

Matter of Cohen v Berliner
2021 NY Slip Op 31416(U)
April 24, 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: 4-24-21
Mot. Seq. No.: 6

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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 80-88, were read
on this motion:

The respondents, DOVID BERLINER a/k/a DAVID MENDEL BERLINER, ISAAC
BIRNACK a/k/a YITZCHOK BIRNACK and ABRAHAM M. ABRAMOVITS (“respondents”)
move by Order to Show Cause for an order dismissing the petition on the ground that there is no
statutory authority permitting a special proceeding to be brought for the relief the petitioners are
seeking. In the alternative, the respondents seek an order converting the petition to a complaint
and deeming the answer to the petition the answer to the complaint.

Background:

The petitioners commenced this special proceeding seeking an order compelling the
respondents, the current Trustees of Congregation Machne Ger, to call, notice and hold a special

meeting of the members of the Congregation Machne Ger Corporation (“the Congregation”). The petitioners contend that prior to the commencement of the proceeding, a demand was served on the respondents, who currently sit on the Board of Trustees of the Congregation, directing them to hold a special meeting on November 15, 2020 for the purpose of electing new Trustees. The petitioners maintain that they were entitled to demand the special meeting pursuant to Religious Corporations Law § 194, which provides “[a] special corporate meeting of any such church may be called . . . on the written request of at least ten qualified voters of such church.” The petitioners maintain that the demand for the special meeting, which is dated September 2, 2020, was signed by over two hundred qualified voters of the Congregation (“the signatories”). When the respondents failed to hold the meeting, the petitioners commenced this special proceeding.

The respondents had previously moved to dismiss the proceeding on the ground that neither the petitioners nor any of the signatories to the demand for the special meeting were qualified voters of the Congregation. Inasmuch as the record developed on respondents’ motion did not demonstrate as a matter of law that the signatories to the demand for a special meeting were not qualified voters of the Congregation, the court directed that an evidentiary hearing be held for the purpose of determining the issue whether they were qualified voters. The evidentiary is scheduled to begin on April 26, 2021.

Discussion:

Respondents’ contention that the petitioners were not entitled to commence a special proceeding to obtain the relief they now seek because there is no statutory authority for the commencement of such a proceeding is without merit. CPLR 7801 expressly authorizes the commencement of a special proceeding to obtain “relief previously obtained by writs of . . . mandamus...” A writ of mandamus is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed (see *All. to End Chickens as Kaporos v. New York City Police Dep’t*, 152 A.D.3d 113, 117, 55 N.Y.S.3d 31, 34 (2017), *aff’d*, 32 N.Y.3d 1091, 114 N.E.3d 1070). The petitioners clearly commenced this proceeding seeking a writ of mandamus. Specifically, petitioners seek to compel the current Board of Trustees of the Congregation to hold a special meeting pursuant to the demand dated September 2, 2020, a duty that they are undoubtedly required to perform by the clear dictates of Religious Corporations Law 194 if it is determined that at least ten of signatories to the demand

for a special proceeding were qualified votes of the Congregation. The issue of whether a body or officer failed to perform a duty enjoined upon it by law is undoubtedly an issue that can be raised in a CPLR article 78 proceeding (CPLR 7803, subd. 1; 5 N.Y.Jur.2d, § 72).

The fact that respondents are not a governmental body is of no moment as it is well settled that judicial relief in the form of mandamus is available to compel action by the officers of a corporation (see e.g., *Matter of Auer v. Dressel*, 306 N.Y. 427, 118 N.E.2d 590; *Luczaj v. Bortnik*, 91 A.D.3d 872, 873, 937 N.Y.S.2d 277, 279 *Matter of Phalen v. Theatrical Protective Union No. 1.*, 22 N.Y.2d 34, 39–40, 290 N.Y.S.2d 881, 238 N.E.2d 295, cert. denied 393 U.S. 1000, 89 S.Ct. 486, 21 L.Ed.2d 465). Indeed, it has long been recognized that the commencement of a special proceeding for mandamus relief is the appropriate means of seeking an order compelling a corporate officer to comply with his or her duty to call a special meeting (see, *Auer v. Dressel*, 306 N.Y. 427, 118 N.E.2d 590; *Stuek v. Baugher*, 72 A.D.3d 1103, 1104, 900 N.Y.S.2d 334, 335; *People ex rel. Miller v. Cummings*, 72 N.Y. 433, 433; *Luczaj v. Bortnik*, 91 A.D.3d 872, 872, 937 N.Y.S.2d 277, 278).

While the respondents correctly state that mandamus does not lie to enforce a duty that is discretionary (*Matter of Hamptons Hosp. & Med. Ctr. v. Moore*, 52 N.Y.2d 88, 96, 436 N.Y.S.2d 239, 417 N.E.2d 533), the current Board of Trustees had no choice but to hold the meeting under Religious Corporations Law § 194 if it is determined at the evidentiary proceeding that at least ten qualified voters of the Congregation signed the demand for the special meeting. In an analogous case, the Court of Appeals stated “[t]here was no discretion in this corporate officer as to whether or not to call a meeting when a demand therefor was put before him by owners of the required number of shares” (*Auer v. Dressel*, 306 N.Y. at 431, 118 N.E.2d at 592).

Simply because the respondents “vehemently” maintain that the signatories to the demand for a special meeting were not qualified voters is not a valid reason to convert this proceeding into a plenary action. The *Auer* Court made it clear that a stockholders’ important right to have special meetings called would effectively be obliterated if corporate management can ignore requests for such meetings and force the stockholders to commence lengthy and expensive litigation to compel such meetings (*id.*).

In sum, respondents’ motion is in all respects denied. In light of this determination, the Court need not address petitioners’ contention that CPLR 3211(e) prohibited the respondents

from bringing this motion. The Court has considered respondents' remaining argument in support of the motion and find them to be unavailing.

Respondents' belated request for discovery is **DENIED**.

For all of the above reasons, is hereby

ORDERED that the motion is in all respects **DENIED**

This constitutes the decision and order of the Court.

Dated: April 24, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020