

**WI/BSREP III 390 Park LLC v 390 Park Ave. Assoc.,
LLC**

2020 NY Slip Op 31585(U)

April 17, 2020

Supreme Court, New York County

Docket Number: 150859/2020

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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WI/BSREP III 390 PARK LLC,390 TOWER ASSOCIATES,
LLC

Plaintiff,

- v -

390 PARK AVENUE ASSOCIATES, LLC,390 PARK
PROPERTY LLC,

Defendant.

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INDEX NO. 150859/2020
MOTION DATE N/A
MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 29, 30, 31, 32,
33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for APPOINT - FIDUCIARY

This petition is brought by petitioner-landlords WI/BSREP III 390 Park LLC and 390
Tower Associates, LLC, pursuant to CPLR 7601, for the appointment of a third appraiser to
assess the fair market value of the property located at 390 Park Avenue. (Petition, at 1.)
Petitioners move for an order appointing the third appraiser pursuant to the parties' Restated and
Amended Agreement of Lease (the Lease). Respondent-tenants 390 Park Avenue Associates,
LLC and 390 Park Property LLC cross-move for an order appointing the third appraiser from the
list maintained by Part 36 of the Rules of the Chief Judge (22 NYCRR § 36.0) (the Part 36 list).

The parties' Lease sets forth the process for assessing the fair market value (FMV). In
brief, in the event that landlord and tenant are unable to agree on the FMV within the specified
time period, each party is required to appoint an appraiser and the parties' appraisers are
required to confer in an effort to reach agreement on the FMV. (Lease, Ex. C, § B [iii] [aa], [cc]
[Weigel Aff. In Supp., Ex. 1].) In the event the parties' appraisers are unable to reach
agreement, they are required to select a third appraiser. (Id., § B [iii] [cc].) If they are unable to
agree upon the third appraiser, either party may request the appointment from the President of

the Association of the Bar of the City of New York. (Id.) In the event of the failure of such President to act, “then the parties shall apply to the Supreme Court in the County of New York for the appointment of such third appraiser.” (Id.) The Lease specifies that the third appraiser shall meet the following requirements (the Lease requirements): The third appraiser shall be “competent and impartial” (id.) and, like the appraisers appointed by the parties, shall “be a Member of the Appraisal Institute having at least ten (10) years experience in the appraisal of commercial properties similar to the Premises in Manhattan.” (Id., § B [iii] [aa], [cc].)

It is undisputed that the parties’ appraisers did not agree to a third appraiser and that the President of the New York City Bar declined to appoint the third appraiser. (Resps.’ Memo. In Opp., at 2; Pets.’ Memo. In Reply, at 1.) It is also undisputed that the court must appoint the third appraiser. (Resps.’ Memo. In Opp., at 1; Pets.’ Memo. In Reply, at 2.) The parties’ dispute concerns the criteria that must be met for appointment of the third appraiser.

Petitioners argue that the third appraiser must meet “[t]he specific criteria agreed in the Ground Lease” (Pets.’ Memo. In Reply, at 2.) Respondents argue that the court need not appoint a third appraiser who satisfies the Lease requirements because those requirements “do not bind the Court, given that the Court is not a party to the Lease.” (Resps.’ Memo. In Opp., at 8.) They further state that “[n]evertheless, to the extent possible, the Court’s appointment should conform to [the Lease] criteria, with the most important being ‘competent and impartial.’” (Id.)

As the Court of Appeals has explained, “[i]t is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. Thus, clear, complete writings should generally be enforced according to their terms.” (Matter of Wallace [v 600 Partners Co.], 86 NY2d 543, 548 [1995] [internal quotation marks and citations omitted].) Applying this precept in the context of CPLR 7601, this

court holds that the Lease expressly sets forth the criteria for appointment of the third appraiser, and that these criteria must therefore be applied. (See Matter of Trio Asbestos Removal Corp. [v Marinelli], 37 AD3d 475, 477 [2d Dept 2007] [holding that where the shareholders' agreement provided that the valuation of shares was to be determined by the petitioner-corporation's accountants, that provision was required to be enforced, and a valuation of the shares performed by outside accountants was therefore ineffective].)

Respondents further argue that the court should select the third appraiser from the Part 36 list. (Resps.' Memo. In Opp., at 10.) They propose five possible appraisers from the list. (Id., at 8.) Petitioners contend that the court is not required to choose the appraiser from the Part 36 list. (Pets.' Memo. In Reply, at 6.) They propose 10 possible appraisers, none of whom is from the Part 36 list. (Id., at 3.)

As petitioners correctly argue, the appointment of the third appraiser is not an appointment which, by the terms of the Court Rules, is required to be made from the Part 36 list. (See 22 NYCRR § 36.2.) Petitioners do not, however, dispute, that the court retains discretion to make the appointment from the list. The court elects to do so here. The purpose of the Part 36 list is to “ensure that appointees are selected on the basis of merit, without favoritism, nepotism, politics or other factors unrelated to the qualifications of the appointee or the requirements of the case.” (Id., § 36.0, Preamble.) Given the contentiousness of the litigation and the parties' inability to reach agreement on a potential source for the appointment of the appraiser, the Part 36 list will provide a court-vetted pool of potentially competent and impartial appraisers. In so holding, the court notes that petitioners do not claim that it will not be possible to select an appraiser from the Part 36 list who meets the requirements of the Lease.¹ (Pets.' Memo. In

¹ Petitioners acknowledge that an appraiser on the Part 36 list, James Gregory Taylor, meets the Lease requirements. (Pets.' Memo. In Reply, at 12.) As this acknowledgement was made in petitioners' reply, respondents have not had

Reply, at 12.) Petitioners do, however, challenge the impartiality of two appraisers (Mr. Tener and Mr. DiGeronimo) proposed by respondents. (Id., at 10-11.) Respondents also challenge the impartiality of four unnamed appraisers proposed by petitioners. (Resps.' Memo. In Opp., at 9-10.) The challenges made by both petitioners and respondents are based on the contacts of the proposed third appraisers with the parties or with the appraisers selected by the parties.

In the arbitration context, there is extensive authority as to the circumstances under which an arbitrator is disqualified, or an award rendered by the arbitrator should be vacated, for actual bias or partiality or for the appearance of bias or of partiality. It is well settled that “a weak line of indirect relationships purporting to tie an arbitrator to a claimant,” without more, is “too remote and speculative” to provide a basis for disqualification of an arbitrator. (Matter of Weinrott [Carp], 32 NY2d 190, 201 [1973]; see also Matter of CPG Constr. & Dev. Corp. [v 415 Greenwich Fee Owner, LLC], 117 AD3d 623, 624 [1st Dept 2014]; Rose v J.J. Lowrey & Co., 181 AD2d 418, 418 [1st Dept 1992].) Courts have applied this authority in determining whether a neutral appraiser should be disqualified. (E.g. W&HM Realty Co., LLC v 853 Seventh Ave. Owners, LLC, 15 AD3d 186, 187 [1st Dept 2005] [holding that the “appearance of partiality” was not raised where the neutral appraiser was employed by a large real estate firm, an “entirely different” division of which did business with a principal]; Kaygreen Realty Co., LLC v IG Second Generation Partners, L.P., 116 AD3d 667, 668 [2d Dept 2014] [noting that the “appearance of partiality” of an arbitrator is not raised by “mere occasional associations between an arbitrator and a party or witness . . . ,” and applying this precept to a neutral appraiser] [brackets and internal quotation marks and citations omitted].)

the opportunity to comment on the qualifications of this appraiser. The court makes no finding as to Mr. Taylor’s qualifications, as the court holds below that the parties must, in the first instance, confer with a view to reaching agreement on an appraiser from the Part 36 list who meets the Lease requirements.

A highly fact-specific inquiry is required in order to determine whether an appraiser's contacts with a principal, witness, or another appraiser are too remote to give rise to the appearance of partiality. This determination "ought to be resolved in the first instance by the parties to the agreement." (Matter of J.P. Stevens & Co., 34 NY2d 123, 128 [1974]; SOMA Partners, LLC v Northwest Biotherapeutics, Inc., 41 AD3d 257, 258 [1st Dept 2007].) In light of the protracted, contentious litigation between the parties over the selection of the third appraiser, they are cautioned that any objection to a proposed appraiser must be consistent with the governing caselaw on the issue. As the Court of Appeals has reasoned: "In the modern world of sprawling corporations . . . , it would be most difficult to find a large number of potential well-qualified arbitrators who did not have some indirect relationship with one of the parties to the litigation." (Weinrott, 32 NY2d at 201.) Here, similarly, given the parties' pre-eminent position in the New York commercial real estate community, it would be difficult, if not impossible, to find potential well-qualified appraisers who, if they work in major real estate entities, do not have some contacts with petitioners and/or respondents.

It is hereby ORDERED that the parties shall confer with a view to reaching agreement on a third appraiser; and it is further

ORDERED that, in the event the parties do not reach agreement on a third appraiser, they shall each serve a list of three proposed appraisers from the Part 36 list who meet the Lease requirements. Such service shall be made by May 20, 2020. During the pendency of the coronavirus emergency, such service shall be made by email or other agreed-upon means; and the lists shall be emailed to the Part 60 email. (See Part 60 Temporary Rules for the Part 60 email address and other requirements for filing during the emergency); and it is further

ORDERED that if the parties' list of proposed appraisers both name the same appraiser, that appraiser shall be appointed by the court. If the parties do not name the same appraiser, the court shall appoint the appraiser, with or without the use of a randomizer, in the court's discretion.

Dated: New York, New York
April 17, 2020



MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE