IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

21ST CENTURY FINANCIAL SERVICES, LLC, PLAINTIFF,	§	
V.	§	CAUSE NO. A-10-CV-803-LY
MANCHESTER FINANCIAL BANK A/K/A MANCHESTER FINANCIAL BANK (IN ORGANIZATION) A/K/A MANCHESTER FINANCIAL BANK (PROPOSED), DEFENDANT.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the court in the above styled and numbered cause of action are Plaintiff's Motion to Confirm Arbitration Award filed October 7, 2011 (Doc. #55)[1]; 21st Century Financial Services, LLC's Brief in Support of Motion to Confirm Arbitration Award filed August 20, 2012 (Doc. #76); Defendant Manchester Financial Bank, N.A. (In Organization)'s Brief in Response to Plaintiff 21st Century Financial Services, LLC's Motion to Confirm Arbitration Award filed August 30, 3012 (Doc. #77); 21st Century Financial Services, LLC's Reply Brief in Support of Motion to Confirm Arbitration Award filed September 14, 2012 (Doc. #78). The parties also filed Joint Proposed Stipulations on August 10, 2012 (Doc. #75).

On September 19, 2012, the court conducted a bench trial, at which counsel for both parties appeared. Having considered the motion, response, reply, evidence, and argument of counsel, as

[1] The court construes the motion to be a second amended complaint and, as such, Plaintiff's last live pleading.

well as the applicable law in this cause, the court finds that the arbitration award at issue should be confirmed. In so deciding, the court makes the following findings of fact and conclusions of law.[2]

I. Background

According to Plaintiff 21st Century Financial Services, LLC ("21st Century"), the underlying arbitration proceeding arose out of an agreement between 21st Century and Defendant Manchester Financial Bank ("Manchester Bank").

In 2008, a group of "organizers," including Douglas F. Manchester, Richard Gibbons, Frederick J. Mandelbaum, and Steven M. Strauss, sought to charter a national bank to be called Manchester Financial Bank, N.A. On January 4, 2008, an Application for National Bank Charter and Federal Deposit Insurance Corporation ("FDIC") coverage was filed with the Comptroller of the Currency (the "Comptroller") for Manchester Financial Bank, N.A. (proposed).

On January 1, 2008, and February 20, 2008, two checks were written by Manchester Financial Group, L.P.–the organizing group–to 21st Century. On February 25, 2008, Manchester Financial Bank (proposed)[3] and 21st Century executed an "Agreement for Computer Processing Services" (the "Agreement"). The Agreement required 21st Century to provide computer and software-related services, including the implementation services to begin electronic banking services, as well as other services, in exchange for initial, monthly, and other fees to be paid by Manchester Bank. Manchester Bank was required to obtain these electronic services to satisfy one

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[2] Any finding of fact contained herein that is more appropriately considered a conclusion of law is to be so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact shall be so deemed.

[3] Over time, the name of Defendant Manchester Financial Bank evolved–from "Manchester Financial Bank (proposed)" to "Manchester Financial Bank (in organization)." For clarity, Defendant will be referred to herein simply as "Manchester Bank."

of the requirements for final regulatory approval. The Agreement identified Mandelbaum as the "CEO" of Manchester Bank and referenced an address in La Jolla, California for notices to the bank.

On June 10, 2008, the Comptroller sent a letter to Manchester Bank confirming the organizers' establishment of the corporate existence of the proposed bank. On October 2, 2008, the FDIC sent a letter to Mandelbaum, approving the bank's deposit-insurance application. On October 3, 2008, Mandelbaum e-mailed Scott Davis of 21st Century, stating that although the bank had "received FDIC approval to move forward," the bank's principal investor, Doug Manchester, "decided not to move forward based on the current economic turmoil."

Pat Jerge, president of 21st Century, forwarded invoices to Mandelbaum in December 2008 for amounts due under the Agreement.[4] In response, Mandelbaum e-mailed Jerge, confirming that he had received copies of the invoices, disputing portions of them, expressing willingness to pay certain fees, and requesting that the balance of "$11,050.00 ($53,100.00 minus $42,050.00)" be forwarded to "Manchester Financial Group, L.P. c/o Crystal Tidball, One Market Place, 33rd Floor, San Diego, CA 92101-7714" (the "San Diego address").

On May 19, 2009, Michael Levinson, an attorney with the Cooley Law Firm, representing Manchester Bank, sent a letter to Timothy Nolan, an attorney for 21st Century, stating that the bank was not granted final approval by the Comptroller and therefore neither Manchester Bank nor Manchester Financial Group, L.P. was liable to 21st Century under the Agreement and

[4] 21st Century asserts and Manchester Bank does not dispute that 21st Century performed all of its contractual duties under the Agreement.

requesting that 21st Century "promptly refund to [Manchester] Bank" the balance of the initial deposit paid to 21st Century on January 1 and February 20, 2008.

On June 5, 2009, Nolan, on behalf of 21st Century, made demand for arbitration under the Agreement, listing Levinson as the representative of Manchester Bank. In response on June 25, 2009, Strauss sent a letter to Nolan and copied Kathleen A. Gossett-Cantrell, an American Arbitration Association ("AAA") Case Manager, stating that the Cooley Law Firm did not represent the bank, and that no one did, because the bank never came into existence.

On July 22, 2009, the AAA sent a letter to Nolan and Strauss, confirming receipt of Strauss's letter, providing notice to Levinson that it would conduct an arbitration, and asking Nolan to confirm an address to use for Manchester Bank. On July 24, 2009, Nolan responded, providing the AAA the address used in the Agreement, 7821 Fay Ave., Suite 100, La Jolla, CA 92037 (the "La Jolla address"), but also referenced Mandelbaum's recent directive to return the deposit in care of Manchester Financial Group, L.P. at the San Diego address.

On August 17, 2009, Cantrell sent an e-mail to Nolan requesting that he confirm Manchester Bank's address, because the correspondence the AAA sent to the bank at the La Jolla address had been returned as undeliverable, to which Nolan responded on August 18, providing the San Diego address.

On September 8, 2009, the AAA sent a letter in care of Manchester Financial Group, L.P. to the San Diego address, attaching an executed "Notice of Appointment" of an arbitrator and setting the date for a preliminary hearing via conference call on September 14, 2009. In response to the September 8 letter from the AAA, Levinson, on behalf of Manchester Financial Group, L.P., responded to the AAA on September 10, 2009, with copies to Strauss, Gibbons,

and Nolan, referencing the September 8 letter and stating that no correspondence should be sent to Manchester Financial Group, L.P.

On September 14 and 15, 2009, Nolan sent two letters to the AAA, one asking that all notices be sent to the contact at the San Diego address identified by Mandelbaum, and one asking that the service list be revised to add "Manchester Financial Bank, Attn. Mr. Douglas F. Manchester, Director and Chairman, One Market Place, 33rd Floor, San Diego, CA 92101-7714." On September 28, 2009, the AAA sent a letter to 21st Century, to "Manchester Financial Bank, c/o Doug Manchester, Director and Chairman, One Market Place, 33rd Floor, San Diego, CA 92101" and to "Manchester Financial Group, attn. Crystal Tidball, One Market Place, 33rd Floor, San Diego, CA 92101," confirming that a preliminary hearing was held on September 14, 2009, at which Manchester Bank failed to appear, and scheduling the arbitration hearing for January 13, 2010, pursuant to a "Notice of Hearing" attached to the letter. After the September 28 letter was sent, Mari Waldron of Manchester Financial Group, L.P. sent an e-mail asking that the AAA substitute her and Dick Gibbons for Tidball as service recipients. Nolan agreed to the substitution by letter to the AAA dated October 5, 2009, but asked that Douglas Manchester be kept on the list.

On November 5, 2009, Summer Wynn of the Cooley Law Firm forwarded a letter of the same date from Strauss to Cantrell, stating that "[t]he proposed Bank is merely a proposed entity that never came into existence, and to our knowledge, has not been properly served with Claimant's Demand." As the arbitration date approached, Manchester Bank organizers Gibbons and Douglas Manchester were served various pleadings and notices both by Nolan and the AAA, including 21st Century's exhibit list, its prehearing brief, and a reminder notice from the AAA.

On December 10 and December 28, 2009, Nolan sent correspondence to Cantrell confirming service of 21st Century's exhibit list and prehearing brief. On January 11, 2010, Cantrell sent a letter to Nolan, Manchester Financial Bank c/o Douglas Manchester, Gibbons, and Waldron, reminding all parties of the scheduled commencement of the arbitration proceedings "on January 13, 2010, at 9[:]00 a.m. CST at the Austin Business Suites located at 9442 Capital of Texas Highway North, Arboretum Plaza One, Suite 500, Austin, Texas 78759."

The arbitration was held on January 13, 2010. Although Manchester Bank did not participate, the arbitrator did not enter a default award, but required 21st Century to present evidence and testimony in support of its claim. The next day, the AAA sent another notice regarding closing of the record and then forwarded a copy of the award to the service list, including Gibbons and Douglas Manchester.

On February 2, 2010, the arbitration tribunal issued an arbitration award in favor of 21st Century and against Manchester Bank in the amount of $477,070.39, including $348,790.35 in actual damages and $73,246.04 in preaward interest, together with legal fees of $44,274.00, with postjudgment interest on above sums at the rate of 10% per annum, as well as arbitration expenses of $10,760.00 ("Arbitration Award"). In the Arbitration Award, the arbitrator made the following statements regarding notice and service:

> [D]ue notice was given of the case and the hearing date upon with the Arbitrator would hear the testimony of witnesses, receive evidence and arguments in support of and in defense of the claims made. There is evidence that the AAA and the Claimant attempted to further contact representatives of the Respondent of this arbitration matter and of the date and time for the hearing. Despite these communications and numerous notices and emails by the AAA and the Claimant over several months, neither the Respondent nor its representatives appeared at the hearing on January 13, 2010 in Austin, Texas.

To date, the Arbitration Award has not been paid.

21st Century moves this court to confirm and render a final judgment on the Arbitration Award. In response, Manchester Bank seeks to have the Arbitration Award vacated on two theories: the bank "never received notice of the arbitration," and the arbitrator exceeded his powers by not finding that the parties first attempted to negotiate in good faith prior to invoking arbitration, as the bnak alleges was required by the Agreement.

III. Analysis

A court's review of an arbitration award is "exceedingly deferential," and the award can be vacated only on "very narrow grounds." *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 380 (5th Cir. 2004). "A court must affirm an arbitral award if the arbitrator is 'arguably construing or applying the contract and acting within the scope of his authority.'" *Teamsters Local No. 5 v. Formosa Plastics Corp.*, 363 F.3d 368, 371 (5th Cir. 2004) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). If the award is "rationally inferable" from the record before the arbitrator, the court must affirm the award. *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004). The court cannot vacate an arbitration award even if the arbitrator failed to apply governing law correctly. *American Laser Vision, P.A. v. The Laser Vision Inst., L.L.C.*, 487 F.3d 255, 258 (5th Cir. 2007).

An arbitration award must be confirmed unless the court determines that the award should be vacated under section 10 or modified under section 11 of the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. §§ 10(a) and 11 (2009); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008). "There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies." *Id.* at 588.

> The FAA provides four statutory bases for vacating an arbitration award:
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> (1) where the award was procured by corruption, fraud or undue means;
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> (2) where there is evidence of partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct . . . or any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers . . . .

9 U.S.C. § 10(a).

Was Manchester Bank provided proper notice?

The Arbitration Award expressly states that "due notice was given of the case and the hearing date upon which the Arbitrator would hear the testimony of witnesses, receive evidence and arguments in support of and in defense of claims made." Manchester Bank asserts that because 21st Century made its arbitration demand using the San Diego address, rather than the La Jolla address provided in the Agreement, and because the AAA failed to sent notice of the arbitration by registered or certified mail with confirmation, a provided in the Agreement, Manchester Bank did not have the opportunity to participate in the arbitration. Therefore, the bank argues, the court should not confirm the Arbitration Award.

21st Century asserts that whether or not the AAA's notice was technically defective under the terms of the Agreement, or that 21st Century's demand for arbitration was sent to an address different from that contained in the Agreement, Manchester Bank nonetheless had actual notice and knowledge of the proceedings, twice acknowledging receipt of 21st Century's demand for arbitration through Strauss's June 25, 2009 and November 5, 2009 letters, in which Strauss also acknowledges notice of the arbitration, further stating that the bank "has not consented to arbitration in Texas."

21st Century argues that the stipulated facts confirm that, despite their actual notice, the organizers elected not to have the bank participate in the arbitration. Therefore, 21st Century asserts, the bank's absence does not render the Arbitration Award defective, nor does it rise to a basis for vacating the award under the FAA. *See Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos*, 553 F.2d 842, 845 (2d Cir. 1977).

Although "[a]ll parties in an arbitration proceeding are entitled to notice and an opportunity to be heard," *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979), due process is not violated if the hearing proceeds in the absence of one of the parties when that party's absence is the result of the party's decision not to attend. *See Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 729 (5th Cir. 1987).

Paragraph 15.2 of the Agreement provides:

> All notices, requests, and other communications required or permitted to be given or delivered hereunder to either Party must be in writing, and shall be personally delivered, sent by certified or registered mail, postage prepaid and addressed, by overnight courier such as FedEX, by fax, or by email to such Party at the address shown on the first page of this Agreement, or at such other address as has been furnished by notice given in compliance with this Section. All notices, requests, and other communications shall be deemed to have been given upon delivery as evidenced by return receipt, courier records, fax communication, or confirming email.

The address provided in the Agreement is the La Jolla address.

21st Century acknowledges that it sent its demand letter to the San Diego address instead of the La Jolla address, and the evidence shows that the AAA sent notice of the arbitration to Manchester Bank by regular instead of registered or certified mail with confirmation, as provided under the terms of the Agreement. However, the evidence also shows that 21st Century relied upon the e-mail from Mandelbaum to Jerge which listed the San Diego address as the proper address at

which the bank could be reached. The evidence also shows that the AAA attempted to send notice of the arbitration to the bank at the La Jolla address, but that it was returned as undeliverable. After Nolan provided the AAA with the San Diego address, the AAA sent its letter notice to that address. Douglas Manchester later confirmed receipt of both the demand letter and the notice through its communications with the AAA and 21st Century before the date of the arbitration.

Therefore, the court concludes that 21st Century and the AAA gave and Manchester Bank received actual notice of the arbitration proceedings. *See Bosarge*, 813 F.2d at 729.

Did the arbitrator exceed his powers?

Manchester Bank asserts that the arbitrator exceeded his powers by failing to find that the parties first attempted to negotiate in good faith with senior management before invoking arbitration, as it alleges is required by the terms of the Agreement. In response, 21st Century argues that the bank can cite to no authority holding that the absence of an express finding concerning a prerequisite to arbitration establishes a basis to question, at confirmation, whether that condition was satisfied. The court agrees.

Paragraph 11.1 of the Agreement provides:

> In the event of any claim controversy, or dispute between [Manchester Bank] and [21st Century] regarding this Agreement or the Services or Purchased Products provided by [21st Century] hereunder, the parties agree to negotiate in good faith toward resolution of the issues, and to escalate the dispute to senior management personnel in the event that the dispute cannot be resolved at the operational level. Disputes that cannot be resolved shall be submitted to binding arbitration . . . .

The court finds that the plain language in the Agreement neither requires senior management to negotiate nor conditions arbitration on such negotiations. In addition, Paragraph 11.2 of the Agreement provides that "[i]f the parties cannot resolved any claim, controversy, or dispute through

good faith negotiation . . . either Party may demand that such matter be submitted to final an binding arbitration."

Moreover, the stipulated facts establish that the dispute over liability under the Agreement was escalated to senior management as the e-mail correspondence from Manchester Bank's CEO, Mandelbaum, to 21st Century's president, Jerge, attests. The banks's demands for payment and refusal to negotiate continued through correspondence between attorney for both parties in May 2009. The court finds that negotiations at all levels were attempted and failed to succeed.

Therefore, the court concludes that the arbitrator did not exceed his authority conferred by the Agreement and will confirm the Arbitration Award.

III. Conclusion

Having considered the motions, response, reply, arguments of counsel, along with the applicable law in this cause, the court will grant Plaintiff's motion to confirm the Arbitration Award and confirm the arbitrator's final arbitration award signed February 2, 2010.

A Final Judgment shall be filed subsequently.

SIGNED this 22nd day of March, 2013.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE