

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

**FILED AND  
ENTERED  
ON  
  
ROCKLAND  
COUNTY CLERK**

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KHAL BAIS SHMIEL,

Plaintiff,

**DECISION & ORDER**

Index No: SU-2005-005550

**- against -**

ASSESSOR, TOWN OF RAMAPO, THE TOWN OF  
RAMAPO, ROCKLAND COUNTY, NEW YORK AND  
THE BOARD OF ASSESSMENT REVIEW  
FOR THE TOWN OF RAMAPO,

Defendants.

-----X

DICKERSON, J.

**KHAL BAIS SHMIEL : APPLICATION FOR " COMPLETE AND TOTAL EXEMPTION "**

The Plaintiff, KHAL BAIS SHMIEL, claims that it is a religious corporation and is entitled to a " complete and total exemption "<sup>1</sup> from real property taxes, presumably, pursuant to Real Property Tax Law [ " R.P.T.L. " ] § 420(a)<sup>2</sup> for the tax year " 2005 through the date of judgment to be rendered in this action "<sup>3</sup> for its property located at 44

Phyllis Terrace, Monsey, New York within the Town of Ramapo. After a careful review of the Plaintiff's Notice of Motion seeking summary judgment pursuant to C.P.L.R. § 3212 together with the supporting Affirmation<sup>4</sup> and Reply Affirmation<sup>5</sup> of Alan M. Simon and the Defendants' papers submitted in opposition thereto including the Affirmation of Elana L. Yeager<sup>6</sup> and the Affidavit of William White<sup>7</sup>, the Court hereby renders its Decision.

### **FACTUAL BACKGROUND**

#### **What Is It's Purpose?**

The Plaintiff's attorney, Alan M. Simon, asserts that KHAL BAIS SHMIEL is a religious corporation and owns a house located at 44 Phyllis Drive, Monsey, New York [ " the subject property " ] which is " used in accordance with their purposes " <sup>8</sup>. Unfortunately, the " purposes " of KHAL BAIS SHMIEL are unknown or contradictory<sup>9</sup> as is its corporate status since a Certificate of Incorporation has not been submitted herein<sup>10</sup>.

#### **Where Is It Located?**

Is KHAL BAIS SHMIEL located at the subject property, 44 Phyllis Terrace<sup>11</sup>, where it conducts " religious services, counseling and religious instruction " <sup>12</sup> or is it located at 16 Suzanne Drive<sup>13</sup>.

### Is It In Compliance With Zoning Codes?

If it is operating a synagogue or yeshiva at 44 Phyllis Terrace has it complied with all zoning statutes and, if not, it may have no standing to seek a tax exemption pursuant to R.P.T.L. § 420(a) [ See e.g., Congregation Or Yosef v. The Town of Ramapo, 2006 NYSlipOp 51828 ( Rockland Sup. 2006 )( " the Congregation operates a synagogue, a mikvah, a shul and provides a residence for its Rabbi and his family in the subject property and has never filed development site plans nor applied for or obtained building permits and a Certificate of Occupancy for anything other than " a single family dwelling with a finished basement ". The Congregation was served with a Notice of Violation dated June 29, 2004 [ " the Violation " ] " for use other than as a single-family residence " and has not responded to the Violation by applying for a " building permit for work relating to the construction or renovations for a synagogue " and " site plan approval for a synagogue ". The use of the subject property in violation of zoning ordinances is a complete defense to the Congregation's application for a tax exemption [[ Oxford Group-Moral Re-Armament, MRS, Inc. v. Hogarth Sweet, 309 N.Y. 744, 128 N.E. 2d 759 ( 1955 )( " That the use of the premises...was and is in violation of the zoning ordinance...and that said violation constitutes a complete defense to the petitioner's application for exemption " ); Collella v. Board of Assessors of the County of Nassau, 266 A.D. 2d 286, 698 N.Y.S. 2d 291 ( 2d Dept. 1999 )( " Under local

zoning ordinances, the Temple was required to obtain a special use permit before the property could be used for any purpose other than a single-family residence. The Temple's 1997 application for special use permit was denied by the Zoning Board of Appeals...Therefore its use of the property as a religious and spiritual center was illegal and acted as a complete bar to the granting of its application for a tax exemption " ), rev'd on other grounds 95 N.Y. 2d 401, 741 N.E. 2d 113, 718 N.Y.S. 2d 268 ( 2000 )]. In addition, the recent decision of the Court of Appeals in Legion of Christ Inc. v. Town of Mount Pleasant, 1 N.Y. 3d 406, 806 N.E. 2d 973, 774 N.Y.S. 2d 860 ( 2004 ) held, among other things, that Oxford, supra, is good law and that the use of developed land for exempt purposes in violation of zoning laws is still a complete bar to a request for a real property tax exemption [ See e.g. Legion, at 1 N.Y. 3d 412 ( " The Town's reliance on Matter of Oxford ( supra )...is misplaced. Oxford involved land that was already developed and actually being used for exempt purposes in violation of the municipal zoning law, not property that was vacant or otherwise unimproved, as is the case here " )].

#### **Who Lives At The Subject Property?**

Mr. Simon asserts that the subject property " is used as a residence for students in the Talmudical program "<sup>14</sup> and he refers to two unsworn letters with unidentifiable signatures from " Kollel Bais Shmiel

D'Kasho " dated " May 17, 05 " which state that " Rabbi Jacob Lebovits [ and Rabbi Gedalie Katz<sup>15</sup> ] residing at 44 Phyllis Terr. Monsey, is enrolled as a student in our Talmudical program for 30 hours weekly "<sup>16</sup>. No sworn statements have been produced from anyone who lives at the subject property.

### What Rent Is Charged?

Mr. Simon asserts that KHAL BAIS SHMIEL should be completely exempt from real property taxes because " all of the residents are either students or are working in conjunction with an educational program which is sponsored and adhered to by the owner, the religious corporation and working to foster and further the interests of the religious corporation "<sup>17</sup>. In its Application for a tax exemption KHAL BAIS SHMIEL asserted in an unsworn document entitled " Property Use-Occupancy Statement " that the subject property was being used as a " Rabbinical Students Residence " and that the amount of rent paid was " To Cover Expenses "<sup>18</sup>. The amount of rent, who is paying the rent, the expenses of operating the subject property and who is paying the expenses are all important factors to be considered [ See e.g., Congregation Or Yosef v. The Town of Ramapo, 2006 NYSlipOp 51828 ( Rockland Sup. 2006 ) ( The Congregation is " double dipping " in that it rents the top floor of the subject property to Rabbi Moscovitz for \$1,780.00 a month, \$1,617.00 of which is paid by the Section 8 Housing Voucher Program, the balance of which,

\$163.00, was supposed to have been paid by Rabbi Moscovitz to the Congregation but was only paid " Maybe around five, six times " in three years. The Congregation can not seek two governmental subsidies for the same property by " requesting a tax exemption and then receiving Section 8 rent for the exempt property " )].

### **Is A Profit Being Made?**

Without a detailed accounting of the expenses and revenues in operating the subject property as a synagogue/yeshiva and/or residence for rabbinical students, KHAL BAIS Shmiel may be making a profit [ See e.g., Congregation Or Yosef v. The Town of Ramapo, 2006 NYSlipOp 51828 ( Rockland Sup. 2006 ) ( " In addition, the credible evidence demonstrates that the Congregation is making a profit from this arrangement of " \$381.68/month or \$4,580.16 a year ". As correctly noted by the Congregation " RPTL 420-a provides that property conducted exclusively for religious purposes is entitled to exemption provided that no member receives any pecuniary profit nor the organization makes a profit from the property ". The Congregation has failed to rebut the Defendants' factual analysis which demonstrates that a profit is being made by renting the upper level of the subject property to Rabbi Moscovitz [ See e.g., Matter of Stuyvesant Square Thrift Shop, Inc. v. Tax Commission, 54 N.Y. 2d 735, 426 N.E. 2d 478, 442 N.Y.S. 2d 984

( 1981 )( " The fact that the net cash profits are ultimately distributed to various institutions organized for charitable purposes does not in and of itself directly involve the Thrift Shop in the charitable activities of the distributee organization or render its function exclusively charitable " ); State Board of Equalization and Assessment, 2 Op. Counsel SBEA No. 49, 1970 WL 11159 ( " It should be noted that in cases such as these it must be clearly demonstrated that it is necessary for the employee to reside on the premises and that such residence is not merely provided for the convenience of either the employee or the employer. It should also be noted that the fact that rent may be charged for occupying the property will not necessarily violate the ' exclusive use ' provision *if it can be shown that the amount of rent collected does not constitute revenue* " [ emphasis added ] ).

#### **Where Do The Rabbinical Students Work & For How Many Hours?**

In two unsworn letters with illegible signatures it is asserted that Rabbi Jacob Lebovits works 22 hours weekly for a yeshiva in Woodbridge, New York and Rabbi Gedalie Katz works 20 hours per week for a yeshiva in Hillburn, New York<sup>19</sup>. However, according to William White " Mrs. Katz indicated that her husband worked ten (10) hours a week at Yeshiva Mishkenos in Hillburn...and Mrs. Lebovits indicated that her husband worked twelve (12) hours a week at a yeshiva in Woodbridge "<sup>20</sup>

## DISCUSSION

### Failure To Present Credible Evidence

Unlike other cases in which this Court has ruled upon the requests of religious and charitable corporations for real property tax exemptions pursuant to R.P.T.L. § 420(a)<sup>21</sup> [ See e.g., Matter of Gemilas Chasdum Keren Eluzer, Inc. v. Assessor of the Town of Ramapo, 5 Misc. 3d 1026 ( Rockland Sup. 2004 ) ( Free Loan Society operated by orthodox synagogue seeks tax exemption for house in which its Rockland County Executive Director resides with his family and in-laws; exemption denied for failing to show that " subject property is used exclusively for exempt purposes " )] and § 462 [ See e.g., Congregation Kneset Israel v. Assessor of the Town of Ramapo, 8 Misc. 3d 1021 ( Rockland Sup. 2005 ) ( Congregation Kneset Israel operates a synagogue and owns a house wherein its Rabbi resides and for which a tax exemption is sought on the grounds that Rabbi is full time " officiating clergyman " notwithstanding his full time employment during the day " as a teacher at the Kesser Torah School...( and ) also teaches two periods a week at a high school for girls, Ateres Bais Yakov "; motion and cross motion for summary judgment denied )], the Motion of KHAL BAIS SHMIEL seeking a " complete and total exemption " from real property taxes is devoid of credible evidence to warrant any tax exemption whatsoever.

## Burden Of Proof

Real Property Tax Law § 420-a(1)(a) provides that " Real property owned by a corporation...organized or conducted exclusively for religious, charitable...purposes...and used exclusively for carrying out thereon... such purposes...shall be exempt from taxation...". To be entitled to such a tax exemption the Petitioner has the burden [ see e.g., Matter of Marble Masonic Historical Society v. Tuckahoe, 262 A.D. 2d 487, 488, 691 N.Y.S. 2d 786 ( 2d Dept. 1999 ) ( " party seeking an exemption...bore the burden of establishing its entitlement to an exemption " ); ( Matter of Long Island Foundation For Education v. Michael, 97 A.D. 2d 843, 844, 469 N.Y.S. 2d 85 ( 2d Dept. 1983 )] of demonstrating that it is (1) organized exclusively for tax exempt purposes and (2) that the subject property is used exclusively for exempt purposes [ see e.g., American-Russian Aid Association v. City of Glen Cove, 41 Misc. 2d 622, 246 N.Y.S. 2d 123, 126 ( Nassau Sup. 1964 ) ( RPTL § 420-a(1)(a) " impose(s) two requirements-first that the property be owned by a non-profit exempt organization and secondly that the property be used exclusively for one or more of those exempt purposes recited in the Certificate of Incorporation...' When the purpose accomplished is that of public usefulness unstained by personal, private or selfish considerations, its charitable character insures its validity ' " ), *aff'd* 23 A.D. 2d 966, 260 N.Y.S. 2d 589 ( 2d Dept. 1965 )].

### Failure To Carry Burden Of Proof

KHAL BAIS SHMIEL must come forward with convincing evidence, any ambiguity of which will be strictly construed against it [ Matter of City of Lackawanna v. State of Equalization & Assessment, 16 N.Y. 2d 222, 230, 264 N.Y.S. 2d 528, 212 N.E. 2d 42 ( 1965 ) ( " Tax exemptions...are limitations of sovereignty and are strictly construed...If ambiguity or uncertainty occurs, all doubt must be resolved against the exemption" ) ] although the interpretation of exemption statutes " should not be so narrow and literal as to defeat [ their ] settled purpose...that of encouraging, fostering and protecting religious and educational institutions " [ Matter of Yeshivath Shearith Hapletah v. Assessor of Town of Fallsburg, 79 N.Y. 2d 244, 249, 582 N.Y.S. 2d 54, 590 N.E. 2d 1182 ( 1992 ) ]. The term " exclusive " as it appears in RPTL § 420-a(1)(a) has been " broadly defined to connote ' principal ' or ' primary ' such that purposes and uses merely ' auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption ' " [ Matter of Yeshivath, supra, at 79 N.Y. 2d 249 ]. As noted KHAL BAIS SHMIEL has failed to carry its burden of proof and its Motion and supporting papers raise more questions of fact and law than it resolves.

### The Standard For Summary Judgment

Summary judgement is appropriate if there are no factual issues in dispute [ See e.g., Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131 ( 1974 ) ( " Summary judgement is designed to expedite civil cases by eliminating from the Trial Calendar claims that can be properly resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues..." )]. The moving party bears the initial burden of making a *prima facie* showing of entitlement [ See e.g., Bowen v. Dunn, 306 A.D.2d 929, 762 N.Y.S.2d 465 ( 4<sup>th</sup> Dept 2003 )], which burden then shifts to the opposing party to come forward with proof to demonstrate the existence of an issue of fact [ See e.g., Marinelli v. Shifrin, 260 A.D.2d 277, 288, 688 N.Y.S.2d 72 ( 1<sup>st</sup> Dept 1999 ); New York Service Higher Education Corp. V. Ortiz, 104 A.D.2d 684, 479 N.Y.S.2d 910 ( 3d Dept 1984 ); Stern v. Stern, 87 A.D.2d 887,888, 449 N.Y.S.2d 534 ( 2d Dept 1982 )].

### Factual Issues In Dispute

There are numerous factual issues in dispute which can not be resolved within the context of a summary judgment motion including, but not limited to, what is the purpose of KHAL BAIS SHMIEL?, Where is it located?, Is it in compliance with zoning codes?, Who lives and works at

the subject property? Is the subject property a synagogue, yeshiva and residence?, What are the expenses of operating the subject property and who pays the expenses? What rent is charged? Is a profit being made? What do the occupants of the subject property do?

Based upon the foregoing the Plaintiff's Motion seeking summary judgment is denied in all respects.

Dated: White Plains, N.Y. 10601  
September 29, 2006

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HON. THOMAS A. DICKERSON  
SUPREME COURT JUSTICE

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## ENDNOTES

1. Affirmation of Alan M. Simon dated December 1, 2005 [ " Simon Aff. " ] at para. 12.

2. The Plaintiff's Notice of Motion and the supporting Affirmation of Alan M. Simon dated December 1, 2005 [ " Simon Aff. " ] and the Complaint [ Simon Aff. at Ex. A ] do not set forth the statutory provision under which a 100% exemption from real property taxes is sought. However, Plaintiff's Application For Real Property Tax Exemption [ Simon Aff. at Ex. C ] contains a page entitled General Information And Filing Requirements referring to " Tax exemption for nonprofit organizations under section 420-a of the Real Property Tax Law " .

3. Simon Aff. at Ex. A.

4. Simon Aff.

5. Reply Affirmation of Alan M. Simon dated January 17, 2006 [ " Simon Reply Aff. " ]

6. Affirmation In Opposition of Elana L. Yeager dated January 6, 2006 [ " Yeager Aff. " ].

7. Affidavit of William White sworn to January 5, 2006 [ " White Aff. " ].

8. Simon Aff. at para. 4.

9. The Plaintiff appears to operate an " educational program " [ Simon Aff. at para. 9 ], or " sponsor(s) " an educational Program [ Simon Aff. at para. 11 ] is somehow " related ( to a ) Yeshiva in Woodbridge, New York " [ Simon Aff. at para. 10 ] and gives " Religious services, counseling and religious instruction " [ Simon Aff. at Ex. C ].

10. See e.g., Congregation Or Yosef v. Assessor of the Town of Ramapo, 2006 NY Slip Op 51828 Rockland Sup. 2006 )( " The Congregation was organized as a religious corporation, the Certificate of Incorporation of which provides " SECOND: The purposes for which this corporation is formed are...(a) To conduct and maintain a House of Worship in accordance with orthodox Jewish custom and traditions, (b) To promote the religious, intellectual, moral and social welfare among its members and their families, © To promote and increase interest in the study of the Torah, by maintaining classes for the teaching

of the customs, traditions and mode of worship of the orthodox Jewish faith...FIFTH: The principal place of worship of the corporation shall be located...at 32 College Road, Monsey, New York " )].

11. Simon Aff. at Ex. C [ Application For Real Property Tax Exemption For Nonprofit Organizations ].

12. Id.

13. Simon Aff. at Exs. F & G.

14. Simon Aff. at para 8(a).

15. Simon Aff. at Ex. G.

16. Simon Aff. at Ex. F.

17. Simon Aff. at para. 11.

18. Simon Aff. at Ex. C.

19. Simon Aff. at Ex. H.

20. White Aff. at para. 3.

21. See also: Otrada, Inc. v. Assessor of the Town of Ramapo, 9 Misc. 3d 1116 ( Rockland Sup. 2005 )( 100% tax exemption restored to American Russian Aid Association ), reargument granted 11 Misc. 3d 1058 ( Rockland Sup. 2006 ); Matter of Salvation & Praise Deliverance v. The City of Poughkeepsie, 6 Misc. 3d 1021 ( Dutchess Sup. 2005 )( Bar claim action granted; Article 7 petition moot ); Matter of Adult Home At Erie Station, Inc. v. Assessor of City of Middletown, 8 Misc. 3d 1010(A) ( Orange Sup. 2005 )( not-for-profit adult home not tax exempt ); Matter of Miriam Osborn Memorial Home Association v. The City of Rye, 6 Misc. 3d 1035(A)( West. Sup. 2005 )( discussion of the burden of proof of " charitable " use and " hospital " use tax exemptions ).