

Matter of East Nassau Hebrew Cong., Inc.
2010 NY Slip Op 33534(U)
December 14, 2010
Supreme Court, Nassau County
Docket Number: 020387/08
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 3
NASSAU COUNTY

In the Matter of the Application of the East Nassau Hebrew Congregation, Inc., for Dissolution pursuant to New York Religious Corporation Law Section 18.

ORIGINAL RETURN DATE: 09/16/10
SUBMISSION DATE: 11/04/10
Index No. 020387/08

MOTION SEQUENCE #7

The following papers read on this motion:

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Motion by petitioner for an order against the objectors and in favor of petitioner granting summary judgment pursuant to CPLR 3212, an order of preclusion pursuant to CPLR 3126 and sanctions pursuant to Rule 130-1.1 is denied.

Petitioner, East Nassau Hebrew Congregation, Inc. ("ENHC"), is a religious corporation founded in July 26, 1956, pursuant to the New York State Religious Corporations Law. In January 2009 ENHC filed an Amended Petition for Dissolution under Religious Corporations Law Section 18. Petitioner was given leave to amend and furnish a copy of the pleadings to the Attorney General. Petitioner asserts that ENHC is no longer a viable religious corporation. No services have been conducted since 2007; the building which houses the sanctuary is boarded up and the pipes are drained of water. An Order of the Town of Oyster Bay declaring the property a hazard remains in effect. The membership drastically declined in the last fifteen years. The minimum quorum needed to conduct services on the Sabbath has become impossible to attain with any consistency. Daily services have not taken place for years.

It is alleged that ENHC has a duly adopted written set of Bylaws which have been in existence since 1984. The Constitution and Bylaws of ENHC set forth the requirements for membership in the congregation. While all are invited to attend services, only those individuals who have met

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the membership requirements by paying dues or purchasing tickets to High Holy Day services are considered members pursuant to the Bylaws.

Religious Corporation Law §§ 194 and 195 provide that a synagogue may adopt a constitution and bylaws by which it will be governed and recognized as a religious institution. Petitioner argues that ENHC has adhered to its Constitution and Bylaws in relation to the petition for dissolution and as such the actions of the congregation be affirmed by the court. Petitioner also asserts that objectors have no standing because they are not members of ENHC. They are not listed in the membership rolls and cannot establish that they paid dues within the recent past, if ever.

Objector Adler, who by his own admission, never attended a service at ENHC prior to April 2007 (and then only during three services) and never paid any dues to petitioner, is a member and regular attendant of at least two other congregations. Adler challenges the veracity of the By-Laws submitted to the court by petitioner.

The By-Laws of ENHC provide that to be a member, one must pay dues annually or purchase annual tickets to High Holy Day Services:

"ARTICLE III, MEMBERSHIP,

Section 3: Payment

While every Jew is welcome to attend and pray at any service as an attendee, to be a member, however, dues must be paid. Payment of dues can be accepted in any one of three ways:

- a.) By payment of the membership fee as set by the Board of Trustees;
- b.) By payment of the full price of a ticket for a seat for the High Holidays as set by the Board of Trustees;
- c.) By payment of full tuition for the current Hebrew School year as set by the Board of Trustees;
- d.) Family membership dues are capped at three times that of dues for a single member" (Ex. H).

Religious Corporations Law §§ 194 and 195 sets forth how membership of a religious corporation is to be determined in the absence of By-Laws and a constitution. Section 195 provides as follows:

"Organization and conduct of corporate meetings; qualification of voters thereat

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At a corporate meeting of an incorporated church to which this article is applicable the following persons, and no others, shall be qualified voters, to wit: All persons who are then members in good and regular standing of such church by admission into full communion or membership therewith in accordance with the rules and regulations thereof, and of the governing ecclesiastical body, if any, of the denomination or order to which the church belongs, or who have been stated attendants on divine worship in such church and have regularly contributed to the financial support thereof during the year next preceding such meeting; and any other church incorporated under this article, may at any annual corporate meeting thereof, or any corporate meeting called pursuant to the provisions of this article, if notice of the intention so to do has been given with the notice of such meeting, determine that thereafter only members of such church shall be qualified voters at corporate meetings thereof. The presence at such meetings of at least six persons qualified to vote thereat shall be necessary to constitute a quorum. The action of the meeting upon any matter or question shall be decided by a majority of the qualified voters voting thereon, a quorum being present. The first named of the following persons who is present at such meeting shall preside thereat, to wit: The minister of such church, the officiating minister thereof.”

As part of its regular course of business, the secretary of petitioner is required to maintain a list of members of the congregation and ensure that the members fulfill their dues paying obligation as provided by the By-Laws. Neither the individuals representing petitioner nor the objectants have satisfied the court in the evidentiary submissions now being considered that they qualify as members in good standing of ENHC. Since the synagogue has been closed, none of the litigants have demonstrated their status as regular worship attendees at ENHC.

Not being a member, is each individual plaintiff both a “stated attendant on divine worship” and a regular contributor to the synagogue, as required by law? Stated attendance has been held to mean regular attendance according to the customs and usages of the church in question, rather than occasional or sporadic visits. (*People v Tuthill*, 31 NY 550). Although the custom and practice of Orthodox Judaism mandates the holding of daily services each morning and evening, diminished attendance in recent years as prevented the congregation from attaining, on a daily basis, a minyan (i.e., the quorum of 10 adult males required by Jewish tradition for the conduct of public worship). *Kroth v Congregation Chebra Ukadisha Bnai Israel Mikalwaire*, 105 Misc2d 904, 913 (Sup Ct NY County, July 1980).

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There is no indication when the last time an orthodox minyan was held at the ENHC. Moreover, neither petitioner nor the objectants have demonstrated they paid any dues or made any financial contribution during the requisite period provided for by the statute.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York University Med. Ctr.*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. Petitioner has not made an adequate entitlement to summary judgment. A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof but must affirmatively demonstrate the merit of its claim. *Fromme v Lamour*, 292 AD2d 417; *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614.

Objectants request that the court direct the Attorney General to undertake an investigation into the affairs of ENHC or to order the Attorney General to "oust" the present board and install objectants as the valid board members of ENHC. Objectants have no right to such relief. Objectants are required to bring a cross-petition seeking a *writ of mandamus* pursuant to CPLR Article 78. CPLR 8020(b) requires objectant to pay a \$45 filing fee to bring a motion. "Article 78 relief in the form of *mandamus* to compel may be granted only where a petitioner establishes a 'clear legal right' to the relief requested" (*Matter of Brusco v Braun*, 84 NY2d 674; *Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380. "Inasmuch as plaintiffs seek to test the action or inaction of a public officer, their sole available remedy lies . . . in a CPLR Article 78 proceeding seeking *mandamus* to compel. *Mandamus* is available, however, only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (see CPLR 7803[1]; *Matter of Legal Aid Socy. of Sullivan County, Inc. v Scheinman*, 53 NY2d 12; *New York Civil Liberties Union v State of New York*, 4 NY3d 175, 183-84, *rearg. den.*, 4 NY3d 882, 831 [2005]).

Unlike the statutorily-mandated role of the Attorney General in determining whether the sale or encumbrance of real property or the sale of substantially all of the assets by a religious corporation is in the best interests of the congregation (see Religious Corporations Law ("RCL") § 12; Not-For-Profit Corporation Law ("NPCL") §§ 510-511, the Attorney General is not a statutory party to the dissolution of a religious corporation, see RCL § 18. However, at the request this court, the Attorney General has monitored the course of this litigation and, in furtherance thereof, participated in depositions and conferences in connection with this dispute between the objectants and petitioners.

NPCL § 1101 authorizes, but does not require, the Attorney General to commence a proceeding to dissolve a not-for-profit corporation. The Attorney General determines whether to exercise such discretion, on a case-by-case basis. Here, where the numerous questions of fact and legal issues are being contested by interested individuals with competing claims for control of the

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destiny ENHC, and the parties are represented by counsel, the Attorney General has opted not to exercise that discretion, and objectants have no clear legal right to a *writ of mandamus* compelling the Attorney General to do otherwise. However, as requested by the court, the Attorney General has monitored the course of the litigation, participated in the discovery process and will continue to play a role in this matter.

Based on the evidence that has been revealed during discovery in this matter, including sworn testimony given by petitioners and several of the objectants, this court agrees with the Attorney General that there are numerous questions of fact that render summary judgment in this matter premature.

The Attorney General observed that sworn testimony demonstrated no members of the Appleman board (all of whom are related to Rabbi Solomon Appleman by blood, marriage or business relationships, and almost none of whom reside within the Syosset area or within walking distance of the Orthodox synagogue) have played any part in the management of ENHC; rather, management of the day-to-day operations of ENHC and sole control of its finances has remained the province of first, Rabbi Morris Appleman, and later, Rabbi Solomon Appleman, his son, with no oversight exercised by ENHC's board, nor any input by the board members. None of the members of the board have a working knowledge of ENHC's finances – including the current President of the board, a CPA and partner in an accounting firm, who testified that he has served as a board member of ENHC since the 1980s, although he does not live in the Syosset area and has for years worshiped at a synagogue near his residence in Great Neck. Moreover, the Attorney General states that neither Rabbi Appleman nor the members of the board can account for the whereabouts of thousands of dollars of insurance proceeds that were intended to be used for the repair of the synagogue and one of the ENHC residences, following a flood and fire at those premises. The board also approved, without question and without any request for substantiation of the amount, the payment of a severance package for Rabbi Appleman in the amount of approximately \$291,500, the dollar amount of the severance package having been set by Rabbi Solomon Appleman. The board also voted to ratify all of the actions taken by prior boards of ENHC, as well as the actions of the Rabbis Morris and Solomon Appleman, without any knowledge of what actions were taken by those individuals and entities. The board thus ratified, *inter alia*, Rabbi Solomon Appleman's disbursement of thousands of dollars of ENHC funds to his family members; the occupation, rent-free, of one of ENHC's houses, by Rabbi Appleman's former sister-in-law and her son, as part of a divorce settlement between Rabbi Appleman's brother and his former wife; Rabbi Solomon Appleman's execution of a stipulation and general release that prevented ENHC from pursuing any remedies against the Torah Academy of Long Island ("TALI"), for breach of contract, breach of the lease agreement between TALI and ENHC and civil or criminal remedies against TALI to recover thousands of dollars of insurance proceeds resulting from claims in connection with the flood of the ENHC synagogue during TALI's use of the premises – monies or the whereabouts of which remain unaccounted for by petitioners. It must also be determined what is to become of the 8 Torah scrolls, three to four silver Torah breast plates, ritual objects, prayer books and other personality.

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The Attorney General opines that the foregoing is by no means an exhaustive description of the testimony and evidence that has come to light causing the Attorney General to question whether the members of the present board have fulfilled their fiduciary responsibilities to manage the affairs of ENHC.

The very competent attorney for ENHC has done a diligent job in explaining to this court the history of the synagogue in the context of its present condition and declining membership. Petitioner has formulated a plan for the dissolution of ENHC and the disposition of its assets they truly perceive to be in the best interests of the Orthodox Jewish Community of Long Island.

Although most of the testimony of Michael Adler, the main objectant was vacuous, pedantic and posturing with little substance, the application to determine that objectants have no standing is denied at this time since petitioners have not met the burden of establishing their standing. *See Fromme v Lamour, supra; George Larkin Trucking Co. v Lisbon Tire Mart, supra.*

In light of the concerns of the Attorney General, the best interests of the Orthodox Jewish Community on Long Island in the context of applicable New York State Law, the evidence, including the affidavits and testimony submitted by petitioner and objectants which bear on the issue of whether they possess standing and whether petitioners, objectants or none of them should be deemed the valid board of ENHC, a trial is required on the issues of whom, if anyone, possesses standing to claim membership in a validly-constituted board of ENHC, such that valid board votes could have been, or can now be taken, regarding the future of ENHC; whether ENHC's assets should be sold and, if so, how the proceeds derived from such sale be distributed and whether ENHC should be dissolved.

This matter is referred to the Calendar Control Part for trial and shall appear on the calendar of CCP on the 12th day of January, 2011, at 9:30 A.M. subject to the approval of the Justice there presiding. No less than 10 days prior thereto, the attorney for petitioner shall serve a copy of this order and the Note of Issue with receipt of payment on the Calendar Clerk of CCP. The attorney for petitioner shall also forthwith serve a copy of this Order on the Attorney General and the remaining objectants.

The application for a preclusion order and sanctions is denied.

This decision constitutes the order of the court.

Dated: 12-14-10

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

ENTERED
DEC 21 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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Attorneys of Record:

Jonathan E. Kroll & Associates, PLLC
Attention: Jonathan E. Kroll, Esq.
Attorneys for Petitioner
400 Garden City Plaza
Garden City, NY 11530

Law Offices of Gerald P. Gross
Attention: Elliot B. Pasik, Esq.
Attorneys for Objectants
366 Pearsall Avenue, Suite #5
Cedarhurst, NY 11516

Hon. Andrew M. Cuomo, Attorney General
Attention: Dorothy Oehler Nese, Esq.
Assistant Attorney General
200 Old Country Road
Mineola, NY 11501-4241