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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH Justice J.S.C. PART

CONGREGATION KEHILATH

- v -

CHAIM OPHIR

INDEX NO. 600091/03

MOTION DATE 6/17/04

MOTION SEQ. NO. 3

MOTION CAL. NO. 203

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5
Replying Affidavits	6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/Order

FILED

JUL 14 2004

COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/8/04

SHIRLEY WERNER KORNREICH J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

CONGREGATION KEHILATH JESHURUN

Plaintiff, Index No.: 03-600091

- against -

CHAIM OPHIR AND MERIRA OPHIR

Defendants

----------X **DECISION and ORDER**

CHAIM OPHIR AND MERIRA OPHIR

Third-party Plaintiffs,

- against -

HASKEL LOOKSTEIN and
LEONARD SILVERMAN

Third Party Defendants

----------X

KORNREICH, SHIRLEY WERNER, J:,

Plaintiff Congregation Kehliath Jushurun ("plaintiff" or "KJ") moves to dismiss the counterclaims of defendants Chaim Ophir ("Mr. Ophir") and Meira Ophir ("Mrs. Ophir") (collectively "the Ophirs" or "defendants"). C.P.L.R. 3211(1)(5), & (7). Defendants filed two amended counterclaims of fraud against plaintiff and one amended counterclaim of breach of contract. Third-party defendants Haskel Lookstein ("Rabbi Lookstein") and Leonard Silverman ("Mr. Silverman") (collectively "third-party defendants") were both named in the second of these claims of fraud with Rabbi Lookstein also named in the first fraud claim. Additionally, the Ophirs brought an amended counterclaim for intentional infliction of emotional distress against plaintiff and third-party defendants. Finally, an amended claim was brought against third-party

defendants alleging that their acts were *ultra vires* and committed and/or omitted outside the scope of their employment.' Plaintiff argues: 1) the first counterclaim of fraud is barred by the statute of limitations; 2) the Ophirs have not suffered any damages as a result of the alleged fraud, 3) there was no breach of an employment contract since Mr. Ophir was an "at will employee"; 4) the second fraud counterclaim cannot stand since the Ophirs showed neither reliance nor damages and it is inconsistent with their breach of contract counterclaim; and 5) plaintiffs conduct was insufficient to establish intentional infliction of emotional distress.

Facts

KJ is a synagogue in Manhattan and a sponsor of the Ramaz School, an Orthodox Jewish Day School that employed Mr. Ophir as a teacher since approximately 1988. Aff. of Chaim Ophir 72. In November, 1993, plaintiff approached Mr. Ophir to serve as Ritual Director for KJ in addition to his teaching duties at Ramaz, beginning July 1, 1994. Id. ¶5. As compensation, Mr. Ophir would receive an annual salary of $10,000 and rent payment on Apartment 3A at Ruppert Yorkville Towers ("apartment 3A"). Id. ¶6. It is not disputed that Rabbi Rubin, a former employee of KJ, had resided in apartment 3A prior to the Ophirs. Id. 76. Indeed, plaintiff submits a letter, dated June 5, 1989, from Ms. Teresa Tota, Manager of Ruppert Yorkville Towers, confirming that they had been placing employees in the apartment for many years. Aff. in Support of Mot. to Dismiss at Ex. D. Defendants admit that Rabbi Lookstein, principal of Ramaz and Rabbi

[1] Third-party defendants do not move to dismiss any of the claims against them As such, defendants' fifth counterclaim concerning only the third-party defendants will not be considered on this motion. While third-party defendants were not served with a copy of plaintiffs motion to dismiss this would be unnecessary given that plaintiffs lawyer was accepting service for the thud-party defendants. Attorney Aff. in Opp. to Plaintiffs Mot. to Dismiss at Ex. B. Third-party defendants were served with a copy of the complaint against them as well as with a copy of the affirmation in opposition to plaintiffs motion to dismiss (accepted by the attorney for the plaintiff. Id. at Ex. A & B.).

for KJ, aided the Ophirs in securing apartment 3A by arranging an interview with the landlord and writing a letter of reference. Aff. of Chaim Ophir ¶6. However, they allege that, in making the offer of employment, plaintiff and Rabbi Lookstein represented that the Ophirs would have the exclusive right to use, occupy, and reside in the apartment subject only to the terms of the lease entered into with the landlord. Aff. in Support of Mot. to Dismiss at Ex. C 759. According to defendants, such representations continued through 2002. Id. ¶60.

In a letter written by Rabbi Lookstein dated November 29, 1993, he refers to apartment 3A as "his [Mr. whir's] apartment." Aff. of Chaim Ophir at Ex. A. At the end of November or beginning of December, 1993, the Ophirs met with the landlord of the Ruppert Yorkville Towers where they learned that the building was a Mitchell-Lama Housing Development that was supervised by the Housing Preservation and Development Administrator of the City of New York ("HPD") and required its tenants to use their apartments as their principal residence. Id. ¶12. On December 2, 1993, the Ophirs signed a written, three year lease agreement with the landlord for apartment 3A; Chaim and Meira Ophir were listed as the tenants. Id. at Ex B. Defendants claim that, based on these representations, they accepted KJ's offer of employment. Id. ¶8.

Plaintiff disputes that the Ophirs did not know that KJ claimed a legal interest in apartment 3A and, instead, contends that all parties agreed and understood that the Ophirs were merely holding and leasing apartment 3A for the benefit of KJ, who, at all times, would retain a legal interest in the apartment. Aff. in Support of Mot. to Dismiss at Ex. A ¶1. KJ provides a letter dated February 28, 1994, in which Rabbi Lookstein outlined the terms of Mr. Ophir's employment agreement. Id. at Ex. E. In this letter

Rabbi Lookstein referred to apartment **3A** as "the Congregation's apartment". Id. The letter noted that the Ophirs would remain responsible for the rent for the six month period in which they planned to live in apartment **3A** prior to Mr. Ophir commencing his duties at KJ. Id. KJ also provides a series of e-mails sent to Mr. Ophir from June 2001 to August 2002 in which Mr. Silverman, an officer and/or director of KJ (Aff. in support of Mot. to Dismiss at **Ex.** C ¶56), refers to apartment **3A as** "the synagogue's apartment" and "the KJ apartment". Id. at **Ex.** F.

Prior to moving into apartment **3A,** the Ophirs resided in **a** duplex, rent-stabilized apartment. Aff. of Chaim Ophir ¶4. They contend that they left that apartment in order to reside in apartment **3A** based on the representations made by Rabbi Lookstein that apartment 3A would offer them similar protections. Id. ¶8. Between 1994 **and** 2002, the Ophirs signed lease renewals with the landlord (allegedly based on the continued representations of KJ and Rabbi Lookstein that they would maintain exclusive rights to the apartment) **and** received **all** rent bills and correspondence directly from the landlord. Id. at Ex. C, D, & E. During this time, plaintiff made all rent payments on the apartment. Aff. in **Support** of Mot. to Dismiss at **Ex. A** ¶1. In 1999, defendants received a letter from Rabbi Lookstein indicating that KJ would still pay the rent on "your **[Mr.** whir's] apartment". Id. at **Ex.** F. They **also** claim that during the period in which they lived in the apartment they spent substantial resources in improvements. Id. at **Ex.** C ¶64.

The Ophirs became aware of the conversion of apartment **3A** into a condominium on April 18th, 2001, but did not receive the **particulars** until March **8,2002** when the Offering Plan was accepted for filing by the Attorney General of the State of New **York.** Id. at Ex. I ¶¶ 19-20. The offer gave each tenant the exclusive right to purchase the

apartment at a discounted rate or to remain in occupancy as non-purchasing tenants. Id. 7720-21, 23. It defined tenants as residents who had the rights to both renew their leases and to remain as the occupants of their apartments. Id.

In 2001, KJ, Rabbi Lookstein and Mr. Silverman became aware that the building in which apartment 3A was located was to be converted to condominium ownership. Aff. of Chaim Ophir 720; Aff. in Support of Mot. to Dismiss at Ex. A ¶14. On June 6, 2001, Mr. Silverman sent an electronic message to Mr. Ophir indicating that it would like a copy of the documentation relating to the prospective sale of the apartment. Id. at Ex. F. On January 18,2002, another electronic message was sent to Mr. Ophir indicating that KJ was still interested in purchasing the apartment and inquiring as to whether Mr. Ophir had any new information regarding its sale. Id. Defendants allege that at some point after learning of the conversion of apartment 3A into a condominium, plaintiff and third-party defendants induced the Ophirs to believe that they had no legal right to either remain in or purchase apartment 3A, that KJ was the only party with the right to do so, and that Mr. Ophir's employment would be terminated if he did not assign the purchase agreement to KJ. Aff. of Chaim Ophir 720. Conversely, plaintiff contends that the Ophirs readily agreed to purchase apartment 3A and assign it to KJ because plaintiff was ineligible to purchase the apartment outright. Aff. in Support of Mot. to Dismiss at Ex. A ¶15. On August 7,2002, Rabbi Lookstein gave a check, written on KJ's bank account, for $1,000 to Mr. Ophir to be used as the deposit to purchase apartment 3A. Aff. in Support of Mot. to Dismiss at Ex. H. Mr. Ophir deposited this check into his own account and later paid the deposit on the apartment out of his own funds. Id. According

to the plaintiff, KJ also provided legal counsel to supervise the sale of the apartment. Id. at Ex. A ¶2.

The Ophirs offered KJ $100,000 for the right to purchase apartment 3A (allegedly because of the fraudulent representations that they did not have the legal right to purchase the property otherwise). Id. at Ex. F. KJ refused this offer, and Mr. Silverman instructed Mr. Ophir to purchase apartment 3A as KJ's agent. Id. at Ex. A ¶18 and Ex. F. The Ophirs executed a purchase agreement for apartment 3A on August 9,2002. Id. at Ex. G. Despite demands by KJ, the title was never transferred to it.[2] Id. at Ex. A 720. On February 5,2003, the title was altered to name only Meira Ophir as owner. Id. at Ex. I ¶36.

It is further alleged by defendants that: in order to convince the Ophirs to assign the apartment to them and in retaliation for the Ophirs' failure to assign the apartment, Mr. Silverman and Rabbi Lookstein made repeated telephone calls to defendants at all hours and threatened Mrs. Ophir at work, in front of their son; Rabbi Lookstein and Mr. Silverman held Mr. Ophir in Rabbi Lookstein's office against his will and used loud and aggressive gestures while physically threatening, interrogating and intimidating him; Rabbi Lookstein and Mr. Silverman spread false statements about the Ophirs' marriage and their standing in the community; Rabbi Lookstein and Mr. Silverman accused Mr. Ophir of crimes connected with his religious duties at KJ; and Rabbi Lookstein and Mr. Silverman prevented Mr. Ophir from saying the Kaddish, a Jewish prayer for the dead, when his mother passed away and from praying freely. Aff. of Chaim Ophir ¶¶ 28, 29, 31, 33. This harassment and intimidation allegedly caused Mr. Ophir to suffer an

[2] This failure to assign the apartment to KJ forms the basis of plaintiffs original complaint against defendants.

inflammation of his large intestine, post traumatic stress disorder, and general anxiety disorder. Aff. in Support of Mot. to Dismiss at Ex. C ¶89. Mr. Ophir and Mrs. Ophir continue to undergo psychotherapy, purportedly as a result of the harassment and intimidation. Id. ¶90.

In June, 2002, Mr. Ophir contends that he had entered into a written employment agreement with KJ whereby he was to be employed as plaintiffs Ritual Director for one year in return for a $10,000 salary and the continued rent payments. Id. at Ex. C ¶72. This agreement has not been produced by either party although defendants claim that they have searched for the agreement and will continue to search for the agreement during discovery. Aff. of Chaim Ophir 735. Plaintiff provides an affidavit by Mr. Silverman claiming that no such written agreement existed and that document production in this case has been completed. Aff. of Leonard Silverman in Support of Mot. to Dismiss ¶¶ 2-3. Subsequent to the commencement of this action, Mr. Ophir's employment with KJ was terminated despite Mr. Ophir's allegations that he performed all of his duties under the alleged written agreement. Id. 735; Aff. in Support of Mot. to Dismiss at Ex. C ¶75.

The Ophirs contend that in 2002, they discovered that all of the representations made to them by KJ, Rabbi Lookstein, and Mr. Silverman were fraudulent. Aff. of Chaim Ophir 722. It was discovered that in 1989, KJ had entered into an agreement with HPD that was allegedly kept secret from the Ophirs. Aff. in Support of Mot. to Dismiss at Ex. D. This agreement allowed KJ to maintain an interest in the apartment by allowing it to place employees in apartment 3A without HPD approval contrary to HPD policy.

Id. Defendants allege that they would never have moved into apartment 3A or accepted KJ's offers of employment had they known about this agreement. Id. at Ex. C ¶69.

The original action was brought by KJ against the Ophirs seeking to impose a constructive trust on apartment 3A, for breach of contract as a result of defendants' refusal to assign the purchase agreement to KJ, and for breach of fiduciary duty owed to KJ by reason of defendants' diversion of the subject apartment to themselves. This Court denied defendants' motion to dismiss the claims and for summary judgment. Defendants then answered the complaint on October 17th, 2003, at which time they asserted four counterclaims against plaintiff. The answer and counterclaims subsequently were amended on January 23, 2004, to include Rabbi Lookstein and Mr. Silverman as third-party defendants. Plaintiff now moves to dismiss the counterclaims against it as noted above.

Conclusions of Law

On a motion to dismiss the complaint under C.P.L.R. 3211, the factual averments in a pleading must be accepted as true and the complaint liberally construed in the claimant's favor so as to give the claimant the benefit of every possible favorable inference. Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976); Williams v. Williams, 23 N.Y.2d 592 (1969). In determining a motion under C.P.L.R. 3211, a court may use claimant's affidavits in its consideration. Rovello, 40 N.Y.2d at 635-636. Additionally, when a motion to dismiss a complaint is based on documentary evidence, the documents must resolve all factual issues in order to dispose of the claimant's claims. Leon v. Martinez, 84 N.Y.2d 83 (1994); Scadura v. Robillard, 256 A.D.2d 567 (2nd Dept. 1998).

First Fraud Counterclaim

The statute of limitations for fraud is **six** years from the fraud or two years from the date that the claimant discovered the fraud, or could have been expected to discover the fraud with reasonable diligence. Avalon LLC **v.** Coronet Props. Co., 306 A.D.2d **62** (1st Dept. 2003); Quadrozzi Concrete Corp. **v.** Mastroianni, 56 A.D.2d 353 (2nd Dept. 1977) (both interpreting C.P.L.R. 213 and 203(g)). Whether aperson could have been expected to discover the fraud with reasonable diligence is typically a mixed question of law and fact that **turns** upon whether a person of ordinary intelligence possessed facts from which the fraud could be reasonably inferred. Kaufman v. Cohen, 307 A.D.2d 113, 123 (1st Dept. 2003). See also Ghandour **v.** Shearson Lehman Bros., 213 A.D.2d 304, 305 (1st Dept. 1995) (holding that person of ordinary intelligence should have discovered fraud with reasonable diligence). Mere suspicion is not a substitute for factual knowledge of the fraud. McFarlane **v.** Rowlee, 266 A.D.2d 861 (4th Dept. 1999). Where there is a factual issue as to whether claimant should have discovered the fraud with reasonable diligence, a motion to dismiss should be denied, Trepuk v. Frank, **44** N.Y.2d 723,725 (1978) (denial of motion to dismiss where evidence of knowledge of fraud is not conclusive); Erbe v. Lincoln Rochester Trust Co., 3 N.Y.2d 321 (1957) (whether plaintiff possessed requisite knowledge to infer fraud is generally question of fact so motion to dismiss should be denied absent conclusive evidence).

Upon the instant facts, a trier of fact may conclude that a person of ordinary intelligence acting with reasonable diligence, would not have inferred fraud until 2002. The documentary evidence produced by plaintiff showing that defendants had notice that KJ had a legally cognizable interest in the apartment contrary to their alleged

representations, consists of the 1994 letter referring to the apartment as "the Congregation's apartment" and a series of e-mails from 2001 and 2002 in which KJ expressed its desire to purchase the apartment. The letter standing alone does not necessarily imply a continuing legal interest in the apartment. Nor do the e-mails conclusively establish anything more than a desire to purchase the apartment. When combined with plaintiffs alleged representations that the Ophirs would have exclusive rights to the apartment, the lease agreement and extensions signed by the Ophirs, and the HPD status of the apartment, the Ophirs may have reasonably inferred -- as they allege -- that they had exclusive legal rights to the apartment. Taking the claims of the Ophirs as true, there are factual questions as to when the Ophirs, acting with reasonable diligence, should have discovered the fraud, rendering the issue appropriate for a trier of fact.[3] Similarly, the questions of reliance and motive, at this juncture, raise issues of fact.

Breach of Contract

While, under the best evidence rule, it is typically required that a party seeking to prove the existence or contents of a writing produce that writing, the contents of the writing may be proven by secondary evidence if the absence of the original writing can be satisfactorily accounted for. Dependable Lists, Inc. v. Malek, 98 A.D.2d 679,680 (1st Dept. 1983) (lost document may be proven by admissions of adversary); Schozer v. William Penn Life Ins. Co., 84 N.Y.2d 639,644 (1994) (third party witness testimony admissible to prove contents of lost x-ray),

Here, defendants claim that "despite diligent efforts," they have been unable to locate the written contract establishing that Mr. Ophir was to be employed by KJ for one

[3] The determination that the Ophirs' claim is not barred by the statute of limitations renders it *unnecessary* to reach the question of continuous representation.

year. On a motion to dismiss, the allegations of the claimant must be assumed to be true. Williams v. Williams, 23 N.Y.2d 592, 595-596 (1969). "Appellants should not be foreclosed at this stage of litigation in their efforts, through examinations before trial and other discovery procedures, to establish alternative means of proving the contents of that agreement." Dependable Lists, 98 A.D.2d at 680. While the affidavit of Mr. Ophir may not be sufficient on its own to prove the existence of an agreement at trial, evidence obtained by the Ophirs from pre-trial examinations or other discovery may provide the requisite proof.

The lower court cases of Sirico v. Cotto, 67 Misc.2d 636 (Civ. Ct., N.Y. Co., 1971) and Deverho Constr Co. v. State, 94 Misc.2d 1053 (Ct. Cl., N.Y. Co., 1978), cited by plaintiff, do not militate in favor of a different result. In Sirico there was no reason offered for the nonproduction of the x-ray. Similarly, in Deverho the party seeking to admit the secondary evidence had purposefully destroyed the original evidence so that the reason for the nonproduction was unsatisfactory. As the Ophirs have alleged that the document was lost and it does not appear that they were acting in bad faith in not producing the document, their reason for nonproduction is satisfactory.

Second Fraud Counterclaim

The five elements of a claim for fraud are: a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury. Kaufman v. Cohen, 307 A.D.2d 113, 119 (1st Dept. 2003); Ochs v. Woods, 221 N.Y. 335,338 (1917) (Five elements of fraud are representation, falsity, ***scienter,*** deception and injury).

In claiming that defendants failed to show both reliance and injury, plaintiff cites several cases holding that absent such a showing a claim must be dismissed. This argument is misplaced as defendants have claimed both reliance and injury.

In his affidavit Mr. Ophir states that he and his wife relinquished their rights as non-purchasing tenants in the apartment because he and his wife believed KJ when it indicated that the Ophirs were under an obligation to purchase the apartment and assign it to KJ. Plaintiff argues that because the Ophirs did not assign the apartment to KJ in the end that there was no reliance. However, because the Ophirs have claimed that the reliance stems from giving up their rights as *non-purchasing* tenants, the reliance may have been in purchasing the apartment with the original intent to re-sell it to KJ when, absent the representations made by KJ, they would not have purchased the apartment and remained as tenants.

Moreover, as long as damages may be inferred from a complaint, it will not be deficient because it fails to state the method by which the damages should be calculated. Winter v. American Airline Products, Inc., 236 N.Y. 199,204 (1923). While damages are a required element of a fraud claim, fraud from which even nominal damages result has been held to be actionable. Garnett v. Hudson Rent-A-Car, 276 A.D.2d 524 (2nd Dept., 2002); Cooke v. Colman, 150 Misc. 294 (N.Y. App. Term 1st Dept. 1934).

The fact that the Ophirs did not assign the apartment to KJ does not necessarily mean that there are no damages resulting from the alleged fraud. Based on the analysis above, if the Ophirs purchased the apartment based on the representations of KJ, there may be damages resulting from the fact that the Ophirs were deceived into expending resources when they did not wish to do so. The fact that they did not indicate in their

complaint how the $1,000,000 compensatory damage figure was calculated or why they were entitled to anything more than nominal damages stemming from the purchase of the apartment when they did not wish to so, does not render their claim deficient as a matter of law.

Plaintiffs claim that the Ophirs' counterclaims are inconsistent with each other in that they allege differing time-lines of events in each of the counterclaims does not alter the analysis since a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery. Mitchell v. New York Hospital, 61 N.Y.2d 208,218 (1984); Cohn v. Lionel Corp., 21 N.Y.2d 559 (1968).

Intentional Infliction of Emotional Distress

Liability for intentional infliction of emotional distress is found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Howell v. New York Post Co., 81 N.Y.2d 115,122 (1993); Fischer v. Maloney, 43 N.Y.2d 553, 557 (1978). In Kaminski v. United Parcel Service, 120 A.D.2d 409 (1st Dept. 1986), the Court found that a man who was held against his will in an office while being intimidated and threatened by his superiors with legal action, had a viable claim for intentional infliction of emotional distress.

Here, the allegations make out conduct which goes beyond mere insults or annoyances. Further, Mr. Ophir's claims involve a similar situation to that in Kaminski. Defendant Chaim Ophir alleges that he was held against his will in an office where he was threatened and intimidated with "loud aggressive gestures" and protracted legal

action. Taking these allegations to be true, Mr. Ophir states a valid claim for intentional infliction of emotional distress.

On the other hand, Mrs. Ophir's allegation that "threats" were made by telephone and in person at her place of business does not satisfy the extreme and outrageous behavior test. See Novak v. Rubin, 129 A.D.2d 780,781 (2nd Dept. 1987) (telephone calls threatening plaintiffs wife's career not sufficiently outrageous to support claim of intentional infliction of emotional distress). Nor were the alleged rumors purportedly spread by plaintiff and third-party defendants sufficiently outrageous behavior. See Wadsworth v. Beaudet, 267 A.D.2d 727, 729 (3rd Dept. 1999) (letter making false statements about plaintiff not kind of extreme and outrageous conduct necessary to support claim for intentional infliction of emotional distress).

Accordingly it is

ORDERED that the motion to dismiss the first counter laim for frai d is denied; and it is further

ORDERED that the motion to dismiss the second counterclaim for breach of contract is denied; and it is further

ORDERED that the motion to dismiss the third counterclaim for fraud is denied; and it is further

ORDERED that the motion to dismiss the fourth counterclaim for intentional infliction of emotional distress is denied inasmuch as it applies to Mi. Ophir; and it is further

ORDERED that the motion to dismiss the fourth counterclaim of intentional infliction of emotional distress is granted inasmuch as it applies to Mrs. Ophir and her request to amend this cause of action is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

The foregoing constitutes the decision and order of the Court.

Date: July 8/04
New York, New York

SHIRLEY WERNER KORNREICH

SHIRLEY WERNER KORNREICH
J.S.C.