CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 52

AGUDUS CHASIDEI CHABAD OF THE UNITED STATES,

Petitioner-Licensor,

-against-

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

Respondents-Licensees.

DECISION AND ORDER

Index No.: LT-106105-11

MERKOS L'INYONEI CHINUCH,

Petitioner-Licensor,

-against-

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

Respondents-Licensees.

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MERKOS L'INYONEI CHINUCH,

Petitioner-Licensor,

-against-

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

Respondents-Licensees.

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CAROLYN WALKER-DIALLO, A.J.S.C.:

Recitation, as required by Rule 2219(a) of the New York Civil Practice Law and Rules ("CPLR") of the papers considered in the review of the following Motion and Cross-Motion pursuant to CPLR §5519:

Papers	Numbered
Notice of Motion, Affirmation & Exhibits	1-3
Notice of Cross-Motion, Affirmation & Exhibits	4-6
Reply Affirmation of Zalmen Lipskier in Support of Motion & in Opposition to Cross-Motion	7-9
Reply Affirmation of Edward S. Rudofsky, Esq. in Support of Motion & in Opposition to Cross-Motion	10-12
Reply Affirmation of David S. Abramson, Esq. in Support of Cross-Motion	13-15

Congregation Lubavitch Inc., Zalman Lipskier, Sholom Ber Kievman,[1] Avrohom Holtzberg, Congregation Lubavitch of Agudas Chasidei Chabad, and Congregation Lubavitch purportedly d/b/a Lubavit World Headquarters (collectively "Respondents"), by their attorney, move this Court pursuant to CPLR §5519(a)(6) for an Order to fix an undertaking while appealing the Decision and Order of the Honorable Harriet J. Thompson, dated April 25, 2020 and entered on April 28, 2020. Agudas Chasidei Chabad of the United States ("Petitioner Agudas") and Merkos L'Inyonei Chunuch ("Petitioner Merkos")(collectively "Petitioners") oppose the motion and cross-move for an Order pursuant to CPLR §5519(c) vacating, limiting or modifying any stay granted to Respondents under CPLR §5519(a)(6), and granting Petitioners such other and further relief as the Court deems just and proper. For the reasons set forth below, Respondents' Motion is GRANTED to the extent that that Court shall conduct a hearing to determine the amount of the undertaking. Petitioners' Cross-Motion is DENIED.

Procedural History

The first summary proceeding, Index No. 106105-11, involves the demised premises in controversy at 770 Eastern Parkway, Brooklyn, NY ("770 Eastern Parkway"). Petitioner Agudus served a Ten Day Notice to Quit on Respondents, which provided that: (1) the license to occupy 770 Eastern Parkway terminated effective October 4, 2011; and (2) Petitioner Agudas would commence a summary proceeding to recover possession of 770 Eastern Parkway if Respondents failed to surrender possession. Subsequently, Petitioner Merkos commenced two additional summary proceedings against the same Respondents under Index No. 10106-11 for the demised premises known as 784-788 Eastern Parkway, Brooklyn, NY ("784-788 Eastern Parkway") and

[1] Sholom Ber Kievman died during the pendency of the Summary Proceedings and was succeeded by Nochum Kaplinsky, who was substituted as a party respondent. *See* Decision and Order of the Honorable Harriet Thompson, dated April 25, 2020, page 20.

under Index No. 106107-11 for the demised premises known as 302-304 Kingston Avenue, South East Room of the Second Floor, Brooklyn, NY ("302-304 Kingston"). Respondents did not surrender possession by October 4, 2011, and as a result, Petitioners served a Notice of Petition and Petition returnable on December 7, 2011 in Kings County Commercial Part 52.[2]

After extensive motion practice, including consolidation of these matters for the purposes of motion practice and trial, Respondents served and filed verified answers in these actions.[3] The cases ultimately proceeded to trial before the Honorable Harriet Thompson on May 11, 2015 and the trial concluded on May 24, 2016. In her Decision and Order, Judge Thompson held that Petitioners are entitled to an entry of judgment of possession against the Respondents, with a warrant of eviction to issue forthwith and the execution stayed six months. *See* Decision and Order, page 144. Judge Thompson further held that "Respondents have not established any facts or grounds for the imposition of an implied charitable trust or statutory trust." *Id.* at page 142.

Applicable Law

CPLR §5519(a)(6) provides as follows:

> (a) Stay without court order. Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:
>
> (6) 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

[2] For a detailed explanation of the procedural history of these consolidated cases, this Court respectfully refers to the "Procedural History of the Summary Proceedings" section of the Honorable Harriet Thompson's Decision and Order dated April 25, 2020, page 12.

[3] Respondent Yosef Losh, who as of the date of Judge Thompson's April 25, 2020 decision, has failed to appear in any manner in these proceedings.

> dismissed, the appellant or moving party shall pay the value of the 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...

A stay permits an appellant to prosecute an appeal without fear of losing his or her property during an appeal. *See Morgan v. Morgan,* 2 Misc.3d 1011(A)(Sup. Ct., Kings Cnty. Apr. 16, 2004). The maintenance of the status quo avoids having a prevailing party in an original judgment who is subsequently reversed on appeal from having used or spent the assets of the losing party in the original judgment. *See Id.* Without a stay during the pendency of an appeal, "the appellant may in the meantime have been divested of valuable property without any guarantee that such restitution as may later be ordered against the respondent will be collectible; the respondent may have squandered the money and become insolvent in the interim. A stay avoids that." Professor David Siegel in N.Y. Prac. §535, at 884 (3d Ed.)

The appellant must give an undertaking as a condition to a stay pending appeal. CPLR §2501 states that an undertaking includes "an obligation...which contains a covenant by a surety to pay the required amount, as specified therein." The appellant cannot sign as a surety, and as such, upon appeal, the undertaking shall be filed "in the office where the judgment or order of the court of original instance is entered." CPLR §2505; *See Nicholas v. Maclean,* 98 N.Y. 458, 459 (1885).

CPLR §5519(c) provides as follows:

> (c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any

> stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

Granting a stay pending appeal, under CPLR §5519(c), is a matter of the trial court's discretion. *See Morgan v Morgan*, supra; *Grisi v Shainswit*, 119 A.D.2d 418, 421 (1st Dept. 1986).

Analysis

I. Respondents' Motion Pursuant To CPLR §5519(a)(6) For An Order To Fix An Undertaking Is Granted To The Extent That The Court Shall Conduct A Hearing To Determine The Amount Of The Undertaking.

Respondents now move for an Order fixing the amount of an undertaking and request that the Court fix its undertaking obligations pursuant to CPLR §5519(a)(6) to the "lowest possible amount and waive any requirement of a corporate surety or cash deposit." Affirmation of Zalmen Lipskier ("Lipskier Aff.") dated May 22, 2020, ¶10. Respondents assert that Respondent Congregation "has never been charged or paid and does not currently pay rent to Agudas or Merkos." *Id.* at ¶8. Respondents further assert that Respondent Congregation "is supported by monies raised by the sale of seats for the Jewish High Holidays and charitable donations", that "[a]ll of the Congregation's income is dedicated to paying for the upkeep and operating expenses of the Synagogue, and the Congregation traditionally operates at a deficit." *Id.* at ¶9. Respondents also highlight that, in previous litigation, the parties stipulated that Respondents would post an undertaking only, and not pay use and occupancy. *Id.* at ¶12; *see also* Reply Affirmation of Edward S. Rudofsky, Esq. ("Rudofsky Reply") dated July 8, 2020, ¶¶38-39; Respondents Exhibits "C" and "D" (copy of the Order of the Appellate Division, Second Department dated January 31, 2008 and So Ordered Stipulation of Honorable Bernadette F. Bayne dated September 8, 2010).

Petitioners oppose Respondents' motion on the grounds that: (1) the summary proceedings are not within the purview of CPLR §5519(a)(6); (2) CPLR §5519(a)(6) should not apply to a

holdover proceeding, like the proceedings involved in these consolidated cases; and (3) Respondents have unclean hands. Moreover, Petitioners assert that if a stay is warranted, it should be limited pursuant to CPLR §5519(c) and be set at: (1) $1,450,000.00 for use and occupancy; and (2) $6,450,000 for a bond to secure against possible damage. *See* David S. Abramson, Esq. Affirmation in Opposition ("Abramson Opp."), dated June 17, 2020, ¶¶23-25, 30.

Petitioners maintain that Respondents' gross mismanagement of the Synagogue and occupancy of certain portions of the buildings require a significant undertaking, given the resulting harm to Petitioners. *See Id.* at ¶15. In particular, Petitioners assert that Respondents have: 1) been grossly negligent in their management of the Synagogue and occupancy of certain portions of the premises, and there is a likelihood that severe and catastrophic damage to the Synagogue may well occur; 2) unlawfully stored large propane tanks in the basement of 784-788 Eastern Parkway; 3) installed air conditioning and electrical units on the roof of 784-788 Eastern Parkway and in connection with the construction on the roof, have caused the welding of steel platforms, which may not be strong enough to hold such weight; 4) attempted to change the locks (as to which Petitioners had the only key) to the fire exit door at 784-788 Eastern Parkway used by Petitioner Merkos, which is only to be used as a mean of egress in case of an emergency; 5) failed to obtain insurance to cover any damage to the Synagogue or the buildings; 6) used contractors engaged to perform construction work that do not have insurance; and 7) engaged in egregious conduct in preventing Petitioners' access to the Synagogue, as to which they are the fee owners. *Id.* at ¶¶15-20.

In support of its position, Petitioners include the deposition transcript of Rabbi Zalmen Lipskier dated April 24, 2014 to demonstrate that Respondent Lipskier's request for a minimal undertaking is belied by his own deposition testimony. *See* Petitioner's Exhibit "A" annexed to

the Abramson Opp.; ("all of the Congregation's income is dedicated to paying for the upkeep and operating expenses of the Synagogue and Congregation, and the Congregation traditionally operates at a deficit"); *see also* Abramson Opp., ¶27. Petitioner has also annexed a Fair Market Rent Appraisal Report, whereby New York State Certified General RER Appraisal Amanda Aaron estimates the annual fair market value of the premises to be $950,000, annually. *See* Petitioner's Exhibit "B" annexed to the Abramson Opp.

The Court finds that Respondents' request to waive any requirement of a corporate surety or cash deposit is not supported by relevant statutes or case law. In fact, the law is clear that a party cannot serve as its own surety and must file an undertaking in the "office where the judgment or order of the court of original instance is entered." CPLR §2505; *see also* CPLR §2501; *Nicholas v. Maclean,* 98 N.Y. 458, 459 (1885). Moreover, Respondents' assertion that "there has been no waste of the Synagogue property during the more than 70 years that the Gabbaim have managed it" is inadequate to show that Respondents will not commit waste during the pendency of the stay. *See* Rudofsky Reply, ¶46; *see also Morgan v. Morgan,* supra at *3, *4-5 (Sup. Ct. Kings Cnty. April 16, 2004)(finding that a defendant's promise not to commit waste was not an "undertaking.")

As to Petitioners' arguments that CPLR §5519(a)(6) does not apply to these consolidated cases, the Court disagrees. In her Decision and Order, Judge Thompson ordered that "Petitioners are entitled to entry of a judgment of possession against the Respondents stated in the pleadings, including Rabbi Losh, without inquest for the reasons stated above, with the warrant of eviction to issue forthwith and the execution stayed six months." *See* Decision and Order, page 144. CPLR §5519(a)(6), by its very terms, was meant to apply to a judgment granting the right to possession, which Respondents have obtained here. The fact that Judge Thompson stayed the judgment of possession for six months does not remove these consolidated cases from the purview of CPLR

§5519(a)(6).

As to Petitioners' assertion that Respondents have unclean hands, the Court finds that this claim is not supported by the record. While Judge Thompson noted that Respondents' complaints involved "legitimate issues of safety and in the best interest and safety of all occupants", such as: (1) propane tanks in an alleged illegal kitchen; and (2) the installation of air conditioning on the roof of the premises without obtaining required permits and authorizations by the Department of Buildings, and that Respondents did not present any evidence to rebut these contentions, Judge Thompson did not make a finding that Respondents engaged in highly inequitable or unconscionable conduct to warrant the application of the doctrine of unclean hands. *See* Decision and Order, page 121.

Therefore, in accordance with CPLR §5519(a)(6), the amount of the required undertaking must be based on the undertaking's ability to: (a) protect against potential waste to the premises; (b) safeguard payment of use and occupancy of the premises; and (c) guarantee payment of any deficiency." *Bosco Credit v. Trust Series 2012-1 v. Derek Johnson, et al.*, 2019 N.Y. Misc. LEXIS 1977 (Sup. Ct. N.Y. Cnty. April 12, 2019). However, upon careful review of the submissions by the parties, the Court finds that the submissions are an insufficient predicate upon which to set an undertaking. As such, Respondents motion is GRANTED to the extent that a hearing will be held to determine the amount of the undertaking.

II. Petitioners' Cross-Motion To Vacate Any Stay Granted To Respondents Is Denied.

Petitioners cross-move pursuant to CPLR §5519(c) requesting that the Court vacate any stay because Respondents' appeal does not have substantial merit and there is prejudice to the Petitioners. By vacating the six-month stay set by Judge Thompson, this Court would in effect, grant an immediate judgment of eviction and warrant of possession. On June 18, 2020, consistent

with prior and current gubernatorial Executive Orders (EO/202.8, EO/202.14, EO/202.28, EO/202.38 and Administrative Order AO/68/20, Chief Administrative Judge Lawrence K. Marks issued AO/127/20, whereby Judge Marks directed that "RPAPL eviction matters commenced on or before March 16, 2020 shall continue to be suspended until further order." AO/127/20. As such, to ensure compliance with all Executive and Administrative Orders, this Court declines to exercise its discretion to vacate the stay set forth by Judge Thompson. As such, Petitioners' Cross-Motion is DENIED.

Accordingly, it is hereby:

ORDERED that all parties to this action shall attend a hearing, and present, if necessary, any experts and admissible evidence as to the fair sum for the undertaking to be given by Respondents pursuant to CPLR § 5519 (a)(6) for a stay during the pendency of their appeal of Judge Harriet Thompson's Decision and Order, dated April 25, 2020 and entered on April 28, 2020; and is it further

ORDERED that the above-mentioned hearing shall be on August 18, 2020, at 2:00PM via SKYPE; and it is further

ORDERED that the parties will receive further instructions on how to appear virtually by Judge Walker-Diallo's Law Clerk.

This constitutes the Decision and Order of the Court.

Dated: Brooklyn, New York
August 3, 2020

Hon. Carolyn Walker-Diallo, A.J.S.C.
Supervising Judge, Kings County Civil Court