

**Loren v Arbittier**

2016 NY Slip Op 31914(U)

October 11, 2016

Supreme Court, New York County

Docket Number: 162631/2015

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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LISA LOREN, etc.

Plaintiff

Index No. 162631/2015

v

DECISION AND ORDER

JERRY ARBITTIER, etc., et al.

MOT. SEQ. 002

Defendants.

-----X

BANNON, J.:

I. INTRODUCTION

This is an action by a congregant of a Jewish synagogue to recover damages arising from the determination of the synagogue's board of trustees (the board) not to renew the contract of its rabbi, for a judgment declaring that the board violated plaintiff's rights as a congregant, and for a permanent injunction, inter alia, removing defendants as members of the board. Defendants move pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that plaintiff lacks standing to prosecute the action (CPLR 3211[a][3]), the complaint fails to state a cause of action (CPLR 3211[a][7]), documentary evidence establishes a complete defense to the action (CPLR 3211[a][1]), and the members of the board are immune from liability pursuant to N-PCL 720-a (CPLR 3211[a][11]). Plaintiff opposes the motion. The court grants those branches of the motion which are to

dismiss the fourth cause of action, which seeks to recover damages for prima facie tort, so much of the fifth cause of action as seeks to remove the members of the board, and the demand for punitive damages, and denies the remainder of the motion.

## II. BACKGROUND

Plaintiff, Lisa Loren, is a member in good standing of defendant Congregation B'nai Israel of New York (the congregation), a religious corporation organized under the Religious Corporations Law. Pursuant to a written agreement dated October 23, 2009, the congregation retained Chava Koster as its rabbi, with a term of employment from July 1, 2009, through June 30, 2016. Pursuant to the agreement, Koster's responsibilities included conducting religious services, officiating at life-cycle events, working with the congregation's education committee, communicating with the members of the congregation, and supporting lay leadership within the congregation. The agreement permitted the congregation to terminate Koster's employment prior to the end of the term of employment for cause, defined as "the reasonable and good faith determination of the Temple that the Rabbi . . . has failed, either willfully or negligently, to perform the duties described in [the] Agreement following written notice specifying in detail

the deficiencies in performance and reasonable opportunity to improve." The agreement provided that review of Koster's performance would be undertaken in accordance with guidelines promulgated by the National Commission on Rabbinical-Congregational Relationships (NCRCR).

The complaint alleges that, in November 2014, the board promised Koster that it would evaluate whether to renew the agreement and thereupon extend her term of employment, but would wait until eight months prior to the end of the term before taking any steps in that regard. The complaint further alleges that, during the summer of 2015, the board began to gather information necessary to review Koster's performance, a process that had not previously been undertaken, and that it applied its own methodology and criteria when conducting that review, rather than those articulated by the NCRCR. The complaint also asserts that the board failed to consult with Koster for the purposes of obtaining her feedback and identifying those areas of her performance that needed improvement.

Plaintiff asserts that the amended and restated constitution and by-laws of the congregation (the by-laws) authorize the board to "employ all necessary personnel, fix their duties and compensation, and to remove them as employees, except that it shall have no power to engage, remove or fix the compensation of the Rabbi, which power shall be in the Congregation at large."

The by-laws further provide that persons may become "members in good standing" of the congregation after being elected to membership by the board and timely paying their dues. She alleges that members in good standing are entitled to vote at any general or special meeting of the congregation. The by-laws further provide that special meetings of the congregation may be called by the president of the congregation, the board, or upon the written request of 25 members in good standing of the congregation, and that a notice of a special meeting must be given to each member of the congregation at least 10, and no more than 60, days prior to the meeting.

The complaint alleges that, on October 20, 2015, the board discussed Koster's employment with her, and determined on October 21, 2015, not to renew her employment. According to the complaint, the board pressured Koster to contact members of the congregation in order to request them to withdraw any opposition to its plan to terminate her employment, but to refrain from contacting them for any other reason. The complaint asserts that, shortly thereafter, the board, during a regularly scheduled monthly meeting, formally voted not to renew Koster's employment agreement. The complaint further alleges that, in response to plaintiff's entreaties and those of other congregants, the board, by notice dated December 7, 2015, convened a special meeting of the congregation to be conducted on December 15, 2015, for the

purpose of permitting congregants voice their opinions as to Koster's continued employment, but that the notice provided less than the 10 days required by the by-laws. According to plaintiff, the notice expressly precluded the members of the congregation from voting on the issue of whether to renew Koster's employment agreement, the board never intended to permit the members of the congregation to determine or have input into the decision of whether to renew Koster's employment agreement, and the board employed threats and intimidation to achieve its goal of nonrenewal. Plaintiff asserts that the board's conduct in connection with Koster's employment usurped the congregation's rightful function, and damaged her individual membership interest in the congregation, as well as the interest of the congregation at large.

Plaintiff commenced this action against the members of the board, seeking compensatory and punitive damages, as well as declaratory and injunctive relief.

The complaint alleges five causes of action. The first cause of action alleges that the board violated Religious Corporations Law §§ 5 and 200, which limit the power of a board of a religious corporation in connection with the employment and renewal of the employment of a spiritual leader. That cause of action seeks unspecified compensatory damages. The second cause of action alleges that the board's conduct was arbitrary and

capricious and violated the congregation's by-laws, and also seeks unspecified compensatory damages. The third cause of action alleges that the board, by its conduct, breached its fiduciary duty to the members of the congregation, and demands unspecified compensatory damages. The fourth cause of action alleges that the board committed a prima facie tort by intentionally acting to inflict harm upon plaintiff and others supporting Koster's employment, and seeks unspecified compensatory damages. The fifth cause of actions seeks a judgment declaring that the board members violated their fiduciary responsibilities to the congregation and plaintiff's right as a congregant, and a permanent injunction both preventing them from engaging in similar conduct in the future and removing them from their positions as members of the board. The complaint also demands punitive damages and an award of an attorney's fee.

Defendants move pursuant to CPLR 3211(a) to dismiss the complaint on the grounds that plaintiff lacks standing to prosecute the action (CPLR 3211[a][3]), the complaint fails to state a cause of action (CPLR 3211[a][7]), documentary evidence provides a complete defense to the action (CPLR 3211[a][1]), and members of the board are immune from personal liability pursuant to N-PCL 720-a (CPLR 3211[a][11]).

### III. DISCUSSION

#### A. Standing To Sue

Standing to sue requires an interest in the claim at issue in the action that the law will recognize as a sufficient predicate for determining the issue at the litigant's request. See New York State Assn. of Nurse Anesthetists v Novello, 2 NY3d 207, 211 (2004). Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria. See Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 (1991); see also Warth v Seldin, 422 US 490, 498 (1975). As the Court of Appeals explained it, a plaintiff, in order to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. See Matter of Fritz v Huntington Hosp., 39 NY2d 339, 346 (1976). This familiar two-part test requires a plaintiff first to establish that he or she will actually be harmed by the challenged action, and that the injury is more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision or recognized common-law relationship pursuant to which a defendant has acted. See New York State Assn. of Nurse Anesthetists v Novello, supra at 211;

Mahoney v Pataki, 98 NY2d 45, 52 (2002); Society of Plastics Indus. v County of Suffolk, *supra*, at 773; Matter of Colella v Board of Assessors, 95 NY2d 401, 409-410 (2000); People of State of N.Y. v Grasso, 54 AD3d 180, 190 (1<sup>st</sup> Dept 2008).

Plaintiff is a member in good standing of the congregation, which, by its very nature, is a membership organization. Plaintiff seeks to hold the board responsible for its failure to comply with both Religious Corporations Law §§ 5 and 200, as well as its by-laws. In accordance with those statutes and the by-laws, the members of the congregation have rights that may not be usurped by the board, such as the right to vote on whether a rabbi is hired, fired, or retained. See Kamchi v Weissman, 125 AD3d 142 (2<sup>nd</sup> Dept 2014). Accordingly, plaintiff's interest as a member of the congregation would be adversely affected were the board to usurp the functions of the congregation. Hence, plaintiff has standing to assert the causes of action set forth in the complaint. See generally *id.*; cf. Blaudziunas v Egan, 74 AD3d 697 (1<sup>st</sup> Dept 2010), *affd* 18 NY3d 275 (2011).

#### B. Failure To State A Cause of Action

When assessing the adequacy of a complaint in the context of a CPLR 3211(a)(7) motion to dismiss, the court's role is "to determine whether plaintiffs' pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144,

151-152 (2002). To determine whether a complaint adequately states a cause of action, the court must "liberally construe the complaint," accept the facts alleged in it as true, and accord the plaintiff "the benefit of every possible favorable inference." Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881, 887 (2013); Simkin v Blank, 19 NY3d 46, 52 (2012); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Romanello v Intesa Sanpaolo, S.p.A., supra, at 887; Leon v Martinez, 84 NY2d 83, 87 (1994); Guggenheimer v Ginzburg, 43 NY2d 268 275 (1977).

"A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)." Sokol v Leader, 74 AD3d 1180, 1181 (2<sup>nd</sup> Dept 2010); see CPLR 3211(c). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.'" Sokol v Leader, supra, at 1181-1182, quoting Guggenheimer v Ginzburg, supra, at 275 (1977). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [plaintiff] has no cause of action." Sokol v

Leader, supra, at 1182 (internal quotation marks omitted).

"Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" Id., quoting Guggenheimer v Ginzburg, supra, at 275.

1. Violation of the Religious Corporations Law and By-Laws

The court notes that there is no applicable First Department precedent addressing the question of whether a congregant may assert a cause of action against members of the board of directors of a religious corporation, based on alleged violations of the Religious Corporations Law or the corporation's by-laws regulating the retention of the congregation's spiritual leader. Accordingly, this court is bound to apply the precedent established in this regard by the appellate division in another judicial department until a contrary rule is established by the First Department or by the Court of Appeals. See D'Alessandro v Carro, 123 AD3d 1, 6 (1<sup>st</sup> Dept 2014). Since the only appellate division precedent in this regard was articulated by the Second Department in Kamchi v Weissman, supra (125 AD3d 142 [2<sup>nd</sup> Dept 2014]), this court is bound to apply it.

In Kamchi, the Second Department was asked to address a situation remarkably similar to that underpinning the instant

matter. There, several members of the congregation of a Jewish synagogue commenced an action against the congregation's board of directors, challenging the board's failure to renew the contract of the congregation's rabbi in the absence of approval by the members of the congregation. There, as here, the by-laws of the congregation provided that the power to hire and fire the rabbi was retained by the congregation at large, and not delegated to the board. There, as here, members of the congregation called for a congregation-wide vote on whether to renew a rabbi's employment agreement. There, as here, the board allegedly noticed a meeting that purported to limit the agenda to informational matters, and expressly precluded the members of the congregation from voting on the issue of the rabbi's continued or extended employment.

The board in Kamchi argued, as does the board here, that the complaint failed to state a cause of action. In a detailed opinion by Justice Dickerson, the Second Department analyzed the history and purpose of Religious Corporations Law §§ 5 and 200, and the interplay of those statutes with the by-laws of the subject congregation, and concluded that the plaintiffs stated a cause of action alleging violation of the statutes and by-laws.

"The primary purpose of the Religious Corporations Law is to provide an orderly method for the administration of the property and temporalities dedicated to the use of religious groups, and

to preserve them from exploitation by those who might divert them from the true beneficiaries of the corporate trust." Morris v Scribner, 69 NY2d 418, 423 (1987); see Saint Nicholas Cathedral of Russian Orthodox Church in N. Am. v Kedroff, 302 NY 1 (1950). In Kamchi, as in the instant dispute, "[a]n allegation essential to much of the plaintiff['s] action is that the defendants violated [the] Religious Corporations Law, as well as the Congregation's bylaws." Kamchi, at 151.

Religious Corporations Law § 5 articulates the general powers and of a board of trustees of a religious corporation (see Morris v Scribner, supra, at 423), and provides that by-laws may be adopted or amended by a two-thirds vote of the qualified voters present and voting at the meeting for incorporation or at any subsequent meeting. In relevant part, section 5 provides that "by-laws thus adopted or amended shall control the action of the trustees. But this section does not give to the trustees of an incorporated church, any control over the calling, settlement, dismissal or removal of its minister, or the fixing of his [or her] salary." Religious Corporations Law § 200 provides:

"A corporate meeting of an incorporated church, whose trustees are elective as such, may give directions, not inconsistent with law, as to the manner in which any of the temporal affairs of the church shall be administered by the trustees thereof; and such directions shall be followed by the trustees. The trustees of an incorporated church to which this article is applicable, shall have no power to settle or remove or fix the salary of the minister, or without the consent of a corporate meeting, to incur debts

beyond what is necessary for the care of the property of the corporation; or to fix or [change] the time, nature or order of the public or social worship of such church, except when such trustees are also the spiritual officers of such church."

As the Second Department construed the two statutes, board members have "no power to settle, or hire," the rabbi; "they have no power to remove, or terminate the engagement of," the rabbi; and, finally, "they have no power to fix the salary of" the rabbi. Kamchi, at 153. Moreover, a determination not to renew a rabbi's employment is the equivalent of the removal or termination of the engagement of the rabbi. See id. Accordingly, plaintiff has a cause of action alleging that the board violated Religious Corporations Law §§ 5 and 200 by unilaterally determining not to renew Koster's employment, thus usurping the rightful, exclusive authority of the congregation to make that determination. See id.; Watt Samakki Dhammikaram, Inc. v Thenjitto, 166 Misc 2d 16, 20 (Sup Ct, Kings County 1995); Zimblor v Felber, 111 Misc 2d 867, 880-881 (Sup Ct, Queens County 1981); Kupperman v Congregation Nusach Sfard of The Bronx, 39 Misc 2d 107, 113 (Sup Ct, Bronx County 1963).

For the same reasons, plaintiff has a cause of action alleging that the board violated the by-laws, which, insofar as they address the right to renew or terminate a rabbi's employment and engagement, essentially mirror the division of powers between the congregation and the board articulated in the Religious

Corporations Law. See Kamchi, supra, at 155-156.

Accordingly, the first and second causes of action state a cause of action.

## 2. Breach of Fiduciary Duty

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." Deblinger v Sani-Pine Prods. Co., Inc., 107 AD3d 659, 660 (2<sup>nd</sup> Dept 2013); see Stortini v. Pollis, 138 AD3d 977 978-979 (2<sup>nd</sup> Dept 2016); Matter of JPMorgan Chase Bank N.A., 122 AD3d 1274 1277 (4<sup>th</sup> Dept 2012). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. See CPLR 3016(b).

While a cause of action alleging a breach of fiduciary duty may not be asserted in the context of a dispute over church governance between different levels of a church hierarchy (see Upstate N.Y. Synod of Evangelical Lutheran Church in Am. v Christ Evangelical Lutheran Church of Buffalo, 185 AD2d 693, 694 [4<sup>th</sup> Dept 1992]), there is no similar limitation where the issue involves neutral principles of law, simple questions of statutory construction, or the interpretation of unambiguous corporate by-laws. See Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana, 9 NY3d 282, 286 (2007). The "neutral principles of law"

approach requires the court to apply objective, well-established principles of secular law to the issues. See First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am., 62 NY2d 110 119-120 (1984). In doing so, courts may rely upon internal documents, such as a congregation's by-laws, but only if those documents do not require interpretation of ecclesiastical doctrine. Thus, judicial involvement is permitted when the case can be "decided solely upon the application of neutral principles of . . . law, without reference to any religious principle." Avitzur v Avitzur, 58 NY2d 108, 115 (1983).

With certain exceptions not applicable here, Religious Corporations Law § 2-b makes the provisions of the Not-for-Profit Corporation Law applicable to religious corporations. N-PCL 717(a) provides, in relevant part, that "[d]irectors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men [and women] would exercise under similar circumstances in like positions." Thus, the members of a board of directors of a not-for-profit corporation, including a religious corporation, have a statutorily defined fiduciary duty to act in good faith, and may not engage in conduct detrimental to the corporation for the purpose of perpetuating themselves in office or exercising control over aspects of corporate governance that are duly dedicated to other bodies or persons. See generally Fitzgerald v National Rifle Assoc. of Am., 383 F Supp

162, 165-166 (D NJ 1974) (applying N-PCL 717[a]).

Accordingly, in connection with the third cause of action, plaintiff has a cause of action alleging that the members of the board breached their fiduciary duty to her, as a member of the congregation, by failing to act in good faith when it usurped her right to vote as a congregant on the issue of Koster's continued employment.

### 3. Prima Facie Tort

To state a legally cognizable claim for prima facie tort, a plaintiff must allege "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." Freihofer v Hearst Corp., 65 NY2d 135, 142-143 (1985). "Special damages consist of the loss of something having economic or pecuniary value, which must flow directly from" the wrongful conduct. Franklin v Daily Holdings, Inc., 135 AD3d 87, 93 (1<sup>st</sup> Dept 2015), quoting Agnant v Shakur, 30 F Supp 2d 420, 426 (SD NY 1998). In addition, there can be no recovery under this theory "unless malevolence is the sole motive for defendant's otherwise lawful act or, in [other words], unless defendant acts from disinterested malevolence." Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 333 (1983) (internal quotation marks and citations omitted); see Posner v Lewis, 18 NY3d 566, 570 n 1 (2012).

While a liberal reading of the complaint reveals that plaintiff alleges that the board intentionally inflicted harm upon her, there is no allegation of special damages, and no allegation that disinterested malevolence was the sole motivation of the members of the board, let alone that the conduct complained of was otherwise lawful. Rather, the gravamen of the complaint is that the members of the board engaged in the challenged conduct in order to usurp the congregation's authority, not solely to inflict harm upon plaintiff or other congregants. Moreover, plaintiff's allegations make clear that the challenged conduct was not otherwise lawful, but instead violative of the Religious Corporations Law and the by-laws.

Accordingly, the fourth cause of action fails to state a cause of action, and must be dismissed.

#### 4. Declaratory and Injunctive Relief

"A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration.'" Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, 87 AD3d 1148, 1150 (2<sup>nd</sup> Dept 2011), quoting Staver Co. v Skrobisch, 144 AD2d 449, 450 (2<sup>nd</sup> Dept 1988). "Thus, 'where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and

other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied.'" DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 AD3d 725, 728 (2<sup>nd</sup> Dept 2013), quoting Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, supra, at 1150. Generally, a court may not summarily determine the merits of a properly pleaded declaratory judgment cause of action based on the pleadings alone. See Matter of 24 Franklin Ave. R.E. Corp. v Heaship, 74 AD3d 980, 980-981 (2<sup>nd</sup> Dept 2010). Nonetheless, a court may reach "the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where 'no questions of fact are presented [by the controversy].'" Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, supra, at 1150, quoting Hoffman v City of Syracuse, 2 NY2d 484, 487 (1957); see Minovici v Belkin BV, 109 AD3d 520 524 (2<sup>nd</sup> Dept 2013). Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly." Siegel, NY Prac § 440 [5th ed]; see Lanza v Wagner, 11 NY2d 317, 334 (1962); Minovici v Belkin BV, supra, at 524; Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, supra, at 1150).

Here, defendants are not entitled to such a declaration. However, the record is insufficient at this juncture to permit the court to make the opposite declaration, as it is unclear as

to whether there are disputed factual issues concerning the parties' rights and obligations under the Religious Corporations Law or the by-laws, or whether the congregation was properly provided with the opportunity to vote to determine Koster's employment status. The allegations are nonetheless sufficient to state a cause of action for a judgment declaring that plaintiff's rights were violated and that the board breached its fiduciary duty to her and other congregants by virtue of its conduct. Similarly, so much of the fifth cause of action as sought permanent injunctive relief prohibiting the board from unilaterally determining the employment status of the congregation's rabbi states a cause of action.

Conversely, the portion of the fifth cause of action which seeks removal of the current members of the board fails to state a cause of action. The detailed provisions of Article IX of the by-laws provide the exclusive means for removing members of the board based on conduct prejudicial to the interests or welfare of the congregation, although any determination made in accordance with that procedure is subject to subsequent judicial review after internal remedies are exhausted. See generally Matter of Nazir v. Charge & Ride, Inc., 95 AD3d 1215, 1216 (2<sup>nd</sup> Dept 2012). That article requires the preferment of written charges and specifications to the board itself, signed by at least 10 members of the congregation, the board's appointment of 3 board members to a committee to investigate the charges, an investigation, and

the preparation and filing of a report of the investigation. A majority of the board present may then vote either to dismiss the member or conduct a hearing on 30 days written notice, and the board member who is the subject of the charges may thereafter only be dismissed upon the vote of two-thirds of the congregation. Although it is possible that each and every member of the board might ultimately be subject to such charges in the instant dispute, the court is without power at this stage of the litigation to entertain a demand that all board members be removed from office where plaintiff has not availed herself of the procedures for removal articulated in the by-laws.

#### C. Defense Founded On Documentary Evidence

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 87-88 (1994); see Ellington v EMI Music, Inc., 24 NY3d 239 249 (2014); Heaney v Purdy, 29 NY2d 157 (1971). Here, defendants have not submitted documentary evidence that conclusively establishes a defense to the action. Indeed, the documents submitted support the facial validity of the first, second, and third causes of action, and most of the fifth cause of action. Accordingly, the complaint may not be dismissed pursuant to CPLR 3211(a)(1).

#### D. Qualified Immunity

N-PCL 720-a provides, in pertinent part, and with exceptions not relevant here, that "no person serving without compensation as a director, officer or trustee of a corporation, association, organization or trust described in section 501(c)(3) of the United States internal revenue code shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such director, officer or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability." Thus, N-PCL 720-a "confers a qualified immunity on uncompensated directors, officers, and trustees of certain not-for-profit corporations." Samide v Roman Catholic Diocese of Brooklyn, 5 AD3d 463, 465 (2<sup>nd</sup> Dept 2004); see Kamchi v Weissman, supra, 125 AD3d at 160-161; Norment v Interfaith Ctr. of N.Y., 98 AD3d 955, 956 (2<sup>nd</sup> Dept 2012). On a motion pursuant to CPLR 3211(a)(11) to dismiss a complaint, based on the assertion of such immunity, the court must first determine whether defendants are entitled to the benefit of N-PCL 720-a immunity, and then determine "whether there is a reasonable probability that the specific conduct of such defendant[ ] alleged constitutes gross negligence or was intended to cause the resulting harm." CPLR 3211(a)(11).

It is not disputed that the defendants are serving, without

compensation, as "director[s], officer[s] or trustee[s] of a corporation, association, organization or trust described in section 501(c)(3) of the United States internal revenue code," and that the wrongs alleged were the result of conduct undertaken in the execution of these roles. With respect to the causes of action which seek money damages based on defendants' conduct in usurping the congregation's authority, the gravamen of the claims are that defendants, in bad faith and with malice, usurped the congregation's authority in refusing to allow the congregation to vote on the issue of Koster's retention. Plaintiffs alleged that defendants refused to allow the congregants to vote on the matter in violation of Religious Corporations Law § 200 and the by-laws, and notwithstanding requests that the congregation be permitted to vote on the matter. In short, essentially all of the allegations involve the intentional infliction of harm by defendants. See Kamchi, supra, at 161. "Unlike the low threshold for defeating a motion to dismiss under other provisions of CPLR 3211, a plaintiff faced with a motion pursuant to CPLR 3211(a)(11) should lay bare proof supporting the alleged grossly negligent or intentional conduct and '[t]he mere possibility that such proof can develop does not suffice to keep the case alive.'" Krackeler Scientific, Inc. v Ordway Research Inst., Inc., 97 AD3d 1083, 1084 (3<sup>rd</sup> Dept 2012) (citation omitted), quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:34a at 55. Given the nature of the specific allegations,

as well as certain undisputed facts in this case, including the board's refusal to allow the congregation to vote notwithstanding several demands, on this record, the court concludes that there is a reasonable probability that plaintiff can establish that the defendants' conduct constituted gross negligence or was intended to cause the resulting harm. See CPLR 3211Z(a)(11); Kamchi, supra, at 162; see also Norment v Interfaith Ctr. of N.Y., supra, at 956.

The court notes that the qualified immunity afforded by N-PCL 720-a is not applicable to the fifth cause of action in the first instance, since that cause of action seeks a declaratory judgment and injunctive relief rather than money damages.

#### E. Punitive Damages

Demands for punitive damages usually arise in the context of intentional torts, and therefore the availability of such damages is often discussed in terms of conduct that is intentional, malicious, and done in bad faith. In other contexts, however, it is well settled that although conduct warranting an award of punitive damages "need not be intentionally harmful," it must "consist of actions which constitute willful or wanton negligence or recklessness." Home Ins. Co. v American Home Prods. Corp., 75 NY2d 196, 204 (1990); see Guariglia v Price Chopper Operating Co., Inc., 38 AD3d 1043 (3<sup>rd</sup> Dept 2007); Gruber v Craig, 208 AD2d 900, 901 (2<sup>nd</sup> Dept

1994). Such wantonly negligent or reckless conduct must be "sufficiently blameworthy," and the award of punitive damages must advance a strong public policy of the State by deterring its future violation. Doe v Roe, 190 AD2d 463, 474-475 (4<sup>th</sup> Dept 1993); see Randi A. J. v. Long Is. Surgi-Center, 46 AD3d 74, 80 (2<sup>nd</sup> Dept 2007). Indeed, as the Court of Appeals has often said, a principal goal of punitive or exemplary damages is to "deter future reprehensible conduct" by the wrongdoer "and others similarly situated." Ross v Louise Wise Servs., Inc., 8 NY3d 478, 479, 489 (2007) (citations omitted); see Zurich Ins. Co. v Shearson Lehman Hutton, 84 NY2d 309, 316 (1994); Soto v State Farm Ins. Co., 83 NY2d 718, 724 (1994). In addition, the award of punitive damages requires "evidence of conduct evinc[ing] a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations." Howard S. v. Lillian S., 62 AD3d 187, 193 (1<sup>st</sup> Dept 2009), quoting Walker v Sheldon, 10 NY2d 401, 405 (1961). The egregiousness of a tortfeasor's conduct, and the corresponding need for deterrence, cannot be made to depend solely on the tortfeasor's intent or bad faith, but must also take into account the importance of the underlying right or public policy jeopardized by the tortfeasor's conduct. See Randi A. J. v Long Is. Surgi-Center, supra, at 82.

The board's conduct, as alleged by plaintiff, involves ultra vires determinations made in contravention of statutes and by-

laws that apportion the powers of religious corporations between congregants and boards of directors. This type of conduct may be improper, but may not be characterized as reprehensible, criminally indifferent, or evincing a high degree of moral turpitude. Nor does it so jeopardize individual rights or conflict with public policy as to warrant an award of punitive damages. See Russian Church of Our Lady of Kazan v Dunkel, 67 Misc 2d 1032, 1061 (Sup Ct, Nassau County 1971).

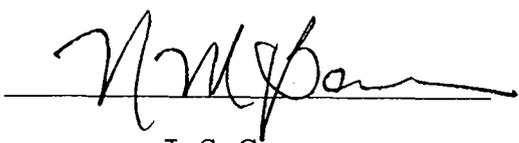
#### IV. CONCLUSION

In light of the foregoing, it is

ORDERED that those branches of defendants' motion which are to dismiss the fourth cause of action, so much of the fifth cause of action as seeks to remove the members of the board, and the demand for punitive damages are granted, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: 10/11/16

ENTER: 

J.S.C.

**HON. NANCY M. BANNON**