JAMS COMPREHENSIVE ARBITRATION
NEW YORK, NEW YORK

LAWRENCE L. STONE,

Claimant,

and

JAMS Ref. No.
1425009600

MONTGOMERY JAZ, LLC,

Respondent.

AMENDED FINAL AWARD

The undersigned Arbitrator, having been designated pursuant to an Agreement of Sale dated June 20, 2011, (hereafter the Agreement) and having duly heard the proofs and allegations of the Claimant and the Respondent, and having rendered a PARTIAL FINAL AWARD dated February 6, 2012, does hereby find and AWARD as follows:

BACKGROUND

The Claimant as Purchaser and the Respondent as Seller entered into the Agreement for the sale of a parcel of land in Orange County, State of New York, improved with a building leased to Walgreen Eastern Co., Inc. The seller was to convey its right in that lease. The price was $8,115,000. The Claimant made a down payment of $250,000 to be held in escrow. The Agreement provided that it was not contingent on financing, yet, preserved the Claimant's option to secure a loan as long as this would not delay the closing.

The Agreement in Paragraph 4(A) provided the Claimant with a so-called Investigation Period which is at the heart of the controversy in this arbitration. The Investigation Period ran from the Agreement Date, June 20, 2011, and expired at 5:00 PM on the tenth business day after the Claimant would receive all of the "Seller Materials." These were defined in Paragraph 4(B) as the documents listed on Exhibit G to the Agreement. This exhibit, entitled "List of Seller Materials" contained fourteen categories of documents. For purposes of the motions for summary disposition, to be described *infra*, the salient documents on this list were the Roof and Pavement Warranties and the Phase I Environmental Site Assessment.

Before the Investigation Period expires, if the Purchaser should decide for any reason "in its sole discretion" that he is not satisfied with the results of the Investigation or any other condition of the property, he could notify the Seller in writing of his election to terminate the agreement and retrieve his escrowed deposit of $250,000. (Agreement Paragraph 4[D]). Paragraph 20(C) prescribed how notices, consents or other communications were to be transmitted. They had to be in writing and would be deemed to have been duly received three days after being mailed by certified mail, return receipt requested or one business day after being transmitted by overnight delivery at specified addresses.

Among other relevant clauses was a "time of the essence"

provision applicable to all times specified in the Agreement (¶20 [D]), a provision that New York law governs (¶ 20[F]) and an integration clause somewhat out of the ordinary (¶ 20[A]). It reads in pertinent part:

> (1) This Agreement contains the entire understanding of the parties respecting the subject matter of this Agreement and supersedes all prior understandings, representations and warranties among the parties except as specifically provided herein to the contrary.
>
> (2) ****
>
> (3) The parties are not entitled to any remedy for any extra-contractual representations, oral or written.

By June 20, 2011, the Respondent had transmitted some Seller Materials leaving others to be supplied, notably the roof and pavement warranties which were supplied on June 30, 2011, and the Phase I Environmental Site Assessment from 2003 recited in Walgreen's lease. The Environmental Assessment dated February 3, 2010, the most recent one, was transmitted on May 8, 2011, by email. The Phase I Environmental Site Assessment referred to in the Walgreen lease was finally furnished on July 12, 2011 (Exhibit F to affidavit of Debora A. Gonzalez sworn to December 15, 2011). The tenth business day thereafter was July 26, 2011.

The Respondent relies on email exchanges between transactional counsel on June 29, 2011. Its counsel wrote to Debora Gonzalez, the associate in Claimant's counsel's office, that "per my

conversation with Stuart Lundy [the partner in charge], the delivery of the warranties and guaranties for the roof and paving are not going to delay the commencement and termination of the Investigation Period." (Exh. E to affidavit of Wilbur F. Breslin, sworn to December 9, 2011). Ms. Gonzalez responded to confirm that the Investigation Period would expire on July 13, 2011, "notwithstanding the fact that we may not have received the roofing and paving warranties as of that date....Settlement shall then be on August 10, 2011." (Ibid.) Nevertheless, the Respondent transmitted the paving and roofing warranties on June 30, 2011.[1] Suffice it to say, the Claimant had been seeking these warranties as part of the Seller Materials as recently as the day prior (Exh. D to affidavit of Laurence L. Stone sworn to December 7, 2011). In light of the disposition reached herein, the factual dispute concerning the end of the Investigation Period as a result of the email exchange between transactional counsel (see Affidavit of Stuart R. Lundy sworn to December 15, 2011) is of no moment to the final result.

On July 13,2011, the Claimant by his transactional attorneys, sent a letter by Federal Express, addressed to the Respondent at the address specified in ¶ 20(C) of the Agreement, and by email to Respondent's transactional counsel. This letter offered a First Amendment to the Agreement signed by the Claimant. The offer,

[1] The tenth business day thereafter was July 15, 2011.

triggered by the receipt the prior day of the 2003 Environmental Assessment, would have extended the Investigation Period to give Claimant's environmental expert, at Claimant's expense, an opportunity to examine the conditions reported on the 2003 Assessment (see ¶13 of Gonzalez affidavit sworn to December 15, 2011). In the event Respondent rejected the Amendment, which it in fact rejected, the letter stated that it served as formal notice pursuant to ¶4(D) of the Agreement that "Purchaser is not satisfied with the results of the Investigation...and is hereby notifying Seller as of this date, which is the last day of the Investigation Period...of Purchaser's election to terminate the Agreement." The letter asked the Respondent to authorize the escrow agent to return the Claimant's deposit. The Respondent refused.[2] This arbitration, pursuant to ¶21 of the Agreement, ensued.

The Pleadings

The Statement of Claim dated July 29, 2011, seeks return of the $250,000 deposit plus interest, costs, disbursements and attorneys' fees. The Claimant's theory is that the July 13, 2011, notice of termination was effective and timely as a Termination Notice under ¶4(D). Consequently, the Respondent's refusal to consent to return of the Claimant's Deposit constitutes a breach of contract.

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[2] The Respondent has since sold the premises at a slightly advanced price.

In an Amended Statement of Claim dated August 22, 2011, the Claimant added a theory that the July 13,2011, Termination Notice was also a timely and effective termination pursuant to ¶ 5(A)[3] of the Agreement. Pleading that this procedure was triggered on June 29 by Claimant's listing of Title Objections and the Respondent having failed to respond, the Amended Statement of Claim alleges that the Claimant was permitted to terminate no later than July 15, 2011.

The Respondent's Answer and Counterclaim dated August 5, 2011, and its Answer to Claimant's Amended Statement of Claim dated August 30, 2011, allege that the requirement of supplying a Phase I Environmental Assessment was satisfied when the Respondent served the most recent one dated February 3, 2010; that the parties agreed in writing that the expiration of the Investigation Period would occur on July 13, 2011; and that the Termination Notice was not received until July 14, 2011, one day late. Relying on Maxton Builders Inc. v Lo Galbo, 68 NY2d 373 (1986), the Respondent alleges that the termination was tardy and that it was entitled to retain the contract deposit. It refutes the theory in the Amended Statement of Claim that the July 13, 2011, letter served as notice

[3] This paragraph provides a procedure, following Purchaser's receipt of the Title Report and Survey, to notify the Seller within 5 days of exceptions which the Seller is required to correct. If Seller elects not to cure them or fails to respond within 5 days, the Purchaser has the right to terminate within 5 days after the Seller's response period.

under ¶5(A) of the Agreement and denies that the Claimant's Title Objections set forth any bona fide objections to title at all, but only enumerated the routine encumbrances that are removed at the time of closing. Respondent also alleges that the Title Objections letter itself was tardy because 5 days after Claimant's receipt of the Title Documents was May 20, 2011,[4] whereas the objections were not sent until June 29.

The Respondent counterclaims for a declaration that it is entitled to retain the $250,000 contract deposit. The Respondent's second counterclaim seeks recovery of its legal fees and disbursements.

The Motions

Upon letter applications the Arbitrator in Order No. 2 dated November 29, 2011, granted the parties leave to make dispositive motions in the nature of summary judgment pursuant to JAMS Rule 18. They have each submitted their motions and opposition thereto. Oral argument was held on January 12, 2012. These motions are determined as follows:

Decision

The Respondent, relying on Maxton Builders Inc. v Lo Galbo, supra, rests on the proposition that the one day tardiness of the Claimant's notice was insufficient to satisfy the ten- business-day

[4] This date precedes the date of the Agreement, June 20, 2011.

requirement for the Termination Notice. As a corollary to this argument, the Respondent propounds its theory that the Claimant's transactional attorneys, having apparent authority to do so, waived the requirement of producing the roofing and pavement warranties, among the Seller Materials, as a trigger for the ten day period and that they bound their client to the end date of July 13, 2011, for giving the Termination Notice. And, as a further string to its bow, the Respondent contends that the 2010 Phase I Environmental report satisfied that line item in the enumeration of Seller Materials in Exh. G to the Agreement. They elaborate that this was the current Phase I report; it defies commercial reality and common sense to require as well that the Respondent supply the outdated and superseded 2003 Phase I report; and this is a concocted theory erected for purposes of this arbitration. Finally, the Respondent contends that the reliance on title objections and trying to treat the July 13, 2011, letter as notice under ¶ 5(A) of the Agreement is contrived.

The Claimant, in contrast, argues that the emails did not alter the terms of the Agreement; that the requirement in Exhibit G of the Agreement for a Phase I Environmental Site Assessment included the 2003 version; that the Claimant timely exercised the Termination Right in ¶4(D) of the Agreement; that the July 13, 2011, Termination Notice constituted a termination pursuant to ¶5(A) as to which it was unquestionably timely; and, even if late,

equitable considerations excuse the one day tardiness in accordance with 135 East 57th Street LLC v Daffy's, Inc., 91 AD3d 1 (1st Dept 2011).

At the oral argument on January 12, 2012, the Respondent also contended for a distinction between contract-forming and notice-giving communications suggesting that Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, rearg. den, 57 NY2d 674 (1982)[5] permits modification of the Agreement by attorney email and constitutes a waiver of a right under the contract, whereas a notice is unilateral and differs. In an email dated January 17, 2012, Respondent's counsel explained: "I raised it only in response to the legal arguments of Claimants' counsel during his oral argument contending that the Statute of Frauds and the prohibition in the Agreement against oral modifications barred Respondent's claims that the Agreement was bindingly modified by the parties' e-mail correspondence, and so as to demonstrate that a waiver is not affected by the Statute of Frauds or by a contractual prohibition against oral modifications." It also relies on dictum in Swick v Heaney, 43 AD2d 645 (3d Dept 1973) ("Defendant's

[5] This case was not construing the terms of a notice provision like ¶20(C) or a prohibition against remedies based on any extra-contractual representations, oral or written like ¶20(A)(3), but, rather, the influence of General Obligations Law §5-1103 on the oral waiver of certain conditions to delay foreclosure of a mortgage and the lack of consideration for that waiver. Here, on the other hand, we deal with a clause prescribing procedures for "All notices, consents or other communications...." We have no Statute of Frauds implicated.

[seller's] late refutation of her attorney's authority is not well taken. He, at very least, had apparent authority to extend the closing time which action bound his principal.")

This decision will first address the Respondent's argument based on Nassau Trust. This case did not distinguish so much between contract-forming communications versus notice-giving communications as it did between modifications of written agreements and waivers. This case seems inapposite. The issues before the Arbitrator do not involve either an oral modification or an oral waiver. Rather, they involve a written modification in the form of an email. Assuming, without deciding, the authority of Ms. Gonzalez, an associate in the Claimant's transactional attorneys' firm, the question refines to whether she could modify the Agreement by waiving, via email, the paving and roofing warranties.

An exchange of emails may constitute a binding contract under New York law [see Newmark & Co. Real Estate Inc. v 2615 East 17 St. Realty LLC, 80 AD3d 476, 477 (1st Dept 2011); Naldi v Grunberg, 80 AD3d 1, 6-7 (1st Dept 2010) *lv app denied* 16 NY3d 711 (2011); Williamson v Delsener, 59 AD3d 291 (1st Dept 2009); Stevens v Publicis, S.A., 50 AD3d 253, 255-56 (1st Dept) *lv app dismissed* 10 NY3d 930 (2008)]. Moreover, "[e]mail communication evidencing an agreement to modify the terms of an agreement constitutes a 'signed writing' as per the statute of frauds, where (1) the terms of the proposed modification are set forth in the email; (2) a reply email

evidences acceptance of the proposed modification; and (3) the emails include signature blocks, which signify an intent to authenticate" [In re 4Kids Entertainment, Inc., ___ BR ___, 2011 WL 6887369 *72 (SDNY Dec. 29, 2011) citing Stevens v Publicis, S.A., supra].

That being said, paragraph 20(C) of the Agreement governs "Notices" and provides, in pertinent part:

> (1) All notices, consents or other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly received: (a) three (3) business days after being mailed by first class certified mail, return receipt requested, postage prepaid; or (b) one (1) business day after being sent by a reputable overnight delivery service, postage or delivery charges prepaid. . . .

[Agreement p26]. Paragraph 20(C) further sets forth the parties to whom notices, consents or other communications were to be given and their addresses. The parties included the Seller, Montgomery JAZ, LLC, with a copy to Sheldon Goldstein, Esquire, and the Purchaser, Laurence L. Stone, with a copy to Stuart R. Lundy, Esq. [see Agreement pp26-27]. Neither ¶20(C) nor any other provision in the Agreement permits the sending of notices, consents or other communications via email. Thus, the purported modification of the Agreement was not sent in the manner prescribed in the Agreement. Moreover, the email does not appear to have been sent to the Seller, Montgomery JAZ, LLC, as required by the Agreement.

A contract must be "enforced according to its terms" [W.W.W.

Associates v Giancontieri, 77 NY2d 157, 162 [1990]; see Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 475 (2004)], and should be construed so as to avoid an interpretation that would leave contractual clauses meaningless [see Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Associates, 63 NY2d 396, 404 (1984)]. There is nothing ambiguous about the "Notices" provision in the Agreement. To permit the Agreement to be modified via email renders meaningless the requirements in ¶20(C) of sending all notices, consents or other communications by first class or overnight mail. The notice requirements in the Agreement were negotiated by the parties and set forth with some precision and detail and should not be ignored.

Requiring strict compliance with notice provisions finds support in cases involving termination of a contract. "[U]nder New York law, a purported notice of breach will not be effective where it does not comply with a contractual requirement that it be sent in a specified manner" [In re 4Kids Entertainment, Inc., ___ BR ___, 2011 WL 6887369 *62 (SDNY Dec. 29, 2011) citing Luxottica Group S.p.A. v. Bausch & Lomb Inc., 160 F Supp 2d 545, 551 (SDNY 2001). In Luxottica, the contract required notice of breach to be sent to four named individuals by overnight mail. Bausch & Lomb sent notice of breach by facsimile to only one of the named individuals, and failed to give the contractually required 30 days' notice to cure. The court carefully scrutinized the default notice

in accordance with the law that forfeiture based on a failure to respond to a default notice will be defeated by any material defect in the notice, no matter how trivial [160 F Supp 2d at 550-551]; see also USI Ins. Services LLC v Miner, 2011 WL 2848139 *2 (SDNY 2011) (written notice requirements setting forth specific methods of delivery are fully enforceable and serve the function of allowing the purported breaching party to distinguish between minor complaints and an actual threat of termination); Bausch & Lomb Inc. v Bressler, 977 F2d 720, 727 (2d Cir 1992) (where the Agreement specifies conditions precedent to the right of cancellation, the conditions must be complied with); Consumers Power Co. v Nuclear Fuel Servs., Inc., 509 F Supp 201, 211 (WDNY 1981)(same); see also, In re 4Kids Entertainment, Inc., ___ BR ___, 2011 WL 6887369 *62 (SDNY Dec. 29, 2011) (in which the agreement read: "All notices, requests, consents and other communications hereunder shall be in writing and shall be sent by express mail, or telefax[6] with a

[6] It is interesting to note that neither telefax nor email is mentioned in ¶20(C). When the Respondent contracted with the subsequent buyer that acquired the property, however, the "Notices" provision added the following "The attorneys for Seller and Purchaser are authorized to send notices and demands hereunder on behalf of their respective clients. Notwithstanding anything herein to the contrary, Purchaser's Termination Notice and Purchaser's Title Objection notice and/or any objections based on Purchaser's Survey, may each [sic] made by electronic transmission from Purchaser's attorney to Seller's attorney." (Purchase and Sale Agreement dated September 19, 2011, ¶28; Appendix B to Respondent's Memorandum of Law in Opposition to Claimant's Motion for Summary Judgment and in Further Support of Respondent's Motion for Summary Judgment, dated December 16, 2011).

follow up copy by express airmail to the parties at their addresses first above written.... Notice shall be deemed received upon actual receipt or when such receipt has been refused."].

From another vantage point, the Respondent's argument defeats itself because, as the Nassau Trust case points out, a waiver need not be in writing nor supported by consideration. Under this circumstance, if the parties had actually waived the formalities of ¶ 20(A) and (C), there would be no need for the Claimant to mail the Termination Notice in accordance with ¶ 20(C). The Claimant's Termination Notice was emailed on July 13, 2011, and would be timely and effective to terminate the agreement pursuant to ¶4(D). The Respondent never objected that it did not receive the email on that date.

In summary, the Arbitrator holds that the emails from Ms. Gonzalez and even the representation in her letter of termination dated July 13, 2011, do not comply with the inhibition of ¶20(A) to bind the Claimant to a waiver of the roofing and pavement warranties and to a date specifying the end of the Investigation Period based on such a waiver. Moreover, these emails were ineffective because they did not comply with the requirements of ¶20(C).

This brings us to the question of the timeliness of the July 13, 2011, Notice of Termination or, stated differently, the question of the end of the Investigation Period.

It is simple for the Respondent to argue that the latest Phase I Environmental Site Assessment is the only commercially reasonable and sensible report that it had to supply under Exhibit G to the Agreement. First, the listing of the Phase I Environmental Site Assessment as part of "Seller Materials" could have specified that it was limited to the latest one dated February 3, 2010 (Exh. L to affidavit of Laurence L. Stone sworn to December 7, 2011). It did not impose that limitation. Secondly, when the Claimant received the Walgreens Lease, the Claimant learned of earlier environmental reports suggesting prior environmental problems. There is nothing commercially unreasonable in Claimant's quest for the earlier assessments. Thus, the Claimant kept pressing the Respondent to deliver the 2003 Phase I Assessment. Thirdly, the Respondent actually acceded to these requests and delivered the March 26, 2003, Assessment (id. at Exh. K) on July 12, 2011. This delivery of the final of Seller Materials worked to extend the date for Claimant to furnish Notice of Termination for ten business days beyond July 12, or until July 26, 2011.

This fact alone makes it unnecessary to confront the Respondent's delivery of the paving and roofing warranties. Suffice it to say that these "Seller Materials" were not furnished until June 30, 2011. Ten business days thereafter would have afforded the Claimant until July 15, 2011, to send his Notice of Termination. His July 13th Notice, then, was timely and complied

with ¶20(C). Since the Claimant's Notice of Termination was timely notice under ¶4(D), the Claimant was entitled to the return of his Deposit of $250,000.

The foregoing conclusion renders it unnecessary to discuss the Claimant's alternative theory that his Notice of Termination also complied with ¶5(A).[7] Likewise, we need not reach the question of the applicability of equitable principles for a one day tardiness to avoid a forfeiture (compare 135 East 57th Street LLC v Daffy's Inc., 91 AD2d 1 [1st Dept 2011] with Maxton Builders Inc. v Lo Galbo, 68 NY2d 373 [1986]).

Attorneys' Fees and Arbitration Costs

Under JAMS Comprehensive Rule 24(g)[8] the award may allocate attorneys' fees and expenses if provided by the parties' agreement or allowed by applicable law. Both parties seek their attorneys fees and expenses in connection with this arbitration. The Agreement in ¶10(C) prescribes that in any litigation commenced in connection with the Agreement the party determined to be at fault "shall pay all actual, reasonable attorney's fees and expenses

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[7] "...[W]here a party to a contract terminates the contract and presents a specific reason for the termination, that party is estopped from raising a different reason upon the commencement of an action. *See, e.g.*, Littlejohn v Shaw, 159 NY 188, 191 (1899); Rode & Brand v Kasim Games, Inc., 181 F2d 584, 587 (2d Cir. 1950); Vernon Lumber Corp. v Harcan Const. Co., 155 F2d 348, 351 (2d Cir. 1946) (construing New York law)." Leventhal v New Valley Corp., 1992 WL 15989 at *5 (SDNY 1992).

[8] Paragraph 4 of Order No. 1 dated October 7, 2011, made these rules applicable to this arbitration.

incurred by the other party in connection with such litigation." Paragraph 21(A) of the Agreement specifies that "The fees of...JAMS...and the Arbitrator shall be borne by the non-prevailing party as designated by the Arbitrator."

The Claimant is clearly the prevailing party in this arbitration. He is entitled to his attorneys' fees, expenses or disbursements, and his share of the JAMS fees and Arbitrator compensation to be reimbursed by the Respondent, the non-prevailing party.

Application for Attorneys' Fees and Arbitration Costs

In affidavits sworn to March 5 and March 26, 2012, Claimant's counsel, Steven J. Shore, Esq., states that the Claimant has incurred $118,158.50 in attorneys' fees through March 23, 2012,[9] plus $5,608.67 in costs and disbursements, and that he has paid $13,439.30 in Arbitration fees and Arbitrator compensation. Respondent contests the sum Claimant seeks in attorneys' fees as unreasonable with respect to both the hourly rate charged and the number of hours expended in this matter.

In support of his application, Claimant's counsel, Mr. Shore, submitted a detailed affidavit setting forth the legal services

[9] This sum reflects $108,005.50 in attorneys' fees requested in the affidavit of Steven J. Shore, Esq. sworn to March 5, 2012 in support of Claimant's Application for Attorneys' Fees, Costs and Arbitration Fees, and an additional $10,153.00 in attorneys' fees incurred after the initial affidavit was filed [see Reply Affidavit of Steven J. Shore, Esq. sworn to March 26, 2012].

rendered in this proceeding by the different counsel in his firm, the hourly fee charged by each attorney, and their experience. Claimant's counsel also submitted the invoices the firm sent to the Claimant which list the actual services performed, the attorney performing each service, the time spent, and the fees charged for each service. Mr. Shore contends that the discovery in this proceeding was difficult, at best, due to Respondent's alleged lack of cooperation, resulting in the need for rulings from the Arbitrator. Moreover, Respondent refused to abide by the PARTIAL FINAL AWARD, initially objecting to the release of Claimant's $250,000 escrow deposit, prompting Claimant to move in the United States District Court for the Southern District of New York to confirm the PARTIAL FINAL AWARD. Thereafter the Respondent filed a motion in this proceeding to modify or correct the PARTIAL FINAL AWARD, to which the Claimant filed opposition.

Mr. Shore asserts that the hourly rates charged by his firm, Ganfer & Shore, are similar to those approved by both federal and state courts in New York for attorneys with similar years of experience. In addition, the arbitration was vigorously litigated and counsel achieved a favorable result for the Claimant. These factors, argues Mr. Shore, all warrant awarding Claimant the reasonable attorneys' fees requested in the sum of $118,158.50.

In opposition, Respondent recites the parties' Agreement which requires a showing of "actual, reasonable attorney's fees" incurred

in connection with the arbitration [see Agreement ¶10(C)]. Ganfer & Shore did not submit the retainer agreement entered into with the Claimant. Thus, Respondent contends that the Claimant has failed to prove his "actual" attorneys' fees. Respondent also contends that the hourly rates charged by Claimant's counsel are too high for the contractually-fixed arbitration venue of Orange County. Respondent claims that the designation of Orange County as the place for arbitration reflects the parties' intent that any fee award in this arbitration would be governed by rates applicable to an Orange County arbitration, as opposed to the New York City premium hourly rates requested by Claimant's counsel.

In addition, Respondent takes issue with the total hours expended by Claimant's counsel in this proceeding on the ground that they are excessive. Claimant's counsel spent approximately 286.1 hours[10] on this matter, while Respondent's counsel spent 183.3 hours. Respondent contends that the tasks performed by Claimant's counsel are associated with an unreasonable number of hours, and that these excessive hours reflect duplicative and unnecessary billing. Finally, Respondent asserts that the motion to confirm the PARTIAL FINAL AWARD was unnecessary and, therefore, any request for fees associated with that proceeding should be denied.

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[10] This figure does not include the additional 24.40 hours Claimant's counsel spent in opposing Respondent's motion to modify or correct the PARTIAL FINAL AWARD, the Petition to Confirm the PARTIAL FINAL AWARD, or the Reply in this attorneys' fee application.

In reply, Mr. Shore submitted the firm's retainer agreement with the Claimant showing the actual hourly rates agreed to be paid by Claimant. Claimant's counsel further contends that the parties were free to retain counsel of their choosing, and nothing in the Agreement limited either side to hire counsel in Orange County. He claims that there is no evidence that the parties intended to bind themselves to the rates charged by attorneys in Orange County and, in any event, Respondent agreed to New York City as the venue for the arbitration, waiving the contractual requirement that the arbitration take place in Orange County. Moreover, Mr. Shore points out that the Agreement contains a provision where the parties agreed to submit to the jurisdiction of the state courts of Orange County, New York, or the United States District Court with jurisdiction over disputes in Orange County. The United States District Court for the Southern District of New York has jurisdiction over claims in Orange County, and it is the court in which the Claimant filed his motion to confirm the PARTIAL FINAL AWARD. Mr. Shore states that the United States District Court for the Southern District of New York has approved hourly rates similar to those charged by Ganfer & Shore.

Claimant's counsel argues that the hours expended in this matter were not excessive; the invoices include work that Respondent did not similarly have to perform, e.g., preparation of a Reply to Respondent's Answer with Counterclaims, and reflect

additional time Claimant's counsel had to spend going through Respondent's document production which was much larger than Claimant's. Finally, Mr. Shore argues that the motion to confirm was indeed necessary as Respondent's counsel objected to the escrow agent's release of the deposit on the ground that the PARTIAL FINAL AWARD had not been confirmed.

In determining an attorneys' fee award, the lodestar amount, or "the number of hours reasonably expended . . . multiplied by a reasonable hourly rate" is generally the starting point [Hensley v Eckerhart, 461 US 424, 433 (1983); see Perdue v Kenny A. ex rel. Winn, ___ US ___, 130 S Ct 1662, 1672-1673 (2010)(reaffirming use of the lodestar approach as the superior method to be used in determining attorneys' fee applications)][11], for calculating a "presumptively reasonable fee" [see Millea v Metro-North R. Co., 658 F3d 154, 166 (2d Cir 2011); Arbor Hill Concerned Citizens Neighborhood Assn. v County of Albany, 522 F3d 182, 183 (2d Cir 2008)]. The goal is to establish an hourly rate that a reasonable, paying client would be willing to pay, multiplied by the number of hours reasonably spent on a case [see Arbor Hill Concerned Citizens Neighborhood Assn. v County of Albany, supra at 193].

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[11] *But see* Konits v Karahalis, 409 F Appx 418, 422 (2d Cir 2011) and Green v City of New York, 403 F Appx 626, 629 (2d Cir 2010) applying both the lodestar approach and the 12 factors set forth in Johnson v Georgia Highway Express, Inc., [488 F2d 714, 717-719 (5th Cir 1974) *abrogated on other grounds by* Blanchard v Bergeron, 489 US 87, 92-93 (1989)] to determine a presumptively reasonable fee.

The Claimant's failure to submit the retainer agreement in support of the application for attorneys' fees is not fatal to the Claimant's application. The detailed invoices attached to Mr. Shore's March 5th affidavit list the hourly fees charged by each attorney in connection with the services provided in this proceeding. This is sufficient to establish the actual attorneys' fees incurred by Claimant in connection with the arbitration. Moreover, the retainer agreement, though submitted by Claimant for the first time with the reply papers, serves to confirm that the Claimant did, indeed, contract to pay the hourly rates set forth in the invoices.

Respondent contends that the hourly rates charged by Claimant's counsel are out of line with the rates charged by attorneys practicing commercial litigation in Orange County. Claimant disputes that the rates charged by Orange County attorneys are the proper measure here. An attorney's hourly rate is considered reasonable when it is "in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." [Blum v Stenson, 465 US 886, 895 n11 (1984); see Gurung v Malhotra ___ F Supp 2d ___, 2012 WL 983520 at *10 (SDNY March 16, 2012)]. Generally, the relevant community is "the district in which the reviewing court sits," [In re Agent Orange Product Liability Litigation, 818 2d 226, 232 (2d Cir 1987); see Dunn v Advanced

Credit Recovery, Inc., 2012 WL 676350 at *5 (SDNY March 1, 2012)][12], although, sometimes, the legal market may be defined otherwise, such as by "practice area," [Arbor Hill Concerned Citizens Neighborhood Assn. v County of Albany, supra 522 F3d at 192 (rejecting the idea of defining markets by geography as "too simplistic")].

There is no evidence to support the Respondent's contention that, by fixing the venue of the arbitration in Orange County, the parties contemplated that any fee award would be governed by the rates charged by Orange County attorneys. The premises that were the subject of the parties' Agreement are situated in Orange County. This factor would provide the logical basis for an Orange County arbitration venue. There is absolutely no indication in the Agreement that the fees charged by Orange County counsel was a motivating factor in choosing Orange County as the venue for arbitration of the parties' disputes. In any event, the parties agreed to waive this contractual provision and arbitrated this matter in New York County. Further undermining Respondents' argument is the fact that the parties also agreed to submit to the jurisdiction and venue of "the United States District Court with venue and jurisdiction for disputes in Orange County, New York" [Agreement ¶20(H)]. The United States District Court for the

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[12] As applied here, it would be the district in which the arbitration proceeding was held.

Southern District of New York has jurisdiction over disputes in Orange County, New York. Thus, the parties could not have contemplated that, in the event of a dispute, any fee award would be governed by the rates charged by Orange County attorneys.

Lead counsel for the Claimant in this case, Steven J. Shore, is the managing partner at Ganfer & Shore and has been licensed to practice law for more than 40 years. He is the head of the firm's Commercial Litigation Group and thus has extensive experience in complex commercial litigation. For his hourly fee, Mr. Shore charged $525 in 2011 and $545 in 2012. William A. Jaskola, Esq., is a senior associate at Ganfer & Shore with 15 years experience in commercial litigation. He performed the bulk of the services in this matter, charging $350 an hour in 2011 and $360 an hour in 2012. The junior associate at the firm, Manali S. Torgalkar, Esq. has 3 years of experience and had a minor role in this matter. Ms. Torgalkar's services were billed at $235 per hour in 2011.

The hourly rates billed to the Claimant are commensurate with the rates charged by attorneys in New York with comparable experience and have been approved in other commercial litigation cases in the Southern District of New York [see Sidley Holding Corp. v Ruderman, 2009 WL 6047187 at *26 (SDNY 2009) (surveying fee awards and noting that courts in the Southern District have found hourly rates for contract litigation reasonable "in the range of $450.00 to $600.00 for experienced partners, $350.00 for senior

associates, $250.00 for junior associates, and $125.00 to $170.00 for paralegals") *report and recommendation adopted by* 2010 WL 963416 (SDNY 2010); Verizon Directories Corp. v AMCAR Transp. Corp., 2008 WL 4891244 at *5 (SDNY 2008) ($300 is a reasonable rate for an associate with "several years" of experience of "commercial litigation" and $425 and $525 are reasonable rates for New York City firm partners with "extensive experience in commercial litigation."); Phoenix Four, Inc. v Strategic Resources Corp., 2006 WL 2135798 at *2 (SDNY 2006) (finding partner rates of $600 and senior associate rates of $440 per hour reasonable for a small firm doing general and complex commercial litigation)].

The cases relied upon by the Respondent, approving much lower fees for civil rights attorneys, are inapposite [but see e.g. Adorno v Port Auth. of N.Y. & N.J., 685 F Supp 2d 507, 513-15 (SDNY 2010) (reasonable hourly rate in civil rights case is $550 for labor and employment partner with 36 years experience)]. Swiss Skies AG v Air Luxor, S.A. 2010 WL 3219295 (SDNY 2010), also relied on by the Respodent, is unpersuasive as the lower fees awarded in that case were the result of consideration of "case-specific variables" as identified in Johnson v Georgia Highway Express, Inc. [supra 488 F2d at 717-719], consideration of which the United States Supreme Court disfavors [see Perdue v Kenny A. ex rel. Winn, supra ___ US ___, 130 S Ct at 1671-1673][13]. It is noteworthy,

[13] See n11.

however, that the "most important" case-specific variable considered by the court in Swiss Skies was the fact that "plaintiff's counsel had been unable to obtain worthwhile results for its client in nearly six years" [Swiss Skies AG v Air Luxor, S.A., supra 2010 WL 3219295 *5]. Moreover, the experience of the attorneys in the Swiss Skies case ranged between 21 and 6 years; none of the attorneys in that case had years of experience comparable to those of Mr. Shore.

Here, although this matter was not particularly complex, it presented a somewhat novel issue, and was litigated vigorously by both sides. Finally, Claimant's counsel obtained a favorable outcome for its client in less than one year since commencement of this proceeding.

To determine whether counsel's hours were excessive, the invoices should be examined with an eye toward "the value of the work product" to the Claimant's case [Luciano v Olsten Corp., 109 F3d 111, 116 (2d Cir 1997); see Underdog Trucking, LLC v Verizon Services Corp., 276 FRD 105, 110 (SDNY 2011)]. Any expenditure of time deemed "excessive, redundant or otherwise unnecessary" will be excluded from the lodestar calculation [Hensley v Eckerhart, supra 461 US at 434; see Underdog Trucking, LLC v Verizon Services Corp., supra]. In reviewing the invoices for this proceeding, it appears that all entries and tasks on the invoices are reasonably related to the arbitration. The time expended by Claimant's counsel is not

excessive when viewing the time spent on each of the tasks performed in any given hourly period, or as a whole. Moreover, none of the time charges appears excessive, redundant or unnecessary.

Claimant also is entitled to recover attorneys' fees for the proceeding to confirm the PARTIAL FINAL AWARD in the United States District Court for the Southern District of New York. That proceeding was commenced in response to Respondent's letter to the escrow agent blocking the release of the escrow deposit on the very ground that the award had not been confirmed. Furthermore, the parties' Agreement authorizes an award of fees for "any litigation commenced in connection with [the] Agreement" [Agreement ¶10(C)]. The arbitration was commenced in connection with the parties' Agreement. Similarly, the proceeding to confirm the PARTIAL FINAL AWARD issued in the arbitration also was commenced "in connection with" the parties' Agreement [see Loeb v Blue Star Jets, LLC, 2009 WL 4906538 at *3 (SDNY 2009)].

Accordingly, Claimant's application to recover the sum of $118,158.50 in attorneys' fees incurred through March 23, 2012, is granted.

Claimant submitted invoices detailing the costs incurred in this proceeding, as well as the JAMS invoice for his share of the Arbitration fees and Arbitrator compensation and expenses. Respondent does not contest either of these sums. Accordingly, the

Claimant is entitled to recover from Respondent the sum of $5,608.67 in costs and disbursements, and the sum of $13,439.30 in Arbitration fees and Arbitrator compensation and expenses.

Within seven days of the delivery on May 11, 2012 of the FINAL AWARD dated April 19, 2012, the Claimant moved by letter dated May 14, 2012, pursuant to JAMS Comprehensive Rule 24(j) to correct the FINAL AWARD to include arbitration fees and Arbitrator compensation and expenses he incurred through April 19, 2012. These amounted to $3,524.50 in addition to the $13,439.30 for a total of $16,963.80. The Claimant was not aware of these additional fees and expenses when he submitted his application for the reimbursement of arbitration fees and Arbitrator compensation and expenses. By email from Robert M. Calica, Esq. dated May 15, 2012, at 5:25 pm to Virginia Corvey and Edward M. Ross, Esq., the Respondent advised that it would not be responding to the Claimant's application.

The application is granted without opposition and the fourth decretal paragraph of the FINAL AWARD dated April 19, 2012, shall be amended by substituting for the figure $13,439.30 the figure of $16,963.80.

CONCLUSION

Any argument not addressed in this FINAL AWARD was found to be unavailing, without merit, academic or unnecessary to reach.

Accordingly, the Arbitrator concludes and AWARDS as follows:

1. The Claimant's motion for Summary Disposition in the nature of

Summary Judgment is granted.

2. The Respondent's motion for Summary Disposition in the nature of Summary Judgment is denied.

3. The Claimant's first claim for relief in his Amended Statement of Claim is granted and he shall recover from the Respondent who is directed to pay him $250,000 plus interest at the statutory rate of 9% per annum from July 13, 2011.

3. The Claimant's second claim for relief is granted, and he shall recover his reasonable attorneys' fees in the sum of $118,158.50 incurred through March 23, 2012, and costs and disbursements in the sum of $5,608.67.

4. The Claimant's motion pursuant to JAMS Comprehensive Rule 24(j) is granted without opposition, and, accordingly, the Respondent shall reimburse the Claimant for his share of the Arbitration fees and Arbitrator compensation and expenses in the sum of $16,963.80.

5. The Respondent's First Counterclaim is granted[14] to the extent of declaring that the Claimant is entitled to the return of his Deposit in the sum of $250,000 and the Escrow Agent is directed to release the Deposit to the Claimant; and, otherwise, the First Counterclaim is denied.

6. The Respondent's Second Counterclaim for an award of legal fees and disbursements is denied and this Counterclaim is

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[14] Lanza v Wagner, 11 NY2d 317, 334 (1962).

dismissed.

This AMENDED AWARD and the PARTIAL FINAL AWARD are in full satisfaction of all claims and defenses submitted in this arbitration.

Stephen G. Crane

Stephen G. Crane, Arbitrator

State of New York)
: ss:
County of New York)

I, Stephen G. Crane, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my AMENDED FINAL AWARD.

MAY 18, 2012
Date

Stephen G. Crane

Stephen G. Crane

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Stone, Laurence L. vs. Montgomery JAZ, LLC
Reference No. 1425009600

I, Meredith Stockman, not a party to the within action, hereby declare that on May 18, 2012 I served the attached Amended Final Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at New York, NEW YORK, addressed as follows:

Steven J. Shore Esq.
William A. Jaskola Esq.
Ganfer & Shore
360 Lexington Ave.
14th Floor
New York, NY 10017
Tel: 212-922-9250
Email: sshore@ganfershore.com
WJaskola@ganshore.com
Parties Represented:
Laurence L. Stone

Robert Calica Esq.
Edward M. Ross Esq.
Rosenberg, Calica & Birney LLP
100 Garden City Plaza
Suite 408
Garden City, NY 11530-3200
Tel: 516-747-7400
Email: rob@rcblaw.com
eross@rcblaw.com
Parties Represented:
Montgomery JAZ, LLC

I declare under penalty of perjury the foregoing to be true and correct. Executed at New York, NEW YORK on May 18, 2012.

Meredith Stockman
mstockman@jamsadr.com