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

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AGUDAS CHASIDEI CHABAD OF THE UNITED STATES,

Index No. L&T 106105 KLT 2011

Petitioner-Licensor,

- against -

POST-HEARING SUMMATION

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

Respondents-Licensees.

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

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MERKOS L'INYONEI CHINUCH,

Index No. L&T 106106 KLT 2011

Petitioner-Licensor,

- against -

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

Respondents-Licensees.

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

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MERKOS L'INYONEI CHINUCH,

Index No. L&T 106107 KLT 2011

Petitioner-Licensor,

- against -

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

Respondents-Licensees.

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Introduction

In a Decision and Order dated August 3, 2020, Justice Carolyn Walker-Diallo decided Respondents' motion for a stay under CPLR §5519(a)(6) ("§5519(a)(6)"). Justice Walker-Diallo

found that she could not determine the amount of the required undertaking on the papers submitted and ordered an evidentiary hearing to determine the amount of such undertaking. On August 18, 2020, August 24, 2020, and August 26, 2020 an evidentiary hearing (the "Hearing") was held before the Honorable Matthew Blum, J.C.C.[1] There were two witnesses who testified at the hearing. Amanda Aaron, Petitioners' appraisal expert, testified for Petitioners and Gabbai Zalmen Lipskier ("Gabbai Lipskier") testified for the Respondents. Certain documents were introduced into evidence, including the Appraisal Report of Ms. Aaron ("the Appraisal") (Petitioners Exh. 2 in evidence).[2] At the conclusion of the hearing, both sides requested that written summations be submitted in lieu of oral summations.

Overview

There are two components to a determination as to the amount of the required undertaking under §5519(a)(6). First, the value of the use and occupancy of the property. Second, the potential damage to the property which may result if the occupant remains in occupancy pending the determination of appeal.

As is shown below, Ms. Aaron's testimony on the value of the use and occupancy of the Premises is highly credible and her Appraisal is flawless. In contrast, Gabbai Lipskier's testimony as to the value of the use and occupancy of the Premises was totally conclusory and not credible; it is also irrelevant to the determination of this issue. Moreover, Gabbai Lipskier gave no testimony concerning the threat of damage to the Premises from Respondents' unauthorized control and occupancy of the Synagogue.

[1] Cites to the Hearing transcripts are referred to as: "8/18 Tr."; "8/24 Tr." and "8/26 Tr."

[2] Ms. Aaron was qualified by the Court as an appraisal expert. (8/24 Tr. p. 38, l. 7 to l. 10).

We will first address the value of the use and occupancy of the Premises, which was established by the Appraisal and testimony of Ms. Aaron.

Credentials of the Appraiser

Ms. Aaron is highly qualified to appraise the Premises. Among other things, she is an MAI certified Appraiser and holds the New York State certified general license. (Appraisal at p. 46; 8/24 Tr. p. 35, l. 10 to p. 36, l. 12). She has appraised over 5,000 properties in New York City, many of them in Brooklyn. (8/24 Tr. p. 35, l.7 to l. 9). While she has primarily appraised commercial properties, she has also appraised residential properties and synagogues. (8/24 Tr. p. 34, l. 20 to l. 23; p. 48, l. 17 to p. 49, l. 9). Ms. Aaron's Appraisal, including her conclusions and opinion, was in conformity with the Uniform Standards of Professional Appraisal Practice and the Code of Professional Ethics and standard of professional practice of the Appraisal Institute. (8/24 Tr. p. 42, l. 21 to p. 43, l. 4).[3]

Ms. Aaron's Appraisal and hearing testimony showed that: (i) her engagement was not contingent upon developing or reporting predetermined amounts; (ii) the appraisal was not based on a requested minimum or specific valuation; and (iii) her compensation was not tied to reaching a particular result. (Appraisal p. 45; 8/24 Tr. p. 36, l. 22 to p. 37, l. 2).

As is shown below, counsel for Respondents did nothing to cast any doubt on Mr. Aaron's vast knowledge and expertise or her objectivity; nor did they advance any argument to alter or counter Ms. Aaron's testimony. Significantly, and as shown below, if Respondents wanted to challenge Ms. Aaron's conclusions, it was incumbent on them to produce their own expert (with differing conclusions) and to do so.

[3] Ms. Aaron appraised a portion of 770, 784 and 788 Eastern Parkway and 302-304 Kingston Avenue (sometimes referred to as the "Premises").

The Appraisal and Hearing Testimony

The scope of work for the Appraisal included: (i) performing an exterior inspection of the Premises; (ii) researching the subject property's location in terms of economic activity; (iii) analyzing the income generating capacity of the subject property in terms of physical and economic characteristics; (iv) conducting a market survey of rent levels for similar property types; and (v) making adjustments to rental comparables for factors such as market conditions, lease terms, location, size, utility and condition. (Appraisal p. 13).

Ms. Aaron valued the Premises based on its highest and best use. She considered that the "subject [property]'s current use as a religious community facility" was its highest and best use (and that such use is both legally permissible and physically possible). Accordingly, she valued the Premises as a religious community facility and/or community facility. (Appraisal p. 30). She used five religious community facilities and/or community facilities in Brooklyn as the comparables. (Appraisal pp. 31-37).

The methodology and findings in the Appraisal, and Ms. Aaron's testimony, are unassailable. Counsel for Respondent completely failed to controvert Ms. Aaron's testimony (and Appraisal) in any material (or other) respect.

We will now discuss the various issues which were advanced by Respondents in an attempt to challenge the Appraisal.

Special Purpose Property

Counsel for Respondents examined Ms. Aaron as to whether the Premises was a special purpose property, first asking "would a religious building be part of the definition of special purposes or specialized properties." Ms. Aaron responded that "although they are included in that definition, not all buildings used for religious purposes are necessarily special purpose properties."

(8/26 Tr. p. 8, l. 13 to l. 19).

Counsel for Respondent then asked why she did not appraise the Premises as a special purpose property. She responded that in her "judgment, . . . these properties are typical of many properties that are used for multiple uses in – multiple potential usage in configuration and construction. Therefore, it was not necessary to appraise them as special purpose properties." (8/26 Tr. p. 10, l. 1 to l. 8).

Ms. Aaron explained that the type of construction of the Premises did not restrict its use to religious uses. She further testified that she has appraised properties "such as these all the time in Brooklyn. There are many properties built in a way that have flexible potential uses, and my inspection of these properties led me to conclude that they could – if they were sold or rented be rented for uses other than religious [ones]." (8/26 Tr. p.10, l. 13 to l. 24). She therefore testified "that [this] is counter to the definition of special purpose property. I didn't see that definition as relevant to my valuation." (8/26 Tr. p. 10, l. 25 to p.11, l. 3). Ms. Aaron concluded that her understanding of special purpose properties "is that their construction leads them only to be suitable for a particular use." (8/26 Tr. p.11, l. 13 to l. 15).

Counsel for Respondent did nothing to counter Ms. Aaron's testimony. Nor is there any evidence in the record that even assuming arguendo the Premises was a special purpose property, it would alter Ms. Aaron's opinion of the fair market rental value of the Premises. If Respondents wanted to controvert Ms. Aaron's testimony that the Premises was not a special purpose property, they were required to call their own expert to seek to controvert Ms. Aaron's opinion in this regard. Having failed to do so, Respondents are now foreclosed from arguing that the Premises should have been appraised as a special purpose property.

Expenses Paid by the Congregation

Respondents examined Ms. Aaron as to whether she considered in reaching her opinion expenses paid by the "tenant" in this case. She responded that she "was asked to provide a fair market rental value based on typical lease terms in the marketplace." She further testified that her "assignment was not based on a particular tenancy," and that her "appraisal outlines which expenses would be typical in the marketplace." (8/24 Tr. p. 66, l. 21; p. 67, l. 20 to l. 25). In his cross-examination, counsel for Respondents failed to counter the method Ms. Aaron used for her appraisal in this regard.

Even assuming arguendo that the expenses paid by Respondents were relevant to the method used by Ms. Aaron in preparing the Appraisal, there is nothing in the record as to what types of specific expenses were paid by Respondents (and their amount) and whether such expenses were of the type the owner customarily pays. The only testimony in this regard was Gabbai Lipskier's assertion, without any basis, that he believed the annual expenses were "between 90 and a million." (8/24 Tr. p 4, l. 12). However, he then testified that he could not provide any exact total figures or breakdown of the expenses from his memory. (8/24 Tr. p 4, l. 13 to l. 18). Therefore, on this record, it is impossible to determine what, if any, of these expenses are customarily paid by the owner.

Value In Use

Counsel for Respondents asked Ms. Aaron what the "value in use" methodology was. She answered that "[v]alue in use is an evaluation subject to specified use not market value – what we call highest and best use which is what my market value is based on." (8/26 Tr. p. 15 l. 15 to l. 19). When counsel for Respondents inquired further as to "value in use," Ms. Aaron testified that this was not the method she used in her Appraisal, and reiterated that she used fair market rental value.

(8/26 Tr. p. 15, l. 20 to p. 16, l. 3). When counsel for Respondent continued to ask questions about value in use, the Court halted counsel for Respondents' inquiry in this regard because Ms. Aaron "testified that she did not use value in use [in] her determination," and that counsel for Respondent at this point was testifying. (8/26 Tr. p.16. l. 13 to l. 18).

Accordingly, if counsel for Respondents believed that the appropriate method to use was "value in use," it was incumbent on Respondents to use their own expert to submit an appraisal based on this method of valuation.

Intended Use of the Premises and Rent History

Counsel for Respondent asked Ms. Aaron certain questions about the intended use of the Premises, as well as its rent history, and whether such matters would affect her opinion. (8/26 Tr. p. 20, l. 24 to p. 21, l. 10; p. 23, l. 3 to l. 10; p. 28, l. 9 to l. 19). Ms. Aaron testified that they would not (*id*.), and that "fair market rental appraisal is an appraisal of a typical rent in the typical marketplace." (8/26 Tr. p. 20, l. 2 to l. 4). Ms. Aaron testified that the only matter which would affect her opinion as to the fair market rent value of the Premises was if there was some "deed restriction or legal mandate" restricting its use. (8/26 Tr. p. 28, l. 17 to l. 19). There is nothing in the record whatsoever that there are any such restrictions. Accordingly, this line of inquiry is irrelevant to Ms. Aaron's opinion as to the fair market rental value of the Premises.

Measurements - Square Footage

The one matter that Ms. Aaron testified could potentially affect her conclusion of the fair market rental value of the Premises was if the measurements of the property appraised were inaccurate, testifying that "[t]he rental value is contingent on the square footage of the property, yes." (8/24 Tr. p. 58, l. 13 to l. 15; p. 59. l. 1 to l. 5). Ms. Aaron testified that because of the COVID pandemic, she was unable to take the measurements of the interior of the space herself, and relied

on the measurements provided by her client. (8/24/ Tr. p. 58, l. 7 to l. 12). (This was pointed out in her Appraisal).

The measurements Ms. Aaron used were a leasable area of 23,559 square feet. (Appraisal pp.14 & 42). The record is bereft of any evidence whatsoever that the measurements used for the square footage of the Premises were in any way inaccurate. Respondents had Ms. Aaron's Appraisal Report well over *two months* before the Hearing commenced. It is Respondents who are in occupancy and control of the Premises. They could have easily presented to the Court their own measurements. Alternatively, they could have retained an expert to take the measurements. The fact that they chose not to do so speaks volumes as the accuracy of the measurements that were included in Ms. Aaron's report.

Therefore, there is nothing in the record to challenge the accuracy of the measurements used by Ms. Aaron, and those measurements must be accepted as being accurate.

The Testimony of Gabbai Zalmen Lipskier

Through Gabbai Lipskier's testimony, Respondents sought to show two things. They failed in both respects. (At the outset, Gabbai Lipskier said nothing during his testimony which bears on a proper determination of the value of use and occupancy of the Premises. We also believe that the record shows that Gabbai Lipskier's testimony was entirely conclusory, self-serving, and not credible.) [4]

[4] Moreover, as set forth in our motion papers on the underlying motion, Gabbai Lipskier: (i) was found in a prior related proceeding to not be a credible witness, and (ii) at his deposition in these proceedings, took the Fifth Amendment in refusing to answer questions regarding matters which bear some similarity to the subject matter of his testimony at the Hearing. (See, Affirmation of David S. Abramson In Opposition and in Support of the Cross-Motion, dated June 17, 2020, ¶¶12-14.)

First, Respondents attempted to establish that they do not have the financial ability to obtain a substantial undertaking. While Petitioners believe the testimony of Gabbai Lipskier totally failed to do so, even if he had, this is not pertinent to the relevant inquiry. CPLR §5519(a)(6) requires that an undertaking be obtained to, inter alia, secure the value of the use and occupancy of the property. The financial wherewithal of the party required to post the undertaking is irrelevant to this determination.

If Respondents' position had any merit, it would lead to illogical and unfair results. Thus, if Respondents' position were accepted, a tenant who remains in possession after he is ordered to vacate the property would be required to post a minimal undertaking even though the value of the use and occupancy was extremely high. This would defeat the very purpose of the undertaking required by §5519(a)(6), i.e., to require the tenant to pay the value of the use and occupancy of the property if he elects to remain in possession pending his appeal (which, in this case, would be for an extremely lengthy time).

Second, Respondents appear to take the position that all they are required to show is that they are financially able and willing to pay for the upkeep and operating expenses of the Synagogue. All this shows is that they are able to financially operate the synagogue. It has little or no bearing on the value of the use and occupancy of the Premises. It is true that the court in the prior proceeding required one of the Respondents to "continue to pay the operating expenses of Congregation Lubavitch . . . out of the income thereof." But this was not stated to be for the value of the use and occupancy of the Premises. Paying the operating expenses of the Congregation is not the same as an undertaking for the value of use and occupancy of the Premises.

Finally, Petitioners submit that a "missing witness" instruction should apply here in two respects. A "missing witness" instruction is applicable where a witness knowledgeable about a material issue in the case is not called by a party seeking to establish an issue in the case about which the witness would normally be expected to support that party's version of events.

The failure to call such a witness allows the trier of fact to draw an unfavorable inference that such witnesses' testimony would be unfavorable to that party. Where a witness is favorable to one party and hostile to the other, the witness is said to be in the "control" of the party to whom he is favorably disposed, and the unfavorable inference may be drawn from the failure to call such witness. *People v. Gonzalez*, 68 N.Y. 2d 424, 509 N.Y.S. 2d 796 (1986).

A "missing witness" charge should be given with respect to Gabbai Lipskier's testimony concerning a Rabbi Drizen's ability and willingness to post a significant undertaking. On direct, Gabbai Lipskier testified that when in the past they put up bonds, they borrowed the funds from a Rabbi Drizen. (8/4 Tr. p. 22 , l. 10 to 14). On cross-examination, Gabbi Lipksier sought to avoid questions about the extreme wealth of Drizen (but did not deny that this was the case) and testified that Drizen had declined to "help" them with the bond in this case.

As counsel for Petitioners stated at the Hearing, they believe that it is common knowledge in Crown Heights that Drizen is extremely wealthy and considered to be a billionaire or thereabouts, and has financed these protracted proceedings in which legal fees have been extremely high. Since Drizen would be expected to support Gabbai Lipskier's testimony concerning Drizen's ability and willingness to provide the funds needed to post a substantial undertaking (and is the only person competent to do so), and was available to be called as a witness by Respondents, an adverse inference should be drawn from Respondents' failure to call him, i.e., that Drizen is able and willing to provide the funds for a large undertaking.

A "missing witness" charge should also be given because of Respondents' failure to call their bookkeeper. Gabbai Lipskier testified that the congregation has a bookkeeper "who keeps track of the income and expenses." (8/18 Tr. p. 5, l. 15 to l. 19) (Transcribed by Nina Hull). Gabbai Lipskier further testified that as to knowledge of the income and expenses that "[p]robably, yes I can't swear on it but that's what I have the bookkeeper for." (8/18 Tr. p. 6, l. 15 to l. 16) (Transcribed by Nina Hull). Respondents obviously had the ability to call the bookkeeper as a witness, but choose not to. Accordingly, an adverse inference should be drawn that the income and expenses of Respondents are sufficient for them to post a large undertaking.

APPLICABLE LAW

As stated above, even though they had over two months to do so, Respondents elected not to call an expert as to the value of the use and occupancy of the Property. In contrast, Petitioners retained an expert who issued an appraisal report which is unassailable and whose testimony at the Hearing was highly credible.

There is not a per se rule that in the absence of conflicting expert testimony, the expert report and testimony must necessarily be accepted under all circumstances. However, the courts have found in many cases that the opinion of an expert, if qualified to render the opinion and his/her report/testimony was credible, should be accepted in the absence of expert evidence to the contrary.

These cases include *Brushton-Moira Central School District v. Alliance Wall Corp.,* 195 A.D. 2d 801, 600 N.Y.S. 2d 511 (3d Dept. 1993) ("[i]n our view, the expert's testimony was sufficient to establish a prima facie case of liability for breach of contract . . . and in the absence of any expert evidence to the contrary, we conclude that plaintiff is entitled to judgment on the issue of defendant's liability for breach of contract"); *Procario v. Procario*, 164 Misc. 2d 79, 623

N.Y.S. 2d 971 (Sup. Ct. Westchester County 1994) ("Defendant, however, had an opportunity to present contrary expert evidence of a higher amount and chose not to do so"; court accepted the valuation of plaintiff's expert); *D'Alfonso v. County of Oswego*, 198 A.D. 2d 802, 603 N.Y.S. 2d 934 (4th Dept. 1993) (defendant-county met their burden on summary judgment by offering expert opinion evidence that intersection was maintained in reasonably safe manner in accordance with established standards, absent expert opinion evidence to the contrary); *Matter of O'Malley v. Consolidated Edison Co. of New York*, 301 A.D. 2d 814, 753 N.Y.S. 2d 587 (3rd Dept. 2003) (expert's "opinion as to causal relation, which we find to be rationally supported by facts gleaned from the medical record . . . is uncontroverted and the Board may not reject it in the absence of some contrary medical expert opinion evidence regarding the cause of death"); *Bills v. Africano*, 132 A.D. 2d 935, 518 N.Y.S. 2d 267 (4th Dept. 1987) (in medical malpractice case, the "affidavit of plaintiff's attorney was insufficient to raise a triable issue of fact; the detailed expert opinion submitted by defendants required an expert response."); *see also Oppenheimer v. Dresdner Bank A.G.*, 50 A.D. 2d 434, 377 N.Y.S. 2d 625 (2d Dept. 1975) (in accepting opinion of defendant's expert, court stated that the "affidavit of Dresdner's legal expert, whose qualifications were most impressive, established that under the law of West Germany the two remittances made by Dresdner . . . to the plaintiff . . . constituted full payment of the obligation due on that date and discharged Dresdner of any liability thereunder [and] the plaintiff offered no expert evidence to the contrary").

Under the controlling case law, given that the Appraisal, at the minimum, is well grounded and persuasive and the Appraiser's testimony was highly credible, and that Respondents failed to proffer an expert report or expert witness to the contrary, the only evidence in the record which the Court can and should consider regarding the value of the use and occupancy of the Premises,

is the Appraisal and the testimony of Ms. Aaron. Based on her report, the undertaking for the value of the use and occupancy of the Premises should be found to be *$950,000* annually.

CONCLUSION AS TO UNDERTAKING FOR THE VALUE OF USE AND OCCUPANCY

For all of the above reasons, the expert opinion of Petitioners' expert that the annual fair market rent of the Premises is *$950,000* annually should be accepted in its entirety. This Court can take judicial notice that because of the heavy case load of the Appellate Term of the Supreme Court in the Second Judicial Department, this appeal, from the date it is perfected until the date on which it is determined could well take one and one-half years. Accordingly, Petitioners respectfully request that the undertaking for the value and use of the Premises be fixed at *$1,450,000*.

THREAT OF WASTE TO THE PREMISES

The amount of an undertaking for threat of waste should be rationally related to the *potential* damage to the property that the party may suffer pending the determination of the appeal. *Clover Street Associates v. Nilsson*, 244 A.D. 2d 312, 665 N.Y.S. 2d 537 (Mem) (2d Dept. 1997). Here, there is a grave risk of major damage to the Premises based on Respondents' highly reckless conduct to date. Petitioners introduced into evidence by way of Stipulation the two most serious of the numerous instances of grossly reckless conduct by Respondents which could result in significant damage to the Premises.

First, in 2011 or 2012, two propane tanks were used in the portions of 784-788 Eastern Parkway controlled by the Gabboim without the knowledge of Petitioners. (Stipulation ¶1)[5].

[5] It is common knowledge and this Court can take judicial notice of the major danger a propane tank used indoors poses by causing a fire or other dangerous occurrence.

Second, in or around 2016, the Gabboim replaced central air conditioning units on the roof of 784-788 Eastern Parkway without the knowledge of Petitioners and without work permits. (Stipulation ¶3).

Of all of the egregious behavior exhibited by the Respondents, these two acts are the most relevant for the Court to consider when determining an amount to protect against waste, because each one of these has the potential to cause significant structural damage to the buildings (or even cause its destruction). Their conduct could also cause grave injury to the occupants of the buildings, or even worse – loss of life.

Justice Thompson in her opinion expressly found that this irresponsible conduct by Respondents resulted in major safety and health risks. Thus, Justice Thompson found that:

> In fact, the evidence presented by the Petitioners demonstrates that the Respondents were informed in writing by the chairman of the board that their conduct in regards to the property was unacceptable. Their complaints were legitimate issues of safety and in the best interest and safety of all of the occupants such as propane tanks in the alleged illegal kitchen in the basement. Additionally, the installation of air conditioning on the roof of any property requires permits and authorization from the Department of Buildings for a myriad of obvious reasons including health and safety. The Respondents did not present any evidence whatsoever to rebut these contentions by the Petitioner. 67 Misc. 3d 1214 (A) at *64.

Based on this and other reckless behavior by the Gabboim to date, there is a real and concrete risk that significant damage to the Premises (and its occupants) may transpire during the pendency of the appeal. Significantly, Respondents' witness, Gabbai Lipskier, gave no indication that the Gabboim had put in place proper safeguards to assure that this type of behavior would not be repeated in the future, or that the risk of damage to the Premises had been mitigated. Moreover, there is no evidence that the Respondents have any insurance to cover damage to the Premises.

Finally, in support of their position as to the amount of the undertaking, Respondents rely almost exclusively on the fact that in two prior proceedings, they were required to pay an undertaking of $250,000 for the threat of loss to the Premises. However, in these prior proceedings, unlike in this case, there was no hearing held in order to determine the amount of the undertaking. Of even greater significance is that these proceedings occurred in 2008 and 2010, more than 10 years ago. Respondents stubbornly fail to recognize that the two most grave incidents highlighted above (the propane tanks and air conditioning installation), occurred ***after*** that time period. (See Stipulations ¶¶1 & 3). These acts (or similar acts) by Respondents, if they were to be repeated, have the potential to cause catastrophic results; thus, the undertaking set in 2008 and 2010 is not informative of the undertaking which should now be required.

The one thing Petitioners and Respondents agree on is the tremendous value of the Premises given, among other things, its central importance to the Chabad community worldwide. It is undoubtedly the most valuable property in the Chasidic world. Bearing in mind that the replacement value of 770 may be incalculable, it is not at all a stretch – based on Respondents undisputed history of gross mismanagement – to ask that the amount of the undertaking to protect against waste be set at $5 million.

CONCLUSION

At the hearing, Petitioners established that the undertaking they request is well grounded both under the record facts and applicable law. In contrast, at the hearing Respondents did nothing to counter Petitioners' showing, or support or bolster Respondents' position that the undertaking should be fixed at a dramatically lower amount.

Accordingly, for all of the above reasons, Petitioners respectfully request that the amount of the undertaking be set at *$6,450,000* ($5,000,000 to protect against the threat of potential waste to the Premises, and $1,450,000 for the value and use of the Premises).

Dated: New York, New York
September 11, 2020

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