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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DIANE BARNES, et al.
Petitioners,

- against -

G TOE S. WASHINGTON, et al,
Respondents.

Index
No. 2307 2014

Motion
Date May 5, 2014

Motion
Cal. No. 17

Motion
Seq. No. 1

Conference
Date September 18, 2014

The following papers numbered 1 to 23 read on this proceeding by petitioners to: (1) enjoin respondents from disrupting the services or locking out petitioners from the Ezekiel House of Prayer, Inc. (Church); (2) bar respondents from the Church premises; and (3) remove respondents from the Trustee Board of the Church, pursuant to Not-For-Profit Corporation Law (N-PCL) § 706 (d); and on this cross-motion/petition by respondents to: (1) dismiss the petition; (2) remove petitioners Willie Rhett, Carl L. Paris, Jr., and Ernest Harmon as trustees; (2) require Ernest Harmon, as treasurer, to provide an accounting from August 29, 2010 to date; and (3) require petitioners to pay respondents costs, disbursements, and counsel fees.

	Papers Numbered
Order to Show Cause - Petition - Exhibits.....	1-7
Notice of Cross Motion/Petition - Affirmation - Exhibits.....	8-16
Answering Affirmation - Exhibits.....	17-20
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Upon the foregoing papers it is ordered that the petition, cross-motion/petition are determined as follows:

Petitioners commenced this proceeding alleging that they are 29 of the 35 members of the Church, representing 82% of the membership and 50% of the board of directors. Three of the 29 petitioners are directors/trustees, to wit: Willie Rhett, Carl Paris, Jr., and Ernest Harmon. The remaining three directors/trustees are respondents herein, to wit: G Toe S. Washington, Louella King, and Anna Washington. Petitioners allege that, as members of a "free church" under article 9 of the Religious Corporations Law, with a self-perpetuating board of trustees, they seek to remove respondents as directors pursuant to N-PCL § 706 (d).

Petitioners claim that the board of trustees was incorporated with seven members. After the death of the Church's pastor, Cora Paris, in 2009, and several vacancies at that time, the board of trustees consisted of four members. Three new members were then voted in by the board. The vote was conducted by only three of the four board members, as the fourth, non-party Faye Rohden, "left the Board as she failed to cooperate with the Board in turning over financial records in her control resulting in [the Church] taking legal action against her." Since that time, petitioners allege that the trustee board became "divided, divisive, ineffective and deadlocked" on practically every issue facing the Church. As a result of growing frustration, several members of the congregation attempted to vote in six additional members to the board, said vote resulting in judicial intervention in this court, under Index No. 5978/2012. That proceeding was brought by respondents herein, for, *inter alia*, a judgment declaring that the vote was void *ab initio*. The Honorable Allan B. Weiss, in his judgment dated December 3, 2012, determined that the election was invalid inasmuch as it violated section 182 of the Religious Corporations Law. Further, the court held that "the election is void because article 9 of the Religious Corporations Law makes no provision for any elections, other than by votes of the trustees themselves." The court advised that the removal of trustees of a self-perpetuating board such as the one here may only be accomplished by section 706 (c) (2) or (d) of the N-PCL. The court also adjudged that the six above-named members of the board are indeed members of the board; the court made no determination as to whether Faye Rohden was a member thereof or resigned therefrom, however, inasmuch as she was not made a party to that proceeding.

Petitioners further allege that respondents: refuse to participate in board meetings; failed to attend Church anniversary celebrations; separate themselves from Church activities; and rarely participate in Church services. Since petitioners felt they were unable to continue the Church under those conditions (and still without a pastor), the three petitioner-trustees herein commenced a proceeding in this court, under Index No. 3143/2013, to, *inter alia*, dissolve the Church pursuant to Religious Corporations Law § 18. The Honorable Janice A. Taylor, in her order and judgment dated December 18, 2013, denied the petition inasmuch

as the three petitioners did not constitute a majority of the board of trustees (noting that the Church was "presently managed by a six member board"). The court also denied a cross-motion by "respondents" G Toe S. Washington, Anna Washington, and Louella King for an order removing the three petitioners as members of the board, as they were not parties to the proceeding. Justice Taylor also referenced the need to comply with N-PCL § 706 (c) (2) or (d).

Since the disposition of that proceeding, petitioners allege other facts which form the basis for the instant proceeding. Petitioners state that, on January 25, 2014, respondents changed the locks on the Church and attempted to install video equipment thereat, resulting in a call to the police; that respondents erroneously represented to the police that they had the authority to close down the Church; that respondents erroneously represented to the members of the Church that the decisions of Hon. Weiss and Hon. Taylor empowered them to do so; that these actions prevented the Church from holding services; and that respondents again padlocked the Church doors on February 8, 2014. Petitioners claim that respondents' actions represent cause for their removal as trustees.

Respondents have answered the petition and asserted two affirmative defenses, to wit: failure to state a cause of action and the defense that petitioners are not members of the Church. Respondents have also submitted a cross-petition. As for the first prayer for relief, respondents seek the removal of petitioners Willie Rhett, Carl Paris, and Ernest Harmon, for, *inter alia*: (1) expending monies without authorization of the board (which they say, contrary to what petitioners contend, includes the seventh member, non-party Faye Rhoden); (2) locking respondents out of the Church; and (3) removing the portrait of the founder of the Church without board authorization. As for the second cause of action, respondents seek an accounting from petitioner Ernest Harmon, as secretary/treasurer of the board, pursuant to N-PCL § 114. Respondents also seek sanctions for petitioners' frivolous conduct.

Initially, it is noted that this proceeding should have been brought as an action. Pursuant to CPLR 103 (b), all claims must be prosecuted in the form of an action, unless a special proceeding is specifically authorized by statute (*Matter of Town of Johnstown v City of Gloversville*, 36 AD2d 143, 144 [1971]). Section 706 (d) of the N-PCL specifically indicates that removal of a director (or directors) be sought by way of an action (*see also* Bus. Corp. Law § 706 [d] [after which N-PCL § 706 (d) was modeled]). The statute does not specifically authorize commencement by special proceeding. It is noted that petitioners could have – but did not – frame this proceeding as an Article 78 proceeding against a "body or officer" (CPLR 7802 [a]) to challenge a particular action taken by the respondent-trustees (CPLR 7803). However, the third paragraph of the "wherefore" clause of the petition specifically refers to relief being sought pursuant to N-PCL § 706 (d). While the first paragraph thereof presumably challenges the alleged actions of respondents of, inter alia,

"disrupting the services of the church," that relief was only sought "pending the outcome of this preceding [sic]." The second paragraph, which seeks an order enjoining respondents from Church premises, similarly limits such relief to pending the outcome of the proceeding. In any event, such relief is framed within the context of a provisional remedy (*see generally* CPLR 6001; *see also* CPLR 6301 *et seq.*). It is noted, though, that the Honorable Denis J. Butler, who signed the order to show cause on behalf of the undersigned, already made a determination – by striking certain provisions of the order as it was proposed to him – that petitioners were not entitled to relief pending the outcome of the proceeding.

Given the above, the court hereby converts this proceeding into an action (CPLR 103 [c]). The petition is deemed the complaint. The answer and cross petition are deemed the answer to the complaint and counterclaims, respectively.

Turning now to the substance of N-PCL § 706, same provides two methods by which directors may be removed. Subsection (c) (2) provides:

> "When by the provisions of the certificate of incorporation or the by-laws the members of any class or group, or the holders of bonds, voting as a class, are entitled to elect one or more directors, any director so elected may be removed only by the applicable vote of the members of that class or group, or the holders of such bonds, voting as a class."

Whether or not the board is comprised of six or seven members, it is clear that neither plaintiffs nor defendants have been able to rely upon this provision inasmuch as: (1) if there are six members on the board, the board is deadlocked; and (2) if there are seven members of the board, both parties concede that the seventh member, Faye Rhoden, has been inactive and has not participated in voting, thereby resulting, in any event, in a deadlock.

Thus, plaintiffs have resorted to their remedy under N-PCL § 706 (d), which provides, in relevant part, that: "An action to procure a judgment removing a director for cause may be brought by . . . ten percent of the members whether or not entitled to vote. The court may bar from re-election any director so removed for a period fixed by the court." Defendants argue that this provision does not apply since Justice Weiss determined in his December 3, 2012 judgment that there were no members of the Church. Initially, it is noted that, defendants having taken such a position, it is unclear under what authority they seek to have plaintiff-trustees removed. Notwithstanding, defendants misinterpret Justice Weiss' determination. No where in same does Justice Weiss state that there are no members of the church; Justice Weiss stated, rather, in the context of determining whether the Church was an article 9 or article 10 Church – and concluding that it was the former – that the only "members" entitled to vote in elections pursuant to article 9 of the Religious Corporations

Law are the members of the board of trustees. Presumably, it was pursuant to that rationale that Justice Weiss determined that a vote by the congregants to elect trustees was void *ab initio*, since the only members entitled to vote were the members of the board. To that extent, there were no other "members."

Also noted by Justice Weiss, and reiterated herein, the only members referred to in article 9 of the Religious Corporations Law are the members of the board of trustees (*see also* Religious Corporations Law § 181; *Matter of Venigalla v Nori*, 11 NY3d 55 [2008]; *Stokes v Phelps Mission*, 47 Hun 570 [1888]). Moreover, N-PCL§ 102 (a) (9) defines "member" as "one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws." The certificate of incorporation specifically names the members of the Church, to wit: the board of trustees (N-PCL § 601 [a]). Thus, this court finds that, pursuant to N-PCL § 706 (d), only the attorney general and the members of the board of trustees have standing to remove directors.[1] The congregants of the Church are not "members" for purposes of section 706 (d). That having been said, none of the 29 named plaintiffs, with the exception of Willie Rhett, Carl Paris, Jr., and Ernest Harmon, have demonstrated that they have standing herein. As such, to the extent defendants seek dismissal of the complaint against those members, same is granted and the action by those 26 members is dismissed.

That having been said, both the remaining plaintiffs and defendants are able to maintain their respective claims under section 706 (d), as they each represent 50% of the active board.[2] However, inasmuch as this matter has since been converted, and each of the respective parties, by their motions, seek removal pursuant to section 706 (d), it would be premature at this juncture to award either party the ultimate relief being sought. Notably,

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1. It is noted that it happens to be, in this case, that all members are entitled to vote. Section 706 (d) applies to different types of corporations (as provided in N-PCL § 103), which may provide for different classes of members (*see* N-PCL § 601), some of which may or may not have voting rights, depending on the particular structure of the corporation. It is further noted that this court must give effect to the plain meaning of the statute, and where the statute is clear and unambiguous, the court should construe same to give effect to the plain meaning of the words (*see Buchbinder Tunick & Co. v Tax Appeals Tribunal of City of New York*, 100 NY2d 389 [2003]; *Rosner v Metropolitan Property and Liability Ins. Co.*, 96 NY2d 475 [2001]). As such, for the reasons stated in this decision, the only members of the Church are the members of the board; the court will not read into the reference to "members" found in N-PCL § 706 (d) to extend to those persons who make up the congregation, as suggested by plaintiffs.

2. Though the court makes no determination as to whether Faye Rohden is a member of the board, assuming she were, the respective parties would otherwise meet the 10% threshold, representing approximately 42% of the members of the board.

defendants suggest that the opportunity be given to them to conduct discovery in order to determine the full extent of plaintiffs' acts sufficient to constitute "cause." It is also noted that it is unclear to the court whether the Church has by-laws; if so, those by-laws have not been submitted on these papers, to assist the court in determining, for example, whether those members sought to be removed are operating in a manner which is inconsistent with same.

To the extent defendants' second counterclaim seeks an accounting, same must be dismissed as procedurally improper, without prejudice, inasmuch as defendants failed to move by order to show cause and failed to name the corporation as a party, as required by N-PCL § 114. Moreover, defendants have not demonstrated authority for plaintiff Ernest Harmon, as Secretary/Treasurer, to account for the period starting from August 29, 2010, as requested by them (*see* N-PCL § 114 [allowing only for an accounting for the twelve months next preceding the granting of such an order]).

To the extent plaintiffs, by way of their order to show cause, seek an order barring defendants from Church premises, same is denied inasmuch they have not established the elements necessary to obtain a preliminary injunction on that issue. However, to the extent plaintiffs seek to enjoin defendants from "disrupting the services or locking out [plaintiffs] from" the Church, same is granted as plaintiffs have adequately demonstrated that defendants had no authority to do so. Neither of the parties shall attempt to impede access to the Church, which is consistent with the purpose of maintaining the status quo pending determination of the action (*Board of Managers of Britton Condominium v C.H.P.Y. Realty Assoc.*, 101 AD3d 917 [2012]).

Accordingly, as noted above, this proceeding is hereby converted into an action. The caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

WILLIE RHETT, CARL PARIS, JR., and ERNEST HARMON,

Plaintiffs,

-against-

G TOE S. WASHINGTON, LOUELLA KING, and ANNA WASHINGTON,

Defendants.

Plaintiffs shall serve a copy of this order with notice of entry upon the County Clerk who is then directed to change the caption of this action as noted, *supra*. The branch of defendants' motion for an order dismissing the action against them is granted only to the extent that the action, insofar as asserted by congregants of the Church, is dismissed for lack of standing. The action asserted by the remaining plaintiffs, who represent three of the members of the board of trustees, against defendants, shall remain. The second counterclaim asserted by defendants for an accounting is dismissed without prejudice. The third counterclaim for counsel fees/sanctions is dismissed, inasmuch as defendants have not demonstrated that plaintiffs' conduct in commencing this action is sanctionable. The causes of action which remain are that brought by plaintiffs Willie Rhett, Carl Paris, Jr., and Ernest Harmon for removal of the defendant-board members pursuant to N-PCL § 706 (d) and defendants' counterclaim against those plaintiffs for similar relief.

The action is set down for preliminary conference, and the parties shall appear in the Preliminary Conference Part, on November 12, 2014, at 9:30 A.M. Neither plaintiffs nor defendants shall impede access to the Church in a manner which is inconsistent with the by-laws, to the extent that same exists.

All other applications not specifically addressed herein are denied.

Dated: September 29, 2014

J.S.C.