

2nd Ave Holding 1 LLC v Lowenbraun
2021 NY Slip Op 31276(U)
April 16, 2021
Supreme Court, New York County
Docket Number: 162426/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 12

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2ND AVE HOLDING 1 LLC,

Plaintiff,

- v -

NORMAN LOWENBRAUN and RENATA
LOWENBRAUN, Trustees of the Nathan
Lowenbraun Irrevocable Trust, WENDY S. LEWIT
and LESLIE LEWIT MILNER,

Defendants.

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INDEX NO. 162426/2019
MOTION DATE _____
MOTION SEQ. NO. 001

**SUPPLEMENTAL
DECISION & ORDER ON
MOTION**

HON. BARBARA JAFFE:

This is an action for partition of real property located at 1306 Second Avenue in Manhattan. Defendants’ motion for an order determining that the property constitutes “heirs property” within the meaning of the newly enacted Real Property Actions and Proceedings Law (RPAPL) § 993 was granted (NYSCEF 32), ultimately giving rise to a hearing as to the fair market value of the property.

I. FACTUAL BACKGROUND

On August 21, 2018, plaintiff purchased a four-story mixed-use property located at 1308 Second Avenue in Manhattan. On April 29, 2019, plaintiff purchased from Guy Lewit a 16.667 percent (one-sixth) interest in the 1306 Second Avenue (1306), the neighboring four-story mixed-use property immediately south of 1308 and on the east side of Second Avenue. Both properties are between East 68th and 69th Streets. Defendant trust owns a 50 percent interest in 1306, and the other two defendants each own a 16.667 percent interest.

The gross building area of 1306 is 7,892 square feet above grade, comprising 12

residential units, one of which is rent-stabilized, with four units on each of the second, third, and fourth floors. There are also two ground-floor commercial units, one of which has been vacant for several years. The fourth-floor units are duplexes with shared patios. (NYSCEF 1).

II. PROCEDURAL BACKGROUND

Based on its one-sixth interest in 1306, plaintiff commenced this partition action on December 24, 2019. (*Id.*). In their answer, filed on January 31, 2020, defendants assert as an affirmative defense that plaintiff is barred by RPAPL § 993 from the relief it seeks. (NYSCEF 3). On February 5, 2020, plaintiff was ordered to show cause why 1306 should not be deemed heirs property within the meaning of RPAPL § 993. (NYSCEF 19). Upon consideration of the parties' papers and after oral argument, by decision and order dated March 16, 2020, defendants' motion was granted and the property was held to be heirs property (NYSCEF 32), thereby triggering the remaining provisions of the statute.

Due to the recent onset of the COVID-19 pandemic (pandemic), further proceedings pursuant to the statute were stayed until May 4, 2020. A settlement conference mandated by RPAPL § 993(5)(a) was scheduled (NYSCEF 39), adjourned, and held without a settlement being reached. Thus, pursuant to RPAPL § 993(6)(d), a duly licensed and disinterested real estate appraiser (neutral) was appointed to determine the fair market value of 1306. As the neutral had selected September 24, 2020 to perform her inspection of 1306, and as she indicated her intent to appraise 1306 as of that date, it was also ordered that September 24, 2020 was the date as of which she would appraise it. (NYSCEF 50).

On November 20, 2020, the neutral efiled her verified appraisal (NYSCEF 55), and by order dated December 2, 2020, pursuant to RPAPL 993(6)(e), the parties were notified that the fair market value of the property, appraised as of September 24, 2020 by David M. Shlosh and

Marianne T. Mueller of Mueller Lang & Associates, LLC, was \$4 million. (NYSCEF 58).

By affirmation dated January 14, 2021, plaintiff objected to the neutral appraisal for various reasons and submitted an independent appraisal. (NYSCEF 59). By letter of the same date, defendants expressed their objections to the neutral's appraisal and reserved their rights to offer, pursuant to RPAPL § 993(6)(f), evidence at a statutory hearing to be held to determine the fair market value of the property. (NYSCEF 64). The parties' arguments are addressed along with the issues raised at the hearing, *infra*, III.A.

At a pre-hearing conference held on February 9, 2021, defendants were given, over plaintiff's objection, until February 17, 2021 to submit their independent appraisal, which they timely submitted. (NYSCEF 66).

By stipulation so ordered on March 5, 2021, the parties agreed, in pertinent part, that each written appraisal would serve as the respective appraiser's direct hearing testimony in lieu of direct examination, and that each party would be permitted to cross-examine, re-direct, and conduct such other examination as permitted by me. (NYSCEF 68).

III. HEARING

The hearing was held via Microsoft Teams on March 10, 11, and 12, 2021. Each party consented to the application of the Part 12 Virtual Protocols.

A. In limine applications

1. Plaintiff (NYSCEF 59-63)

a. Objection to neutral appraisal

In its January 14 letter, plaintiff complained that as the neutral appraisal was prepared by Shlosh and not by Mueller, the appointed appraiser, it was precluded from conducting a pre-hearing inquiry into Shlosh's qualifications and biases.

At the hearing, Shlosh testified that he has never spoken with, nor performed any appraisal services for, any of the defendants, and that Mueller was his supervisor who had assigned him to prepare the appraisal, which she reviewed and certified. Additionally, Shlosh's qualifications, as set forth in the appraisal and in his testimony, including that elicited by plaintiff, reflect that he is well-qualified to testify as an expert appraiser in this matter. Consequently, any prejudice arising from plaintiff's inability to conduct its own pre-hearing inquiry into Shlosh's background was dispelled at the hearing. Moreover, as the neutral appraisal had been efiled on November 20, 2020, plaintiff had 24 days before it interposed its written objection within which to research Shlosh's qualifications and biases. And, as the hearing was held two months after that, nothing prevented plaintiff from conducting a broad investigation prior thereto.

b. As-of date of valuation

Plaintiff also asserted in its January 14 letter that as it had filed the partition action on December 24, 2019, before the onset of the pandemic, the property should have been appraised when the New York real estate market was "bustling." Having unknowingly assumed the risk of the market downturn resulting from the pandemic, plaintiff maintains that "[t]he most equitable and logical date as of which the valuation should have been conducted is December 23, 2019, the day before the complaint was filed."

In support, plaintiff relies on Business Corporation Law (BCL) § 1118, which governs the valuation of shares to be purchased from one bringing a proceeding for judicial dissolution of a corporation. Pursuant to subsection (b), absent an agreement on the fair value of such shares, the court may determine the fair value "as of the day prior to the date on which the petition for dissolution was filed . . ." Plaintiff contends that such a date for valuation will ensure that

defendants do not profit from the pandemic by “consolidating their interests in the premises for pennies on the dollar.” Plaintiff, having purchased its one-sixth interest in 1306 in April 2018, pre-pandemic, paid far greater than it will receive if 1306 is valued as of a post-pandemic date, a punitive result that goes far beyond the legislative intent of “protect[ing] low and middle income families from being forced into selling family property at a loss.”

Absent sales of comparable properties during the pandemic, plaintiff argues, a valuation date of December 23, 2019 would yield a baseline valuation of the premises that is “both more equitable and grounded in an objective reality” and would provide a “more useful figure” from which to determine the fair market value. Alternatively, plaintiff asks that to arrive at a fair market value, the date as of which 1306 should be appraised must either precede the date on which the action was filed or follow the abatement of the market disruptions due to the pandemic. It predicts that “[w]ith the rollout of COVID-19 vaccines in its infancy, there exists just cause to believe that the market will begin to stabilize and comparable sales will begin to go forward.”

This objection is addressed *infra*, at IV.B.

c. Timeliness of submission of defendants’ independent appraisal

At the start of the hearing, plaintiff’s counsel moved to preclude the admission in evidence of defendants’ independent appraisal, claiming that defendants had been given a 30-day opportunity to tailor their appraisal in rebuttal of plaintiff’s appraisal, which had been efiled 30 days earlier. Defense counsel denied that defendants’ appraisal constituted a rebuttal and observed that nothing in the statute supports plaintiff’s objection.

In RPAPL § 993(6)(f), the provision mandating that a hearing be held to determine the fair market value of the property, there is no requirement that evidence offered by parties as to

the fair market value be submitted at any particular time. Thus, a court is given broad discretion in that regard, constrained solely by fairness and due process.

Plaintiff identified nothing in defendants' appraisal indicating that it had been prepared in rebuttal of plaintiff's appraisal, and thus, plaintiff demonstrates no basis for its objection. Moreover, absent any schedule or agreement of the parties relating to the offer of evidence in this aggressively litigated matter, and as defendants had clearly indicated in their January 14 letter that they were reserving their right to offer evidence at the hearing, and counsel did not cross examine defendants' appraiser on this issue, plaintiff waived its objection to defendants' submission of their independent appraisal.

d. Exhibits offered by defendants (DX-DEMO-1, 2, 3)

Plaintiff's counsel also objected to three exhibits offered by defendants the morning of the hearing, asking that they be precluded from offering a copy of the tax bill as of June 2020 for 1306 and a list of rent-stabilized apartments. Absent any dispute that the building contains a rent-stabilized tenant, the objection was overruled, and even though the amount of taxes owed as of June 2020 is undisputed, I sustained the objection to the tax bill. As counsel agreed that the third exhibit, a spread sheet setting forth the salient information gleaned from the three appraisals, was demonstrative, he withdrew his objection to it and raised no issue as to the data contained therein.

2. Defendants (NYSCEF 64)

In their January 14 letter, defendants objected to the neutral's appraisal on the grounds that it does not reflect that the building is rent-stabilized and that the comparable properties considered had sold "at substantial premiums above market value as part of an assemblage of properties acquired for redevelopment . . ." These facts, according to defendants, "require a

downward adjustment of the fair market value” of the property as of the valuation date from \$4,000,000 to approximately \$3,000,000 or less.

Defendants’ objection is addressed, *infra*, at IV.D.

B. Testimony

As this hearing may be the first held pursuant to RPAPL § 993, which became effective December 6, 2019, and as the Legislature provided no guidance as to its procedural mechanisms, the parties’ lawyers entered into a stipulation addressing many procedural aspects.

1. Testimony of neutral appraiser

David Shlosh is a certified appraiser with approximately 25 years of experience and memberships in various professional organizations and has performed many appraisals of air rights as well. He testified that he and Mueller inspected the building’s south retail unit, apartment units 3RS and 4RN, the common areas, rear yard, and basement. He was not sure how long the retail unit has been vacant.

a. Comparable sales

In appraising the property as of September 24, 2020, Shlosh first considered comparable sales, which he assumed include the air rights, or excess development rights (EDR), for each property. Those figures, as set forth in a chart in Shlosh’s appraisal (NYSCEF 54, at 40), are derived from the sales of:

1388 Second Avenue on February 26, 2020 for \$5.975 million;
1364 York Avenue on January 31, 2020 for \$6.050 million;
1341 Second Avenue on December 10, 2019 for \$7.2 million; and
1308 Second Avenue on August 21, 2019 for \$7 million

The square footage of each of these properties is, respectively 6,000, 9,180, 7,475, and 7,052, which are similar enough to 1306 and thus there was no need to adjust any of them. Nor did Shlosh see a need to adjust for the age or condition of the properties.

The 13,488 square feet of EDR attributed to 1306, Shlosh acknowledged, does not expire and it possesses intrinsic value, although he did not appraise the EDR separately. The square footage of the EDR for each of the four properties, is respectively, 12,750, 15,320, 10,465, and 14,328. While each of the four buildings and 1306 are assigned the same maximum floor to area ratio (FAR) of 10, Shlosh opined that the ability to build to the maximum FAR depends on zoning and other considerations.

The prices per square foot of these properties are, respectively, \$996, \$659, \$963, and \$993, however, given the “inferior” quality of the York Avenue property, Shlosh had adjusted it by 10 percent, yielding \$725 per square foot.

Shlosh applied an overall adjustment of 25 percent representing the negative market impact of the pandemic which, according to him, rendered the demand for residential units below historic norms on the upper east side of Manhattan. He based this “conservative” figure on “dozens of conversations” he had with appraisers, investigators, and brokers, who were discussing the pandemic’s impact “ad nauseum,” on information he gleaned at Appraisal Institute events, and on an item from *The PwC Real Estate Investor Survey for the Third Quarter of 2020*, entitled, “Unknowns Dampen CRE Sales Activity,” which focuses on the pandemic’s impact negative impact, along with that of the preceding growth of e-commerce (*id.*, at 29). Shlosh had learned that valuations for buildings like 1306 are “being hit” by 15 to 50 percent due to the pandemic. He also observed that businesses and individuals had fled Manhattan in September 2020 and that the lack of data to support the reduction is due to the lack of sales. Shlosh thus represented that he had considered all pertinent facts and circumstances, and did not average out the figures reported by his sources.

Shlosh observed that banks “have different motivations for reporting different things,”

and thus was not persuaded to alter his position based on the alleged 5 to 10 percent reduction of values taken by banks in response to the pandemic. He also denied that banks are necessarily more conservative than other investors. He conceded, however, that while the market downturn impacted walk-up buildings on the upper east side of Manhattan, they were not as negatively impacted as luxury buildings.

According to Shlosh, the presence of the rent-stabilized unit in the building had no major impact on the value of 1306 as the rents for all of its residential units are consistent with those in the neighborhood, and he accounted for a nine-month exposure time for 1306, which would commence in January 2020, before the onset of the pandemic. The indication he had seen in ACRIS (New York City's Automated City Register Information System) that 1306 had been sold on April 29, 2019 for \$1.2 million in an arm's length transaction struck him as highly unlikely, and when counsel informed him that it represented an interest in the building of 16.667 percent, he was not surprised. Nonetheless, he denied that the value of the entire building as of the date of valuation would be properly based solely on the sale price of the 16.667 percent interest.

Shlosh's adjustments yield prices per square foot of the four buildings at, respectively, \$747, \$544, \$722, and \$744. After averaging the adjusted prices, he arrived at \$689. However, as the values range from \$544 to \$747 per square foot, and in light of the market at the time, Shlosh selected the midpoint of \$650, and denied that it constitutes a further reduction in value. Rather, he testified, \$650 per square foot accounts for the value of the air rights which is implied in the sales comparison value. He then multiplied \$650 by 7,892, the square footage of 1306, yielding a rounded \$5.13 million.

b. Income capitalization

As 1306 produces rental income, Shlosh gave primary consideration to the income

capitalization method of valuing property. He described capitalization rates as reflecting the rates investors would pay for a property at a point in time regardless of its income, and contended that such rates are essential to valuing a property.

Based on the rent roll for 1306, reimbursement income such as for a tax refund, and market rent estimates, Shlosh estimated that the potential gross annual income (PGI) is \$469,830, representing “the total income attributable to the property at full occupancy before deduction for vacancy and operating expenses.” (*Id.*, at 53). Given market conditions and notwithstanding historic rates of 5 to 10 percent, he applied to the PGI a vacancy and collections reduction of 12.5 percent over time, representing losses in rent incurred for vacant units, noncollection of rents, and fixing up of vacated units, yielding an effective gross income (EGI) of \$411,101 per year, the anticipated income from all operations of the real property. (*Id.*, at 53).

Shlosh considered the fixed and variable expenses “that would typically occur at periodic rates during the projection period.” (*Id.*). They were \$23,676 for utilities, 7,892 for insurance, 23,676 for payroll, \$28,777 for management, and \$149,833 for taxes, totaling \$233,853.

Absent information about the income and expenses of the comparable buildings, Shlosh considered national and local surveys, anecdotal information from local brokers, the impact of the pandemic, income from other retail and residential properties as of September 2020, and a table of capitalization rates produced by local brokers (NYSCEF 54, at 56), although the table is entitled “National Apartment Market,” arriving at a capitalization rate of 6 percent for 1306. He then subtracted the operating expenses of 1306 from the EGI, yielding \$177,248, which he divided by the capitalization rate of 6 percent, arriving at a rounded value of \$2.95 million for 1306.

c. Highest and best use

Shlosh testified that to appraise real property, its highest and best use must be determined according to the “reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.” (NYSCEF 54, at 22). “[I]f vacant and available for development,” Shlosh found that the highest and best use of 1306 as of September 24, 2020, “is for current development to the maximum density permitted under existing zoning regulations.” (*Id.*, at 23).

As improved, consideration must be given to whether the property should remain unchanged or be demolished or modified. Although Shlosh acknowledged that there are no easements recorded against the property nor any legal restrictions placed on its development, the building is in a “densely populated residential commercial corridor” where, at the time of the hearing, the rental of residential units yielded “an economic return.” And although the development of the property would increase its income, its present rental income demonstrates that its highest and best use is its present mixed use as construction had halted due to the pandemic and given the existing tenancies and vacancies. (*Id.*, at 24).

d. Conclusion

Shlosh reconciled his two valuations, \$5.13 million and \$2.95 million, at \$4 million, with a “bias” toward the income approach.

2. Testimony of defendants’ appraiser

Richard Evans, a certified appraiser for 30 years, is licensed in New York, New Jersey, and Connecticut, with experience in appraising air rights both with and without a fee interest. The sales data on which he relied was derived from sources such as CompStak, Costar, and Genesis, whereas the rental data he considered may have come from appraisals previously

performed by his associates.

Like Shlosh, Evans appraised 1306 as of September 24, 2020, and allotted to it an estimated exposure time of 12 months, which includes a period preceding the onset of the pandemic.

Notwithstanding the pandemic, Evans testified that the demand for residential units in and around 1306 is “good,” and that development of its EDR would create additional units to rent out or sell. He cited a finding by the Federal Reserve Bank that a recovery from the pandemic would be more pronounced and dramatic than that following the 2008 recession, absent a banking crisis. In his appraisal, Evans stated that the economy had “bottomed-out” in April 2020 and rebounded beyond expectations, and he agreed that with the availability of COVID-19 vaccinations, the economic outlook was even better than in April 2020. Nonetheless, Evans declined to link such progress with the development potential of 1306, identifying factors such as people working remotely instead of commuting to Manhattan, which he directly linked to the pandemic. Thus, he referenced higher vacancy rates, lower rents “across the board,” and weaknesses in the rental market, and reported national and regional improvements, except for Manhattan.

a. Comparable sales

Evans’s analysis of comparable sales is derived from the sales of:

1388 Second Avenue on February 26, 2020 for \$5.975 million;
1670 Third Avenue on December 25, 2019 for \$7,097,382;
1711 Second Avenue on November 1, 2019 for \$6.15 million;
1368 York Avenue on January 31, 2020 for \$7.8 million;
1341 Second Avenue on December 10, 2019 for \$7.2 million; and
240 East 75th Street on March 27, 2019 for \$6.9 million

(NYSCEF 66, at 60). He gleaned this data from local reported tax appeals, broker’s advertisements, Costar, and listings, to name a few of Evans’s sources.

Evans adjusted the sale price of the 240 East 75th Street property by 5 percent given the change in the rent-stabilization law effective in June 2019 which would not have been factored into the earlier sale of that property. He also adjusted the sale price of 1368 York Avenue by adding to it 5 percent given its location, and subtracted 5 percent from the sale price of 240 East 75th Street due to its location.

The entire square footage of each these properties is, respectively 6,000, 8,216, 7,300, 11,191, 7,475, and 7,912. No adjustments were made.

The square footage of the EDR for each of the six properties, is respectively, 12,150, 17,114, 11,450, 14,339, 10,465, and 2,265. Evans adjusted the 240 East 75th Street property by 5 percent given its relatively small EDR. He looked for but did not find any sales of the air rights for these properties apart from the sales of the buildings themselves.

The price per square foot of each of these properties is, respectively, \$996, \$864, \$842, \$697, \$963, and \$868.

Like Shlosh, Evans consulted with other market professionals and, based on reductions of 10 to 15 percent reported to him on account of the pandemic, he reduced the figures for each property by 10 percent, relying in large part on the Federal Reserve of New York's Beige Book which provides in its comprehensive "Summary of Economic Activity" for New York City in November 2020 an analysis of the contrasting impacts of the pandemic and the 2008 recession (*id.*, at 25-37). While he perceived no legal impediments to developing the EDR of 1306, he opined that it is not feasible due to the pandemic and that otherwise, he could not offer an opinion about whether 1306 is structurally sound enough to support development.

According to Evans, his adjusted data reveals a range of from \$368,550 to \$720,000 per unit, with a mean of \$499,235 per unit, and from \$658.65 to \$896.25 per square foot, with a

mean of \$782.52 per square foot. (*Id.*, at 67). “Placing the most emphasis” on the Second Avenue sales, Evans estimated the per unit value of 1306 to be \$575,000, and the value per square foot to \$840, yielding, respectively, \$8.05 million for the 14 units, and \$6.629 million for the 7,892 square feet. (*Id.*, at 68).

Evans also calculated the value of 1306 based on the EGIM (effective gross income multiplier), the last of which he credibly described as an “extra step” he employs when appraising apartment buildings. He calculated the EGIM by subtracting the vacancy and collection losses from the potential gross income, which he derived from the New York Real Property Income and Expense (RPIE) statements or from CoStar or broker advertisements. He distinguished the calculations for determining the EGIM from those used for arriving at the income capitalization rates as being significantly simpler, and verified them against the RPIE, finding that for 1388 Second Avenue, the EGIM is 21.04, for 1670 Third Avenue, it is 13.70, for 1368 York Avenue, it is 12.84, for 1341 Second Avenue it is 20.92, and for 240 East 75th Street it is 13.99. Pertinent data was not available for 1711 Second Avenue.

Evans rejected the notion that a valuation should be arrived at by taking the average of the three calculations, as “appraisers don’t average.” Rather, he advocated that each approach be evaluated in order to attribute the greatest weight to the most valid, and opined that the EGIM is the strongest indicator of value of the three as the building’s income is directly impacted by the pandemic, whereas the price per unit and per square foot are not. He acknowledged that calculating based on the EGIM produced a value of almost half of that based on the price per unit or square foot, and that he had rejected an EGIM from within the 12.84 to 21.84 range of the comparable sales in favor of the opinions of four active local brokers that the range is closer to 8 to 15.

Given the pandemic, the long-term vacancy of the residential unit, and the vacancy of the retail unit, Evans chose an EGIM of 10 for 1306, and arrived at a value of \$4.45 million which he rounded to \$5 million to account for the higher values reached for 1388 Second Avenue. (*Id.*).

b. Income capitalization

Evans again relied on management's projected income and expenses (*id.*, at 85), arriving at a gross income of \$445,027.

Based on the historical operating expense statements obtained from management, and historical expenses from similar properties, Evans calculated the variable annual expenses for 1306 as follows: The projected annual payroll expense is \$24,000 based on the salary of a single visiting superintendent. For heat and hot water furnished to three of the residential units, Evans estimated the annual cost at \$13,000. For building maintenance, Evans estimated an annual \$6,000, and assigned 4 percent of the EGI to management and professional fees which he states is typical for such properties and size of the collectable income, or \$2,500 per year. The expense of reserves for replacements was estimated by Evans to be \$150 per unit, although management seldom includes such reserves in expense statements.

Based on historical figures, Evans calculated the fixed annual expenses of 1306 as follows: The insurance expense is \$15,000, much like that for buildings of the type, location, and vintage of 1306. Water and sewer expenses are \$9,800, and the actual taxes are \$149,833. The total estimated expenses for 1306 is \$241,734, or 54 percent of the EGI which is within the operating range for properties like 1306, although he subtracted \$40,000 from the final value to account for the six-month rent loss from the vacant retail unit and for brokerage fees of \$24,000.

Evans included in his chart the capitalization rates reported for each comparable sale but did not use them in his calculations as they are all pre-pandemic. Instead, Evans culled

post-pandemic capitalization rates from property sales in other parts of Manhattan which, he asserted, are similar to the rental structures, vacancy rates, and EDR of 1306 and on the upper east side:

439 Amsterdam Avenue, sold for \$17 million in September 2020, 12 units, 5 percent cap rate;
94 St. Marks Place, sold for \$8.5 million in August 2020, 8 units, 5.5 percent cap rate;
506 East 6th Street, sold for \$4 million in August 2020, 14 units, 5.2 percent cap rate;
124 W. 78th Street, sold for \$4.5 million in August 2020, 10 units, 4.25 percent cap rate;
1024 Second Avenue, sold for \$7.1 million in March 2020, 7 units, 4.20 percent cap rate;
345 East 65th Street, sold for \$8.28 million in July 2019, 20 units, 4.41 percent cap rate;
12 West 104th Street, sold for \$8.1 million, in June 2019, 16 units, 4.41 percent cap rate;
310 West 89th Street, sold for \$5.6million in October 2019, 10 units, 4 percent cap rate;
439 West 46th Street, sold for \$6.6 million in April 2019, 20 units, 4 percent cap rate;
and 345 East 65th Street, sold for \$8.280 million in July 2019, 20 units, 4.41 percent cap rate

(*Id.*, at 82).

Evans adhered to rates of 4 percent and lower for the pre-pandemic sales, and 5 percent and more for the post-pandemic sales. While he acknowledged that there were sales that had closed between April 2019 and September 2020, whereas the comparable sales had closed between March 2019 and February 2020, Evans did not include in his calculations the capitalization rates of sales with capitalization rates of three percent or less even though most of them had closed between April 2019 and September 2020. And, although the local vacancy rate as reported in CoStar is 5.4 percent, Evans applied a capitalization rate of 5 percent for the residential units and 10 percent for the commercial units, which he blended, explaining that both the pre- and post-pandemic sales reflected a trend of increasing rates.

In calculating the value, again finding that the gross income of 1306 is \$445,027, with annual expenses of \$241,734, which yielded a net operating income of \$203,293, which he divided by the capitalization rate of 5 percent to yield \$4,065,860. Evans adjusted that figure by the vacancy and collection losses and brokerage fee to yield \$4 million.

c. Highest and best use

If vacant, Evans opined in his appraisal that the highest and best use of 1306, would be “for it to be held pending the end of the COVID pandemic and the economic fallout, and then developed with a residential building” (*id.*, at 54), whereas as improved, Evans determined that the condition of 1306 comports with market expectations and therefore requires no further improvement, given the sufficient income it provides. Thus, considering a variety of pertinent factors, and as the area demand is “good and likely to remain that way for the foreseeable future,” Evans’s opinion is that the existing improvement as a mixed-use, residential apartment property is the highest and best use of the land. While he acknowledges that 1306 and each of the comparable buildings is assigned the same maximum FAR of 10, Evans was unable to say whether 1306 could physically support a full development of the air rights without reinforcement and he recognized the obstacles posed by the existing tenancies, which depend on whether the building is demolished and whether tenants accept buyouts.

d. Conclusion

Evans favors the income capitalization approach for valuing the property given the likelihood of its appeal to investors and its reliance on internally generated data, whereas the sale comparison approach is tied to pre-COVID data. Based thereon, Evans found that the fair market value of the building as of September 2020 is \$4 million.

3. Testimony of plaintiff’s appraiser

Joseph Lifschitz, a fee appraiser and consultant with Westrock Appraisal Services for approximately eight years, has been licensed solely as a New York State assistant appraiser for five years, with plans to become fully licensed upon passing the certified general appraiser

examination in April 2021. He has never been qualified as an expert witness, has written no articles about the appraisal process, has never been a speaker at any seminars about appraising, and has won no awards. He performs some 20 to 25 appraisals a month, approximately one-third of which are for mixed use properties and one-quarter of which are in New York City.

Plaintiff paid Lifschitz an hourly fee of \$350 and Westrock \$10,000 for the two appraisals Lifschitz performed, one as of December 29, 2020 and the other as of December 23, 2019. Those dates were selected by plaintiff's principal, with whom Lifschitz had spoken with several times.

Given his status as an assistant appraiser, Westrock's principal reviewed and signed the appraisals prepared by Lifschitz who visited the property. In preparing his appraisals of the building alone, Lifschitz adhered to the Unified Standards of Professional Appraisal Practices, Title XI of the Financial Institutions Reform Recovery and Enforcement Act of 1989, and the Appraisal Institutes Code of Professional Ethics and Standards. To his knowledge, there are no standards or guidelines for valuing a building's air rights.

While acknowledging that market value is "the most probable price which a property would bring in a competitive and open market under all conditions requisite to a fair sale" if the price is not affected by the "undue stimulus" which Lifschitz attributes to the June 2019 amendment to the rent-stabilization laws, Lifschitz minimized the impact of the amendment on 1306, and observed that the presence of only one rent-stabilized tenant with a lease at not much below market price would not likely deter a buyer.

a. Comparable sales (NYSCEF 62)

Lifschitz's analysis of comparable sales is derived from the sales of:

135 East 63rd Street on December 1, 2020 for \$6,493,542;
1129 Lexington Avenue on April 17, 2019 for \$6,009,632; and

1341 Second Avenue on December 10, 2019 for \$6,124,690.

These figures are not the actual sale prices. Rather, Lifschitz adjusted each at the outset to account for the differences in EDR among them, even though the actual sale prices presumably reflect EDR values.

The differences between the 13,488 square feet of EDR for 1306 and the square footage of the EDR of each of the comparables are, respectively, 7,987, 7,352, and 10,465. Using a baseline of 9,000 square feet in an effort to render the three properties comparable to the EDR of 1306, he multiplied the difference in square footage between the baseline and the EDR by the price per square foot of \$734 and added it to his adjusted sale prices. As one of the property's EDR exceeds 9,000 square feet, he multiplied the difference between them by \$734 and subtracted the product from the adjusted sale price.

Lifschitz derived the figure of \$734 from the valuations of four parcels of vacant land on the upper east side (NYSCEF 62, at 62, 90), reasoning that the sale of vacant land, like the sale of air rights, entails the sale of the right to build. He conceded, however, that he did not check to see whether \$734 per square foot is consistent with the square footage of other buildings on the upper east side within the past three years.

For 135 East 63rd Street, Lifschitz multiplied the difference between the baseline square footage of 9,000 and the actual EDR square footage of 7,987 by \$734, yielding \$743,542, which he added to its actual sale price of \$5.75 million, yielding \$6.5 million. For 1129 Lexington Avenue, he multiplied the difference between 9,000 and 7,352 square feet of its actual EDR by \$734, yielding \$1,209,632 which he added to the actual sale price of \$4.8 million, yielding \$7.22 million. And, as the EDR of 1341 Second Avenue is greater than 9,000 square feet, he deducted from its actual sale price of \$7.2 million the product of \$734 and the difference between 9,000

and 10,465 square feet, or \$1,075,310, yielding \$8.275 million.

Lifschitz then adjusted each property by an additional 5 percent, as the average actual sale prices of the three properties is \$5.917 million, yielding \$6.2 million.

Lifschutz performed additional adjustments. Due to the respective locations of 135 East 63rd Street and 1129 Lexington Avenue, he added 10 percent to the value of the first, and deducted 15 percent from the value of the second, and further deducted by 5 percent the value of the second due to its smaller size. He then reduced, on account of the ages of the properties, 5 percent, and for their condition, 10 percent, and for their quality, 5 percent.

Owing to the pandemic, Lifschitz deducted 10 percent “off the top” of the value of each property based on bank adjustments for the pandemic ranging from 5 to 10 percent. According to Lifschitz, higher pandemic adjustments are accorded office buildings which he feels have more difficult recoveries. He did not adjust for time as the properties have neither appreciated nor depreciated since sold, apart from the adjustment for the pandemic.

Lifschitz then calculated that the price per square foot for the comparable properties, as adjusted, is \$700, which he multiplied by 7,892, the square footage of 1306, yielding a base value of \$5,524,400, and assuming the baseline of 9,000 square feet of EDR, he added \$3.3 million for “excess FAR development” plus the vacancies, yielding \$8,824,400. Lifschitz distinguished the sums added to reach the 9,000 square foot baseline for the EDR from the excess FAR, and denied any double counting of values. Absent the EDR, Lifschitz valued 1306 at \$6 million and thus he did not agree that the difference between his appraisals and those of the other appraisers is due solely to his valuation of the air rights.

Lifschitz thus estimated the market value of the property post-pandemic, based on his comparable sales analysis, at \$8.7 million.

b. Income capitalization

Lifschitz agreed that the best method of determining the value of an income-producing property is through income capitalization, substantiated by comparable sales. When the two methods yield significantly different results, he assumes that something is missing.

Lifschitz obtained the building's income and expenses from the property manager's profit loss statement and observed that property owners often provide inaccurate information. Thus, he does not "rubber stamp" data received from owners but adjusts it based on his experience and market norms which, according to him, is an accepted methodology in appraising real property, albeit only when the data so warrants.

Lifschitz's sole adjustment to the income obtained from the property manager was the reduction by 10 percent of the rent for unit 3FN which he claimed was above-market. He made adjusted the building's expenses by reducing the annual utility expense for common areas from \$2,846 to \$2,000, and the 2019 amount for repairs, maintenance, and supplies from \$35,199 to \$7,700 due to nonrecurring electrical upgrades to the vacant commercial unit that year. Absent pertinent information from the property manager, he used "proforma data" culled from other buildings of the same type which he then averaged to arrive at \$7,700. Although Lifschitz acknowledged that the profit and loss statement reflects an expense of \$9,068.80 for electrical repairs for 2019, he would not likely alter his adjustment.

While the actual 2019 expense for management fees was \$18,339.39, Lifschitz decreased it to \$14,802, without explanation, and increased the annual payroll expenses by almost \$6,000 as the \$613 figure on the statement was plainly inaccurate. Although management's total expense figure is \$230,708, Lifschitz entered it as \$231,261.75, and then determined that the market projection for operating the building would be \$209,983, which he calculated by the

expenses he had adjusted, thereby reducing the total actual expenses incurred in 2019 by some 9 percent. Lifschitz agreed that by reducing the actual expenses, he raised the net operating income.

In appraising the rental income for the vacant commercial unit at \$138 per square foot, Lifschitz relied on four comparable rentals, whereas the other two appraisers appraised it at \$100 per square foot. And, notwithstanding the exposure time of 9 to 12 months he projected for the sale of the property, which constitutes the entire calendar year of 2020 or from April 1, 2020, which includes the great increase in retail vacancies due to the pandemic, Lifschitz adhered to the projected rent of \$138 per square foot for the vacant commercial unit. He was not concerned with how long it had remained vacant, opining that the neighborhood is more significant than the duration of the vacancy.

Lifschitz projected a net operating income of \$283,431 for 2021, whereas the actual net operating income for 2019 was \$150,415.64, which he had arrived at by projecting a higher income and lower expenses.

In deriving the capitalization rate for the property, Lifschitz relied on rates from four nearby properties:

1024 Second Avenue, sold on March 30, 2020, 4.2 percent;
1031 Second Avenue, sold on November 26, 2019, 4.25 percent;
401 East 57th Street, sold on February 11, 2019, 4.5 percent; and
219-221 East 59th Street, sold on March 11, 2020, 5.61 percent

Lifschitz adjusted the pre-pandemic rates by one half-point which he characterized as “effectively” a 10 percent decrease in value, as “the city is going to pick up,” and chose a capitalization rate of 4.75 percent.

Lifschitz also factored in the vacancy rate for area properties, which he reported as approximately 5 percent as of December 2020 for commercial and residential properties. He took

the 5 percent “off the top,” and then deducted all of the expenses to get the net operating income which he divided by 4.75 percent and then compared it with his analysis of the comparable sales, arriving at \$9.15 million.

c. Highest and best use

In Lifschitz’s opinion, 1306 is underutilized, given its EDR. Thus, he testified, its highest and best use is to modify it and maximize its value by tripling its size, whether by adding to the top or demolishing or rebuilding, which would yield some 15 floors and require an elevator. According to Lifschitz, the building would then bring in three times more revenue although he acknowledged that the project would be expensive and he was unable to address the various requirements for it.

The existing tenancies at 1306 pose no problem to Lifschitz as the leases for 10 of the 12 residential units expire within a year or two and the rent-stabilized tenant could be bought out or remain, in which case the building would not be demolished but added on to, although he acknowledged stating in his appraisal that the highest and best use must be “legally permissible, physically possible, financially feasible, and maximally productive,” and he did not know whether all of those conditions could be satisfied.

d. Conclusion

Lifschitz compared the results of his two appraisals, observing that their capitalization rates differ by one-half point, and that the vacancy rate was greater post-pandemic. He also divided the property’s “stabilized productive gross income” by the capitalization rate, yielding a value to which he added the EDR, and deducted \$110,000 representing the approximate rent loss and \$16,000 as the estimated brokerage fee, concluding that the fair market value as of December 2020 is \$10.4 million.

III. POST-HEARING MEMORANDA

A. Defendants (NYSCEF 69)

From the legislative mandate that the court order a neutral appraisal to determine the property's fair market value, per RPAPL § 993(6)(c), defendants argue that the determination of the court-appointed neutral is "conclusive in the first instance," absent fraud, bias or bad faith.

As Lifschitz inflated the net operating income and deflated the expenses of 1306, he chose a capitalization rate lower than those chosen by the two other appraisers, and did not sufficiently disclose in his appraisals the adjustments he had made to the comparable sale prices. Defendants thus maintain that plaintiff's appraisal has no probative value, especially given his lack of appraisal experience.

Additionally, plaintiff's failure to obtain an appraisal as of September 24, 2020 violates that "law of the case" as set forth in the amended order appointing the neutral appraiser (NYSCEF 50), and thus, defendants claim that plaintiff's appraisals are without probative value. Moreover, they observe, Lifschitz had not been made aware by Westrock or plaintiff of the court-ordered valuation date.

Defendants also allege that Lifschitz's finding that the best and highest use of the property is as developed is "fundamentally hypothetical," given his admission that he knew not whether construction to the maximum FAR was feasible or whether the rent-stabilized tenant could be bought out. Another basis for disregarding Lifschitz's appraisals, defendants assert, is his "unduly complex process involving patently incomparable vacant land sales data to come to the preposterous value of \$734/sq. ft. for excess FAR rights" (emphasis omitted), which he admitted matched no sale in the area or in all of Manhattan. As the other appraisers identified and considered the sales of comparable mixed-use properties with EDRs similar to those of the

property, defendants maintain that Lifschitz's addition of more than \$3 million to the EDR resulted in double-counting.

B. Plaintiff (NYSCEF 70)

In light of the uncertainty of the impact of the pandemic on the property's fair market value, plaintiff urges that it be disregarded, and maintains that the sole equitable determination of value is to consider the statute's purpose and that of analogous statutes such as the BCL § 1118. It observes that in order for a party, like it, to assess its risk in seeking partition and a potential buyout, the date as of which the value should be determined is the date of commencement of the partition action. Otherwise, the parties are subject to market uncertainties during the action's pendency. Thus, Lifschitz's 2019 appraisal, the only one requiring no "guesswork" as to the pandemic's impact on the market, should be solely considered, especially as Lifschitz, in contrast to the other appraisers, details "the high demand for properties" to be developed on the upper east side. Plaintiff also notes that Evans stated in his appraisal that there is no legal impediment to developing the property and that New York's "Sliver Law" is not applicable here absent an analysis of its terms. Additionally, plaintiff argues that it is not bound by the valuation date of September 24, 2020 as set forth in the amended order.

Lifschitz's "rigorous" calculations of a baseline for the FARs of the comparable sales, plaintiff contends, affords an "apples to apples" comparison of the other properties, as evidenced by the similar adjusted values arrived at by the other two appraisers, and that Lifschitz's capitalization rate of 4.25 percent is consistent with the historic rates cited by Evans. According to plaintiff, Lifschitz's net operating income analysis for the building is more accurate than the others, as he used his professional judgment in lieu of relying solely on the unverified profit and loss statements provided by management. In any event, none of the appraisers wholly accepted

management's statement.

Plaintiff thus alleges that Lifschitz's 2019 appraisal is the sole objective appraisal and that the fair market value of the building based thereon should be between \$11.5 million and \$10.4 million. If not, then Lifschitz's 2020 appraisal is best as he utilized a 10 percent adjustment for the pandemic, as did Evans, which is more appropriate than Shlosh's arbitrarily arrived at 25 percent.

Shlosh's appraisal, moreover, is alleged by plaintiff to be unreliable for having used a national capitalization rate without regard to rates on Manhattan's upper east side, and it disputes his vacancy rate of 12.5 percent, claiming that it is unsupported by objective data and is above historical vacancy rates. Plaintiff maintains that Shlosh's rates resulted in his "absurdly low" valuation of \$2.95 million which is far lower than both his own comparable sale figure and the price for which plaintiff purchased his interest in the property.

The values reached by Evans based on the price per unit, price per square foot, and EGIM, according to plaintiff, reflect a wide range of \$4 million and an almost \$2 million spread among them. Alleging that Evans utilized the EGIM as a second income method in order to reduce its sales comparison figures, plaintiff asks that it be disregarded. In any event, it discredits Evans's use of a multiplier below those used for the comparable properties.

Plaintiff also observes that Evans's income valuation of \$4 million is approximately half of his sales comparison valuation, thereby demonstrating his use of the wrong capitalization rate, which Evans admitted was not applicable to the comparable properties, but was gleaned from a city-wide capitalization rate. By contrast, Lifschitz employed rates that comport with those on the upper east side and the rates reported in Evans's comparable properties.

Both Shlosh and Evans failed, plaintiff argues, to attribute a proper value to the 13,488

square feet of unused FAR, and unduly discounted the development potential of the building based solely on the pandemic, a proposition with which plaintiff disagrees as air rights do not expire and there is no prohibition to developing the property. It criticizes Shlosh's and Evans's contention that the EDRs of the comparable properties are factored into their values as "far too simplistic."

Plaintiff asserts that Lifschitz's 2020 appraisal is supported by recent sales history, namely, plaintiff's own purchase of its 16.667 percent interest in the building, which plaintiff asserts reflects a "minimum" value of \$7.2 million and, with the typical minority discount, reflects a true value of \$9 million. Thus, the adoption of Lifschitz's 2020 appraisal warrants a finding that the fair market value of the property is \$8.7 to \$9.15 million.

IV. ANALYSIS

Effective December 6, 2019, New York has adopted the "Uniform Partition Of Heirs Property Act" (L.2019, c. 596, § 1), joining eleven other states and the U.S. Virgin Islands in targeting "predatory real estate speculators [who] have taken advantage of New York's laws governing partition actions by purchasing a stake in a residential property-- usually after a number of family members have inherited the property--and then using that ownership stake to file a partition action to dispossess the family of the property through a forced sale, often for pennies on the dollar relative to the actual value of the property." Committee Report, 2019 N.Y.S.B. 4865 (NS), June 5, 2019.

The Act has the goal of protecting family-held lands from speculators who acquire properties by leveraging minority interests and applies to any partition action where two or more interested parties are 'relatives' by blood or marriage, no matter how distant. The intent is to allow such relatives holding fractional interests to acquire full ownership or receive full value of their interest in legacy real property through additional service (posting) requirements, court conferencing akin to the settlement conferences in mortgage foreclosure actions, and appraisal requirements.

(Dan M. Blumenthal, Practice Commentaries, McKinney's Cons Laws of NY, Real Property Actions and Proceedings Law § 993).

Fair market value is defined as "the most probable price in terms of money which a property should bring in a competitive and open market under all conditions requisite to a fair

sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus,” as set forth by the American Institute of Real Estate Appraisers and Society of Real Estate Appraisers (*Grandview Heights Ass’n, Inc. v Bd. of Assessors of Town of Greece*, 176 Misc 2d 901, 904–05 [Sup Ct, Monroe County 1998]; Shannon P. Pratt, “What Is Value? Defining Terms in the Valuation of a Business,” *Fam. Advoc.*, Spring 1995, at 29 [citing *Uniform Standards of Professional Practice*, Washington, DC: The Appraisal Foundation, 1995]).

Although the term “undue stimulus” is not defined, the definition of fair market value does not encompass consideration of a party’s motives or conduct, even if predatory. (*Cf.* Pratt, “What Is Value? Defining Terms in the Valuation of a Business,” *Fam. Advoc.*, Spring 1995, at 28 [“In most interpretations of fair market value, the willing buyer and willing seller are hypothetical persons dealing at arm’s length, rather than any particular buyer or seller. In other words, a price would not be considered representative of fair market value if influenced by special motivations not characteristic of a typical buyer or seller.”]). Consequently, while the circumstances leading to plaintiff’s action for the partition of 1306 reflect the scenario that inspired the Legislature to enact RPAPL § 993, the statute mandates that the hearing court determine only the fair market value of the property, apparently without regard to “special motivations.” Additionally, “fair market value means the price at which a transaction could be expected to take place under *conditions existing at the valuation date.*” (*Id.*, at 29 [emphasis in original]).

To arrive at the fair market value of 1306, all of the appraisals must be evaluated with respect to the factors considered in appraising real property.

A. Credibility and reliability of the appraisals

In addition to Lifschitz's lack of an appraiser's license and relative lack of experience as an appraiser, plaintiff's payment of well over \$10,000 to Westrock and Lifschitz and its desire to develop the property may account for the seemingly arbitrary nature of many of the adjustments Lifschitz made to the profit and loss statement of 1306 and to the data reported for the comparable properties. Shlosh's and Evans's appraisals do not suffer by comparison. And while defendants offer no persuasive authority for the proposition that Shlosh's appraisal is conclusive in the first instance, it is the sole neutral appraisal and to that extent may be accorded a degree of greater probative value than the others.

B. As-of date of valuation

Not only did the Legislature provide no guidance for conducting a hearing on fair market value, but as the parties observe, it provided no guidance as to the date as of which the value should be appraised. (*Cf* BCL § 1118[b] [date of valuation of partnership shares for purposes of corporate dissolution is date before commencement of action seeking dissolution]). Given the general rule of statutory construction that the plain meaning of a statute reflects the legislative intent (McKinney's Cons Laws of NY, Book 1, Statutes § 94), and as the Legislature provided a valuation date for BCL § 1118(b), its omission of a date as of which fair market value should be valued pursuant to RPAPL § 993 signals an intention that the hearing court exercise broad discretion in selecting the date, bounded solely by an abuse of discretion. Had the Legislature intended that the hearing court be guided by BCL § 1118(b), it would have so provided.

Absent any cogent argument by plaintiff that the selection of the September 24, 2020 date constitutes an abuse of discretion, it remains the effective date for the neutral appraisal. As only the neutral appraiser was ordered to use the September 24 date, plaintiff was not precluded from

selecting a different date, although its expressed interest in obtaining “apples to apples” comparisons is not advanced by its decision to use December 29, 2020 or the pre-pandemic 2019 date of instead of September 24, 2020.

In light of this broad discretion reposed by the Legislature in the hearing court, the parties’ respective litigation strategies are both subject to the whims of fortune, as are decisions respecting real property. Consequently, plaintiff’s unknowing risk does not figure into this decision, especially as Lifschitz apparently built into his appraisals adjustments designed to credit plaintiff for that risk.

Moreover, plaintiff’s argument that the sole objective appraisal is the one prepared by Lifschitz as of December 23, 2019, and that the fair market value of the building based thereon should be between \$11.5 million and \$10.4 million, is unreasonable in light of plaintiff’s own recognition, just eight months earlier, pre-pandemic, that the fair market value of 1306 was approximately \$7.2 million when it purchased its 16.667 percent interest in it, and eight months before when it purchased the very similar property at 1308 Second Avenue for \$7 million.

C. Adjustment of value due to the pandemic

Clear-headed consideration of how the pandemic has been managed by governmental entities and citizenry warrants pessimism concerning its continuing impact on New York real estate, notwithstanding Lifschitz’s youthful optimism, tempered by his relative lack of experience. If history is a guide, the pandemic’s negative impact is bound to stop, only to start and stop again, fueled by new variants, for who knows how long. The pandemic must thus be seriously considered in valuing this property.

Consequently, plaintiff’s criticism of Shlosh’s reduction of value by 25 percent is not persuasive, notwithstanding Evans’s agreement with Lifschitz that a 10 percent reduction in

value due to the pandemic is appropriate. Given Shlosh's neutrality, his determination should be afforded some weight, notwithstanding his reliance on conversations with colleagues. His rejection of using bank adjustments of 5 to 10 percent as a guide is soundly based.

While the Federal Bank of New York's prognostications cited by Evans are compelling, they precede more recent reports of an upswing in virus variants and new infections. (See <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>; see also *LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012] ["This Court has discretion to take judicial notice of material derived from official government web sites"]; *People ex rel. Squirrel v Langley*, 68 Misc 3d 498, 508 [Sup Ct, Putnam County 2020] [taking judicial notice of Centers for Disease Control and Prevention guidelines and advisories relating to COVID-19 pandemic]; *People v Matias*, 68 Misc 3d 352, 366 n 17 [Sup Ct, Bronx County 2020] [taking judicial notice of data provided by the Center for Disease Control]).

For these reasons, a more reasonable 15 percent reduction of value due to the pandemic is warranted under the circumstances.

Plaintiff's argument that the absence of sales of comparable properties since February 26, 2020 "demonstrates a general consensus among property owners that the value of their real property is far greater than what they might be able to obtain in the current market" is disregarded as pure sophistry. An absence of real property deals may be attributable to many factors, and an owner's belief that a property warrants a higher sale price does not disprove that properties remain unsold due to a fear of investing during a pandemic, when uncertainty reigns. Additionally, plaintiff's assertion that the Legislature intended that no party to a partition action governed by RPAPL § 993 be burdened or benefitted by "temporary aberrations in the market that might occur" is not only unsupported but is contrary to the definition of fair market value as

the price at which a transaction could be expected to take place under conditions existing on the valuation date.

D. Comparable sales

To evaluate the appraisers' comparable sales, it must first be determined whether the data on which they rely is sufficiently comparable to 1306. As Evans observed in his appraisal, "[a]ny dissimilarities, such as size, location, condition and date of sale are reconciled through the process of adjustments" (NYSCEF 66, at 58), although he also observed that "[t]hose sales requiring the least number of adjustments are usually the most similar to the subject and therefore, provide the most meaningful indication of value" (NYSCEF 66, at 58).

In Shlosh's opinion, there was no need to adjust the sizes or EDRs of his four comparable properties, each of which is of the same approximate vintage as 1306 and was properly appraised as a leased fee interest. Defendants' argument that the four comparable properties had sold well above market value in aid of development is unsupported.

Like Shlosh, Evans did not adjust the sizes of his six comparable properties and adjusted the EDR for only the property at 205 East 75th Street. He also performed a calculation based on the EGIM which yielded \$4.45 million. Not only did Evans testify that he employs this method as an additional indicator of value which is simpler than income capitalization, but Lifschitz offered no basis for his accusation that Evans employed it for the sole purpose of coming to a lower valuation. Evans also estimated the per unit value of 1306 as \$575,000, and that the value per square foot is \$840, yielding, respectively, \$8.05 million for the 14 units, and \$6.63 million for the 7,892 square feet. He blended all of these figures and concluded that the comparable sales yield a value for 1306 of \$5 million.

Lifschitz's attempt to adjust the EDR of the properties goes too far as his multiplier of

\$734 per square foot appears random, as does his addition of \$3.3 million, even if the sale of vacant land and the sale of air rights are analogous. Most importantly, no evidence was offered that the actual sale figures of all of the comparable properties do not include their air rights. That air rights are included in the sale prices of all of the comparable properties is supported by the reasonable inference, drawn from plaintiff's purchase of 1308 Second Avenue, that it included the air rights; had it not, plaintiff surely would have offered such evidence in support of its position. And, as Shlosh and Evans agreed that the highest and best use of 1306 is its present improved use, Lifschitz's adjustment of the EDR of each property is unwarranted, especially to the extent of its large impact on value. Absent the \$3.3 million, the value is \$5.4 million.

Lifschitz's appraisal as of December 23, 2019 is not probative absent a basis for comparing it to the post-pandemic appraisals.

E. Income capitalization

Although all three appraisers agree that the income capitalization method is generally preferred for valuing an income producing property, Shosh's figure of \$2.95 million is too low and Lifschitz's \$9.15 million figure is disregarded given his many unwarranted adjustments to management's profit and loss statement. Evans's \$4 million is also disregarded in favor of his EGIM calculation.

V. CONCLUSION

For their comparable properties, Shlosh and Evans arrived at, respectively \$5.13 million and \$5 million. Lifschitz's valuation of \$8.7 million is reduced by \$3.3 million to \$5.4 million, for the reason stated *supra*, at IV.E. The average of these four valuations is \$5.177 million.

No further adjustment for the pandemic is needed as the appraisers' reductions average out at 15 percent. This decision constitutes the notice of value required by RPAPL § 993(6)(g).

Accordingly, it is hereby

ORDERED, that the fair market value of 1306 Second Avenue is \$5.177 million; and it is further

ORDERED, that on or before June 3, 2021, pursuant to RPAPL § 993(7)(b), defendants may give notice to the court of the total amount of percentage interests subject to purchase that they elect to buy.

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BARBARA JAFFE, J.S.C.

4/16/2021

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE