

**Marmelstein v Kehillat New Hempstead: The Rav  
Aron Jofen Community Synagogue**

2006 NY Slip Op 30204(U)

June 14, 2006

Supreme Court, New York County

Docket Number: 0117629/2005

Judge: Jane S. Solomon

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

PART 55

Index Number: JANE S. SOLOMON  
117629/2005

MARMELSTEIN, ADINA

vs

KEHILLAT NEW HEMPSTEAD

Sequence Number: 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 2/14/06

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on \_\_\_\_\_ motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with the annexed memorandum decision and order.*

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

**FILED**

JUN 20 2006

COUNTY CLERK'S OFFICE  
NEW YORK  
**JANE S. SOLOMON**

Dated: 6-14-06

*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, I.A.S. PART 55

-----X  
ADINA MARMELSTEIN,

Plaintiff,

DECISION AND ORDER

-against-

INDEX NO. 117629/05

KEHILLAT NEW HEMPSTEAD: THE RAV ARON  
JOFEN COMMUNITY SYNAGOGUE and MORDECAI  
TENDLER,

Defendants.

-----X

SOLOMON, J.

Defendant Mordecai Tendler moves, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing the complaint insofar as it is asserted against him. Tendler is, and at all relevant times was, employed by defendant Kehillat New Hepstead: The Rav Aron Jofen Community Synagogue (Synagogue) as its rabbi.

As against Tendler, the complaint alleges the following four causes of action: fraud; breach of fiduciary duty; intentional infliction of emotional distress; and negligent infliction of emotional distress. These claims are supported by the following allegations of fact, all of which are taken to be true for purposes of deciding this motion. In 1994, plaintiff became acquainted with Tendler's reputation as a counselor and adviser on issues of particular concern to women, and she began to consult him, by telephone, on a number of personal issues. In 1995, Tendler began to encourage plaintiff to join his congregation at the Synagogue. Plaintiff began attending services at the Synagogue in September 1996. Throughout this time, and continuing at all relevant times, Tendler represented

to plaintiff that he would assist her in finding a husband, with whom she could have children. In November 2001, Tendler began a sexual relationship with plaintiff that continued until May 2005. Prior to commencing that relationship, and throughout its duration, Tendler advised plaintiff that she was "closed to the possibility of finding a husband," and that having sexual relations with him would enable her to marry and have children. The complaint further alleges that Tendler often stated that he was as close to God as anyone could be.

Finally, the complaint alleges that, once plaintiff had submitted to Tendler's purported sexual therapy, Tendler physically and emotionally abused her for his own pleasure, rather than assisting her to reach her goal; and that, throughout the relationship, Tendler warned plaintiff not to divulge it to anyone, and threatened dire consequences if she did.

#### Failure to State a Claim

In support of her cause of action alleging fraud, plaintiff alleges that Tendler's representations about the course of sexual therapy that he advised were false and known by him to be false at the time that he made them; that she relied upon those representations, and would not have had a sexual relationship with Tendler had she known that he entered into the relationship solely for his own pleasure; and that she has suffered damage by, among other things, having been ostracized by her community.

In sum, plaintiff's claim of fraud is no more than a

claim of seduction, a cause of action "which contemplates any conduct on the part of a man, without the use of force, in wrongfully inducing a woman to surrender to his sexual desires" (Coopersmith v Gold, 172 AD2d 982, 984 [3d Dept 1991]), and which was abolished, in 1961, by Civil Rights Law § 80-a. In addition, plaintiff has failed to allege any actual pecuniary loss, a necessary element for a claim of fraud. See Lama Holding Co. v Smith Barney Inc., 88 NY2d 413 (1996).

A fiduciary relationship arises "in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed." Penato v George, 52 AD2d 939 (2d Dept 1976). A court "will look to whether a party reposed confidence in another and reasonably relied on the other's [assumed] superior expertise or knowledge." Wiener v Lazard Freres & Co., 241 AD2d 114, 122 (1st Dept 1998). A fiduciary relationship need not have been memorialized in a writing, but may be created by "the ongoing conduct between [the] parties." Id. at 122. Whether a fiduciary relationship has arisen in a particular case is a factual matter to be decided by the jury.

Citing Langford v Roman Catholic Diocese of Brooklyn (271 AD2d 494 [2d Dept 2000]) and Wende C. v United Methodist Church (6 AD3d 1047 [3d Dept 2004], affd 4 NY3d 293 [2005]), Tandler argues that, notwithstanding the well-developed law on fiduciary relationships, a court may not entertain a breach of fiduciary duty claim brought by a congregant against a cleric. In Langford, a case in which the plaintiff, who had been under

the care of a psychiatrist because of suicidal thoughts, had sought religious counseling from the individual defendant and had had a sexual relationship with him, the court noted that the plaintiff's claim of breach of fiduciary duty could only be construed as a claim of clergy malpractice, "since it would clearly require a determination concerning [the individual defendant's] duties as a member of the clergy offering religious counseling to the plaintiff." Id. at 495. Such a claim, the Court held, was foreclosed by the First Amendment bar to an excessive entanglement with religion. Similarly, in Wende C., the Court held that the plaintiff's claim, that the individual defendant had breached his fiduciary duty to her by entering into an adulterous relationship with her, should be dismissed, because "any attempt to define the duty of care owed by a member of the clergy to a congregant or parishioner would result in excessive entanglement on the part of the court in matters of religion." Id. at 1050. However, in affirming the Appellate Division's order dismissing the complaint in Wende C., the Court of Appeals noted that the plaintiff's cause of action sounded in clergy malpractice, and that she had not properly pled a fiduciary cause of action. The Court expressly left open the question of whether a claim of breach of fiduciary duty between a cleric and a parishioner could arise in "very different circumstances." Wende C. v United Methodist Church, 4 NY3d 293, 299 (2005). The Appellate Division, Second Department, too, in a case decided subsequently to Langford, has left open the question of whether a

breach of fiduciary duty claim may be raised by a congregant against a cleric. See Lightman v Flaum, 278 AD2d 373 (2d Dept 2000), affd 97 NY2d 128 (2001).

This court starts with the unchallenged principle that, even where a dispute implicates the Free Exercise or the Establishment Clause of the First Amendment, a court may decide the dispute, if it can do so through the use of neutral principles of law, that is, through "the application of objective, well-established principles of secular law." Avitzur v Avitzur, 58 NY2d 108, 115, cert denied 464 US 817 (1983); see also First Presbyt. Church of Schenectady v United Presbyt. Church in United States of America, 62 NY2d 110 (1984). Here, in contrast to the plaintiff in Langford, plaintiff does not allege that she sought any religious or spiritual counseling from Tendler. Rather, she claims that she sought advice and counseling on how to find a husband. Plaintiff alleges that she consulted Tendler because of his reputation as a scholar, educator, and community leader within the Orthodox community, and because he held himself out, within that community, as a counselor and adviser with an expertise in women's issues, not because he was the rabbi of her synagogue. Indeed, plaintiff joined Tendler's congregation only two years after she had begun consulting him on her personal problems. The issue to be determined by the jury is not whether Tendler's alleged acts were in conformance with his religion or his calling, but, rather, whether those alleged acts betrayed a trust that plaintiff had

reasonably placed in him, commencing well before she joined his congregation. To determine that issue will require no reference to any religious doctrine or practice. Such a determination would decide no doctrinal issue, nor interfere with any religious authority. See Davis v Melnicke, 808 NYS 2d 671 (\_\_\_ AD2d -- [1st Dept 2006]). Accordingly, allowing the breach of fiduciary duty claim to go forward, here, will not lead to an impermissible entanglement with any religious matter. While the courts may not intrude on matters of religion, the fact that a defendant is a member of the clergy does not suffice to shield him or her from secular claims that can be decided by the application of objective principles of law.

Plaintiff's cause of action for intentional infliction of emotional distress is based on her allegations that Tendler falsely induced her into a sexual relationship, and subsequently encouraged his congregants to harass and threaten plaintiff, and that they did so. The complaint includes not even one factual allegation to support its conclusory statements as to harassment and threats. However, in Noto v St. Vincent's Hosp. & Med. Ctr. of New York (160 AD2d 656 [1st Dept 1990]), a case in which the Court affirmed the trial court's denial of defendant's motion to dismiss a claim of intentional infliction of emotional distress, the defendant physician had treated the plaintiff as her attending psychiatrist while she was an inpatient at the hospital, and had subsequently engaged in sexual relations with her, causing her to become pregnant and to undergo an abortion.

The trial court had emphasized the allegation that the defendant doctor had taken advantage of a former patient known by him to exhibit seductive behavior and to flaunt exhibitionist tendencies. Here, at the time that Tendler allegedly began a sexual relationship with plaintiff, he had been advising and counseling her for approximately seven years, and he knew then, and throughout the more than four years that he allegedly continued the sexual relationship, that plaintiff had been unsuccessfully seeking a husband with whom to have children. This court will not say that Tendler's alleged actions are less atrocious and shocking to the conscience than the acts alleged by the plaintiff in Noto.

Plaintiff's cause of action for negligent infliction of emotional harm fails because, among other reasons, plaintiff has not alleged any negligent act on Tendler's part.

#### Timeliness

The limitations period on a breach of fiduciary duty claim depends upon the relief sought. Leonard v Santa Fe Indus., 70 NY2d 262 (1987). Here, where plaintiff seeks money damages only, the applicable limitations period is three years. Kaufman v Cohen, 307 AD2d 113 (1st Dept 2003); Yatter v William Morris Agency, 256 AD2d 260 (1st Dept 1998). This action was commenced on December 20, 2005. Thus, with regard to the second cause of action, all of Tendler's actions since December 20, 2002, are within the limitations period.

The statute of limitations on a claim of intentional

infliction of emotional distress is one year. CPLR 215; Yong Wen Mo v Gee Ming Chan, 17 AD3d 356 (2d Dept 2005). However, where, as here, a plaintiff has adequately pled a continuing course of tortious conduct extending into the one-year period preceding the commencement of the action, the claim, including the events alleged to have taken place outside the limitations period, is not time-barred. Ain v Glazer, 257 AD2d 422 (1st Dept 1999); Drury v Tucker, 210 AD2d 891 (4th Dept 1994).


Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the first and fourth causes of action are dismissed; and it is further

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

Dated:  2006

ENTER:

  
 \_\_\_\_\_  
 J.S.C.

JANE S. SOLOMON

**FILED**  
 JUN 20 2006  
 COUNTY CLERK