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

D34993
W/kmb

_____AD3d_____ Argued - March 26, 2012

ARIEL E. BELEN, J.P.
L. PRISCILLA HALL
PLUMMER E. LOTT
LEONARD B. AUSTIN, JJ.

2010-08606 DECISION & ORDER

Wilmos Friedman, et al., plaintiffs, v CYL Cemetery, Inc., et al., defendants/cross claim defendants-respondents, Congregation Yetev Lev D'Satmar, Inc., defendant/cross claim plaintiff-appellant, et al., defendant/cross claim plaintiff, et al., defendants; Berl Friedman, et al., additional cross claim defendants-respondents.

(Index No. 8208/09)

Smith Campbell, LLP, New York, N.Y. (David S. Smith of counsel), for defendant/cross claim plaintiff-appellant.

Tarshis, Catania, Liberth, Mahon & Milligram, PLLC, Kravet & Vogel, LLP, and Fischer & Fischer (Mischel & Horn, P.C., New York, N.Y. [Scott T. Horn], of counsel), for defendants/cross claim defendants-respondents and additional cross claim defendants-respondents (one brief filed).

In an action, inter alia, to permanently enjoin the defendants from directly or indirectly interfering with the plaintiffs' rights under certain certificates issued by Congregation Yetev Lev D'Satmar, Inc., regarding burial in the Kiryas Joel Cemetery, the defendant/cross claim plaintiff Congregation Yetev Lev D'Satmar, Inc., appeals, as limited by its brief, from so much of an amended order of the Supreme Court, Orange County (Alfieri, Jr., J.), dated July 27, 2010, as granted those branches of the motion of the defendants/cross claim defendants CYL Cemetery, Inc., Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., Central Congregation Yetev Lev D'Satmar, Inc., Joseph Weiss, and David Markowitz, and the additional cross claim defendants Berl Friedman, Isaac Rosenberg, David Hauer, and Samuel Oberlander, which were to compel arbitration of its cross claims against the defendants/cross claim defendants and the additional cross claim defendants, stay

the action while the arbitration is pending, and submit the dispute for arbitration before a certain Rabbinical Court or to any other Rabbinical Court as mutually agreed upon by the parties.

ORDERED that the amended order is reversed insofar as appealed from, on the law, with costs, and those branches of the motion of the defendants/cross claim defendants CYL Cemetery, Inc., Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., Central Congregation Yetev Lev D'Satmar, Inc., Joseph Weiss, and David Markowitz and the additional cross claim defendants Berl Friedman, Isaac Rosenberg, David Hauer, and Samuel Oberlander which were to compel arbitration of the cross claims asserted against the defendants/cross claim defendants and the additional cross claim defendants, stay the action while the arbitration is pending, and submit the dispute for arbitration before a certain Rabbinical Court or to any other Rabbinical Court as mutually agreed upon by the parties are denied.

Contrary to the Supreme Court's determination, the defendants/cross claim defendants CYL Cemetery, Inc., Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., Central Congregation Yetev Lev D'Satmar, Inc., Joseph Weiss, and David Markowitz and the additional cross claim defendants Berl Friedman, Isaac Rosenberg, David Hauer, and Samuel Oberlander (hereinafter collectively the respondents), waived any right they had to arbitrate by actively participating in the litigation (*see Sherrill v Grayco Bldrs.*, 64 NY2d 261, 272-273; *Accessory Corp. v Capco Wai Shing, LLC*, 39 AD3d 344, 345; *St. Paul Travelers Cos., Inc. v Joseph Mauro & Son, Inc.*, 36 AD3d 891, 892). The respondents failed to raise their purported right to arbitration as a defense in their answers, and thereafter moved for a change of venue, sought discovery, participated in preliminary conferences, moved to dismiss the cross claims, and waited more than one year after the interposition of the cross claims and more than eight months after the service of their answers to move to compel arbitration. This conduct was "'clearly inconsistent with [their] later claim that the parties were obligated to settle their differences by arbitration'" (*Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66, quoting *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 372).

In light of our determination, we need not reach the parties' remaining contentions.

BELEN, J.P., HALL, LOTT and AUSTIN, JJ., concur.

ENTER:

Aprilanne Agostino
Clerk of the Court