

Matter of Cohen v Berliner
2021 NY Slip Op 32856(U)
December 31, 2021
Supreme Court, Kings County
Docket Number: Index No. 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

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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,

DECISION/ORDER

-against-

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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Introduction:

The petitioners commenced this proceeding pursuant to Not-for-Profit Law §§ 603 and 604 and Religious Corporation Law §§ 194 and 195 seeking an order and judgment directing the respondents, the current Trustees of Congregation Machne Ger (“the Congregation”), to call, notice and hold a special meeting of the members of the Corporation pursuant a written demand for such meeting dated September 2, 2020 for the purpose of electing a new Board of Trustees. The demand was served on the respondents pursuant to Religious Corporations Law § 194, which in relevant part, 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.” When the respondents refused to call the meeting, the petitioners commenced this proceeding. The respondents moved to dismiss on the ground that

the petitioners were not “qualified voters” of the Congregation and lacked standing to demand the special meeting. The Court denied the motion finding that the respondents did not establish petitioners’ lack of standing as a matter of law and directed that an evidentiary hearing be held for the purpose of determining whether any ten (10) of the signatories to the demand were for the special meeting were qualified voters of the Congregation when the demand was served. The evidentiary hearing was held in May and June 2021 over thirteen sessions. The following constitute the Court’s findings of fact and conclusions of law:

Background and Prior Proceedings:

The Congregation is a religious not-for-profit corporation that was incorporated in New York in 1972. The Congregation’s Certificate of Incorporation reflects that the corporation was formed for multiple purposes, including ... [t]o purchase, operate and maintain children's camps in the State of New York.” The Certificate of Incorporation does not identify the members of the Congregation, nor does it set forth the manner in which regular or special meetings are to be called and conducted. The primary asset of the Congregation is a Camp that operates in Sullivan County, New York during the summer months.

In 2019, the undersigned presided over a special proceeding brought by David Mendel Berliner (“Berliner”) and Yitzchok a/k/a Isaac Birnhack (“Birnhack”) to invalidate an election allegedly held by the Congregation at a special meeting in June 2019. The petitioners prevailed in that 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 lawful Board of Trustees of the Congregation.

On June 27, 2019, the same day the order was issued, a plenary action was commenced in Sullivan County under Index No. E2019-1267 on behalf of the Congregation by David Olewski,

Yehuda Cohen and Isadore Danziger. These plaintiffs sought a declaration that they constituted the lawful Board of Trustees of the Congregation and had the right to operate and control the operations of the camp. They further maintained that Dovid Berliner, the defendant in the action, was never duly elected to the Board of Trustees and had no right to control the operations of the Congregation or the camp.

The action was assigned to Justice Schick and by order dated June 5, 2020, he determined that Dovid Berliner, Isaac Birnack and Abraham M. Abramovits were duly elected to the Board of Trustees at meeting held in 2017, that they were to remain Trustees until a new election was held and a new board was appointed and qualified, and that pending the new election, they would have sole custody and control of all the temporalities and property of the Congregation, including the summer camp. Justice Schick further determined that the plaintiffs were barred from contesting the 2017 election due to the expiration of the statute of limitations and that by virtue of this Court's prior order invalidating 2019 election, they were collaterally estopped from relitigating the validity of that election.

The Claims in this Proceeding:

In this proceeding, the petitioners contend that since neither the Certificate of Incorporation nor any duly adapted By-Laws of the Congregation set forth the manner in which regular or special meetings are to be called and conducted, the Court must look to Article 10, Religious Corporations Law §§ 194 and 195 to determine whether the respondents are required to hold a special meeting pursuant to their demand. 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.”

The term qualified voters is defined in Religious Corporations Law § 195 as:

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....

Petitioners contend that the demand for a special meeting that was served in this case was signed by over two hundred “qualified voters” of the Congregation, that the demand noticed a special meeting for November 15, 2020 for the purpose of electing new Trustees and that the respondents failed to hold the meeting. The petitioners seek an order and judgment directing the respondent to hold the special meeting. The respondents maintain, among other things, that since none of the signatories to the demand were “qualified voters” of the Congregation, the petition must be denied.

The Evidentiary Hearing:

As stated above, an evidentiary hearing was held in May and June 2021 for the purpose of determining whether any ten (10) of the signatories to the demand for a special meeting were “qualified voters” of the Congregation when the demand was served. Petitioners called fifteen witnesses who had signed the demand for the special meeting, whose names are as follows: Shimon Kenigsberg, Israel Regal, Dovid Shedrowitzky, Shmuel Winegarten, Leib Paluch, Nehemia Eckstein, Abraham Monheit, Zev Abramovitz, Shimon Rosenwasser, Tzvi Malach, Yisroel Radzik, Avrohom Nussbaum, Shmuel Lev, Simcha Traube and Shimshon Jalas. The testimony of these witnesses demonstrated that the Congregation was established in the 1970’s by Petitioner Yehuda Cohen and other members of the Ger Community, for the purpose of creating a religious environment for the continuation of the education of the children of the Ger

Community during the summer months. After the Congregation was formed, petitioner Cohen raised funds from various members of the Ger Community which allowed the Congregation to purchase the Camp in Sullivan County. Although all the signing witnesses believed that the Camp belongs to the Ger Community, the unrefuted evidence established that the Camp is owned by the Congregation, a religious corporation incorporated under the law of the State of New York.

None of the signing witnesses prayed on a regular basis at the synagogue at the Camp. Since the Camp only operated in the summer, it was virtually impossible for anyone to pray there on a regular basis. All of the signing witnesses prayed on a regular basis at various shuls located in Brooklyn and Staten Island. These witnesses visited the camp only sporadically over the years.

Further, the credible evidence demonstrated that the signing witnesses did not regularly contribute to the financial support of the Congregation in the year before the demand for a special meeting was served. Although all of the signing witnesses testified that they donated money for the maintenance and upkeep of the Camp in the year before the demand for a special meeting was served, the donations was never actually given to the Congregation. All of the donations were made to deposited into the account of Bais Yaakov D'Chassidei Gur ("Bais Yaakov") to establish and operate a camp for the female children of the Ger community known as Camp Chavivin. Bais Yaakov is a separate and distinct legal entity from the Congregation and had leased the Camp from the Congregation, pursuant to a written lease, and paid a substantial amount of money to the Congregation to lease the Camp.

All of the signing witnesses testified that they were members of the Ger community because they prayed regularly in a Ger synagogue, donated to Ger institutions on a regular basis and were named in the Ger phone book. They further testified that as members of the Ger

Community, they automatically became members of the Congregation. The petitioners did not, however, introduce any documentary evidence supporting this proposition. The Congregations Certificate of Incorporation does not indicate this to be the case nor were any bylaws introduced into evidence supporting this proposition.

Conclusions of Law:

Where the Certificate of Incorporation and By-Laws of a religious corporation are silent as to who may vote at and demand a special meeting of an Article 10 Religious Corporation, Religious Corporations Law § 194 provides that at “least ten qualified voters of such church” may make a written demand for such a meeting. Religious Corporations Law § 195 sets forth two categories of “qualified voters”. The first includes “[a]ll 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” (Religious Corporations Law § 195). The second category are those “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....” (Religious Corporations Law § 195).

The First Category of Religious Corporations Law § 195:

The word “church” is not defined in the Religious Corporations Law. It is obvious, however, that word “church” as used in Religious Corporations Law § §194 and 195 means a particular religious corporation and not the “unincorporated church”, order or denomination to which the religious corporation and/or its members belong. The very language of Religious Corporations Law § 195 makes clear that the work “church” is not synonymous with the denomination or order to which the church belongs. In this regard, to be a qualified voter under

the first category of Religious Corporations Law § 195, a person must not only be a member in good and regular standing of a **church** by admission into full communion or membership in accordance with the rules and regulations of the church, but also in accordance with the rules and regulations of “the governing ecclesiastical body, if any, of the **denomination** or **order** to which the church belongs” (Religious Corporations Law § 195). Further, since the Religious Corporations Law applies only to religious corporations (Religious Corporations Law § 2-a), which are defined as “religious corporation[s] created to enable its members to meet for divine worship or other religious observances” (Religious Corporations Law § 2), it would be illogical to construe the word “church” as used in Religious Corporations Law §§ 194 and 195 as anything but a religious corporation¹.

It is undisputed that the Congregation is a religious corporation. No evidence was presented indicating that the Ger Community is a religious corporation. Thus, in order to demonstrate that at least ten (10) of the signatories to the demand for the special meeting were qualified voters under the first category of Religious Corporations Law § 195, the petitioners were required to show (1) that at least ten (10) of the signatories were members in good and regular standing of the **Congregation** by admission into full communion or membership in accordance with the rules and regulations of the **Congregation** (2) and the rules and regulations of the “the governing ecclesiastical body, if any, of the **denomination** or **order** to which the **Congregation** belongs.

¹ The Court notes that the Religious Corporations Law does not apply to “unincorporated churches”, which are defined as “congregation[s], society[s], or other assemblage[s] of persons who are accustomed to statedly meet for divine worship or other religious observances, without having been incorporated for that purpose” (Religious Corporations Law § 2).

Here, the petitioners did not show that at least ten (10) of the signatories were members in good and regular standing of the Congregation by admission into full communion or membership in accordance with the rules and regulations of the Congregation. In making this determination, the Court was bound by the First Amendment which generally forbids civil courts from interfering in or determining religious disputes because of the substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs (*see Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich*, 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 [1976]). Civil disputes involving religious institutions may only be adjudicated without offending the First Amendment if “neutral principles of law” are the basis for their resolution (*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 [1984]; *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 [1997], citing *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 [1979]). The “neutral principles of law” approach requires the court to apply objective, well-established principles of secular law to the issues (*First Presbyt. Church*, 62 N.Y.2d at 119–120, 476 N.Y.S.2d 86, 464 N.E.2d 454). In resolving religious disputes under this approach, Courts may rely upon internal documents, such as a congregation's bylaws if those documents do not require interpretation of ecclesiastical doctrine. Thus, judicial involvement is permitted when the case can be “decided solely upon the application of neutral principles of ... law, without reference to any religious principle” (*Avitzur v. Avitzur*, 58 N.Y.2d 108, 115, 459 N.Y.S.2d 572, 446 N.E.2d 136 [1983]).

The petitioners did not offer any internal documents of the Congregation, such as the Congregation’s Certificate of Incorporation or its bylaws, or any other documentary evidence to

show that the signing witnesses were “members in good and regular standing of [the Congregation] by admission into full communion or membership therewith in accordance with the rules and regulations of the Congregation (Religious Corporations Law § 195).”² The only evidence petitioners offered to show that the signing witnesses met this criteria was the testimony of the signing witnesses themselves, who maintained that anyone who regularly prayed in a Ger synagogue, contributed to Ger institutions and whose names appeared in the Ger phone book automatically became members in good and regular standing of the Congregation. Even if this was the accepted rule in the Ger Community, which is doubtful, to find for the petitioners on this basis would require the Court to interpret and apply ecclesiastical doctrine, which the First Amendments forbids. Further, accepting this argument would be tantamount to a finding that any member of the Ger community who meets this criteria is qualified to vote at any special meeting held by a religious corporation incorporated by members of the Ger Community regardless of whether such person had any connection to such corporation.

In sum, the petitioners did not meet their burden under the neutral principles of law approach of demonstrating that at least ten (10) of the signatories to the demand for a special meeting were “qualified voters” under the first category of Religious Corporations Law § 195.

The Second Category of Religious Corporations Law § 195:

To establish that at least ten (10) signatories to the demand for a special meeting met the criteria set forth in the second category of “qualified voters” of Religious Corporations Law §

² The respondents maintain that there were bylaws in effect at the time the demand for a special meeting was served demonstrating that the signing witnesses were not members in good standing of the Congregation. The Court need not address whether these bylaws were legally binding since the petitioners did not demonstrate that at least ten (10) of the signing witnesses were “qualified voters” within the meaning of RCL § 195. Absent such a showing, the petitioners cannot be granted the relief they seek.

195, petitioners had to demonstrate that such signatories “have been stated attendants on divine worship in [the Congregation] and have regularly contributed to the financial support thereof during the year next preceding such meeting...” “[S]tated attendants on divine worship” has been interpreted as requiring regular attendance according to the customs and usages of the church in question, rather than occasional or sporadic visits (*Kroth v. Congregation Chebra Ukadish Bnai Israel Mikalwarie*, 105 Misc. 2d 904, 914, citing *People v. Tuthill*, 31 N.Y. 550, 557). None of the signatories to the demand for a special meeting were “stated attendants on divine worship” at the Congregation. All of the signatories regularly prayed at shuls located at various addresses in Brooklyn and Staten Island. These shuls are distinct entities, with their own location, own members and own religious leaders. The presence of some of the signing witnesses at the Camp can only be described as occasional or sporadic. The fact that it is impossible for anyone to pray on a regular basis at the Congregation since the Camp only operates in the summer is not a basis to refrain from applying the statutory criteria.

Further, the signing witnesses did not regularly contribute to the financial support of the Congregation in the year prior to service of the demand for a special meeting. The testimonial and documentary evidence adduced at the hearing established that the money the signatories donated towards the Camp was actually given to and deposited into the account of Bais Yaakov D’Chassidei Gur (“Bais Yaakov”) to establish and operate a camp for the female children of the Ger community known as Camp Chavivin. The signatories never donated or deposited money directly into an account controlled by the Congregation. Bais Yaakov is a separate and distinct legal entity from the Congregation and had leased the Camp from the Congregation, pursuant to a written lease and paid a substantial amount of money to the Congregation to lease the Camp.

In sum, the petitioners did not demonstrate that ten (10) of the signatories to the demand for a special meeting were qualified voters within the second category of Religious Corporations Law § 195.

Conclusion:

The petitioners failed to meet their burden of demonstrating that at least ten (10) of the signatories to the demand for a special meeting were “qualified voters” within the meaning of Religious Corporations Law §§ 194 and 195. The petitioners therefore did not demonstrate their entitlement to an order and judgment directing the respondents to hold a special meeting for the purposes of electing a new Board of Trustees.

Accordingly, it is hereby

ORDRED that the petition is **DENIED** and the proceeding is **DISMISSED**.

This constitutes the decision and order of the Court.

Dated: December 31, 2021.

PETER P. SWEENEY, J.S.C.

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