

<b>Pastreich v Pastreich</b>
2018 NY Slip Op 30910(U)
May 11, 2018
Supreme Court, New York County
Docket Number: 650740/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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MARK PASTREICH,	<b>INDEX NO.</b>	<u>650740/2018</u>
Plaintiff,	<b>MOTION DATE</b>	_____
- v -	<b>MOTION SEQ. NO.</b>	<u>001 &amp; 002</u>
YITZHAK PASTREICH, MENACHEM PASTREICH, LISA ARONSON	<b>DECISION AND ORDER</b>	
Defendant.		

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The following e-filed documents, listed by NYSCEF document number 9, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32

were read on this application to/for Appraisal & Dismissal

HON. BARRY R. OSTRAGER:

Pursuant to multiple prior court orders, the Court held an evidentiary hearing on May 10, 2018 to determine the fair market value of a 101,000 square foot, multi-tenant office and retail building located at One Civic Center Plaza, Poughkeepsie, New York. The appraisal hearing was necessitated because the building is owned by a Trust created by Mark Pastreich and, pursuant to the terms of the Trust, Mark Pastreich, who is eighty-eight-years old and occupies office and other space in the building, has elected, pursuant to the express terms of the Trust, to exercise his right to substitute for One Civic Center Plaza other and equivalent collateral to the Trust in order to regain exclusive title to the building.

It is undisputed that there is an existing mortgage on the building in the sum of \$2,904,127. The Trustee defendants and Mark Pastreich have stipulated that three buildings that

Mark Pastreich is prepared to contribute to the Trust have a fair market value of \$2,035,000, but the parties disagree as to the fair market value of One Civic Center Plaza. Consequently, at the hearing each party presented testimony from expert appraisers, together with appraisal reports. The objective of the hearing was to determine the shortfall, if any, between the fair market value of One Civic Center Plaza and the three properties that Mark Pastreich is prepared to contribute to the Trust.

The plaintiff Mark Pastreich's appraisal expert was Ronald J. Rubino, the highly credentialed president of the commercial division of GAR Associates LLC, a firm of real estate appraisers and consultants. Mr. Rubino testified under direct and cross-examination about the approximately 200-page expert report he prepared together with a revision to the report he made by reason of a newly executed lease for space at One Civic Center Plaza. Mr. Rubino's exhaustive analysis and exceedingly credible testimony appraised the fair market value of One Civic Center Plaza to be \$5,260,000 using a direct capitalization approach. Mr. Rubino's analysis was largely predicated upon the historic income and expenses of the building over the last four years, and he reasonably assumed a 15 percent vacancy and collection rate which the Court found to be an optimistic projection inasmuch as 46 percent of the space in the building that is occupied is occupied without a lease or pursuant to leases that expire in the next 1 ½ years. Until recently the building had an 18 percent vacancy rate.

In the latter connection, Mr. Rubino demonstrated that the income generated by the building has remained relatively stable over the last four years but noted that the market for office space in the Poughkeepsie area is not growing. Mr. Rubino's report catalogued the current gross income of the building to include \$1,152,703 of annual rent, together with additional rent, effective February 1, 2018, of \$68,000, and other income, such as parking income, totaling

\$78,000. He valued the vacant and owner-occupied space at \$13.25 per square foot instead of the average price of \$14.05 per square foot that space in the building is presently renting at. Against the total value of the space, incorporating the discount for vacancy and collection rates, he calculated actual expenses to be \$7.67 per square foot for a total of \$782,000. Mr. Rubino found the ratio of expenses to income to be comparable to other similar buildings. Mr. Rubino's conclusion is that the fair market value of the building is \$5,260,00 based on a capitalization rate of 9.5% which he testified was consistent with a market survey of comparable properties. When questioned about defendant's expert report from BDO Seidman, Mr. Rubino was of the view that the BDO Seidman report significantly overstated potential revenue using a discounted cash flow methodology and understated vacancy and collection rates.

The Court found plaintiff's expert to be well prepared, his report to be thorough, well researched, and persuasive, and his testimony to be totally credible.

By contrast, defendants' expert, Robert Martinek, appeared only casually familiar with BDO Seidman's seventy-page expert report, and while Mr. Martinek is a well-credentialed appraiser, he was unable, under cross-examination, to defend the analysis sponsored in the BDO Seidman expert report which appraised the subject property at either \$7 million using a discounted cash flow approach or \$6.8 million using a direct capitalization approach. Specifically, while One Civic Center Plaza presently has an anomalously low 12 percent vacancy rate only since February 2018, the BDO Seidman report assumed that the vacancy rate would remain at 12 percent for the next ten years. And, the BDO Seidman report further assumed that the rental rates for space in the building would rise annually at a compound 2 percent rate except for leases with fixed and static rents. These assumptions bear no relationship to the building's experience during the last four years when vacancy rates often exceeded the 15 percent vacancy

rate and credit risk plaintiff's expert used in his valuation. And, ironically, the four comparable buildings BDO Seidman referenced in its report all had vacancy rates in excess of 15 percent and as high as 40 percent. Further, each of BDO Seidman's "comparables" are arguably in more desirable locations significantly south of Poughkeepsie. While Mr. Martinek quibbled with some elements of plaintiff's appraisal, if BDO Seidman had simply assumed a 15 percent vacancy rate over time instead of a 12 percent vacancy rate, BDO Seidman's direct capitalization appraisal value would be relatively close to plaintiff's direct capitalization appraisal. The Court rejects BDO Seidman's discounted cash flow appraisal as entirely flawed given its reliance on ever increasing rents and unreasonable vacancy rates in the Poughkeepsie rental market which is stable at best and perhaps softening based on the testimony of both appraisal experts

The Court therefore adopts plaintiff's appraisal. Significantly, as Mr. Martinek concedes, any fair market appraised value has to be reduced by the \$2,904,127 mortgage balance on the mortgage with which the Trust encumbered One Civic Center Plaza. Therefore, the delta between the \$5,260,000 fair market value and the \$2,035,000 stipulated value of the collateral Mark Pastreich is prepared to substitute is relatively modest when the amount of the outstanding mortgage is added to the stipulated collateral. The precise amount of the delta, assuming that Mark Pastreich assumes the mortgage, is \$5,260,000 minus \$4,939,127—or a shortfall of \$330,873.

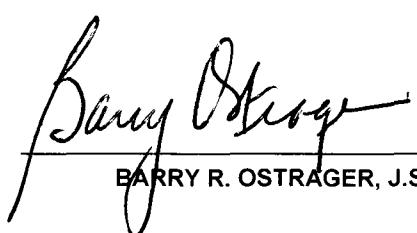
Accordingly, it is hereby

ORDERED that plaintiff, in addition to substituting three properties with a stipulated value of \$2,035,000, must, within thirty days, pay to the Trust \$330,873. The Trust is directed to convey title to One Civic Center Plaza to Mark Pastreich and to take whatever steps are necessary to substitute Mark Pastreich as the mortgagors of the unpaid mortgage. If Mark

Pastreich cannot assume the mortgage then he will have to pay the Trust the amount of the mortgage and the Trust will satisfy the mortgage in full; it is further

ORDERED that defendants' motion to dismiss is denied.

5/11/2018  
DATE

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE