Merkos L'Inyonei Chinuch, Inc. v United Lubavitcher Yeshivoth
2003 NY Slip Op 30209(U)
October 29, 2003
Supreme Court, New York County
Docket Number: 30793/02
Judge: Carolyn E. Demarest

At a Commercial Division, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29* day of October, 2003.

P R E S E N T :
HON. CAROLYN E. DEMAREST,
Justice.

. X

MERKOS L'INYONEI CHINUCH, INC., and MACHNE ISRAEL,

Plaintiffs,

DECISION

- against -

Index No.30793/02

UNITED LUBAVITCHER YESHIVOTH,

Defendant.

. . . . . -X

The following papers numbered to read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2,
Opposing Affidavits (Affirmations)	3,4
Reply Affidavits (Affirmations)	5,6
(Affirmations)	
Other Papers Memoranda of Law	7-11

Plaintiffs Merkos L'Inyonei Chinuch, Inc. ("Merkos") and Machne Israel ("Machne") commenced this action for a declaratory judgment, specific performance and injunctive relief alleging an implied-in-fact contract with Defendant United Lubavitcher Yeshivoth ("ULY") to share equally the bequest of Juda L. Weinstock to Defendant. Plaintiffs have moved for partial summary judgment on the issue of liability only, seeking a declaration that such alleged contract is valid, binding and enforceable. Defendant has cross-moved seeking dismissal based upon the statute of limitations and the alleged willful failure to provide discovery and for summary judgment for failure to prove a contract cause of action.

Summary of the Case

Juda Leo Weinstock died on August 12, 1987, leaving a will subscribed May 29, 1985, with a codicil executed February 19, 1987, modifying the designation of his four co-executors and otherwise ratifying the provisions of the May 29, 1985 will, in which his entire estate was bequeathed to Defendant United Lubavitcher Yeshivoth. It is undisputed that, of the four designated executors of Mr. Weinstock's estate, two, Rabbi Yehuda Krinsky and Rabbi Sholom Simpson, represented the Plaintiff entities, and two, Rabbi Hersh Kotlarsky and Rabbi Josef Wineburg, represented Defendant in the management of the assets of the estate'. At the time of Mr. Weinstock's demise, Rabbi Menachem Mendel Schneerson, the "Rebbe" of the international Lubavitch movement and President of both Plaintiffs, and his brother-

'Executors Yehuda Krinsky and Hersh Kotlarsky have submitted affirmations in support of Plaintiffs' motion for summary judgment.

in-law Rabbi Samarius Gourary (the "Rashag"), Executive Director of Defendant ULY, were both living. In February 1989, the Rashag passed away leaving the management of ULY legally in the hands of a nine member Board of Trustees, which included Rabbi Schnejer Zalman Gurary who ultimately became Chairman of the Board of ULY, but actual day to day management was entrusted to various employees and officers who had served under the Rashag and continued to function under the auspices of the Rebbe .

Between Mr. Weinstock's death and the death of the Rebbe in June 1994, distributions were made from the Weinstock estate to both Plaintiffs and Defendant. Following the Rebbe's death, in December 1994, a conflict arose among the various interested parties concerning the proper distribution of the estate. ULY, whose governing Board was by then significantly diminished by attrition, was struggling financially but was unable to access the funds of the estate because of a dispute among the executors regarding Plaintiffs' alleged entitlement to fifty percent of the proceeds.[2] In order to address what had become a crisis situation, in 1997 a new Board of Trustees of ULY was appointed pursuant to § 199 of the Religious Corporations Law by the sole surviving original ULY trustee, Rabbi Schnejer Zalmon Gurary. That Board commenced a proceeding in Surrogate's Court seeking an accounting and distribution of the estate.

In response to an accounting filed in Surrogate's Court at that Court's

---

[2]See history of Surrogate's Court proceeding as recited in decisions of Surrogate Feinberg: Matter of United Lubavitcher Yeshivoth [Will of Judah Leo Weinstock), NYLJ, 9/3/97, p. 25, c.2; Estate of Judah Leo Weinstock, NYLJ, 11/30/98, p.32, c.3; Estate of Judah Leo Weinstock, NYLJ, 4/22/99, p.31, c.6; Estate of Judah Leo Weinstock, NYLJ, 10/2/2000, p.31, c.3.

direction by Executor Hersh J. Kotlarsky, on June 9, 1998, ULY filed objections, specifically taking exception to the distributions to Plaintiffs based upon an "agreement between ULY and Merkos L'Inyonei Chinuch to share amounts received under the Will" (Schedule E to Petition for Judicial Settlement of Account of Executor-Plaintiffs' Exhibit 67 to the Motion for Summary Judgment). The account, representing distributions through January 31, 1998, indicates that a total of $24,334,848.00 was distributed to ULY as beneficiary, of which, between April 10, 1988, and February 9, 1996, $7,397,857.04 was "then" distributed to Machne Israel "by or a; the instruction of ULY. . . pursuant to an agreement between ULY and Merkos L'inyonei Chinuch to share amounts received under the Will" (Schedule E, id.) It is this alleged agreement, characterized by the parties in Hebrew as a "magbis mishutefes" or "joint fundraising", that is the basis of Plaintiffs' claims to be entitled to fifty percent of all assets of the Weinstock estate.

In the course of the litigation before Surrogate Feinberg, representatives of Plaintiff: appeared in the courtroom during a hearing before Special Referee Laurino and the parties were permitted to amend the citation to add Plaintiffs as necessary parties. However, on appeal, the Appellate Division reversed the Surrogate's Court, finding that such Court lacked jurisdiction over the Plaintiffs' claims as creditors against the distributee of an estate pursuant to an agreement with such distributee. Matter of the Estate of Judah L. Weinstock, 283 AD2d 510 (2d Dep't, 2001). Thereafter, this action was commenced on August 6, 2002. The issue before this Court is whether a binding and enforceable contract can be implied from the facts which would entitle Plaintiffs to recover from Defendant beneficiary half of the entire estate of Juda Leo Weinstock.

Applicable Law

It has long been recognized that, even in the absence of written or otherwise overt expression, a true, valid and enforceable implied-in-fact contract may be inferred from the conduct of the parties. Parsa v. State of New York, 64 NY2d 143, 148 (1984); Jemzura v. Jemzura, 36 NY2d 496,503-504 (1975); Miller v. Schloss, 218 NY 400,406 (1916); Wells v. Mann, 45 NY 327, 331 (1871). However, "in order to infer the existence of a contract from the actions of the parties it must appear that they actually intended to form a contract." Matter of Estate of Argersinger, 168 AD2d 757, 758 (3d Dep't, 1990), quoting European American Bank v. Cain, 79 AD2d 1i8, 163 (2d Dep't, 1981). "[A] contract implied in fact contemplates not assurances or promises but conduct." Zimmer v. Town of Brookhaven, 247 AD2d 109, 114 (2d Dep't, 1998), quoting Parsa v. State of New York,supra, 64 NY2d at 148. Although the intent to commit to an agreement may be inferred from the conduct of a party, an enforceable contract implied-in-fact still requires the elements of consideration, mutual assent, legal capacity and legal subject matter. Maas v. Cornell University, 94 NY2d 87 (1999). The burden rests upon the party seeking to enforce the contract to prove the existence and validity of such contract, as well as its terms. Matter of Estate of Argersinger, supra, 168 AD2d at 758.

Procedural History

The Lubavitch movement of the Jewish faith had its origins in the 1700's in

Europe where it was based prior to 1940. In 1940, the headquarters of the movement was moved to the United States by its then leader, Rabbi Joseph Isaac Schneersohn, who was succeeded as "the Rebbe" by his son-in-law, Rabbi Menachem Mendel Schneerson, in 1950. The Lubavitch movement is comprised of numerous organizational entities, three of which are the parties to this lawsuit. Defendant ULY, organized under the Religious Corporations Law in 1954, operates a school system in Brooklyn comprised of four schools covering grades through twelve and a rabbinic seminary. Plaintiff Merkos is a Lubavitch entity with international educational responsibilities and also publishes and distributes educational materials. Merkos was organized as a corporation in 1942 under the Membership Corporations Law, which was replaced by the Not-For-Profit Corporations Law effective September 1, 1970. (L. 1969, c. 1066). Machne serves as the treasury for various international Lubavitcher endeavors, receiving and disbursing funds as needed throughout the movement. According to Plaintiffs, funds intended for Merkos were funneled through Machne. The Rebbe was President of both Plaintiffs prior to his death and exercised complete and unilateral control over the management and dispersal of the resource; of both Merkos and Machne. Rabbi Yehuda Krinsky, who has been employed by Machne since 1957, is presently the Chairman and an officer of both Machne and Merkos. It is further undisputed that Machne has extended loans to ULY which have been repaid.

During the life of the Rebbe, absolute deference was paid to his judgments regarding the allocation of all Lubavitch resources. However, ULY was separately governed, first by the Rashag and, after his death, by Executive Director Schusterman, hired by the remaining members of ULY's Board. When ULY's financial situation became desperate in 1994, efforts were made to access the funds

in the Weinstock estate for operation of ULY's schools. It was then discovered that the estate funds could not be used because Co-executor of the estate Rabbi Yehuda Krinsky claimed a portion of the funds for Merkos and Machne. On December 7, 1994, a letter was sent to Rabbi Krinsky from ULY, signed by five of the six members of ULY's governing "Hanhola" or executive committees, including Co-executors Hirsch Fotlarsky and Josef Wineberg, notifying him that the claims of Merkos and Machne to the proceeds of the Weinstock estate were disputed and that all further distributions from the estate would be suspended pending a resolution by a "Din Torah B'zabl'a." [3] The letter states: "Therefore we are serving you notice herewith that you can not initiate any transactions relating to the estates [sic] assets until this matter is resolved." (Exhibit 3 to Cohen Affirmation of June 26,2003, in Support of Defendant's Motion to Dismiss). No Beth Din was agreed upon however and the "matter" remained unaddressed until Defendant sought relief in the Surrogate's Court.[4]

---

[3]It is acknowledged on both sides that the resolution of disputes between Jewish people must take place before a rabbinical tribunal known as a "Beth Din" and that litigation in the secular courts regarding such disputes is a matter of last resort when all else fails.

[4]In the Surrogate's Court, a dispute exists as to the true membership of ULY's Board. Since early in this case, Attorney David Zaslowsky of the firm Baker and McKenzie has appeared on behalf of co-executors Rabbis Hersh Kotlarsky, Yehuda Krinsky and Josef Wineberg, and Rabbis Shemtov, Lipsker, Lazaroff, Raskin and Levitin who purport to constitute the legitimate Board of Trustees of ULY (Letter to Court from Zaslowsky dated May 2,2003.) In fact, Baker and McKenzie interposed an Answer to the Complaint herein essentially conceding Plaintiffs' claims and affirmatively contending that only a Rabbinic arbitration will be binding on the parties. Consequently, those persons represented by Baker and McKenzie have declined to participate in the instant suit on behalf of ULY, deferring the defense of this action to the firm of Herzfeld and Rubin which represents the Board members described in the Baker and McKenzie Answer as "the Interloper Group". It is this Board that is representing the interests of ULY before this Court. Mr. Zaslowsky has acknowledged, however, on behalf of his clients, that they will be bound by this Court's determination regarding Plaintiffs' claims to a contractual right to share in the Weinstock estate. (Transcript of April 28, 2003, pp. 16-22).

On July 3, 1997, through its newly constituted Board of Trustees headed by Rabbi Schnejer Zalman Gurary as President, ULY filed a petition in Surrogate's Court for an immediate emergency distribution in order to keep the schools open and for an accounting and for distribution to itself, as sole residuary legatee, of the remaining balance of the Weinstock estate. On May 7, 1998, Co-executor Hersh J. Kotlarsky petitioned for Judicial Settlement of Account of Executor. Co-executors Yehuda Krinsky and Josef Wineberg joined in the account, but Sholom M. Simpson did not join in the Kotlarsky petition. Defendant ULY filed objections to the account on June 9, 1998, taking issue with the distributions to Plaintiffs alleged to have been based upon a contract. The Kotlarsky accounting indicated that between August 12, 1987, and January 31, 1998, $24,334,848 had been distributed, of which $7,397,857.04 was distributed directly to Machne Israel. The first such payment to Machne occurred on April 10, 1988, and the last, on February 9, 1996. Plaintiffs were not parties to the Surrogate's Court proceeding and had never filed a claim against the estate. However, when representatives of Plaintiffs appeared at a hearing before him on December 21, 1998, Special Referee Laurino sua **sponte** recommended that they be joined as necessary parties (see Transcript of Hearing to Compel Accounting before Special Referee Louis D. Laurino, 12/21/98), and Surrogate Feinberg confirmed that recommendation on April 16, 1999. Estate of Judah Leo Weinstock, supra, NYLJ, 4/22/99, **p.** 31, c.6, rev'd 283 AD2d 510. When the Appellate Division reversed the joinder of Plaintiffs in the Surrogate's Court proceeding in May, 2001, this action followed.

Findings of Fact and Legal Conclusions

Plaintiffs' claims rest upon an alleged implied-in-fact agreement between themselves and ULY, denominated "magbis mishutefes", to conduct "joint fundraising" for the benefit of the Lubavitch movement. Considerable evidence has been presented that such "joint fundraising" was a common practice among the various components of the Lubavitch movement. It is not clear that "joint fundraising" necessarily applied to all donations or that the parties would necessarily share equally in all cases as Plaintiffs contend. During his life, the Rebbe had unilateral and unquestioned authority to determine the distribution of all of the resource; of the various Lubavitch components, including those of the litigants herein, and apparently frequently directed the transfer of resources from one Lubavitch organization to another. The unilateral acts of the Rebbe in moving Lubavitch resources from ULY to Plaintiffs would not alone support the creation of a binding and enforceable obligation on ULY to share the Weinstock estate with Plaintiffs. However, it is clear from the evidence presented that, prior to Mr. Weinstock's death, ULY agreed to share equally with Merkos all proceeds and all expenses incidental to compliance with the terms of the will dated March 9, 1978, which provided that the funds be used for ULY's "corporate purposes and more particularly to be expended in the State of Israel" including facilities for religious education of children in the city of Safed.

On March 14, 1978, just days after Mr. Weinstock had executed his first will, the Rashag wrote a "Memorandum" in Hebrew on Defendant's letterhead which he signed as "Chairman, Executive Director", in which he expressly references the Weinstock will of March 9, 1978, indicating that Mr. Weinstock "left everything he

had in all locations, in the name of UNITED LUBAVITCHER YESHIVOTH". (Plaintiffs' Exhibit 11 to Motion for Summary Judgment). As officially translated, the Memorandum further states:

> All of what there will be from the above-mentioned will with the Almighty's assistance, half for the central Yeshiva Tomchei Temimim Lubavitch here, and half for Merkos L'Inyonei Chinuch here.
>
> B. In the event there will be a need to construct something in the Holy Land in accordance with the above-mentioned will; in the event we will be required to do the construction then, the two institutions, TTL [Tomchei Temimim Lubavitch] and MLC [Merkos L'Inyonei Chinuch] are obligated to deal with it.
>
> C. And in the event the construction will be done by a third party, then there needs to be an agreement by both parties about it.
>
> D. All expenses necessary in the matter of the above-mentioned will, shall rest upon TTL and MLC equally.

It is noted that Brooklyn-based ULY was not capable of executing fully the testator's directions but necessarily relied upon Merkos' international reach to complete projects in Israel'.

Exhibits submitted by Plaintiffs unequivocally demonstrate that during Mr. Weinstock's life, donations made by him to ULY were divided equally and half was sent on to the Rebbe who was the President of Plaintiffs at the time (Exhibits 33-45 to Plaintiffs' Motion for Summary Judgment). In some of those transmittals the Rashag expressly acknowledged that the donations from Mr. Weinstock were

---

[5] On May 29, 1985, Mr. Weinstock executed a new will which modified some of the earlier donative provisions. The new will did not mention the Safed facilities, but continued to precatorily provide for kindergartens in both the United States and the State of Isreal.

"Magbis Meshutefes." (See, e.g., Exhibit 36, letter of April 11, 1980, from the Rashag to the Rebbe and Exhibits 38, 42, 43,44, 52, and 53.) The last of such donations was made April 16, 1985.

There is also substantial evidence in the correspondence between Nachman Sudak, a Lubavitch representative based in London where Mr. Weinstock was a frequent visitor, and the Rashag and the Rebbe in New York, of a joint effort in securing the donations from Mr. Weinstock and the intent to share the proceeds among various Lubavitch interests. In a letter dated March 16, 1978, the Rashag writes on behalf of both ULY and Merkos enlisting the assistance of Rabbi Sudak in serving Mr. Weinstock's needs when he is in London, indicating that Mr. Weinstock's well-being was "very important" to the interests of both ULY and Merkos (Exhibit 12 to Plaintiffs' Motion for Summary Judgment). That letter specifically acknowledges that Mr. Weinstock had provided for both ULY and Merkos and that together ULY and Merkos were responsible to provide for Mr. Weinstock upon his death.

Following Mr. Weinstock's death, Rabbi Sudak wrote separately to the Rashag and to the "Hanhala", or Administrator, of Merkos requesting that some portion of the estate be contributed to the work of Lubavitch in London based upon Rabbi Sudak's own efforts in securing the entire estate for the Lubavitch movement. In both letters, Rabbi Sudak mentions that Mr. Weinstock intended that his estate be given to the "Central Lubavitch" and the Rebbe who would determine the application of funds, indicating that he had not explained to Mr. Weinstock that there were separate Lubavitch entities because to do so might have discouraged him from leaving the entire estate to Lubavitch. (Exhibits 13, 14 and 15 to Plaintiffs' Motion). As consideration for Rabbi Sudak's efforts, Machne paid the London Lubavitch House

$400,000 in January 1989 and agreed to future sharing of 10 percent of its proceeds of the estate (Exhibit 16), but Defendant ULY insisted that its obligation be determined by a Rabbinical Court. The Rabbinical Court determined that ULY was obligated to pay Rabbi Sudak $375,000, noting that this sum was unrelated to the greater cbligation of Merkos "which got half of the will" (Exhibit 19 to Plaintiffs' Motion: Opinion of Rabbinical Tribunal, June 13, 1989)[6] .

Particularly compelling evidence of the intention of the parties, in light of the undisputed authority of the Rebbe to order all affairs of the Lubavitcher movement, is the Rebbe's handwritten note regarding the Sudak claim to compensation from Merkos n which he advises "To inquire of the Anash Rabbis here [the Rabbinical Tribunal]- how much of the part [of the estate] that will come to the Secretariat [Merkos], because half of the above goes to TT [Tomchei Tmimim a/k/a ULY]" (Exhibit 15 to Plaintiffs' Motion; See Krinsky Affirmation in Support.) The Rabbinical Tribunal's acknowledgment that both Merkos and ULY were indebted to London House in securing the benefits of the Weinstock estate also corroborates the mutuality of obligation between Plaintiffs and Defendant.

Further support for the existence of an enforceable and binding agreement can be found in the documents evidencing payments by Plaintiffs of fifty percent of the costs incurred in securing the benefits of the Weinstock estate. When Mr. Weinstock executed a new will in May 1985, Machne was asked to pay half of the legal fees which had been paid by ULY(Krinsky Affirmation in Support of Plaintiffs' Motion;

---

[6]Defendant takes issue with Plaintiffs' merging of the interests of their separate entities in this litigation but it is apparent that, in the context of the subject of the Weinstock estate, all participants treated Machne and Merkos as one interest. See, e.g., Exhibit **16** (10%paid by Machne to Sudak) and Exhibit **19** (Ruling by Rabbinical Court that Merkos is obligated for 10%).

Exhibit **51).** Machne and ULY also shared the burial expenses for Mr. Weinstock (Krinsky Affirmation in Support of Plaintiffs' Motion, Exhibits **61** and **62).** Shortly after Mr. Weinstock's death, Plaintiffs and Defendant each contributed **$25,000** for the dedication of a building in Israel in Mr. Weinstock's memory (Wineberg Deposition of December **4,2002,** Exhibit **64** to Plaintiffs' Motion). Clearly, Plaintiffs provided substantial consideration to the effort necessary to secure Mr. Weinstock's estate.

Finally, and most compelling, are the statements of the only representative of Defendant ULY with personal knowledge of the facts. Rabbi Schnejer Zalmon Gurary is the current Chairman and President of ULY. He is the only surviving member of the original Board of Trustees of ULY from its incorporation on July **9, 1954,** and, as such, has appointed all the other current Board members. He has acknowledged, by letter and deposition, that the Rashag was Chairman and Executive Director of ULY from its incorporation in **1954** until his death in **1989** and had ultimate authority to make decisions and to bind ULY and that the Rebbe directed all Lubavitcher organizations, including ULY, until his death in **1994.** In his most recent deposition of March **20,2003,** Rabbi Gurary stated he had no knowledge of the arrangement regarding the Weinstock estate, but acknowledged the common practice of magbis mishutefes or "joint appeal" between the Rebbe, as President of Merkos, and ULY in which each would share equally or 50/50 in donations (Exhibits 3**1-32** to Plaintiffs' Motion; see also Exhibit **20).** However, in an "Open Letter" dated June **21, 1998,** addressed to Shmuel Malamud but intended to be read by the entire Lubavitch community (see Exhibit **71** to Plaintiffs' Motion, EBT of January **14,** 2003), Rabbi Gurary, then Chairman of the Board of Trustees of ULY, disclaims his participation in the challenge brought by ULY to the accounting filed by the three

executors of the Weinstock estate and asserts that he does not challenge any disbursements made from the estate prior to 1994 when the Rebbe was living. In this letter he unequivocally states: "only half [of the estate] belongs to The Yeshiva, . . .in the first years (1987-88) this is how the allocation had been. Having been involved in these matters, I hereby attest that only half belongs to the Yeshiva [emphasis added]. . .". He repeats: "I am the chairman, and I was involved in the matter, and I know for certain that the Yeshiva gets only 50% [emphasis added]'' (Exhibit **70** to Plaintiffs' Motion).

Josef Wineburg, one of the executors representing ULY, explained in his deposition of December 4,2002, that ULY and the Rebbe, had "a system" of joint fundraising with respect to certain donors, including Mr. Weinstock. Mr. Wineburg personally participated in these fundraising campaigns, travelling all over the country with members of the Rebbe's staff to solicit funding. Mr. Wineburg further explained that the Rashag knew that certain donors approached him at ULY, not because of ULY, but in the interest of furthering the "Lubavitcher Rebbe's work all over" (Exhibit 78 to Plaintiff's Motion):

> In such cases, we contacted the Rebbe's office and we made a mutual campaign. The same goes with Mr. Weinstock's estate. Mr. Weinstock did not come to the Lubavitcher Yeshivoth as a Yeshivoth, because he wanted things that the Yeshivoth didn't have in the beginning. He went about making the schools for children in Israel and so on. He came because of Lubavitch. Rabbi Gurary [the Rashag] found it necessary to make an agreement with the Rebbe and with Rabbi Hodakov, which was that it immediately put two people in the Rebbe's office and two people from the Yeshivoth [to act as executors]. This was part of it.

Following the Rebbe's death in June 1994, distributions continued to be made to Plaintiffs from the Weinstock estate, but were not equal to those made to ULY. It is apparent, and has been acknowledged by Plaintiffs, that even during the Rebbe's life, distributions were not always equally authorized or divided between Plaintiffs and ULY, but were made based upon need, ULY consistently being in greater need (see Kotlarsky Affirmation in Support of Plaintiffs' Motion). Notwithstanding this practice, however, the evidence presented overwhelmingly establishes the mutual intent of ULY, legally represented by its Executive Director, the Rashag, and Merkos and Machne, legally represented by their President, the Rebbe, to enter into a legally binding contract to share equally in the proceeds and obligations of the estate of Juda L. Weinstock. The consideration for this agreement, evidenced by partial performance over **a** period of nearly ten years (see copies of checks written to Plaintiff Machne from the Estate account, Exhibit 56 to Plaintiffs' Motion), was the mutuality of the parties' reciprocal agreement to jointly solicit donations and share equally the burdens and benefits of their combined investment of resources. See Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88 (1917). There is no legal requirement that the consideration be equivalent from each party. Cf. Spaulding v. Benenati, 57 NY2d 418 (1982).

The totality of the evidence establishes to this Court's satisfaction that although the bequest was to ULY alone, the prestige of the Rebbe and his worldwide resources were critical in securing the bequest from Mr. Weinstock whose intent, as originally expressed in the 1978 will, included the building of facilities in Israel, as well as New York, something ULY was not equipped to do. Merkos was therefore a necessary component to ultimate performance in accordance with Mr. Weinstock's testamentary intent. The affirmation of Ephrem Hecht, the attorney who drafted both

Mr. Weiistock's 1978 and 1985 wills and the 1987 codicil and discussed their contents directly with Mr. Weinstock, confirms the express intent of the Rashag to share the estate "on a 50-50 basis" with Plaintiffs. Mr. Hecht further confirms that Mr. Weinstock provided for four executors in order to "retain the parity of having two ULY executors and two Merkos/Machne executors" in the administration of this estate for the benefit of " Lubavitch" (Hecht Affirmation of July 14,2003 annexed to Plaintiffs' Reply in Support of Motion for Summary Judgment). While Mr. Weinstock's wishes do not control the issue before this Court, his implementation of the plan of the parties here by naming representatives of both ULY and Plaintiffs as co-executors is concrete evidence that such agreement was in accord with his wishes and was meant to be binding.

Defendant's Motion

Defendant has moved to dismiss Plaintiffs' complaint on three grounds: the failure tc sustain their burden of proof as to the existence of a contract; under CPLR § 3126, for willful failure to "make discovery"; and as barred by the Statute of Limitations.

Defendant's principle argument to controvert the overwhelming evidence of an intentional and binding agreement supported by consideration is based upon the uneven distribution of the assets of the Weinstock estate especially during the Rebbe's life. Neither side to this controversy takes issue with anything that was done during the Rebbe's life. All parties concede absolute deference to his judgments in all matters. Defendant submits, however, that the Rebbe's acceptance of unequal distributions indicates the absence of a commitment to the alleged 50/50 sharing.

Such sporadic and occasional inequality in practice cannot, however, overcome the overwhelming evidence that supports a clear intent to ultimately share equally.

Rabbi Menachem Mendel Schneerson exercised control over all assets and all aspects of the various Lubavitch organizations during his life. He left no designated successor to this authority. It is clear from the various documents submitted bearing the Rebbe's handwriting and the signature of the Rashag, who managed the operation of ULY subject only to the Rebbe's authority, that a binding agreement to share equally the assets of the Weinstock estate was intended and that both Plaintiffs and ULY were to service Mr. Weinstock's needs both during his life and, in compliance the terms of his will, following his death. The Rashag's Memorandum of March **14, 1978, can** only be interpreted as an unequivocal acknowledgment of ULY's obligation to Plaintiffs. However, the Rebbe was also the patriarch for all of the parties hereto and, observing the greater and more immediate needs of ULY, had the authority, both in his clerical role as leader of the Lubavitch movement and in his secular legal role as President of Plaintiffs, to defer demand for payment of fifty percent of a particular distribution to a later time. His decision in this regard cannot defeat Plaintiffs' right to demand performance under the agreement before this Court unless the claim was interposed after the running of the statute of limitations. See Phoenix Acquisition Corp. V. Campcare, Inc., **81** NY2d **138 (1993).** That issue will be discussed infra.

Defendant resists the Plaintiffs' motion for partial summary judgment arguing that Plaintiffs have not sustained their burden of proof and that issues of fact remain to be tried. Defendant has failed, however, to adduce competent evidence to support such assertions. The affirmations of Rabbis Eli Cohen and Sholom Gorodetsky, both members of Defendant's current Board formed in **1997** who had no knowledge of the

Weinstock Estate prior to 1996, cannot controvert the overwhelming evidence adduced by Plaintiffs of the intent of the Rashag and the Rebbe, as expressed in numerous documents and as confirmed by participants in the events, to enter into an agreement to share the proceeds of the estate equally. In fact, all six of the individuals whose testimony has been supplied, either by affirmation or deposition, and who have personal and direct knowledge of events surrounding the execution of the Weinstock will- - three of the four executors: Josef Wineberg and Rabbis Yehuda Krinsky and Hersh Kotlarsky; Rabbi Schnejer Zalman Gurary, current President of ULY and a Board member of ULY throughout the time the wills were drafted; Ephrem Hecht who actually met with Rabbi Kotlarsky, the Rashag and Mr. Weinstein and drafted the wills; and Rabbi Nachman Sudak who acted as London agent for both Plaintiffs and Defendant with respect to Mr. Weinstock - - have attested to the general practice of sharing donations among various Lubavitch organizations and corroborste, either directly or circumstantially, that a contract, known as "magbis mishutefes" in Hebrew, had been entered into between the Rebbe, acting for Plaintiffs, and the Rashag, acting for Defendant, to share equally both the proceeds and the obligations of the Weinstock will. Documents created contemporaneously with the events further corroborate this testimony and establish that there was actual performance in accordance with the terms of the agreement. This overwhelming and undisputed evidence is sufficient to sustain Plaintiffs' burden. No competent evidence has been offered to controvert any significant facts. The affirmations of Rabbis Cohen and Gorodetsky are insufficient to defeat Plaintiffs' motion for partial summary judgment. See Spaulding v. Benenati, supra, 57 NY2d at 425; Zuckerman v. City of New York, 49 NY 2d 562 (1980).

As to the allegation that Rabbi Kotlarsky willfully and purposefully failed to respond to interrogatories, such complaint is not sufficiently sustained by the record to warrant the relief requested.

This case first appeared before me on November 21, 2002, upon motions to dismiss and preclude and for a protective order. Those motions were resolved on the record in open court by directing specific depositions on dates certain and other discovery. All discovery in this action was to be available for use in the Surrogate's Court proceeding as well. Thereafter, this Court received letters and telephone conference calls from both sides complaining of obfuscation and lack of co-operation by the other. Several meetings with counsel were held in chambers and in open court to resolve discovery disputes. In late May, 2003, a motion for a Protective Order from Baker and McKenzie to preclude the oral deposition of Rabbi David Raskin ultimately led to the appointment of JHO Margaret Cammer to supervise the deposition and provoked a court order directing Defendant to give Plaintiffs access to documents stored at ULY's premises. The history of discovery in this case is fraught with acrimony and evasion on both sides. Whatever the merits of Defendant's complaints, they do not support the dismissal of the complaint under CPLR § 3126.[7] Kihl v. Pfeiffer, 94 NY2d 118 (1999), upon which Defendant relies, is not factually apposite to the circumstances at bar.

---

[7] See also decisions of Surrogate Feinberg as cited in footnote *2* in which the Judge recites the frustrated efforts to complete discovery before that Court.

Statute of Limitations

As the Appellate Division made clear in reversing the joinder of Plaintiffs in the related Surrogate's Court proceeding, Plaintiffs' suit is premised, not upon the terms of the Weinstock will or the testator's expressed wishes, but upon an alleged contract with Defendant. Plaintiffs have established that they have a contractual right to one half of the proceeds of Mr. Weinstock's estate. The applicable period of limitations is therefore six years. CPLR §213 (2). "In New York, a breach of contract cause of action accrues at the time of the breach". Elv-Cruikshank Co., Inc. v. Bank of Montreal, 81 NY2d 399,402 (1993). As a matter of policy, the statutory period begins to run when liability for a wrong arises even if the wronged party is unaware of the triggering event. Elv-Cruikshank Co., Inc. v. Bank of Montreal, id. at 403. However, no claim could be interposed herein prior to distribution to ULY because Defendant could not have breached the contract until it was actually in possession of the funds and in a position to perform under the agreement. Moreover, the value of the estate has fluctuated significantly since Mr. Weinstock's death. Any assessment of the amount due to Plaintiffs therefore depends on the value of a particular distribution to ULY at the time made. Thus, Plaintiffs' cause of action must be said to have accrued separately as to each distribution to ULY at the time it was made, and the statute of limitations therefore commenced to run on the date of each distribution. See, Phoenix Acquisition Corp. v. Campcare, Inc., supra, 81NY2d 138; Parker v. Town of Clarkstown, 217 AD2d 607 (2d Dep't, 1995); Woodlaurel, Inc. v. Wittman. 199 AD2d 497 (2d Dep't, 1993).

The record establishes that both during Mr. Weinstock's life and in the first few months of the administration of the estate, distributions were routinely shared equally

immediately upon receipt. This practice was later followed only sporadically, however, beginning in September 1988 when the entire distribution to ULY of $2,620,125 was turned over to Plaintiffs (Schedules to Surrogate's Court Accounting-Exhibits 1 and 2 to Cohen Affirmation in Support of Motion to Dismiss). Thereafter, payments to Plaintiffs often did not correspond to distributions received by ULY from the estate. The last payment to Plaintiffs is dated February 9, 1996. By this date, Plaintiffs had been put on notice by the letter of December 7, 1994 to Rabbi Krinsky, Chairman of both Plaintiffs, that a dispute existed regarding their entitlement to share the estate equally with Defendant, the legal residuary legatee. Defendant argues that the date of this letter should be the accrual date for Plaintiffs' entire claim and that this action, instituted on August 6, 2002, must be dismissed in its entirrty as barred by the statute of limitations prescribed in CPLR $213. Alternatively, Defendant argues that the statute of limitations should be deemed to have commenced to run upon the issuance of letters testamentary because it was at that point that the executors acquired control of the assets of the estate and were in a position to make distributions. This argument is unavailing, however, because, as the Appellate Division has implicitly ruled, the Plaintiffs' claim is not against the estate, but against Defendant ULY. Blood v. Kane, 130 NY 177 (1892), and State Bank of Albany v. Kavanaugh, 14 AD2d 175 (2d Dep't, 1961), cited by Defendant in support of its theory, are therefore inapplicable to this case.

While it may be argued that the letter to Executor Krinsky of December 7, 1994, alerted Plaintiffs to Defendant's anticipated breach, that letter was not unequivocal and, since subsequent payments were actually made to Plaintiffs, Plaintiffs had the right to wait until an actual breach, i.e., a failure to pay over fifty percent of a particular distribution, had occurred. Rachmani Corp. v. 9 East 96*

Street Apartment Corp., 211 AD2d 262 (1st Dep't, 1995). In fact, as in Rachmani, in this case, no obligation to pay Plaintiffs arose until ULY received a distribution from the estate. The record before this Court is not adequate to determine exactly when the first breach actually occurred. However, Plaintiffs' claims for fifty percent of distributions made to ULY prior to August 6, 1996, are barred by the six year statute of limitations.

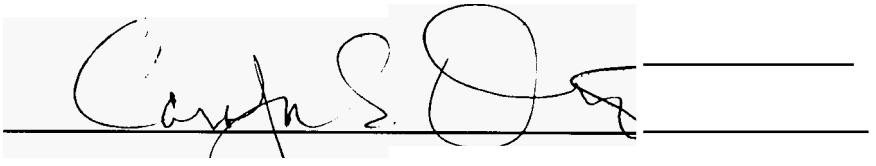
Conclusions

Upon the above analysis of the law as applied to the established facts, Plaintiffs' Motion for Partial Summary Judgment on their first Cause of Action for a Declaration that the agreement between Plaintiffs and Defendant that the proceeds of the Estate of Juda Leo Weinstock would be shared equally constitutes a true, valid, binding and enforceable contract is granted. Defendant's Motion to Dismiss the Complaint is granted as to all claims relating to distributions made from the estate to Defendant prior to August 6, 1996, and is, in all other respects, denied.

The parties are directed to appear before this Court at 10:30 a.m. on November 19, 2003, Courtroom 756, 360 Adams Street, Brooklyn, N.Y. to discuss Plaintiffs' remaining causes of action.

The foregoing constitutes the decision and order of the Court.

E N T E R :



J.S.C.