CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS

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AGUDUS CHASIDEI CHABAD OF THE UNITED STATES

Petitioner-Licensor,

DECISION AND ORDER

Index No. LT-106105-11

-against-

CONGREGATION LUBAVITCH, INC ("CLI"), et al

Respondents-Licensees

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MERKOS L'INYONEI CHINUCH

Petitioner-Licensor,

Index No. LT-106106-11

-against-

CONGREGATION LUBAVITCH, INC ("CLI"), et al

Respondents-Licensees

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Petitioner-Licensor,

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-against-

CONGREGATION LUBAVITCH, INC ("CLI"), et al

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The Decision/Order of the court after a hearing is as follows:

This matter began as a summary action commenced by Augudus Chasidei Chabad of the United States and Merkos L'Inyonei Chinuch ("Petitioners") to recover possession of real property. By decision dated April 25 and entered April 28, 2020, the Honorable Harriet Thompson determined that Petitioners were entitled to an entry of Judgment of possession against Congregation Lubavitch Inc, Zalman Lipskier, Nochum Kaplinsky, Avrohom Holtzbert, Congregation Lubavitch of Agudus Chasidei Chabad, and Congregation Lubavitch purportedly d/b/a Lubavitch World Headquarters ("Respondents"). Judge Thompson's decision is currently the subject of an appeal filed by Respodents.

Pending that appeal, Respondents filed a motion to move this Court pursuant to CPLR 5519 (a)(6) to fix an undertaking. Petitioners, the determined possessors of the property, opposed that motion and cross moved requesting that the Court vacate or limit any stays that were granted. By decision dated August 3rd, 2020 and amended on August 17, 2020, the Honorable Carolyn Walker- Diallo, denied Petitioners cross-motion and granted Respondents' motion to the extent that the Court shall conduct a hearing to determine the amount of the undertaking, as it was her determination, that neither party put forth sufficient evidence in their respective moving papers as to why their requested amount should be granted. The Respondent congregation requested the undertaking be set at "the lowest possible amount", and pointed out that in both 2008 and 2010, the Appellate Division Second Department and the Kings County Supreme Court fixed an undertaking of $250,000.00 for the same properties. Petitioners are requesting the amount be set at $5,000,000.00 to protect against waste, plus Use and Occupancy in the amount of $1,450,000.00 for a total of $6,450,000.00.

Testimony and evidence were heard by the Court on August 18, 24 and 28th, 2020, with both sides resting off the record by stipulation. For reasons set forth below the Court sets the undertaking at $302,225.24.

Justice Walker-Diallo's decision discussed in depth the procedural history of this case as well as an examination of the exhibits that were made part of the motion papers. For this Decision, the Court while taking those things in to account, will discuss the testimony and evidence presented by the parties at the hearing.

Applicable Law

CPLR 5519(a)(6), provides as follows

(a) Stay without Court order. Service upon the adverse party of an appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

(b) The appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value and use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property

and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency.

The amount of an undertaking must be based on the undertakings ability to protect against potential waste to the premises and safeguard of use and occupancy of the premises.

Analysis

Presented as evidence to the Court during the hearing were two witnesses, one by each side, for the Petitioners, Amanda Aaron, a commercial appraiser who was hired by the Petitioners to inform the Court of the current value of the property, and for the Respondent, Gabbai Zalman Lipskier. The testimony adduced from the hearing revealed that the role of a Gabbai, is best described as part of a committee of individuals from the congregation, who are the care takers of the properties in question. In addition, the physical evidence presented to the Court was the report of Ms. Aaron and a stipulation from both parties that includes information regarding propane tanks that were located at the properties of 784-788 Eastern Parkway in 2011-2012 but were subsequently removed from the properties, and that in 2016 central air conditioning systems were replaced by the Gabboim without the knowledge or permission of Merkos. In addition, the Court took judicial notice of two prior decisions from Courts of different jurisdictions on matters involving the same parties. A Second Department Appellate Division Decision from January of 2008 which set a fixed undertaking at $250,000.00 for the same properties, and a stipulation from September of 2010, from Kings County Supreme Court, which the parties agreed to set a fixed undertaking at $250,000.00.

The Court does not believe that either party presented any evidence that was substantially different from that which was provided in the moving papers, as was directed by the Court. It is

the Court's opinion that neither side met their burden of proof for why their requested amounts should be granted. For that reason, the Court believes that the fairest way to determine the amount of the undertaking would be to rely on the amount fixed two times prior. That amount was sufficient to protect the properties against waste in both 2008 and 2010, and there was nothing put forth by either side as to why the Court should deviate from that figure. The Court does note that those amounts were set twelve and ten years ago respectively, and as such the Court took inflation into account when making its final determination. The Court used the average rate of inflation over the past ten years to come up with the fixed number being set by this Decision. The Court has determined that $250,000.00 in 2008 would be valued today at the amount set by Court of $302,225.24. [1]

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The Petitioners have asked the Court to consider the construction done by respondent congregation as well as the fact that they stored propane tanks in the building. The Court notes that the only admissible evidence to be considered regarding these actions, is by way of the stipulation agreed upon by the parties. That stipulation states the propane tanks were subsequently removed from the building, and there was no evidence put forth by Petitioners to say that they have been in the building since 2012. In addition, the construction referenced was done in 2016, with no evidence put forth that it caused a dangerous condition or that it was constructed in an unsafe way. Installing a central air conditioner without permits is neither on its face unsafe, nor was there any evidence put forth to the Court as to the construction of the air conditioning, or in regard to anything in the subsequent four years since the air conditioner was installed. There was no testimony or evidence of any kind that

[1] https://www.usinflationcalculator.com/

would suggest that the congregation has created any dangerous or unsafe conditions that are still in effect that would sway the Court to increase an amount that was found to be sufficient multiple times prior.

Additionally, Petitioners requested that the Court include in its undertaking an amount of Use and Occupancy of the buildings in question. The amount requested is based upon a report submitted by Amanda Aaron for the fair market appraisal of the location and takes into consideration the estimated time of the appeal. The Court notes the historical and religious significance of the buildings in question, as well as the long-standing relationship between the building and the congregation, as well as the world wide Lubavitch community. In Bosco Credit V trust series 2012-1 v Johnson, 2019 N.Y. Misc Lexis 1977, the Court did not include use and occupancy in its final determination, because as is the case in this matter, in that matter, the Court did not deem the property in question to be a rental property. As such, the Court does not believe that an undertaking in this matter need include use and occupancy. As was the situation in Bosco, this is not a rental property. The Court will follow the reasoning of Justice Silver in that this situation is not akin to a landlord tenant situation. Although, through the testimony and report of Ms. Aaron the Petitioners attempted to set forth a fair market value of the building and comparable rents paid by similar use buildings in the area, this is not a rental property. This has never been a rental property, nor was there any testimony that this will ever be a rental property. In fact, based upon the historical and religious significance these buildings hold in this community, the Court finds it extremely hard to envision a scenario where a lease would ever be created for these properties. As such, the Court is not inclined to create one now.

The Court does note the professional background and experience of Ms. Aaron and the fact that she was deemed an expert in the field, without an objection. As such, the Court is not discrediting her testimony as the attorneys for the congregation are requesting, but the Court was slightly troubled by the fact that she was not allowed admittance to the subject buildings, nor did she inspect the properties that she used as comparable. It appears from her testimony that this is a large reason as to why the estimates given in her report are just hypothetical. Ms. Aaron also failed to consider the long-standing history of the two parties in this matter. The Court is by no means discrediting her report or her, but the Court does not believe that the nature of the properties at question in this hearing are such that a commercial real estate appraiser, even one as well respected as Ms. Aaron can put a rental value on the buildings without additional supplemental evidence; evidence that perhaps could have been given by the party that hired her as to the intended future use or of the past history between the parties regarding the lack of rent for the entirety of the relationship. For these reasons, the Court is not including use and occupancy in its determination.

The Court also heard from Gabbai Lipskier, who the Court found to be credible. As part of his testimony, he informed the Court that the congregation has been responsible for the day to day operating expenses. There was no evidence put forth to refute this claim. As such, the Court has determined that the congregation should continue to pay the operating expenses during the pendency of the appeal.

Both parties in their written summations, requested that a negative inference be held against the other side for failure to call a material witness. The Court is denying this request by both sides, as the appropriate time to make this argument would have been at the close of

testimony when the respective other side would have had an opportunity to argue against the request.

Accordingly, it is hereby:

ORDERED that Respondents; (1) continue to pay the operating expenses of the property that is the subject of these consolidated cases pending the completion of the appeal of this matter; and (2) post and undertaking in the amount of $302.225.24 within seven (7) business days of this Decision and Order.

THIS CONTSTITUES THE DECISION AND ORDER OF THE COURT

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Dated: Brooklyn, New York
October 16, 2020

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HON. MATTHEW P. BLUM JCC