SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 533082/21
Motion Dates: 2-28-22
Mot. Seq. No.: 2, 3, 4

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AVROHOM MORDECHAI COHEN, and YITZCHOK LEIB MALLACH, as Members of Congregation Ohr Yisroel, Inc.,

Plaintiffs,

-against-

DECISION/ORDER

CHAIM LANDAU, CONGREGATION OHR YISROEL INC., and JOHN DOES NOS 1 THROUGH 6 being the Members of the Board Of Trustees of Congregation Ohr Yisroel Inc.,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 14-21, 23-37, 46-48, 50-53, the motions are decided as follows:

By Notice of Motion dated January 20, 2022, defendant Chaim Landau moved for an order: 1) Pursuant to CPLR 3211 (a)(1) and (3) dismissing Plaintiffs' Complaint in its entirety; and 2) granting other and further relief as this Court deems just and proper (**Motion Seq. No. 2**).

By separate Notice of Motion dated January 21, 2022, defendants Congregation Ohr Yisroel, Inc. and its Trustees, except for Trustee Chaim Landau, also moved for an order dismissing the Complaint pursuant to CPLR Section 3211 (a)(1) and (3). In the alternative, these movants seek to compel arbitration before Rabbi Moshe Fogiel, pursuant to CPLR Section 7503 (**Motion Seq. No. 3**).

By Order to Show Cause dated January 26, 2022, plaintiffs, Avrohom Mordechai Cohen, and Yitzchok Leib Mallach, as Members of Congregation Ohr Yisroel Inc., moved for an order (i) pursuant to CPLR 6301, pending the entry of a final judgment in this Action, enjoining defendant Chaim Landau, as the purported President of the Congregation Ohr Yisroel, Inc. (the "Congregation"), and the Congregation, from taking any action to pay any funds of the Congregation with respect to a mortgage or with respect to the purported indebtedness underlying the mortgage; and (ii) pursuant to CPLR 3102 and 3107 directing defendant Landau to appear for a deposition to explain the circumstances surrounding the alleged execution and

delivery of the Purported Mortgage and the Alleged Underlying Indebtedness(**Motion Seq. No. 4**). The three motions are consolidated for disposition.

Background:

On December 27, 2021, the plaintiffs, Avrohom Mordechai Cohen and Yitzchok Leib Mallach, as alleged members of the Congregation, commenced this action seeking the cancellation of a $5.7 million mortgage which had been placed on the Congregation's real property located at 5002 19th Avenue, Brooklyn, New York ("the Shul Property") in favor of defendant Chaim Landau, the mortgagee ("the mortgage"). The mortgage is dated April 15, 2019 but was not filed until December 7, 2021. The mortgage refers to a note that was allegedly signed by the Congregation which, according to the recital in the mortgage, matured and became immediately due and payable on April 15, 2021. The plaintiffs contend that the mortgage is a sham. They contend that the membership of the Congregation was never advised of the mortgage or loan transaction in 2019 (or at any time thereafter) and that the mortgage was filed only after a demand letter was transmitted to Landau and the Congregation's Trustees challenging certain actions taken by Landau and the Trustees with respect to the operation of the Congregation. Plaintiffs further claim that the mortgage is invalid, as a matter of law, because the approval of the Attorney General or the Supreme Court was not obtained for the transaction, as required by Religious Corporation Law § 12.

Defendants' Motions (Mot. Seq. Nos. 2 & 3):

Citing Religions Corporations Law § 5, the defendants maintain that only a trustee of a Religious Corporation may seek the relief plaintiffs are requesting. Since neither plaintiff is a trustee of the Congregation, the defendants contend that the action must be dismissed for lack of standing. The defendants further maintain that even if the Court were to find that a member of a religious corporation may seek the relief the plaintiffs are requesting in their complaint, the action must be dismissed for lack of standing since neither plaintiff is a member of the Congregation. The movants contend that the plaintiffs were never voted in as members pursuant to ARTICLE II of the Congregation's bylaws entitled "Membership", which provides:

> Membership Members of this organization will be its trustees and individuals who are accepted by the Trustees as members. An

> individual shall not become a member unless so designated by a majority vote of the trustees, even if said individual participates in services and pays for a seat at the congregation. In the event that the trustees have not accepted any members, then the trustees alone shall be the members. 2/3 of the members constitute a quorum. Any matter for which a membership vote is necessary shall be decided by a 51% majority of the members present unless otherwise specified in these articles.

Defendants submitted the affirmations of David Piekarski and Mayer Gelbart, two of the current trustees of the Congregation, who stated that neither plaintiff has been designated a legal member of the Congregation by a majority vote of the trustees, nor voted in by a 51% majority of the members. They further state that a vote related to their legal membership status never occurred.

Defendants further claim that the "First Amendment" precludes the court from deciding the issue of whether the plaintiffs are members of the corporation as the dispute involves religious matters.

Finally, the defendants contend that if the matter is not dismissed, the matter should be referred to arbitration pursuant to the Congregation's amended bylaws which provide:

> 1. Any and all disputes relating to the corporation, shall be submitted to arbitration to Rabbi Moshe Fogiel residing at 1937 50th Street, Brooklyn, NY 11204. In the event that Rabbi Fogiel is not available, or declines for whatever reason to serve as arbitrator, Rabbi Moshe Fogiel shall select an alternative arbitrator.
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> 2. In the event that any party shall challenge his/her/its obligation to submit a dispute to arbitration, then, in the event that a Court of competent jurisdiction rules that this arbitration clause is not enforceable against such individual, then it is the intention of the corporation to have the clause read as obligating arbitration to the extent allowed by law. It is the intention of the corporation that in the event that the Court invalidates this clause to some extent, this clause should not be ineffective, or make this amendment ineffective. This clause should be read as obligating arbitration to the extent allowed by law in accordance with the rulings of courts of competent jurisdiction. Furthermore, all issues related to arbitration, where no court has ruled that they are not arbitrable, are within the exclusive jurisdiction of the arbitrator, and this jurisdiction shall include any and all prearbitration remedies.

In opposition to the motions, the plaintiffs submitted affirmations stating that they are indeed members of the Congregation. To further support their contention that they are members, they submitted a copy of the Congregation's membership list, which lists them as members. They also submitted copies of statements provided to them by the Congregation documenting that they have been paying monthly membership dues. Plaintiffs further contend that the Court can decide the issue of whether they are members of the Congregation by applying neutral principles of law and that the Court's adjudication of the matter would not violate the First Amendment.

With respect to defendants' contention that if the matter is not dismissed, the matter must be referred to Rabbi Moshe Fogiel for arbitration, as required by the Congregation's bylaws, plaintiffs contend that allowing Rabbi Moshe Fogiel to arbitrate the matter, or even to select an alternative arbitrator, would be grossly unfair since he presently sits on the Board of Trustees of the Congregation and is being sued in the action.

Discussion:

The Standing Issue:

To prevail on their motion to dismiss the action on the ground that the plaintiffs lack standing, the defendants had the burden establish, prima facie, that the plaintiffs lack of standing as a matter of law (*see Cenlar FSB v. Lanzbom,* 168 A.D.3d 670, 671, 90 N.Y.S.3d 285; *Deutsche Bank Natl. Trust Co. v. Homar,* 163 A.D.3d 522, 523, 80 N.Y.S.3d 409). The defendants have not met this burden.

The Court rejects defendant's contention but only a trustee of the Congregation may seek the relief that plaintiffs demand in their complaint. The case law fully supports plaintiff's contention that members of Religious Corporations may also seek such relief (see *Kroth v. Congregation Chebra Ukadisha Bnai Israel*, 105 Misc.2d 904 [holding that members of a synagogue had standing to challenge the proposed sale of the synagogue's property]; *Loren v. Arbittier*, 2016 WL 5958103 [holding that a member in good standing of a congregation had standing to challenge legality of action taken by the board]). As plaintiff's counsel points out in his opposition, "in those cases where the courts have denied standing to a party to challenge the

sale of the organization's property, that was only because the court found that the plaintiff was, on the facts of those cases, not a valid member of the corporation" (*see, e.g., Cong. Beth Midrash of Monsey. Inc. v. Rolling Acres Chestnut Ridge, LLC*, 101 A.D.3d 797 ["since Empire is not a member of the plaintiff, it lacks standing to challenge the alleged statutory violation"); *Matter of Bridge to Spiritual Freedom, Inc.*, 304 A.D.2d 574 (since "appellants were not members of the respondent...they therefore could not object to the sale of the subject property"); *Agudas Chadidei Chabad v. Cong. Lubavitch, Inc.*, 67 Misc.3d 1214(A) ["the parishioners are not members of the religious corporation [so] lack standing to challenge decisions [made by the trustees] concerning the transfer of the corporation's property made by the five member board of trustees"]).

Clearly, the defendants have not established as a matter of law that the plaintiffs are not members of the Congregation. While the defendants submitted the affirmations of two of the Congregation's current trustees who state that the plaintiffs were never voted in as members, as required by the bylaws, the plaintiffs made a strong showing in opposition to the motion that they are indeed members of the Congregation. The plaintiffs submitted affirmations averring to the fact that they are numbers and supported their contention with a copy of the Congregation membership list, listing them as members, and submitting copies of statements provided to them by the Congregation that they have been paying membership dues. Whether the plaintiffs are members of the Congregation present triable issues of fact.

The Arbitration Issue:

Clearly, since Rabbi Moshe Fogiel is a current trustee of the Congregation (see NYSCEF Doc. # 41) and is being sued by the plaintiffs as a trustee, it would be fundamentally unfair to allow him to arbitrate the issue of whether plaintiffs are members of the Congregation as the bylaws require. For the same reason, it would be fundamentally unfair to allow him to select an alternate arbitrator.

In appropriate circumstances, such as here, the Court may disqualify an arbitrator from arbitrating a dispute (*see*, *Rabinowitz v. Olewski*, 100 A.D.2d 539, 540, 473 N.Y.S.2d 232; *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 530, 630 N.Y.S.2d 492, 494). The proper standard of review for the disqualification of an arbitrator "is whether the arbitration

process is free of the appearance of bias" (*Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 530, 630 N.Y.S.2d 492, 494; *quoting Rabinowitz v. Olewski*, 100 A.D.2d 539, 540, 473 N.Y.S.2d 232; citing *Commonwealth Corp. v. Continental Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301). Bias must be clearly apparent based upon established facts, and not merely supported by unproved and disputed assertions (*Bronx-Lebanon Hosp. Center v. Signature Medical Management Group, L.L.C.* 6 A.D.3d 261, 261, 775 N.Y.S.2d 279, 280). Here, since the Congregation's bylaws list Rabbi Moshe Fogiel as a current trustee of the Congregation, there is no doubt there would be an appearance of bias if the arbitration provision is enforced. For these reasons, he cannot a arbitrate the matter or select an alternate arbitrator.

The First Amendment Issue:

The defendants have not demonstrated that the First Amendment precludes the Court from adjudicating the issue of whether the plaintiffs are members of the Congregation. 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, 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). Here, there is nothing in the record even suggesting that the issue of whether the plaintiffs are members of the Congregation cannot be decided by applying neutral principles of law.

Plaintiff's Motion for a Preliminary Injunction:

"To be entitled to a preliminary injunction, a movant must establish (1) a probability of success on the merits, (2) a danger of irreparable injury in the absence of an injunction, and (3) a balance of the equities in the movant's favor" (*Congregation Erech Shai Bais Yosef, Inc. v. Werzberger*, 189 A.D.3d 1165, 1166–1167, 138 N.Y.S.3d 542 [internal quotation marks omitted]; *see GG Acquisitions, LLC v. Mount Olive Baptist Church of Manhasset*, 178 A.D.3d 1023, 1024, 116 N.Y.S.3d 303). Where, as here, "the denial of a preliminary injunction would disturb the status quo and render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced" (*Congregation Erech Shai Bais Yosef, Inc. v. Werzberger*, 189 A.D.3d at 1167, 138 N.Y.S.3d 542 [internal quotation marks omitted]). Signficantly, "[t]he mere existence of an issue of fact will not itself be grounds for the denial of the motion" (*Arcamone–Makinano v. Britton Prop., Inc.*, 83 A.D.3d at 625, 920 N.Y.S.2d 362).

Applying these principles, if it is determined that the plaintiffs are members of the Congregation, there is little doubt that they would be entitled to the relief they seek in their complaint. Religious Corporation Law § 12(1) provides that "a religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court or of the attorney general therefor..." (emphasis supplied). Significantly, the defendants are not disputing that they failed to obtain the consents required by Religious Corporation Law § 12(1) in order to mortgage the Shul property. Such failure renders the mortgage "invalid" (see *Congregation Nachlas Jacob Anshe Sfard of Jackson Heights v. Schwarz*, 152 A.D.3d 647, 55 N.Y.S.3d 913; *Wiggs v. Williams*, 36 A.D.3d 570, 571, 828 N.Y.S.2d 397; *Matter of Agudist Council of Greater N.Y. v. Imperial Sales Co.*, 158 A.D.2d 683, 551 N.Y.S.2d 955).

While it is true that triable of fact exist as to whether plaintiffs have standing, this alone does not require denial of the motion (see *Arcamone–Makinano, supra.)*. Considering plaintiffs' strong showing that they are members of the Congregation and the almost undeniable fact that the mortgage is invalid, a balance of the equities is in plaintiffs' favor. Denying plaintiffs' motion for a preliminary injunction would disturb the status quo and possibly render the final

judgment ineffectual. Accordingly, plaintiffs' motion for a preliminary injunction is **GRANTED** to the extent indicated below.

For all of he above reasons, it is hereby

ORDERED that those branches of defendants' motions to dismiss the action on the ground that plaintiffs lack standing is **DENIED**; it is further

ORDERED that those branches of defendants' motions to dismiss the action on the ground that the First Amendment precludes the Court from adjudicating this matter is **DENIED;** it is further

ORDERED that those branches of defendants' motion to compel arbitration are **DENIED**, it is further

ORDERED plaintiffs motion for a preliminary injunction is **GRANTED** to the extent that the defendants are enjoined from taking any action to pay any funds of the Congregation with respect to the mortgage or with respect to the purported indebtedness underlying the mortgage without prior Court approval; and it is further

ORDERED that that branch of plaintiffs' motion seeking discovery is **GRANTED** to the extent that the parties are to appear in CCP on July 30, 2022, for a discovery conference.

This constitutes the decision and order of the Court.

Dated: June 21, 2022

PPS

PETER P. SWEENEY, J.S.C.

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