copy to US East in order for the 2003 Agreement to be effective (*Schoenfeld v Masucci*, 205 AD2d 749, 749-50 [2d Dept 1994] [A binding contract may be made without physical delivery of the instrument evidencing the contract.] [internal citations and quotations marks omitted]). Giving effect to the final paragraph of the Master Agreement, and ascribing to the words used their plain meaning (*Laba v Carey*, 29 NY2d 302, 308 [1971]), the agreement unambiguously provides that it shall be effective upon execution by the parties. Because the 2003 Agreement did not contain a delivery requirement, US East fails to show that the 2003 Agreement was ineffective.

Alternatively, US East argues that even if the 2003 Agreement took effect, Chase later terminated the 2003 Agreement pursuant to the terms of the Notice of Termination in 2005. The Notice of Termination provided notice that termination would be effective April 30, 2005. US East directs the Court's attention to the "Term and Termination" provisions in both the 1998 and 2003 Agreements, which state: "No [] termination shall be effective, however, until the last Task Order then in effect expires or is terminated." US East argues that the 2003 Agreement

terminated by its terms on April 30, 2005 because, as of that date, no Task Orders then in effect referenced the 2003 Agreement. US East further argues that, once the 2003 Agreement terminated, the 1998 Agreement controlled the existing contractual relationship between the parties because the Task Orders then in effect referenced only the 1998 Agreement.

As this Court decided in its decision dated May 10, 2006, the Master Agreement remained in effect through May 24, 2005 (the date that US East claims Chase improperly hired US East employees). Thus, there is no serious dispute as to whether the Master Agreement terminated during the relevant period. This Court, however, did not determine whether the Master Agreement was the 1998 Agreement or the 2003 Agreement. Therefore, the remaining issue is which Master Agreement remained in effect through May 24, 2005.

By its terms, the 2003 Agreement unequivocally superseded the 1998 Agreement:

> **Supremacy of This Agreement**
> The provisions, terms and conditions of this Agreement (together with the Task Orders and other documents referenced herein or therein) represent the entire agreement between JPMorgan Chase and [US East] on the subject matter hereof and this Agreement (together with the Task Orders and other documents referenced herein or therein) supersedes all related prior agreements and understandings between the parties.

Thus, when the 2003 Agreement became effective, it replaced the 1998 Agreement (*see Kindler v Newsweek, Inc.*, 277 AD2d 159, 160 [1st Dept 2000]; *Blair & Co. v Otto V.*, 5 AD2d 276, 280 [1st Dept 1958]). Indeed, "courts hasten to find an intention to have a substituted or superseding agreement discharging the old where the [new agreement] has resulted in formalized papers with unequivocal language" (*Goldbard v Empire State Mut. Life Ins. Co.*, 5 AD2d 230, 234 [1st Dept 1958]). Additionally, the "Standard Terms and Provisions" paragraph provided that the Master Agreement would be incorporated by reference into each Task Order without regard to an

express reference therein. Being the sole Master Agreement, the 2003 Agreement, by its terms, substituted any reference to the 1998 Agreement in each Task Order. According to the unambiguous terms of the "Supremacy of This Agreement" and "Standard Terms and Provisions" paragraphs, the 2003 Agreement superseded the 1998 Agreement and the 2003 Agreement was incorporated into each Task Order, regardless of whether any Task Order referenced the 1998 Agreement.

Furthermore, the Amendment Provision strengthens this conclusion. The 2003 Agreement provided that no amendment "shall be valid unless in a writing signed by an authorized representative of either the party against whom enforcement of such amendment, change, waiver or discharge is sought." By the terms of the Amendment Provision, a reference in the Task Order could not rise to the level of a modification manifesting the intent of both parties to revert to the 1998 Agreement. Thus, any reference in a Task Order to the 1998 Agreement could not have breathed life into the already extinguished 1998 Agreement (*see Citigifts, Inc. v Pechnik*, 67 NY2d 774, 774 [1986]). Because the 2003 Agreement did not terminate until the last Task Order expired, the 2003 Agreement was the controlling Master Agreement when JPMorgan allegedly hired US East's employees by improper means.

CONCLUSION

For the reasons stated above, this Court finds the 2003 Agreement enforceable, not terminated, and controlling as of the May 24, 2005 date. Since US East has failed to provide an adequate basis to deny enforcement of a valid and enforceable waiver to a jury trial, Chase's motion to strike the jury demand from the note of issue must be granted.

ORDERED that defendant's motion to strike the demand for jury trial granted, on the

ground that the parties waived a jury trial by a provision in the 2003 Agreement .

Dated: October 11, 2007

ENTER:

J.S.C.