Joshua Metzger (Congregation B'nai Abraham Mordecai) vs. Vicki Ross

New York, NY

November 16, 2004

PRELIMINARY STATEMENT

This post-trial memorandum is respectfully submitted on behalf of respondent, Vicki Ross ("Ross"), the long-term, rent-stabilized tenant of record of Apartment #2 (the "Apartment") on the second floor at 32 East 38th Street, New York, New York (the "Building"), and pursuant to the directive of the Court (Wendt, J.) that the parties submit post-trial memoranda.

Petitioner, Congregation B'nai Abraham Mordecai ("Petitioner"), an alleged not-for-profit religious organization, commenced this summary holdover proceeding in April 2002 to evict Ross from her home of then more than twenty-five (25) years, based upon Petitioner's fallacious claim that it seeks possession of the Apartment for non-residential use in connection with its alleged "charitable" and/or "educational" purposes. As the trial record plainly demonstrates, Petitioner's suspect desire to use the Building for its alleged charitable or educational purposes (as asserted in its Notice of Non-Renewal) is a pure subterfuge for the improper purpose of evicting Ross from the Apartment. Inasmuch as the evidence at trial demonstrated that Petitioner did not (and, indeed, does not now) engage in any of the alleged charitable and/or educational activities at the time of the service of the Notice of Non-Renewal (in November 2001), this proceeding is nothing more than a thinly-veiled sham, and Ross is immune from eviction under the applicable provisions of the Rent Stabilization Code.

In truth, and in fact, Petitioner is nothing more than a "paper" corporation that was created for the sole purpose of recovering possession of the entire Building in order to house

Joshua Metzger ("Metzger"), Petitioner's self-proclaimed "rabbi" and spiritual leader, his family and/or others associated with Petitioner, the nominal titleholder. As the mountain of evidence confirms, the real party in interest and true owner of the Building is the Chai Foundation, Inc., which is also run by, and under the exclusive control of, Metzger. Indeed, any so-called "charitable or educational" use of the Building by Petitioner is a pure pretext designed to circumvent the provisions of the Rent Stabilization Code, which would otherwise preclude Ross's eviction by a not-for-profit institution for residential use by that institution.

It is respectfully submitted that the trial testimony and documentary evidence unquestionably confirmed Ross's contention that the alleged charitable and/or educational programs referred to by Petitioner were (and are), to the limited extent that any of them actually exist, the "programs" not of Petitioner, but of Chabad Lubavitch of Midtown Manhattan, an affiliate of the Chai Foundation, Inc. Notably, each of the three (3) "related" entities (i.e., Chai Foundation, Inc., Chabad Lubavitch of Midtown Manhattan and Petitioner) were created by, and are under the control of, Metzger. Evidently, Petitioner (or Metzger) believed that it (he) could circumvent the law by intentionally blurring the operations of each of the three (3) related entities, as Petitioner attempted to do throughout the trial to suit its purposes. However, as each of the alleged "congregants" (that Petitioner itself called as witnesses) confirmed, while they were a part of a "congregation", the name of that "congregation" was, and is, Chabad Lubvatich of Midtown Manhattan.

Additionally, since its purchase of the Building in September 2000 (which, not coincidentally, was shortly after Petitioner's purported legal formation), Petitioner has engaged in a campaign of harassment and service reductions intended to punish the tenants and drive

them from the Building. To date, Petitioner has succeeded in obtaining possession of all of the apartments in the Building other than Ross's Apartment.

It is respectfully submitted that the mere fact that Petitioner claims to be a not-for-profit corporation that does religious work does not excuse Petitioner from its obligations to comply with law or immunize Petitioner from the sound scrutiny of this Court in ensuring that any owner use proceeding is not a subterfuge. Nor does its alleged religious status or charitable purpose "justify" the Petitioner's deliberate terrorizing of Ross including, but not limited to, its relentless retaliation against Ross for asserting her rights under law and opposing its unlawful attempt to evict Ross from her home, or its calculated efforts to drain her both financially and emotionally.

ISSUES OF LAW

1. Whether Petitioner sufficiently satisfied the statutory requirements of Section 2524.4(b)(1) of the Rent Stabilization Code necessary to recover possession of the Apartment?

> Based upon the testimony and evidence at trial, the Court (Wendt, J.) should answer this question in the negative.

2. Whether Petitioner demonstrated the requisite "good faith intention" to recover possession of the Apartment for its alleged charitable and educational purposes?

> Based upon the testimony and evidence at trial, the Court (Wendt, J.) should answer this question in the negative.

3. Whether Petitioner violated Section 223-b of the Real Property Law by commencing this proceeding in retaliation against Ross for exercising her legal rights and/or for being part of a tenants' association at the Building?

> Based upon the testimony and evidence at trial, the Court (Wendt, J.) should answer this question in the affirmative.

4. Whether Petitioner breached (and continues to breach) the warranty of habitability by failing to provide Ross with essential services at the Building?

Based upon the testimony and evidence at trial, the Court (Wendt, J.) should answer this question in the affirmative.

5. Whether Petitioner's acceptance and retention of Ross's monthly rent checks after the service of the Notice of Non-Renewal, but prior to the commencement of this proceeding, vitiated the Notice of Non-Renewal and reinstated Ross's rent-stabilized tenancy?

Based upon the testimony and evidence at trial, the Court (Wendt, J.) should answer this question in the affirmative.

6. Whether the petition should be dismissed based upon Petitioner's failure to serve the Notice of Non-Renewal in accordance with Section 2524.4 of the Rent Stabilization Code?

Based upon the testimony and evidence at trial, the Court (Wendt, J.) should answer this question in the affirmative.

7. In the event that the Court determines that Ross is the prevailing party herein, is Ross entitled to recover her reasonable attorneys' fees and disbursements, pursuant to Section 234 of the Real Property Law?

Based upon the testimony and evidence at trial, the Court (Wendt, J.) should answer this question in the affirmative.

THE PETITION SHOULD BE DISMISSED AS PETITIONER FAILED TO ESTABLISH ITS *PRIMA FACIE* CASE

The Court should enter judgment in favor Ross and dismiss the petition, as Petitioner failed to establish, by a preponderance of the evidence, that it is a legitimate not-for-profit religious corporation that seeks possession of the Apartment for its use in connection with its alleged "charitable and/or educational" purposes. As the trial progressed, it became increasingly evident (based upon the testimony of Petitioner's own witnesses, as well as its own purported "documentary" evidence) that: (i) Petitioner is nothing more than a "paper" corporation; (ii) there is absolutely no distinction in Petitioner's "evidence" between Petitioner, the Chai Foundation, Inc. ("Chai") and/or Chabad Lubvatich of Midtown Manhattan ("Chabad"), all of

which are alleged to operate interdependently; (iii) all of Petitioner's alleged programs are, in truth and in fact, Chabad's programs to the extent they actually exist; and (iv) Petitioner was created for the sole purposes of (a) circumventing the provisions of the Rent Stabilization Code that would preclude Ross's eviction, by a not-for-profit institution, for residential use by the institution [see Jewish Theological Seminary of America v. Roy, 188 Misc.2d 723, 729 N.Y.S.2d, 232 (A.T. 1st Dept. 2002)]; and (b) recovering possession of, and vacating, the entire Building in order to house Metzger, his family and/or others related to Petitioner.

Indeed, from the very first day of trial, Petitioner attempted to "blur" any distinctions among and between these related entities, as the very first two (2) exhibits offered into evidence by Petitioner were Chai's certificate of incorporation and Chai's certificate of assumed name (whereby Chai assumed the name of Chabad). If Petitioner were truly a separate and distinct operating entity from Chai and Chabad and one that actually performed, on its own, all of the charitable and educational programs as set forth in the Notice of Non-Renewal, then there would simply be no reason for Petitioner to have introduced such exhibits.

As set forth in its Notice of Non-Renewal[1], the statutory ground upon which Petitioner relies is RSC §2524.4(b)(1)(ii). Significantly, the statute provides as follows:

> (1) The owner is a hospital, convent, monastery, asylum, public institution, college, school dormitory, or any institution operated exclusively for charitable or educational purposes on a non-profit basis, and the owner, upon notice to the tenant in accordance with section 2524.2(c)(4) of this Part, requires the housing accommodation for its own use in connection with its charitable or educational purposes, and . . .:
>
> * * *
>
> (ii) the owner requires the housing accommodation

[1] As respectfully requested at trial, the Court should take judicial notice of the Notice of Non-Renewal annexed to the Petition herein.

> for a nonresidential use in connection with its charitable or educational purposes. (Emphasis added).

According to the Notice of Non-Renewal, Petitioner (which, as noted below, is admittedly not an "institution operated exclusively for charitable or educational purposes" [emphasis added]) elected not to renew Ross's rent-stabilized Lease (a copy of Ross's most recent Lease is Petitioner's Exhibit 23 in evidence) because it allegedly intends to use Ross's Apartment "for some or all" of the following purposes:

> (a) Office space for volunteers working on the [Petitioner's] numerous community public service programs including hospital visitation, elderly home visitation, food for the poor and elderly and clothing for the poor and elderly;
>
> (b) A study library;
>
> (c) Women's educational classes including birthing classes, cooking classes, etc;
>
> (d) Tutoring for educationally challenged children and adults.

In order to prove its *prima facie* case, Petitioner, like any other party to a Civil Court proceeding, has the burden of proving, by a preponderance of credible evidence, all of the allegations contained in the petition.[2] See Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc., 39 N.Y.2d 191, 383 N.Y.S.2d 286 (1976). In addition, as the Court (Wendt, J.) repeatedly noted throughout the entire twenty-four (24) day trial of this proceeding, Petitioner's "good faith intent" to recover the Apartment for the purposes stated in its Notice of Non-Renewal is one of the most critical factors that the Court must consider in rendering its decision.

In Canino v. Fogel, 9/22/93, N.Y.L.J., p. 21, col. 1 (Civ. Ct. N.Y. Co.), an owner's use

[2] The general burden of proof on any given issue in a civil case contemplates proof of said issue by a preponderance of the evidence (meaning that it must be established by a fair preponderance of the credible evidence). The term "credible evidence," in turn, means the testimony or exhibits that are worthy of belief. See PJI 1:23.

holdover proceeding, the Court (Wendt, J.) stated that, to satisfy its burden, the petitioner is:

> . . . required to demonstrate [a] good faith intention to recover possession in making out its prima facie case. Good faith has been described as an 'honest intention and desire' to gain possession of the premises for one's personal use or use by one's family members. *Matter of Rosenbluth v. Finkelstein, 300 NY 402 (1950)*. 'This intent must be actual and genuine and not a subterfuge to remove occupant tenants, [and] only to replace the premises on the market a short time thereafter.' *Sobel v. Mauri, NYLJ, December 12, 1984, 10:4 (App. Term, Dept).*

In Obloj v. Shaw, N.Y.L.J. 5/13/98, p. 31, col. 2 (Civ. Ct. Kings Co.), another owner's use holdover proceeding, the Court (Wendt, J.) recognized that each proceeding for the recovery of an apartment for the owner's use depends on its own particular circumstances. In Obloj, *supra*, the Court dismissed the petition based upon the totality of circumstances including, but not limited to, glaring omissions and inconsistencies in the testimony by the petitioner.

Notably, while, both, Canino v. Fogel, *supra,* and Obloj v. Shaw, *supra*, are "individual" owner's use holdover proceedings and not, as here, an "institutional" owner's use holdover proceeding, the fact remains that simply because Petitioner claims to be a "religious" organization does not excuse Petitioner from proving its alleged "good faith" intention to recover the Apartment for its own charitable and educational purposes, especially where, as here, Petitioner is nothing more than a sham, "alter ego" of Chai/Chabad formed for the sole purpose of providing Metzger, and his family, with an opulent, "tax-free" residence or so-called "parsonage". Indeed, during the course of the trial, the Court (Wendt, J.) referred the parties to the Court of Appeals' holding in Rosenbluth v. Finkelstein, 300 N.Y. 402 (1950) and specifically noted that while the words "good faith" may not be expressly (but only impliedly) included in

the statute[3], Petitioner still had the burden of establishing that it had a good faith intention to recover possession of the Apartment for the very reasons stated in the Notice of Non-Renewal, and that the proceeding was not a mere subterfuge for evicting rent-regulated tenants.

In any event, as Petitioner claims to be a "religious" institution whose primary purpose (according to Metzger himself and Petitioner's own application for tax exempt status, see Petitioner's Exhibit 17)) is its "prayer services", it is respectfully submitted that, as a matter of law, Petitioner cannot satisfy the unequivocal requirement of the statute that the petitioner-owner be an "institution" that is "operated exclusively [not primarily] for charitable or educational purposes on a non-profit basis[.]" RSC §2524.4(b)(1)(ii) (emphasis added). Indeed, the statute expressly provides that the subject institution be operated "exclusively" for charitable and educational, and not religious purposes. Accordingly, as Petitioner's admitted primary function is to serve a religious purpose (i.e., providing "prayer services") and it is not operated exclusively for its charitable and educational purposes, then, as a matter of law, Petitioner could not possibly (and did not) prove its primary facie case. See Brown v. Wing, 93 N.Y.2d 517, 693 N.Y.S.2d 475 (1999) (holding that courts should strictly construe the plain meaning of a statue); Lincoln West Partners, L.P. v. Department of Housing Preservation and Development of the City of New York, 179 Misc.2d 271, 684 N.Y.S.2d 744 (Sup. Ct. N.Y. Co. 1998) (holding that the rules of statutory construction require the enforcement of the plain meaning of a statutory scheme).

As discussed below, the Court should dismiss the petition because Petitioner abysmally failed to demonstrate any "good faith" intent to recover possession of the Apartment for its own use (as opposed to Chai/Chabad's use) for the reasons stated in its Notice of Non-Renewal, much

[3] Similarly, the "good faith" requirement in ordinary owner use cases is by case law, as the statute [RSC §2524.4(a)(1)] does not expressly include a "good faith" requirement.

less satisfy the strict statutory requirements, set forth in Section 2524.4(b)(1)(ii) of the Rent Stabilization Code, that Petitioner be an "institution" that is operated exclusively for charitable and educational purposes.

A. Metzger's direct testimony conclusively established that Petitioner is nothing more than a sham religious corporation formed for the sole purpose of taking title to the Building, evicting all the tenants and obtaining possession of the entire Building as a residence for Metzger, his family and others associated with Chai/Chabad/Petitioner.

In order to establish its *prima facie* case, Petitioner called Joshua Metzger as its principal witness. However, based upon Metzger's responses to the questions posed by Petitioner's counsel, it became more and more obvious (as Metzger all but admitted), that: (i) there was no real difference or distinction between the alleged activities of, and "membership" in, Petitioner, Chai and Chabad; (ii) all of Petitioner's "alleged" programs were, in fact, Chai and Chabad "programs" to the extent that they were being conducted at all; and (iii) Petitioner was formed for the sole purpose of acquiring title to, and gaining exclusive possession of, the Building for residential purposes by Metzger, his family and other people associated with Petitioner, Chai and/or Chabad, in violation of the Rent Stabilization Law.

i. Petitioner's "legal" formation in 2000.

According to Metzger, Petitioner was legally incorporated only in 2000 (Petitioner's Exhibit 16 in evidence is Petitioner's certificate of incorporation) shortly before the closing on the Building. Metzger further claimed, however, that Petitioner was "informally" established in 1995, in honor of the tenth (10^{th}) anniversary of the death of his grandfather, Abraham Mordechai. In addition, prior to the "legal" formation of Petitioner, Metzger claimed to have

opened a bank account in Petitioner's name and solicited, and accepted, donations to Petitioner. Notably, as was the case throughout the trial, Metzger had no records or documents to support any of his contentions.

ii. To the extent that they even exist, Petitioner's alleged "programs" are actually run, and sponsored, by Chai and Chabad.

On direct examination, Metzger testified that he was the President of Chai, Chabad and Petitioner. According to Metzger, he founded Chai in 1990 for the public relations purpose of disseminating Jewish advertising and promoting Jewish education and spirituality. In addition, according to Metzger, since 1996 (four [4] years prior to the "legal" formation of Petitioner), Chai and Chabad (and not Petitioner) ran the following programs, for the most part, out of 509 Fifth Avenue:

- Sunday morning torah study and breakfast program;
- marriage and bereavement counseling for "congregants";
- various holiday programs;
- a Hebrew language program (for adults and children);
- Jewish music programs;
- college campus outreach programs;
- CLE programs for attorneys;
- koshering kitchen programs;
- mezzuzah program;
- crisis intervention (for drug users, hospitals patients and elderly people);
- "library" program;

- the Rabbi discretionary charity program; and
- one on one study programs.

Notwithstanding Metzger's admission on "direct examination" that all of the aforementioned programs are allegedly run, and sponsored, by Chai and Chabad, Metzger, in an attempt to demonstrate that Petitioner had sponsored (and continues to sponsor) programs and engaged in the educational and charitable activities set forth in its Notice of Non-Renewal, offered a series of brochures for programs at 509 Fifth Avenue (See Petitioner's Exhibits 5 through 14 in evidence). Notably, none of the brochures mentioned Petitioner's name. Instead, all of the brochures confirmed that these were alleged Chai and Chabad programs. In addition, the Court (Wendt, J.) correctly noted that the majority of brochures were for programs that had taken place prior to the service of the Notice of Non-Renewal (and, in any event, were not the "programs" specifically referred to in the Notice of Non-Renewal) and, thus, were of no probative value to Petitioner's case.[4]

In response to the Court's inquiry regarding the noticeable discrepancy between the programs listed in Petitioner's Notice of Non-Renewal and those that Metzger testified about, Metzger stated that it was not his intention to limit Petitioner's activities by excluding some of its programs from the Notice of Non-Renewal. Based upon Metzger's representation, the Court (Wendt, J.) noted that, in order to succeed on the merits, Petitioner would have establish that Petitioner engaged in the activities set forth in the Notice of Non-Renewal, as well as those that Metzger testified about at trial. In the end, Petitioner utterly failed to do either.

[4] With the brochures and in his testimony, Metzger was playing a "shell game" with the Court and Ross, forcing the Court and Ross to continually guess which of the three (3) entities was involved and actually running any of the alleged programs or activities.

Furthermore, in her rebuttal of Metzger's claims regarding Petitioner's alleged "programs", Ross later testified that, at a DHCR conference held in March 2002, Metzger admitted that Petitioner did not, at the time that the Notice of Non-Renewal was served, engage (and is presently not engaged) in any of the listed activities, with the exception of the alleged "hospital visitation" program, but hoped to establish these programs in the future.

B. Petitioner's sham is exposed during Metzger's cross-examination.

On cross-examination, Metzger made, among others, the following critical and material statements and admissions: [5]

- several of Metzger's sworn statements in Petitioner's Application for an Exempt Organization Certificate (Petitioner's Exhibit 17 in evidence) were false;

- notwithstanding Petitioner's contention that Ross's Apartment would be used as Petitioner's "library" and that the apartments on the upper floors in the Building would be used as offices and/or classrooms, Petitioner never engaged an architect to prepare any drawings or plans for any portion of the Building other than Metzger's own residence, and had nothing in writing to substantiate any of its alleged "plans" for the upper floors;

- incredibly, in response to questions concerning Petitioner's plans for the Building, Metzger replied that (now, nearly two and a half years after the service of the Notice of Non-Renewal) he could not "tie down the specifics" and that he still has not explored in detail how the Building would be used;

- in September 1995, Metzger was the "synagogue rabbi" of Chabad Lubvatich of Midtown Manhattan at 500 Fifth Avenue;

- the purpose of creating Chabad was, among other things, to create a "synagogue";

- Metzger holds himself out as the "rabbi" of Chai and Chabad, and that Chai is a synagogue located at 509 Fifth Avenue;

[5] These items are only a mere sampling of Metzger's fallacious and often contradictory testimony. As a result of the Court-imposed fifty (50)-page limit, Ross could not possibly mention each one of Metzger's falsehoods and distortions.

- since 1995, Metzger's congregants refer to their "congregation" as either Chabad or Petitioner;

- there are no records and/or lists of the names of the alleged members of, or of the charitable donations made to, Petitioner; and

- after claiming, during his direct testimony, that he received a "certificate" confirming his ordination as a rabbi, Metzger flip-flopped positions on cross-examination, and admitted that he never completed a formal course of study and had no license or other documentation to confirm his alleged ordination.

In connection with his direct testimony concerning Petitioner's "activities" allegedly undertaken at 509 Fifth Avenue, Metzger further admitted that the signs on the façade and entrance of 509 Fifth Avenue refer only to Chabad and not Petitioner (See Respondent's Exhibits C, D1, D2 and D3 in evidence, which are photographs depicting the signs on the façade and entrance of 509 Fifth Avenue). In order to "explain" the absence of Petitioner's name from any of the program brochures (which are in evidence as Petitioner's Exhibits 5 through 14), or from any of the signs at 509 Fifth Avenue, Metzger explained that (as in a "bait and switch" scheme) "Chabad" is the recognized "brand name" that is used to draw in the public. Additionally, Metzger claimed that, in any event, Petitioner's name is not posted on the façade and entrance of 509 Fifth Avenue because the sign was put up in 1999, prior to Petitioner's formation. Notably, the foregoing claim is wholly inconsistent with Metzger's prior testimony that, from "1995" forward, the name of his "congregation" was Petitioner. To date, there are still no signs at 509 Fifth Avenue referencing Petitioner.

i. Petitioner's application to the Internal Revenue Service was riddled with false and misleading statements.

In order to substantiate that it is a not-for-profit religious organization, Petitioner offered, in evidence, its Application for an Exempt Organization Certificate (Petitioner's Exhibit 17) and

the Internal Revenue Service's Approval Certificate (Petitioner's Exhibit 18). On cross-examination, Metzger admitted that much of the information contained in that application (which was executed by Metzger under penalty of perjury) was, in fact, false. Indeed, on the very first page of the application, Petitioner claimed that it was "organized" in April 1996 and not in 1995 as Metzger testified at trial. In addition, while certainly not the most significant of his many false representations, Metzger admitted that the telephone number (212/972-0770) identified as belonging to Petitioner, on the first page of the application, is actually Chai and Chabad's telephone number.

In the "Narrative Description" of Petitioner's activities (which is attached to the Application), Petitioner stated that its prayer services, which are claimed to be the most important activity performed by Petitioner, were initiated by Metzger in 1996 (and, as set forth above, not in 1995 as Metzger previously testified). The foregoing representation by Petitioner to the IRS, as part of its application for tax exemption, is further irrefutable proof that Petitioner did not (and cannot) satisfy the requirements of RSC §2524.4(b)(1)(ii), which, in order for Petitioner to have legal standing, require Petitioner to demonstrate that it is an institution that exclusively performs charitable and educational (as opposed to primarily religious) activities.

Significantly, the schedule of Petitioner's prayer services (which is annexed to the Application) is exactly the same as Chabad's schedule of services, as listed on the outside of 509 Fifth Avenue (See Respondent's Exhibit D(1) in evidence)[6]. As there was absolutely no mention of Chabad in the application, the Court (Wendt, J.) inquired of Metzger as to whether Petitioner's

[6] In this regard, it should be noted that Ross's Exhibit E in evidence, Metzger's business card, represents that Metzger is the chairman of Chabad (without any mention of Petitioner), gives his address as 509 Fifth Avenue, and lists the exact same prayer schedule for Chabad as the schedule listed in Petitioner's application to the IRS. Metzger further confirmed that Exhibit E is his only business card, and that he does not have a separate business card as the alleged "president" and "rabbi" of Petitioner.

prayer services and Chabad's prayer services were one and the same. In response to the Court's inquiry, Metzger conceded that Petitioner and Chabad did not hold separate prayer services and that they were, in fact, one and the same. Metzger further admitted that there was nothing, in writing, to demonstrate that the services at 509 Fifth Avenue were conducted by Petitioner.

In addition, as part of the "Narrative Description" annexed to the application, Petitioner also claimed that, among other things: (i) it runs religious classes for adults and children; (ii) it operates a Judaic library (that was started in 1998); and (iii) it runs a "visits to the sick" program that was started by Chaim Boyarsky in 1999. According to Metzger's direct testimony, however, all of the programs mentioned in the application are actually Chai and Chabad's programs. Moreover, on cross-examination, Metzger admitted that Petitioner does not actually operate a "library" (once again, contradicting the Notice of Non-Renewal), and that he did not have any documentation to support the claims in the application regarding the amount of hours he spends working for Petitioner (nor did Metzger offer any documentation differentiating between the time he spent working for Chai and Chabad, versus the time he spent working for Petitioner).

After admitting that many (if not all) of the material statements in the application concerning Petitioner's activities were false, Metzger attempted to shift the blame for these "errors" to Edward Gewirtz, Esq., the attorney who drafted the application on behalf of Petitioner and further offered, as an excuse, that the application was not the "Ten Commandments". The Court (Wendt, J.), however, noted that Metzger, an educated individual, would be expected to read a document before signing it and that his testimony certainly raised issues of credibility.

ii. The purchase of the Building

According to Metzger, one of the reasons that Petitioner purchased the Building was to provide a residence for him and his family (consisting of his wife, Brocha Metzger, and, as of now, three (3) young children).[7] On cross-examination, Metzger alleged that he did not receive any compensation for his work in connection with Chai and Chabad, and only a "meager allowance" and the use and occupancy of his apartment in the Building as a so-called "parsonage", in exchange for his work for Petitioner. Indeed, it is respectfully submitted that the purpose of a "parsonage" is to provide modest housing to a spiritual leader of a church or congregation and not, as here, a luxury residence that, in size as well as cost, rivals or even overshadows the actual place of worship. In addition, while Metzger claimed that Petitioner pays for all of the expenses associated with his "parsonage", he again failed to produce any documentation to support such claim.

Metzger also described his so-called "parsonage" as a three (3)-level, three (3) bedroom and three and one-half (3½)-bathroom apartment with approximately three thousand (3,000) square feet (which, significantly, is at least equal to the entire square footage of the space at 509 Fifth Avenue).

As already noted, while at the time that the proceeding was commenced Metzger had two (2) children, during the course of the trial of this proceeding, Metzger's wife, Brocha, gave birth to another child. Although that his family was growing, Metzger claimed that he did not need any additional space for his residence, notwithstanding that the architectural plans for Metzger's residence reveal that Metzger's then two (2) young children (a daughter and son) were allegedly sharing a small, ten by ten (10x10) foot bedroom facing the rear courtyard on the ground floor level (See Ross's Exhibit M in evidence, a copy of the architectural drawings of Metzger's

[7] At the time that the proceeding was commenced, Metzger had only two (2) children.

residence at the Building). Moreover, as the Court (Wendt, J.) itself recognized, Ross's Apartment is contiguous to the Metzger residence and would certainly be easy to incorporate into his existing apartment.

iii. Under the doctrine of *falsus in uno falsus in omnibus*, the Court should disregard all of Metzger's testimony.

As demonstrated above, Metzger's testimony was riddled with inconsistencies, contradictions (including several outright contradictions with his deposition testimony, with which he was impeached at trial) and blatant fabrications. Given his demonstrably false and misleading testimony on several critical issues, as well as the several substantial contradictions and other irregularities as previously detailed, all of Metzger's testimony should be completely disregarded by the Court as incredible, pursuant to the well-settled doctrine of *falsus in uno*, *falsus in omnibus*, See, e.g., In re Goodman's Will, 2 A.D.2d 558, 157 N.Y.S.2d 109 (1st Dept. 1956) (when a witness speaks falsely on one point, he is presumed to have done so on other points, and a court is free to reject, in whole or in part, such testimony as not credible). See, also, Beare v. Prudential Insurance Co., 66 A.D.2d 936, 411 N.Y.S.2d 442 (3d Dept. 1978); In Re Estate of Giddings, 96 Misc.2d 824, 410 N.Y.S.2d 16 (Sur. Ct. Onondaga Co. 1978).

C. The testimony of Chaim Boyarsky, the alleged director of Petitioner's "hospital visitation" program, and Rabbi David Rabham, the resident Rabbi at New York University Hospital, conclusively established that Petitioner did not (and does not) run any such program.

In order to establish the existence of its alleged "hospital visitation" program, Petitioner called both Chaim Boyarsky ("Boyarsky") and Rabbi David Rabham ("Rabham"), the resident Rabbi at New York University Hospital, as its witnesses.

On direct examination, Boyarsky testified that, in or about early 2001 (and not in 1998, as set forth in Petitioner's application to the Internal Revenue Service), he approached Metzger (with whom he was familiar, as a result of his friendship with Metzger's younger brother) and asked Metzger to "sponsor" his visits to hospital patients. According to Boyarsky, until he moved, in the past year, to Tenafly, New Jersey, he visited sick people on a weekly basis at various New York City hospitals and brought them various items (i.e., kosher food and religious items). Boyarsky further testified that while Metzger allegedly sponsored these "hospital visits", he could not recall which "entity" reimbursed him for his out of pocket expenses.

Boyarsky further testified that he was familiar with 509 Fifth Avenue because he had occasionally prayed there, and because he would pick up supplies in that location. In response to an inquiry from the Court (Wendt, J.), Boyarsky admitted that he was not, however, employed by Petitioner and did not receive any stipend, salary or consideration for his "hospital visits". To substantiate Petitioner's claims regarding the alleged "hospital visitation" program, Boyarsky was shown a series of photographs (Petitioner's Exhibits 29A through O for identification purposes only). However, none of those photographs were admitted into evidence because they were taken after the time that the Notice of Non-Renewal had been served. In denying the admissibility of those photographs, the Court (Wendt, J.) correctly likened the situation to a non-primary residence proceeding, where a tenant may register to vote or obtain a driver's license after being served with a notice of default so as to establish residency after the fact. Indeed, the Court (Wendt, J.) also stated that "anyone can bootstrap evidence," but that the critical fact was whether Petitioner had been performing the services that it claimed to be performing at the time that the Notice of Non-Renewal was served, which, as the evidence confirms, it did not.

Significantly, on cross-examination, Boyarsky denied that, in January 2003, he advised Ross's counsel that he had no connection to, and was not familiar with, Petitioner and that he did not know Metzger. Boyarsky also claimed that he did not recall leaving a "voicemail" message for Ross's counsel, wherein he stated that he had nothing to with Metzger or Metzger's "organization".

However, as confirmed by Respondent's K in evidence (the transcription of a July 2003 voicemail message from Boyarsky to Ross's counsel), Boyarsky stated as follows:

> Hi, Bruce, it's Chaim Boyarsky and I got your subpoena to the court. I promise you I have no affiliation with Josh Metzger. I really can't take off work. It has nothing to do with my boss -- getting paid -- I just have so much work ahead of me. Please leave me alone with this whole thing, I have no affiliation whatsoever. I can't be bothered with this whole thing. I don't know who he is -- I've nothing to do with him, please, please, I, I, the whole Shabbos, I couldn't do anything. I just – I cannot - my mind wasn't – wasn't working. I'm asking you please to retract the subpoena. I really, I'll put it in writing that I have no affiliation with anything. I don't, I don't know who he is, I mean I know a little bit but I have no close connection with him. I volunteered for a hospital I knew he paid the bills but I don't, I have nothing to do with him. Please, please I don't go there anymore. Take this away from me, I don't have the patience for this. I don't have the strength for this. Thank you very much.

(See Respondent's Exhibit K in evidence).

In a failed attempt to rehabilitate his "credibility", Boyarsky purported to justify his admittedly inconsistent sworn statements by claiming, on redirect examination, that: (1) he was not "under oath" when he left the voicemail message for Ross's counsel; and (2) he only left that voicemail message because he was allegedly afraid.

Rabbi Rabham's earlier testimony, much like that of Boyarsky, also confirmed Ross's contentions that Petitioner does not actually operate a "hospital visitation" program. In fact, Rabham testified that:

- Rabham had never heard of Petitioner until he spoke, before testifying, with one of Ross's attorneys on the telephone;
- Rabham's understanding was that Metzger was the "Rabbi" of Chabad at 509 Fifth Avenue; and
- Rabham never saw Metzger at the hospital and Metzger was not a "volunteer" at the hospital.

Notwithstanding Petitioner's contentions that it operated , and still operates, a "hospital visitation" program, the testimony of Petitioner's own witnesses, Boyarsky and Rabham, clearly establish just the opposite.

D. The Testimony of Judy Metzger (Metzger's mother) further demonstrated that Petitioner did not have a "good faith" intent to use the Building in connection with any of the alleged educational and charitable purposes stated in the Notice of Non-Renewal.

To further "support" its claimed intention to use the Building for its alleged educational and charitable purposes, Petitioner called Judy Metzger, Metzger's mother and Petitioner's corporate "Secretary", as its witness.

On direct examination, Judy Metzger testified that her son was the "rabbi" of both Chabad and Petitioner and that her role with Petitioner was to "fill in the breach" or in other words, to do whatever her son needed her to do. According to Judy Metzger, she has always been involved with her son's activities (including the formation of Chai, while he was still living at her home). Judy Metzger further testified that: (1) Petitioner is "run under the dictates of Chabad and as defined by Chabad"; and (2) while Chai and Petitioner work "in partnership", the

name on all written materials is "Chabad" because it is known worldwide (or, as Metzger testified, is the "brand" name).

With respect to Petitioner's claimed intent to use Ross's Apartment as a "library", Judy Metzger was shown a series of photographs of books in her home that were allegedly going to be "donated" to Petitioner. Once again, the Court (Wendt, J.) correctly noted that the issue was the sincerity of Petitioner's intent to form a library and denied Petitioner's attempt to introduce the photographs of, what the Court itself described as, the Metzger family's personal books, as evidence of its "intent" to form a library. Indeed, the Court recognized the deliberate blurring of any distinction between Petitioner's books and those belonging to the Metzgers.

On cross-examination, Judy Metzger made the following significant concessions:

- Petitioner's name is really an "honorary" name for Chabad's congregation;
- She never taught any of Petitioner's alleged classes or ran any of Petitioner's alleged programs;
- As corporate Secretary (and Trustee) of Petitioner, she had no real formal duties and there were no minutes of any of Petitioner's meetings (because she speaks to her son everyday);
- There is a definite overlap between Petitioner and Chabad and that it is impossible to distinguish between the two (2) entities because they are, in effect, the same people and the same activities;
- It is impossible for a "volunteer" to differentiate between work being done for Petitioner and work being done for Chabad;
- Notwithstanding her claim that the Building was purchased because there was not enough room at 509 Fifth Avenue, she never saw the inside of the Building before it was purchased;
- At the time that the Building was purchased, she was aware that there were tenants in the Building and that there was no space available for offices and/or a library; and

- She has never attended any programs at the Building.

Based upon the foregoing, Judy Metzger's testimony, at the very least, confirmed Ross's contention that Petitioner is merely a sham corporation formed for the improper purpose of recovering possession of the Apartment.

E. The testimony of Raymond Irrera established that Petitioner cannot use the Building for its alleged proposed educational and charitable purposes

In order to establish the feasibility of its proposed uses of the Building, Petitioner called Raymond Irrera ("Irrera"), a licensed architect, as an expert in the general field of architecture. According to Irrera, he was only recently retained by Petitioner to inspect the Building and to determine whether Petitioner's proposed uses thereof could be done "as of right".

Irrera further testified that he only recently inspected the residential portion and the upper floors of the Building and researched the applicable zoning resolutions. Thus, based upon his research and the certificate of occupancy for the Building (Petitioner's Exhibit 26 in evidence), Irrera opined that Petitioner's proposed uses may be permitted as of right.

On cross-examination, Irrera admitted the following:

- He was actually retained in late January 2004 by Petitioner's counsel and not Petitioner, and the retainer was paid by Petitioner's counsel and anticipated a court appearance;

- He visited the Building once in February 2004, for approximately one (1) hour, and once again in March 2004, to refresh his memory;

- He did not make any written reports concerning his inspection of the Building and did not bring any records or notes to court with him and was testifying completely from memory;

- The current certificate of occupancy did not permit Petitioner to use the Building for its proposed uses, and the

certificate of occupancy would have to be amended in order for it be legal for Petitioner to utilize the Building for the proposed uses described in the Notice of Non-Renewal;

- If the Department of Buildings rejected Petitioner's application, Irrera could not state "with certainty" that the Board of Standards and Appeals would grant Petitioner a variance for its proposed uses;

- In order to amend the certificate of occupancy, Petitioner would have to engage an architect to prepare plans and submit them to the Department of Buildings for consideration. If the Department of Buildings rejected Petitioner's application, then Petitioner could file an appeal with the Board of Standards and Appeals, which Irrera "believed" would be granted. However, Irrera also admitted that all of the foregoing was pure speculation, as Petitioner has not filed any such application;

- To his knowledge, Petitioner has not engaged anyone to prepare any such plans or filings;

- Irrera had no idea what the cost would be to convert the upper floors so as to make them usable for Petitioner's proposed uses;

- Metzger's residence violates the current certificate of occupancy;

- Irrera recognized that if Petitioner used the Building for its proposed uses, then, under applicable law, no more than sixty (60) people could be inside the Building at any given time and the proposed "library" could only accommodate forty (40) to forty-five (45) people at once;

- Based upon his memory, Irrera claimed that the staircase leading from the tenants' entrance to the second floor was 44' inches wide, but admitted that if it were only 32' inches wide, it would not be legal;[8] and

- Irrera also recognized that both the dramatic turn in the stairway from the second floor upward, and the fact that the

[8] The foregoing concession is significant because, as discussed below, both Ross and the Metzgers' own architect, who drafted the plans (Ross's Exhibit M in evidence), testified that the stairway in question is only 32' inches wide.

> Building was not ADA compliant, could present potential problems for the alleged intended uses.

In response to an inquiry by the Court (Wendt, J.) regarding possible egress issues and other impediments, Irrera explained that Metzger told him that there were no plans to alter the configuration of the Building. In addition, the Court asked Irrera whether, in the event (as he believed) the Building would qualify as a "community facility" (within the meaning of the Zoning Resolution), Petitioner would still have to make the Building ADA compliant in order to use it for its proposed purposes. Irrera unequivocally conceded that a community facility would have to be made ADA compliant. Lastly, Irrera testified that he was not retained to, and therefore did not, prepare or submit any proposals, suggestions or plans to Petitioner concerning its purported intended uses of the Building.

Significantly, the fact that Irrera was only retained by Petitioner's counsel more than three (3) years after Petitioner served its Notice of Non-Renewal further establishes Petitioner's bad faith. Indeed, if Petitioner truly desired to recover possession of the entire Building (including Ross's Apartment) for the purposes set forth in the Notice of Non-Renewal, Petitioner could have, and unquestionably should have, engaged an architect prior to its purchase of the Building, in order to examine whether it could utilize the Building for such purposes. Instead, Metzger only retained an architect (Michael Just) to draw plans for his alleged "parsonage" and, as discussed below, did not even discuss Petitioner's proposed uses of the upper floors with his own architect (who would have needed to know such information in connection with the new, narrow stairway for the tenants). The fact remains that, to date, Metzger and Petitioner have failed to taken any steps toward determining whether the Building could be lawfully used for Petitioner's alleged "charitable" and "educational" purposes, and Ross should not be evicted

from her home of more than twenty-seven (27) years based upon Petitioner's suspect and purely speculative claims.

F. The testimony offered by various alleged "congregants" demonstrated that they themselves believed that the name of their congregation was, in fact, "Chabad".

In support of its demonstrably false contentions, Petitioner called a number of alleged "congregants" to testify on its behalf. With each alleged "congregant" who testified, however, there was a further "blurring" of the lines between the entities, as each "congregant" confirmed that they were members of a congregation named "Chabad," and not Petitioner.

According to Richard Allen, he has been a member of Chabad and has been attending their services (which now take place at 509 Fifth Avenue) since 1992. Mr. Allen testified that he is familiar with Metzger and that he has volunteered for some of Chabad's events. Notably, Mr. Allen further testified that Chabad is also known as Chai, and that he had heard the name "Congregation B'nai Abraham." On cross-examination, Mr. Allen admitted that he actually belongs to another synagogue and has always belonged to another synagogue. In addition, Mr. Allen admitted that his understanding is that Chai, Chabad and Petitioner are three (3) separate entities, with different names, that do the exact same things.

Petitioner also called Alan Markowitz, a licensed real estate broker, to testify on its behalf. According to Markowitz, he tried to assist Metzger in finding a townhouse in 1996, but nothing materialized. Markowitz also testified that he visits 509 Fifth Avenue several times a week for classes and services. On cross-examination, Markowitz testified unequivocally that he prays at Chabad.

Benita Rosenberg, another one of Petitioner's alleged congregants, testified that she and her husband attend Chabad's services, programs and classes at 509 Fifth Avenue. On cross-

examination, Mrs. Rosenberg testified that: (1) she was a member of "Chabad"; (2) Chabad and Petitioner were one and the same; and (3) she paid for the courses she attended at 509 Fifth Avenue by check made payable to Chabad.

Petitioner also called Mark Fisher to testify on its behalf. According to Fisher, he became familiar with Chabad in 1998, and that Petitioner was simply another name for Chabad. Fisher explained that "shuls" use lots of names to honor someone, in the way that Chabad used the name of Petitioner to honor Metzger's grandfather.

Based upon the foregoing, as Petitioner's own alleged congregants testified that they are members of Chabad, it is simply indisputable that Petitioner failed to establish its prima facie case because it is not a separate institution from Chabad, and was not formed for the exclusive purpose of performing charitable and educational activities, as required by the statute.

ROSS'S CASE-IN-CHIEF

Quite apart from Petitioner's woeful failure to prove its prima facie case, on her own case, Ross proved, by a preponderance of the evidence, the following:

- Prior to its purchase of the Building, Petitioner was fully aware that it could not utilize the Building for its alleged "educational" and "charitable" purposes;

- Chai itself is the current "mortgagee" and the true owner of the Building;

- Petitioner itself does not have the financial wherewithal either to alter the Building for its alleged intended use in connection with "educational" and "charitable" programs, or to operate and maintain such programs;

- Petitioner itself did not (and presently does not) engage in any of the alleged programs set forth in its Notice of Non-Renewal;

- Petitioner's acceptance of Ross's rent after the service of the Notice of Non-Renewal, but prior to the commencement of this proceeding, vitiated the Notice of Non-Renewal;[9]

- Petitioner's failure to serve the Notice of Non-Renewal in accordance with the applicable law mandates the dismissal of the Petition;

- Petitioner was aware of the existence of a tenants' association at the Building prior to the commencement of this proceeding;
- Petitioner commenced this proceeding against Ross in retaliation for Ross's complaints of inadequate services and assertions of her legal rights and for her participation in a tenants' association;

- Petitioner did not rebut the statutory presumption that it commenced this proceeding in retaliation for Ross's complaints and assertions of her legal rights and her participation in a tenants' association;

- Petitioner breached the warranty of habitability by failing to provide Ross with essential services including, but not limited, heat, hot water, security and extermination services; and

- Upon the Court's determination that Ross is the prevailing party, Ross is entitled, pursuant to Section 234 of the Real Property Law, to an award of reasonable attorneys' fees and disbursements incurred herein.

A. Petitioner's own real estate broker confirmed that Petitioner was made aware, prior to its purchase, that it could not use the Building for the purposes set forth in the Notice of Non-Renewal.

In order to demonstrate Petitioner's sham contentions, Ross called Yvonne Hillman Sultan ("Sultan"), Metzger's own real estate broker for the purchase of the Building, as her

[9] While Ross respectfully requests that the Court render a decision on the merits, the fact remains that the Petition should be dismissed based upon Petitioner's: (i) failure to serve the Notice of Non-Renewal in accordance with applicable law, as explained below; and (ii) acceptance of rent after the service of the Notice of Non-Renewal, but prior to the commencement of this proceeding.

witness.[10] Sultan credibly testified that she has been a licensed real estate broker since 1961 and that she specializes in townhouses, cooperative apartments and condominiums (a copy of Sultan's license is Ross's Exhibit FFF in evidence). Sultan further testified that she had been previously qualified as an expert witness on numerous occasions, specifically as an appraiser of real estate.

Sultan became familiar with Metzger because he answered an advertisement for another building located at 115 East 38th Street. According to Sultan, Metzger told her that he was looking for a house near his synagogue, because he needed to be able to walk there. Metzger also told Sultan that he needed a residence with a small office. Sultan not only confirmed that Metzger never mentioned to her that he was looking for a building for the purposes set forth in the Notice of Non-Renewal, but also testified that she advised Metzger that the Building was only zoned for residential use and that she would never have shown Metzger the Building had she known that he was looking for a property for nonresidential use. Sultan explained that, as a real estate broker, she had a duty to disclose the buyer's intentions to the lending institution. Additionally, Sultan testified that, for the price that Metzger was willing to pay, there were no properties available that could be used as both a residence and a commercial facility for Petitioner's alleged charitable and educational purposes. Lastly, Sultan testified that she advised Metzger that there were rent-stabilized tenants living in most of the apartments in the Building.

B. Chai is the true owner of the Building

[10] Sultan candidly disclosed to the Court that she had read about this proceeding in the New York Times and, as a result, had contacted Ross. When Sultan spoke to Ross about the proceeding, she realized, only at that point, that she had first met Ross thirty (30)-years ago while on a family vacation.

As part of her case, Ross testified that she conducted an investigation[11] concerning Petitioner's contentions and discovered the following facts:

- Petitioner's mortgage with Independence Community Bank (Ross's Exhibit DDD in evidence) was assigned to an entity known as Ann Kew Enterprises, Inc. (a copy of the Assignment of Mortgage is Ross's Exhibit EEE in evidence); and

- The amount of Petitioner's mortgage with Ann Kew Enterprises is One Million Three Hundred Fifty Thousand Dollars ($1,350,000). (Ross's Exhibit KKK in evidence).

On this issue, Ross subpoenaed Martin Sukenik, Esq., the attorney who prepared the mortgage assignment documents (Ross's Exhibit EEE in evidence). Sukenik, a member of Sukenik Segal & Graff, P.C., testified as to the following facts:

- Sukenik is Metzger's uncle (through marriage);

- Sukenik was the attorney who incorporated Chai (Petitioner's Exhibit 1 in evidence) and prepared the certificate of assumed name for Chabad (Petitioner's Exhibit 2 in evidence);

- Sukenik was involved in the refinance and assignment of Petitioner's original mortgage (held by Independence Community Bank) on the Building;

- Ann Kew Enterprises, Inc. was, and is, a mere shell corporation that was used solely as a vehicle for another entity to acquire the mortgage. In connection with the foregoing, Sukenik testified that it is common practice for him to have a number of shell corporate entities "on his shelf" and at his disposal for use by his clients;

[11] As part of her investigation, Ross also discovered that Chabad maintains a website (wwww.chabadofmidtown.com) which includes information concerning Chabad's programs and prayer service schedule (Ross's Exhibit YYY in evidence). Notably, notwithstanding Metzger's self-serving claim that Chabad and Petitioner run the programs and prayer services in concert, there is virtually no mention at all of Petitioner (or that Petitioner is, in any way, involved with the programs and prayer services) in any part of Chabad's website. In addition, Ross also undermined Metzger's testimony that Chabad and Petitioner had no formal membership requirements, and that anyone who attended services and/or made a donation was considered a "member", by introducing a Chabad membership application in evidence (Ross's Exhibit OOOO).

- In truth, and in fact, Chai and Charles Sukenik (Sukenik's cousin) were "acquiring" (actually satisfying) the mortgage on the Building; Chai was providing One Million Dollars ($1,000,000) and Charles Sukenik was providing the remaining Three Hundred Fifty Thousand Dollars ($350, 000);

- Sukenik represented "Ann Kew Enterprises, Inc." and Petitioner was purportedly not represented by counsel in the transaction;

- Both Chai and Charles Sukenik have waived all interest due on the mortgage;

- Charles Sukenik has thus far forgiven One Hundred Fifty Thousand Dollars ($150,000) of his "loan" to Petitioner over a two (2)-year period;

- Charles Sukenik was forgiving the "loan" in stages for tax purposes and will ultimately forgive the entire "loan" over time;

- There have been no documents filed to confirm a reduction in the mortgage;

- To date, Petitioner itself has not repaid any part of the mortgage principal; and

- Sukenik "assumed" that the purpose of the assignment of mortgage was to avoid paying interest on the mortgage to the original lender, Independence Community Bank.

In addition, Sukenik testified that he prepared the document, entitled Affidavit for Real Property Law Section 275, that is annexed to the Assignment of Mortgage (Ross's Exhibit EEE in evidence) and that Metzger executed that document.

The sworn affidavit provides as follows:

> The assignee set forth on the assignment of the mortgage is not acting as a nominee of the owners (mortgagor) of the property, and the mortgage continues to secure a bona fide obligation.

As there was and is an unquestionable "alter ego" relationship between Chai and Petitioner, and as the "obligation" was no longer bona fide, the affidavit is simply another one of Metzger's many false statements under oath. In view of this evidence of a clandestine "assignment" of the mortgage to Chai (by means of a shell entity), and, more importantly, the subterfuge satisfaction of the mortgage, together with the proof previously elicited by Petitioner itself (despite Metzger's attempted equivocation on Petitioner's case-in-chief) that Chai had provided the funds for the original down payment on the Building, the evidence could not be clearer that (as Ross has contended all along) Chai was and is the true owner of the Building and was simply acting through its "nominee", Petitioner, in acquiring title. This convenient arrangement was made in order to permit "owner use" eviction proceedings to be brought against the existing tenants. Chai itself, which has a stated mission of "Jewish" public relations and is not a congregation, would not have qualified under RSC §2524.4(B)(1)(ii) to commence such cases.

C. Petitioner does not have the financial wherewithal to reconstruct the Building for its alleged charitable and educational purposes and, in any event, has not had any plans drawn for any portion of the Building other than the Metzgers' own residence.

As part of her investigation concerning Petitioner's purported "good faith" intent to use the Building for its alleged charitable and educational purposes, Ross discovered and presented the following on her case:[12]

- A Mechanic's Lien was filed against the Building on December 31, 2002 by IDI Construction Company, Inc. in the amount of $325,000 in connection with the construction of the Metzgers' residence therein (Ross's Exhibit TTT in evidence);

[12] It is noteworthy that Petitioner's case-in-chief offered no proof whatsoever of Petitioner's financial ability either to reconstruct the Building to accommodate these alleged programs, or even to initiate and maintain Petitioner's intended programs.

- IDI Construction Company, Inc. has commenced a New York Supreme Court action under index no. 600839/03 to foreclose on its unsatisfied lien (Ross's Exhibit UUU in evidence); and

- There is an unsatisfied monetary judgment in the amount of Sixteen Thousand Nine Hundred Eighty Four and 72/100 Dollars ($16,984.72), plus interest, that was entered against Joshua Metzger, in July 2002, on consent, in favor of his prior landlord, 40 Park Avenue LLC (Ross's Exhibits VVV and WWW in evidence are the Stipulation of Settlement between Metzger and his prior landlord and the monetary judgment entered in accordance with that settlement agreement).

Based upon the foregoing factors, as well as Petitioner's utter failure to demonstrate anything to the contrary, Petitioner does not have the present financial ability to reconstruct the Building to suit its alleged needs. Indeed, as Metzger admitted on cross-examination, to date (three [3] years after serving its Notice of Non-Renewal), Petitioner has not even explored the possibility of reconstructing the Building for its alleged charitable and educational purposes or finalized any of its "intentions" for the Building. The foregoing was also confirmed by the testimony of Raymond Irrera (Petitioner's architectural expert), who testified that he was only recently retained by Petitioner's counsel to examine (for the first time) whether Petitioner may utilize the Building for its alleged charitable and educational purposes. Irrera also testified that he was specifically not retained to prepare any plans or offer any proposals concerning the Building.

In addition, Ross called Michael Just, the architect who designed the plans for the Metzgers' residence at the Building. On direct examination, Just testified as follows:

- Just was retained by Chabad to perform architectural services relating to the Building (Ross's Exhibit MMM in evidence is the contract between Just and Chabad, as executed by Metzger on behalf of Chabad);

- Just never heard of Petitioner, other than seeing its name on the checks that he received from Metzger;

- Just never had any discussions with the Metzgers about the upper floors and was not retained to prepare architectural drawings for the upper floors;

- In 2002, Chabad and/or Metzger stopped making the payments due pursuant to Just's contract (Ross's Exhibits NNN and OOO in evidence are Just's bills and invoices reflecting an outstanding balance of Four Thousand Five Hundred Seventy Three Dollars ($4,573) for the work performed at the Building); and

- Just never filed an amended certificate of occupancy to reflect the alterations and current status of the Building;

For the purposes of rebutting the prior, clearly erroneous testimony of Raymond Irrera, Just was asked about the width of the stairway from the tenants' entrance to the second floor. According to Just, the width of that stairway is 36' inches (and not 44' inches, as Irrera had testified), which is lawful for residential use. Just further testified that, if Petitioner wanted to use the upper floors for a library or other office-type uses, then the stairway would have to be at least 44' inches wide. In turn, if the upper floors were going to be used as a school, then they would have to be at least 66' inches wide.

On cross-examination, Petitioner's counsel inquired as to whether Just's opinion would change if the Building was classified as a "community facility". In response, Just further rebutted Irrera's opinion and testified that his own opinion would remain the same, because the width of a staircase in a community facility must still be at least 44' inches.

D. The Testimony of Brocha Metzger and Noah Heber confirmed that Petitioner does not actually run any of its alleged programs, to the extent that they even exist.

G.

In support of her contentions, Ross also called Brocha Metzger, Metzger's wife, and Noah Heber (Brocha's brother) to testify regarding Petitioner's alleged programs.

Brocha Metzger testified that she does not hold any position with Petitioner other than being a "volunteer", and that her role as the wife of Petitioner's "rabbi" is basically one of hostess and volunteer. According to Brocha Metzger, she formerly ran the (now defunct) "Mommy & Me" program for all three (3) entities (i.e., Chai, Chabad and Petitioner), out of 509 Fifth Avenue, from 1996 until 2000, and that this program has not been in operation since November 2001. Brocha Metzger also admitted that there are no records of the alleged attendees of the program, and that the program was financed by donations, none of which were recorded.

Ross also called Noah Heber, an employee of Petitioner who was working in the Building, as her witness at trial. The more Heber testified, the more it became evident that he was being less than truthful with the Court and was intentionally equivocating and blurring any distinction between Chabad and Petitioner. For example, Heber testified that:

- Heber is employed by both Chabad and Petitioner, as their program director/events coordinator;[13]

- Heber receives a salary of One Thousand Three Hundred Dollars ($1,300) per month from both Petitioner and Chabad (half from each). However, in response to the subpoena that was served upon him, Heber produced only nine (9) separate checks. As the Court (Wendt, J.) noted, none of the checks were in the amount of Heber's claimed salary of One Thousand Three Hundred Dollars ($1,300) or even Six Hundred Fifty Dollars ($650), which would have reflected a fifty percent (50%) payment by either Petitioner or Chabad;

- One of the checks produced by Heber was made out to his mother, Nechama Heber, however Heber claimed that he did not know for whom his own mother worked;

- Heber claimed that all of the programming is for both Petitioner and Chabad. It is his understanding, from Metzger, that the programs are "half and half";

[13] In fact, Heber's sworn testimony totally contradicted Metzger's prior sworn deposition testimony (see page 84, lines 7-14 of Metzger's deposition transcript, Ross's Exhibit PPPP), wherein Metzger testified that Heber was employed by Chabad and not Petitioner.

- Heber did not have any records of the attendees of any of the programs that he allegedly ran for both Petitioner and Chabad;

- Heber repeated the familiar refrain that Petitioner's name is not on any of the promotional material because Chabad is the "brand name" with which everyone is familiar;

- Heber admitted that he used apartment 3R at the Building as an "office" for a period of one (1) year, but that he has not used that apartment since February 2004;[14]
- Notwithstanding the foregoing, Heber had no explanation as to why the telephone bill, dated May 28, 2004, would be over One Hundred Dollars ($100.00) if he was no longer using that apartment as an "office"; and

- While Heber claimed that all of Chabad's programs are run in conjunction with Petitioner, he had no documentation to substantiate such claim.

H. Petitioner's acceptance of rent after allegedly terminating the Lease vitiated the Non-Renewal Notice

As her first affirmative defense to the instant proceeding, Ross claims that, prior to the commencement of this proceeding (in April 2002) but after the purported expiration of the Lease (on February 28, 2002), Petitioner accepted and retained Ross's monthly tenders of rent for March and April 2002, without cashing these rent checks. Accordingly, Ross contends that Petitioner's acceptance of rent for the period after the purported termination of the Lease vitiated the Notice of Non-Renewal, the predicate notice upon which this proceeding is allegedly based, and thereby reinstated Ross's tenancy and her rights to a renewal lease.

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[14] As confirmed by the trial testimony of the Con Edison representative, Ray Byrne, and the documents he produced at trial (Ross's Exhibit LLL in evidence), all of the accounts at the Building are "residential accounts", despite Petitioner's admitted commercial use thereof as an "office" for Noah Heber. In addition, according to Con Edison's records (Ross's Exhibit LLL in evidence), six (6) accounts at the Building are paid for by Chabad.

It is well settled that where, as here, a landlord receives rent checks and does not immediately return them, courts have not hesitated to find that the mere retention of those checks constitutes acceptance of rent sufficient to vitiate a notice of termination, thereby depriving the court of jurisdiction. See 205 East 78th St. Assocs. v. Cassidy, 192 A.D.2d 479, 598 N.Y.S.2d 699 (1st Dept. 1993); Roxborough Apt. Corp. v. Becker, 176 Misc.2d 503, 673 N.Y.S.2d 814 (Civ. Ct. N.Y. Co. 1998).

Even when a landlord eventually returns an uncashed check to a tenant, the landlord's previous retention of the check is equivalent to acceptance. See, Mannino v. Figuerora, N.Y.L.J. 11/22/95, p. 25, col. 1 (Civ. Ct. Kings Co.); St Luke's/Roosevelt Hosp. Ctr. v. Taft Pharmacy, Inc. N.Y.L.J. 5/10/95, p. 25 col. 5 (Civ Ct. N.Y. Co. 1995); Shulen Realty Corp. v. R&R House of Lites, Inc., N.Y.L.J. 5/1/89, p. 25, col. 2 (Civ Ct. N.Y. Co. 1989).

In Associated Realities v. Brown, 146 Misc.2d 1069, 554 N.Y.S.2d 975 (Civ. Ct. N.Y. Co.), a nuisance/objectionable conduct holdover proceeding, the court stated:

> . . . it has long been the law in this jurisdiction that acceptance of rent after the service of the notice of termination and before the commencement of the proceeding, for a period after expiration of the notice, vitiates the notice.

At trial, Petitioner conceded that after purportedly terminating the Lease, but prior to the commencement of this proceeding, Ross tendered, and Petitioner received and retained, monthly rent checks for March and April 2002. In this regard, Ross testified that she mailed a check in payment of March 2002's rent to Petitioner on March 6, 2002 (which is after the alleged termination of her Lease and more than a month before the petition was served) and, on April 1, mailed another check in payment of April 2002 rent.

It is simply irrefutable that Petitioner was, in fact, aware that, in order to recover possession of the Apartment, it was not permitted to accept any rent from Ross after the

expiration of the Lease (on February 28, 2002). Indeed, by fax memo, dated February 26, 2002, Petitioner's former attorneys (the law firm of Belkin Burden Wenig & Goldman LLP) advised Metzger as follows:

> For Vicki Ross, 32 East 38th Street, Apt. 2, her lease expires on February 28, 2002. Please do not bill the tenant nor accept any rent from her.

(See Respondent's Exhibit WW in evidence).

Moreover, Ross also testified that on May 10, 2002, two (2) months after Ross tendered March 2002's rent and only after Ross had already moved, by Notice of Motion dated May 1, 2002, for dismissal of the proceeding (based upon Petitioner's acceptance of rent after the alleged termination of the Lease), Petitioner purported to "return" Ross's rent checks for March and April 2002 rent. (A copy of the May 10, 2002 correspondence from Petitioner's attorneys purporting to return the March and April 2002 rent checks to Ross's attorney, together with copies of those checks, were admitted in evidence as Ross's Exhibit XX).

On September 14, 2004, as part of Petitioner's rebuttal case, Metzger admitted that he received Ross's aforementioned rent checks only after receiving the fax memo from his attorneys directing him not to accept any rent from Ross. Metzger tried to "excuse" his conduct by explaining that, after he received those checks, he merely put them in a drawer and took no further action. Significantly, in response to the Court's inquiry as to whether Metzger ever considered returning those checks, Metzger replied that he did not. On September 21, 2004, during cross-examination, Metzger admitted that he recalled having discussions with his attorneys (at Belkin Burden Wenig & Goldman LLP) concerning the March and April 2002 rent checks, but that the checks were only returned to Ross after she had already made her motion to dismiss. At Ross's request, the Court took judicial notice of Ross's motion (which was served

on May 2, 2002, eight (8) days prior to the belated return of the March and April 2002 rent checks).

Based upon the foregoing, it is respectfully submitted that Metzger's acceptance and retention of Ross's March and April 2002 rent checks cannot be viewed as "inadvertent," as Metzger was unquestionably on notice that he should not do so and failed to return the checks until after Ross sought dismissal of the proceeding upon this ground.

I. Petitioner failed to serve the Notice of Non-Renewal in accordance with applicable law.

As her eighth affirmative defense to the proceeding, Ross claimed that the Petition should be dismissed based upon Petitioner's premature commencement of the proceeding. According to the undisputed testimony by Ross, her last lease renewal (Petitioner's Exhibit 23 in evidence) was not provided to her until a week or two (2) before its expiration on February 28, 2000. Pursuant to Section 2523.5(c)(1) of the Rent Stabilization Code, as a result of Petitioner's predecessor's failure to timely offer Ross a renewal lease, her last lease did not actually commence, by statute, until July 1, 2000 (at least 120 days after the untimely offer) and, thus, did not expire until June 30, 2002. As the Notice of Non-Renewal was purportedly served in November 2001, some seven (7) months prior to the expiration of the Lease, it was decidedly premature. Moreover, the proceeding was purportedly commenced in April 2002, also well before the actual expiration of the Lease. For these reasons, as well, the petition should be dismissed.

J. Petitioner commenced this proceeding in violation of RPL §223-b

By her tenth affirmative defense and second counterclaim, Ross claims that Petitioner commenced the instant proceeding in violation of RPL §223-b, in retaliation for Ross's

complaints, assertion of her legal rights as well as her active participation (and leadership) in the Building's tenants' association.[15]

RPL 223-b provides, in pertinent part, as follows:

> 1. No landlord of premises or units to which this section is applicable shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for:
>
> (a) A good faith complaint, by or in behalf of the tenant, to a governmental authority of the landlord's alleged violation of any health or safety law, regulation, code, or ordinance, or any law or regulation which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or
>
> (b) Actions taken in good faith, by or in behalf of the tenant, to secure or enforce any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter, or under any other law of the state of New York, or of its governmental subdivisions, or of the United States which has as its objective the regulation of premises used for dwelling purposes or which pertains to the offense of rent gouging in the third, second or first degree; or
>
> (c) The tenant's participation in the activities of a tenant's organization.

In addition, pursuant to RPL §223-b(5), there exists a rebuttable presumption that the landlord is acting in retaliation if the tenant establishes, as here, that the landlord served a termination notice and/or commenced a proceeding to recover possession within six (6) months after the tenant's assertion of his or her rights under the law. See 390 West End Associates v. Raiff, 166 Misc.2d 730, 636 N.Y.S.2d 965 (1st Dept. 1995). Furthermore, pursuant to RPL §223-

[15] In addition to Petitioner's retaliation against Ross for asserting her legal rights and participating in the tenants' association, to date, Petitioner has also refused to respond to Ross's legitimate claim concerning her rent security deposit (Ross's Exhibit GGGG in evidence).

b(3) a landlord shall be subject to a civil action for damages and other appropriate relief in any case where the court determines that the landlord violated this section. 601 West 160 Realty Corp. v. Henry, 189 Misc.2d 352, 731 N.Y.S.2d 581 (A.T. 1st Dept. 2001) (awarding tenant monetary damages for retaliatory eviction in connection with tenant's actions as president of tenants' association); Northwood Village, Inc. v. Curet, N.Y.L.J., 11/30/98, p. 35, col. 5 (D.C. Suff. Co.) (awarding tenant punitive damages on his counterclaim for retaliatory eviction).

As part of Petitioner's self-serving "rebuttal" case, Metzger testified that, prior to any one of Ross's complaints, he, as the President of Petitioner, always intended to commence the instant proceeding. In addition, Metzger further swore that he was unaware of the existence of any tenants' association. On cross-examination, however, Metzger was shown two (2) letters (See Ross's Exhibit BB and CC in evidence), both of which were sent to Metzger prior to the service of the Notice of Non-Renewal. In both letters, Ross complained to Metzger about the conditions in the Building on behalf of the tenants' association. In response, Metzger arrogantly alleged that he did not recall or recognize either of those letters because, as he stated, "Ross sent him many letters." In response to the Court's own inquiry concerning what Metzger understood the word "we" to mean in Ross's letters, Metzger testified that he thought the word "we" merely referred to Ross, individually.

In addition, Metzger's testimony that he was "unaware" of any tenants' association prior to the commencement of the proceeding was further belied by Petitioner's own Exhibit 34 in evidence, the "Tenant's Statement of Complaint(s) – Harassment" form that was filed on January 29, 2002, wherein Ross is listed as the chairperson of the tenants' committee at the Building. Notably, as the foregoing exhibit was offered into evidence through Metzger himself, his

testimony that he was "unaware" of any tenants' association prior to the commencement of the proceeding, like much of his overall testimony, is simply unworthy of belief. [16]

H. Petitioner Breached the Warranty of Habitability.

By her eleventh affirmative defense and third counterclaim, Ross claimed that Petitioner violated the warranty of habitability, pursuant to Section 235-b of the Real Property Law, by permitting certain conditions to exist at the Building and Ross's Apartment, thereby entitling Ross to a substantial rent abatement. Specifically, at trial, Ross testified that Petitioner failed to provide essential services including, but not limited to, heat, adequate hot water, extermination services, security, garbage removal, janitorial and maintenance services (only a thoroughly sham superintendent, Tzvi Reines, was alleged appointed), all of which materially impacted upon Ross's health and safety.

It is well settled that the warranty of habitability was designed to give rise to an implied promise on the part of a landlord that both the demised premises and the areas within a landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term. Park West Management Corp. v. Mitchell, 47 N.Y.2d 316, 418 N.Y.S.2d 310 (1979); 61 Melvin Avenue Realty Corp. v. Brantley, N.Y.L.J., 3/16/94, p. 23, col. 3 (Civ. Ct. N.Y. Co.) (Wendt, J.).

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[16] As though this Court needed another reason to find Metzger's testimony incredible, the Court should recall that Metzger offered in evidence (as part of his rebuttal case in response to Ross's claim that Petitioner did not properly maintain the Building) an April 2002 letter and envelope from Ross concerning the condition of the Building (Petitioner's 72 in evidence). While Ross had previously testified that she did not believe that the particular letter and envelope went together (which prompted the Court to reject Petitioner's initial offer thereof in evidence as Petitioner's 37) Metzger, in the most self-serving manner, testified that he was able to "identify" that particular letter and envelope, which were sent more than two (2) years ago. The foregoing claim is simply unbelievable, especially when Metzger had testified, only minutes before his testimony concerning Exhibit 72, that he did not recall any specific letters from the many that he had received from Ross.

RPL §235-b(1) provides, in pertinent part:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety.

According to Ross, shortly after it took title to the Building, Petitioner undertook a construction project at the Building (that lasted from September 2001 through September 2002), whereby, the basement, ground floor and first floor thereof were converted into an apartment for the use of Metzger and his family. By reason of that construction project, which incorporated the former main Building entrance, hallway and central staircase into Metzger's apartment (and "study"), and relegated the remaining tenants to the former service entrance and back stairway, the tenants (including Ross) endured conditions including, but not limited to, dust, dirt and debris and the frequent interruption, or outright elimination, of Building services such as heat and hot and cold water. As part of this project, Petitioner also permanently eliminated the tenants' laundry room and storage area (which Metzger simply had demolished and made a part of his own residence). Indeed, even after the completion of construction on Metzger's "residence", Petitioner's refusal to provide Ross with various services has continued to this day.

Thus, even after the construction project had been completed, Petitioner continued to deprive Ross of essential services including, but not limited to, heat, hot and cold water, security, garbage removal, general building maintenance, water service to her terrace, and extermination services. As evidence of Petitioner's many and substantial breaches of the warranty of habitability, Ross submitted the following exhibits and her own confirming testimony thereon at trial:

- Twenty-Eight (28) separate letters from Ross to Petitioner for the period covering December 30, 2000 through November 2003 providing notice of various conditions at the Building and in Ross's Apartment including, but not limited to, lack of security, lack of heat and hot water, lack of cleaning services, lack of extermination services, rodent and vermin infestation, leaky pipes and floods, clogged vents in Ross's kitchen and bathroom, cracked walls in Ross's Apartment and in the common areas of the Building, no superintendent, lack of water service to her terrace, and unsecured mailboxes (Ross's Exhibit S through Z and BB through UU in evidence);

- A video, on DVD, shot by Ross in March 2004, depicting the interior of Ross's Apartment, the common areas of the Building and the exterior of the Building (Ross's Exhibit AA in evidence);

- Twenty-Six (26) separate photographs that were taken by Ross during the period of December 2001 through April 2003, depicting the conditions at the Building including, but not limited to rodent and vermin infestation, the hazardous mound outside the tenants' entrance in front of the Building, the water-stained, cracked walls in Ross's Apartment and the common hallways, and the debris and general condition of the Building at the time of the construction of Metzger's residence (Ross's Exhibits VV(1) through VV(26) in evidence);

- The December 3, 2002 Order of the Court (Klein, J.) issued in the HP proceeding entitled *Ross v. Congregation B'Nai Abraham Mordechai* and identified by New York Civil Court HP no. 006509, directing Petitioner to provide heat and hot water to Ross's Apartment (Ross's Exhibit AAA in evidence);

- The So-Ordered Stipulation of Settlement dated January 2, 2003, resolving the HP proceeding entitled *Ross v. Congregation B'Nai Abraham Mordechai* and identified by New York Civil Court HP no. 006509, wherein Petitioner agreed to provide adequate hot water to Ross's Apartment by January 9, 2003 (Ross's Exhibit BBB in evidence);[17]

[17] By its express terms, the Stipulation (in paragraph 6) settled Ross's breach of warranty of habitability claims for heat and hot water (but no other conditions) for the period November 15, 2002 (the commencement date of the proceeding) through January 2, 2003 only. The settlement consisted of a one (1)-month rent abatement, representing the payment for the month of February 2003. Inasmuch as the landlord (Petitioner herein) failed to comply with paragraph 7 of the Stipulation, requiring the restoration of hot water within seven (7) days, Ross did not waive any

- The Decision/Order of the Court (Klein, J.), dated October 31, 2003, issued in the HP proceeding entitled *Ross v. Congregation B'Nai Abraham Mordechai* and identified by New York Civil Court HP no. 006509, wherein the Court held Petitioner in "contempt" for failing to comply with a prior Order of the Civil Court, as well as a "so-ordered" Stipulation between the parties, both requiring Petitioner to provide adequate hot water to Ross's Apartment (Ross's Exhibit CCC in evidence);

- Three (3) separate violations issued in 2001, 2002 and 2003 by the Department of Buildings, based upon Petitioner's failure to conduct the required annual boiler inspections (Ross's Exhibits CCCC(1) through (3) in evidence);

- A printout of all HPD violations issued against the Building as of June 10, 2004 (Ross's Exhibit DDDD in evidence);

- Four (4) separate DHCR Rent Reduction Orders, decreasing Ross's rent based upon Petitioner's failure to provide services including, but not limited to, hot water, water service to the terrace, extermination services and general building-wide maintenance. In addition, inspections by the DHCR revealed that both the kitchen and bathroom exhaust vents were inoperable and the walls in the Apartment were cracked. (Ross's Exhibits EEEE(1) through (4) in evidence); and

- DEP noise violations issued in connection with Metzger's air conditioner condensor unit located in the courtyard below Ross's Apartment (Ross's Exhibit TTTT in evidence).

During Ross's testimony concerning the above-referenced conditions, the Court (Wendt, J.) itself noted that a breach of the warranty of habitability can more greatly affect someone, like Ross, who works out of her home.

It is well settled that the proper measure of damages for breach of the warranty of habitability is the difference between the rent paid by the tenant and the rental value of the

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further warranty of habitability claims relating to hot water. In view of the foregoing, Petitioner's claim herein, that the Stipulation constituted a full "settlement" of all of Ross's warranty of habitability claims up to and including January 2, 2003, has no legal basis or merit.

premises during the period of breach. Mastrangelo v. Five Riverside Corp., 262 A.D.2d 218, 692 N.Y.S.2d 350 (1st Dept. 1999).

Based upon the foregoing, and as Ross, pursuant to the Court's directive, continued to pay rent/use and occupancy during the pendency of this proceeding, the Court should award Ross a substantial abatement, for all of the conditions set forth above, from the time that Petitioner purchased the Building and began depriving Ross and other tenants of essential services through the end of trial.[18]

I. Ross is entitled to an award of her reasonable attorneys' fees incurred in this proceeding.

Upon the Court's determination that Ross, whose financial resources have been severely strained in battling this illegitimate proceeding, is the overall prevailing party herein (based upon the dismissal of the petition and/or favorable determinations on her affirmative defenses and counterclaims), the Court should: (i) sustain Ross's fourth counterclaim for her reasonable attorneys' fees incurred in this proceeding; and (ii) schedule an immediate hearing to determine the amount of attorneys' fees to be awarded to Ross.

As a general rule, attorneys' fees are not recoverable by the prevailing party from the losing side unless authorized by agreement between the parties or by statute or court order. Solow v. Wellner, 205 A.D.2d 339, 613 N.Y.S.2d 163 (1st Dept. 1994); Cier Industries Company v. Hessen, 136 A.D.2d 145, 526 N.Y.S.2d 77 (1st Dept. 1988).

[18] As part of its "rebuttal" case, Petitioner itself confirmed the existence of most of the aforementioned conditions, by purporting to demonstrate that it only began to remedy such conditions during the latter stages of the trial.

Here, Article 27 of the Lease (which was admitted in evidence as Petitioner's Exhibit 23) entitled "Legal Fees", provides as follows:

> The successful party in a legal action or proceeding between Landlord and Tenant for non-payment of rent or recovery of possession of the Apartment may recover reasonable attorneys' fees and costs from the other party. (Emphasis added).

Thus, pursuant to the garden variety attorneys' fee provision of the Lease, if Petitioner is (or was) compelled to incur any expense, including reasonable attorneys' fees, in instituting and/or prosecuting any proceeding by reason of a default by Ross in a covenant of the Lease, then such expense would be due from Ross to Petitioner. Conversely, pursuant to RPL §234, whenever a residential lease (like the one at issue) provides that a landlord may recover its reasonable attorneys' fees incurred in the prosecution of a proceeding, a reciprocal covenant is implied and imposes upon the landlord a duty to reimburse the tenant, who is successful in defending an action and/or proceeding that was commenced by the landlord, for the tenant's reasonable attorneys' fees, disbursements and expenses. See College Props. v. Bruce, 122 Misc.2d 766, 473 N.Y.S.2d. 906 (A.T. 1st Dept. 1984).

Specifically, RPL §234 provides as follows:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding

> commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

In Dulac v.Hochwald, N.Y.L.J., 3/23/94, p. 21, col. 1 (Civ. Ct. N.Y. Co.), the Court (Wendt, J.) stated that "[t]o redress the recognized inequality at the bargaining table between landlord and tenant, and to protect the public interest involved" the Legislature enacted RPL §234 to give prevailing tenants a right to recover attorneys' fees where a landlord has a contractual right to such fees. See, also, Haberman v. Wassberg, 131 A.D.2d 331, 516 N.Y.S.2d 925 (1st Dept. 1987). Thus, while a landlord's right to attorneys' fees must arise from the language of the lease, a tenant's right to such fees is statutory. See Greco v. GSL Enterprises, Inc., 137 Misc.2d 714, 521 N.Y.S.2d 994 (Civ. Ct. N.Y. Co. 1987).

In its petition herein, Petitioner specifically alleged that:

> In accordance with the terms of the most recent rental agreement between the parties herein, [respondent] agreed to pay for [her] use and occupancy of the demised premises at the rate of $1,050.55 per month plus the costs and disbursements, **including reasonable legal fees**, **which might be incurred by the landlord in any action to enforce the landlord's rights under said rental agreement.** (Emphasis added).

(The Court's attention is directed to paragraph "11" of the Petition herein, and Ross respectfully requests that the Court take judicial notice of the Petition herein).

In addition, as part of the relief demanded in this proceeding, Petitioner demanded:

> . . . a final judgment awarding possession of the subject premises to petitioner-landlord; the issuance of a warrant to remove respondent from possession thereof; fair value of use and occupancy at the rate of $2,000.00 per month with interest from March 1, 2001; and **the costs and disbursements of this proceeding.** (Emphasis added).

(The Court's attention is directed to "wherefore" clause of the Petition herein and Ross respectfully requests that the Court take judicial notice of the Petition herein).

Here, Petitioner's own demand for the recovery of its attorneys' fees incurred in the within proceeding is based upon Petitioner's contention that it was compelled to commence this proceeding as a result of Ross's default in the covenant of the Lease to surrender possession of the Apartment upon the expiration of her tenancy. Petitioner, in the event Ross prevails, is therefore judicially estopped from denying Ross's own entitlement to recover attorneys' fees. See Karasik v. Bird, 104 A.D.2d 758, 480 N.Y.S.2d 491 (1st Dept. 1984) ("It is a well-settled principle of law in this State that a party who assumes a certain position in a legal proceeding may not thereafter, simply because his interests have changed, assume a contrary position. . . . Invocation of the doctrine of estoppel is required in such circumstances lest a mockery be made of the search for truth" [citations omitted]); see, also, Nestor v. Britt, 270 A.D.2d 192, 707 N.Y.S.2d 11 (1st Dept. 2000).

In S&J Realty Corp. v. Korybut, N.Y.L.J., 5/25/90. p. 22, col. 5 (Civ. Ct. N.Y. Co.), then Civil Court Judge Peter Tom (now a Justice of the Appellate Division) held that the tenant was entitled to recover attorneys' fees for the successful defense of an owner use holdover proceeding. In reaching its determination, the Court reasoned that:

> Since petitioner alleges in this proceeding that respondent has breached a covenant of the lease by not surrendering the premises at the expiration of the lease term, and respondent has proved otherwise that it was petitioner who has not met its obligation to offer a renewal lease, the reciprocal covenant to recover attorneys' fees is triggered.

See, also, Lee v. Shelton, N.Y.L.J., 6/27/90, p. 23, col. 2 (Civ. Ct. N.Y. Co.) (holding that a tenant was entitled to legal fees in the defense of an owner use holdover proceeding).

In Schwartz v. Dobrin, N.Y.L.J., 12/12/90, p. 21, col. 2 (A.T. 1st Dept.), another owner use proceeding, the landlord included a demand for legal fees in its petition and tenant requested the same in its answer. The court ultimately found that the landlord was not acting in good faith

and the court ruled in favor of the tenant. The Appellate Term held that "an award of attorneys fees pursuant to RPL 234 may be made to the prevailing tenant in an owner use occupancy proceeding." See, also, Halsenuss v. Brackett, N.Y.L.J., 4/10/91, p. 21 col. 3 (A.T. 1st Dept.) (tenant, after being deemed to be the prevailing party in an underlying owner use holdover proceeding, was entitled to attorneys' fees under the reciprocal provisions of RPL §234).

Quite significantly, in Jocar Realty Co. v. Galas, 176 Misc.2d 534, 673 N.Y.S.2d 836 (Civ. Ct. N.Y. Co. 1998), the Court (Stallman, J.), examined the triggering effect of RPL §234 and held that:

> The reciprocal effect of RPL §234 is triggered by the presence in the lease of a provision entitling the landlord to attorneys' fees. The statute then 'implie[s] in such a lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses' caused by the landlord's breach of the lease or the tenant's "successful defense" of a landlord-initiated proceeding. RPL §234.
>
> * * *
>
> Neither does the tenant's entitlement to attorneys' fees under RPL §234 depend on the landlord's inclusion of a request for attorneys' fees in the petition. (Citation omitted). The statute makes the existence of the lease clause the only condition precedent to the tenant's reciprocal right. Whether the landlord relied on the lease clause or whether the landlord can enforce it against the tenant, are equally immaterial. To hold otherwise would encourage owners to bring summary proceedings on flimsy grounds, if by deliberately forbearing from demanding their attorneys' fees they could avoid liability for tenants' legal fees.

Thus, apart from the fact, that Petitioner itself has sought attorneys' fees in this proceeding, the mere fact that the Lease contains an "attorneys' fees" provision triggers the reciprocal statutory right to fees in favor of Ross, which is not altered or affected by the alleged "religious" or "charitable" mission of Petitioner.

CONCLUSION

Simply put, there are not merely a few "inconsistencies" in Petitioner's prima facie case, but a pervasive deception and lack of good faith that permeated its entire presentation to this Court. Even now, the Court cannot be sure that Petitioner actually "exists" separately and independently of Chai and Chabad, or that Petitioner runs, or even ran, any "programs", let alone any of those listed in the predicate Notice of Non-Renewal. Under these, at best, "murky" circumstances and given the overwhelming evidence of retaliation and harassment of Ross (as orchestrated by Metzger), it is respectfully submitted that the Court must dismiss the Petition and not permit the eviction of Ross from her home of more than twenty-seven (27) years.

Based upon all of the testimony and the documentary proof submitted at trial, it is respectfully submitted that Petitioner utterly failed to prove its prima facie case by a fair preponderance of the evidence and the Court should enter an Order/Judgment: (i) dismissing the Petition; (ii) directing Petitioner to issue Ross a renewal lease; (iii) directing Petitioner to correct the conditions giving rise to Ross's claim for breach of the warranty of habitability; (iv) awarding Ross a substantial rent abatement on her defense/counterclaim for the breach of the warranty of habitability; (v) awarding Ross monetary damages on her counterclaim for retaliatory eviction; and (vi) scheduling an immediate hearing to determine the amount of attorneys' fees to be awarded to Ross.

Dated: New York, New York
November 16, 2004

Respectfully submitted,

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