

**Congregation Brech Shai Bais Yosef Inc. v
Werzberger**

2022 NY Slip Op 32687(U)

July 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 516604/2018

Judge: Ingrid Joseph

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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of July, 2022.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
CONGREGATION ERECH SHAI BAIS YOSEF
INC., SHULEM MALEK, HILLEL MALEK, HEDY
MALEK, ISRAEL BOIM, and ESTHER BOIM,

Plaintiffs,

-against-

Index No.: 516604/2018
Motion Seq. 12

YOEL WERZBERGER, BERRY LEBOWITZ,
SAUL WOLHENDLER, SHLOMO LISAUER
and MORDECHAI MALEK,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>283-286</u>
Plaintiffs' Memorandum of Law in Opposition	<u>330</u>
Defendants' Memorandum of Law in Reply and Exhibit	<u>333-334</u>

Plaintiffs, Congregation Erech Shai Bais Yosef Inc. (“the Congregation”), Shulem Malek, Hillel Malek, Hedy Malek, Israel Boim, and Esther Boim (collectively, “plaintiffs”) filed the instant matter against defendants, Yoel Werzberger, Berry Lebowitz, and Saul Wolhender (collectively, “defendants”) for, among other things, a declaratory judgment that a purported election of trustees of the Congregation is null and void. Defendants now move (Motion Seq. 12) for an order, pursuant to CPLR § 2221, granting leave to reargue the court’s decision and order dated September 23, 2021 and

entered on September 24, 2021 (NYSCEF Doe Nos. 279, 285; *Congregation Erech Shai Bats Yosef Inc. v. Werzberger*, 2021 WL 4352694 [Sup Ct, Kings County 2021]), and, upon reargument, an order granting their prior motion (Motion Seq. 6) to cancel the substitution of counsel of Seddio and Associates, P.C., and the notice of appearance of Kravet & Vogel, LLP, under which Seddio and Associates, P.C. and Kravet & Vogel, LLP, purport to represent the Congregation as co-counsel, and/or to disqualify said counsel for the Congregation and further, to compel the individual plaintiffs to pay use and occupancy to the Congregation for the apartments in which they remain in occupancy pursuant to a preliminary injunction issued by Justice Pamela L. Fisher. Defendants also seek an order denying plaintiffs' prior cross motion (Motion Seq. 7) to disqualify their attorney, J. Michael Gottesman, Esq., as counsel for the Congregation and that branch of plaintiffs' prior motion (Motion Seq. 8) for leave to file a second amended complaint with respect to their First, Third, and Fourth causes of action.

This action arises out of a dispute as to who is authorized to act on behalf of the Congregation and to control the use of real property located at 1364 57th Street in Brooklyn, New York, which is held in the name of the Congregation (the 1364 57th Street property). The 1364 57th Street property consists of three apartments where the individual plaintiffs reside and a basement that is used as a place of worship for the Congregation.

By a decision and order dated September 23, 2021, the court, among other things, denied the defendants' motion (motion sequence number six), granted plaintiffs' cross motion (motion sequence number seven), and granted plaintiffs' motion (motion

sequence number eight). On October 28, 2021, defendants filed the instant motion (Motion Seq. 12) for reargument of the court's decision and order dated September 23, 2021. Plaintiffs oppose the motion.

Pursuant to CPLR § 2221 (d) (2), a motion for reargument must "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (*see also Fuessel v Chin*, 179 AD3d 899, 900-901 [2d Dept 2020]; *Bueno v Allam*, 170 AD3d 939, 940 [2d Dept 2019]; *Daluise v Sottile*, 15 AD3d 609, 609 [2d Dept 2005]). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]).

Defendants reiterate their prior argument that plaintiffs' counsel, Seddio & Associates and Kravet & Vogel, should be disqualified from representing the Congregation. Defendants' attorney, J. Michael Gottesman, Esq., once again argues, that it was plaintiffs who named the Congregation as a plaintiff, and that the Congregation should instead be aligned as a defendant in this action with him representing it, along with defendants. He contends that the court should not have disqualified him from being the Congregation's counsel. He claims that the Congregation did not retain Seddio & Associates and Kravet & Vogel because defendants, rather than plaintiffs, represent the Congregation and they chose him to be the Congregation's counsel. He asserts that the Congregation should follow defendants' instructions. He also contends that the court

overlooked Justice Fisher's September 13, 2019 decision and order disqualifying Howard Birnbach, Esq. from representing the Congregation (NYSCEF Doc Nos. 81, 286).

The court, in its September 23, 2021 decision and order, however, did not overlook or misapprehend the facts or law, but specifically considered, addressed, and rejected defendants' argument. While Justice Fisher, in her September 13, 2019 decision and order (NYSCEF Doc Nos. 81, 286), found that the Congregation was entitled to its own counsel because there was the possibility that as the litigation progresses the Congregation and the individual plaintiffs' interests may diverge, the court is cognizant of the fact that one or the other of the two rival groups, i.e., either plaintiffs or defendants, would have to retain counsel for the Congregation. The Congregation is a necessary party to this action since any declaration as to the trustees must be binding upon it. There is a duty imposed upon the Congregation to see that an actual election of trustees was held and to that extent it is a proper party plaintiff (*see Segal v Bresnick*, 30 Misc 2d 569, 571 [Sup Ct, NY County 1952]). If the court were to realign the Congregation as a defendant, as requested by defendants, this would be tantamount to a finding, prior to trial, that the defendants were validly elected trustees, which is at the heart of the controversy in the present action, and would alter the status quo.

““When considering a motion to disqualify counsel, a trial court must consider the totality of the circumstances and carefully balance the right of a party to be represented by counsel of his or her choosing against the other party's right to be free from possible prejudice due to the questioned representation”” (*Ferolito v Vultaggio*, 99 AD3d 19, 27 [1st Dept 2012], quoting *Abselet v Satra Realty, LLC*, 85 AD3d 1406, 1407 [3d Dept

2011)). Here, a disinterested lawyer could believe that dual representation of the individual plaintiffs and the Congregation would be appropriate (*see Ferolito*, 99 AD3d at 27-28). The simultaneous representation of the Congregation and the individual plaintiffs does not present a true conflict of interest (*see 207 Second Ave. Realty Corp. v Salzman & Salzman*, 291 AD2d 243, 244 [1st Dept 2002]). While a corporation should obtain independent counsel whenever the corporation elects to take an active role in the litigation, here, the Congregation is not taking an active role in the litigation, but is merely named as a necessary party so that the court may address who are its rightful trustees.

With respect to the practical implications of granting a motion to disqualify, it is noted that any counsel hired to represent the Congregation would be directed by either plaintiffs or defendants. Thus, a change of counsel would have no practical impact on protecting the integrity of the underlying legal proceedings (*see Evans v Perl*, 19 Misc 3d 1119[A], 2008 NY Slip Op 50775[U], [Sup Ct, NY County 2008]). Any counsel hired for the Congregation would still be taking direction from either plaintiffs or defendants, depending on who hired such counsel. Notably, this action does not involve a public corporation where there is a board which consists of officers and directors that have decision-making ability independent of those whose authority is being challenged.

Defendants' argument that they will be adversely affected by the Congregation being represented by plaintiffs' present counsel is devoid of merit. The Congregation itself is a passive litigant, which has not asserted any independent claims. The outcome of this action will be the same whether plaintiffs represent only the individual plaintiffs or

both the individual plaintiffs and the Congregation. The absence of “independent” counsel will not affect the ferreting out of wrongdoing, if there is any, by those in control. Thus, there is no need for separate representation of the Congregation (*see Obeid ex rel. Gemini Real Estate Advisors v La Mack*, 14 CV 6498 [LTS] [MHD], 2015 WL 7180735, [SD NY Nov. 9, 2015]; *Stilwell Value Partners IV, L.P. v Cavanaugh*, 123 AD3d 641, 641-642 [1st Dept 2014]; *207 Second Ave. Realty Corp.*, 291 AD2d at 244).

While defendants contend that they should represent the Congregation, dual representation of a corporation and individual defendants in an action that asserts a claim of serious wrongdoing by those in control of the corporation is considered improper because a potential conflict of interest exists between counsel’s duty to the corporation and counsel’s relationship with the individual defendants. Thus, a potential conflict of interest exists when the same lawyer attempts to represent a corporation while concurrently representing the corporate insiders accused of wrongdoing. While defendants argue that they have not committed any wrongdoing, plaintiffs’ allegations specifically accuse defendants of wrongful withdrawals from the corporate bank account, as well as repeated filings of fraudulent, fictitious corporate amendments.

The Congregation is named as a plaintiff in this action, and, thus, defendants’ attorney is seeking to represent a plaintiff and the defendants in the same action. Defendants and the Congregation, as a plaintiff, have divergent and adverse interests since plaintiffs are seeking to declare the election null and void and are contending that defendants are not legitimate trustees and are not authorized to act on behalf of the Congregation, whereas defendants seek to uphold the purported election and maintain that

they are the Congregation's legitimate trustees. Consequently, defendants' counsel cannot represent both defendants and the Congregation as a plaintiff. Thus, the court adheres to its determination that defendants' motion, insofar as they seek to disqualify plaintiffs' counsel, must be denied, and plaintiffs' cross motion to disqualify defendants' counsel must be granted.

The court now turns to plaintiff's request for leave to amend its complaint. It is understood that "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading 'are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'" (*Myung Hwa Jang v Mang*, 164 AD3d 803, 804 [2d Dept 2018], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008], appeal withdrawn 12 NY3d 804 [2009] and 12 NY3d 813 [2013]). Despite this well-settled legal principle, defendants repeat their previous argument that plaintiffs should be denied leave to file a second amended complaint with respect to the First, Third, and Fourth causes of action. However, with respect to plaintiffs' proposed First and Third causes of action, the court, in its September 23, 2021 decision and order, upon a review of these causes of action, found that they were essentially the same claims that defendants had previously moved to dismiss, and which Justice Fisher, in her March 8, 2019 decision and order, found to have stated viable causes of action, and the Appellate Division, Second Department, affirmed that decision and order (*Congregation Ezech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d 1165, 1166 [2d Dept 2020]). Thus, the defendants have failed to assert any valid basis to change the court's prior determination.

With respect to plaintiffs' proposed fourth cause of action for fraud, "[t]he elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Defendants repeat their contention that plaintiffs have not alleged that they made a misrepresentation for the purpose of inducing plaintiffs to rely on it nor did plaintiffs rely on the truth of their misrepresentation. The court determined, however, in its September 23, 2021 decision and order, that contrary to this contention, plaintiffs pleaded these requisite elements of a fraud claim. The court specifically pointed to plaintiffs' allegations, in paragraphs 163 through 165 of their proposed second amended complaint, that they reasonably relied upon defendants' false statements contained in the purported August 8, 2016 and February 25, 2020 amended certificates of incorporation and the purported authority of defendants to commence and continue the holdover proceedings.

Moreover, plaintiffs pleaded the overall fraudulent plan and scheme of the defendants (NYSCEF Doc. No. 288, ¶¶ 1-4; 125-129; 143-144; 147; 162). Plaintiffs also pleaded, in detail, several alleged material misrepresentations of fact contained in the fraudulent and fictitious 2016 and 2020 purported amendments to the Congregation's articles of incorporation (*id.* at ¶¶ 130-141; 148-159), defendants' knowledge of the falsity of the material misrepresentations (*id.* at ¶¶ 142; 146; 160-161; 163), defendants' intent to induce reliance (*id.* at ¶¶ 163-164; 166), and the resulting damages to them (*id.* at ¶ 167). While defendants assert that there was no change in position by plaintiffs, in paragraph 167 of plaintiff's proposed second amended complaint, allege that they were

“forced to defend against defendants’ continuing willful, illicit and fraudulent actions, and have incurred and paid legal fees and expenses to do so.” In view of plaintiffs’ pleading of all of the requisite elements of their fraud claim, the court finds that there was no misapprehension of law or facts when the court granted that branch of the plaintiffs’ motion for leave to amend their first amended complaint to assert their fraud claim.

Regarding use and occupancy, the defendants again repeat their contention that the individual plaintiffs should be forced to pay use and occupancy to the Congregation for the apartments in which they reside. Defendants argue that in denying their motion to compel use and occupancy payments, the court overlooked that plaintiffs’ failure to pay consideration for the use and occupancy of their respective apartments is illegal, and that the Congregation had a landlord-tenant relationship with plaintiffs. These same arguments were made by defendants in the original motion and were rejected then and are rejected now.

Plaintiffs’ failure to pay use and occupancy for their apartments is not illegal. “The right to recover reasonable interim use and occupancy . . . rests exclusively with [a] landlord because it is derived solely from a landlord’s statutory right to a final award of such relief” (*El Gallo Meat Mkt. v Gallo Mkt.*, 286 AD2d 255, 255-256 [1st Dept 2001]; see also Real Property Law § 220). “A landlord-tenant relationship is the *sine qua non* for this remedy” (*El Gallo Meat Mkt.*, 286 AD2d at 256 [1st Dept 2001]; see also *14 Second Ave. Realty Corp. v Anne Steven Corp.*, 16 AD2d 751, 751 [1st Dept 1962], *affd* 12 NY2d 919 [1963]). Thus, the Congregation’s right to recover reasonable interim use and occupancy from the individual plaintiffs is inextricably linked to the issue of whether

there exists a landlord-tenant relationship between the two sides. Significantly, plaintiffs dispute that defendants are validly acting on behalf of the Congregation, which is the owner of the 1364 57th Street property. Plaintiffs deny that they have a landlord-tenant relationship with those purporting to now represent the Congregation in the holdover proceedings. Since the prerequisite of a showing of a landlord-tenant relationship has not been satisfied, the court, in its September 23, 2021 decision and order, declined to compel the payment of use and occupancy by the individual plaintiffs. As the court previously observed, this finding is consistent with the rulings of two prior justices, both of whom determined that the leases (previously relied upon by the individual plaintiffs) are invalid under the Religious Corporation Law.

Notably, Real Property Law § 220 provides that “the landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which [it] is entitled.” Plaintiffs’ purported leases did not provide for the payment of any rent (NYSCEF Doc No. 126). Furthermore, this is not an action to recover use and occupancy or rent from plaintiffs, but an action to determine whether defendants are the proper trustees of the Congregation with the authority to commence holdover proceedings.

Moreover, it is the landlord, as the party seeking damages, who has the burden of proving entitlement to use and occupancy (*see Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011]; *Beacway Operating Corp. v Concert Arts Socy.*, 123 Misc 2d 452, 453 [Civ Ct, NY County 1984]). Since the amount to be paid for use and occupancy is not

based on leases, but, rather, is based upon the reasonable value of use and occupation of the premises, it is within the court's discretion to set use and occupancy at an amount that it deems appropriate (*see Mushlam, Inc.*, 80 AD3d at 472). The best measure of an appropriate amount for use and occupancy is the amount of monthly rent for which the tenant was liable prior to the termination of the tenancy, such as that set forth in an expired lease (*see id.*; *Earl v Nalley*, 273 App Div 451, 455 [3d Dept 1948]; *OLR ECW, L.P. v Myers*, 59 Misc 3d 650, 659 [Civ Ct, Bronx County 2018]; *76th St. Owners' Corp. v Elshiekh*, 29 Misc 3d 1225[A], 2010 NY Slip Op 51998[U][Civ Ct, Bronx County 2010], *aff'd* 32 Misc 3d 144[A], 2011 NY Slip Op 51728[U] [App Term, 1st Dept, 2011]).

As previously noted, the plaintiffs paid no rent at any time. Moreover, Hon. Cheryl J. Gonzales' order dated November 30, 2018, which directed Israel and Esther Boim to pay use and occupancy of \$3,750 to the Department of Finance based on the testimony of defendants' expert real estate broker, Simcha Loevy, at a hearing, was stayed by the granting of the preliminary injunction by Judge Fisher, and there were no orders as to the payment of use and occupancy in the holdover proceedings with respect to Shulem Malek or Hillel and Hedy Malek. As the court previously found in its September 23, 2021 decision and order, "[t]he stay effectively preserves the status quo by dispensing with the payment of use and occupancy until the instant matter is fully resolved." Since plaintiffs have never paid rent to the Congregation and since defendants' right to represent the Congregation and seek use and occupancy on its behalf as the landlord of the 1364 57th Street property is at issue, the court, in order to maintain the status quo, determined, in its September 23, 2021 decision and order, that no award of

use and occupancy should be granted during the pendency of this action. It is further noted that the Appellate Division, Second Department, affirmed the stay imposed by Justice Fisher (*Congregation Ezech Shai Bais Yosef, Inc.*, 189 AD3d at 1167). Thus, the court finds that it properly denied defendants' prior motion insofar as it sought use and occupancy.

Based upon the foregoing, the court finds that the defendants have failed to demonstrate that this court misapprehended the law or facts and have, to a large extent, rehashed arguments already considered and rejected by this court.

Accordingly, defendants' motion for reargument is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice