

**Abounding Grace Ministries v Ukrainian Evangelical
Assemblies of God Church, Inc.**

2007 NY Slip Op 34197(U)

December 20, 2007

Supreme Court, New York County

Docket Number: 0115381/2004

Judge: Carol R. Edmead

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

PRESENT: Edmead
Justice

PART 35

Abounding Grace

INDEX NO. 115381/04

MOTION DATE 11/27/07

MOTION SEQ. NO. 11

MOTION CAL. NO. _____

- v -

Ukrainian Evangelical

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by First Ukrainian to dismiss the second amended complaint is granted, and the second amended complaint is dismissed; and it is further

ORDERED that the cross-motion to amend said complaint is denied; and it is further

ORDERED that First Ukrainian serve a copy of this order with notice of entry upon all parties within 20 days of entry, and it is further

ORDERED that the Clerk may enter judgment accordingly.
This constitutes the decision and order of the Court.

Dated: 12/20/07

Carol R. Edmead
Hon. Carol R. Edmead, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ABOUNDING GRACE MINISTRIES and COMMUNITY
SOLUTIONS INC., d/b/a GENERATION XCEL,

Index No. 115381/2004

Plaintiffs,

DECISION/ORDER

-vs-

UKRAINIAN EVANGELICAL ASSEMBLIES OF GOD
CHURCH, INC. and FIRST UKRAINIAN ASSEMBLY
OF GOD, INC. f/k/a FIRST UKRAINIAN
EVANGELICAL PENTECOSTAL CHURCH, INC.

Defendants.

FILED
DEC 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION¹

For almost three years, three churches have struggled to control a landmark building located at 9 E. 7th Street in the East Village of New York City (the "Church Building" or "Building"), which in 1999, had an estimated value of \$ 2.7 million.²

Parties

Defendant First Ukrainian Assembly of God, Inc. f/k/a First Ukrainian Evangelical Pentecostal Church, Inc. ("First Ukrainian")³ is a district council church of the Assemblies of God Christian denomination. Rev. Anatoly Jaruczyk has been its Senior Pastor since July 1976.

Defendant Ukrainian Evangelical Assemblies of God Church, Inc. is located in Union,

¹ Motion sequence 11 under Index No. 115381/2004 and Motion 001 under Index No. 107298/2007 are consolidated for joint decision.

² In Ukrainian New Jersey's Responses to the Tenants' First Interrogatories, the Church Building was valued at \$2.7 million in connection with an offer to purchase the Building in 1999, and that there has been no appraisal since then, as Ukrainian New Jersey has no intention of selling the Church Building.

³ First Ukrainian was organized in 1935 under the name "First Ukrainian Evangelical Pentecostal Church, Inc." Its current name was changed upon the filing of a certificate of change of name in 1956.

New Jersey ("Ukrainian New Jersey").⁴

Plaintiff Abounding Grace Ministries ("Abounding Grace") is a religious corporation located in New York City. Rev. Richard del Rio is its founder and current Pastor. Plaintiff Community Solutions Inc. d/b/a Generation Xcel ("Generation Xcel") is a youth ministry formed by teenage volunteers of the congregation of Abounding Grace. Abounding Grace holds church services and other ministerial events at the Building. Generation Xcel uses the Church Building for teen outreach programs.

Factual Background⁵

With respect to the Church Building, First Ukrainian's Constitution and By-laws provide:

In the event that the assembly herein mentioned ceases to function as a church body, then the said property . . . shall revert to the Ukrainian Branch of the Assemblies of God

The 1994 Conveyance

By the early 1990s, First Ukrainian had only 8-12 congregants and the Church Building had fallen into disrepair. In order to "keep the building assets for the Ukrainian people" and prevent the Church Building from reverting to the Assemblies of God, First Ukrainian and Ukrainian New Jersey discussed merging; however, the merge never was consummated.

In 1994, Rev. Jaruczyk signed a deed conveying ownership of the Church Building to Ukrainian New Jersey. It was Pastor Jaruczyk's understanding that the deed he signed in 1994 contained a restrictive covenant providing that the Church Building only be used as a church.

⁴ When members of First Ukrainian began moving to New Jersey in the 1950s, they established an affiliate in Newark, which later relocated to Union. Ukrainian New Jersey was initially incorporated as "Union Evangelical Assemblies of God, Inc."

⁵ These facts are taken from the complaint and petition (*discussed infra*) and assumed to be true for purposes of addressing the instant motions.

Pastor Jaruczyk also believed that First Ukrainian would always be allowed to use the Church Building and decide how it would be used and that First Ukrainian could ask for title back at any time.⁶ Neither the deed nor any written agreement between First Ukrainian and Ukrainian New Jersey in 1994 contains any of the conditions that Pastor Jaruczyk believed applied to the 1994 conveyance.

Abounding Grace's Oral Lease

In August 1998, four years after its conveyance to Ukrainian New Jersey, First Ukrainian invited Abounding Grace into the Church Building as a tenant with an Oral Lease: according to Abounding Grace, First Ukrainian's Pastor Jaruczyk stated that Abounding Grace could use the Church Building as long as First Ukrainian maintained a presence in the Building as a viable church; in return, Abounding Grace agreed to pay rent and make any necessary repairs and improvements to the Church Building (the "Oral Lease"). Under this Oral Lease, First Ukrainian allowed Abounding Grace to use the sanctuary, the third floor as a residence for its Pastor, and the second floor as office space.⁷

Abounding Grace's License Agreement

In late 1998, Ukrainian New Jersey approached Abounding Grace for the first time, claiming to be the owner of the Church. Based on Ukrainian New Jersey's representations that it was the owner of the Building, in January 1999, Abounding Grace signed a License, dated as of November 1998 with Ukrainian New Jersey to utilize certain space in the Building. The License

⁶ Thereafter, in 1997, Ukrainian New Jersey filed a petition with the Court in accordance with Religious Corporations Law ("RCL") and Not-for-Profit-Corporation-Law ("NPL") in an attempt to sell the Building to Village Vision. However, this transfer was never completed.

⁷ Abounding Grace alleges that it renovated the third floor and refurbished the apartment on that floor, which First Ukrainian now uses to house its associate pastor, and that the value of that apartment is substantial given today's residential real estate prices.

provides that Ukrainian New Jersey could terminate the License upon 30 days notice.

By check dated December 3, 1998, Abounding Grace tendered \$1,200.00 to "First Assembly of God Ukrainian Church." The deposit ticket for this check bears "Ukrainian Evangelical Assemblies of God NYC Church Acct." for "rent."

Abounding Grace's Occupancy

From 1998 through 2004, Abounding Grace hosted religious services, established substance abuse recovery groups, and housed thousands of outreach volunteers. It is alleged that Abounding Grace expended over \$500,000.00 in improvements and in maintaining the Church Building. Xcel also used its resources to renovate and maintain the top floor of the Church Building for youth programming.

The 2004 Supreme Court Action

On or about October 1, 2004, Ukrainian New Jersey served upon Abounding Grace and Xcel (hereinafter, the "Tenants") a "30 Day Notice Terminating Month to Month Tenancy." In response, the Tenants obtained a temporary stay of any summary eviction proceedings, and filed a complaint seeking a declaration that the 30-day notice was invalid, arguing that since the 1994 conveyance was void, Ukrainian New Jersey was not the lawful owner of the Church Building and thus, lacked standing to evict them. In response, Ukrainian New Jersey counterclaimed for damages arising out of certain improvements Tenants made to the top floor of the Church Building, and alleged as an affirmative defense that Ukrainian New Jersey obtained title to the Church Building by adverse possession. Upon further argument, the Court (Lebedeff, J.) denied injunctive relief on the ground that although Ukrainian New Jersey was not the actual title holder, it could commence a summary eviction proceeding against Abounding Grace as the actual landlord's agent. Subsequently, this Court directed limited discovery on the issues of

ownership, agency and adverse possession. The complaint was later amended to address issues resulting from Judge Lebedeff's decision.⁸

Thereafter, Ukrainian New Jersey moved this Court for the release of use and occupancy payments which were held in escrow pursuant to an order of this Court. In addressing this issue, the Court directed Ukrainian New Jersey to implead First Ukrainian, to avoid any potential prejudice to First Ukrainian. When efforts to so implead First Ukrainian failed, at the Court's direction, the Tenants served a second amended complaint adding First Ukrainian.

Second Amended Complaint

In their second amended complaint, plaintiffs seek the following declarations: (1) that pursuant to CPLR 3001, Abounding Grace has a valid Oral Lease which entitles it to use all of the space that it currently occupies in the Church Building "for as long as" First Ukrainian maintains a presence in the Building as a viable church; (2) that pursuant to CPLR 3001, First Ukrainian breached its duty of good faith and fair dealing implied in the Oral Lease by preparing a petition that would assist Ukrainian New Jersey in obtaining lawful ownership of the Church Building in order to evict the plaintiffs; and (3) that the License and Notice of Eviction are invalid since Ukrainian New Jersey was never the rightful owner of the Church Building. Plaintiffs allege the 1994 conveyance to Ukrainian New Jersey was illegal, null and void, in that First Ukrainian did not apply and/or obtain leave of the court as required under RCL and NPL. Further, Ukrainian New Jersey did not acquire title by adverse possession: Ukrainian New Jersey never exclusively occupied any portion of the Church Building; First Ukrainian never vacated the Church Building and currently occupies the space; to any extent Ukrainian New Jersey

⁸ According to First Ukrainian, Ukrainian New Jersey sought to obtain a confirmatory order *nunc pro tunc* when it became aware that the 1994 conveyance was not Court-approved; however, the Attorney General suggested that First Ukrainian file a petition to confirm the transfer pursuant to the RCL.

occupied any portion of the Building, it was done with First Ukrainian's knowledge and consent, and thus, Ukrainian New Jersey's possession was not hostile; any claim of hostility predicated on rents collected by Ukrainian New Jersey is belied by the fact that Ukrainian New Jersey did not collect rents during the entire ten-year period between October 1994 and October 2004; the December 1998 rent payment was made to First Ukrainian. Further, any claim by Ukrainian New Jersey to title based on the deed conveyed in 1994 is unjustified as it knew and/or should have known that its claim to title based on that conveyance was baseless. At the time Ukrainian New Jersey falsely represented to plaintiffs in 1998 that it was the lawful owner of the Church Building, and at the time Ukrainian New Jersey served the Eviction Notice on October 1, 2004, less than ten years had elapsed since Ukrainian New Jersey recorded the 1994 deed. Nor is Xcel a party to the License. For these reasons, the Licence is also void, invalid and ineffectual. And, Ukrainian New Jersey was never First Ukrainian's agent. Thus, Ukrainian New Jersey lacks authority to evict the Tenants. Further, the Notice of Eviction is stale as more than two years have elapsed since it was first issued.

Plaintiffs also seek damages on the theory of promissory estoppel and unjust enrichment in the amount of rent paid to Ukrainian New Jersey, the costs of the pecuniary investment made by plaintiffs and the increase in the Building's value resulting from plaintiffs' investment.

2007 RCL Petition

During the pendency of the 2004 Action, First Ukrainian submitted to the Attorney General's office a petition to confirm the 1994 conveyance and amend the deed pursuant to the RCL, along with a proposed order granting the petition. The Attorney General signed the proposed order, with an endorsement indicating that it had "no objection to the granting of judicial approval" On May 24, 2007, Ukrainian New Jersey filed the petition with the

Court pursuant to the RCL.

The Petition seeks an order *nunc pro tunc*, pursuant to RCL §§ 12(1) and 12(9) and New York Not-For-Profit Corporation Law § 511, confirming the 1994 conveyance to Ukrainian New Jersey. The Petition also seeks an order directing the execution and delivery by First Ukrainian of a Confirmatory and Corrected Deed in New York County.⁹

In their Answer to the Petition, the Tenants assert “Objections in Point of Law,” arguing the Petition is barred on numerous grounds.¹⁰ The Tenants also counterclaim for a declaration that the Oral Lease is valid, that First Ukrainian breached its duty of good faith and fair dealing implied in the Oral Lease, that Abounding Grace’s tenancy passes with title regardless of whether Ukrainian New Jersey obtains a valid ownership interest in the Church Building, and that the new agreement is a sham under Article 10 of the Debtor and Creditor Law (“DCL”).

The Tenants also claim that Ukrainian New Jersey lacks standing to evict them. The Court

⁹ The petition further seeks an order permitting First Ukrainian to (1) correct the name of First Ukrainian on the 1994 Deed to reflect “First Ukrainian Assembly of God, Inc.” and (2) add to the “Confirmatory and Corrected” deed the provisions that (a) First Ukrainian shall have the right to use and occupy the Church Building for its religious services rent-free as long as “the transferee is the owner of the Premises,” (b) in the event First Ukrainian does not consent to a proposed or contemplated sale or transfer of the Church Building to a third party, First Ukrainian shall have the right of first refusal to repurchase the Church Building for \$10.00, and (c) First Ukrainian “shall have the right to make material decisions jointly with the Grantee as to the rental, management and transfer/sale” of the Church Building all pursuant to an Agreement executed by First Ukrainian and Ukrainian New Jersey on March 26, 2007.

¹⁰ Tenants allege that the Petition is barred on the following grounds: (1) laches; (2) statute of limitations; (3) the unavailability of *nunc pro tunc* relief under RCL §§ 12(1) and 12(9); (4) the members’ vote only authorizes a “confirmation” of the conveyance under RCL § 12(9), and does not authorize the “conveyance” under RCL § 12(1); (5) the Petition seeks to confirm a deed that, as alleged, does not exist, related to an agreement that also did not exist at the time of the transfer; (6) the proposed conveyance does not promote the mission or interests of First Ukrainian; (7) the terms of the proposed conveyance are not fair and reasonable; (8) the transfer does not satisfy the requirements of RCL § 12(8); (9) the proposed conveyance constitutes a breach of First Ukrainian’s Trustees’ and Directors’ fiduciary duties and statutory obligations; (10) the proposed conveyance impermissibly extinguishes the reversionary rights of the Assemblies of God; (11) the amendment provision of the new agreement is inconsistent with RCL § 12 court approval requirement; (12) the proposed conveyance and agreement would render First Ukrainian unable to satisfy any judgment in the Tenants’ favor, and thus, is inconsistent with Article 10 of Debtor Creditor Law; (13) the 1994 conveyance was a quasi-fraudulent conveyance; (14) the petition fails to satisfy the technical requirements of RCL § 12; and (15) the proposed conveyance is contrary to the public interest.

should award the Tenants the monetary investments they made in the Building or, under a theory of unjust enrichment, award the Tenants an amount equal to the monetary investments they made and the increase in value of the property due to the improvements they made to the Building.

Instant Motions

First Ukrainian's Motion to Dismiss the Second Amended Complaint

First Ukrainian now moves pursuant to CPLR 3211(a)(5) and (a)(7) to dismiss the second amended complaint. First Ukrainian argues that Abounding Grace's purported eternal Oral Lease is void, given that the Oral Lease extends beyond five years and leave of court was not sought or granted as required by RCL § 12(1). At best, Abounding Grace may claim that it is a tenant at will, but such tenancy may be terminated by a 30-day written notice. Further, the second amended complaint is silent as to the essential term of the amount of rent agreed to when the Oral Lease was purportedly formed. The rent paid for a specific amount was not made until after the License was entered into, and an agreement to agree later on rent, if that is what occurred here, is insufficient to establish the essential rent term of the lease. Although Abounding Grace argues that the rent paid was consistent with the Oral Lease, such rent was more consistent with the written License. And, taking as true the allegation that Abounding Grace could use the Building "for as long as" First Ukrainian maintained a presence in the Building as a viable church, such "term" is too indefinite to create a valid lease. The Oral Lease also violates the Statute of Frauds, as it is for a term of more than one year, and is not performable within one year. Further, the alleged improvements are not unequivocally referable to the Oral Lease so as to avoid the Statute of Frauds. Abounding Grace signed the License with Ukrainian New Jersey before any of the alleged improvements were made, and most of the improvements were not made until Abounding Grace was given access to the fourth floor in

2001. And, Abounding Grace's expenditures were based upon a series of alleged promises by Ukrainian New Jersey. In any event, the Oral Lease to use the Building "for as long as" First Ukrainian maintained a presence as a viable church makes no sense in light of Abounding Grace's superseding, more limiting, written License. Furthermore, pursuant to RCL §5, collective action as a board is necessary to bind the religious corporation, and thus, Pastor Jaruczyk lacked authority to advise Abounding Grace that it could use the Building as long as First Ukrainian maintained a presence in the Building as a viable church. And, there is no allegation that the voting membership of First Ukrainian approved the alleged Oral Lease, pursuant to First Ukrainian's Constitution and Bylaws. Nor is there any possibility that the putative Oral Lease was made effective through ratification. After the purported Oral Lease agreement, Abounding Grace entered into a written License agreement with Ukrainian New Jersey.

It is also argued that the claim for breach of the covenant of good faith and fair dealing fails because there is no valid and enforceable agreement from which such claim could flow. In any event, the implied covenant of good faith and fair dealing would not prevent First Ukrainian from pursuing confirmation of the 1994 sale of the Church Building to Ukrainian New Jersey. The purported Oral Lease does not limit the applicability of RCL § 12(9) or obligate First Ukrainian to retain ownership of the Building or refrain from selling the Building. Furthermore, a confirmation of the 1994 conveyance would not impair Abounding Grace's claim to an Oral Lease, as properties subject to leases are sold all the time in this city.

First Ukrainian further contends that Abounding Grace's unjust enrichment claim must fail. Since first occupying the Building in 1998, the Tenants owed rent to the owner, and under no set of facts can the Tenants get the benefit of using the Building for nearly a decade rent-free.

The Tenants received what they paid for, *to wit*: use of the Church Building. Further, notwithstanding the Tenants' alleged improvements to the Church Building, Abounding Grace has received more than adequate compensation in the form of under-market rent (at \$121,150 for a six-year period) and cannot recover more than the Church Building owner is owed for plaintiff's use and occupancy (at least \$600,000 per year) of the Building, since an occupant is entitled to only a setoff of the value of permanent improvements. Further, "appreciation" in value of a property during the time of a leasehold over and above the cost of improvements is not recoverable by a tenant in Abounding Grace's position. Thus, the Tenants cannot recover for the increased value in the Church Building between 1998 and the present, because that value exceeds the use and occupancy damages of \$10,000 per month claimed by Ukrainian New Jersey.

Finally, the promissory estoppel claim lacks merit in that Abounding Grace cannot establish reasonable reliance. There are no allegations of promises made by First Ukrainian. Instead, the purported promises were made by Ukrainian New Jersey after Abounding Grace entered the written License. Also, even assuming First Ukrainian promised to allow Abounding Grace to utilize the Church Building indefinitely, any reliance thereon cannot be reasonable because "indefinitely" does not mean "forever" and Abounding Grace signed the License with Ukrainian New Jersey revocable on 30 days notice. Reliance on an alleged oral promise that is in direct conflict with a written agreement is not reasonable.

Tenants' Opposition and Cross-Motion to Amend the Second Amended Complaint

The Tenants oppose dismissal, arguing that First Ukrainian is barred from relying on the Statute of Frauds because it admitted that it entered into the Oral Lease. According to the Tenants, at Pastor Jaruczyk's deposition in January 2006, he did not deny that he extended the Oral Lease to Abounding Grace. The Oral Lease is nonetheless enforceable because here, Pastor Jaruczyk's admission, combined with the fact that First Ukrainian benefitted enormously from its agreement with Abounding Grace, preclude First Ukrainian from claiming the protection of the Statute of Frauds, which was enacted to prevent fraud. Also, the Tenants' part performance in making over \$500,000 in improvements, maintenance, and upgrades to the Church Building, is unequivocally referable to the Oral Lease. It would be incredible to believe that the Tenants would have made such investments if they were guests or held a tenancy or License that could be terminated on 30 days notice. Likewise, Abounding Grace agreed to cede the third floor back to First Ukrainian in exchange for assurances and space on the fourth floor of the Church Building. Abounding Grace would never have surrendered the space, and allowed First Ukrainian to have the third floor if it were merely a Licensee who could be asked to leave on 30 days notice. And, Abounding Grace's investments in the Church Building prevented it from purchasing or leasing other property in the neighborhood, and Abounding Grace would not have put itself in such a position unless there was a promise to permit Abounding Grace to use the Building "for as long as" First Ukrainian remained there. Further, First Ukrainian repeatedly reassured Abounding Grace that they could use the Building "for as long as" First Ukrainian remained in the Church Building. In any event, the Oral Lease satisfies the Statute of Frauds. Here, the Oral Lease was capable of being performed within one year as First Ukrainian could have vacated the Church Building at any time, or dissolved in accordance with RCL § 18. At the time the Oral Lease was

entered into, First Ukrainian was on the verge of dissolving, and thus, termination of the Oral Lease within one year was not only possible, but likely.

The Oral Lease also contains essential agreed upon terms, and is enforceable even if it does not have a duration or term that is "date specific" since the Oral Lease was to continue until stated conditions were met. Since the Oral Lease lasts until First Ukrainian either vacates the Church Building or ceases to exist as a viable congregation, such readily ascertainable and precise events render the Oral Lease enforceable. Further, the parties consented to the price agreed upon, namely \$1,200.00, which First Ukrainian eventually asked Abounding Grace to pay to Ukrainian New Jersey. The price also included heat and other expenses that First Ukrainian would have otherwise incurred in connection with maintaining the Building.

Nor is the Oral Lease void under RCL § 12. Since the Oral Lease was capable of being performed within five years, court approval under RCL § 12 was not required. Further, as Tenants' tenancy prevented First Ukrainian from losing the Building, and promoted the interests of First Ukrainian, equity prevents First Ukrainian from invoking RCL § 12 to defeat the Oral Lease. In any case, the Court should provide Abounding Grace *nunc pro tunc* relief in accordance with RCL § 12(9) and confirm the validity of the Oral Lease so as not to defeat the Tenants' ability to obtain damages against First Ukrainian and permit First Ukrainian to obtain the Tenants' assistance with maintaining the Building.

It is also argued that the License did not supersede the Oral Lease. Abounding Grace entered into the License under the false pretense that Ukrainian New Jersey owned the Building. Also, Abounding Grace's expenditures above and beyond what the License required demonstrate that the Oral Lease and License were two separate, parallel agreements. And, First Ukrainian would not have reaffirmed its promises to Abounding Grace while the License was in effect if

the License had superseded the Oral Lease. Further, the License could not have superseded the Oral Lease because First Ukrainian was not a party to the License.

First Ukrainian's Pastor Jaruczyk had authority to enter into the Oral Lease with Abounding Grace. Officers, such as Pastor Jaruczyk, have apparent authority to bind the corporation. Further, First Ukrainian was run without formality, and Pastor Jaruczyk was, for all intents and purposes, the board of directors and trustees. Additionally, Abounding Grace could not have known that First Ukrainian's By-Laws required a vote by membership to approve the Oral Lease. Thus, First Ukrainian cannot repudiate the Oral Lease based on by-laws kept secret from Tenants until this litigation. Also, without Abounding Grace's efforts, First Ukrainian would have "lost" the Church Building. Thus, First Ukrainian benefitted from Pastor Jaruczyk's purportedly unauthorized act, and having enjoyed the benefits, First Ukrainian should not be allowed to deny Pastor Jaruczyk's authority to have entered into the Oral Lease. And, First Ukrainian's congregation ratified Pastor Jaruczyk's conduct, in that they knew about Tenants' tenancy, never objected to it, and thus, cannot now raise objections based on a failure to adhere to corporate formalities.

Tenants also maintain that their claim for breach of duty of good faith and fair dealing is adequately stated. First Ukrainian's filing of its RCL petition to further the efforts of Ukrainian New Jersey in evicting Tenants, is inconsistent with First Ukrainian's duty of good faith and fair dealing implied in the Oral Lease.

Tenants also claim that they have sufficiently alleged an unjust enrichment claim against First Ukrainian. The pleadings allege that by making various improvements to the Building, the Building's value was enhanced, thereby enriching First Ukrainian, who is alleged to be the owner of the Building. Such improvements were made at Tenants' expense. And, equity and

good conscience require First Ukrainian to make restitution to Tenants. But for First Ukrainian's promises, Tenants would not have invested their capital and labor into improving the Building. Further, courts have recognized that a plaintiff can recover on an unjust enrichment theory for the enhanced value of the property when the plaintiff's contributions went beyond "mere day-to-day" maintenance.

Further, Tenants' promissory estoppel claim is warranted in light of First Ukrainian's repeated promises to permit Tenants to use the Building "for as long as" First Ukrainian remained a viable congregation. Tenants were assured that notwithstanding the License, First Ukrainian controlled the use of the Church Building, trumped Ukrainian New Jersey when it came to deciding matters concerning Tenants' tenancy, and could ask for the Church Building back at any time. In light of the informal way in which First Ukrainian was run, Tenants' reliance on such promises was reasonable.

Tenants also cross-move to amend the second amended complaint in order to add factual allegations, address the pleading deficiencies identified in First Ukrainian's motion to dismiss, and add two new causes of action to confirm the Oral Lease and assert "partnership" claims. The proposed new causes of action against First Ukrainian arise out of the same facts and circumstances as the existing causes of action, and are brought in direct response to cure deficiencies complained of by First Ukrainian in its motion to dismiss. Also, First Ukrainian, as a recently added party to this action, cannot claim prejudice, as its defense will not be compromised in any way. Further, First Ukrainian cannot claim surprise, as many of the additional factual allegations were asserted in Tenants' counterclaims in their Verified Answer. First Ukrainian should have anticipated such alternative causes of action, in that by raising RCL § 12(1) to invalidate the Oral Lease, First Ukrainian all but invited Tenants to seek confirmation

and *nunc pro tunc* relief predicated on RCL § 12(9). Tenants also seek sanctions against Ukrainian New Jersey for its dilatory conduct throughout this litigation.

In reply, First Ukrainian maintains that Tenants commenced this action to cause delay in order to further enjoy their occupancy at below market rent. Xcel never had any legal interest in the Building and the only interest Abounding Grace ever had was its written License with Ukrainian New Jersey, which is terminable on 30 days notice. First Ukrainian adds that there is no exception from RCL § 12's requirement of Court approval when the lease is capable of being performed within five years. RCL's purpose is to protect members of the religious corporation from loss through an unwise bargain and from perversion of the use of property. And, it is not in First Ukrainian's best interest to be forced to accept an allegedly eternal Oral Lease with Abounding Grace.

The Tenants' new allegation in the third amended complaint that Pastor Jaruczyk specified a price term comprising rent of \$1,200 per month and payment of heating oil and other expenses, is flatly contradicted by its License with Ukrainian New Jersey in which it agreed to a price term of \$1,200. Further, the term "viable congregation" is incapable of measurement and thus, too indefinite to create a valid lease, and Tenants' position is contradicted by Abounding Grace's subsequent correspondence with Ukrainian New Jersey asking for a long term lease with Ukrainian New Jersey after entering into the purported Oral Lease with First Ukrainian.

Nor is there caselaw holding that Tenants' allegations constitute "admissions" so as to remove the Oral Lease from the Statute of Frauds. And, a party's admission does not bar application of the Statute where the agreement and material terms thereto are denied. Even substantial renovations to or improvements of leased or Licensed space have been held to be consistent with a short-term License or tenancy. Tenants allege nothing more than the usual

maintenance and other expenses that accompany occupancy of rented space. Further, in light of Tenants' allegations that it "believed" Ukrainian New Jersey to be the owner of the Church Building and its landlord, Tenants' actions between 1998 and 2004 are conclusively not referable to the Oral Lease from First Ukrainian.

Further, Tenants' new allegations that First Ukrainian entered into a second Oral Lease with Xcel and that First Ukrainian reformed and renewed the Oral Lease while the License was operational are irrelevant to the instant motion, and is inconsistent with the License and contradicted by Abounding Grace's own letters to Ukrainian New Jersey, which conclusively establish that the written License has remained in full force and effect since its November 1998 effective date.

Any apparent authority of Pastor Jaruczyk does not overcome the requirements of RCL with respect to church property transactions, and the caselaw on which Tenants' rely is inapposite. Additionally, that First Ukrainian's members never objected to the Oral Lease and celebrated it, are insufficient to establish a ratification of the Oral Lease. Any "celebration" of Tenants' presence would be consistent with the License between Abounding Grace and Ukrainian New Jersey. And, there is no evidence that Ukrainian New Jersey's members were aware of or "celebrating" the terms of the Oral Lease of indefinite duration.

Nor can there be a breach of duty of good faith and fair dealing to seek confirmation of a transfer made years before First Ukrainian had any dealing with Abounding Grace, for a legitimate purpose that had nothing to do with Abounding Grace and under a statute that expressly permits such confirmation.

Given the vast disparity between the amount of improvements alleged (\$500,000) and the value Tenants' received (millions of dollars), Tenants cannot recover even an offset. Nor would

Tenants recover the increased value of the property under their unjust enrichment claim since the alleged improvements were not made under any claim of title.

Finally, the Tenants' reliance is unreasonable, and insufficient to support the Tenants' promissory estoppel claim. Tenants' reliance on an alleged oral promise that Abounding Grace's License would never be terminated is in direct conflict with the written License terminable in 30 days.

With respect to the cross-motion to amend, First Ukrainian argues that it cannot enter into a partnership because a partnership must be a profit seeking enterprise. Plaintiffs fail to allege the element of a partnership, namely, that there was an agreement to share profits and losses. Further, allegations of partnership are inconsistent with evidence of plaintiffs' License with Ukrainian New Jersey; and First Ukrainian could not have transferred the Church Building's title to the partnership without court approval under RCL § 12(1).

Further, RCL § 12(9) does not permit the confirmation of the Oral Lease because the lease was not executed and delivered, the terms of the Oral Lease were unwise and would not be in the best interests of First Ukrainian today. Further, the Tenants have not complied with the technical requirements of RCL § 12(1).

In response, the Tenants add that First Ukrainian failed to demonstrate any prejudice by the proposed amendments. Plaintiffs' partnership claim is grounded on the law and there is no *per se* rule that prohibits religious corporations from entering into a partnership agreement. The *indicia* of partnership exists as Abounding Grace and First Ukrainian's partnership led to an appreciation in value of the Church Building, and a profit for each of them in the form of increased contributions from congregants and benefactors, which were used to carry out their respective charitable missions and goals. The "partnership" profits were addressed by

Abounding Grace agreeing to share a portion of its contributions by investing them in the Building and paying rent, and losses were shared by Abounding Grace bearing the costs of expenses associated with maintaining the Building. The License exists as an agreement separate from the Oral Lease, and RCL § 12's requirements do not apply to the parties' partnership agreement. Plaintiffs do not claim that they own the Church Building as a result of the formation of the partnership, or that title passed to the partnership or to Abounding Grace. Rather, title to the Building remained in First Ukrainian's name, with First Ukrainian holding the Church Building in trust for the partnership.

Additionally, the Court has equitable authority to confirm and order specific performance of the Oral Lease irrespective of RCL § 12(9) based on the best interests of First Ukrainian at the time the Oral Lease was made. Given the Building's condition and the declining congregation, the terms of the Oral Lease were reasonable. And if the Oral Lease is confirmed, First Ukrainian will continue to receive rent and Abounding Grace will continue to improve the Building. Further, RCL § 12(1) and NPL § 511 do not apply, since such sections govern situations when a grantor seeks to convey property to a grantee, and not where, as here, the grantee seeks to confirm a lease that the grantor is now denying.

Analysis:

First Ukrainian's Motion to Dismiss the Complaint and Tenants' Cross-Motion

Under General Obligations Law §§ 5-703 (1), (2),¹¹ any lease agreement, that, by its own terms, cannot be performed within one year, is void and unenforceable unless such agreement is in writing and subscribed by the party to be charged (*Nelson Bagel Bakery Co., Inc. v Moshcorn Realty Corp.*, 289 AD2d 69, 734 NYS2d 134 [1st Dept 2001]; *150 Central Park South v Ritz Carlton Valet Serv.*, 276 AD 214 [1st Dept 1949] [holding, under a former RPL §242, of which substance was transferred to GOL §5-703, a lease for a term exceeding one year cannot be created or granted except by a writing subscribed by the lessor]).¹² It has been held that where the terms of a lease agreement can be construed as being “capable of” performance within a year measured from the date of the agreement, the contract is free from the “writing” requirement of General Obligations Law §5-703 (*City of New York v Heller*, 127 Misc 2d 814 [Civil Court of the City of New York 1985] [applying the writing requirements under both General Obligations Law §§ 5-701 and 5-703 to an oral lease agreement]).

In cases decided under General Obligations Law §5-701, which contains a similar writing

¹¹ General Obligations Law § 5-703 (1) provides:

An estate or interest in real property, other than a lease for a term not exceeding one year, . . . cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. . . .

General Obligations Law §5-703 (2) provides:

A contract for the leasing for a longer period than one year . . . is void unless the contract . . . expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

¹² (See *Geraci v Jenrette*, 41 NY2d 660 [1977] [Noting that “subdivision 1 (General Obligations Law, § 5-703) was formerly section 242 of the Real Property Law”]).

requirements for agreements in general, it has been held that where an oral agreement calls for performance of indefinite duration and terminable within a year of its inception only by its breach or non-performance, such agreement is barred by the Statute of Frauds (*Sabharwal v Eminax, LLC*, 305 AD2d 336 [1st Dept 2003]; *Foscarinis v Seldman*, 192 AD2d 388 [1st Dept 1993] [oral agreement which, by its terms, was to remain in effect for as long as plaintiff was able to practice medicine, is barred by the Statute of Frauds]; *McCoy v Edison Price, Inc.*, 186 AD2d 442 [1st Dept 1992] [where the alleged oral agreement only may be terminated within one year upon a breach thereof or non-performance, it is not exempt from the Statute of Frauds]; *Sachs v Gun Hill Jewish Ctr.*, 48 AD2d 609, 371 NYS2d 367 [1st Dept 1975] [rejecting plaintiff's claim predicated on an oral employment agreement which was to endure as long as plaintiff lived or defendant existed; inference that the possibility of defendant's dissolution within a year precludes application of the Statute of Frauds is not the law of this State]). Analogously, since the Oral Lease is not terminable within one year in the absence of a breach thereof or non-performance, and therefore, is not exempt from the Statute of Frauds.

According to the Tenants, Pastor Jarucyzk represented that Abounding Grace could occupy various portions of the Church Building "for as long as" First Ukrainian remained at the Church Building as a "viable congregation." By its terms, First Ukrainian was not free to terminate the Oral Lease within a year while it was a viable congregation. Further, in the event First Ukrainian was no longer a "viable congregation" within the year of the Oral Lease's inception, such event would render First Ukrainian's performance of the Oral Lease impossible. Since the Oral Lease cannot be construed as being capable of "performance" within a year from the date Abounding Grace and First Ukrainian entered into the agreement, the Oral Lease

violates the writing requirement in the Statute of Frauds.

Nor is the Oral Lease removed from the ambit of the statute by reason of partial performance unequivocally referable thereto. Part performance not unequivocally referable to a contract of sale is insufficient to avoid the application of the Statute of Frauds (*Abbey v Henriquez*, 36 AD3d 724, *supra* [where plaintiff's part performance was more consistent with the performance of a *lease* of the premises, plaintiff's claim for specific performance on a contract of *sale* for the same premises dismissed]). There must be performance "unequivocally referable to" the agreement performance which alone and without the aid of words of promise is unintelligible or at least extraordinary unless as an incident of ownership, assured, if not existing (*Tribune Printing Co., Inc. v 263 Ninth Ave. Realty, Inc.*, 88 AD2d 877, 452 NYS2d 590 [1982]).

The \$1,200.00 monthly payments are not unequivocally referable to the Oral Lease, in light of the License which expressly called for payment by Abounding Grace in the monthly amount of \$1,200.00 (*Gotham Food Group Enterprises, Inc. v Principal Mut. Life Ins. Co.*, 267 AD2d 48, 699 NYS2d 366 [1st Dept 1999] [plaintiff's monthly payments to defendant landlord's receiver were not unequivocally referable to the alleged lease since plaintiff made these payments and defendant accepted them pursuant to a stipulation in a non-payment proceeding]). In their second amended complaint, Rev. Richard Del Rio alleges that Abounding Grace "agreed to pay rent to First Ukrainian." Attached to said complaint is a copy of a check tendered by Abounding Grace, four months after the Oral Lease for "rent" in the amount of \$1,200. However, the License entered into in November 1998 also contains a provision requiring Abounding Grace pay \$1,200.00. The License expressly provides that:

In consideration of the access and use of the Premises, under this Agreement, Licensee agrees to tender to UEAG [Ukrainian New Jersey] the sum of one thousand two hundred

(\$1,200.00) dollars per calendar month, *in advance on the first day of each month*.
(Emphasis added).¹³

One month after Ukrainian New Jersey and Abounding Grace executed the License, Abounding Grace tendered a check in December 1998. Although Abounding Grace's check is made payable to "First Assembly God Ukrainian Church," which is First Ukrainian's original name, the deposit ticket bears "Ukrainian Evangelical Assemblies of God" which is more closely associated with the License. There is no indication that Abounding Grace tendered any rent prior to the date of the License or solely in connection with the Oral Lease. Thus, it cannot be said that the payment of rent by Abounding Grace was "unequivocally referable to" the Oral Lease so as to remove the Oral Lease from the application of the Statute of Frauds.

Nor were the improvements made by the Tenants to the Church Building "unequivocally referable" to the Oral Lease (*Lebowitz v Mingus*, 100 AD2d 816, 474 NYS2d 748 [1st Dept 1984] [\$50,000 improvement to apartment not "unequivocally referable" to oral contract to sell apartment or oral contract to extend lease for an indefinite period and at unspecified rent; improvements may be related to desire to improve the surroundings in which to live and work or on right of first refusal in lease rider]).

Further, the Tenants' argument that the Oral Lease is enforceable since First Ukrainian admits having entered into the contract lacks merit. Abounding Grace's reliance upon *Taussig v The Clipper Group, L.P.* (16 AD3d 224 [1st Dept 2005]) for the proposition that the Oral Lease is enforceable notwithstanding the Statute of Fraud violation in light of Pastor Jarucyzk's

¹³ The License also called for Abounding Grace to procure "general liability insurance" in an amount certain, naming "Ukrainian Evangelical Assembly of God Church" [Ukrainian New Jersey]. Abounding Grace also agreed to maintain, clean and provide security "at all times the [Church] Building or Premises are being accessed or used by Licensee. . . ."

admission of his promise to Abounding Grace, is misplaced. In *Taussig*, the oral agreement at issue involved a finder's fee for referral of an investment opportunity. In the decision, the Court found that the agreement was not indefinite, since its missing terms were determinable by reference to clear objective standards, including those catalogued in the deposition testimony of defendant's president. Citing to *Matisoff v Dobi* (90 NY2d 127, 134, 659 NYS2d 209 [1997]), the Court then stated that an oral agreement that violates the Statute of Frauds is enforceable nonetheless where the party to be charged admits having entered into the contract. Yet the Court in *Matisoff v Dobi* (*supra*), when citing this principle, rejected a party's attempt to incorporate this rule so as to enforce a nuptial agreement. Notably, the case *Cohon & Co. v Russell* (23 NY2d 569, 574, 297 NYS2d 947 [1997], to which *Matisoff* cites, applied this principle when finding that, *inter alia*, a contract clause constituted an admission by the defendant that plaintiff performed services and that an obligation to plaintiff actually existed and that the memorandum therein was sufficient to meet the requirements of the Statute of Frauds. Here, the Tenants merely allege that Pastor Jarucyzk did not deny, at his deposition, that he extended the Oral Lease to Abounding Grace. However, the deposition transcript submitted to the Court does not reflect any admission by Pastor Jarucyzk or by any other member of First Ukrainian. Further, such allegation hardly amounts to the type of "admission" sufficient to exempt the Oral Lease from the Statute of Frauds.

Nor can it be said that the Oral Lease was ratified by Ukrainian New Jersey's "celebration" of Abounding Grace's occupancy in the Church Building. Ratification requires a clearly expressed assent to the transaction and may not be inferred from doubtful or equivocal acts (*Diocese of Buffalo v McCarthy*, 91 AD2d 1210 [4th Dept 1983] [no ratification found,

where property owner, upon learning of lease entered into by an unauthorized agent and occupant, offered different lease rental amount, length of term]).

Here, Ukrainian New Jersey's License with Abounding Grace contains additional terms, which are either significantly different or contrary to the terms of the Oral Lease. While the Oral Lease permits Abounding Grace to remain at the Church Building "for as long as" First Ukrainian remains as a viable congregation, First Ukrainian's obligation under the License agreement to grant Abounding Grace's access to the Church Building could be terminated at will by Ukrainian New Jersey upon 30 days written notice. Unlike the Oral Lease, Abounding Grace's occupancy was not tied to the viability or existence of Ukrainian New Jersey, under the License.

Thus, in light of this Court determination that the Oral Lease is unenforceable, the Court does not reach the issue of whether the Oral Lease is void pursuant to RCL § 12(1)'s requirement of Court-approval. Nor does the Court reach the issue of whether the Oral Lease is superceded by the License, or fails for lack of the essential term of rent, or due to Pastor Jarucyzk's lack of authority.

Consequently, the Tenants' breach of covenant of good faith and fair dealing claims are dismissed, as such claims cannot stand in the absence of an enforceable agreement from which such duties would arise (*American-European Art Assos., Inc. v Trend Galleries, Inc.*, 227 AD2d 170, 641 NYS2d 835 [1st Dept 1996]).

Further, the Tenants' unjust enrichment and promissory estoppel claims lack merit.

To state a claim for unjust enrichment, plaintiff must allege that "a benefit was bestowed . . . by plaintiffs and that defendants will obtain such benefit without adequately compensating

plaintiffs” (*Korff v Corbett*, 18 AD3d 248 [1st Dept 2005] [where plaintiff provided business and consulting services to defendants relating to the property at issue, plaintiff stated a claim for unjust enrichment]). A claim for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another (*Mente v Wenzel*, 178 AD2d 705 [3d Dept 1991]). Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice (50 N. Y. Jur., Restitution, §7). Generally, courts will ascertain whether a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent (*Paramount Film Distributing Corp. v State*, 30 NY2d 415, 334 NYS2d 388 [1972]).

According to the second amended complaint, the Tenants expended approximately \$500,000.00 in improving the Church Building over the period of their tenancy. It is argued that such improvements conferred a benefit upon First Ukrainian for which the Tenants were not adequately compensated. However, Abounding Grace's pastor, Rev. Del Rio, states in an affidavit dated in October 2004, that the Tenants would “have to pay \$600,000 to \$1.35 million per year to find suitable commercial space” to “replace the approximately 15,000 square feet” they are currently using (Aff. of Rev. Del Rio, Exh. C. to Potenza Affirmation). By utilizing such space at a rate of \$1,200.00 per year, instead of at the market rate, it cannot be said that the Tenants did not likewise receive a substantial benefit, notwithstanding its costs of improvements (*Mente v Wenzel*, 178 AD2d 705 [3d Dept 1991] [where plaintiffs lived on the subject property for over 20 years without making payments to defendants/owners for the sale or rental of the

property, there was no proof that plaintiffs' personal services and property improvements unjustly enriched defendants, given the free use and possession of the property for over 20 years]). Nor can it be said that the Tenants' improvements were made under any color of title to the Church Building (*see e.g., Higgins v O'Donnell* (254 AD 775, 4 NYS2d 775 [2d Dept 1938] [improvements were made with the consent of the plaintiff under an arrangement by which plaintiff recognized that the defendant should have the value thereof in the event of a sale of the property])).

The Tenants' reliance upon *Williams v Lynch* (245 AD2d 715) for the proposition that they can recover on an unjust enrichment theory for the enhanced value of property based on their improvements to the Church Building, is misplaced. In *Williams*, the Court sustained plaintiff's unjust enrichment claim for her improvements to an apartment she shared with the defendant. However, unlike the parties in *Williams*, the relationship between Abounding Grace and First Ukrainian was akin to that of a landlord-tenant or licensee.

Furthermore, the Tenants' promissory estoppel claim lacks merit. To sustain a claim for promissory estoppel, the aggrieved party must allege (1) a clear and unambiguous oral promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury caused by the reliance on the promise (*New York City Health and Hosp. Corp. v St Barnabas Hosp.*, 10 AD3d 489 [1st Dept 2004]; *Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792 [3d Dept 2002]). Further, the injured party must demonstrate that it would be unconscionable to invoke the Statute of Frauds to bar such a claim (*Fleet Bank v Pine Knoll Corp.*, *supra*) [where claimant alleged that as a result of plaintiff's failure to fulfill the oral agreement to finance the subject project, she incurred a \$100,000 debt, lost her residence to foreclosure, sold her car to

support the debt, and was left with only a portion of her original business venture, issue of fact exists as to whether claimant sustained an unconscionable injury]).

Any reliance by the Tenants' upon Pastor Jarucyzk's oral promise cannot be deemed "reasonable" under the circumstances of this case. Within three months of the inception of the Oral Lease, Ukrainian New Jersey entered into a License agreement with Abounding Grace, which by its expressed terms, was terminable at will upon 30 days notice (*Sanyo Elec., Inc v Pinros & Gar Corp.*, 174 AD2d 452 [1st Dept 1991])[claim for promissory estoppel fails where the alleged oral promise to grant defendant an exclusive distributorship was completely contradicted by written representations from plaintiff placing defendant on "equal footing" as other distributorships and expressing the intent to terminate the agreement at will)].

Further, there is no claim, and the record does not indicate, that the improvements by the Tenants were made under any claim of title to the Church Building (*see Roller v Frankel*, 9 AD2d 24 [3d Dept 1959] [where improvements are made in good faith and under a claim of title, equity may compel reimbursement by the owner to the other party.

With respect to the Tenants' cross-motion to amend the second amended complaint, the Court observes that leave to amend a pleading should be freely granted, upon an evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phylfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

Given that the Oral Lease is unenforceable, there is no basis on which to approve the Oral Lease pursuant to RCL § 12 as requested by the Tenants. The Court thus determines that the allegation by the Tenants that First Ukrainian entered into an additional oral lease with Xcel, and that First Ukrainian reformed and renewed the Oral Lease is insufficient to overcome the Statute of Frauds.

Further, the Tenants' purported claim sounding in partnership lacks merit. A "partnership" is defined as a contract of two or more persons to place their money, effects, labor or skill or some or all of them in lawful commerce or business and to divide the profits and bear the loss in certain proportions (*Boyarsky v Froccaro*, 479 NYS2d 606 [Supreme Court, New York County 1984]). Under Partnership Law, partnership is defined as "an association of two or more persons to carry on as co-owners of a business for profit" (Partnership Law § 10[1]). It is a "community of interest that manifests itself in mutual control" (*Needel v Flaum*, 248 AD2d 957, 958 [4th Dept 1992]). "Among the factors to be considered in determining whether a partnership was created are "the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was a sharing of the profits as well as a sharing of the losses," and whether there was a contribution by each party of property, financial resources, effort, skill, or knowledge to the business (*Kidz Cloz, Inc v Officially for Kids, Inc.*, 320 F Supp 2d 164, 170 [SDNY 2004]; *Cleland v Thirion*, 268 AD2d 842, 704 NYS2d 316 [3d Dept 2000]; *Kellogg v Kellogg*, 185 AD2d 426, 427, 585 NYS2d 824, quoting *Boyarsky v Froccaro*, 131 AD2d 710, 712, 516 NYS2d 775, quoting *Ramirez v Goldberg*, 82 AD2d 850, 852, 439 NYS2d 959; *Impastato v De Girolamo*, 459 NYS2d 512 [Supreme Court, New York County 1983] [indicia of existence of a partnership relationship among several individuals are . .

. *pro rata* contribution to capital of the enterprise, joint ownership and interest in the enterprises' assets by all investors, intention of the parties that they be partners and the partners all having some voice in management of the enterprise; however, a person who has no proprietary interest in a business except to share profits as compensation for services is not a partner]). A proprietary interest in the business by party claiming partnership is indispensable (*Smith v Maine*, 260 NYS 409 [Supreme Court, New York County 1932]).

Although there is no *per se* rule that prohibits religious corporations from entering into a partnership agreement, there are no *indicia* of a partnership between Abounding Grace and First Ukrainian. The purported Oral Lease neither expressly nor impliedly reflects an intent for Abounding Grace and First Ukrainian to become "partners," but reflects a landlord-tenant relationship. Although both Abounding Grace and First Ukrainian were engaged in Christian ministry, both corporations were uniquely separate, serving separate congregations. Each organization was managed and control led by their respective leaders, and as such, there was no joint control or joint management of the Church Building or of their respective ministries. Although Rev. Del Rio of First Ukrainian acknowledged that "with the help of Abounding Grace, the desires of the Ukrainian congregation are being fulfilled," he considered Abounding Grace's alliance with First Ukrainian "an extension" of his "father's" and First Ukrainian's ministries. Further, there is no indication that they shared any of each others' profits or losses. And, although Abounding Grace tendered payments which ultimately benefitted of Church Building, there was no "joint" contribution of property, financial resources, effort, skill, or knowledge to any shared business. The appreciation in value of the Church Building, and a profit for each of them in the form of increased contributions from congregants and benefactors,

were used to carry out each of Abounding Grace's and First Ukrainian's separate missions and goals. And, the purported "profits" in the form of Abounding Grace's investment in the Building and paying rent, and "losses" in the form of Abounding Grace's costs to maintain the Building are no different from those undertaken in connection with a landlord-tenant relationship.

As the indicia of partnership are lacking, the application by the Tenants' to amend the second amended complaint to confirm the Oral Lease and assert claims sounding in partnership is denied.

First Ukrainian's Petition and Motion to Dismiss the Tenants' Objections and Counterclaims

First Ukrainian asserts that RCL § 12(8) expressly permits transfers of property between two solvent religious corporations with similar religious objects for nominal consideration, and First Ukrainian was solvent at the time of the transfer. The 1994 conveyance has not impeded any claim of any creditor of First Ukrainian. Further, First Ukrainian has no debts or liabilities, no known judgments or tax liens or encumbrances, other than a 1989 sidewalk lien of the Bureau of Highway Operations. At the time of the 1994 conveyance and today, First Ukrainian believes that the conveyance was then and is today, in the best interests of the members of First Ukrainian and that the religious objects and interests of First Ukrainian were and are promoted by the conveyance to Ukrainian New Jersey. The relationship between First Ukrainian and Ukrainian New Jersey was and still is very close due to the identical religious beliefs members of both churches hold. Both churches have worked closely together, and share a "sisterly" relationship. In 1994, when First Ukrainian's membership declined, it did not have sufficient corporate

officers, deacons or manpower to manage the Church Building or its activities without the assistance of Ukrainian New Jersey. Therefore, the members of First Ukrainian voted to transfer the Church Building to Ukrainian New Jersey. Although an attorney drafted the deed, First Ukrainian was unaware of the requirement of Court approval.

Since the conveyance, both churches operated under the presumption that Ukrainian New Jersey was the lawful owner of the Church Building. Ukrainian New Jersey paid the expenses, managed the Church Building, and entered into agreements with third parties relating to the Church Building. First Ukrainian holds services and activities at the Church Building with the assistance of Ukrainian New Jersey.

To confirm the 1994 conveyance, the Board and members of First Ukrainian held a special joint meeting, at which 40 of the 42 official members unanimously agreed that it would be in the best interests of First Ukrainian to confirm and ratify the 1994 conveyance for \$10.00. The members and Board also agreed to enter into an agreement with Ukrainian New Jersey to allow them to use the Church Building, have the right of first refusal to repurchase the Building for \$10.00 in the event of a contemplated transfer of the Building to a third party, and to participate in significant decisions concerning the management and sale of the Church Building.

Reversal of ownership back to First Ukrainian would not serve the interests of First Ukrainian, since First Ukrainian would then be responsible for the actions taken by Ukrainian New Jersey for the past 13 years.

First Ukrainian argues that once the Court determines that Abounding Grace has no Oral Lease, and thus, no interest in this proceeding, the Court must reject respondents' objections and dismiss the Tenants' counterclaims as duplicative of those asserted in their second amended

complaint as lacking in merit.

With respect to the Tenants' objections, laches does not bar confirmation of a RCL transfer proceeding, and in any event, does not apply to this proceeding, as there was no unreasonable delay by First Ukrainian after it became aware of the defect. Although Pastor Jaruczyk signed a "Proof of Reading of Notice and Business Meeting" stating a meeting was going to be held to approve a sale, it said nothing about the RCL or that a court would have to approve the sale. Further, even if Pastor Jaruczyk was present at a discussion of the need to obtain court approval, such meeting did not put him on notice that the 1994 conveyance was not court-approved. Nor did the Tenants suffer any injury from any delay in correcting the defect in title, as they have paid rent to Ukrainian New Jersey for years after it signed the License with Ukrainian New Jersey in 1997.

The six-year statute of limitations bars claims, and thus, has no application to a landowner's right to have an encumbrance discharged from the record. Nor can such right be barred by the statute of limitations.

First Ukrainian argues that the Tenants' unjust enrichment claim, though irrelevant to the transfer, may survive the transfer of the Church Building.

Further, Ukrainian New Jersey is associated with the Assemblies of God as a cooperating church. And, RCL § 12 requires only that the Court ensure that the interests and mission of First Ukrainian are promoted. The real purpose of the petition is not to evict the Tenants, but to confirm a decade-old conveyance First Ukrainian made years before Abounding Grace's occupancy began. The terms of the 1994 conveyance are also fair and reasonable to First Ukrainian. Nominal consideration is appropriate, since one solvent religious corporation is

transferring church property to another religious corporation. Moreover, First Ukrainian's right of first refusal provides additional adequate consideration. And, RCL § 12 permits transfers for nominal consideration where the transfer does not impair the rights of any creditor. Further, the Tenants' new unjust enrichment claim does not bar section 12's authorization of nominal consideration. And, First Ukrainian is a religious corporation as defined under RCL and RCL does not distinguish between substantial or nominal consideration. Further, as the Attorney General recognized, the petition satisfies the technical requirements of RCL: no statement of the Church's "fair value" is needed, the purportedly stale documents were reviewed by the Attorney General, and are now supplemented by a recently prepared First Ukrainian assets and liabilities statement, and First Ukrainian's meeting minutes demonstrate that a *bona fide* vote was taken to approve the 1994 conveyance and amendment to the deed. Also, the "so-called" reversionary interest of the Assemblies of God have no bearing on the petition, since such interests apply only if First Ukrainian ceases to exist, and First Ukrainian remains a functioning church. Notably, the Assemblies of God advised Abounding Grace to seek another location for their ministry. Nor has First Ukrainian's Board violated the requirement of RCL sections 12 and 431. Furthermore, the Tenants lack standing to raise an objection based on breach of fiduciary duties.

Similarly, the Tenants' claim that the 1994 conveyance constitutes a fraudulent conveyance lacks merit. The transfer does not threaten any interest of the Tenants, the 1994 conveyance could not have been made to judgement-proof First Ukrainian vis-a-vis the Tenants, and any constructive fraud claim is barred by the six-year statute of limitations, which accrues from the date of the 1994 conveyance.

Nor are the Tenants' duplicative first, second, fifth, and sixth counterclaims proper, since

the Petition does not contain any claims against them. The Tenants' attempt to amplify their second amended complaint by asserting such counterclaims is a misuse of this Petition proceeding. The fourth counterclaim alleging that First Ukrainian's right of first refusal is a sham lacks merit; such right is permitted because it is a reasonable restraint on the future alienation of the Church Building.

And, the third counterclaim seeking to pass the Tenants' leasehold interests with title to Ukrainian New Jersey is moot, since any such transfer will not modify any rights they may have.

In support of their objection, the Tenants contend that as occupants in the Church Building, they have an interest in prohibiting First Ukrainian from giving away the Church Building to a New Jersey congregation which is disinterested in maintaining the Building, and have a right to be heard under NPL § 511(b). Further, the Attorney General required that the Tenants be given notice of the RCL proceeding.

The Court has an independent obligation to consider the deficiencies in the Petition and scrutinize the 1994 conveyance and deed regardless of whether the Oral Lease is valid and enforceable and notwithstanding the Attorney General's waiver of its right to object.

The terms of the 1994 conveyance were unwise and, if confirmed, would not benefit First Ukrainian or promote the best interests of First Ukrainian or the general public. Looking to the 1994 conveyance at the time it was made, and disregarding the right of first refusal or the terms of the proposed deed, the terms and consideration of the 1994 conveyance were unwise. Ukrainian New Jersey paid no consideration to First Ukrainian, the terms negotiated by Pastor Jaruczyk in 1994 are broader than those reflected by the 1994 proposed deed, and the proposed deed contains a right of first refusal that is not contained in the 1994 deed. Further, the

conveyance is unnecessary today and First Ukrainian offers no reason why transferring the Church to Ukrainian New Jersey promotes its interests or purpose. First Ukrainian now has a board of directors, \$50,000 in assets, not including the Church Building, can make use of the use and occupancy funds paid by the Tenants into escrow since 2004, and can maintain the Church Building without Ukrainian New Jersey's assistance. As the lawful owner of the Building, First Ukrainian would not need the "right of first refusal" as contemplated by the proposed deed. And, ceding the Church Building is inconsistent with First Ukrainian's paramount purpose to establish and maintain "a place," as expressed in its Constitution. The 1994 conveyance also conflicts with First Ukrainian's obligations as an Assemblies of God church to "administer its property and assets in accordance with First Ukrainian's By-laws, and the "rules, regulations and usages of the New York district of the Assemblies of God" denomination. Notably, the Assemblies of God advised the Attorney General it "will not waive its rights with regard to the reversionary clause to release said property to a fellowship, independent or otherwise affiliated, without a similar irrevocable reversionary clause to the Assemblies of God."

Even if the 1994 conveyance satisfies RCL § 12 and NPL § 511(d), the Court still has the discretion to reject a conveyance that will not benefit the "society in general" or promote the "welfare of the people collectively." Courts, acting as "*parens patriae*," are to protect the clergy and parishioners from business deals not in their best interests, and society in general, and the 1994 conveyance will prevent the Tenants from providing various secular services to East Village residents.

Further, the lack of sufficient consideration is fatal to the Petition because RCL § 12(8)'s exception does not apply.

In reply, First Ukrainian submits that Abounding Grace's interest in this proceeding is limited. Abounding Grace is, at most, a month-to-month tenant, with no power to veto the transfer of the Church Building. Further, the Attorney General's office, which did not object to the Petition, did not require that Abounding Grace participate in this proceeding, or advocate for the public interest. Furthermore, whether the transfer is "necessary" or whether First Ukrainian could have obtained a better bargain is of no moment. Here, First Ukrainian will benefit from the conveyance, given that First Ukrainian and Ukrainian New Jersey are sister churches, where the larger, financially stronger Ukrainian New Jersey can help First Ukrainian fulfill its mission. Also, First Ukrainian's board, which is in a better position to assess the interests of its congregation, approved the conveyance.

That the 1994 deed did not contain certain "broader" terms that were supposedly agreed to by the parties is irrelevant, notably where First Ukrainian never complained about the deed it is now seeking to confirm and where the deed gives First Ukrainian the right of first refusal.

Nor does RCL 12 impose a requirement that the conveyance be in the public interest. RCL 12 exists to protect religious corporations from loss through unwise bargains and from perversion of the use of the property.

Abounding Grace's laches argument lacks merit, since no claim has been brought against it, and it would be senseless to enforce laches against two willing parties to a transfer. As to the timing of the Petition, First Ukrainian properly waited for the Attorney General to approve the petition before filing it. Abounding Grace cannot claim prejudice when it would have pursued delay causing discovery if First Ukrainian filed this petition earlier. And, the claim that Abounding Grace did not seek a lease earlier and is now exposed to soaring property values

cannot support its laches claim since Abounding Grace has in fact enjoyed below market rent during the alleged delay.

The plain language of RCL § 12(9) makes no distinction between transfers for nominal consideration and other transfers. To permit *nunc pro tunc* confirmation of conveyances for nominal consideration does not render RCL § 12(8) redundant. RCL § 12(8)'s reference to "order of the court, obtained as above provided" simply means that conveyances for nominal consideration requires court approval just like all other conveyances by religious corporations, and section 12(9) allows the court to give this approval *nunc pro tunc* if a party inadvertently fails to secure it in the first place. Abounding Grace cites no cases denying *nunc pro tunc* approval of a transfer for nominal consideration on this ground.

Contrary to Abounding Grace's contention, Ukrainian New Jersey is a "religious corporation" for purposes of RCL § 12. Ukrainian New Jersey has engaged in joint activities with First Ukrainian in New York, acted as landlord of the Church Building since 1994, and there is no requirement that a sister church perform religious services in New York State in order to qualify as a religious corporation.

Nor does RCL § 12 prohibit a conveyance simply because one party alleges that someone involved has had a mixed motive. First Ukrainian attempted to convey the Church Building to Ukrainian New Jersey years before either party even heard of Abounding Grace, and by filing this Petition, First Ukrainian simply seeks to confirm the state of affairs it has wanted all along. Thus, there can be no question that First Ukrainian was motivated by anything but the interests of First Ukrainian

Nor are there any loopholes in the agreement absolving the requirement that the parties

seek court approval under RCL § 12(1) in order to amend the deed. The fact that First Ukrainian and Ukrainian New Jersey may, in the future, seek approval of further amendments from the court is no reason to refuse approval of the amendments to the deed now.

First Ukrainian's motion to dismiss Abounding Grace's objections is procedurally proper. An objection in point of law is akin to an affirmative defense, and thus subject to defeat under 3211(b). In any event, CPLR 402 allows the Court in a special proceeding to permit such other pleadings as are authorized in any action, and the Court has discretion to allow the motion. Abounding Grace has alleged no prejudice as a result of First Ukrainian's motion, and has responded to the motion in full.

Finally, First Ukrainian's motion to dismiss Abounding Grace's counterclaims should be upheld. Abounding Grace has had ample opportunity to articulate its claims in the related action and has amended its claims twice. The Court should resolve them there, and decide the confirmation petition on its own merits.

Analysis of Application to Confirm Conveyance and Motion to Dismiss Objections

RCL § 12(1) provides as follows:

religious corporation shall not sell . . . any of its real property without applying for and obtaining leave of the court therefor pursuant to section five hundred eleven of the not-for-profit corporation law as that section is modified by paragraph (d-1) of subsection one of section two-b of this chapter . . . without obtaining leave of the court therefor.

Subdivision (d) of section 511 provides that the court may authorize the sale if it appears to the court's satisfaction that: "the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted [thereby]" (see *Church of God v Fourth Church of Christ, Scientist,*

76 AD2d 712 [2d Dept 1972]).

The purpose of RCL § 12 is to “protect the members of the religious corporation ...from loss through unwise bargains and from perversion of the use of the property” (*Soho Ctr for Arts and Education v Church of Saint Anthony of Padua*, 146 AD2d 407 [1st Dept 1989]; *Diocese of Buffalo v McCarthy*, 91 AD2d 1210 [4th Dept 1983]). RCL §12 is to be strictly construed and compliance with it is “absolutely necessary” and “indispensable” to the validity of the transaction (*Diocese of Buffalo v McCarthy*, 91 AD2d 1210 [4th Dept 1983]).

However, in the event a religious corporation fails to obtain such court-approval, the religious corporation may avail itself of RCL § 12(9), which provides:

If a sale . . . of any real property of any such religious corporation has been . . . made and a conveyance or mortgage executed and delivered without the authority of a court . . . the court may, thereafter, upon the application of the corporation or of the grantee . . . confirm said previously executed conveyance . . . and order and direct the execution and delivery of a confirmatory deed or mortgage, or the recording of such confirmatory order . . . ; and upon compliance with the said order such original conveyance or mortgage shall be as valid and of the same force and effect as if it had been executed and delivered after due proceedings had in accordance with the statute and the direction of the court.

To determine the validity of a contract for sale of religious property, the Court must consider (1) the fairness and reasonableness of the terms of the transaction, as of the “time of the making of the contract,” and (2) whether the sale is in the best interest of the congregation, the real parties at interest, at the time approval of the contract is considered (*Wolkoff v Church of St. Rita*, 132 Misc 2d 464 [Supreme Court, Richmond County 1986]). “Market value will not be dispositive” (*Wolkoff v Church of St. Rita, supra*).

Looking first to the terms of the 1994 conveyance, the Court determines that the terms therein are fair and reasonable under the circumstances. At the time of the conveyance in 1994,

membership at First Ukrainian had decreased significantly. It is undisputed that First Ukrainian was nearly insolvent, and could not maintain the Church Building.

RCL § 12(8) provides that

. . . any solvent religious corporation may, by order of the court, obtained as above provided in proceedings to sell, mortgage or lease real property, convey the whole or any part of its real property to another religious corporation, or to a membership, educational, municipal or other nonprofit corporation, for a consideration of one dollar or other nominal consideration, and for the purpose of applying the provisions of article five of the general corporation law, a proposed conveyance for such consideration shall be treated as a sale, but it shall not be necessary to show, in the petition or otherwise, nor for the court to find that the pecuniary or proprietary interest of the grantor corporation will be promoted thereby; and the interests of such grantor shall be deemed to be promoted if it appears that religious or charitable objects generally are conserved by such conveyance, provided, however, that such an order shall not be made if tending to impair the claim or remedy of any creditor.

Under RCL § 12(8), nominal consideration, such as \$10.00 herein, for the conveyance of the Church Building is expressly authorized since First Ukrainian was solvent. Thus, the consideration in the conveyance is sufficient to support the conveyance.

Further, there is no indication that confirmation of the 1994 conveyance will impair the rights of any creditor. To the extent that the Tenants claim that they are “creditors” by way of their claims asserted in the second amended complaint, such claims, which this Court determines lack merit, can not serve as a bar to this Petition. As a result, the Tenants’ twelfth objection in this regard is dismissed.

With respect to the best interests of First Ukrainian, the record indicates that the 1994 conveyance now serves the best interests of the members of First Ukrainian. The circumstances under which the 1994 conveyance was made were such that members of First Ukrainian were concerned that ownership of the Church Building might revert to the Assemblies of God due to

the decrease in membership. First Ukrainian lacked the financial ability to maintain the Church Building, and determined that it was in the best interests of their members to “keep” the Church Building in the hands of the Ukrainians. In First Ukrainian’s judgment, a transfer of ownership to Ukrainian New Jersey would accomplish this result.

The confirmation of the 1994 conveyance remains in the best interests of First Ukrainian. The desire of First Ukrainian to convey the Church Building was confirmed at three meetings, at which its members discussed and voted to ratify the 1994 conveyance to Ukrainian New Jersey. It cannot be disputed that both First Ukrainian and Ukrainian New Jersey have operated as “sister” churches, maintain the same religious beliefs, and share the common goal of ministering to the Ukrainian people.

Consequently, the Tenants’ fifth objection alleging that said conveyance was not in the best interests of First Ukrainian, and sixth objection alleging that the terms of the of the conveyance were not reasonable or fair, are dismissed.

The Court also determines that the Petition sufficiently satisfies the technical requirements of RCL § 12, and thus, the Tenants’ fourteenth objection is dismissed.

Upon review of the submissions, and based on the above, the Court determines that the remaining objections to the Petition and the Tenants’ counterclaims lack merit and are insufficient to defeat the Petition by First Ukrainian. Accordingly, the motion to dismiss the Tenants’ objections and counterclaims is granted.

In light of this Court’s grant of the Petition, the Tenants’ claims for declaratory relief concerning the validity of the Oral Lease, the invalidity of the License and Notice of Eviction, and whether Ukrainian New Jersey acquired title by adverse possession are dismissed. In light

of the above, the Tenants' second amended complaint is dismissed as lacking in merit and moot.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by First Ukrainian to dismiss the second amended complaint of the Tenants is granted, and the second amended complaint is dismissed; and it is further

ORDERED that the Tenants' cross-motion to amend said complaint is denied; and it is further

ORDERED that the motion by First Ukrainian to dismiss the objections and counterclaims by the Tenants is granted, and such objections and counterclaims are dismissed; and it is further

ORDERED that the Petition for an order *nunc pro tunc*, pursuant to RCL §§ 12(1) and 12(9) and New York Not-For-Profit Corporation Law § 511, confirming the 1994 conveyance to Ukrainian New Jersey, directing the execution and delivery by First Ukrainian of a Confirmatory and Corrected Deed in New York County, and permitting First Ukrainian to (1) correct the name of First Ukrainian on the 1994 Deed to reflect "First Ukrainian Assembly of God, Inc." and (2) add to the "Confirmatory and Corrected" deed the provisions that (a) First Ukrainian shall have the right to use and occupy the Church Building for its religious services rent-free as long as "the transferee is the owner of the Premises," (b) in the event First Ukrainian does not consent to a proposed or contemplated sale or transfer of the Church Building to a third party, First Ukrainian shall have the right of first refusal to repurchase the Church Building for \$10.00, and © First Ukrainian "shall have the right to make material decisions jointly with the Grantee as to the

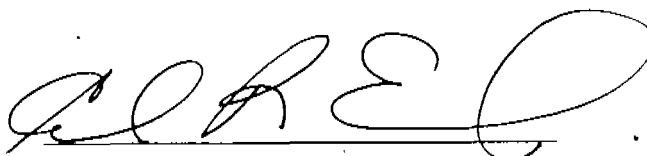
rental, management and transfer/sale” of the Church Building all pursuant to an Agreement executed by First Ukrainian and Ukrainian New Jersey on March 26, 2007, is GRANTED; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that First Ukrainian shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 20, 2007



Hon. Carol Robinson Edmead, J.S.C.

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NEW YORK
COUNTY CLERK'S OFFICE