

Matter of Cohen v Berliner
2021 NY Slip Op 30682(U)
March 5, 2021
Supreme Court, Kings County
Docket Number: 517690/2020
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 517690/2020
Motion Date: 1-5-21
Mot. Seq. Nos.: 2-3

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In the Matter of the Application of

YEHUDA COHEN, ABRAHAM PLUCZENIK,
NACHMAN SHATZ, MEILICH NAPERSTEK,
SAMUEL YESHA YE SEIDENFELD and SIDMON
KENIGSBURG,

Petitioners,

-against-

DECISION/ORDER

DAVID BERLINER and ISAAC BIRNHAK, As the
Incumbent Trustees of CONGREGATION MACHNE
GER, , Respondents, For an Order Pursuant to Sections
603 and 604 of the Not for Profit Corporation Law and
Section 194 of the Religious Corporation Law, Directing
the Noticing of a Special Meeting of the Membership of
Congregation Machne Ger.

Respondents.

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The following e-filed documents, listed by NYSCEF as item numbers 1-55 were read on
this petition and motion:

The petitioners commenced this proceeding pursuant Sections 603 and 604 of the Not for
Profit Corporation Law and Section 194 of the Religious Corporation Law directing the
respondents, the current Trustees of Congregation Machne Ger, to call, notice and hold a special
meeting of the members of the Corporation. The respondents oppose the application and move to
dismiss the proceeding on the grounds that the petitioners are not members of the Congregation
and lacked standing to commence the proceeding. Respondents further argue that the petitioners
judicially estopped from arguing that venue lies in Kings County.

Background:

A. The Prior Proceeding in Supreme Court, Kings County:

The Congregation Machne Ger (“the Congregation”) is a religious not-for-profit
corporation that was incorporated in 1972. The certificate of incorporation on file with the

County Clerk of Kings County reflects that the principle place of business of the corporation is 701 Empire Blvd., Brooklyn, New York. The corporation was formed for many purposes, including ... [t]o purchase, operate and maintain children's camps in the State of New York.” The Congregation presently operates a summer camp in Sullivan County, New York

In 2019, the undersigned presided over a special proceeding brought by David Mendel Berliner (“Berliner”) and Yitzchok a/k/a Isaac Birnhack (“Birnhack”), who sought to invalidate an election of the members of the Congregation that was alleged to have occurred during a Special Meeting held by Olewski, Cohen and Danziger in June 2019. The petitioners prevailed in the proceeding and by order of the undersigned filed on June 27, 2019, the election was deemed invalid. No determination was made in the proceeding as to who constituted the Board of Trustees of the Congregation.

B. The Sullivan County Action:

On June 27, 2019, the same day the order was issued invalidating the 2019 election, Olewski, Cohen, and Danziger, as alleged officers of the Congregation, commenced an action in Sullivan County under Index No. E2019-1267 seeking a declaration that they were in control of the summer camp located in Sullivan County. The defendants in the action maintained that Berliner, Birnhack and Abraham M. Abramovits (“Abramovits”), as the duly elected members of the Board of Trustees of the Congregation, they were in control of the camp. These defendants maintained that they were elected to the Board at a corporate meeting held in 2017. The Sullivan County action was assigned to Justice Schick.

On November 26, 2019, defendant Berliner moved for a change of venue to Kings County. Before the motion was decided, defendant Berliner moved by order to show cause for additional relief, including an order dismissing the action and restraining the plaintiffs from interfering with the operation of the summer camp. By decision and order dated June 25, 2020, Justice Schick decided the motions and held that by virtue of the 2017 election, defendants Berliner, Birnhack and Abramovits were the duly elected Board of Trustees of the Congregation, that they were to remain as Trustees until a new election was held and a new board was appointed and qualified, and that pending a new election, the existing Board would have custody and control of all the temporalities and property of the Congregation, including the summer camp. Justice Schick further held that the plaintiffs were barred from contesting the 2017 election due to the expiration of the statute of limitations and that they were collaterally estopped

from arguing that the 2019 election was valid by virtue of this Court's prior order invalidating that election.

C. The June 28, 2019 Meeting:

Respondent's contend that on June 28, 2019, three days following the issuance of Justice Schick's order, a special meeting of the Board of Trustees was held at which time they voted to close membership in the Congregation. In support of their motion to dismiss, respondents annexed copies of the minutes from this meeting. The purported minutes from this meeting reflect that the Board voted to dispense with formal notice of the meeting and to deem the meeting regularly called.

D. The September 2, 2020 Demand for a Special Meeting:

The demand for a special meeting that is the subject of this proceeding is dated September 2, 2020 ("the demand") and is signed by over two hundred purported members of the Congregation ("the signatories"). The signatories demanded that the respondents notice a special meeting of the membership of the Congregation to be held on November 15, 2020 for the purpose of electing new Trustees. When the respondents failed to notice the meeting, the petitioners brought this proceeding pursuant to Sections 603 and 604 of the Not for Profit Corporation Law and Sections 194 and 195 of the Religious Corporation Law for an order directing the respondents to hold the meeting.

E. The November 23, 2020 Meeting:

The respondents maintain that another corporate meeting was held on November 23, 2020, at which Berliner, Birnack and Abramovits were re-elected as the Board of Trustees. The minutes to the meeting reflect that membership was re-opened, that a new person was allowed to become a member, and membership was again closed. The minutes further reflect that the Congregation passed new criteria for becoming a member.

F. Respondent's Motion to Dismiss:

In their pre-answer motion, the respondents maintain that the proceeding should be dismissed on two grounds. First, the respondents maintain that the petitioners and the signatories lacked standing to commence the proceeding and demand the special meeting. Acknowledging that there are no bylaws of the Congregation identifying the membership and that no criteria was

established by the Congregation for becoming a member prior to the November 23, 2020 meeting, the standing issues are controlled by Religious Corporations Law § 195. Respondents maintain that the First Amendment to the United States Constitution bars the Court from determining these issues, and that even if the Court were able to make such determinations, the petitioners and the signatories do not meet the criteria of the statute. Second, the respondents that the proceeding should be dismissed because it was improperly venued proceeding in Kings County.

Discussion:

Where, as here, a religious corporation has never enacted bylaws setting forth the manner in which regular or special meetings of a Congregation are to be called and who may vote at such meetings, the Court must look to Article 10, Religious Corporations Law §§ 194 and 195. Religious Corporations Law § 194 provides that “[a] special corporate meeting of any such church may be called by the board of trustees thereof, on its own motion **or on the written request of at least ten qualified voters of such church**” (*see also, Kupperman v. Congregation Nusach Sfard of Bronx*, 39 Misc. 2d 107, 113, 240 N.Y.S.2d 315, 320). Religious Corporations Law § 195 controls the issue of who may vote at a special meeting and provides:

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....

A. The First Amendment Issue:

Respondents contention that the First Amendment bars the Court from determining whether the petitioners and the signatories are qualified voters within the meaning of Religious Corporations Law § 195 is without merit. The First Amendment only forbids civil courts from interfering in or determining religious disputes when the there is “substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs” (*Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9

N.Y.3d 282, 286, 879 N.E.2d 1282, 1284; *citing Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151). The First Amendment does not bar the Court from resolving civil disputes involving religious parties or institutions, where, as here, such disputes can be resolved by applying neutral principles of law (*see First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.*, 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454; *Park Slope Jewish Ctr. v. Congregation B'nai Jacob*, 90 N.Y.2d 517, 521, 664 N.Y.S.2d 236, 686 N.E.2d 1330, *citing Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775). The “neutral principles of law” approach requires the court to apply objective, well-established principles of secular law to the issues without reference to any religious principle (*see First Presbyt. Church*, 62 N.Y.2d at 119–120, 476 N.Y.S.2d 86, 464 N.E.2d 454; *Avitzur v. Avitzur*, 58 N.Y.2d 108, 115, 459 N.Y.S.2d 572, 446 N.E.2d 136 [1983]; *Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 286, 879 N.E.2d 1282, 1284–85).

There have been many instances where civil courts have been called upon to adjudicate whether persons were qualified to vote pursuant to Religious Corporations Law § 195 (*see Islamic Ctr. of Harrison, Inc. v. Islamic Sci. Found., Inc.*, 262 A.D.2d 362, 363, 692 N.Y.S.2d 94, 95; *Kroth v. Congregation Chebra Ukadisha Bnai Israel Mikalwarie*, 105 Misc. 2d 904, 430 N.Y.S.2d 786; *Eisenberg v. Fauver*, 25 Misc. 2d 98, 100, 200 N.Y.S.2d 749, 752) and there have been numerous other instances where the Courts have been called upon to adjudicate disputes related to elections held by religious corporations (*see Rector, Churchwardens & Vestrymen of Church of Holy Trinity v. Melish*, 3 N.Y.2d 476, 168 N.Y.S.2d 952, 146 N.E.2d 685; *Sillah v. Tanvir*, 18 A.D.3d 223, 794 N.Y.S.2d 348; *Venigalla v. Alagappan*, 307 A.D.2d 1041, 1041, 763 N.Y.S.2d 765; *Matter of Kaminsky*, 251 App.Div. 132, 295 N.Y.S. 989, *affd.* 277 N.Y. 524, 13 N.E.2d 456). This case is clearly distinguishable from the line of cases where Court involvement in election matters involving religious corporations was not permitted because ecclesiastical issues were involved (*see, e.g., Congregation Yetev Lev D'Satmar Inc., supra*, [the bylaws of the corporation conditioned membership on whether a congregant followed the “ways of the Torah”]; *Park Slope Jewish Ctr. v. Stern*, 128 A.D.2d 847, 848, 513 N.Y.S.2d 767, 769 [members were required to pledge adherence to a conservative egalitarian form of worship]). Here, the only criteria for determining whether the petitioners are “qualified voters” is set forth

in Religious Corporations Law § 195, which, in the Court's view, does not set forth any ecclesiastical criteria.

B. Application of Religious Corporations Law § 195:

The first category of persons qualified to vote under Religious Corporations Law § 195 are those “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.....” The second category of qualified voters under Religious Corporations Law § 195 are those persons “ 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” The respondents’ have not demonstrated, as a matter of law, that the petitioners are not qualified voters under these categories.

Contrary to respondents’ contention, the minutes from the corporate meeting held on July 21, 2017 are not determinative of whether the petitioners and the signatories are qualified voters. While Justice Schick held that Berliner, Birnhack and Abramovitz were elected to the Board of Trustees at this meeting and that the petitioners are barred from contesting the election due to the expiration of the statute of limitations, Justice Schick did not find that the petitioners and the signatories were not qualified voters of the Congregation within the meaning of Religious Corporations Law § 195.

While petitioner Cohen, as of 2019, may not have been able to establish the identity of the membership because “[t]he original corporate book (sic) and records were either lost or misplaced many years ago”, such does not mean, as respondents contend, that the petitioners cannot prove that at least ten of the signatories to the demand are members and/or qualified voters pursuant to Religious Corporations Law § 195. The fact that membership was purportedly closed at the June of 2019, the minutes from this meeting do not reflect that the petitioners and the signatories were expelled from membership. Finally, while an annual meeting may have been on November 1, 2020, at which time Berliner, Birnhack and Abramovits were re-elected as the Board of Trustees, this meeting occurred after the demand for a special meeting was made and has no bearing on whether the petitioners and signatories were entitled to the special

meeting. In sum whether the petitioners have standing and whether at least 10 of the signatories to the demand for a special meeting are qualified voters requires an evidentiary hearing.

C. The Venue Issue:

Since “[i]mproper venue is not a jurisdictional defect requiring dismissal” (*Lowenbraun v. McKeon*, 98 A.D.3d 655, 656, 950 N.Y.S.2d 381, quoting *Chira v. Global Med. Review*, 160 Misc.2d 368, 369, 609 N.Y.S.2d 511 [Sup.Ct., Rockland County]), *see also Elie v. Marathon REO Mgmt., LLC*, 119 A.D.3d 890, 891, 989 N.Y.S.2d 863), respondents’ contention that the proceeding should be dismissed because it should have been brought in Sullivan County is without merit. Since there is no motion before the court to change the venue of this action to Sullivan County, the Court will not address whether Kings County is a proper venue.

For all of the above reasons, is hereby

ORDERED that the respondents’ motion to dismiss the proceeding is **DENIED**; it is further

ORDERED that the respondents shall serve an answer to the petition within the time provided by the CPLR; it is further

ORDERED that the petition for an order directing the respondents to hold a special meeting pursuant shall be held in abeyance pending joinder of issue and an evidentiary hearing before the undersigned to determine whether the petitioners and the signatories to the demand for the special meeting are “qualified voters” within the meaning of Religious Corporations Law §§ 194 and 195; and it is further

ORDERED that the parties shall appear for a virtual conference in the above matter on March 11, 2021, at 11 a.m. The court shall send the parties an invite to the conference.

This constitutes the decision and order of the Court.

Dated: March 5, 2021



PETER P. SWEENEY, J.S.C.