Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D17002
C/kmg

_____AD3d_____ Argued - October 25, 2007

HOWARD MILLER, J.P.
ROBERT A. LIFSON
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY, JJ.

2006-01725 DECISION & ORDER

City of New York, et al., plaintiffs-counterclaim-defendants-appellants-respondents, v Abundant Life Alliance Church of New York, respondent-appellant, et al., defendants, New York City Planning Commission, et al., additional defendants on the counterclaims-appellants-respondents.

(Index No. 8151/03)

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Leonard Koerner, Stephen J. McGrath, Robin Green, and Alan Beckoff of counsel), for plaintiffs-counterclaim-defendants-appellants-respondents and additional defendants on the counterclaims-appellants-respondents.

Epstein Becker & Green, New York, N.Y. (Ralph Berman and Adrian Zuckerman of counsel), and Patrick W. Jones, P.C., Great Neck, N.Y., for respondent-appellant (one brief filed).

In an action, inter alia, for a judgment declaring that the use of premises located at 15-19 132nd Street, College Point, New York, by the defendant Abundant Life Alliance Church of New York as a house of worship violated certain restrictive covenants, the plaintiffs-counterclaim-defendants, City of New York and New York City Economic Development Corporation, and the additional defendants on the counterclaims, the New York City Planning Commission and the New York City Department of City Planning appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Kelly, J.), dated December 21, 2005, as granted those branches of the motion of the defendant Abundant Life Alliance Church of New York which were for summary

judgment dismissing the complaint insofar as asserted against it and on so much of its counterclaims as sought an order directing the additional defendants on the counterclaims, the New York City Planning Commission and the New York City Department of City Planning, to certify its land use review application as complete and to process the application, and the defendant Abundant Life Alliance Church of New York cross-appeals, as limited by its notice of cross appeal and brief, from so much of the order as, sua sponte, in effect, directed the dismissal of its remaining counterclaims as premature.

ORDERED that on the court's own motion, the notice of cross appeal from so much of the order as, sua sponte, in effect, directed the dismissal of the remaining counterclaims of the defendant Abundant Life Alliance Church of New York as premature is treated as an application for leave to cross-appeal from that portion of the order, and leave to cross-appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is modified, on the law, by deleting the provisions thereof granting that branch of the motion of the defendant Abundant Life Alliance Church of New York which was for summary judgment dismissing the complaint insofar as asserted against it and, sua sponte, in effect, directed the dismissal of its remaining counterclaims as premature, and substituting therefor a provision denying that branch of its motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The defendant Abundant Life Alliance Church of New York (hereinafter Abundant Life) failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it (*see* CPLR 3212[b]; *Weingrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 854). Thus, the Supreme Court should have denied that branch of the motion of the defendant Abundant Life which was for summary judgment dismissing the complaint insofar as asserted against it and should not have, sua sponte, in effect, directed the dismissal of the remaining counterclaims of the defendant Abundant Life as premature.

The parties' remaining contentions are without merit.

MILLER, J.P., LIFSON, ANGIOLILLO and McCARTHY, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court