PROGRAM NOTICE

IN GOD WE TRUST - BUT LET'S MAKE SURE

Sales of Real Property, Mergers and Related Party Transactions Entered Into By Religious Corporations

Thursday, February 23, 2017, 5:30 p.m.
Nassau County Bar Association,
15th & West Streets, Mineola, New York

AGENDA:

1. Introduction - Neil A. Miller, Esq. - 5 minutes.

2. Temple Tradition's President meets with the Temple Attorney (Hailey Kantrow & Jorge Macias) - 10 minutes.

3. Court hearing on Temple Tradition's application to sell its real property and the merger petitions of Temple Tradition and Temple Mishagas (Hon. Fred Hirsh, Richard Kestenbaum, Esq., Andres Baena) - 20 minutes.

4. Comments by the Attorney General's Office on the Sales and Mortgages of Real Property (Assistant Attorney Generals Karin Kunstler Goldman, Esq., Linda Heinberg, Esq. & Abigail Young, Esq.) - 10 minutes.

5. Question & Answer Session - 5 minutes.

6. Introduction to new statutes on Related Party Transactions - Neil A. Miller, Esq. - 5 minutes

7. Temple Mishagas' Post-Merger President meets with the Temple Attorney (S. Robert Kroll, Esq. & Hailey Kantrow) - 15 minutes.

8. Court hearing on the enforceability of the 5 $50,000 loans to Temple Mishagas (Hon. Fred Hirsh, S. Robert Kroll, Esq., Richard Kestenbaum, Esq. & Neil A. Miller, Esq.) - 20 minutes.

9. Comments by the Attorney General's Office on the Legislative History of the Nonprofit Revitalization Act of 2013, the 2015 and 2016 amendments thereto, and the Attorney General's role in enforcing the provisions thereof (Assistant Attorney Generals Karin Kunstler Goldman, Esq., Linda Heinberg, Esq. & Abigail Young, Esq.) - 10 minutes.

10. Question and Answer Session - 10 minutes.

CLE Credit Requested: 2 hours of professional practice.

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I. First Amendment Considerations Applicable to Court Review of Disputes Within Religious Corporations

A. "The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Presbyterian Church v. Hull Church,* 393 U.S. 440, 449 (1969). Courts are wary of intervening in internal religious matters because there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich,* 426 U.S. 696, 709 (1976); *Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d 282, 286, 849 N.Y.S.2d 463, 465, 879 N.E.2d 1282, 1284 (2007).

B. Resolution of disputes involving religious parties or institutions must be decided on neutral principles of law by application of objective, well-established principles of secular law to the issues, such as by relying upon the corporation's internal documents, but only if those documents do not require interpretation of ecclesiastical doctrine.

1. *Congregation Yetev Lev D'Satmar, Inc. v. Kahana, supra*, 9 N.Y.3d at 286, 849 N.Y.S.2d at 466, 879 N.E.2d at 1284-85 (Court could not resolve dispute between two factions of congregation which went beyond mere notice and quorum challenges and involved membership issues which at their core were ecclesiastical).

2. Where there are dispute as to whether real property held in the name of local parish was in fact owned by the local parish in trust for the benefit of the larger governing religious body to which the parish belongs may be resolved by review of deeds, and of constitution and canons to the extent they provide for ownership of real property. *Episcopal Diocese of Rochester v. Harnish*, 11 N.Y.3d 340, 870 N.Y.S.2d 814, 899 N.E.2d 920 (2008) (where constitution and canons of Diocese stated that parish holds property in trust for Diocese, Court resolved dispute over ownership in favor of Diocese); *First Presbyterian Church v. United Presbyterian Church*, 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454 (1984) (focusing on language of deeds, terms of local church charter, State statutes governing the holding of church property and the provisions in the constitution of the general church concerning the ownership and control of church property, court found no basis for a trust or similar restriction in favor of the general church, real property was owned by local church that withdrew from the Presbytery).

3. Court can determine if religious corporation followed proper procedures set forth in State law and corporate constitution and bylaws if it can do so without determining religious doctrine. *Rector, Churchwardens & Vestrymen of Church of Holy Trinity v. Melish,* 3 N.Y.2d 476 (1957) (existence of lawful quorum); *Kamchi v. Weissman*, 125 A.D.3d 142, 1 N.Y.S.3d 169 (2nd Dept. 2014) (Court could determine if Board of Trustee decision not to allow Congregation to vote on whether to renew or extend Rabbi's employment agreement violated Religious Corporation Law §200 and Congregation's bylaws); *Matter of Midway Jewish Center*, 16 Misc.3d 607, 838 N.Y.S.2d 879 (Sup. Ct. Nassau Co. 2007) (in approving merger of synagogues, Court reviewed contentions as to propriety of meeting notice and whether members who voted were in good standing, but determined that issues as to differences in religious practices between synagogues fell within realm of theology and ritual and could not be addressed).

C. The line between matters which can be resolved on neutral principles and those which require resort to ecclesiastical issues is not always clear. *Hafif v. Rabbinical Council of Syrian & Near Easter Jewish Communities in America*, 140 A.D.3d 1017, 34 N.Y.S.3d 160 (2nd Dept. 2016) (Court refuses to determine proper interpretation and understanding of Hebrew word "mizuyaf", the authenticity requirements of documents being submitted on an application to a Jewish religious tribunal for permission to remarry and the validity of the documents submitted in the context of a Jewish religious divorce dispute).

II. Sales of Real Property Owned by Religious Corporations

A. Governed by Religious Corporation Law §12

1. Covers sales, mortgages and leases for a term exceeding 5 years. Does not apply to mortgage foreclosure sales.

2. While generally the right to vote by proxy is left to the constitution and by-laws of a synagogue, there is a statutory right to vote by proxy on a proposition to sell, mortgage or lease a synagogue's property (Religious Corporation Law §207).

3. Requires leave of Court or Attorney General, except for purchase money mortgages or purchase money security interests

B. Leave of Court - Not-for-Profit Corporation Law ("N-PCL") §511

1. Required Content of Petition to Court - N-PCL §511(a)

- name of corporation and law under or by which it was incorporated
- names and places of residence of directors and principal officers
- activities of corporation
- description with reasonable certainty of assets to be sold, leased,

exchanged or otherwise disposed of or statement that disposing of all or substantially all the corporate assets more fully described in a schedule attached to petition

- statement of fair value of assets and amount of corporation's debts and liabilities and how secured

- consideration to be received by corporation and disposition proposed to be made thereof, and statement that the dissolution of corporation is or is not contemplated thereafter

- that consideration and terms of sale, lease or exchange or other disposition of assets are fair and reasonable to corporation, and that purposes of the corporation, or the interests of its members will be promoted thereby, and statement of reasons therefor

- sale, lease, exchange or disposition has been recommended or authorized by vote of directors, at a meeting duly called and held as shown in a schedule annexed to petition setting forth a copy of the resolution with a statement of the vote thereon

- where consent of members of corporation required by law, that such consent has been given at a meeting of members, as shown in a schedule annexed to petition setting forth a copy of the resolution with a statement of the vote thereon

2. Court must direct a minimum of 15 days notice by mail or in person to Attorney General; in fact approval from Attorney General is often sought and obtained in advance of the filing of the petition

3. Court has discretion to direct notice of application, by mail or personally, to any person interested as member, officer or creditor of the corporation

4. Court may authorize sale, lease, exchange or other disposition of all or substantially all the assets of the corporation if satisfied that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or interests of the members will be promoted. If the Court finds that the contemplated sale will not promote the purposes of the religious corporations or its members and therefore denies judicial consent, the putative purchaser has no right to either specific performance or money damages. *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn*, 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480 (1981).

C. Attorney General Approval - N-PCL §511-a

1. Attorney General approval cannot be sought if corporation is insolvent or would become insolvent as a result of the transaction, or if Attorney General concludes that a court should review and determine petition.

2. Required Content of Petition to Attorney General - N-PCL §511-a(b). All information required to obtain Court approval as per N-PCL 511(a), PLUS:

- statement that corporation is not insolvent and will not become insolvent as a result of transaction

- statement as to whether any persons have raised, or have a reasonable

basis to raise, objections to the sale, lease, exchange or other disposition

- names and addresses of such persons, nature of their interest and description of their objections

- Attorney General may direct corporation to provide notice of petition to any interested person, and corporation must provide certification that required notice was provided

D. Trustees of the following churches cannot seek sale without approval of or consent of proper religious officials as specified in Religious Corporation Law §§12(2) - (5): Protestant Episcopal church, Roman Catholic church, Ruthenian Catholic church of the Greek rite, African Methodist Episcopal Zion church, Presbyterian church, United Methodist Church, Reformed Church in connection with the General Synod of the Reformed Church in America.

E. If sale, mortgage or lease for term exceeding 5 years is made without authority of Court of Attorney General, court may still retroactively confirm the transaction at a later date, upon application of corporation, grantee or mortgagee or any person claiming through or under grantee or mortgagee. Religious Corporation Law §12(9)

III. Consolidation and Mergers of Jewish Religious Corporations. Governed by Religious Corporation Law §208

A. Must have written agreement for the consolidation setting forth:

1. Terms and conditions of consolidation
2. Name of proposed or surviving corporation
3. Number of trustees
4. Time of annual election and names of persons who will be trustees until first or next annual meeting.

B. Must be approved by petition to Court.

1. Each congregation must approve both agreement of consolidation and the Court petition by 2/3 vote. Affidavit by president and secretary of each corporation stating such approval has been given must be annexed to petition.

2. By statute, voting by proxy is allowed.

3. Draftsmanship issue: Religious Corporation Law §208 states that notice of meeting must be in manner prescribed by N-PCL §605. But Religious Corporation Law §2-b states that N-PCL §605 shall not apply to religious corporations.

4. Petition must set forth agreement for consolidation and statement of petitioner's real property and its liabilities.

5. Petition should be made by Order to Show Cause, and Court decides how and to whom notice of the petition is to be given. See *Matter of Midway Jewish Center*, 16 Misc.3d 607, 838 N.Y.S.2d 879 (Sup. Ct. Nassau Co. 2007).

6. Certified copy of Order approving consolidation or merger must be filed with the secretary of state and offices of the County Clerks in which the constituent synagogues had recorded their certificates of incorporation, or, if no certificate recorded, with County Clerk of the county in which the principal place of worship of the new or surviving synagogue.

IV. The Nonprofit Revitalization Act of 2013 and "Related Party Transactions"

A. Prior Law

1. Under N-PCL §715(a), no contract between a not for profit corporation and a director or officer (or entity in which a director or officer has a substantial financial interest) would be void or voidable for that reason alone, even if the director or officer was present at the meeting of the board when the transaction was authorized, if (a) the material facts as to the director's or officer's interest were disclosed in good faith and the board vote was sufficient to approve the transaction without counting the vote of the interested director, OR (b) the material facts as to the director's or officer's interest were disclosed in good faith or known to the members entitled to vote thereon.

2. If good faith disclosure was not made, or the vote of the interested director or officer was necessary to authorize the transaction, the burden was on the parties to the transaction to establish affirmatively that it was fair and reasonable as to the corporation at the time it was authorized.

3. N-PCL §717 imposed a duty on directors and officers to discharge their duties "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances". Protected by the business judgment rule. *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317 (1990).

4. Action could be brought under N-PCL §720, which allows actions to compel an officer or director to account for violation of duties in management and disposition of corporate assets, acquisition by himself or others due to violation of duties, set aside conveyance where transferee knew of its unlawfulness.

5. Attorney General Enforcement

- Only where specifically authorized by statute. *People v. Grasso*, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 893 N.E.2d 105 (2008).
- not specifically provided for in N-PCL §715.
- authorized for violations of N-PCL §719, which covers certain particular payments and distributions

- authorized for violations of N-PCL §720

B. The Non-Profit Revitalization Act, "Related Party Transactions" and Current Law

1. Under N-PCL §715, nonprofit corporations are barred from entering into "related party transactions" unless determined by board to be fair, reasonable and in corporation's best interest. Any director, officer or key employee who has an interest in the transaction must disclose material facts concerning such interest in good faith to the Board or an authorized committee thereof.

2. Requirements of N-PCL §715(b):

- Prior to entering into the transaction, the Board or authorized committee must consider alternative transactions "to the extent available"
- approve the transaction by not less than a majority vote of the directors or committee members present at the meeting. The related party may not participate in deliberations or voting
- contemporaneously document in writing the basis for the approval, including its consideration of any alternative transactions

3. Attorney General's ability to enforce - N-PCL §715(f)

- can bring action to enjoin, void or rescind any related party transaction that violates the statute or was otherwise not reasonable or in the best interests of the corporation at the time the transaction was approved
- may seek restitution and removal of directors or officers
- may seek to require any person or entity to account for profits and pay them to corporation, pay the corporation the value of the use of any asset used in the transaction, return or replace the assets lost to the corporation, account for proceeds of any sale of property
- in the case of willful and intentional conduct, pay double the amount of any benefit improperly obtained

4. No specific private right of action in N-PCL §715.

5. Requirement that every corporation adopt a conflict of interest policy - N-PCL §715-a

- ensure directors, officers and key employees act in corporation's best interests and comply with applicable legal requirements including N-PCL §715
- must include at a minimum: definition of circumstances that constitute a conflict of interest, procedures for disclosing a conflict of interest, requirement that person with conflict not be present at or participate in board or committee deliberation or vote on the matter, prohibition against any attempt by person with conflict to influence improperly the deliberation or voting, requirement that existence and resolution of conflict be documented in the

corporation's records, including minutes of meeting at which conflict was discussed or voted upon, procedures for disclosing, addressing and documenting related party transactions in accordance with N-PCL §715.

- prior to initial election of any director and annually thereafter, director must complete, sign and submit to corporation secretary or designated compliance officer a written statement entities in which director has a relationship and with which corporation has a relationship, and any transaction in which corporation is a participant and in which director might have a conflicting interest.

- no remedy for violation stated in statute

6. Relevant definitions

- "Relative": means a spouse, domestic partner, ancestors, brothers, sisters, children, grandchildren, great-grandchildren, spouse of domestic partner of a bother, sister, child, grandchild or great-grandchild. N-PCL §102(22)

- "Related party": means director, officer or "key employee" of the corporation or any affiliate of the corporation "or any person who exercises the powers of directors, officers or key employees over the affairs of the corporation or any affiliate of the corporation; any relative of any such individual; any entity in which any such individual owns at least at 35% ownership or beneficial interest; any partnership or professional corporation in which any such individual own a direct or indirect ownership interest in excess of 5%. N-PCL §102(23)

- "Related Party transaction": means any transaction, agreement or other arrangement in which a related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant. N-PCL §102(24)

- "Key employee": means any person "who is in a position to exerciser substantial influence over the affairs of the corporation as referenced in the federal statutory and regulatory definitions of a "disqualified person"

C. 2016 Amendments Effective May 27, 2017

1. N-PCL §715 amended to include new subsection I recognizing, in an action by anyone other than the Attorney General, a defense that the transaction was fair, reasonable and in the corporation's best interest at the time the corporation approved it.

2. N-PCL §715 amended to include new subsection j, recognizing same defense in actions commenced by the Attorney General, but requiring that, PRIOR to receipt of any request for information by the Attorney General, that (1) Board has ratified the transaction by finding in good faith that it was fair, reasonable and in the corporation's best interest at the time it was approved; (2) for a related party transaction involving a charitable corporation in which a related party has a substantial financial interest, the Board considered alternative transactions to the extent available; and (3) the Board has put into place procedures to ensure compliance with N-PCL §715(a) and (b) in the future.

3. N-PCL §102(23) & (25) - portion of definition of "Related party" concerning a "key employee" changed to "key person", with latter now being defined as a person other than a director or officer, whether or not an employee of the corporation, who

- "has responsibilities, or exercises powers or influence over the corporation as a whole similar to the responsibilities, powers or influence of directors and officers"
- "manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation"; or
- "alone or with others controls or determines a substantial portion of the corporation's capital expenditures or operating budget"

4. N-PCL §102(24) - adds exceptions to the definition of a "Related party transaction" so as to exclude

- "de minimis" transactions and transactions in which the related party's financial interest is de minimis
- transactions that would not customarily be reviewed by the boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms
- the transaction constitutes a benefit provided to a related party solely as a member of a class of the beneficiaries that the corporation intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of the same class on the same terms.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by McCarthy v. Fuller, S.D.Ind., May 23, 2012

96 S.Ct. 2372
Supreme Court of the United States

The SERBIAN EASTERN ORTHODOX DIOCESE FOR the UNITED STATES OF AMERICA AND CANADA et al., Petitioners,
v.
Dionisije MILIVOJEVICH et al.

No. 75-292.
|
Argued March 22, 1976.
|
Decided June 21, 1976.
|
Rehearing Denied Oct. 4, 1976.

See 429 U.S. 873, 97 S.Ct. 191.

A Circuit Court in Illinois entered judgment determining that a bishop's defrockment was proper, that division of the American-Canadian diocese of a hierarchical church into three new dioceses was illegal and unenforceable, and that amendments to the constitution of the dioceses were without force or effect. The Illinois Supreme Court, 60 Ill.2d 477, 328 N.E.2d 268, affirmed in part and reversed in part and remanded, holding that the proceedings of the mother church respecting the bishop were procedurally and substantively defective under the internal regulations of the mother church and were therefore arbitrary and invalid. The Illinois Supreme Court also invalidated the diocesan reorganization. On grant of certiorari, the Supreme Court, Mr. Justice Brennan, held that the state court's "detailed review" of the evidence was impermissible under the First and Fourteenth Amendments, and the court's error was compounded by error in evaluating evidence, error in delving into various church constitutional provisions and error in sanctioning circumvention of tribunals set up to resolve internal church disputes. Although the defrocked diocesan bishop controlled a monastery and was the principal officer of property-holding corporations, the civil courts were required to accept that consequence as the incidental effect of an ecclesiastical determination which was not subject to judicial abrogation, having been reached by the final church judicatory in which authority to make the decision resided.

Opinion on remand, 6 Ill.Dec. 792, 363 N.E.2d 606.

Reversed.

Mr. Chief Justice Burger concurred in the judgment.

Mr. Justice White filed a concurring opinion.

Mr. Justice Rehnquist dissented and filed opinion in which Mr. Justice Stevens joined.

West Headnotes (11)

[1] **Constitutional Law**
⚖Internal affairs, governance, or administration; autonomy or polity
Constitutional Law
⚖Religious organizations

Consistently with First and Fourteenth Amendments, civil courts do not inquire whether relevant hierarchical church governing body has power under religious law to decide religious disputes; to permit civil courts to probe deeply enough into allocation of power within hierarchical church so as to decide religious law governing church polity would violate First Amendment in much same manner as civil determination of religious doctrine. U.S.C.A.Const. Amends. 1, 14.

52 Cases that cite this headnote

[2] **Constitutional Law**
⚖Internal affairs, governance, or administration; autonomy or polity
Constitutional Law
⚖Religious organizations

Where resolution of religious disputes cannot be made without extensive inquiry by civil courts into religious law and polity, First and Fourteenth Amendments mandate that civil courts not disturb decisions of highest ecclesiastical tribunal within church of hierarchical polity but, rather, accept such decisions as binding on them, in their application to religious issues of doctrine or polity before them. U.S.C.A.Const. Amends. 1, 14.

107 Cases that cite this headnote

[3] **Constitutional Law**
⇐Property

Even when rival church factions seek resolution of church property dispute in civil courts there is substantial danger that state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs, and First Amendment therefore severely circumscribes role that civil courts may play in resolving church property disputes. U.S.C.A.Const. Amend. 1.

83 Cases that cite this headnote

[4] **Constitutional Law**
⇐Property

Principle that First Amendment commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine applies with equal force to church disputes over church polity and church administration. U.S.C.A.Const. Amend. 1.

68 Cases that cite this headnote

[5] **Constitutional Law**
⇐Religious Organizations in General

Whether or not there is room for "marginal civil court review" under narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception, in sense of inquiry whether decisions of highest ecclesiastical tribunal of hierarchical church complied with church laws and regulations is consistent with constitutional mandate that civil courts are bound to accept decisions of highest judicatory of religious organization of hierarchical polity on matters of discipline, faith, internal organization or ecclesiastical custom or law. U.S.C.A.Const. Amends. 1, 14.

302 Cases that cite this headnote

[6] **Religious Societies**
⇐Judicial supervision in general

General rule is that religious controversies are not proper subject of civil court inquiry, and that civil court must accept ecclesiastical decisions of church tribunals as it finds them. U.S.C.A.Const. Amends. 1, 14.

47 Cases that cite this headnote

[7] **Constitutional Law**
⇐Clergy; Ministers
Constitutional Law
⇐Religious organizations

State court's "detailed review" of evidence in challenge to proceedings resulting in removal and defrockment of bishop of hierarchical church by religious bodies in whose sole

discretion the authority to make such ecclesiastical decisions was vested was impermissible under First and Fourteenth Amendments, and court's error was compounded by error in evaluating evidence, error in delving into various church constitutional provisions and error in sanctioning circumvention of tribunals set up to resolve internal church disputes; in summary, state court unconstitutionally undertook resolution of quintessentially religious controversies committed by First Amendment exclusively to highest ecclesiastical tribunals of the hierarchical church. U.S.C.A.Const. Amends. 1, 14.

219 Cases that cite this headnote

[8] **Religious Societies**
Judicial supervision in general

Although diocesan bishop controlled monastery and was principal officer of property-holding corporations, civil courts were required to accept that consequence as incidental effect of ecclesiastical determination which resulted in defrocking of diocesan bishop but which was not subject to judicial abrogation, having been reached by final judicatory in which authority to make the decision resided. U.S.C.A.Const. Amends. 1, 14.

14 Cases that cite this headnote

[9] **Constitutional Law**
Internal affairs, governance, or administration; autonomy or polity
Constitutional Law
Religious organizations

First and Fourteenth Amendments forbade action of state court, asked to pass upon validity of action of mother church in hierarchical organization in separating one diocese into three, in substituting court's own interpretation of diocesan and mother church constitutions for that of highest ecclesiastical tribunals in which church law vested authority to make such interpretation. U.S.C.A.Const. Amends. 1, 14.

46 Cases that cite this headnote

[10] **Religious Societies**
Judicial supervision in general

Constitutional provisions of American-Canadian diocese of hierarchical church were not so express that civil courts could enforce them, even on purported "neutral principles" for resolving property disputes, without engaging in searching, and therefore impermissible, inquiry into church polity. U.S.C.A.Const. Amends. 1, 14.

37 Cases that cite this headnote

[11] **Constitutional Law**
Internal affairs, governance, or administration; autonomy or polity
Constitutional Law
Religious organizations

First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters; when this choice is exercised and ecclesiastical tribunals are created to decide disputes over government and direction of subordinate bodies, Constitution requires that civil courts accept their decisions as binding upon them. U.S.C.A.Const. Amends. 1, 14.

278 Cases that cite this headnote

**2374 Syllabus*

*696 During the course of a protracted dispute over the control of the Serbian Eastern Orthodox Diocese for the United States and Canada, the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church (Mother Church) suspended and ultimately removed and defrocked the Bishop, respondent Dionisije, and appointed petitioner Firmilian as Administrator of the Diocese, which the Mother Church then reorganized into three Dioceses. The Serbian Orthodox Church is a hierarchical church, and the sole power to appoint and remove its Bishops rests in the Holy Assembly and Holy Synod. Dionisije filed suit in the Illinois courts seeking to enjoin petitioners from interfering with Diocesan assets of respondent not-for-profit Illinois corporations and to have himself declared the true Diocesan Bishop. After a lengthy trial, the trial court resolved most of the disputed issues in favor of petitioners. The Supreme Court of Illinois affirmed in part and reversed in part, holding that Dionisije's removal and defrockment had to be set aside as "arbitrary" because the proceedings against him had not in its view been conducted in accordance with the Church's constitution and penal code, and that the Diocesan reorganization was invalid because it exceeded the scope of the Mother Church's authority to effectuate such changes without Diocesan approval. Held :

1. The holding of the Illinois Supreme Court constituted improper judicial interference with the decisions of a hierarchical church and in thus interposing its judgment into matters of ecclesiastical cognizance and polity, the court contravened the First and Fourteenth Amendments. Pp. 2380-2387.

(a) "(W)henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of (the) church judicatories to which the **2375 matter has been carried, the legal tribunals must accept such decisions as final, and as binding . . .." Watson v. Jones, 13 Wall. 679, 727, 20 L.Ed. 666. Pp. 2380-2381.

(b) Under the guise of "minimal" review of the Mother *697 Church's decisions that the Illinois Supreme Court deemed "aitrary" that court has unconstitutionally undertaken the adjudication of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church. Pp. 2382-2385.

2. Though it did not rely on the "fraud, collusion, or arbitrariness" exception to the rule requiring recognition by civil courts of decisions by hierarchical tribunals, but rather on purported "neutral principles" for resolving property disputes in reaching its conclusion that the Mother Church's reorganization of the American-Canadian Diocese into three Dioceses was invalid, that conclusion also contravened the First and Fourteenth Amendments. The reorganization of the Diocese involves solely a matter of internal church government, an issue at the core of ecclesiastical affairs. Religious freedom encompasses the "power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120. Pp. 2385-2387.

60 Ill.2d 477, 328 N.E.2d 268, reversed.

Attorneys and Law Firms

Albert E. Jenner, Jr., Chicago, Ill., for petitioners.

Leo J. Sullivan, III, Waukegan, Ill., for respondents.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

In 1963, the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church (Mother Church) *698 suspended and ultimately removed respondent Dionisije Milivojevich (Dionisije) as Bishop of the American-Canadian Diocese of that Church, and appointed petitioner Bishop Firmilian Ocokoljich (Firmilian) as Administrator of the Diocese, which the Mother Church then reorganized into three Dioceses. In 1964 the Holy Assembly and Holy Synod defrocked Dionisije as a Bishop and cleric of the Mother Church. In this civil action brought by Dionisije and the other respondents in Illinois Circuit Court, the Supreme Court

of Illinois held that the proceedings of the Mother Church respecting Dionisije were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid. The State Supreme Court also invalidated the Diocesan reorganization into three Dioceses. 60 Ill.2d 477, 328 N.E.2d 268 (1975).[1] We granted certiorari to determine whether the actions of the Illinois Supreme Court constituted improper judicial interference with decisions of the highest authorities of a hierarchical church in violation of the First and Fourteenth Amendments. 423 U.S. 911, 96 S.Ct. 770, 46 L.Ed.2d 634 (1975). We hold that the inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity and the court's actions pursuant thereto contravened the First and Fourteenth Amendments. We therefore reverse.

I

The basic dispute is over control of the Serbian Eastern Orthodox Diocese for the United States of America and Canada (American-Canadian Diocese), its property and assets. Petitioners are Bishops Firmilian, Gregory Udicki, and Sava Vukovich, and the Serbian Eastern *699 Orthodox Diocese for the United States of America and Canada (the religious body in this country). Respondents are Bishop Dionisije, the Serbian Orthodox Monastery of St. Sava, and the Serbian Eastern Orthodox Diocese for the United States of America and Canada, an **2376 Illinois religious corporation. A proper perspective on the relationship of these parties and the nature of this dispute requires some background discussion.

The Serbian Orthodox Church, one of the 14 autocephalous, hierarchical churches which came into existence following the schism of the universal Christian church in 1054, is an episcopal church whose seat is the Patriarchate in Belgrade, Yugoslavia. Its highest legislative, judicial, ecclesiastical, and administrative authority resides in the Holy Assembly of Bishops, a body composed of all Diocesan Bishops presided over by a Bishop designated by the Assembly to be Patriarch. The Church's highest executive body, the Holy Synod of Bishops, is composed of the Patriarch and four Diocesan Bishops selected by the Holy Assembly. The Holy Synod and the Holy Assembly have the exclusive power to remove, suspend, defrock, or appoint Diocesan Bishops. The Mother Church is governed according to the Holy Scriptures, Holy Tradition, Rules of the Ecumenical Councils, the Holy Apostles, the Holy Faiths of the Church, the Mother Church Constitution adopted in 1931, and a "penal code" adopted in 1961. These sources of law are sometimes ambiguous and seemingly inconsistent. Pertinent provisions of the Mother Church Constitution provide that the Church's "main administrative division is composed of dioceses, both in regard to church hierarchical and church administrative aspect," Art. 12, and that "(d)ecisions of establishing, naming, liquidating, reorganizing, and the seat of the dioceses, and establishing or eliminating of position of vicar bishops, *700 is decided upon by the (Holy Assembly), in agreement with the Patriarchal Council," Art. 16.

During the late 19th century, migrants to North America of Serbian descent formed autonomous religious congregations throughout this country and Canada. These congregations were then under the jurisdiction of the Russian Orthodox Church, but that Church was unable to care for their needs and the congregations sought permission to bring themselves under the jurisdiction of the Serbian Orthodox Church.

In 1913 and 1916, Serbian priests and laymen organized a Serbian Orthodox Church in North America. The 32 Serbian Orthodox congregations were divided into 4 presbyteries, each presided over by a Bishop's Aide, and constitutions were adopted. In 1917, the Russian Orthodox Church commissioned a Serbian priest, Father Mardary, to organize an independent Serbian Diocese in America. Four years later, as a result of Father Mardary's efforts, the Holy Assembly of Bishops of the Mother Church created the Eastern Orthodox Diocese for the United States of America and Canada and designated a Serbian Bishop to complete the formal organization of a Diocese. From that time until 1963, each bishop who governed the American-Canadian Diocese was a Yugoslav citizen appointed by the Mother Church without consultation with Diocesan officials.

In 1927, Father Mardary called a Church National Assembly embracing all of the known Serbian Orthodox congregations in the United States and Canada. The Assembly drafted and adopted the constitution of the Serbian Orthodox Diocese for the United States of America and Canada, and submitted the constitution to the Mother Church for approval. The Holy Assembly made changes to provide for appointment of the Diocesan Bishop by the Holy Assembly and to require Holy Assembly *701 approval for any amendments to the

constitution, and with these changes approved the constitution. The American-Canadian Diocese was the only diocese of the Mother Church with its own constitution.

Article 1 of the constitution provides that the American-Canadian Diocese "is considered ecclesiastically-judicially as an organic part of the Serbian Patriarchate in the Kingdom of Yugoslavia," and Art. 2 provides that all "statutes and rules which regulate the ecclesiastical-canonical authority and position of the Serbian Orthodox Church in the Kingdom of Yugoslavia are also compulsory for" the American-Canadian **2377 Diocese. Article 3 states that the "jurisdiction of the . . . Diocese . . . includes the entire political territory of the United States of America and Canada, which as such by its geographical location enjoys full administrative freedom and accordingly, it can independently regulate and rule the activities of its church, school and other diocesan institutions and all funds and beneficiencies, through its organs . . . ." Article 9 provides that the Bishop of the Diocese "is appointed by the Holy Assembly of Bishops of the Serbian Patriarchate"; various provisions of the constitution accord that Bishop extensive powers with respect to both religious matters and control of Diocesan property. The constitution also provides for such Diocesan organs as a Diocesan National Assembly, which exercises considerable legislative and administrative authority within the Diocese.

In 1927, Father Mardary also organized a not-for-profit corporation, the Serbian Eastern Orthodox Council for the United States and Canada, under the laws of Illinois. The corporation was to hold title to 30 acres of land in Libertyville, Ill., that Father Mardary had personally purchased in 1924. The charter of that corporation was allowed to lapse, and Father Mardary organized *702 another Illinois not-for-profit corporation, respondent Serbian Eastern Orthodox Diocese for the United States and Canada, under Illinois laws governing incorporation of hierarchical religious organizations. In 1945, respondent not-for-profit monastery corporation, the Monastery of St. Sava, was organized under these same Illinois laws, and title to the Libertyville property was transrred to it. Similar secular property-holding corporations were subsequently organized in New York, California, and Pennsylvania.

Respondent Bishop Dionisije was elected Bishop of the American-Canadian Diocese by the Holy Assembly of Bishops in 1939. He became a controversial figure; during the years before 1963, the Holy Assembly received numerous complaints challenging his fitness to serve as Bishop and his administration of the Diocese.

During his tenure, however, the Diocese grew so substantially that Dionisije requested that the Patriarch and Holy Assembly appoint bishops to assist him but to serve under his supervision. Eventually, the Diocese sought its elevation by the Holy Assembly to the rank of Metropolia, that South America be added to the Diocese, and that several assistant bishops be appointed under Dionisije. Dionisije specifically recommended that petitioners Firmilian and Gregory Udicki, and one Stefan Lastavica be named assistant bishops. A delegation from the Diocese was sent to the May 1962 meeting of the Holy Assembly in Belgrade to urge adoption of these reorganization proposals, and on June 12, 1962, the Holy Synod appointed a delegation to visit the United States and study the proposals. The delegation was also directed to confer with Dionisije concerning the complaints made against him and his administration over the years.

The delegation remained in the United States for three *703 months, visiting parishes throughout the Diocese and discusng both the reorganization proposals and the complaints against Dionisije. After completion of its survey, the delegation suggested to the Holy Synod the assignment of vicar bishops to the Diocese and recommended that a commission be appointed to conduct a thorough investigation into the complaints against Dionisije. However, the Holy Assembly on May 10, 1963, instead recommended that the Holy Synod institute disciplinary proceedings against Dionisije. The Holy Synod thereupon met immediately and suspended Dionisije pending investigation and disposition of the complaints. The Holy Synod appointed petitioner Firmilian, Dionisije's chief episcopal deputy since 1955 and one of Dionisije's candidates for assistant bishop, as Administrator of the Diocese pending completion of the proceedings.

The Holy Assembly thereafter reconvened and, acting under Art. 16 of the constitution of the Mother Church, reorganized **2378 the American-Canadian Diocese into three new dioceses the Middle Western, the Western and the Eastern whose boundaries were roughly those of the episcopal districts previously created by Dionisije.[2] The final fixing of boundaries for the new dioceses and all other organizational and administrative matters were left to be determined by the officials of the old American-Canadian Diocese. Dionisije was appointed

Bishop of the Middle Western Diocese and, seven days later, petitioners Archimandrites Firmilian, Gregory, and Stefan[3] were appointed temporary administrators for the new Dioceses.

*704 Dionisije's immediate reaction to these decisions of the Mother Church was to refuse to accept the reorganization on the ground that it contravened the administrative autonomy of the Diocese guaranteed by the Diocesan constitution, and to refuse to accept his suspension on the ground that it was not effectuated in compliance with the constitution and laws of the Mother Church. On May 25, 1963, he prepared and mailed a circular to all American-Canadian parishes stating his refusal to recognize these actions, and on May 27 he issued a press release stating his refusal to recognize his suspension and his intent to litigate it in the civil courts. This refusal to recognize the Diocesan reorganization and his suspension as Bishop was again stated by Dionisije in a circular issued on June 3 and addressed to the Patriarch, the Holy Assembly, the Holy Synod, all clergy, congregations, Diocesan committees, and all Serbians in North America. He also continued to officiate as Bishop, refusing to turn administration of the Diocese over to Firmilian; in a May 30 letter to Firmilian, Dionisije repeated this refusal, asserted that he no longer recognized the decisions of the Holy Assembly and Holy Synod, and charged those bodies with being "communistic."

The Diocesan Council met on June 6, and Dionisije reaffirmed his refusal to turn over administration of the Diocese to Firmilian; he also announced that he had discharged two of his vicars general because of their loyalty to the Mother Church. The Council resolved at the meeting to advise the Holy Synod that the proposal to reorganize the Diocese into three dioceses would be submitted to the Diocesan National Assembly in August for acceptance or rejection. The Council also requested that the Holy Assembly promptly send a committee to investigate the complaints against Dionisije.

On June 13, the Holy Synod appointed such a commission, *705 composed of two Bishops and the Secretary of the ly Synod. On July 5, the commission met with Dionisije, who reiterated his refusal to recognize his suspension or the Diocesan reorganization, and who demanded all accusations in writing. The commission refused to give Dionisije the written accusations on the ground that defiance of decisions of higher church authorities itself established wrongful conduct, and advised him that the Holy Synod would appoint a Bishop as court prosecutor to prepare an indictment against him.

On the basis of the commission's report and recommendations, which recited Dionisije's refusal to accept the decisions of the Holy Synod and Holy Assembly and his refusal to recognize the court of the Holy Synod or its competence to try him, the Holy Assembly met on July 27, 1963, and voted to remove Dionisije as Bishop. The minutes of the Holy Assembly meeting and the Patriarch's letter to Dionisije informing him of the Holy Assembly's actions made clear that the removal was based solely on his acts of defiance subsequent to his May 10, 1963, suspension, and his violation of his oath and loss of certain qualifications for Bishop under Art. 104 of the constitution of the Mother Church.

**2379 The Diocesan National Assembly, with Dionisije presiding despite his removal, met in August 1963 and issued a resolution repudiating the division of the Diocese into three Dioceses and demanding a revocation by the Mother Church of the decisions concerning that division. When the Holy Assembly refused to reconsider, the Diocesan National Assembly in November 1963 declared the Diocese completely autonomous and reinstated the provisions of the Diocesan constitution that provided for election of the Bishop of the Diocese itself and for amendments without the approval of the Holy Assembly.

Meanwhile, the Holy Synod in October 1963 forwarded *706 to Dionisije a formal written indictment bad on the charges of canonical misconduct. In November 1963, Dionisije responded with a demand for the verified reports and complaints referred to in the indictment and for a six-month extension to answer the indictment. The Holy Assembly granted a 30-day extension in which to answer, but declined to furnish verified charges on the grounds that they were described in the indictment, that additional details would be evidentiary in nature, and that there was no legal or canonical basis for forwarding such material to an accused Bishop.

Dionisije returned the indictment in January, refusing to answer without the verified charges, denouncing the Holy Assembly and Holy Synod as schismatic and pro-Communist, and asserting that the Mother Church was proceeding in violation of its penal code and constitution.

The Holy Synod, on February 25, 1964, declared that it

could not proceed further without Dionisije and referred the matter to the Holy Assembly, which tried Dionisije as a default case on March 5, 1964, because of his refusal to participate. The indictment was also amended at that time to include charges based on Dionisije's acts of rebellion such as those committed at the November meeting of the National Assembly which had declared the Diocese separate from the Mother Church. Considering the original and amended indictments, the Holy Assembly unanimously found Dionisije guilty of all charges and divested him of his episcopal and monastic ranks.

Even before the Holy Assembly had removed Dionisije as Bishop, he had commenced what eventually became this protracted litigation, now carried on for almost 13 years. Acting upon the threat contained in his May 27, 1963, press release, Dionisije filed suit in *707 the Circuit Court of Lake County, Ill., on July 26, 1963, seeking to enjoin petitioners from interfering with the assets of respondent corporations and to have himself declared the true Diocesan Bishop. Petitioners countered with a separate complaint, which was consolidated with the original action, seeking declaratory relief that Dionisije had been removed as Bishop of the Diocese and that the Diocese had been properly reorganized into three Dioceses, and injunctive relief granting petitioner Bishops control of the reorganized Dioceses and their property. After the trial court granted summary judgment for respondents and dismissed petitioners' countercomplaint, the Illinois Appellate Court reversed and remanded for a hearing on the merits. Serbian Orthodox Diocese v. Ocokoljich, 72 Ill.App.2d 444, 219 N.E.2d 343, appeal denied, 34 Ill.2d 631 (1966).[4]

Following a lengthy trial, the trial court filed an unreported memorandum opinion and entered a final decree which concluded that "no substantial evidence was produced . . . that fraud, collusion or arbitrariness existed in any of the actions or decisions preliminary to or during the final proceedings of the decision to defrock Bishop Dionisije made by the highest Hierarchical bodies of the Mother Church," Pet. for Cert., App. 44; that the property held by **2380 respondent corporations is held in trust for all members of the American-Canadian Diocese; that it was "improper and beyond the power of the Mother Church to take its action in dividing the whole American Diocese into three new Dioceses, changing its boundaries, and in appointing new bishops for *708 said so-called new Dioceses," *id.*, at 46; and that "Firmilian was validly appointed by the Holy Episcopal Synod as temporary Administrator of the whole American Diocese in place of the defrocked Bishop Dionisije," *ibid.*

On appeal, the Supreme Court of Illinois affirmed in part and reversed in part, essentially holding that Dionisije's removal and defrockment had to be set aside as "arbitrary" because the proceedings resulting in those actions were not conducted according to the Illinois Supreme Court's interpretation of the Church's constitution and penal code, and that the Diocesan reorganization was invalid because it was beyond the scope of the Mother Church's authority to effectuate such changes without Diocesan approval. 60 Ill.2d 477, 328 N.E.2d 268 (1975). Although the court denied rehearing, it amended its original opinion to hold that, although Dionisije had been properly suspended, that suspension terminated by operation of church law when he was not validly tried within one year of his indictment. Thus, the court purported in effect to reinstate Dionisije as Diocesan Bishop.

II

[1] [2] The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes). . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. *709 To permit civil courts to probe deeply enough into the allocation of power within ahierarchical) church so as to decide . . . religious law (governing church polity) . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine." Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369, 90 S.Ct. 499, 500, 24 L.Ed.2d 582 (1970) (Brennan, J., concurring). For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them. Ibid.

[3] [4] Resolution of the religious disputes at issue here

affects the control of church property in addition to the structure and administration of the American-Canadian Diocese. This is because the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations. Resolution of the religious dispute over Dionisije's defrockment therefore determines control of the property. Thus, this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals. Even when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Because of this danger, "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." Presbyterian Church v. Hull Church, 393 U.S. 440, 449, 89 S.Ct. 601, 606, 21 L.Ed.2d 658 (1969). "First **2381 Amendment *710 values are plainly jeopardized when church property litigation is made turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . (T)he (First) Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." Ibid. This principle applies with equal force to church disputes over church polity and church administration.

The principles limiting the role of civil courts in the resolution of religious controversies that incidentally affect civil rights were initially fashioned in Watson v. Jones, 13 Wall. 679, 20 L.Ed. 666 (1872), a diversity case decided before the First Amendment had been rendered applicable to the States through the Fourteenth Amendment.[5] With respect to hierarchical churches, Watson held:

"(T)he rule of action which should govern the civil courts . . . is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Id., at 727, 20 L.Ed. 666.

In language having "a clear constitutional ring," Presbyterian Church v. Hull Church, supra, 393 U.S. at 446, 89 S.Ct. 601, Watson reasoned:

"The law knows no heresy, and is committed to the *711 support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." 13 Wall., at 728-729, 20 L.Ed. 666 (emphasis supplied).

Gonzalez v. Archbishop, 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929), applied this principle in a case involving dispute over entitlement to certain income under a will that turned upon an ecclesiastical determination as to whether an individual would be appointed to a chaplaincy in the Roman Catholic Church. The Court, speaking through Mr. Justice Brandeis, observed:

"Because the appointment (to the chaplaincy) is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church *712 tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise." *Id.*, at 16, 50 S.Ct. at 7.

**2382 Thus, although Watson had left civil courts no role to play in reviewing ecclesiastical decisions during the course of resolving church property disputes, Gonzalez first adverted to the possibility of "marginal civil court review," Presbyterian Churgh v. Hull Church,

supra, 393 U.S. at 447, 89 S.Ct. at 605, in cases challenging decisions of ecclesiastical tribunals as products of "fraud, collusion, or arbitrariness." However, since there was "not even a suggestion that (the Archbishop) exercised his authority (in making the chaplaincy decision) arbitrarily," 280 U.S., at 18, 50 S.Ct., at 8, the suggested "fraud, collusion, or arbitrariness" exception to the Watson rule was dictum only. And although references to the suggested exceptions appear in opinions in cases decided since the Watson rule has been held to be mandated by the First Amendment,[6] no decision of this Court has given concrete content to or applied the "exception." However, it was the predicate for the Illinois Supreme Court's decision in this case, and we therefore turn to the question whether reliance upon it in the circumstances of this case was consistent with the prohibition of the First and Fourteenth Amendments against rejection of the decisions of the Mother Church upon the religious disputes in issue.

[5] [6] The conclusion of the Illinois Supreme Court that the decisions of the Mother Church were "arbitrary" was grounded upon an inquiry that persuaded the Illinois Supreme *713 Court that the Mother Church had not followed its own laws and procedures in arriving at those decisions. We have concluded that whether or not there is room for "marginal civil court review " under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes,[7] no "arbitrariness" exception in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law. For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense "arbitrary " must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them. Watson itself requires our conclusion in its rejection of the analogous argument that ecclesiastical decisions of the highest church judicatories need only be accepted if the subject matter of the dispute is within their "jurisdiction."

"But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character, a matter over which the civil courts *714 exercise no jurisdiction, in a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a **2383 sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that If the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, And would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions." 13 Wall., at 733-734, 20 L.Ed. 666. (Emphasis supplied.)

Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith[8] whether or not rational or measurable by *715 objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

The constitutional evils that attend upon any "arbitrariness" exception in the sense applied by the Illinois Supreme Court to justify civil court review of ecclesiastical decisions of final church tribunals are manifest in the instant case. The Supreme Court of Illinois recognized that all parties agree that the Serbian Orthodox Church is a hierarchical church, and that the sole power to appoint and remove Bishops of the Church resides in its highest ranking organs, the Holy Assembly and the Holy Synod.[9] Indeed, final authority with respect to **2384 the

*716 promulgation and interpretation of *all* maers of church discipline and internal organization rests with the Holy Assembly, and even the written constitution of the Mother Church expressly provides:
"The Holy Assembly of Bishops, as the highest hierarchical body, is legislative authority in the matters of faith, officiation, church order (discipline) and internal organization of the Church, as well as the highest church juridical authority within its jurisdiction (Article 69 sec. 28)." Art. 57.
"All the decisions of the Holy Assembly of Bishops *717 and of the Holy Synod of Bishops of canonical d church nature, in regard to faith, officiation, church order and internal organization of the church, are valid and final." Art. 64.

"The Holy Assembly of Bishops, whose purpose is noted in Article 57 of this Constitution:

"9) interprets canonical-ecclesiastical rules, those which are general and obligatory, and particular ones, and publishes their collections;

"12) prescribes the ecclesiastical-judicial procedure for all Ecclesiastical Courts;

"26) settles disputes of jurisdiction between hierarchical and church-self governing organs;

"27) ADJUDGES:

"A) In first and in final instances:

"a) disagreements between bishops and the Holy Synod, and between the bishops and the Patriarch;

"b) canonical offenses of the Patriarch;

"B) In the second and final instance:

"All matters which the Holy Synod of Bishops judged in the first instance." Art. 69.

Nor is there any dispute that questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern; the bishop of a church is clearly one of the central figures in such a hierarchy and the embodiment of the church within his Diocese, and the Mother Church constitution states that "(h)e is, according to the church canonical regulations, chief representative and guiding leader of all church spiritual life and church order in the diocese." Art. 13.

[7] [8] Yet having recognized that the Serbian Orthodox Church is hierarchical and that the decisions to suspend and *718 defrock respondent Dionisije were made by the religious bodies in whose sole discretion the authority to make thosecclesiastical decisions was vested, the Supreme Court of Illinois nevertheless invalidated the decision to defrock Dionisije on the ground that it was "arbitrary" because a "detailed review of the evidence discloses that the proceedings resulting in Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of the Serbian Orthodox Church." 60 Ill.2d, at 503, 328 N.E.2d at 281. Not only was this "detailed review" impermissible under the First and Fourteenth Amendments, but in reaching this conclusion, the court evaluated conflicting testimony concerning internal church procedures and rejected the interpretations of relevant procedural provisions by the Mother Church's highest tribunals. Id., at 492-500, 328 N.E.2d at 276-280. The court also failed to take cognizance of the fact that the church judicatories were also guided by other sources of law, such as canon law, which are admittedly not always consistent, and it rejected the testimony of **2385 petitioners' five expert witnesses[10] that church procedures were properly followed, denigrating the testimony of one witness as "contradictory" and discounting that of another on the ground that it was "premised upon an assumption which did not consider the penal code," even though there was some question whether that code even applied to discipline of Bishops.[11] The court *719 accepted, on the other hand, the testimony of respondents' sole expert witness that the Church's procedures had been contravened in various specifics. We need not, and under the First Amendment cannot, demonstrate the propriety or impropriety of each of Dionisije's procedural claims, but we can note that the state court even rejected petitioners' contention that Dionisije's failure to participate in the proceedings undermined all procedural contentions because Arts. 66 and 70 of the penal code specify that if a person charged with a violation fails to participate or answer the indictment, the allegations are admitted and due process will be concluded without his participation; the court merely asserted that "application of this provision . . . must be viewed from the perspective that Bishop Dionisije refused to participate because he maintained that the proceedings against him were in violation of the constitution and the penal code of the

Serbian Orthodox Church." 60 Ill.2d, at 502, 328 N.E.2d, at 281. The court found no support in any church dogma for this judicial rewriting of church law, and compounded further the error of this intrusion into a religious thicket by declaring that although Dionisije had, even under the court's analysis, been properly suspended and replaced by Firmilian as temporary administrator, he had to be reinstated as Bishop because church law mandated a trial on ecclesiastical charges within one year of the indictment. Yet the only reason more time then that had expired was due to Dionisije's decision to resort to the civil courts for redress without attempting to vindicate himself by pursuing available ***720** remedies within the church. Indeed, the Illinois Supreme Court overlooked the clear substantive canonical violations for which the Church disciplined Dionisije, violations based on Dionisije's conceded open defiance and rebellion against the church hierarchy immediately after the Holy Assembly's decision to suspend him (a decision which even the Illinois courts deemed to be proper) and Dionisije's decision to litigate the Mother Church's authority in the civil courts rather than participate in the disciplinary proceedings before the Holy Synod and the Holy Assembly. Instead, the Illinois Supreme Court would sanction this circumvention of the tribunals set up to resolve internal church disputes and has ordered the Mother Church to reinstate as Bishop one who espoused views regarded by the church hierarchy to be schismatic and which the proper church tribunals have already determined merit seversanctions. In short, under the guise of "minimal" review under the umbrella of "arbitrariness," the Illinois Supreme Court has unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church. And although the Diocesan Bishop controls respondent Monastery of St. Sava and is the principal officer of respondent property-holding corporations, the civil courts must accept that consequence as the incidental effect of an ecclesiastical determination that is not subject ****2386** to judicial abrogation, having been reached by the final church judicatory in which authority to make the decision resides.

III

Similar considerations inform our resolution of the second question we must address the constitutionality of the Supreme Court of Illinois' holding that the Mother Church's reorganization of the American-Canadian Diocese ***721** into three Dioceses was invalid because it was " 'in clear and palpable excess of its own jurisdiction.' " Essentially, the court premised this determination on its view that the early history of the Diocese "manested a clear intention to retain independence and autonomy in its administrative affairs while at the same time becoming ecclesiastically and judicially an organic part of the Serbian Orthodox Church," and its interpretation of the constitution of the American-Canadian Diocese as confirming this intention. It also interpreted the constitution of the Serbian Orthodox Church, which was adopted after the Diocesan constitution, in a manner consistent with this conclusion. 60 Ill.2d, at 506-507, 328 N.E.2d, at 283-284.

[9] This conclusion was not, however, explicitly based on the "fraud, collusion, or arbitrariness" exception. Rather, the Illinois Supreme Court relied on purported "neutral principles" for resolving property disputes which would "not in any way entangle this court in the determination of theological or doctrinal matters." Id., at 505, 328 N.E.2d, at 282. Nevertheless the Supreme Court of Illinois substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments forbid.

[10] We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs; Arts. 57 and 64 of the Mother Church constitution commit such questions of church polity to the final province of the Holy Assembly. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952), stated that religious freedom encompasses the ***722** "power (of religious bodies) to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." The subordination of the Diocese to the Mother Church in such matters, which are not only "administrative" but also "hierarchical,"[12] was provided, and the power of the Holy Assembly to reorganize the Diocese is expressed in the Mother Church constitution.[13] Contrary to the interpretation of the Illinois court, the church judicatories interpreted the provisions of

the Diocesan constitution **2387 not to interdict or govern this action, but only to relate to the day-to-day administration of Diocesan property.[14] *723 The constitutional provisions of the American-Canadian Diocese were not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity. See Md. & Va. Churches v. Sharpsburg Church, 396 U.S. at 368-370, 90 S.Ct., at 500-501 (Brennan, J., concurring).[15]

The control of Diocesan property may be little affected by the changes; respondents' allegation that the reorganization was a fraudulent subterfuge to divert Diocesan property from its intended beneficiaries has been rejected by the Illinois courts. Formal title to the property remains in respondent property-holding corporations, to be held in trust for all members of the new Dioceses. The boundaries of the reorganized Dioceses generally conform to the episcopal districts which the American-Canadian Diocese had already employed for its internal government, and the appointed administrators of the new Dioceses were the same individuals nominated by Dionisije as assistant bishops to govern similar divisions under him. Indeed, even the Illinois courts' rationale that the reorganization would effectuate an abrogation of the Diocesan constitution has no support in the record, which establishes rather that the details of the reorganization and any decisions pertaining to a distribution of *724 the property among the three Dioceses were expressly left for the Diocesan National Assembly to determine. In response to inquiries from the Diocese, the Holy Assembly assured Bishop Firmilian:
"1. That all the rights of the former American-Canadian Diocese, as they relate to the autonomy in the administrative sense, remain unchanged. The only exception is the forming of three dioceses and

"2. That the Constitution of the former American-Canadian Diocese remains the same and that the Dioceses in America and Canada will not, in an administrative sense (the management (Or direction) of the properties) be managed (Or directed) in the same manner as those in Yugoslavia." App. 1446.

As a practical matter the effect of the reorganization is a tripling of the Diocesan representational strength in the Holy Assembly and a decentralization of hierarchical authority to permit closer attention to the needs of individual congregations within each of the new Dioceses, a result which Dionisije and Diocesan representatives had already concluded was necessary. Whether corporate bylaws or other documents governing the individual property-holding corporations may affect any desired disposition of the Diocesan property is a question not before us.

IV

[11] In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over *725 the government and direction of subordinate bodies, the Constitution requires **2388 that civil courts accept their decisions as binding upon them.

Reversed.

THE CHIEF JUSTICE concurs in the judgment.

Mr. Justice WHITE, concurring.

Major predicates for the Court's opinion are that the Serbian Orthodox Church is a hierarchical church and the American-Canadian Diocese, involved here, is part of that Church. These basic issues are for the courts' ultimate decision, and the fact that church authorities may render their opinions on them does not foreclose the courts from coming to their independent judgment. I do not understand the Court's opinion to suggest otherwise and join the views expressed therein.

Mr. Justice REHNQUIST, with whom Mr. Justice STEVENS joins, dissenting.

The Court's opinion, while long on the ecclesiastical history of the Serbian Orthodox Church, is somewhat short on the procedural history of this case. A casual

reader of some of the passages in the Court's opinion could easily gain the impression that the State of Illinois had commenced a proceeding designed to brand Bishop Dionisije as a heretic, with appropriate pains and penalties. But the state trial judge in the Circuit Court of Lake County was not the Bishop of Beauvais, trying Joan of Arc for heresy; the jurisdiction of his court was invoked by petitioners themselves, who sought an injunction establishing their control over property of the American-Canadian Diocese of the church located in Lake County.

The jurisdiction of that court having been invoked *726 for such a purpose by both petitioners and respondents,ontesting claimants to Diocesan authority, it was entitled to ask if the real Bishop of the American-Canadian Diocese would please stand up. The protracted proceedings in the Illinois courts were devoted to the ascertainment of who that individual was, a question which the Illinois courts sought to answer by application of the canon law of the church, just as they would have attempted to decide a similar dispute among the members of any other voluntary association. The Illinois courts did not in the remotest sense inject their doctrinal preference into the dispute. They were forced to decide between two competing sets of claimants to church office in order that they might resolve a dispute over real property located within the State. Each of the claimants had requested them to decide the issue. Unless the First Amendment requires control of disputed church property to be awarded solely on the basis of ecclesiastical paper title, I can find no constitutional infirmity in the judgment of the Supreme Court of Illinois.

Unless civil courts are to be wholly divested of authority to resolve conflicting claims to real property owned by a hierarchical church, and such claims are to be resolved by brute force, civil courts must of necessity make some factual inquiry even under the rules the Court purports to apply in this case. We are told that "a civil court must accept the ecclesiastical decisions of church tribunals as it finds them," Ante, at 2382. But even this rule requires that proof be made as to what these decisions are, and if proofs on that issue conflict the civil court will inevitably have to choose one over the other. In so choosing, if the choice is to be a rational one, reasons must be adduced as to why one proffered decision is to prevail over another. Such reasons will *727 obviously be based on the canon law by which the disputants have agreed to bind themselves, but they must also represent a preference for one view of that law over another.

If civil courts, consistently with the First Amendment, may do that much, the question arises why they may not do what the Illinois courts did here regarding the defrockment of Bishop Dionisije, and conclude, on the basis of testimony from experts on the canon law at issue, that the decision of the religious tribunal involved **2389 was rendered in violation of its own stated rules of procedure. Suppose the Holy Assembly in this case had a membership of 100; its rules provided that a bishop could be defrocked by a majority vote of any session at which a quorum was present, and also provided that a quorum was not to be less than 40. Would a decision of the Holy Assembly attended by 30 members, 16 of whom voted to defrock Bishop Dionisije, be binding on civil courts in a dispute such as this? The hypothetical example is a clearer case than the one involved here, but the principle is the same. If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, they can easily be converted into handmaidens of arbitrary lawlessness.

The cases upon which the Court relies are not a uniform line of authorities leading inexorably to reversal of the Illinois judgment. On the contrary, they embody two distinct doctrines which have quite separate origins. The first is a common-law doctrine regarding the appropriate roles for civil courts called upon to adjudicate church property disputes a doctrine which found general application in federal courts prior to Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), but which has never had any application to our review of a state-court *728 decision. The other is derived from the First Amendment to the Federal Constitution, and is of course applicable to thisase; it, however, lends no more support to the Court's decision than does the common-law doctrine.

The first decision of this Court regarding the role of civil courts in adjudicating church property disputes was Watson v. Jones, 13 Wall. 679, 20 L.Ed. 666 (1872). There the Court canvassed the American authorities and concluded that where people had chosen to organize themselves into voluntary religious associations, and had agreed to be bound by the decisions of the hierarchy created to govern such associations, the civil courts could not be availed of to hear appeals from otherwise final decisions of such hierarchical authorities. The bases from which this principle was derived clearly had no constitutional dimension; there was not the slightest suggestion that the First Amendment or any other

provision of the Constitution was relevant to the decision in that case. Instead the Court was merely recognizing and applying general rules as to the limited role which civil courts must have in settling private intraorganizational disputes. While those rules, and the reasons behind them, may seem especially relevant to intrachurch disputes, adherence or nonadherence to such principles was certainly not thought to present any First Amendment issues. For as the Court in Watson observed:
"Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints." Id., at 714, 20 L.Ed. 666.

The Court's equation of religious bodies with other private voluntary associations makes it clear that the principles ***729** discussed in that case were not dependent upon those embodied in the First Amendment.

Less than a year later Watson's observations about the roles of civil courts were followed in Bouldin v. Alexander, 15 Wall. 131, 21 L.Ed. 69 (1872), where the Court held that the appointed trustees of the property of a congregational church
"cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules." Id., at 140, 21 L.Ed. 69.

Again, there was nothing to suggest that this was based upon anything but commonsense rules for deciding an intraorganizational dispute: in an organization which has provided for majority rule through certain procedures, a minority's attempt to usurp that rule and those procedures need be given no effect by civil courts.

****2390** In Gonzalez v. Archbishop, 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929), the Court again recognized the principles underlying Watson in upholding a decision of the Supreme Court of the Philippine Islands that the petitioner was not entitled to the chaplaincy which he claimed because the decision as to whether he possessed the necessary qualifications for that post was one committed to the appropriate church authorities. In dicta which the Court today conveniently truncates, Mr. Justice Brandeis observed:

"In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determinations of the judicatory bodies established* ***730** *by clubs and civil associations.*" *Id.*, at 16-17, 50 S.Ct., at 7-8 (emphasis supplied; footnotes omitted).

Gonzalez clearly has no more relevance to the meaning of the First Amendment than do its two predecessors.

The year 1952 was the first occasion on which this Court examined what limits the First and Fourteenth Amendments might place upon the ability of the States to entertain and resolve disputes over church property. In Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952), the Court reversed a decision of the New York Court of Appeals which had upheld a statute awarding control of the New York property of the Russian Orthodox Church to an American group seeking to terminate its relationships with the hierarchical Mother Church in Russia. The New York Legislature had concluded that the Communist government of Russia was actually in control of the Mother Church and that " 'the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy,' " Id., at 107 n. 10, 73 S.Ct., at 150, quoting from 302 N.Y. 1, 32-33, 96 N.E.2d 56, 73-74 (1950), and the New York Court of Appeals sustained the statute against the constitutional attack. This Court, however, held the statute was a violation of the Free Exercise Clause, noting:
"By fiat it displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." 344 U.S., at 119, 73 S.Ct., at 156.

On remand from the decision in Kedroff, the New York Court of Appeals again held that the American ***731** group was entitled to the church property at issue. This ti relying upon the common law of the State, the Court of Appeals ruled that the Patriarch of Moscow was so

dominated by the secular government of Russia that his appointee could not validly occupy the Church's property. On appeal, this Court reversed summarily, Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960), noting in its Per curiam opinion that "the decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in Kedroff." Id., at 191, 80 S.Ct., at 1038.

Nine years later, in Presbyterian Church v. Hull Church, 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), the Court held that Georgia's common law, which implied a trust upon local church property for the benefit of the general church only on the condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches, was inconsistent with the First and Fourteenth Amendments and therefore could not be utilized to resolve church property disputes. The Georgia law was held impermissible because
**2391 "(u)nder (the Georgia) approach, property rights do not turn on a church decision as to church doctrine. The standard of departure-from-doctrine, though it calls for resolution of ecclesiastical questions, is a creation of state, not church, law." Id., at 451, 89 S.Ct., at 607.

Finally, in Md. & Va. Church v. Sharpsburg Church, 396 U.S. 367, 90 S.Ct. 499, 24 L.Ed.2d 582 (1970), the Court considered an appeal from a judgment of the Court of Appeals of Maryland upholding the dismissal of two actions brought by the Eldership seeking to prevent two of its local churches from withdrawing from that general religious association. The Eldership had also claimed the rights to select the *732 clergy and to control the property of the two local churches, but the Maryland courts, relying "upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, *and upon pvisions in the constitution of the General Eldership pertinent to the ownership and control of church property," Ibid.* (emphasis supplied; footnote omitted), concluded that the Eldership had no right to invoke the State's authority to compel their local churches to remain within the fold or to succeed to control of their property. This Court dismissed the Eldership's contention that this judgment violated the First Amendment for want of a substantial federal question.

Despite the Court's failure to do so, it does not seem very difficult to derive the operative constitutional principle from this line of decisions. As should be clear from even this cursory study, Watson, Bouldin, and Gonzalez have no direct relevance* to the question before us today: *733 whether the First Amendment, as me applicable to the States by the Fourteenth, prohibits Illinois from permitting its civil courts to settle religious property disputes in the manner presented to us on this record. I think it equally clear that the only cases which Are relevant to that question Kedroff, Kreshik, Hull, and Md. & Va. Churches require that this question be answered in the negative. The rule of those cases, one which seems fairly implicit in the history of our First Amendment, is that the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious belief, tenet, or sect. That is what New York attempted to do in Kedroff and Kreshik, albeit perhaps for nonreligious reasons, and the Court refused to permit it. In Hull, the State transgressed the line drawn by the First Amendment when it applied a state-created rule of law based upon "departure from doctrine" to prevent the national hierarchy of the Presbyterian Church in the United States from seeking to reclaim possession and use of two local churches. When the Georgia courts themselves required an examination into whether there had been a departure from the doctrine of the church in order to apply this state-created rule, they went beyond mere application of neutral principles of law to such a dispute.

There is nothing in this record to indicate that the Illinois courts have been instruments **2392 of any such impermissible intrusion by the State on one side or the other of a religious dispute. There is nothing in the Supreme Court of Illinois' opinion indicating that it placed its thumb on the scale in favor of the respondents. Instead that opinion appears to be precisely what it purports *734 to be: an application of neutral principles of law consistent with the decisions of this Court. Indeed, petitioners make absolutely no claim to the contrary. They agree that the Illinois courts *should* have decided the issues which *they* presented; but they contend that in doing so those courts should have deferred entirely to the representations of the announced represeatives of the Mother Church. Such blind deference, however, is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical

religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.

In any event the Court's decision in Md. & Va. Churches demonstrates that petitioners' position in this regard is untenable. And as I read that decision, it seems to me to compel affirmance of at least that portion of the Illinois court's decision which denied petitioners' request for the aid of the civil courts in enforcing its desire to divide the American-Canadian Diocese. See Ante, at 2385-2387 (Part III). I see no distinction between the Illinois courts' refusal to place their weight behind the representatives of the Serbian Mother Church who sought to prevent portions of their American congregation from splitting off from that body and the Maryland courts' refusal to do the same thing for the Eldership of the Church of God. The Court today expressly eschews any explanation for its failure to follow Md. & Va. Churches, see Ante, at 2386, contenting itself with this conclusory statement:
"The constitutional provisions of the American-Canadian Diocese were not so express that the civil *735 courts could enforce them without engaging in a searching and therefore impermissible inquiry into crch polity." Ante, at 2386.

But comparison of the relevant discussions by the state tribunals regarding their consideration of church documents makes this claimed distinction seem quite specious. Compare Md. & Va. Churches v. Sharpsburg Church, 254 Md. 162, 170, 254 A.2d 162, 168 (1969), with Serbian Orthodox Diocese v. Ocokoljich, 72 Ill.App.2d 444, 458-462, 219 N.E.2d 343, 350-353 (1966).

In conclusion, while there may be a number of good arguments that civil courts of a State should, as a matter of the wisest use of their authority, avoid adjudicating religious disputes to the maximum extent possible, they obviously cannot avoid all such adjudications. And while common-law principles like those discussed in Watson, Bouldin, and Gonzalez may offer some sound principles for those occasions when such adjudications are required, they are certainly not rules to which state courts are required to adhere by virtue of the Fourteenth Amendment. The principles which that Amendment, through its incorporation of the First, Does enjoin upon the state courts that they remain neutral on matters of religious doctrine have not been transgressed by the Supreme Court of Illinois.

All Citations

426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The opinion of the Illinois Appellate Court in an earlier appeal is reported sub nom. Serbian Orthodox Diocese v. Ocokoljich, 72 Ill.App.2d 444, 219 N.E.2d 343 (1966).

2 The Mother Church decided against creation of a "Metropolia" because it had not employed that organizational system and had not required one Bishop to serve under another.

3 Stefan has since died, and the Holy Assembly appointed petitioner Sava Vukovich in his place.

4 The Appellate Court initially held that the suspension, removal, and defrockment of Dionisije were valid and binding upon the civil courts but on rehearing directed that Dionisije should be afforded the opportunity at trial to prove that these were the result of fraud, collusion, or arbitrariness.

5 Since Watson predated Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), it was based on general federal law rather than the state law of the forum in which it was brought.

6 See Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115-116, 73 S.Ct. 143, 154, 97 L.Ed. 120, and n. 23 (1952); Presbyterian Church v. Hull Church, 393 U.S. 440, 447, 450-451, 89 S.Ct. 601, 605, 606-607, 21 L.Ed.2d 658, and n. 7 (1969); Md. & Va. Churches v. Sharpsburg Church, 396 U.S. 367, 369 n. 3, 90 S.Ct. 499, 501, 24 L.Ed.2d 582 (1970) (Brennan, J., concurring).

7 No issue of "fraud" or "collusion" is involved in this case.

8 Civil judges obviously do not have the competence of ecclesiastical tribunals in applying the "law" that governs ecclesiastical disputes, as Watson cogently remarked, 13 Wall., at 729, 20 L.Ed. 666:
"Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."

9 "Plaintiffs argue and defendant Bishop Dionisije does not dispute that the Serbian Orthodox Church is a hierarchical and episcopal church. Moreover, the parties agree that in cases involving hierarchical churches the decisions of the proper church tribunals on questions of discipline, faith or ecclesiastical rule, though affecting civil rights, are accepted as conclusive in disputes before the civil courts. . . . All parties maintain that the sole limitation on this rule, when civil courts may entertain the 'narrowest kind of review,' occurs when the decision of the church tribunal is claimed to have resulted from fraud, collusion or arbitrariness." 60 Ill.2d 477, 501, 328 N.E.2d 268, 280 (1975).
Respondents conceded as much at oral argument. Tr. of Oral Arg. 24-25, 39-40. The hierarchical nature of the relationship between the American-Canadian Diocese and the Mother Church is confirmed by the fact that respondent corporations were organized under the provisions of the Illinois Religious Corporations Act governing the incorporation of religious societies that are subordinate parts of larger church organizations. Similarly, the Diocese's subordinate nature was manifested in resolutions of the Diocese which Dionisije supported, and by Dionisije's submission of corporate bylaws, proposed constitutional changes, and final judgments of the Diocesan Ecclesiastical Court to the Holy Synod or Holy Assembly for approval. Moreover, when Dionisije was originally elevated to Bishop, he signed an Episcopal-Hierarchical Oath by which he swore that he would "always be obedient to the Most Holy Assembly" and:
"Should I transgress against whatever I promised here, or should I be disobedient to the Divine Ordinances and Order of the Eastern Orthodox Church, or to the Most Holy Assembly (of Bishops) I, personally, will become a schismatic and should I make the Diocese entrusted to me in any manner to become disobedient to the most Holy Assembly (of Bishops), may I, in that case, be defrocked of my rank and divested of the (episcopal) authority without any excuse or gainsay, and (may I) become an alien to the heavenly gift which is being given unto me by the Holy Spirit through the Consecration of the Laying of Hands." App. 1088.
Finally, the hierarchical relationship was confirmed by provisions in the constitutions of both the Diocese and the Mother Church.

10 Three of these witnesses, including the author of the Church penal code, were members of the Holy Assembly of Bishops, one was the Secretary of the Holy Synod, and one was a recognized expert in the field of ecclesiastical law.

11 Indeed Dionisije, who does not dispute the power of the Holy Assembly to discipline him for the substantive charges in his indictment, nevertheless inconsistently insists that the Holy Assembly must be bound by procedures which were not extant when he executed his Episcopal-Hierarchical Oath, see n. 9, Supra, and which were promulgated within a year of the beginning of this controversy, although at the same time he agrees that the Holy Assembly could formalize and promulgate any procedures it desired for the conduct of disciplinary action.

12 See Art. 12, quoted Supra at 2376. Various provisions of the Diocesan constitution reaffirm the subordinate status of the Diocese. E. g., Arts. 1, 2, 10, 12, 23, 53. Moreover, the Mother Church exerts almost complete authority over most Diocesan matters through the Diocesan Bishop, and there is no question that the Diocese has no voice whatever in the appointment of the Bishop.

13 See Art. 16, quoted Supra, at 2376. In rejecting the Holy Assembly's interpretation of this provision, the Illinois court treated the creation and reorganization of dioceses as purely administrative, without recognizing the central role of a diocese in the hierarchical structure of the Church. In particular, the Illinois court noted that Art. 14 of the Mother Church constitution states "(t)hese are the Dioceses in the Serbian Orthodox Church," and lists only the Dioceses within Yugoslavia. In Art. 15, on the other hand, were listed Dioceses "under the jurisdiction of the Serbian Orthodox Church in spiritual and hierarchical aspect," including the American-Canadian Diocese. Although nothing in the constitution restricted the Mother Church's power with respect to reorganizing the Dioceses listed in Art. 15, the Illinois courts simply asserted that Art. 16 was only intended to apply to Dioceses named in Art. 14. Yet even the Diocese itself recognized the Holy Assembly's powers when it sought approval for institution of the "Metropolia" system.

14 The Illinois court, in refusing to follow the Holy Assembly's interpretation of these religious documents, relied primarily on Art. 3 of the Diocesan constitution, quoted Supra, at 2376. However, the Holy Assembly's construction of that provision limits its application to administration of property within the Diocese, and as not restricting alterations in the Diocese itself.

15 No claim is made that the "formal title" doctrine by which church property disputes may be decided in civil courts is to be applied in this case. See Md. & Va. Churches v. Sharpsburg Church, 396 U.S. at 370, 90 S.Ct., at 501 (Brennan, J., concurring). Indeed, the Mother Church decisions defrocking Dionisije and reorganizing the Diocese in no way change formal title to all Diocesan property, which continues to be in the respondent property-holding corporations in trust for all members of the reorganized Dioceses; only the identity of the trustees is altered by the Mother Church's ecclesiastical determinations.

* I am far from persuaded, moreover, that these decisions would require the result reached today even if we were reviewing a federal decision rather than that of a state court. As demonstrated in the text, Supra, these cases were applications of the general principle that persons who have contractually bound themselves to adhere to the decisions of the ruling hierarchy in a private association may not obtain relief from those decisions in a civil court. Here the underlying question addressed by the Illinois courts is the one assumed in Watson et al.: whether the members of the American-Canadian Diocese Had bound themselves to abide by the decisions of the Mother Church in the matters at issue here. The Illinois courts concluded that in regard to some of these matters they had agreed to be bound only if certain procedures were followed and that as to others there had been no agreement to submit to the authority of the Belgrade Patriarchate at all. If these conclusions are correct, and there is little to indicate they are not, then the "Watson rule" which the Court brandishes so freely today properly would have no application to these facts even if this case had arisen in federal court.

End of Document

Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana

Court of Appeals of New York

October 16, 2007, Argued; November 20, 2007, Decided

No. 142

Reporter
9 N.Y.3d 282 *; 879 N.E.2d 1282 **; 849 N.Y.S.2d 463 ***; 2007 N.Y. LEXIS 3284 ****; 2007 NY Slip Op 9068

[1] In the Matter of Congregation Yetev Lev D'Satmar, Inc., et al., Appellants, v Jacob (Jeno) (Yaakov) Kahana et al., Respondents. Congregation Yetev Lev D'Satmar, Inc., et al., Appellants v 26 Adar N.B. Corp. et al., Respondents.

Subsequent History: Reported at *Congregation Yetev Lev D'Satmar, Inc. v Kahana, 2007 NY LEXIS 3308 (N.Y., Nov. 20, 2007)*

Prior History: Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered July 11, 2006. The Appellate Division affirmed so much of an order and judgment of the Supreme Court, Kings County (Melvin S. Barasch, J.; op *5 Misc 3d 1023[A], 2004 NY Slip Op 51515[U], 799 NYS2d 159)*, as had dismissed the petition in a proceeding pursuant to *Not-For-Profit Corporation Law § 618* to determine the validity of the election of officers of Congregation Yetev Lev D'Satmar, Inc. The following question was certified by the Appellate Division: "Was the decision and order of this court dated July 11, 2006, properly made?"

Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana, 31 AD3d 541, 820 NYS2d 62, 2006 NY App Div LEXIS 9177 (N.Y. App. Div. 2d Dep't, 2006), affirmed.

Disposition: [****1] Order affirmed, with costs, and certified question not answered upon the ground that it is unnecessary.

Core Terms

Congregation, election, faction, religious, Church, neutral principles, issues, disputes, bylaws, courts, nonjusticiable, membership, civil court, ecclesiastical, cases, defer, religious doctrine, Corporations, respondents', binding, bodies, hierarchical, requirements, matters, parties, quorum, says, Not-For-Profit, candidates, tribunal

Case Summary

Procedural Posture
Petitioner and respondent congregations appealed an order by the Appellate Division (New York) that affirmed a decision by the trial court that their election controversy could not be achieved through the application of neutral principles of law without judicial intrusion into matters of religious doctrine; the Appellate Division certified a question to determine whether its decision and order were properly made.

Overview

Some time after the founder of a religious congregation died, a bitter feud erupted between his sons' supporters pertaining to who should succeed him. As a result, the congregation split into two rival factions. Each faction conducted a separate election of a board of directors and officers for the congregation. The petitioners brought a proceeding pursuant to *Not-For-Profit Corporation Law § 618* seeking an order declaring, inter alia, that the respondent's election was null and void. The lower courts declined to make a determination as to the validity of the respondent's election because the resolution of the issues would require them to apply ecclesiastical doctrine in violation of the First Amendment. The court of appeals found that the dispute between the two factions involved issues beyond mere notice and quorum challenges. The membership issues at the core of the case were an ecclesiastical matter that had to be resolved by the members of the congregations, and could not be determined by the courts through *Not-For-Profit Corporation Law § 618* or *Religious Corporations Law § 207* without judicial intrusion into matters of religious doctrine.

Outcome
The order was affirmed, and the certified question was not answered upon the ground that it was unnecessary.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN1[] The First Amendment forbids civil courts from interfering in or determining religious disputes, because 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.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN2[] Civil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution. The "neutral principles of law" approach requires courts to apply objective, well-established principles of secular law to the issues. In doing so, the courts may rely upon internal documents, such as a congregation's bylaws, but only 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.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN3[] In a First Amendment context, it is well settled that membership issues are an ecclesiastical matter. A decision as to whether or not a member is in good standing is binding on the courts when examining the standards of membership requires intrusion into constitutionally protected ecclesiastical matters.

Headnotes/Syllabus

Headnotes

Religious Corporations and Associations -- Elections -- Validity -- Justiciability

Resolution of an election controversy between two rival factions of a religious congregation could not be achieved through the application of neutral principles of law without judicial intrusion into matters of religious doctrine. The *First Amendment* forbids civil courts from interfering in or determining religious disputes, because 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. 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. Resolution of the parties' dispute herein would necessarily involve impermissible inquiries into religious doctrine and the Congregation's membership requirements. Such membership issues are an ecclesiastical matter and cannot be determined by the courts.

Counsel: *Kirkpatrick & Lockhart Preston Gates Ellis LLP*, New York City (*Gerald A. Novack* and *Walter P. Loughlin* of counsel), *Smith, Buss & Jacobs, LLP*, Yonkers (*Jeffrey D. Buss* of counsel), and *Thacher Proffitt & Wood LLP*, White Plains (*Kevin J. Plunkett* of counsel), for appellants. I. Respondents' election is a nullity because it was held in violation of the governing bylaw provisions. (*Kuehne & Nagel v Baiden, 36 NY2d 539, 369 NYS2d 667, 330 NE2d 624*; *Sealey v American Socy. of Hypertension, Inc., 10 Misc 3d 572, 809 NYS2d 421*; *Ehrlich v American Moninger Greenhouse Mfg. Corp., 26 NY2d 255, 257 NE2d 890, 309 NYS2d 341*; *Matter of Venigalla v Alagappan, 307 AD2d 1041, 763 NYS2d 765*; *Matter of Sousa v New York State Council Knights of Columbus Found., 10 NY2d 68, 176 NE2d 77, 217 NYS2d 58*.) II. There is no *First Amendment* bar to nullifying respondents' election. (*Watson v Jones, 13 Wall [80 US] 679, 80 US 679, 20 L Ed 666*; *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 US 440, 89 S Ct 601, 21 L Ed 2d 658*; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *Morris v Scribner, 69 NY2d 418, 508 NE2d 136, 515 NYS2d 424*; *Park Slope Jewish Ctr. v Congregation B'nai Jacob, 90 NY2d 517, 686 NE2d 1330, 664 NYS2d 236*; *Matter of Kaminsky, 251 App Div 132, 295 NYS 989*; *Karageorgious v Laoudis, 271 AD2d 653, 706 NYS2d 720*; *Matter of Venigalla v Alagappan, 307 AD2d 1041, 763 NYS2d 765*; *Sillah v Tanvir, 18 AD3d 223, 794 NYS2d 348*; *Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 684 NYS2d 76*.) III. A holding of nonjusticiability would require the entry of a judgment recognizing the authority of the board elected in the first election. (*Matter of Empire State Supreme Lodge of Degree of Honor, 118 App Div 616, 103 NYS 1124*.)

Herrick, Feinstein LLP, New York City (*Scott E. Mollen* and *Paul Rubin* of counsel), for respondents. I. The *First Amendment to the United States Constitution* requires a civil court to refrain from resolving Congregation Yetev Lev D'Satmar, Inc.'s election controversy. (*Serbian Eastern Orthodox Diocese for United States & Canada v Milivojevich,*

426 US 696, 96 S Ct 2372, 49 L Ed 2d 151; *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America, 344 US 94, 73 S Ct 143, 97 L Ed 120*; *Kreshik v Saint Nicholas Cathedral of Russian Orthodox Church of North America, 363 US 190, 80 S Ct 1037, 4 L Ed 2d 1140*; *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 US 440, 89 S Ct 601, 21 L Ed 2d 658*; *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am., 62 NY2d 110, 464 NE2d 454, 476 NYS2d 86*; *Waller v Howell, 20 Misc 236, 45 NYS 790*; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *Avitzur v Avitzur, 58 NY2d 108, 459 NYS2d 572, 446 NE2d 136, 464 US 817, 104 S Ct 76, 78 L Ed 2d 88*; *Park Slope Jewish Ctr. v Congregation B'nai Jacob, 90 NY2d 517, 686 NE2d 1330, 664 NYS2d 236*; *Matter of George v Holstein-Friesian Assn. of Am., 238 NY 513, 144 NE 776*.) II. The Religious Corporations Law requires the trustees to respect the stated objectives of Congregation Yetev Lev D'Satmar, Inc. and the religious disciplinary rulings of its ecclesiastical leadership. (*Kroth v Congregation Chebra Ukadisha Bnai Israel Mikalwarie, 105 Misc 2d 904, 430 NYS2d 786*; *Walker Mem. Baptist Church, Inc. v Saunders, 285 NY 462, 35 NE2d 42*; *Serbian Eastern Orthodox Diocese for United States & Canada v Milivojevich, 426 US 696, 96 S Ct 2372, 49 L Ed 2d 151*; *Waller v Howell, 20 Misc 236, 45 NYS 790*; *Wall v Mount Calvary Baptist Church, Inc., 188 Misc 350, 64 NYS2d 200*.) III. Appellants are judicially estopped from claiming that this dispute should be decided by a civil court. (*Nestor v Britt, 270 AD2d 192, 707 NYS2d 11*; *Atlas Drywall Corp. v District Council of N.Y. City & Vicinity of United Bhd. of Carpenters & Joiners of Am., Carpenters Local Union 531, 207 AD2d 762, 616 NYS2d 508*.)

Judges: Opinion by Judge Pigott. Chief Judge Kaye and Judges Ciparick, Graffeo and Read concur. Judge Smith dissents in an opinion. Judge Jones took no part. SMITH, J. (dissenting).

Opinion by: PIGOTT, J.

Opinion

[1283] [*284] [***464]** Pigott, J.

The central issue in this appeal is whether resolution of an election controversy between two rival factions of a religious congregation can be achieved through the application of **[2]** neutral principles of law without judicial intrusion into matters of religious doctrine. Like the trial court and Appellate Division, we conclude that it cannot.

Congregation Yetev Lev D'Satmar, Inc. is a community of Orthodox Judaism known as Satmar Hasidism located in Brooklyn. The Congregation was founded in 1948 by Grand Rabbi (also referred to as Rebbe) Joel Teitelbaum and formally incorporated in New York. In 1952, bylaws were promulgated setting forth the purpose of the Congregation, the functions of the Grand Rabbi, as well as issues involving membership in the community. The bylaws provided for a board of directors and officers to preside over **[****2]** the Congregation and, among other things, assure compliance with the rules of the Congregation.

[*465]** In 1974, the Grand Rabbi expanded the Satmar community by establishing a new congregation in Monroe, New York. In **[*285]** 1981, that congregation, named for him, was incorporated in New York as Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc.

In 1979, the Grand Rabbi died and was succeeded by his nephew, Moses Teitelbaum. Moses Teitelbaum, now deceased, appointed his elder son, Aaron Teitelbaum, Chief Rabbi of the Monroe Congregation and his younger son, Zalman Leib Teitelbaum, Chief Rabbi of the Brooklyn Congregation. Some time thereafter, a bitter **[**1284]** feud erupted between Rabbi Aaron's supporters and Rabbi Zalman's supporters pertaining to who should succeed as Grand Rabbi. [1] As a result, the Brooklyn Congregation split into two rival factions.

Each faction conducted a separate election of the board of directors and officers for the Brooklyn Congregation. The first election, which took place on May 12-13, 2001, resulted in the election of petitioners, with Berl Friedman **[****3]** as president. The second, which took place the same day and is claimed to have been certified by the Grand Rabbi Moses Teitelbaum himself on May 24, 2001, resulted in the election of respondents, with Jacob (Jeno, Jenoe) Kahan as president.

Petitioners brought the instant proceeding pursuant to *Not-For-Profit Corporation Law § 618* seeking an order declaring that the respondents' election is null and void and directing that Congregation property be transferred to Berl Friedman. Petitioners claimed that their election resulted in certain members of the Congregation becoming duly elected officers, including Berl Friedman; that respondents illegally attempted to "remove" these duly elected officers and expel Berl Friedman from membership; and that respondents' election violated the bylaws and/or the Religious Corporations Law. Respondents challenged the jurisdiction of Supreme Court, arguing that it should refrain from interfering in the internal affairs of the **[3]** Congregation; and further contended that

[1] Respondents contend that Moses Teitelbaum designated his younger son, Rabbi Zalman, to be his successor as Grand Rabbi upon his death.

their election was proper, legal and in accordance with the Congregation's prior practice and bylaws. Respondents disputed petitioners' election, arguing it was a sham election for several reasons, [****4] including that Berl Friedman had been expelled from the Congregation by the Grand Rabbi.

Supreme Court declined to make a determination as to the validity of respondents' election, holding that it could not decide [*286] the election dispute through the application of neutral principles of law because the resolution of the issues would require it to apply ecclesiastical doctrine in violation of the *First Amendment*. The Appellate Division, with one Justice dissenting, agreed with Supreme Court that "resolution of the parties' dispute would necessarily involve impermissible inquiries into religious doctrine and the Congregation's membership requirements" (*31 AD3d 541, 543, 820 NYS2d 62 [2d Dept 2006]*). The Appellate Division subsequently granted leave and certified the following question to us: "Was the decision and order of this court dated July 11, 2006, properly made?" We now affirm.

HN1[↑] The *First Amendment* forbids civil courts from interfering in or determining religious disputes, because 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 (*see Serbian Orthodox Diocese [***466] for United States and Canada v Milivojevich, 426 US 696, 96 S Ct 2372, 49 L Ed 2d 151 [1976]*). [****5] *HN2*[↑] Civil disputes involving religious parties or institutions may be adjudicated without offending the *First Amendment* as long as 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 NY2d 110, 464 NE2d 454, 476 NYS2d 86 [1984]*; *Park Slope Jewish Ctr. v Congregation B'nai Jacob, 90 NY2d 517, 521, 686 NE2d 1330, 664 NYS2d 236 [1997]*, citing *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775 [1979]*). The "neutral principles of law" approach [**1285] requires the court to apply objective, well-established principles of secular law to the issues (*First Presbyt. Church, 62 NY2d at 119-120*). In doing so, courts may rely upon internal documents, such as a congregation's bylaws, but only 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 NY2d 108, 115, 446 NE2d 136, 459 NYS2d 572 [1983]*).

Petitioners argue that this case involves nothing more than notice, quorum or other technical challenges to the respondents' election. At first blush, the arguments raised by the petitioners in their appellate brief to this Court, [2] do not appear to implicate [****6] ecclesiastical issues. [4] Indeed, courts have properly adjudicated [*287] disputes involving religious elections on neutral principles of law. For example, in *Rector, Churchwardens & Vestrymen of Church of Holy Trinity v Melish (3 NY2d 476, 146 NE2d 685, 168 NYS2d 952 [1957])*, after determining that the quorum rules of the Religious Corporations Law, by their terms, did not apply to an Episcopalian church's election of a rector, we held that two meetings held by the church complied with applicable quorum requirements of a church canon. The Appellate Divisions have resolved similar disputes (*see Matter of Kaminsky, 251 App Div 132, 295 NYS 989 [4th Dept 1937], affd 277 NY 524, 13 NE2d 456 [1938]*; *Sillah v Tanvir, 18 AD3d 223, 794 NYS2d 348 [1st Dept 2005], lv denied 5 NY3d 711, 804 NYS2d 35, 837 NE2d 734 [2005]*; *but see Mays v Burrell, 124 AD2d 714, 508 NYS2d 226 [2d Dept 1986]*). These cases were resolved under neutral principles of law pursuant to the court's power to adjudicate under the Religious Corporations Law and/or the Not-For-Profit Corporation Law (*see e.g. N-PCL 618, 706*). In each of those cases, the courts resolved the election dispute by applying those laws as well as the bylaws or rules of the religious organization.

Here, however, as both Supreme Court and the Appellate Division recognized, the dispute between the two factions involves issues beyond mere notice and quorum challenges, such as whether Berl Friedman had been removed or expelled from the Congregation. Respondents [***467] claim that Jacob (Jeno, Jenoe) Kahan succeeded Berl Friedman as president and thus Jacob (Jeno, Jenoe) Kahan had the authority to conduct respondents' election. Specifically, respondents claim that Grand Rabbi Moses Teitelbaum denounced [****8] Berl Friedman and another member of his faction for rebelling against the authority of the Grand Rabbi and the Grand Rabbi's son, resulting in their expulsion from the Congregation. Berl Friedman denies being removed from the Congregation and further argues that an elected corporate officer cannot be removed by a spiritual authority such as the

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[2] Notably, petitioners' initial complaints found in their [****7] petition and considered by Supreme Court regarding the inadequacies of respondents' election were different from those now raised to this Court. Specifically, petitioners argued that the proxies and mail-in ballots were wrongly counted, membersof the Congregation Kiryas Joel, Monsey and Spring Valley were "disenfranchised" from voting in the election, members were wrongly prohibited from casting write-in votes, and the election was "packed" by new "members" and others unqualified to vote. Petitioners on appeal to this Court attempt to recast the issues, focusing on challenges concerning notice, quorum and resolution requirements found in the Religious Corporations Law in a futile attempt to make this case justiciable.

Grand Rabbi, which respondents refute.

[**1286] *HN3*[↑] It is well settled that membership issues such as those that are at the core of this case are an ecclesiastical matter (*Park Slope Jewish Ctr. v Stern, 128 AD2d 847, 513 NYS2d 767 [2d Dept 1987], appeal* [*288] *dismissed 70 NY2d 746, 519 NYS2d 1032, 514 NE2d 390 [1987]*; *Matter of Kissel v Russian Orthodox Greek Catholic Holy Trinity Church of Yonkers, 103 AD2d 830, 478 NYS2d 68 [2d Dept 1984]*). A decision as to whether or not a member [5] is in good standing is binding on the courts when examining the standards of membership requires intrusion into constitutionally protected ecclesiastical matters. Although courts generally have jurisdiction to determine whether a congregation has adhered to its own bylaws in making determinations as to the membership status of individual congregants, here, the Congregation's bylaws condition membership on religious criteria, including whether a congregant [****9] follows the "ways of the Torah." Whether Berl Friedman was expelled from membership of the Congregation inevitably calls into question religious issues beyond any membership criteria found in the Congregation's bylaws (*Park Slope Jewish Ctr., 128 AD2d 847, 513 NYS2d 767 [1987]*; *Kissel, 103 AD2d 830, 478 NYS2d 68 [1984]*).

Contrary to petitioners' position, Berl Friedman's religious standing within the Congregation is essential to resolution of this election dispute. Petitioners ask this Court not only to determine the validity of the respondents' election but also to recognize that petitioners, including Berl Friedman, are elected officers and the authorized governing body of the Congregation. With such membership issues at the center of this election dispute, matters of an ecclesiastical nature are clearly at issue. These particular issues must be resolved by the members of the Congregation, and cannot be determined by this Court.

Accordingly, the Appellate Division order should be affirmed with costs and the certified question not answered upon the ground that it is unnecessary. [****10]

Dissent by: SMITH

Dissent

SMITH, J.(dissenting). The majority is of course correct in saying that courts of our state, like other state and federal courts, are forbidden from deciding religious questions. This rule, as applied to disputes over ecclesiastical property, is usually a rule of deference: Civil courts defer to the decisions of religious tribunals, unless the case can be decided on the basis of neutral (i.e., non-religious) principles. But in cases like this one, there is no religious tribunal to defer to, and the rule becomes one of justiciability; the majority here does not accept the decision of a religious tribunal as binding, but simply refuses to decide the case at all. Such a refusal is a drastic measure, because when a case is non-justiciable it means the wrong committed, if there is one, cannot be remedied anywhere. [*289] Whichever side happens to be the defendant in the case will win.

[6] I believe that courts should hold disputes between religious factions to be [****11] nonjusticiable [***468] only as a last resort, where it is absolutely clear that no neutral principle can decide the case. I do not think that is true here, and I therefore dissent from the majority's finding of nonjusticiability and would reach the merits. On the merits, I would reject the claim that Berl Friedman and his allies are the duly elected officers of the Brooklyn Congregation, and would remit the case for Supreme Court to decide whether Jacob (Jenoe, Jenoe) Kahan and his allies were validly elected, or whether there must be a new election.

I

The rule that civil courts may not decide ecclesiastical questions has its origin in [**1287] *Watson v Jones (13 Wall [80 US] 679, 80 US 679, 20 L Ed 666 [1872])*, in which the United States Supreme Court decided that the right to use property claimed by contesting factions of a local Presbyterian church must be resolved not by the courts, but by the highest decision-making authority of the Presbyterian Church in the United States. Though the decision was not based on the Constitution, it was based on fundamental principles of religious freedom and state neutrality toward religion:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, [****12] and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." (*Id. at 728.*)

Watson made clear that its holding applied only to hierarchical organizations like the Presbyterian Church--"large and influential bodies," each having "a body of constitutional and ecclesiastical law of its own" (*id. at 729*). The Court said:

> "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their

application to the case before them." (*Id. at 727.*)

[*290] The *Watson* Court distinguished the case of a hierarchical church from the case of "a church of a strictly congregational or independent organization, governed solely within itself" (*id. at 724*). For congregational churches, *Watson* did not pronounce a rule of deference, but [7] said: "where there is a schism which leads to a separation into distinct and [****13] conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations" (*id. at 725*). In applying to congregational churches the rules governing voluntary associations, there could be "no inquiry into the existing religious opinions of those who comprise the legal or regular organization" (*id. at 725*).

The rule of *Watson* was recognized in the twentieth century as having a constitutional basis, and was followed in a series of Supreme Court cases, among them *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America (344 US 94, 73 S Ct 143, 97 L Ed 120 [1952])*; *Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church (393 US 440, 89 S Ct 601, 21 L Ed 2d 658 [1969])*; and *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevich (426 US 696, 96 S Ct 2372, 49 L Ed 2d 151 [1976])*. These cases seemed to stand for the proposition that a civil court must always defer to the authoritative decision-making bodies of hierarchical churches, but in *Jones v Wolf (443 US 595, 99 S Ct 3020, 61 L Ed 2d 775 [***469] [1979])*, the Court held that states could decide religious property disputes in civil courts if they did so according to "neutral principles of law" (*id. at 602-603*). [****14] The Court in *Jones v Wolf* restated the constitutional rule established by several of its earlier cases: "[T]he *First Amendment* prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice" (*id. at 602*).

In *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am. (62 NY2d 110, 121, 464 NE2d 454, 476 NYS2d 86 [1984])*, we adopted the "neutral principles" approach, describing it as "preferable to deference." We also held in *First Presbyterian,* however, that we were "constitutionally foreclosed" from resolving [**1288] doctrinal issues, including issues of church government (*id. at 124*).

All the cases cited so far in this opinion involved hierarchical churches. They established that civil courts may decide church property disputes based on "neutral principles" where they can, but must defer to ecclesiastical authorities when neutral principles will not resolve the case. The problem of how to deal with disputes within congregational religious bodies is harder, and has received less attention. Deference often is not possible, [*291] for there is no tribunal of the church hierarchy to defer to. Neutral principles seem the only available option--but what if, as sometimes [****15] happens, neutral principles cannot resolve the case? The Supreme Court has said that there are cases in which adjudicating a property dispute "would require the civil court to resolve a religious controversy" (*Jones v Wolf, 443 US at 604*)--but it said in the same case that civil courts may not do so.

When the dilemma is insoluble, the only remedy is the one the majority adopts here--to dismiss the case as nonjusticiable. This is not the first case in which it has been done (*see e.g. Congregation Beth Yitzhok v Briskman, 566 F Supp 555, 557-558 [ED NY 1983]*,), [8] though I think it is the first in which we have done it, and there is no case in which the United States Supreme Court has endorsed that remedy. It is a remedy that should if possible be avoided.

Nonjusticiability implies that the party having the burden of proof loses; thus it is ordinarily a "defendant wins" rule. It will inevitably produce arbitrary and inconsistent, and sometimes perverse or unjust, results. Here, for example, the Kahan faction is the defendant, and therefore wins, because the status quo is in its favor--it is in de facto control of the Brooklyn Congregation. But if members of the Friedman faction had [****16] somehow succeeded in occupying the Congregation's offices, and the Kahan faction sued to evict them, presumably the majority would say the case is still nonjusticiable and the Friedman faction, being the defendant, would win. Or suppose both factions claimed the corporation's bank account and the bank, not knowing whose checks to honor, brought an interpleader action. Would the majority say that the interpleader action is nonjusticiable--leaving the bank account frozen indefinitely?

It is to avoid problems like these, I think, that courts try hard to find, and usually succeed in finding, neutral principles to resolve disputes where deference is not an option. In *Park Slope Jewish Ctr. v Congregation B'nai Jacob (90 NY2d 517, 686 NE2d 1330, 664 NYS2d 236 [1997])*, we held that a dispute arising from a schism within a congregation could be resolved by neutral principles, reversing a ruling that it was nonjusticiable. Lower New York courts have removed the management of religious bodies, and ordered [***470] new elections under court supervision, without deciding any religious issue (*see e.g. St. Matthew Church of Christ, Disciples of Christ v Creech, 196 Misc 2d 843, 768 NYS2d 111 [Sup Ct 2003]*). And in a copyright infringement dispute involving a prayer [****17] book, where the defendant argued that the court lacked jurisdiction because the case [*292] turned on the validity of a rabbinical court ruling, the Court of Appeals for the Second Circuit concluded that, while

defendant's argument had "some force," it must be rejected because of the harm that would flow from a holding of nonjusticiability: "we cannot decline jurisdiction on this basis; to do so would permit any party to contend that religious doctrine that it deems authoritative undermines the authority of its adversary's position" (*Merkos L'Inyonei Chinuch, Inc. v [**1289] Otsar Sifrei Lubavitch, Inc., 312 F3d 94, 100 [2d Cir 2002]*).

For similar reasons, I approach this case with a strong reluctance to decline jurisdiction, and I conclude that the case can be decided on neutral principles.

II

Before turning to neutral principles, however, I consider the possibility that deference *is* an option in this case--that the approach of *Watson v Jones* and later cases involving hierarchical religious bodies can be applied here. It can be argued--indeed, the Kahan faction seems to argue, and Supreme Court may have found--that the Brooklyn Congregation, [9] however unlike the Catholic or Presbyterian church [****18] in its structure, is hierarchical in the relevant sense, because there is a single decision-making body whose authority all adherents have agreed to accept: the Grand Rabbi. The Kahan faction submits a document, which it says was signed by the Grand Rabbi, certifying that the Kahan faction nominees were validly elected. This, the Kahan faction says, ends the matter. I do not think the case can be resolved so easily.

First, as I read the parties' contentions, the Friedman faction disputes the authenticity of the document and of the Grand Rabbi's signature on it. But putting that aside, the Friedman faction disputes the Grand Rabbi's authority to decide the validity of a congregational election; it acknowledges the Grand Rabbi's supreme authority in spiritual matters, but claims that he has "no secular authority," and that the validity of the election is a secular question. Central to this argument is article 8 of the bylaws, which speaks of the first Grand Rabbi, Joel Teitelbaum, in terms that the parties agree apply to his successor, Moses Teitelbaum:

> "The most revered teacher, Rabbi Yoel Teitelbaum, may he live long and be well, is our local rabbi, may it be for many years to come. [****19] Nobody can perform [*293] his functions without his consent. He is the only authority in all spiritual matters. No rabbi, ritual slaughterer or teacher can be chosen without his consent. His decision is binding on every member."

This may mean that all of the Grand Rabbi's decisions bind every member, or only that they bind every member "in all spiritual matters." The language seems ambiguous to me, and I do not think the ambiguity can be resolved without deciding a religious question--the scope of a religious leader's authority over his followers. Indeed, it is one of the ironies of this case that Supreme Court based its finding of nonjusticiability on its interpretation of this bylaw; I think the issue of what the bylaw means is itself nonjusticiable.

III

The Friedman faction makes essentially two claims: that its candidates are the [***471] validly elected leaders of the Brooklyn Congregation, and that the candidates of the Kahan faction are not. I conclude, applying neutral principles, that we can readily resolve the first of these claims: The Friedman faction has wholly failed to establish that its candidates were validly elected. The question as to whether the election of the Kahan faction's [****20] candidates was valid, I conclude, raises issues of fact that should be resolved by Supreme Court.

A

The basis for the Friedman faction's claim to control the Brooklyn Congregation is an election held in early May 2001, pursuant to a resolution passed at what the Friedman faction says was a meeting of the Congregation's board of trustees on January 14, 2001. The Kahan [10] faction says that the Friedman faction's election was irregular in many ways, and the Friedman faction makes no specific response. Indeed, [**1290] the Friedman faction does not explain its basis for asserting that the people who met on January 14 were members of the Congregation's board, and there is considerable reason to doubt the validity of that board meeting. Friedman asserted in an affirmation submitted to Supreme Court that the meeting was attended by "83 board members"--but *Religious Corporations Law § 207* provides for a maximum of 72 trustees, and various versions of the Congregation's bylaws provide for varying numbers, none more than 52.

Without defending the lawfulness of its candidates' election, the Friedman faction says they must be installed in office [*294] because no timely challenge to that election was brought. This [****21] argument fails; that is not the way the Not-For-Profit Corporation Law works.

Section 618 of the Not-For-Profit Corporation Law provides for a proceeding by "any member aggrieved by an election," but the failure to bring such a proceeding does not mean that any activity called an "election" by its participants becomes binding. *Section 618* provides a means of removing from power people who may not have been lawfully elected--not a means of installing claimants who say they have been. On the

Friedman faction's theory, any group of people could hold what they called an "election" for officers of any not-for-profit corporation; wait four months for the statute of limitations to run (*see CPLR 217*); and, if no *section 618* proceeding was brought, march in and take over the corporation. This is an absurd result, and the Friedman faction cites no authority supporting it. No examination of religious doctrine is needed to reject this aspect of the Friedman faction's case.

B

The Friedman faction's challenge to the validity of the election on which the Kahan faction relies, an election allegedly authorized at a board meeting held January 18, 2001, presents a harder issue. The Friedman faction says [****22] this election is invalid on several grounds. One is that it was called by a board from which Berl Friedman had, allegedly improperly, been excluded. The Kahan faction claims that Friedman was removed by the Grand Rabbi. I have already said that I regard the extent of the Grand Rabbi's authority as a religious question, and I therefore agree with the majority that, if the Grand Rabbi did in fact remove Friedman, a challenge to the election based on his lack of authority to do so would not be justiciable. The Friedman faction, however, challenges not only the Grand Rabbi's authority to remove Friedman, but the factual claim that he did so. I agree with Justice Spolzino, dissenting below, that it "requires no inquiry into religious doctrine to ascertain whether the Grand Rebbe said and did what he is [***472] purported to have said and done." (*31 AD3d 541, 546, 820 N.Y.S.2d 62 [2d Dept 2006]*). This issue, at least, can be resolved on neutral principles.

There are other issues that can be so resolved. The Friedman faction's challenge [11] to the election is not based on Friedman's exclusion alone. The Friedman faction disputes whether the January 18 board meeting ever occurred, whether it was called [*295] on proper notice and whether a quorum was present. [****23] It questions whether the resolution calling the election was actually passed. It claims that procedures in the election violated the Religious Corporations Law and the Congregation's bylaws, specifying alleged flaws relating to proxies, mail-in ballots and write-in votes. It claims that some members were excluded from voting, and some nonmembers permitted to vote.

All these issues, except perhaps the ones relating to membership, can be resolved without examination of any religious issues. The majority points out that some [**1291] issues relating to membership may be religious, and therefore nonjusticiable. I agree that a civil court may not examine any assertion that a potential voter in the election did or did not follow the "ways of the Torah." But it does not appear to me from the record that the Friedman faction makes any such assertion. It does raise other issues, including the important one of whether members of the Satmar congregation at Kiryas Joel are also members of the Brooklyn Congregation, a question that should be answerable on neutral principles.

In short, while some nonjusticiable issues may come up in the course of the case, it is not impossible for a civil court to decide [****24] the case as a whole, and because it is not impossible I think it should be done. I recognize that, if we were to reach the result I favor, we would be imposing a significant burden on the Kings County Supreme Court, where Justice Barasch and his colleagues have already struggled mightily with this dispute, showing remarkable patience and devotion to duty. This is an enormously difficult case, involving as it does a bitter battle between two factions whose differences are extremely hard for outsiders to understand. It has produced, as Justice Barasch tells us in an epilogue to his opinion, attempts by people claiming allegiance to one faction or the other "to discredit, intimidate and improperly influence" the Supreme Court, with the result "that there are judges who would prefer to decline any assignment involving members of this group of litigants." (*5 Misc 3d 1023[A], 2004 NY Slip Op 51515[U], *13, *14, 799 NYS2d 159*). I join Justice Barasch--as, I am sure, do all my colleagues--in saying that this behavior is intolerable, and in expressing the hope that the proper authorities will deal with it.

Despite all this, I would ask Supreme Court to take up this case again, and decide the merits. This would, perhaps, illustrate the rule that no good deed [****25] goes unpunished, but I think it would serve a more valuable purpose also. Courts are sometimes most [*296] necessary when the parties to a dispute are at their most passionate and irrational. In such cases, the prospect of the parties resolving their differences in court may be unattractive, but the thought of their resolving them elsewhere may be less attractive still. I therefore think that courts should, where they possibly can do so, accept jurisdiction in cases like this, and I dissent from the majority's decision to decline jurisdiction here.

Chief Judge Kaye and Judges Ciparick, Graffeo and Read concur with Judge Pigott; [***473] Judge Smith dissents in a separate opinion; Judge Jones taking no part.

Order affirmed, etc.

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Episcopal Diocese of Rochester v. Harnish

Court of Appeals of New York

September 9, 2008, Argued; October 23, 2008, Decided

No. 152

Reporter
11 N.Y.3d 340 *; 899 N.E.2d 920 **; 870 N.Y.S.2d 814 ***; 2008 N.Y. LEXIS 3296 ****; 2008 NY Slip Op 7991

[1] Episcopal Diocese of Rochester et al., Respondents, v David Harnish, Former Rector of All Saints Protestant Episcopal Church, et al., Appellants, et al., Defendants. In the Matter of All Saints Anglican Church, Formerly Known as All Saints Protestant Episcopal Church, Appellant v Episcopal Diocese of Rochester et al., Respondents.

Prior History: Appeal, in the first above-entitled matter, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered September 28, 2007. The Appellate Division affirmed a judgment (denominated order) of the Supreme Court, Monroe County (Kenneth R. Fisher, J.; op *17 Misc 3d 1105A[A], 2006 NY Slip Op 52600[U], 851 NYS2d 57*), which, insofar as appealed from, had granted in part plaintiffs' motion for summary judgment and declared that plaintiffs were entitled to the real and personal property at issue that was held in trust by defendant All Saints Anglican Church (formerly All Saints Protestant Episcopal Church) for the benefit of plaintiff Episcopal Diocese of Rochester and the Protestant Episcopal Church in the United States of America, ordered an accounting, declared the January 23, 2006 certificate of amendment to the certificate of incorporation of All Saints Protestant Episcopal Church null and void, enjoined defendants from conducting any activity and/or business for or on behalf of the former All Saints Protestant Episcopal Church under the corporation All Saints Anglican Church, and dismissed defendants' counterclaims.

Appeal, in the second above-entitled matter, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered September 28, 2007. The Appellate Division affirmed a judgment (denominated order) of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered in a proceeding pursuant to CPLR article 78, which had dismissed the petition.

Matter of All Sts. Anglican Church v Episcopal Diocese of Rochester, 43 AD3d 1406, 841 N.Y.S.2d 923, affirmed.

Episcopal Diocese of Rochester v. Harnish, 43 AD3d 1406, 841 NYS2d 816, 2007 N.Y. App. Div. LEXIS 10237 (N.Y. App. Div. 4th Dep't, 2007), affirmed.

Disposition: [****1] Orders affirmed, with costs.

Core Terms

Church, Diocese, Canons, Religious, personal property, ecclesiastical, church property, express trust, Congregation, Mission, provisions, deeds, incorporation, hierarchical, extinct, parties

Case Summary

Procedural Posture
Respondent diocese sued appellant parish, seeking, among other relief, a judgment that the parish's real and personal property was impressed with a trust in favor of the diocese and a national church. The parish counterclaimed, seeking, among other things, to quiet title to the property. The trial court granted summary judgment to the diocese. The Supreme Court of New York, Appellate Division, Fourth Department, affirmed. The parish appealed.

Overview
The diocese had approved a resolution declaring the parish ecclesiastically extinct, and sought return of property held by the parish. The diocese argued that the parish agreed to abide by the constitution and canons of the diocese and was, therefore, subject to the trust doctrine of those canons. The appellate court found that nothing in the deeds, the parish's certificate of incorporation, or the Religious Corporation Law established an express trust. However, certain of the diocese's canons clearly established an express trust in favor of the diocese and the national church, and the parish agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with the diocese in 1947. In agreeing to abide by all "canonical or legal enactments," it was unlikely that the parties intended

that the parish could have reserved a veto over every future change in the canons. Moreover, it was significant that the parish never objected to the applicability or tried to remove itself from the reach of the canons in the more than 20 years since the national church adopted the express trust provision.

Outcome

The orders of the intermediate appellate court were affirmed.

LexisNexis® Headnotes

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN1[] See *Religious Corporations Law § 42-A*.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

HN2[] The Court of Appeals of New York has adopted the neutral principles of law approach to church property disputes set forth by the United States Supreme Court.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

HN3[] Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

HN4[] Application of the neutral principles doctrine requires a court to focus on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. The court must determine from them whether there is any basis for a trust or similar restriction in favor of the general church, taking special care to scrutinize the documents in purely secular terms and not to rely on religious precepts in determining whether they indicate that the parties have intended to create a trust or restriction.

Headnotes/Syllabus

Headnotes

Religious Corporations and Associations -- Determination of Claim to Real Property -- Express Trust

1. Defendant local Episcopal parish held its real and personal property in trust for the benefit of plaintiff Diocese and nonparty Protestant Episcopal Church in the United States of America (National Church), such that upon defendant's separation from the Diocese its property reverted back to the Diocese or the National Church. Application of the neutral principles doctrine to church property disputes requires a court to focus on the language of the deeds, the terms of the local church charter, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property, and to determine whether those documents indicate that the parties intended to create a trust or restriction. Here, nothing in the deeds established an express trust, defendant's certificate of incorporation did not indicate that the church property was to be held in trust, and there was no provision of the Religious Corporations Law that conclusively established a trust in favor of either the Diocese or the National Church. However, under the Dennis Canons, adopted in 1979 by the General Convention of the National Church, a parish holds its property in trust for the Diocese and the National Church, and defendant agreed to abide by the express trust established by the Dennis Canons either upon incorporation or upon recognition as a parish in spiritual union with the Diocese. Although the Dennis Canons were adopted nearly 30 years after defendant became a parish, defendant had agreed to abide by all "canonical and legal enactments," and it was unlikely that the parties intended that defendant could reserve a veto over every future change in the canons. Moreover, defendant never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision.

Religious Corporations and Associations -- Judicial Review -- Resolution Dissolving Parish

2. The resolution by a diocese deeming a local Episcopal parish "extinct" was an ecclesiastical determination not subject to judicial review.

Counsel: *Eugene Van Voorhis,* Rochester, and Adam Clark for appellants in the first and second above-entitled matters. I. Plaintiffs- respondents in action No. 1 and respondent-respondent in action No. 2 did not make a showing of sufficient admissible, undisputed evidence as a matter of law to warrant summary judgment declaring that an express or implied trust in All Saints Protestant Episcopal Church's property was ever created in favor of the Episcopal Diocese of Rochester and/or the Protestant Episcopal Church in the United States of America. (*JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 828 NE2d 604, 795 NYS2d 502*; *Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 476 NE2d 642, 487 NYS2d 316*; *Zuckerman v City of New York, 49 NY2d 557, 404 NE2d 718, 427 NYS2d 595*; *Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 144 NE2d 387, 165 NYS2d 498*; *Matter of Redemption Church of Christ of Apostolic Faith v Williams, 84 AD2d 648, 444 NYS2d 305*; *Greenberg v Manlon Realty, 43 AD2d 968, 352 NYS2d 494*; *Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 239 NE2d 725, 293 NYS2d 93*; ***Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 684 NYS2d 76***; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *Watson v Jones, 80 US 679, 13 Wall [80 US] 679, 20 L. Ed. 666*.) II. Under neutral principles of law All Saints Protestant Episcopal Church (All Saints) does not hold its property in trust for the Episcopal Diocese of Rochester or for Protestant Episcopal Church in the United States of America (ECUSA), and mere passage of Protestant Episcopal Church in the United States of America canons I.7.4 and I.7.5 (Dennis Canon) could not create a trust in All Saints' property under New York law, nor did the Dennis Canon codify existing ECUSA polity. (*Board of Mgrs. of Diocesan Missionary & Church Extension Socy. of Prot. Episcopal Church in Diocese of N.Y. v Church of Holy Comforter, 164 Misc 2d 661, 628 NYS2d 471, 212 AD2d 657, 623 NYS2d 146*; *Presbytery of Hudson Riv. of Presbyt. Church [U.S.A.] v Trustees of First Presbyt. Church & Congregation of Ridgeberry, 13 Misc 3d 707, 821 NYS2d 834*; ***Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 684 NYS2d 76***.) III. Expulsion of All Saints Protestant Episcopal Church (All Saints) from the Episcopal Diocese of Rochester (Diocese) could not trigger a forfeiture of All Saints' property to the Diocese under neutral principles of New York law. (*Westminster Presbyt. Church of W. Twenty-Third St. v Trustees of Presbytery of N.Y., 211 NY 214, 105 NE 199*; *Ludlow v Rector, Church Wardens & Vestrymen of St. John's Church, 68 Misc 400, 124 NYS 75, 144 App Div 207, 207 NY 689*; *Matter of Venigalla v Alagappan, 307 AD2d 1041, 763 NYS2d 765*; *Watson v Christie, 288 AD2d 29, 732 NYS2d 405*; *Natoli v Milazzo, 9 Misc 3d 1116[A], 2005 NY Slip Op 51570[U], 808 NYS2d 919, 35 AD3d 823, 826 NYS2d 716*; *Rector, Churchwardens & Vestrymen of Church of Holy Trinity v Melish, 4 AD2d 256, 164 NYS2d 843*.) IV. It was error on the part of the trial court to predicate its decision of the effect of *article 3 of the Religious Corporations Law* on the relationship of All Saints Protestant Episcopal Church to the Episcopal Diocese of Rochester and Protestant Episcopal Church in the United States of America, especially since serious questions have been raised in the courts below by appellants as to the constitutionality of parts or all of the Religious Corporations Law under the *Establishment Clause of the First Amendment to the Constitution of the United States* and under the *Preference Clause of article 1, § 3 of the New York State Constitution.* (*Cantwell v Connecticut, 310 US 296, 60 S Ct 900, 84 L Ed 1213*; *Lemon v Kurtzman, 403 US 602, 91 S Ct 2105, 29 L Ed 2d 745*; *McCreary County v American Civil Liberties Union of Ky., 545 US 844, 125 S Ct 2722, 162 L Ed 2d 729*; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos, 483 US 327, 107 S Ct 2862, 97 L Ed 2d 273*; *Larson v Valente, 456 US 228, 102 S Ct 1673, 72 L Ed 2d 33, 457 US 1111, 102 S Ct 2916, 73 L Ed 2d 1323*; *Storm v Town of Woodstock, N.Y., 32 F Supp 2d 520*; *United States v Lee, 455 US 252, 102 S Ct 1051, 71 L Ed 2d 127*; *Morris v Scribner, 69 NY2d 418, 508 NE2d 136, 515 NYS2d 424*; *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 US 440, 89 S Ct 601, 21 L Ed 2d 658*; *Trustees of Presbytery of N.Y. v Westminster Presbyt. Church of W. Twenty-Third St., 222 NY 305, 118 NE 800*.) V. In resolving the difference between the decisions in the Third and Fourth Departments of the Appellate Division in ***Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville (250 AD2d 282, 684 NYS2d 76 [3d Dept 1999])*** and in the present case on the one hand and the decision of the Appellate Division, Second Department in *Board of Mgrs. of Diocesan Missionary & Church Extension Socy. of Prot. Episcopal Church in Diocese of N.Y. v Church of Holy Comforter (164 Misc 2d 661, 628 NYS2d 471 [Sup Ct, Dutchess County 1993], affd 212 AD2d 657, 623 NYS2d 146 [2d Dept 1995])* on the other, it is respectfully submitted that the ruling in the latter case should be deemed the correct statement of New York law under neutral principles of law. (*Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*.)

Harter Secrest & Emery LLP, Rochester (*Thomas G. Smith* and Carol L. O'Keefe of counsel), for respondents in the first and second above-entitled matters. I. Under neutral principles of law analysis, All Saints Protestant Episcopal Church held its property in trust for the Episcopal Diocese of Rochester and the Protestant Episcopal Church in the United States of America. (*Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *First Presbyt. Church of Schenectady v United*

Presbyt. Church in U.S. of Am., 62 NY2d 110, 464 NE2d 454, 476 NYS2d 86, 469 US 1037, 105 S Ct 514, 83 L Ed 2d 404; *North Cent. N.Y. Annual Conference v Felker, 28 AD3d 1130, 816 NYS2d 775*; ***Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 684 NYS2d 76***; *Board of Mgrs. of Diocesan Missionary & Church Extension Socy. of Prot. Episcopal Church in Diocese of N.Y. v Church of Holy Comforter, 164 Misc 2d 661, 628 NYS2d 471*; *Maryland & Virginia Eldership of Churches of God v Church of God at Sharpsburg, Inc., 396 US 367, 90 S Ct 499, 24 L Ed 2d 582*; *North Cent. N.Y. Annual Conference v Felker, 28 AD3d 1130, 816 NYS2d 775*; *Presbytery of Hudson Riv. of Presbyt. Church [U.S.A.] v Trustees of First Presbyt. Church & Congregation of Ridgeberry, 13 Misc. 3d 707, 821 NYS2d 834*; *Noel v L & M Holding Corp., 35 AD3d 681, 826 NYS2d 690*; *Anderson v Livonia, Avon & Lakeville R.R. Corp., 300 AD2d 1134, 752 NYS2d 763*.) II. No justiciable controversy exists regarding the constitutionality of the Religious Corporations Law. (*New York Pub. Interest Research Group v Carey, 42 NY2d 527, 369 NE2d 1155, 399 NYS2d 621*; *Islamic Ctr. of Harrison, Pa. v Islamic Science Found., 216 AD2d 357, 628 NYS2d 179*; *Watson v Jones, 80 US 679, 13 Wall [80 US] 679, 20 L Ed 666*; *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 US 440, 89 S Ct 601, 21 L Ed 2d 658*; *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevich, 426 US 696, 96 S Ct 2372, 49 L Ed 2d 151*; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *Dixon v Edwards, 290 F3d 699*; *Tomic v Catholic Diocese of Peoria, 442 F3d 1036*; ***Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 684 NYS2d 76***; *Upstate N.Y. Synod of Evangelical Lutheran Church in Am. v Christ Evangelical Lutheran Church of Buffalo, 185 AD2d 693, 585 NYS2d 919*.) III. The applicable provisions of the Religious Corporations Law do not violate the national church canons and constitution. (*People v Pagnotta, 25 NY2d 333, 253 NE2d 202, 305 NYS2d 484*; *Matter of Van Berkel v Power, 16 NY2d 37, 209 NE2d 539, 261 NYS2d 876*; *Lemon v Kurtzman, 403 US 602, 91 S Ct 2105, 29 L Ed 2d 745*; *Rector, Churchwardens & Vestrymen of Church of Holy Trinity v Melish, 4 AD2d 256, 164 NYS2d 843, 3 NY2d 476, 146 NE2d 685, 168 NYS2d 952*; *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America, 344 US 94, 73 S Ct 143, 97 L Ed 120*; *Watson v Jones, 80 US 679, 13 Wall [80 US] 679, 20 L Ed 666*; *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevich, 426 US 696, 96 S Ct 2372, 49 L Ed 2d 151*; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *Maryland & Virginia Eldership of Churches of God v Church of God at Sharpsburg, Inc., 396 US 367, 90 S Ct 499, 24 L Ed 2d 582*.)

Goodwin Procter LLP, Washington, DC (*Heather H. Anderson, Adam M. Chud* and Soyong Cho of counsel), for Episcopal Church, amicus curiae in the first and second above-entitled matters. I. The *First Amendment* prohibits governmental interference in the internal governance of churches. (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v Amos, 483 US 327, 107 S Ct 2862, 97 L Ed 2d 273*; *Watson v Jones, 80 US 679, 13 Wall [80 US] 679, 20 L Ed 666*; *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America, 344 US 94, 73 S Ct 143, 97 L Ed 120*; *Presbyterian Church in U. S. v Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 US 440, 89 S Ct 601, 21 L Ed 2d 658*; *Maryland & Virginia Eldership of Churches of God v Church of God at Sharpsburg, Inc., 396 US 367, 90 S Ct 499, 24 L Ed 2d 582*; *Serbian Eastern Orthodox Diocese for United States and Canada v Milivojevich, 426 US 696, 96 S Ct 2372, 49 L Ed 2d 151*; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *Avitzur v Avitzur, 58 NY2d 108, 446 NE2d 136, 459 NYS2d 572*; *Park Slope Jewish Ctr. v Congregation B'nai Jacob, 90 NY2d 517, 686 NE2d 1330, 664 NYS2d 236*.) II. The lower courts properly applied neutral principles of law analysis in this case. (*First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am., 62 NY2d 110, 464 NE2d 454, 476 NYS2d 86*; *Jones v Wolf, 80 US 679, 13 Wall [80 US] 679, 20 L Ed 666*; ***Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 684 NYS2d 76***; *North Cent. N.Y. Annual Conference v Felker, 28 AD3d 1130, 816 NYS2d 775*.) III. The result dictated by New York precedent and reached by the lower courts in this case is consistent with authority from around the country. IV. All Saints Protestant Episcopal Church is bound by the Protestant Episcopal Church in the United States of America's express trust canon adopted in 1979. (***Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville, 250 AD2d 282, 684 NYS2d 76***; *Polin v Kaplan, 257 NY 277, 177 NE 833*; *Havens v King, 221 App Div 475, 224 NYS 193, affd sub nom. Havens v Dodge, 250 NY 617, 166 NE 346*; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*.) V. The lower court's decision is consistent with other applicable principles of New York law. (*Polin v Kaplan, 257 NY 277, 177 NE 833*; *Havens v King, 221 App Div 475, 224 NYS 193, affd sub nom. Havens v Dodge, 250 NY 617, 166 NE 346*; *Burt v Oneida Community, 137 NY 346, 33 NE 307*; *Temple Beth AM v Tanenbaum, 6 Misc 3d 373, 789 NYS2d 658*; *Watson v Jones, 80 US 679, 13 Wall [80 US] 679, 20 L Ed 666*; *Lefkowitz v Cornell Univ., 35 AD2d 166, 316 NYS2d 264, 28 NY2d 876, 271 NE2d 552, 322 NYS2d 717*; *Conklin v State of New York, 284 App Div 193, 130 NYS2d 618*; *Saint Joseph's Hosp. v Bennett, 281 NY 115, 22 NE2d 305*.) VI. Appellants have not presented a justiciable controversy for ruling on the constitutionality of New York's Religious Corporations Law. (*New York Pub. Interest Research Group v Carey, 42 NY2d 527, 369 NE2d 1155, 399 NYS2d 621*; *Ashcroft v Mattis, 431*

US 171, 97 S Ct 1739, 52 L Ed 2d 219; *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am., 62 NY2d 110, 464 NE2d 454, 476 NYS2d 86*.)

Jacobowitz and Gubits, LLP, Walden (Donald G. Nichol of counsel), for Presbyterians for Constitutional Action, amicus curiae in the first and second above-entitled matters. I. Since the quitclaim from the Episcopal Diocese of Rochester to All Saints Protestant Episcopal Church is unambiguous, neutral principles of law must enforce the deed. (*Loch Sheldrake Assoc. v Evans, 306 NY 297, 118 NE2d 444*; *Uihlein v Matthews, 172 NY 154, 64 NE 792*; *Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*; *Watson v Jones, 80 US 679, 13 Wall [80 US] 679, 20 L Ed 666*; *Matter of Piel, 10 NY3d 163, 884 NE2d 1040, 855 NYS2d 41*; *Mercury Bay Boating Club v San Diego Yacht Club, 76 NY2d 256, 557 NE2d 87, 557 NYS2d 851*; *Matter of Cord, 58 NY2d 539, 449 NE2d 402, 462 NYS2d 622*; *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am., 62 NY2d 110, 464 NE2d 454, 476 NYS2d 86*.) II. The Episcopal Diocese of Rochester has failed to prove a trust beyond a reasonable doubt. (*Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v Congregation Yetev Lev D'Satmar, Inc., 9 NY3d 297, 879 N.E.2d 731, 849 N.Y.S.2d 192*; *Beaver v Beaver, 117 NY 421, 22 N.E. 940*; *Jones v Wolf, 443 US 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775*.) III. The Episcopal constitu tion may not be enforced. IV. The Religious Corporations Law is unconstitutional. (*Grumet v Pataki, 93 NY2d 677, 720 NE2d 66, 697 NYS2d 846*; *Petty v Tooker, 21 NY 267*.)

Raymond J. Dague, PLLC, Syracuse (Raymond J. Dague of counsel), for Church of the Good Shepherd, amicus curiae in the first and second above-entitled matters. I. The *Jones v Wolf (443 US 595, 99 S Ct 3020, 61 L Ed 2d 775 [1979])* "neutral principles of law" standard does not allow civil enforcement of church canons in derogation of state property and trust law. (*First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am., 62 NY2d 110, 464 NE2d 454, 476 NYS2d 86*; *Watson v Jones, 80 US 679, 13 Wall [80 US] 679, 20 L Ed 666*.) II. Protestant Episcopal Church in the United States of America's (ECUSA) own official commentaries on the ECUSA constitution and canons recognize the ECUSA property canons are not civilly enforceable. (*Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*.) III. Protestant Episcopal Church in the United States of America canons I.7.4 and II.6.4 were never properly adopted. (*Jones v Wolf, 443 US 595, 99 S Ct 3020, 61 L Ed 2d 775*.)

Judges: JONES, J. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Opinion by: JONES

Opinion

[**921] [*346] [***815] Jones, J.

The question before this Court is whether defendant All Saints Protestant Episcopal Church (All Saints, or the parish) held its real and personal property in trust for the benefit of plaintiff Episcopal Diocese of Rochester (Rochester Diocese) and nonparty Protestant Episcopal Church in the United States of America (National Church), such that upon the parish's separation from the Rochester Diocese its property reverted back to the [2] Rochester Diocese or the National Church. For the reasons stated below, we answer this question in the affirmative.

Background

The National Church was founded in the late 1700s and is a member of the Anglican Communion, a group of churches rooted in the doctrine, discipline and worship of the Church of England's Book of Common Prayer. The National Church has a hierarchical form of governance. Its governing body, the General Convention, adopted-- [****2] and periodically amends--a constitution and canons (the National Canons) that manifest its doctrinal law.

The Rochester Diocese is incorporated under *article 3 of the Religious Corporations Law*, which solely governs Protestant [*347] Episcopal parishes or churches.[1] As a member of the National Church, the Diocese is governed by annual Conventions or Councils and, in addition to the National Canons, has adopted its own Diocesan Canons (the Rochester Canons).

All Saints was originally organized in 1927 as a mission under the ecclesiastical canons of the National Church and the Episcopal Diocese of Western New York.[2] Later that year All Saints incorporated under *article 3 of the Religious Corporations Law*. In 1947, All Saints applied to the Rochester Diocese to be recognized as a parish in spiritual union with the Diocese. To this end, All Saints signed a document agreeing "to abide by and conform to the constitution and Canons in force in the Episcopal Diocese of Rochester and to conform to all the canonical and legal enactments thereof." The Bishop of the Diocese approved this union, and All Saints thereafter became a [****3] parish.

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[1] Its predecessor was the Episcopal Diocese of Western New York.

[2] A more detailed description of the history of and property relating to All Saints (e.g., the deeds) can be found in ***Episcopal Diocese of Rochester v Harnish (17 Misc 3d 1105[A], 851 NYS2d 57, 2007 NY Slip Op 51838[U] [Sup Ct Monroe Cty Sept 13, 2006]***).

Facts and Procedural History

Due to serious theological disputes between the Rochester Diocese and the vestry (the leadership) of All Saints, in November 2005, the governing body of the Rochester Diocese--the Diocesan Convention--approved a resolution declaring the parish ecclesiastically "extinct."[3] The [**922] [***816] Convention also resolved that All Saints' real property and tangible and [3] intangible assets were to be "transferred to the trustees of the [Rochester Diocese]."[4] All Saints, however, maintained that it held legal title to the real and personal property and, as it held the property free and clear under New York property law, neither the Rochester Diocese nor the National Church had claim to the property.

Plaintiffs commenced the instant declaratory judgment action seeking, among other relief, (1) a judgment that the real and personal property of All Saints was impressed with a trust in [*348] favor of the Rochester Diocese and National Church, (2) an injunction barring All Saints from interfering with the Rochester Diocese's ownership and use of the property and (3) an accounting. Defendants counterclaimed, seeking to (1) quiet title to the property, (2) declare certain provisions of the Religious Corporations Law null and void under the *Establishment Clause of First Amendment of the United States Constitution* and (3) enjoin the Rochester Diocese from trespassing and interfering in All Saints. Further, All Saints brought a CPLR article 78 proceeding against the Rochester Diocese, seeking to annul the determination declaring the parish extinct. All Saints argued that the Rochester Diocese abused [****5] its discretion and failed to follow its own rules and New York law when it declared All Saints extinct.

Relying on *Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville (250 AD2d 282, 684 NYS2d 76 [3d Dept 1999])*, Supreme Court granted summary judgment to plaintiffs, declaring that All Saints held all the real and personal property of the local parish for the benefit of the Rochester Diocese and National Church and dismissing defendants' counterclaims. The Appellate Division affirmed "for reasons stated in the decision at Supreme Court" and also affirmed Supreme Court's dismissal of the article 78 petition since the Rochester Diocese's decision to dissolve the parish was a purely ecclesiastical determination and not reviewable by the Court *(43 AD3d 1406, 841 NYS2d 816 [2007])*. We granted defendants leave to appeal *(9 NY3d 1027, 881 NE2d 1196, 852 NYS2d 10 [2008])* and now affirm.

Discussion

Plaintiffs argue that there has been both an express and implied trust in favor of the Rochester Diocese and the National Church since All Saints' incorporation pursuant to *article 3 of the Religious Corporations Law*. Specifically, plaintiffs contend that All Saints expressly agreed to abide by the constitution and canons of the Rochester Diocese and is, therefore, subject to the trust doctrine [4] of [****6] National Canons I.7.4 and I.7.5 (the Dennis Canons).[5] [**923] [***817] Under the Dennis Canons, a parish holds its property in trust for the Diocese and the National Church. Plaintiffs also [*349] contend that Rochester Canon 8[6] reaffirms this doctrine, and that the Religious Corporations Law (*see art 3, § 42-a*; *art 2, § 5*[7]) further supports their

[3] The parties acknowledge that the resolution was a purely ecclesiastical determination.

[4] Subsequently, All Saints sought ecclesiastical oversight by other bodies within the Anglican Communion and All Saints notified plaintiff Rt. Reverend Jack M. McKelvey (Bishop of the [****4] Rochester Diocese), by letter, that it was now under the ecclesiastical authority of Archbishop Henry Orombi, Archbishop of the Church of the Province of Uganda. It also sought to amend its certificate of incorporation to change its name from All Saints Protestant Episcopal Church to "All Saints Anglican Church."

[5] The Dennis Canons were adopted in 1979 by the General Convention of the National Church. They provide:

"Sec. 4 All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long [****7] as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

"Sec. 5 The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust."

[6] Rochester Canon 8 provides:

"In conformity and consistent with the provisions of Title I, Canon 7, of the General Convention, it is hereby explicitly reaffirmed that all real and personal property held by or for the benefit of any Parish, Mission, Chapel, or Congregation located in the Diocese of Rochester is held in trust for the Episcopal Church and the Diocese of Rochester."

[7] *Section 42-A*, enacted in 1991, states:

HN1[↑] "Notwithstanding and in addition to the provisions of section five of this chapter, and subject always to the trust in which all real and personal property is held for the Protestant Episcopal Church and the Diocese thereof in which the parish, mission or

contention that a religious corporation, [5] incorporated pursuant to *article 3 of the Religious Corporations Law*, holds its property in trust for the Diocese and the National Church. Finally, plaintiffs argue that All Saints has remained an Episcopal parish for more than 20 years after adoption of the Dennis Canons without challenging their substance or applicability.

Defendants contend that a factual question exists as to whether an express or constructive trust was created or existed in favor of the Rochester Diocese and/or the National Church when they were expelled from the Rochester Diocese. Specifically, [*350] defendants argue that they cannot be bound by the Dennis Canons because they were adopted in 1979, nearly 30 years after All Saints was accepted as a parish. Also, defendants question [****9] whether the Dennis Canons or Rochester Canon 8 create an express trust, effectively divesting All Saints of its property, without violating the due process provisions of the United States and New York State Constitutions. Moreover, defendants argue that there is nothing in any deed or will or in the All Saints certificate of incorporation that establishes a trust over the All Saints property for the benefit of the Rochester Diocese or the National Church. Defendants' arguments are unavailing.

In *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am. (62 NY2d 110, 464 N.E.2d 454, 476 N.Y.S.2d 86 [1984])* HN2[↑] we adopted the neutral principles of law approach to church property disputes set forth by the United States Supreme Court in *Jones v Wolf (443 US 595, 99 S Ct 3020, 61 L Ed 2d 775 [1979])*.

[**924] [***818] HN3[↑]

> "Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. *At any time before the dispute erupts*, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, *the constitution of the general church can be made to recite an express trust in [****10] favor of the denominational church.* The burden involved in taking such steps will be minimal. *And the civil courts will be bound to give effect to the result indicated by the parties*, provided it is embodied in some legally cognizable form" (*Jones, 443 US at 606* [emphasis added]).

The enactment of the Dennis Canons was apparently [6] an attempt by the Episcopal Church to do exactly what this language suggested--to "ensure ... that the faction loyal to the hierarchical church [would] retain the church property."

HN4[↑] Application of the neutral principles doctrine requires the court to focus

> "on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. The [*351] court must determine from them whether there is any basis for a trust or similar restriction in favor of the general church, taking special care to scrutinize the documents in purely secular terms and not to rely on religious precepts in determining whether they indicate that the parties have intended to create a trust or restriction" (*First Presbyterian Church, 62 NY2d at 122, 464 NE2d 454, 476 NYS2d 86* [****11] [citation omitted]).

In *Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, a case similar to this one, the Third Department noted that in many ways Dennis Canon I.7.4 was adopted in response to *Jones v Wolf*, which "held that the constitution of a hierarchical church can be crafted to recite an express trust in its favor concerning the ownership and control of local church property" (*Trinity, 250 AD2d at 285*, citing *Jones, 443 US at 606*). The Third Department affirmed the judgment granted in favor of the diocese, concluding--despite the existence of deeds indicating that the local parish held unrestricted title to three parcels of land surrounding the church--that the property was held in trust for the benefit of the diocese and hierarchical church.

Here, applying the neutral principles of law approach to the case at bar, we find that there is nothing in the deeds that

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congregation is located, the vestry or trustees of any incorporated Protestant Episcopal parish or church, the trustees of every incorporated governing body of the Protestant Episcopal [****8] Church and each diocese are authorized to administer the temporalities and property, real and personal, belonging to the corporation, for the support and maintenance of the corporation and, provided it is in accordance with the discipline, rules and usages of the Protestant Episcopal Church and with the provisions of law relating thereto, for the support and maintenance of other religious, charitable, benevolent or educational objects whether or not conducted by the corporation or in connection with it or with the Protestant Episcopal Church."

Under *section 5*, the trustees of a religious corporation "shall have the custody and control" of all church property and shall administer same in accordance with the rules of the corporation and ecclesiastical governing body.

establishes an express trust in favor of the Rochester Diocese or National Church. All Saints' certificate of incorporation, further, does not indicate that the church property is to be held in trust for the benefit of either the Rochester Diocese or the National Church. Nor does any provision of [****12] the Religious Corporations Law conclusively establish a trust in favor of the Rochester Diocese or National Church. [8]

[1] The remaining factor for consideration under neutral principles, however, [**925] [***819] requires that we look to "the constitution of the general church concerning the ownership and control of church property" (*62 NY2d at 122*). It is this factor that we find dispositive. We conclude that the Dennis Canons [7] clearly establish an express trust in favor of the Rochester Diocese and the National Church (*see Jones, 443 US at 606*), and that All Saints agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with [*352] the Rochester Diocese in 1947. We therefore need not consider the existence of an implied trust. In agreeing to abide by all "canonical and legal enactments," it is unlikely that the parties intended that the local parish could reserve a veto over every future change [****13] in the canons. We find it significant, moreover, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision (*cf. First Presbyt. Church, 62 NY2d at 125*).

[2] In conclusion, plaintiffs have established that they are entitled to the real and personal property at issue and defendants have not raised any triable issue of fact to preclude this determination. We have considered defendants' remaining arguments in support of their declaratory judgment action and conclude that they lack merit. With regard to defendant's article 78 petition, we conclude as did the Appellate Division, that plaintiffs' resolution deeming the parish "extinct" was a nonreviewable ecclesiastical determination (*see Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana, 9 NY3d 282, 879 NE2d 1282, 849 NYS2d 463 [2007]*).

Accordingly, the Appellate Division orders should be affirmed, with costs.

Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Orders affirmed, with costs.

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[8] However, since All Saints was incorporated under *article 3 of the Religious Corporations Law*, which only covers "PROTESTANT EPISCOPAL PARISHES OR CHURCHES," we can conclude that it was a part of the Episcopal Church and Rochester Diocese until it became extinct in 2005.

First Presbyterian Church v. United Presbyterian Church

Court of Appeals of New York

March 22, 1984, Argued ; May 15, 1984, Decided

No Number in Original

Reporter
62 N.Y.2d 110 *; 464 N.E.2d 454 **; 476 N.Y.S.2d 86 ***; 1984 N.Y. LEXIS 4247 ****

First Presbyterian Church of Schenectady et al., Appellants, v. United Presbyterian Church in the United States of America et al., Respondents

Prior History: [****1] Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered March 21, 1983, which modified, on the law and the facts, and, as modified, affirmed a judgment of the Supreme Court, entered in Saratoga County upon a decision of the court at a Trial Term (J. Raymond Amyot, J.), (1) permanently enjoining defendants from interfering with plaintiffs' lands, buildings, moneys and other properties, (2) dismissing plaintiffs' cause of action for a declaratory judgment, and (3) dismissing defendants' counterclaim seeking a permanent injunction. The modification consisted of reversing so much of the judgment as granted plaintiffs injunctive relief and dismissed the counterclaim; dismissing the complaint, and directing entry of judgment in favor of defendants on their counterclaim, permanently enjoining plaintiffs from failing to obey the directives, orders and mandates of the administrative commission in the management and control of plaintiff church.

This action involves a dispute between plaintiff First Presbyterian Church of Schenectady (First Church), and its denominational church organization, defendant United Presbyterian Church in [****2] the United States of America (UPCUSA), which exhibits a hierarchical or connectional form of church government. It arose when First Church withdrew from the denominational church because of a disagreement over UPCUSA's financial support of radical political groups and individuals. Prior to January 24, 1977, First Church was a member of defendant Presbytery of Albany and defendant UPCUSA. First Church was organized in 1760. It became a member of the Presbytery of Albany in 1770 and UPCUSA's predecessor denomination in 1789. It retained that status until January, 1977. During the 1970's members of the church's congregation expressed discontent with UPCUSA and petitioned defendant Presbytery of Albany to be dismissed to another denomination. The request was denied. Instead, defendant Presbytery appointed an administrative commission to investigate the activities of the Session (governing body) of First Church and to file a report containing its findings and recommendations. On January 24, 1977, First Church passed a resolution severing its relations with defendants and retaining title to all real or personal property held by the church. Shortly thereafter, the commission submitted [****3] its report to the Presbytery advising removal of the Session of the First Church and appointment of another administrative commission with authority to function as a Session. The Presbytery attempted to exercise continued control over First Church by removing its ministers' names from the church rolls but plaintiffs disregarded the orders of the commission and functioned as an autonomous body. On April 16, 1977, plaintiffs, the church, its ministers and its governing Session, commenced this action seeking a declaration that it was free to withdraw from defendants UPCUSA and Presbytery of Albany and a permanent injunction enjoining defendants from interfering with plaintiffs' use and enjoyment of church property. Defendants asserted a counterclaim seeking to permanently enjoin plaintiffs from refusing to obey its directives, orders and mandates in the management and control of the church. The Appellate Division modified the judgment of Trial Term by reversing the grant of injunctive relief to plaintiffs, dismissing the complaint, and granting defendants' counterclaim for injunctive relief. Plaintiffs appealed only from that part of the Appellate Division order relating to injunctive [****4] relief.

The Court of Appeals reversed the order of the Appellate Division, insofar as appealed from, and reinstated the judgment of the Supreme Court, holding, in an opinion by Judge Simons, that to the extent plaintiffs' complaint seeks to enjoin defendants from interfering with its use of the property, the matter was properly entertained; that a civil court is a proper forum for the resolution of the parties' property dispute; and that, applying neutral principles of law, plaintiffs were entitled to injunctive relief.

First Presbyt. Church v United Presbyt. Church, 92 AD2d

164.

Disposition: Order, insofar as appealed from, reversed, without costs, and judgment of Supreme Court, Saratoga County, reinstated.

Core Terms

church, Presbytery, local church, religious, denominational, Session, neutral principles, hierarchical, congregation, deference, implied trust, withdraw, principles, provisions, faction, courts, property dispute, church property, Diocese, church property dispute, ecclesiastical, interfering, plaintiffs', appointed, ownership, injunctive relief, civil court, organizations, disputes, provides

Case Summary

Procedural Posture

Plaintiff church challenged an order of the Appellate Division of the Supreme Court in the Third Judicial Department (New York) that reversed the grant of injunctive relief, dismissed the complaint and granted a counterclaim for injunctive relief filed by appellee church organization. The church sought an injunction against the church organization from interfering with the church's lands, buildings, moneys, and properties.

Overview

Civil courts were forbidden from interfering in or determining religious disputes because it would establish one religious belief as correct while interfering with the free exercise of the opposing faction's belief. However, the court held that the church's complaint sought to enjoin the church organization from interfering with its use of the property and that civil court was a proper forum for the resolution of the parties' property dispute. The state had a legitimate interest in resolving property disputes. The court applied applying neutral principles of law, focusing on the deeds' language, the terms of the local church charter, the state laws governing the holding of church property, and the provisions in the constitution of the general church as to the ownership and control of church property. It found that the church held record title to the property free from competing interests. State law provided that disputes involving the church were controlled by the Religious Corporations Act but it did not apply to churches incorporated prior to 1828. The court held that the church was entitled to injunctive relief, reversed the judgment, and reinstated the trial court's judgment.

Outcome

The court reversed the judgment and reinstated the judgment of the trial court.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN1[] The First Amendment, binding on the states through the Fourteenth Amendment, prohibits the making of laws respecting an establishment of religion, or prohibiting the free exercise thereof. *U.S. Const. amends. I* and *XIV*. Consistent with these amendments civil courts are forbidden from interfering in or determining religious disputes. Such rulings violated the First Amendment because they simultaneously establish one religious belief as correct for the organization while interfering with the free exercise of the opposing faction's beliefs. The Constitution directs that religious bodies are to be left free to decide church matters for themselves, uninhibited by state interference.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN2[] The United Supreme Court specifically permits state court resolution of church property disputes in these circumstances, for example, when the denominational church contests the right of the local church to withdraw, by holding that no federal question is presented by the state court's ruling with respect to a property dispute in favor of the withdrawing faction.

Estate, Gift & Trust Law > Trusts > General Overview

Governments > Legislation > Interpretation

HN3[] In applying neutral principles of law, the focus is on the language of the deeds, the terms of the local church charter, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. The court must determine from them whether there is any basis for a trust or similar restriction in favor of the general church, taking special care to scrutinize the

documents in purely secular terms and not to rely on religious precepts in determining whether they indicate that the parties intend to create a trust or restriction.

Estate, Gift & Trust Law > Trusts > Constructive Trusts

Business & Corporate Compliance > ... > Estate, Gift & Trust Law > Trusts > Creation of Trusts

Estate, Gift & Trust Law > Trusts > Resulting Trusts

HN4[] There are three types of implied trusts in church property disputes: (1) an implied trust for the benefit of those members of a divided congregation who adhere to the principles of the founders of the religion; (2) an implied trust for the denominational church; and (3) an implied trust for the members of the congregation.

Headnotes/Syllabus

Headnotes

Religious Corporations and Associations -- Determination of Claim to Real Property -- Power to Control Affairs and Property of Local Church

In an action by plaintiff First Presbyterian Church (local church) against its denominational church organization, defendant United Presbyterian Church in the United States of America (UPCUSA), premised upon plaintiff's withdrawal from the denominational church because of a disagreement over the latter's financial support of radical [****5] political groups and individuals, in which plaintiff sought a declaration of its independent status and a permanent injunction preventing defendants from interfering with plaintiff's use and enjoyment of the local church property, injunctive relief is granted, applying neutral principles of law. To the extent that the complaint seeks to enjoin defendants from interfering with plaintiff's use of the local church property the matter is properly before the courts; at the time the action was before the court, the Presbytery had not yet appointed a commission to replace the Session (governing body) of plaintiff and plaintiff had terminated its relations with the Presbytery, thus, judicial resolution of this property dispute will not cause the court to intrude into the religious area because it is not required to decide which of two competing bodies is the lawful Session with authority to control the property. Plaintiff church held record title to the property free from any competing interests; subdivision 3 of *section 69 of the Religious Corporations Law*, which requires that trustees of the local church govern the property in accordance with the constitution of the UPCUSA, is inapplicable; [****6] and the constitution of the denominational church does not contain any provision creating an express trust in favor of the UPCUSA. Furthermore, the implied trust doctrine is inapplicable.

Counsel: *W. Jack Williamson*, of the Alabama Bar, admitted *pro hac vice*, and *Robert S. Trieble* for appellants. Application of the "neutral principles of law" approach requires affirmance of the trial court judgment. (*Presbyterian Church v Hull Church, 393 U.S. 440*; *Maryland & Va. Churches v Sharpsburg Church, 393 U.S. 367*; *Avitzur v Avitzur, 58 NY2d 108*; *Matter of First Presbyt. Soc., 106 NY 251*; *Westminister Presbyt. Church v Trustees of Presbytery, 211 NY 214*; *Matter of Presbytery of Albany* [*Second United Presbyt. Church*], *35 AD2d 252, 28 NY2d 722, 404 U.S. 803*; *Trustees of Dartmouth Coll. v Woodward*, 4 Wheat [17 U.S.] 518; *People ex rel. Sturges v Keese*, 27 Hun 483; *Jones v Wolf, 443 U.S. 595*.)

Duncan S. MacAffer for respondents. I. This is an ecclesiastical controversy and not a property dispute. (*Presbyterian Church v Hull Church, 393 U.S. 440*; *Jones v Wolf, 443 U.S. 595*.) II. Plaintiffs are under control of defendants and [****7] do not enjoy any independent corporate existence. III. The majority opinion of the court below properly applied the principles of settling church disputes in the government of the United Presbyterian Church in the United States of America. (*Watson v Jones*, 13 Wall [80 U.S.] 679; *Serbian Orthodox Diocese v Milivojevich, 426 U.S. 696*; *Trustees of Presbytery v Westminister Presbyt. Church, 222 NY 305*; *Matter of Presbytery of Albany, 63 Misc 2d 791, 35 AD2d 252, 28 NY2d 772, 404 U.S. 803*; *Knight v Presbytery of Western N. Y., 26 AD2d 19, 18 NY2d 868*.) IV. The reliance by plaintiffs on *section 24 of the Religious Corporations Law* to create an exception to the general rule of deference to the authority of the church is erroneous. (*Conklin v State of New York, 284 App Div 193*; *Westminister Presbyt. Church v Trustees of Presbytery, 211 NY 214*.) V. Under the principles enunciated by the Supreme Court of the United States in *Jones v Wolf (443 U.S. 595)*, the property of the First Presbyterian Church should presently be under the control of defendants. (*Watson v Jones*, 13 Wall [80 U.S.] 679; *Kedroff v St. Nicholas Cathedral, 344 U.S. 94*; *Kreshik [****8] v St. Nicholas Church, 363 U.S. 190*; *Presbyterian Church v Hull Church, 393 U.S. 440*; *Serbian Orthodox Diocese v Milivojevich, 426 U.S. 696*; *Maryland & Va. Churches v Sharpsburg Church, 393 U.S. 367*.)

Judges: Simons, J. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer and Kaye concur.

Opinion by: SIMONS

Opinion

[*113] [**456] [***88] **OPINION OF THE COURT**

This action involves a dispute between plaintiff First Presbyterian Church of Schenectady (First Church), and its denominational church organization, defendant The United Presbyterian Church in the United States of America (UPCUSA). It arose when First Church withdrew from the denominational church because of a disagreement over UPCUSA's financial support of radical political groups and individuals. Plaintiffs seek a declaration of their independent status and a permanent injunction preventing defendants from interfering with plaintiffs' use and enjoyment of the local church property. The issue is whether the court may resolve the dispute between the parties as it would any other or must, consistent with the prohibition against church/State entanglement contained in the *First Amendment to the United [****9] States Constitution*, defer to the determination of the denominational church. We hold that it may resolve the dispute and that plaintiffs are entitled to injunctive relief. We therefore reverse the order of the Appellate Division dismissing the complaint.

[*114] Prior to January 24, 1977, First Church was a member of defendant Presbytery of Albany and defendant UPCUSA. UPCUSA exhibits a hierarchical or connectional form of church government, as differentiated from a congregational form. Under the hierarchical system, authority is vested in the first instance in the governing body of the local church -- the Session -- but its actions are subject to review and control by higher church bodies, in ascending order of authority, the Presbytery, the Synod and the General Assembly. To contrast, a congregational type church is independent of higher church authority and is self-governing.

First Church was organized in 1760, during the colonial period, and first incorporated on January 14, 1803, pursuant to chapter 79 of the Laws of 1801. It became a member of the Presbytery of Albany in 1770 and UPCUSA's predecessor denomination in 1789. It retained that status until January, 1977. [****10] During the 1970's members of the church's 440 person congregation expressed discontent with UPCUSA and petitioned defendant Presbytery of Albany to be dismissed to another denomination. The request was denied. Instead, defendant Presbytery appointed an administrative commission to investigate the activities of the Session of First Church and to file a report containing its findings and recommendations. On January 24, 1977, at its annual meeting, First Church passed a resolution by a final vote of 334 to 4, severing its relations with defendants and retaining title to all real or personal property held by the church. Shortly thereafter, the commission submitted its report to the Presbytery advising removal of the Session of the First Church and appointment of another administrative commission with authority to function as a Session. The Presbytery attempted to exercise continued control over First Church by removing its ministers' names from the church rolls but plaintiffs disregarded the orders of the commission and functioned as an autonomous body.

On April 16, 1977, plaintiffs, the church, its ministers and its governing Session, commenced this action seeking a declaration [****11] that it was free to withdraw from defendants UPCUSA and Presbytery of Albany and a permanent injunction enjoining defendants from interfering with [*115] plaintiffs' use and enjoyment of church property. In their answer, defendants opposed the action and asserted a counterclaim seeking to permanently enjoin plaintiffs from refusing to obey its directives, orders and mandates in the management and control [***89] of the church. * Following a non-jury trial, plaintiffs [**457] were granted an order permanently enjoining defendants from interfering with the property but denying declaratory relief on the withdrawal issue. Defendants' counterclaim was dismissed.

[****12] A divided Appellate Division modified the judgment of Trial Term by reversing the grant of injunctive relief, dismissing the complaint and granting defendants' counterclaim. The three-Judge majority of the court, in an opinion by Justice Kane, relied upon the principle of deference by civil authorities in ecclesiastical matters and held that the court should not adjudicate the claims (see *Watson v Jones*, 13 Wall [80 U.S.] 679). Presiding Justice Mahoney, concurred in part. He applied the "neutral principles of law" rationale of *Jones v Wolf (443 U.S. 595)* to the facts and after doing so he held for defendants on their counterclaim for injunctive relief. Dissenting Justice Casey also applied the "neutral principles of law" analysis but after analyzing the evidence he found that plaintiffs were entitled to injunctive relief and he therefore voted to affirm Trial Term's judgment. Plaintiffs appeal only from that part of the Appellate Division order relating to injunctive relief.

Before this court, defendants characterize the present dispute as involving nothing more than a controversy over church policy and authority. To support their position they cite the allegations [****13] of plaintiffs' complaint objecting to

* Plaintiffs had previously sued in the United States District Court for the Northern District of New York (Foley, J.), seeking identical relief. The requested relief was denied on the ground that the First Amendment precluded the court from ruling on the issues (*First Presbyt. Church v United Presbyt. Church, 430 F Supp 450*). No claim is made that *res judicata* principles apply because of that determination.

UPCUSA's funding of various political and social groups and the refusal of plaintiffs to recognize the authority of the investigative commission. They contend that because this is a policy dispute the court must defer to the authority of the hierarchical church and avoid resolving the underlying question of property ownership; any other course would necessarily entangle it in church dogma and doctrine and thereby violate the First Amendment.

[*116] Plaintiffs, on the other hand, view this as an action concerning only the question of property ownership, a matter which can be resolved without violating the prohibitions of the First Amendment by application of the neutral principles of law analysis. Applying neutral principles, plaintiffs conclude that they are entitled to ownership and control of the property because the deeds to the property are in the name of the local church or its trustees, the members of the local church provided all the funds for the purchase and maintenance of the church property, and the church constitution contained no express language granting a trust or proprietary right in favor of the UPCUSA.

Addressing these [****14] contentions, our analysis starts with a brief discussion of the general principles recognized by the courts in church-related disputes, then proceeds, in order, to a consideration of the deference rule, the neutral principles of law rule and the application of that rule to the facts of this case, and finally, to a consideration of implied trust principles.

I

The legal rules governing this dispute are derived from the Federal Constitution and have developed through a number of court decisions interpreting it.

HN1[↑] The First Amendment, binding on the States through the Fourteenth, prohibits the making of "laws respecting an establishment of religion, or prohibiting the free exercise thereof" (US Const, 1st Amdt, 14th Amdt; *Cantwell v Connecticut, 310 U.S. 296* [free exercise]; *Everson v Board of Educ., 330 U.S. 1* [establishment]). Consistent with these amendments civil courts are forbidden from interfering in or determining religious disputes. [***90] Such rulings violate the First Amendment because they simultaneously establish one religious belief as correct for the organization while interfering with the free exercise [**458] of the opposing faction's beliefs ([****15] *Maryland & Va. Churches v Sharpsburg Church, 396 U.S. 367, 369* [Brennan, J., concurring]; see Nowak, Rotunda & Young, Constitutional Law [2d ed], ch 19, § IV, pp 1071-1072; Tribe, American Constitutional Law, § 14-12, pp 870-872). The Constitution directs that religious [*117] bodies are to be left free to decide church matters for themselves, uninhibited by State interference (*Serbian Orthodox Diocese v Milivojevich, 426 U.S. 696*; *Kedroff v St. Nicholas Cathedral, 344 U.S. 94, 116)*.

In *Serbian Orthodox Diocese* (*supra*), the issues concerned the identity of the lawful bishop of the Serbian Eastern Orthodox Diocese for the United States and the validity of the division of the American-Canadian Diocese into three dioceses. A similar issue was presented in *Kedroff v St. Nicholas Cathedral* (*supra*) when the court was asked to determine which of two competing church organizations, the Russian Orthodox Church in America or its Russian counterpart, had the power to appoint the prelate of the New York Diocese. The Supreme Court refused to resolve these questions notwithstanding that the control of church properties was incidentally affected by the determinations. [****16] The court deferred to the ecclesiastical bodies because to do otherwise in an attempt to settle the property disputes would require the court to interpret church doctrine and involve it in matters which were predominantly religious disagreements.

These rulings controlled the trial court's disposition of plaintiffs' first demand for relief. To the extent that their complaint sought a declaration of their right to withdraw from the Presbytery, it was beyond the power of the court to grant that relief because the determination required an examination and interpretation of the authority of the Presbytery to permit or prevent withdrawal of a local church. And this was so even though the court might have found support for First Church's claim from the facts that the church constitution is silent on the issue and there is apparent precedent for unilateral withdrawal by a local church and dismissal to another denomination.

To the extent that plaintiffs' complaint seeks to enjoin defendants from interfering with its use of the property, however, the matter was properly entertained. At the time this action was before the court, the abstract issue of whether the local church had the right [****17] to withdraw from the Presbytery was not in the case (see *Presbytery of Riverside v Community Church, 89 Cal App 3d 910*, cert den *444 U.S. 974*; and *Presbytery of Elijah Parish Lovejoy v* [*118] *Jaeggi*, SW2d [Mo]). The Presbytery had not yet appointed a commission to replace the church Session and plaintiffs had terminated their relations with the Presbytery and refused to recognize its authority. Thus judicial resolution of this property dispute will not cause the court to intrude into the religious area because it is not required to decide which of two competing bodies is the lawful Session with authority to control the property (cf. *Serbian Orthodox Diocese v Milivojevich, 426 U.S. 696, supra*). Inasmuch as "the State has a legitimate interest in resolving property disputes, and * * * a civil court is a proper forum for that resolution" a determination of the issue submitted to us is

appropriate (see *Presbyterian Church v Hull Church, 393 U.S. 440, 445*; Note, Judicial Intervention in Church Property Disputes -- Some Constitutional Considerations, 74 Yale LJ 1113, 1130). Indeed, *HN2*[↑] the Supreme Court has specifically permitted State court resolution [****18] of church property disputes in these circumstances, i.e., when the denominational church has contested the right of the local church to withdraw, by holding that no Federal question is presented by the State court's ruling with respect to a property [***91] dispute in favor of the withdrawing faction (see *Maryland & Va. Churches v Sharpsburg Church, 396 U.S. 367*, [**459] dsmg app *254 Md 162, supra*).

II

Nevertheless, defendants contend, and the Appellate Division majority held, that even if the case is viewed as a contest over the right to control use of the property, the courts are bound to defer to the highest authority in the hierarchical church pursuant to the long-standing rule of *Watson v Jones* (13 Wall [80 U.S.] 679, *supra*). *Watson*, decided before the First Amendment was held applicable to the States, dealt with a dispute between two rival factions of the Walnut Street Presbyterian Church over control of the church premises. The deed to the property as well as the charter of the local church, "subjected both property and trustees alike to the operation of the general church's fundamental laws. "The minority faction seized control of the church [****19] and in the resulting litigation, the Kentucky courts ruled in its favor. The majority faction then brought an action in Federal court which sustained their claim and [*119] on appeal the United States Supreme Court affirmed. It noted that the local congregation was a member of a larger Presbyterian Church and subject to its authority and because the General Assembly had decided in favor of the majority faction, the courts were bound by that decision. Justice Miller speaking for the court stated that: "where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete [and] * * * whenever *the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them*" (13 Wall [80 U.S.], at pp 722, 727 [emphasis added]). This language forms the basis for the "complete deference" standard of review. [****20] It provides that all members of hierarchical organizations submit themselves to the decision-making authority of the church in ecclesiastical matters, excluding civil court involvement "[in] the absence of fraud, collusion or arbitrariness" (*Gonzalez v Archbishop, 280 U.S. 1, 16*).

Although apparently absolute in scope, the *Watson* decision did not pass on whether the courts could decide exclusively property issues in litigation involving a hierarchical church (see Note, Judicial Intervention in Church Property Disputes -- Some Constitutional Considerations, 74 Yale LJ 1113, 1120-1121). That question was answered in *Presbyterian Church v Hull Church (393 U.S. 440, supra)*. On facts analogous to *Watson*, the court recognized that church property disputes implicate the establishment and free exercise clauses of the First Amendment but held that the courts are free to decide such disputes if they can do so without resolving underlying controversies over religious doctrine. It indorsed the "neutral principles of law" analysis which has been developed for use in all property disputes and which can be applied without "establishing" churches to which the property is [****21] awarded (*Presbyterian Church v Hull Church, supra, at p 449*). This rule was later restated and approved in *Jones v Wolf (443 U.S. 595, supra)*. [*120] Thus even though members of a local group belong to a hierarchical church, they may withdraw from the church and claim title to real and personal property, provided that they have not previously ceded the property to the denominational church (Nowak, Rotunda & Young, Constitutional Law [2d ed], ch 19, § IV, p 1075). The fact that the Presbytery is part of a hierarchical body which may have determined the property dispute adversely to plaintiffs does not bind this court if it proves possible to decide the controversy [***92] through application of "neutral principles of law."

III

The neutral principles of law analysis has not been explicitly adopted by this [**460] State, although we applied the rule in *Avitzur v Avitzur (58 NY2d 108, 114-115*, cert den *U.S. , 104 S Ct 76* [civil court may enforce the secular terms of a religious marriage contract (Ketubah) through application of ordinary principles of contract law]). We do so in this action. Applying that analysis, we determine that the [****22] property shall remain in the control of plaintiff First Church.

In *Jones v Wolf* (*supra*), 164 members of the Vineville Presbyterian Church voted to separate from the Presbyterian Church in the United States (PCUS), while 94 members opposed such action. The majority then united with another denomination and retained possession of local church property. The Presbytery of Augusta-Macon appointed a commission to investigate the dispute and that commission ultimately ruled that the minority faction was the "true congregation" of the local church. Members of the minority faction then sued in State court seeking declaratory and injunctive orders establishing their right to exclusive possession and use of the local church property. Applying "neutral principles of law," the trial court granted judgment

for the majority and the Georgia Supreme Court affirmed. Although the Supreme Court approved the rationale of the State courts it vacated the judgment and remanded the case for further proceedings because they had failed to address the additional complicating factor that the congregation was itself divided. That problem is absent in this case because the four members who did not [****23] [*121] wish to withdraw from the Presbytery have not contested the action of the overwhelming majority of the church membership, and without the dissenters' involvement, the case may properly be viewed as no more than a dispute between the general church and the local congregation.

In *Jones* the Supreme Court held that a State court is entitled to adopt a "neutral principles of law" analysis as a means of resolving church property disputes, but it is not required to do so. Judicial deference to a hierarchical organization's internal authority remains an acceptable alternative mode of decision. We choose to recognize the neutral principles of law analysis and we apply it here. We do so in the belief that when properly applied it avoids drawing civil courts into religious controversies by focusing on evidence from which the court may discern the objective intention of the parties and it also permits the State to protect its legitimate interests in securing titles to property. The rule is explicitly designed to achieve that end (see *Jones v Wolf, 443 U.S. 595, 603-604, supra*). It is completely secular in operation, it is flexible enough to accommodate all forms of [****24] religious organizations and it relies upon well-established principles of law familiar to Judges and lawyers. It also provides predictability so that religious organizations may order their affairs to account for its application. Moreover, we agree with those who have observed that the doctrine is preferable to deference because it does not prefer one group of disputants to another. The deference approach assumes that the local church has relinquished control to the hierarchical body in all cases, thereby frustrating the actual intent of the local church in some cases. Such a practice, it is said, discourages local churches from associating with a hierarchical church for purposes of religious worship out of fear of losing their property and the indirect result of discouraging such an association may constitute a violation of the free exercise clause. Additionally, by supporting the hierarchical polity over other forms and permitting local churches to lose control over their property, the deference rule may indeed constitute a judicial establishment of religion (see Adams & Hanlon, *Jones* v. *Wolf*: Church Autonomy and the [***93] Religion Clauses of the First Amendment, [****25] 128 U of Pa L Rev 1291, 1337).

[*122] *HN3*[↑] In applying neutral principles, the focus is on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the [**461] ownership and control of church property (*Jones v Wolf, 443 U.S. 595, 603, supra*, citing *Maryland & Va. Churches v Sharpsburg Church, 396 U.S. 367, 368*, dsmg app *254 Md 162, supra*). The court must determine from them whether there is any basis for a trust or similar restriction in favor of the general church, taking special care to scrutinize the documents in purely secular terms and not to rely on religious precepts in determining whether they indicate that the parties have intended to create a trust or restriction. The trial court correctly applied these principles in ruling in plaintiffs' favor.

First, under familiar property law principles, plaintiff church held record title to the property free from any competing interests. The deeds by which plaintiff church acquired the several parcels of realty all named First Church or its trustees as grantees, their operative [****26] provisions contained no forfeiture or reversion clauses in favor of the various grantors or UPCUSA and the record does not indicate that any of the property was acquired by restrictive gift. None of the deeds include language of trust or restriction vesting a present or future interest in the Albany Presbytery or the UPCUSA.

Turning to the local charter, plaintiff church apparently filed two certificates of incorporation, the first in 1803 and the second in 1809 and these certificates are silent on the question of how the property is to be owned.

Next, State law provides that property disputes involving the Presbyterian Church are controlled by subdivision 3 of *section 69 of the Religious Corporations Law*. It requires that trustees of the local church govern the property in accordance with the constitution of the UPCUSA (see, e.g., *Trustees of Presbytery v Westminister Presbyt. Church, 222 NY 305*). However, these provisions of the Religious Corporations Law are not applicable to churches incorporated prior to 1828 if the statute is inconsistent with the law as it existed at the time of incorporation, unless the church reincorporates after 1828 or the trustees determine [*123] [****27] by resolution that the provisions of the Religious Corporations Law shall apply (*Religious Corporations Law, § 24*). The exception governs this case inasmuch as the law in 1803, the date of incorporation, is inconsistent with *section 69* (see *Matter of First Presbyt. Soc., 106 NY 251, 254*), there was no reincorporation by plaintiff church subsequent to 1828 and the trustees never resolved to make the statute applicable. Indeed the fact that plaintiff church, acting through its trustees, chose not to bring itself within the scope of *section 69*, relying instead upon prior law giving it undisputed ownership, is evidence that ownership rests with plaintiffs.

The last item to be considered is the constitution of the

denominational church, known as the Book of Order. In examining it, the court may look only to provisions relating to property and it must interpret them in a secular light. The Book contains no provision which creates an express trust in favor of the UPCUSA. But defendants rely upon the wording in two chapters to support their view that the denominational church is intended to retain control of local church property in the event of a schism. In chapter XXXII of part [****28] II, entitled "Of Incorporation and of Trustees", section 62.11 provides that whenever a local church is dissolved, "such property as it may have * * * shall be held * * * as the presbytery may direct * * * in conformity with the Constitution of The United Presbyterian Church in the United States of America." That provision is inapplicable because plaintiff church is not undergoing a dissolution or extinction. Defendants also refer the court to the provisions [***94] in chapter XI of part II, entitled "Of the Session". Section 41.07 of chapter XI provides that the "session", which is the governing body of the local church, has "exclusive authority over the uses to which the church buildings and properties may be put." (See, also, Book of Order, ch XI, § 41.08; ch XXXII, § 62.08.) Section 41.15 authorizes the regional governing body [**462] within UPCUSA, the "presbytery", to appoint a "commission" to take the place of the local church's "session", with the full powers of the "session", in the event "the session of a particular church is unable or unwilling to manage wisely the affairs of its church". These provisions, relied upon by the concurring Justice at the Appellate [****29] Division as establishing an [*124] intent to create a beneficial interest in the denominational church, are located outside the property section of the Book of Order. They deal with church government and relate only indirectly to the control of property. They set forth the mechanism of church government in the event of a church dispute and any inquiry into their meaning by a court is constitutionally foreclosed because it would require the court to choose between the insurgent Session and the commission or "replacement Session." Moreover, the authority of the Session to direct control of property in such a dispute is belied by the constitution itself in view of the fact that other sections of the Book ascribe to the Session power which is purely spiritual (part II, ch V, § 35.03). In view of this ambiguity, these provisions should be discounted, leaving nothing in the Book of Order to support defendants' position.

IV

Finally, we address the argument that in the absence of a specific understanding or agreement preserving a separate entity and expressing an intention to withhold property, it is presumed that the local church intended to dedicate the property to the purposes [****30] of the larger body by voluntarily merging itself with it (see *Mills v Baldwin*, 362 So 2d 2 [Fla], vacated and remanded *443 U.S. 914*). This represents an application of the implied trust doctrine which we have recognized in other contexts (see *St. Joseph's Hosp. v Bennett, 281 NY 115*). It is not applicable here.

HN4[↑] There are three types of implied trusts in church property disputes: (1) an implied trust for the benefit of those members of a divided congregation who adhere to the principles of the founders of the religion (see *Attorney Gen. ex rel. Mander v Pearson*, 3 Mer 353, 36 Eng Rep 135); (2) an implied trust for the denominational church; and (3) an implied trust for the members of the congregation (see Note, Judicial Intervention in Disputes Over the Use of Church Property, 75 Harv L Rev 1142). Only the first two types concern us. An implied trust for the members of the congregation, by definition, would not benefit this denominational church.

[*125] The first type of trust must be rejected where it leaves the courts in the position of determining what the original principles of the church were -- the inquiry into doctrine precluded by *Presbyterian Church [****311 v Hull Church (393 U.S. 440, supra)* and earlier State decisions (see *Gram v Prussia Emigrated Evangelical Lutheran German Soc., 36 NY 161*; *Petty v Tooker, 21 NY 267*; *Robertson v Bullions, 11 NY 243*; see Tribe, American Constitutional Law, § 14-12, pp 872-875). Nor can there be an implied trust of the second type, for to establish such a trust there must be a sufficient manifestation of the intention to do so. (*Restatement, Trusts 2d, § 23*.) First Church acquired the property on its own without any funding assistance from the denominational church and there is no evidence that it intended to hold the property in trust. The evidence is just the other way. First Church took no action from which an intent to create a trust may be implied and it had no notice or knowledge that the Presbytery or UPCUSA claimed that an implied trust existed prior to this dispute. The trustees of First Church failed to pass a resolution bringing the church within the statutory trust provision [***95] of *section 69 of the New York Religious Corporations Law* and no other commitment in writing was undertaken to create one (see *Presbytery of Riverside v Community Church, 89 Cal [****32] App 3d 910, supra*). Additionally, not only does the Book of Order contain no provision of trust, but in 1929 UPCUSA proposed an amendment to the church [**463] rules establishing a trust of all church properties for the denominational church and the amendment failed to receive the necessary votes of the Presbyteries for passage. The mere fact of First Church's association with the denominational body, even an association lasting 200 years, does not by itself support a finding that an implied trust was created.

Accordingly, the order of the Appellate Division, insofar as

appealed from, should be reversed, without costs, and the judgment of Trial Term reinstated.

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3 N.Y.2d 476
Court of Appeals of New York.

RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE CHURCH OF THE HOLY TRINITY et al., Respondents,
v.
William H. MELISH et al., Appellants.

Dec. 5, 1957.

Action for declaratory judgment with respect to election of rector of parish and for injunctive relief. The Supreme Court, Special Term, Kings County, John MacCrate, Official Referee, 3 Misc.2d 997, 155 N.Y.S.2d 792, dismissed complaint and adjudged rector was not lawfully elected, and plaintiffs appealed. The Appellate Division, 4 A.D.2d 256, 164 N.Y.S.2d 843, reversed, and defendants appealed. The Court of Appeals, Desmond, J., held that general canon of Protestant Episcopal Church providing that of any body consisting of several members, a majority of members, the whole having been duly cited to meet, shall be a quorum and majority of quorum so convened shall be competent to act governed as to matter of quorum at meetings of vestry with respect to election of rector rather than Religious Corporation Law, and therefore, where six of eleven members of vestry were present at meetings at which rector was elected, canon's test of validity was satisfied and rector was properly elected.

Judgment affirmed.

West Headnotes (3)

[1] **Religious Societies**
Ordination, Call, Employment, or Settlement

General canon of Protestant Episcopal Church providing that of any body consisting of several members, a majority of members, the whole having been duly cited to meet, shall be a quorum, and majority of quorum so convened shall be competent to act, governed as to matter of quorum at meetings of vestry with respect to election of rector, rather than Religious Corporations Law, and therefore, where six of eleven members of vestry were present at meetings at which rector was elected, canon's test of validity was satisfied and rector was properly elected. Religious Corporations Act, §§ 25, 41, 42.

7 Cases that cite this headnote

[2] **Religious Societies**
Ordination, Call, Employment, or Settlement

Section of Religious Corporations Law providing that vestry may, subject to canons of Protestant Episcopal Church in United States, and of diocese in which parish or church is situated, by majority vote, elect rector to fill a vacancy occurring in rectorship of parish, was plain statement that majority of whole vestry had power to call rector and that power was subject to general canons of church rather than subject to Religious Corporations Law, which set forth other standards by which quorum of vestry could be determined. Religious Corporations Law, §§ 25, 41, 42.

6 Cases that cite this headnote

[3] **Religious Societies**
Ordination, Call, Employment, or Settlement

Amendment to Religious Corporations Law providing that no provisions of law authorized calling, settlement, dismissal or removal of minister, or fixing or changing of his salary, confirmed fact that matter of election of rector for Protestant Episcopal Church was not to be

governed by section of Religious Corporations Law setting forth requirements to constitute a quorum of vestry or Board of Trustees in order to act. Religious Corporations Law, §§ 25, 41, 42.

4 Cases that cite this headnote

Attorneys and Law Firms

***953 **686 *477** Raphael H. Weissman, Brooklvn, Hubert T. Delany and Bernard Reswick, New York City, for appellants.

***479** George L. Hubbell, Jr., and Edward J. Walsh, Jr., New York City, for respondents.

Jackson A. Dykman and Hunter L. Delatour, Brooklyn, for The Right Reverend James P. De Wolfe, Bishop of Long Island, amicus curiae, in support of respondents' position.

Opinion

***954 *480** DESMOND, Judge.

This action is for a judgment declaring plaintiff Sidener to be the rector of the Episcopalian Church of the Holy Trinity in Brooklyn, and restraining defendants from interfering with the conduct of religious services therein or with the property, funds and management of the church. The Official Referee dismissed the complaint after a trial but the Appellate Division reversed and ordered judgment as demanded in the complaint. The only real question is: were there lawful quorums present at the two vestry meetings which by vote of a majority of the whole number of authorized members chose plaintiff Sidener as rector?

Defendants Ramel, Brooks and Burke were at the time of the vestry meetings, February 6 and 7, 1956, hereafter referred to, members of the parish vestry. Defendant Melish was assistant minister of the Church of the Holy Trinity from 1939 and by vestry action in 1951 had been authorized to continue as assistant until a new rector should be elected and installed (to fill a vacancy which had existed since 1949) and until such election should be 'canonically finalized'. On February 6 and 7, 1956 the vestry as authorized by Trinity Church's charter and by statute (see Religious Corporations Law, Consol.Laws, c. 51, s 41) consisted of 2 churchwardens and 9 vestrymen but there were 2 vacancies among the vestrymen. Had there been a rector he would have been an additional member ex officio (Religious Corporations Law, s 41). On each of those February dates there was held a vestry meeting duly called by the clerk and presided over by a churchwarden (see Religious Corporations Law, s 42). In attendance at those meetings were the 2 churchwardens and 4 of the vestrymen, being a majority of the whole authorized vestry of 11. Defendants Ramel, Brooks and Burke refused to attend. At the first of those two meetings the 6 members present communicated to the Ecclesiastical Authority (the Bishop) of the Diocese of Long Island, in which this parish is situated, their proposal to elect Dr. Sidener as rector. On February 7, 1956 the Ecclesiastical Authority notified the vestry of approval of such election (see General Canon 47, subd. 2) and at the meeting of February 7, 1956 the election of Dr. Sidener and the fixing of his salary and allowance, etc., was unanimously voted by the 6 members present. Later an 'instrument of presentation' of the new rector was signed by the churchwardens and recorded in the diocesan archives (see General Canon 47, subd. ***481** 3). On a later day, the Bishop conducted a ceremony instituting Dr. Sidener as rector (see Book of Common Prayer, p. 569, which is part of the Canon Law). The approval of the Bishop is required by the Canons of the General Convention of the Church in the United States and the canons of the Diocese of Long ***955** Island, and was in this instance given as so required. However, defendant Melish and the 3 defendant vestrymen disputed and continue to dispute the validity of the election.

The Official Referee held that each of the February, 1956 meetings lacked a quorum. His reliance was on that part of section **687 42 of the Religious Corporations Law, which reads thus:

'To constitute a quorum of the vestry or board of trustees, there must be present either:

'1. The rector and at least a majority of the whole number of wardens and vestrymen, or

'2. One churchwarden and one more than a majority of the vestrymen or both churchwardens and a majority of

the vestrymen'.

[1] Neither of those requirements, wrote the Referee, was satisfied by the attendance of 2 churchwardens and 4 vestrymen. The dissent in the Appellate Division expressed that same view. The Appellate Division majority took these positions: first, that since the election of a rector is an ecclesiastical matter the law of the church rather than civil statute law must under our Federal Constitution be controlling (Watson v. Jones, 13 Wall. 679, 20 L.Ed. 666; Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120); second, that because of the constitutional prohibition against State interference in such matters section 42 (supra) is to be construed as not applicable to such an election; third, that certain language in section 42 and in section 25 of the Religious Corporations Law justifies a holding that the above-quoted quorum provisions of section 42 are not applicable to meetings held for the election of a rector, and, fourth, that the Bishop's official and formal pronouncement of Dr. Sidener's election was evidence of the church law as to quorum. The Presiding Justice, writing a concurring opinion for reversal, found it unnecessary to discuss the constitutional question posed by the majority of his court. He concluded (and so do we) that on their face and in their setting and in the light of legislative history the quorum requirements of section 42 have no reference to the election of a rector, and that the only applicable ***482** law is the Canon law of the church. Section 2 of General Canon 11 of the Protestant Episcopal Church of the United States says that of any body consisting of several members, 'a majority of said members, the whole having been duly cited to meet, shall be a quorum; and a majority of the quorum so convened shall be competent to act'. These two meetings of the Holy Trinity vestry were attended by a majority of the whole number of the vestry and all voted for Dr. Sidener's election, so the Canon's tests of validity were satisfied.

Accordingly, and passing over all other questions as unnecessary to this discussion, we will do no more than state our reasons for agreeing that *****956** the quorum rules of section 42 have no relevance here. That section is a long one and deals with many details as to membership, meetings and powers of Episcopalian parish vestries. In one form or another there has been such a statute in this State since the early nineteenth century (see Rev.L.1813, ch. 60 (2 Van N. & W. 212, 213)) and it has always authorized the vestry to call or elect a rector. When the original Religious Corporations Law was enacted in 1895 (L.1895, ch. 723) it included an article II headed 'Special Provisions for the Incorporation and Government of Protestant Episcopal Parishes or Churches' quite similar to present article 3 of the Religious Corporations Law. That 1895 revision or consolidation of the general laws respecting religious bodies contained two new statements pertinent to our inquiry. For the first time there were requirements as to the necessary quorum for vestry meetings, as follows (s 32):

'To constitute a quorum of the vestry or board of trustees there must be present either:

'1. The rector, at least one of the churchwardens, and a majority of the vestrymen or

****688** '2. The rector, both churchwardens and one less than a majority of the vestrymen, or

'3. If the rector be absent from the diocese and shall have been so absent for over four calendar months, or if the meetings be called by the rector and he be absent therefrom, or be incapable of acting, one churchwarden and a majority of the vestrymen, or both churchwardens and one less than a majority of the vestrymen.'

Not only did these quoted requirements not refer specifically to the election of a rector but in the same revision there was ***483** another change which could have no purpose other than to make it clear that the election of a rector was to be controlled not by the Religious Corporations Law but by Canon law. The statute had since 1705 authorized the vestry to elect a rector (1 Colonial Laws of N. Y., p. 578). The 1895 revision added a reference to Canon law, making the last sentence of then section 32 read exactly as does the last sentence of present section 42 of the Religious Corporations Law: 'The vestry may, subject to the canons of the Protestant Episcopal church in the United States, and of the diocese in which the parish or church is situated, by a majority vote, elect a rector to fill a vacancy occurring in the rectorship of the parish, and may fix the salary or compensation of the rector.'

[2] That is a plain statement that a majority of the whole vestry has the power to call a rector, but that their exercise of that power is subject to the General Canons of the American Church. As we have seen, General Canon 11 makes a majority of the whole membership a quorum *****957** and makes a majority of such quorum competent to act. Thus, the two February, 1956 meetings we are examining had valid quorums and took action by a

sufficient majority vote. This without more decides the present lawsuit and calls for an affirmance.

[3] And all this is confirmed by another change made by chapter 720 of the Laws of 1899 which added to the Religious Corporations Law a section 20 (now s 25) which is applicable to all religious groups and states: 'No provision of this act authorizes the calling, settlement, dismissal or removal of a minister, or the fixing or changing of his salary, and a meeting of a church corporation for any such purpose shall be called, held, moderated, conducted, governed and notice of such meeting given and person to preside thereat ascertained and the qualification of voters thereat determined, not as required by any provision of this act but only according to the aforesaid laws and regulations, practice, discipline, rules and usages of the religious denomination or ecclesiastical governing body, if any, with which the church corporation is connected.' Thus, since 1899 we have had a complete exclusion, from any coverage of the Religious Corporations Law and as to any denomination, of the choice or removal of a minister of religion and an acknowledgment by the Legislature that all such questions are for the denomination itself to regulate by its own laws and usages.

***484** We will, however, answer briefly the arguments made by appellants from section 42.

As we have pointed out, the 1895 Religious Corporations Law in its general provisions for vestry quorums (then s 32) called for the presence either of the rector plus one churchwarden plus a majority of the vestrymen or the rector plus both churchwardens and one less than a majority of the vestrymen; if the rector were absent or incapable of acting, then for a quorum there were needed either one churchwarden and a majority of vestrymen or both churchwardens and one less than a majority of vestrymen. To this there were made in 1919 (L.1919, ch. 267) two changes and it is on appellants' version of the purpose and meaning of these ****689** 1919 changes that they chiefly rely. In that year the Legislature took notice of a situation which could arise (and presumably had arisen) where a rector might refuse to call a meeting. The statute, as it then read, provided that if there be a rector a vestry meeting must be called by him. Furthermore, the quorum requirements of section 42 in that pre-1919 form called for the presence of a rector unless he was necessarily absent though in office. To provide for this situation where a rector held office but refused to call the vestry into session, the section was amended in two respects. First, there was described a new method whereby in the event of a rector's failure or refusal to issue the call, the clerk might do so on written request by two thirds of the whole vestry. Having thus created a way to call the meeting without the rector's consent, the Legislature ***958** then made it possible legally to hold the vestry meeting without the rector's participation. This was done by changing to its present wording the second numbered quorum rule in section 42. Appellants say this change means that any vestry meeting of any kind held without the rector's presence requires for a quorum 'one churchwarden and one more than a majority of the vestrymen or both churchwardens and a majority of the vestrymen'. Therefore, say appellants, the presence at the February, 1956 meetings of 2 churchwardens and 4 only of the 9 vestrymen was not a quorum. There are two answers to this. As we have seen, the last sentence of section 42, together with section 25, says that as to the calling of a rector, the pertinent quorum provisions are those of the Canon law, and here the Canon law requirements were certainly satisfied. Secondly and we ***485** have discussed this, too, above the 1919 changes in section 42 as to quorums were intended to cover only the special circumstance of a rector in office refusing to call or attend a meeting. Such statutory revisions could not have any relevance to the election of a new rector.

We pass on no other questions.

The judgment should be affirmed, with costs.

CONWAY, C. J., and DYE, FULD, FROESSEL, VAN VOORHIS and BURKE, JJ., concur.

Judgment affirmed.

All Citations

3 N.Y.2d 476, 146 N.E.2d 685, 168 N.Y.S.2d 952

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Rector, Churchwardens and Vestrymen of Church of the Holy..., 3 N.Y.2d 476 (1957)
146 N.E.2d 685, 168 N.Y.S.2d 952

Kamchi v Weissman

Supreme Court of New York, Appellate Division, Second Department

December 31, 2014, Decided

2012-08726

Reporter
125 A.D.3d 142 *; 1 N.Y.S.3d 169 **; 2014 N.Y. App. Div. LEXIS 9021 ***; 2014 NY Slip Op 09109 ****; 39 I.E.R. Cas. (BNA) 997

[****1] David Kamchi et al., Appellants, v Charna Weissman, Individually and as President of the Board of Trustees of Congregation Shaarey Israel, et al., Respondents. (Index No. 34344/11)

Subsequent History: As Corrected March 10, 2015.

Prior History: Appeal from an order of the Supreme Court, Rockland County (Linda S. Jamieson, J.), dated July 19, 2012. The order granted defendants' motion to dismiss the complaint pursuant to *CPLR 3211 (a) (7)* for failure to state a cause of action.

Kamchi v Weissman, 2012 NY Slip Op 33729(U), reversed.

Kamchi v Weissman, 2012 N.Y. Misc. LEXIS 6687, 2012 NY Slip Op 33729(U) (N.Y. Sup. Ct., July 19, 2012)

Core Terms

Congregation, Religious, Corporations, cause of action, bylaws, defendants', renew, defamation, malice, fail to state a cause of action, church, member of the congregation, hiring, settle, spiritual leader, damages, salary, qualified privilege, qualified immunity, gross negligence, no power, fixing the salary, motion to dismiss, plaintiffs', services, usurped, terms, internal quotation marks, allegations, constitutes

Case Summary

Overview

HOLDINGS: [1]-A trial court erred by interpreting *Religious Corporations Law § 200* to mean that a Jewish congregation's board of trustees did not have the power to "settle" or "remove" or "fix" the salary of a rabbi because a more natural reading of *§ 200* indicated the board lacked the power to, inter alia, "remove" or terminate the rabbi's engagement; by refusing to allow the congregation to vote on the issue of extending or renewing the rabbi's contract, the board usurped the congregation's authority; [2]-The board's trustees were not entitled to qualified immunity under *N-PCL 720-a* in a defamation action by the former rabbi and the congregation because there was a reasonable probability the rabbi and the congregation could establish the trustees' actions in refusing to allow the congregation to vote constituted gross negligence or were intended to cause the resulting harm.

Outcome

Order reversed and motion to dismiss denied.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] In assessing the adequacy of a complaint under *CPLR 3211(a)(7)*, a court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true, and afford the plaintiff the benefit of every possible favorable inference.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] A court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to *CPLR 3211(a)(7)*. *CPLR 3211(c)*. If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one. Yet, affidavits submitted by a defendant will almost never warrant dismissal under *CPLR 3211* unless they establish conclusively that the plaintiff has no cause of action. Indeed, a motion to dismiss pursuant to *CPLR 3211(a)(7)* must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute

exists regarding it.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN3[] The primary purpose of the Religious Corporations Law is to provide an orderly method for the administration of the property and temporalities dedicated to the use of religious groups, and to preserve them from exploitation by those who might divert them from the true beneficiaries of the corporate trust. The general powers and duties of the trustees of religious corporations are set forth in *Religious Corporations Law § 5*. *Section 5* grants trustees authority to take certain specified actions in furtherance of their general powers and provides that duly adopted bylaws will control their actions.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN4[] See *Religious Corporations Law § 5*.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN5[] See *Religious Corporations Law § 200*.

Governments > Legislation > Interpretation

HN6[] When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the legislature. The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning.

Governments > Legislation > Interpretation

HN7[] Meaning and effect should be given to every word of a statute.

Governments > Legislation > Interpretation

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN8[] A more natural reading of the provision "the trustees shall have no power to settle or remove or fix the salary of the minister" in *Religious Corporations Law § 200* establishes that "settle or remove" do not modify "the salary of the minister." A more natural reading of this passage would be that the terms "settle," "remove," and "fix the salary of" all modify "the minister." Under this reading, the trustees have no power to settle, or hire, the minister; they have no power to remove, or terminate the engagement of, the minister; and, finally, they have no power to fix the salary of the minister.

Governments > Legislation > Interpretation

HN9[] Words in a statute are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning.

Governments > Legislation > Interpretation

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN10[] The Second Department's interpretation of *Religious Corporations Law § 200*, prohibiting trustees from settling or removing a minister, or fixing his or her salary, is supported by the consistent, and quite similar, language set forth in *Religious Corporations Law § 5*. In this regard, a statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent. Furthermore, each section of a legislative act must be considered and applied in connection with every other section of the act, so that all will have their due, and conjoint effect.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN11[] *Religious Corporations Law § 200* precludes trustees from "settling" or "removing" a minister.

Torts > ... > Defamation > Elements > General Overview

Torts > Intentional Torts > Defamation > Defamation Per Se

HN12[] The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.

Torts > ... > Defamation > Elements > General Overview

Torts > Intentional Torts > Defamation > Procedural Matters

HN13[] Since falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action. In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff. Whether a particular statement constitutes an opinion or an objective fact is a question of law.

Torts > ... > Defamation > Defenses > Fair Comment & Opinion

HN14[] Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation. The Court of Appeals of New York has characterized the matter of distinguishing between opinion and fact for purposes of defamation analysis as "a difficult task." Factors to be considered in performing this task include: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.

Torts > ... > Defenses > Privileges > Absolute Privileges

Torts > ... > Defenses > Privileges > Qualified Privileges

HN15[] Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether. When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only conditionally privileged. One such conditional, or qualified, privilege extends to a communication made by one person to another upon a subject in which both have an interest. This qualified privilege has been applied to communications carried out in furtherance of a common interest of a religious organization. The rationale for applying this qualified privilege in circumstances such circumstances is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded.

Torts > ... > Defenses > Privileges > Qualified Privileges

Torts > Intentional Torts > Defamation > Procedural Matters

HN16[] The protection of the so-called "common interest" qualified privilege may be dissolved if a plaintiff can demonstrate that the defendant spoke with malice. To establish the malice necessary to defeat the privilege, the plaintiff may show either common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth.

Torts > Intentional Torts > Defamation > Procedural Matters

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN17[] For purposes of a defamation action, since the burden does not shift to the nonmoving party on a motion made pursuant to *CPLR 3211(a)(7)*, a plaintiff has no obligation to show evidentiary facts to support his or her allegations of malice on a motion to dismiss pursuant to *CPLR 3211(a)(7)*.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN18[] See *N-PCL 720-a*.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN19[] *N-PCL 720-a* confers a qualified immunity on uncompensated directors, officers, and trustees of certain not-for-profit corporations.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Immunity

HN20[] On a defendant's motion pursuant to *CPLR 3211(a)(11)* to dismiss a complaint premised on the qualified immunity conferred by *N-PCL 720-a*, a court must first determine whether the defendant is entitled to the benefit of *N-PCL 720-a* immunity. If so, the court must then determine whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. Only if the court finds that the defendant is entitled to the benefits of *N-PCL 720-a* immunity, and finds that there is no reasonable probability of gross negligence or intentional harm, will the defendant be entitled to dismissal of the causes of action asserted against that defendant.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN21[] Unlike the low threshold for defeating a motion to dismiss under other provisions of *CPLR 3211*, a plaintiff faced with a motion pursuant to *CPLR 3211(a)(11)* should lay bare proof supporting the alleged grossly negligent or intentional conduct and the mere possibility that such proof can develop does not suffice to keep the case alive.

Headnotes/Syllabus

Headnotes

Religious Corporations and Associations — Meetings — Power of Trustees to Remove Minister

1. Supreme Court erred in dismissing the claims by plaintiff religious congregation members under *Religious Corporations Law §§ 5* and *200* and the congregation's bylaws arising out of a vote by defendants, members of the congregation's Board of Trustees, denying the congregation's Rabbi renewal or extension of his employment contract without allowing plaintiffs an opportunity to be heard in the decision. The provision in *section 200* that the trustees "shall have no power to settle or remove or fix the salary of the minister" does not pertain solely to the salary of the minister. A more natural reading of this passage would be that the terms "settle," "remove," and "fix the salary of" all modify "the minister." Under this reading, which is supported by similar language in *Religious Corporations Law § 5*, the trustees would have no power to settle, or hire, no power to remove, or terminate the engagement of, or fix the salary of the minister. Moreover, the congregation's bylaws did not limit its authority to the hiring of a Rabbi only, but rather authorized its members to "vote on any question affecting the congregation," including the choice of a spiritual leader and whether to renew his or her appointment. Defendants therefore lacked authority to remove the Rabbi and, by refusing to allow plaintiffs to act on the matter, usurped plaintiffs' authority.

Libel and Slander — Actionable Words — Assertions of Fact

2. In an action by members of a religious congregation asserting a defamation claim arising out of alleged statements by defendant member of the congregation's Board of Trustees that the congregation's Rabbi failed to lead services and perform outreach, used an inappropriate prayer book, and failed to control the kosher validation of the kitchen, such statements constituted actionable assertions of fact. Only statements alleging facts can properly be the subject of a defamation action. Whether a particular statement constitutes an opinion or an objective fact is a question of law to be determined based on factors such as whether the language at issue has a precise meaning which is readily understood, whether the statements are capable of being proven true or false, and whether the context and surrounding circumstances signal to readers or listeners that what is being read or heard is likely to be opinion, not fact. The statements at issue here had precise meanings which were readily understood and were thoroughly capable of being proven true or false. Thus, plaintiffs' defamation cause of action was not subject to dismissal on the ground that the alleged statements constituted non-actionable expressions of opinion.

Libel and Slander — Privilege — "Common Interest" Qualified Privilege

3. The alleged defamatory statements by defendant member of a religious congregation's Board of Trustees to other congregation members that the congregation's Rabbi failed to lead services and perform outreach, used an inappropriate prayer book, and failed to control the kosher validation of the kitchen were not protected by the "common interest" qualified privilege. The privilege shields from litigation communications made by one person to another upon a subject in which both have an interest, and has been applied to communications carried out in furtherance of a common

interest of a religious organization. The rationale for applying this qualified privilege in such circumstances is that, so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded. However, the privilege may be dissolved if the plaintiff can show that the defendant spoke with either common-law or actual malice. Here, plaintiffs alleged that the "false" statements were intended to and did undermine the Rabbi's authority as the spiritual leader of the congregation and to interfere with efforts to secure the Rabbi's continued employment, and also reflected adversely on the Rabbi's competence and harmed his standing and reputation with congregants and the community. Plaintiffs therefore sufficiently alleged that defendant made false statements of fact with common-law malice so as to overcome the common interest qualified privilege. Moreover, as the alleged statements would tend to injure the Rabbi in his trade, business, or profession, and thus would constitute slander per se, plaintiffs were not required to allege or prove special damages.

Corporations — Not-For-Profit Corporation — Qualified Immunity of Board of Trustees

4. In an action to recover damages arising out of a vote by defendants, members of a not-for-profit religious corporation's Board of Trustees, to deny the congregation's Rabbi renewal or extension of his employment contract without allowing plaintiff congregation members an opportunity to be heard in the decision, defendants were not entitled to dismissal of the complaint pursuant to *CPLR 3211 (a) (11)* premised on the qualified immunity conferred by *N-PCL 720-a*. Since defendants were serving, without compensation, as trustees of a not-for-profit corporation and the wrongs alleged were the result of conduct undertaken in the execution of those roles, they established, as an initial matter, their entitlement to the benefit of *N-PCL 720-a* immunity. However, plaintiffs alleged that defendants refused to allow congregants to vote on the matter notwithstanding petitions and letters requesting to do so and that defendants made defamatory statements with malice. Essentially all of plaintiffs' allegations thus involved the intentional infliction of harm by defendants. Therefore, on this record, there was a reasonable probability that plaintiffs could establish that defendants' actions constituted gross negligence or were intended to cause the resulting harm.

Counsel: [***1] *Kaiser Saurborn & Mair, P.C.*, New York City (*Henry L. Saurborn, Jr.* of counsel), for appellants.

Savad Churgin, Nanuet (*Susan Cooper* and *Joseph Churgin* of counsel), for respondents.

Zane and Rudofsky, New York City (*Edward S. Rudofsky* of counsel), for amicus curiae United Synagogue of Conservative Judaism.

Judges: PETER B. SKELOS, J.P., THOMAS A. DICKERSON, JOHN M. LEVENTHAL, L. PRISCILLA HALL, JJ. SKELOS, J.P., LEVENTHAL and HALL, JJ., concur.

Opinion by: THOMAS A. DICKERSON

Opinion

Dickerson, J.

Introduction

The plaintiffs are members of the Congregation Shaarey Israel (hereinafter the Congregation), [***2] and the Congregation's former rabbi, Michael Dick (hereinafter the Rabbi). The defendants include members of the Congregation's Board of Trustees (hereinafter the Board). The Rabbi had been employed as rabbi of the Congregation by an agreement which was to expire on July 31, 2011. As that date approached, the Board voted to deny the Rabbi renewal or extension of his employment agreement. According to the plaintiffs, on several occasions, members of the Congregation called for a congregation-wide vote on the matter. However, the Board refused to allow such a vote. The plaintiffs commenced this action alleging that [*145] the Board had usurped the Congregation's authority to choose its own spiritual leader, in violation of both *Religious Corporations Law § 200* and the Congregation's bylaws, by not only declining to extend or renew the Rabbi's contract, but by also blocking the Congregation members' efforts to be heard and participate in this decision. The defendants moved to dismiss the complaint, inter alia, for failure to state a cause of action. The Supreme Court granted that branch of the motion which was to dismiss the complaint for failure to state a cause of action, concluding that neither Religious [****2] Corporations Law [***3] *§ 200* nor the Congregation's bylaws prohibited the Board from making the determination not to renew or extend the Rabbi's contract. For the reasons that follow, we conclude that Religious Corporations Law and the Congregation's bylaws do not grant the Board the power to make the determination to remove a rabbi. We further conclude that the plaintiffs have viable causes of action premised on the defendants' alleged violation of Religious Corporations Law and the Congregation's bylaws based on their allegations that the Board made its determination not to renew or extend the Rabbi's employment contract in the face of opposition from members of the Congregation who were denied an opportunity to vote on the matter. Accordingly, the

Supreme Court erred in granting that branch of the defendants' motion which was pursuant to *CPLR 3211 (a) (7)* to dismiss the complaint for failure to state a cause of action.

Factual and Procedural Background

The plaintiffs David and Lynn Kamchi and Carol Boxer are members of the Congregation. The Rabbi is an ordained rabbi, and was formerly the rabbi of the Congregation. The defendants are members of the Board, including the defendant Charna Weissman, who, at all relevant times, was [***4] the president of the Congregation.

As set forth in the complaint, by written agreement dated March 24, 2009, the Congregation agreed to employ the Rabbi for a three-year term, from August 1, 2008, through July 31, 2011. On October 28, 2010, at a meeting of the Board, Weissman, without issuing prior notice that such [**173] a decision was under consideration, proposed that the Rabbi be denied renewal or extension as spiritual leader of the Congregation. A vote was taken and the Board approved Weissman's proposal.

On November 18, 2010, the Board held another meeting. At that meeting, members of the Congregation objected to the Board's vote, claiming that it violated the Congregation's [*146] bylaws as well as New York statutory law. These members called for a vote by the entire Congregation as to whether to extend or renew the Rabbi's agreement to act as spiritual leader of the Congregation. The Board refused to allow such a vote to go forward.

In December 2010, 12 Board members submitted a petition demanding that Weissman call a special meeting of the Congregation to discuss the continued employment of the Rabbi by the Congregation following the expiration of his original agreement and, thereafter, for [***5] a vote on the matter. On December 21, 2010, Weissman announced that the Board had scheduled a special meeting of the Congregation for January 11, 2011. The plaintiffs allege that Weissman indicated that a vote concerning the Rabbi's future with the Congregation would be held at the meeting. However, when that meeting was eventually held on March 8, 2011, after being rescheduled, an agenda was distributed which indicated that no vote would be taken, but rather only a discussion would be held. According to the plaintiffs, upon realizing that the written agenda did not provide for a vote, many Congregation members simply left the meeting. Nonetheless, at the meeting, a motion was made, and seconded, to approve a new three-year term for the Rabbi. However, the defendant Joel Scheinert, whom Weissman appointed to oversee the meeting, refused to allow a vote on the motion.

The plaintiffs further claim that during the meeting, the defendant Bill Bradin defamed the Rabbi in front of those Congregation members in attendance. Specifically, Bradin allegedly stated,

> "that [the Rabbi] did not show up for morning services; that he failed to perform outreach for young families; that he used a different [***6] prayer book than the Congregation; that he failed to lead Friday services when special evenings were planned for the same day; that he allowed non-[k]osher foods into the Congregation's kitchen and did not properly control the kosher validation of the kitchen; and, that he did not lead the Jewish High Holiday services."

The plaintiffs allege that Bradin's statements "cast [the Rabbi] in a negative light and reflected adversely on his competence as a rabbi, and harmed his standing and reputation with the congregants and others in the community." The plaintiffs further [*147] allege that Bradin's statements were made with the intent to "undermine [the Rabbi's] authority as the spiritual leader of the congregation, and also to aid and further the defendants' goal to interfere with and prevent the efforts by [the Rabbi] and some members of the congregation to secure his continued employment."

On March 24, 2011, Weissman was presented with another petition, signed by 29 [****3] Congregation members, demanding that the Congregation be permitted to vote on whether to retain the Rabbi beyond the expiration of his original agreement. However, Weissman and other Board officers refused to allow a vote. At a Board meeting [***7] on April 28, 2011, Weissman rejected the petition, and thereafter she and the Board's officers refused to schedule a special meeting for the Congregation to vote on whether to retain the Rabbi.

The plaintiffs commenced this action against Weissman, Bradin, and other [**174] members of the Board. In the first cause of action, the plaintiffs alleged that the defendants' actions violated *Religious Corporations Law §§ 5* and *200*. In the second cause of action, the plaintiffs alleged that the defendants' actions were arbitrary and capricious and violated the Congregation's bylaws. In the third cause of action, the plaintiffs alleged that the individual officers "abused their positions of trust and otherwise acted wrongfully, in bad faith and with malice" by manipulating the Board's vote on the retention of the Rabbi and by refusing to allow the Congregation to vote on the issue. The plaintiffs sought damages in the first three causes of action. In the fourth cause of action, the plaintiffs alleged that the defendants' actions, "motivated by malice and ill intent toward" the Rabbi, "intentionally and tortiously interfered with and damaged [the Rabbi's] relationship with the congregation, both

economically and spiritually." In the [***8] fifth cause of action, the plaintiffs alleged that "Bradin slandered and defamed" the Rabbi. The fourth and fifth causes of action sought damages on behalf of the Rabbi only. In the sixth cause of action, the plaintiffs sought a judgment "declaring that the defendants have violated their rights, ordering the defendants to undertake remedial measures, and enjoining defendants from engaging [in] similar future unlawful conduct." In the seventh cause of action, the plaintiffs alleged that the Rabbi sustained damages because the defendants' "actions in conspiring to deny him the opportunity of a renewal or extension of his employment as [the Congregation's] rabbi violated his rights under law."

[*148] The defendants moved pursuant to *CPLR 3211 (a) (7)* and *(11)* to dismiss the complaint on the grounds that it failed to state a cause of action, and that they were entitled to a qualified immunity under *Not-For-Profit Corporation Law (hereinafter N-PCL) 720-a*. In support of their motion, the defendants contended that the first, second, third, fourth, sixth, and seventh causes of action failed to state cognizable claims because their actions in voting to deny the Rabbi a renewal or extension of his contract were not barred [***9] by either *Religious Corporations Law § 200* or the Congregation's bylaws. The defendants also contended that the fifth cause of action, alleging defamation, failed to state a cause of action because Bradin's statements were nonactionable expressions of opinion, or were privileged, and such privilege could only be overcome by a showing of actual malice, which was absent here. The defendants additionally maintained that they were entitled to a qualified privilege under *N-PCL 720-a* because they were officers and trustees of a tax-exempt religious organization, and the complaint did not allege conduct constituting the gross negligence which would be necessary to defeat the privilege.

To substantiate their claim that they were entitled to a qualified privilege under *N-PCL 720-a*, the defendants submitted an affidavit sworn to by the defendant Barry Haberman, who established, through certain attachments, that the Congregation is a tax-exempt organization under *section 501 of the Internal Revenue Code* (*see 26 USC § 501 [c] [3]*). The status of the Congregation as a tax-exempt organization within the meaning of *26 USC § 501 (c) (3)* is not in dispute on appeal. The defendants also annexed a copy of the Congregation's bylaws as an exhibit to their motion papers.

In opposition, the plaintiffs argued that the defendants were not [***10] entitled to immunity pursuant to *N-PCL 720-a* because the complaint alleged conduct that was intended to cause harm. Further, they argued that under *Religious Corporations Law §§ 5* and *200* and the Congregation's bylaws, the members of the Congregation, [**175] not the trustees, had an absolute right to vote on questions affecting the Congregation, including making the determination whether to hire or retain a spiritual leader. Finally, they argued that the defamation cause of action was sufficiently stated because the alleged defamatory statements were statements of fact rather than nonactionable expressions of opinion, and the complaint sufficiently alleged that the statements were made with malice.

[*149] Order Appealed From

In an order dated July 19, 2012, the Supreme Court granted that branch of the defendants' motion which was pursuant to *CPLR 3211 (a) (7)* to dismiss the complaint for failure to state a cause of action (*2012 NY Slip Op 33729[U] [2012] [2012]*). Addressing the first, second, third, fourth, and sixth causes of action, which were predicated on the Board's alleged wrongful conduct in voting against renewal or extension of the Rabbi's employment agreement, the court began its analysis by noting that the dispute between [****4] the parties was governed by both *Religious Corporations Law § 200* and the Congregation's bylaws. [***11] The court then rejected the plaintiffs' contention that *Religious Corporations Law § 200*, which provides in relevant part that, "[t]he trustees of an incorporated church to which this article is applicable, *shall have no power to settle or remove or fix the salary of the minister*" (emphasis added), prohibited the Board from deciding not to renew or extend the Rabbi's employment. The court reasoned that the statutory language providing that the Board had no power to "settle or remove or fix the salary of the minister"

> "applies only to the salary of the minister ... the trustees cannot choose the salary of the minister, or take such salary away from the minister. It plainly does not apply to the selection, hiring or firing of a minister, as plaintiffs assert. Plaintiffs' interpretation of this section, skewed by their deliberate misquoting of it, is thus entirely misplaced." (*2012 NY Slip Op 33729[U], *3.*)

The court further concluded that the Board's decision not to renew or extend the Rabbi's employment agreement did not violate the Congregation's bylaws. In this regard, the court noted that while the Congregation's bylaws contained a general provision authorizing members of the Congregation to vote on "any question affecting the Congregation," it also [***12] contained a specific provision expressly authorizing members of the Congregation to vote on the hiring of a rabbi. In the court's view, to read the general provision as authorizing the Congregation to vote on the extension or retention of a rabbi, or whether a rabbi's contract should be permitted to lapse, would render superfluous the specific provision which expressly authorized the

Congregation to vote only on the hiring of a rabbi.

Turning to the fifth cause of action, alleging defamation, the Supreme Court first concluded that the plaintiffs could not establish [*150] damages, inasmuch as the allegedly defamatory statements were made after the determination not to renew the Rabbi's agreement had already been made. In the event that the statements could be deemed slander per se, the court determined that the statements came under a qualified privilege, as they were made at a meeting of the Congregation. The court concluded that the plaintiffs failed to allege that the statements were made with malice so as to overcome the qualified privilege.

With respect to the seventh cause of action, the Supreme Court held that since this cause of action was "based entirely on the premise that defendants [***13] did something wrong by not allowing the vote," and since the court had "already determined that a vote was unnecessary," this cause of action also "must fail as a matter of law." (*2012 NY Slip Op 33729[U], *6.*)

[**176] In light of its determination that the complaint failed to state a cause of action, the Supreme Court did not address that branch of the defendants' motion which was pursuant to *CPLR 3211 (a) (11)* to dismiss the complaint based on qualified immunity.

The plaintiffs appeal.

Analysis

Standard of Review

HN1[↑] "In assessing the adequacy of a complaint under *CPLR 3211 (a) (7)*, the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff 'the benefit of every possible favorable inference' " (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co., 21 NY3d 324, 334, 992 NE2d 1076, 970 NYS2d 733 [2013]*, quoting *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591, 842 NE2d 471, 808 NYS2d 573 [2005]*; *see Sacher v Beacon Assoc. Mgt. Corp., 114 AD3d 655, 656, 980 NYS2d 121 [2014]*; *Young v Brown, 113 AD3d 761, 761, 978 NYS2d 867 [2014]*).

HN2[↑] "A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to *CPLR 3211 (a) (7)*" (*Sokol v Leader, 74 AD3d 1180, 1181, 904 NYS2d 153 [2010]*; *see CPLR 3211 [c]*). "If the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action, not whether he has stated one' " (*Sokol v Leader, 74 AD3d at 1181-1182*, quoting *Guggenheimer v Ginzburg, 43 NY2d 268, 275, 372 NE2d 17, 401 NYS2d 182*). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under *CPLR 3211* unless they [*151] establish conclusively that [the plaintiff] has no cause of [***14] action" (*Sokol v Leader, 74 AD3d at 1182* [internal quotation marks omitted]).

> "Indeed, a motion to dismiss pursuant to *CPLR 3211 (a) (7)* must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' " (*Sokol v Leader, 74 AD3d at 1182*, quoting *Guggenheimer v Ginzburg, 43 NY2d at 275*).

[****5]

Religious Corporations Law

An allegation essential to much of the plaintiffs' action is that the defendants violated Religious Corporations Law, as well as the Congregation's bylaws.

HN3[↑] "The primary purpose of the Religious Corporations Law is to provide an orderly method for the administration of the property and temporalities dedicated to the use of religious groups, and to preserve them from exploitation by those who might divert them from the true beneficiaries of the corporate trust" (*Morris v Scribner, 69 NY2d 418, 423, 508 NE2d 136, 515 NYS2d 424 [1987]*; *see Saint Nicholas Cathedral of Russian Orthodox Church in N. Am. v Kedroff, 302 NY 1, 96 NE2d 56 [1950]*).

"The general powers and duties of the trustees of religious corporations are set forth in *Religious Corporations Law § 5*" (*Morris v Scribner, 69 NY2d at 423*). *Religious Corporations Law § 5* grants trustees authority to take certain specified actions in furtherance of their general powers and provides that duly adopted bylaws will control their actions. That section concludes,

> *HN4*[↑] "[b]ut this section does not give to the trustees of an incorporated church, any control [***15] over the calling, settlement, dismissal or removal of its minister, or the fixing of his salary; or any power to fix or change the times, nature or order of the [**177] public or social worship of such church" (*Religious Corporations Law § 5*).

Religious Corporations Law § 200 provides,

> *HN5*[↑] "A corporate meeting of an incorporated church, whose trustees are elective as such, may give directions, not inconsistent with law, as to the manner [*152] in which any of the temporal affairs of the church

> shall be administered by the trustees thereof; and such directions shall be followed by the trustees. *The trustees of an incorporated church to which this article is applicable, shall have no power to settle or remove or fix the salary of the minister*, or without the consent of a corporate meeting, to incur debts beyond what is necessary for the care of the property of the corporation; or to fix or [change] the time, nature or order of the public or social worship of such church, except when such trustees are also the spiritual officers of such church" (*Religious Corporations Law § 200* [emphasis added]).

HN6[↑] "When presented with a question of statutory interpretation, our primary consideration 'is to ascertain and give effect to the intention of the Legislature' " (*Perez v Levy, 96 AD3d 729, 730, 946 NYS2d 184 [2012]*, quoting *Riley v County of Broome, 95 NY2d 455, 463, 742 NE2d 98, 719 NYS2d 623 [2000]*). "The statutory text is the clearest **[***16]** indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Perez v Levy, 96 AD3d at 730*; *see Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660, 860 NE2d 705, 827 NYS2d 88 [2006]*; *Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583, 696 NE2d 978, 673 NYS2d 966 [1998]*; *Matter of State of New York v Ford Motor Co., 74 NY2d 495, 500, 548 NE2d 906, 549 NYS2d 368 [1989]*). *HN7*[↑] "[M]eaning and effect should be given to every word of a statute" (*Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 104, 761 NE2d 1018, 736 NYS2d 291 [2001]*).

In concluding that those causes of action premised on an alleged violation of *Religious Corporations Law § 200* failed to state a cause of action, the Supreme Court interpreted the relevant language of that section, emphasized above, as pertaining solely to the salary of the minister, or in this case, rabbi (*see Religious Corporations Law § 2* [the term "minister" includes a duly authorized rabbi]). In other words, the Supreme Court concluded that the words "settle," "remove," and "fix," in that passage all modified the phrase "the salary of the minister."

[1] We disagree with the Supreme Court's interpretation of the operative language. We conclude that *HN8*[↑] a more natural reading of the provision "[t]he trustees . . . shall have no power to settle or remove or fix the salary of the minister" (*Religious Corporations Law § 200*) establishes that "settle or remove" do not modify "the salary of the minister." Rather, a more natural reading of this passage would be that the terms "settle," **[*153]** "remove," and "fix the salary of" all modify "the minister." Under this reading, the trustees have no power to settle, or **[***17]** hire, the minister; they have no power to remove, or terminate the engagement of, the minister; and, finally, they have no power to fix the salary of the minister.

Under the Supreme Court's interpretation of the relevant language, the words "settle" and "fix" would have the same meaning, thus rendering one of these terms superfluous. " *HN9*[↑] 'Words are not to be rejected as superfluous where it is practicable to give each a distinct and separate meaning' " (*Leader v Maroney, Ponzini & Spencer, 97 NY2d at 104*, **[**178]** quoting **[****6]** *Cohen v Lord, Day & Lord, 75 NY2d 95, 100, 550 NE2d 410, 551 NYS2d 157 [1989]*; *see* McKinney's Cons Laws of NY, Book 1, Statutes §231). Moreover, the Supreme Court's interpretation would lead to the somewhat unnatural provision for the "removal" of a clergyperson's salary. Furthermore, the use of the word "or" to separate each of the three terms suggests an intent to distinguish three distinct concepts.

Additionally, our *HN10*[↑] interpretation of the statute, prohibiting the trustees from settling or removing the minister, or fixing his or her salary, is supported by the consistent, and quite similar, language set forth in *Religious Corporations Law § 5*. We note in this regard that " '[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative **[***18]** intent'" (*New York State Psychiatric Assn., Inc. v New York State Dept. of Health, 19 NY3d 17, 23-24, 968 NE2d 428, 945 NYS2d 191 [2012]*, quoting McKinney's Cons Laws of NY, Book 1, Statutes §97; *see Frank v Meadowlakes Dev. Corp., 6 NY3d 687, 691, 849 NE2d 938, 816 NYS2d 715 [2006]*). "Furthermore, '[e]ach section of a legislative act must be considered and applied in connection with every other section of the act, so that all will have their due, and conjoint effect' " (*New York State Psychiatric Assn., Inc. v New York State Dept. of Health, 19 NY3d at 24*, quoting McKinney's Cons Laws of NY, Book 1, Statutes §98, Comment at 221-222 n 23; *see Matter of Kaplan v Peyser, 273 NY 147, 7 NE2d 21 [1937]*).

Again, after delineating certain powers of trustees of religious corporations, *Religious Corporations Law § 5* concludes, in pertinent part, "[b]ut this section does not give to the trustees of an incorporated church, any control over the calling, settlement, dismissal or removal of its minister, or the fixing of his salary" (*Religious Corporations Law § 5*). This provision is similar to the language at issue in *Religious Corporations Law § 200*, **[*154]** is consistent with our reading of that language, and is inconsistent with the reading championed by the defendants and adopted by the Supreme Court.

The relatively few courts that have addressed the matter are in agreement that *HN11*[↑] *Religious Corporations Law § 200*

precludes trustees from "settling" or "removing" the minister (*see Watt Samakki Dhammikaram, Inc. v Thenjitto, 166 Misc 2d 16, 20, 631 NYS2d 229 [Sup Ct, Kings County 1995]; Zimbler v Felber, 111 Misc 2d 867, 880-881, 445 NYS2d 366 [Sup Ct, Queens County 1981]; Kupperman v Congregation Nusach Sfard of The Bronx, 39 Misc 2d 107, 113, 240 NYS2d 315 [Sup Ct, Bronx County 1963]; cf. People v Tuchinsky, 100 Misc 2d 521, 523, 419 NYS2d 843 [1979]*).

In the order appealed from, the Supreme Court relied on *Matter of Saffra v Rockwood Park Jewish Ctr. (239 AD2d 507, 658 NYS2d 43 [1997])*. That was a proceeding pursuant to *CPLR article 75* to compel arbitration of a controversy relating to the termination of a rabbi's employment contract (*see id. at 507*). In dismissing the proceeding, **[***19]** this Court addressed the petitioner's argument based on *Religious Corporations Law § 200* (*see id. at 507-508*). This Court stated, "While the actions of the Board of Trustees . . . indicated its desire not to continue the employment of the petitioner, it did not affirmatively terminate his employment. The petitioner's termination occurred solely because the contract expired. Thus, the Board did not usurp the authority of the congregation members" (*id.*). The basis for this Court's **[**179]** conclusion in Saffra that the Board of Trustees' acts did not usurp the authority of the congregation, was that the Board of Trustees, in fact, took no action. The rabbi's contract simply lapsed.

This case indeed bears significant similarities to *Saffra*. Here, the Rabbi's contract was allowed to lapse, terminating his engagement as rabbi of the Congregation. However, critically, in this case, the Board affirmatively barred the Congregation from voting on the issue of extending or renewing the Rabbi's contract. It is undisputed that the Board refused to allow the Congregation to vote on the matter. Again, as discussed above, pursuant to *Religious Corporations Law § 200*, the Board lacked the authority to remove the Rabbi. By refusing to allow the Congregation to act on the matter, the **[***20]** Board here usurped the Congregation's authority. Thus, the Supreme Court's, and the defendants', reliance on *Saffra* is misplaced.

[*155] Congregation's Bylaws

We further find, contrary to the Supreme Court's conclusion, that the Congregation's bylaws did not limit the Congregation's authority to the hiring of a rabbi only, and exclude from the ambit of the Congregation's authority the power to extend or renew a hired rabbi's contract.

Article XXIII of the Congregation's bylaws broadly authorizes Congregation members in good standing "[t]o vote for Class IV Trustees and on any question affecting the Congregation." It cannot reasonably be disputed that the choice of spiritual leader of a congregation, and whether to renew that individual's appointment, is a "question affecting the Congregation." Indeed, one court observed, in the context of a case involving the discharge of the pastor of a Baptist Church, that the office of spiritual leader of a congregation

> "is one of dignity, reverence and esteem. **[****7]** Its import to the members of the congregation is of the greatest significance. It is one in which the entire congregation shares interest and one in the continuation of which, the entire congregation **[***21]** is entitled to a voice. It is not an office to be lightly bestowed or withdrawn" (*Matter of Hayes v Board of Trustees of Holy Trinity Baptist Church of Amityville, 225 NYS2d 316, 320, 1962 N.Y. Misc. LEXIS 4139 [Sup Ct, Suffolk County 1962]*).

In finding that Article XXIII conferred no such right upon the Congregation, the Supreme Court relied upon the fact that the Congregation's authority to hire a rabbi is expressly addressed elsewhere in the bylaws. In Article XII, entitled "THE RABBI," the bylaws state, among other things, that a "Rabbi shall be employed, engaged, retained and hired for a period of time and upon terms to be determined by the Board of Trustees and the Congregation, as the Rabbi and spiritual leader of this Congregation. The Members, at a Congregational meeting, shall approve the hiring of the Rabbi."

We disagree with the Supreme Court's conclusion that, if the bylaws are interpreted such that Article XXIII authorizes the Congregation to vote on the matter of renewing or extending its rabbi's engagement with the Congregation, the above provision of Article XII would be rendered superfluous, in contravention of well-settled contract interpretation principles (*see generally Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc., 63 NY2d 396, 403, 472 NE2d 315, 482 NYS2d 465 [1984]; Givati v Air Techniques, Inc., 104 AD3d 644, 645, 960 NYS2d 196 [2013]*). **[*156]** Under our interpretation of the bylaws, a reading of the broad provision of Article XXIII which includes the authority to be heard on **[***22]** matters such as extending or renewing a rabbi's engagement with the Congregation, as a "question affecting the Congregation," does not render the provision **[**180]** in Article XII, expressly authorizing the Congregation to approve of the hiring of a rabbi, superfluous. Rather, the bylaws merely take care in Article XII, "THE RABBI," to ensure that the Congregation may be heard on the crucial matter of choosing its spiritual leader. Moreover, the terms of Article XII expressly contemplate that the "Rabbi shall be . . . retained . . . for a period of time and upon terms to be determined by the Board of Trustees *and the Congregation*" (emphasis added). For these reasons, we conclude that the plaintiffs' allegations that

the defendants' conduct in preventing the Congregation from determining whether to retain the Rabbi violated *Religious Corporations Law § 200* and the Congregation's bylaws are legally cognizable. Accordingly, the Supreme Court erred in granting those branches of the defendants' motion which were to dismiss the first, second, third, fourth, sixth, and seventh causes of action pursuant to *CPLR 3211 (a) (7)* for failure to state a cause of action.

Defamation

In the fifth cause of action, the plaintiffs assert that Bradin made defamatory [***23] statements about the Rabbi at a meeting of the Congregation.

[2]*HN12*[↑] " 'The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' " (*Matter of Konig v CSC Holdings, LLC, 112 AD3d 934, 935, 977 NYS2d 756 [2013]*, quoting *Geraci v Probst, 61 AD3d 717, 718, 877 NYS2d 386 [2009]*). *HN13*[↑] "Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, 'it follows that only statements alleging facts can properly be the subject of a defamation action' " (*Gross v New York Times Co., 82 NY2d 146, 152-153, 623 NE2d 1163, 603 NYS2d 813 [1993]*, quoting *600 W. 115th St. Corp. v Von Gutfeld, 80 NY2d 130, 139, 603 NE2d 930, 589 NYS2d 825 [1992]*). " 'In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff' " [*157] (*Konig v CSC Holdings, LLC, 112 AD3d at 935*, quoting *Goldberg v Levine, 97 AD3d 725, 725, 949 NYS2d 692 [2012]*). "Whether a particular statement constitutes an opinion or an objective fact is a question of law" (*Mann v Abel, 10 NY3d 271, 276, 885 NE2d 884, 856 NYS2d 31 [2008]*; *see Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 381, 366 NE2d 1299, 397 NYS2d 943 [1977]*). *HN14*[↑] "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel, 10 NY3d at 276*; *see Weiner v Doubleday & Co., 74 NY2d 586, 593, 549 NE2d 453, 550 NYS2d 251 [1989]*; *Steinhilber v Alphonse, 68 NY2d 283, 501 NE2d 550, 508 NYS2d 901 [1986]*). The Court of Appeals has characterized the matter of distinguishing between [***24] opinion and fact for purposes of defamation analysis as "a difficult task" (*Mann v Abel, 10 NY3d at 276* [internal quotation marks omitted]). Factors the Court of Appeals has identified to be considered in performing this task include:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in [**181] which the statement appears or the broader [****8] social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Mann v Abel, 10 NY3d at 276* [internal quotation marks omitted]; *see Brian v Richardson, 87 NY2d 46, 51, 660 NE2d 1126, 637 NYS2d 347 [1995]*; *Gross v New York Times Co., 82 NY2d at 153*; *Steinhilber v Alphonse, 68 NY2d 283, 292, 501 NE2d 550, 508 NYS2d 901 [1986]*).

In their complaint, the plaintiffs allege that at the meeting of the Congregation on March 8, 2011, Bradin stated,

> "that [the Rabbi] did not show up for morning services; that he failed to perform outreach for young families; that he used a different prayer book than the Congregation; that he failed to lead Friday services when special evenings were planned for the same day; that he allowed non-[k]osher foods into the Congregation's kitchen and did not properly control the kosher validation of the kitchen; and, that [***25] he did not lead the Jewish High Holiday services."

Contrary to the defendants' contention, these statements have precise meanings which are readily understood, and they are thoroughly capable of being proven true or false (*see generally* [*158] *Mann v Abel, 10 NY3d at 276*; *Brian v Richardson, 87 NY2d at 51*; *Gross v New York Times Co., 82 NY2d at 153*; *Steinhilber v Alphonse, 68 NY2d at 292*). Thus, the defamation cause of action is not subject to dismissal on the ground that the alleged statements constitute nonactionable expressions of opinion.

We also reject the defendants' contention that the defamation claim fails to state a cause of action because Bradin's statements were protected by a qualified privilege, and insufficient facts were alleged to show that he spoke with malice necessary to defeat privilege. *HN15*[↑] "Courts have long recognized that the public interest is served by shielding certain communications, though possibly defamatory, from litigation, rather than risk stifling them altogether" (*Liberman v Gelstein, 80 NY2d 429, 437, 605 NE2d 344, 590 NYS2d 857 [1992]*). "When compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only conditionally privileged" (*id.*; *see 600 W. 115th St. Corp. v Von Gutfeld, 80 NY2d at 135-136*). "One such conditional, or qualified, privilege extends to a

'communication made by one person to another upon a subject [***26] in which both have an interest' " (*Liberman v Gelstein, 80 NY2d at 437*, quoting *Stillman v Ford, 22 NY2d 48, 53, 238 NE2d 304, 290 NYS2d 893 [1968]*; *see Diorio v Ossining Union Free School Dist., 96 AD3d 710, 712, 946 NYS2d 195*). This qualified privilege has been applied to communications carried out "in furtherance of a common interest of a religious organization" (*Berger v Temple Beth-El of Great Neck, 41 AD3d 626, 627, 839 NYS2d 504 [2007]*). The rationale for applying this qualified privilege in circumstances such as this "is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded" (*Liberman v Gelstein, 80 NY2d at 437*).

HN16[↑] The protection of this so-called "common interest" qualified privilege "may be dissolved if plaintiff can demonstrate [**182] that defendant spoke with 'malice' " (*Liberman v Gelstein, 80 NY2d at 437*; *see Diorio v Ossining Union Free School Dist., 96 AD3d at 712*). "To establish the malice necessary to defeat the privilege, the plaintiff may show either common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth" (*Diorio v Ossining Union Free School Dist., 96 AD3d at 712* [internal quotation marks omitted]; *see Liberman v Gelstein, 80 NY2d at 437-438*; *see also New York Times Co. v Sullivan, 376 US 254, 280, 84 S Ct 710, 11 L Ed 2d 686 [1964]*).

[3] [*159] Here, the plaintiffs alleged that Bradin's statements

> "were made with the intent to and did undermine [the Rabbi's] authority as the spiritual leader of the congregation, and also to aid and further the defendants' goal to interfere with and prevent the efforts by [the Rabbi] and some members of the congregation to secure [***27] his continued employment by [the Congregation]."

The plaintiffs also alleged that "Bradin's false statements cast [the Rabbi] in a negative light and reflected adversely on his competence as a rabbi, and harmed his standing and reputation with the congregants and others in the community." Contrary to the Supreme Court's determination, affording the complaint a liberal construction, accepting all facts as alleged in the pleading to be true, and according the plaintiffs the benefit of every possible favorable inference (*see Leon v Martinez, 84 NY2d 83, 87, 638 NE2d 511, 614 NYS2d 972 [1994]*; *Santana v Leith, 117 AD3d 711, 985 NYS2d 147 [2014]*; *Sacher v Beacon Assoc. Mgt. Corp., 114 AD3d 655, 656, 980 NYS2d 121 [2014]* [****9]; *Young v Brown, 113 AD3d 761, 761, 978 NYS2d 867 [2014]*; *Breytman v Olinville Realty, LLC, 54 AD3d 703, 703-704, 864 NYS2d 70 [2008]*), it sufficiently alleged that Bradin made false statements of fact with common-law malice so as to overcome the common interest qualified privilege. *HN17*[↑] "Since . . . . the burden does not shift to the nonmoving party on a motion made pursuant to *CPLR 3211 (a) (7)*, a plaintiff has no obligation to show evidentiary facts to support [his or her] allegations of malice on a motion to dismiss pursuant to *CPLR 3211 (a) (7)*" (*Shaw v Club Mgrs. Assn. of Am., Inc., 84 AD3d 928, 931, 923 NYS2d 127 [2011]* [internal quotation marks omitted]; *see Sokol v Leader, 74 AD3d at 1182*; *Kotowski v Hadley, 38 AD3d 499, 500-501, 833 NYS2d 103 [2007]*).

Finally, as alleged, Bradin's defamatory statements would "tend to injure [the Rabbi] in [his] trade, business, or profession," and thus would constitute slander per se (*see Shaw v Club Mgrs. Assn. of Am., Inc., 84 AD3d at 930*). Accordingly, the plaintiffs were not required to allege [***28] or prove special damages, as the law presumes that damages will result (*see Liberman v Gelstein, 80 NY2d at 435*; *Shaw v Club Mgrs. Assn. of Am., Inc., 84 AD3d at 930*).

Accordingly, the Supreme Court erred in granting that branch of the defendants' motion which was to dismiss the fifth cause of action pursuant to *CPLR 3211 (a) (7)* for failure to state a cause of action.

[*160] Qualified Immunity

Turning to that branch of the defendants' motion which was to dismiss the complaint pursuant to *CPLR 3211 (a) (11)*, which the Supreme Court did not address, *N-PCL 720-a* provides, in pertinent part, and with exceptions not relevant here,

> *HN18*[↑] "no person serving without compensation as a director, officer or trustee of a [**183] corporation, association, organization or trust described in *section 501 (c) (3)* of the United States internal revenue code shall be liable to any person other than such corporation, association, organization or trust based solely on his or her conduct in the execution of such office unless the conduct of such director, officer or trustee with respect to the person asserting liability constituted gross negligence or was intended to cause the resulting harm to the person asserting such liability" (*N-PCL 720-a*).

Thus, *HN19*[↑] "*Not-For-Profit Corporation Law § 720-a* confers a qualified immunity on uncompensated directors, officers, and trustees of certain not-for-profit corporations" (*Samide v Roman Catholic Diocese of Brooklyn, 5 AD3d 463, 465, 773 NYS2d 116 [2004]*; *see Norment v Interfaith Ctr. of N.Y., 98 AD3d 955, 956, 951 NYS2d 531 [2012]*; *Palmieri v Marx, 7 AD3d 688, 688, 776 NYS2d 812 [2004]*; *see also* [***29] *Bernbach v Bonnie Briar Country Club, 144*

AD2d 610, 611, 534 NYS2d 695 [1988]).

HN20[↑] On a defendant's motion pursuant to *CPLR 3211 (a) (11)* to dismiss a complaint premised on the qualified immunity conferred by *N-PCL 720-a*, the court must first determine whether the defendant is entitled to the benefit of *N-PCL 720-a* immunity (*see CPLR 3211 [a] [11]*). If so, the court must then determine "whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm" (*CPLR 3211 [a] [11]*). Only if the court finds that the defendant is entitled to the benefits of *N-PCL 720-a* immunity, and finds that there is no reasonable probability of gross negligence or intentional harm, will the defendant be entitled to dismissal of the causes of action asserted against that defendant (*see CPLR 3211 [a] [11]*).

[4] It is not disputed that the defendants are serving, without compensation, as "director[s], officer[s] or trustee[s] of a corporation, association, organization or trust described in *section 501 (c) (3)* of the United States internal revenue code," and that the wrongs alleged were the result of conduct undertaken **[*161]** in the execution of these roles (*N-PCL 720-a*). Thus, they established, as an initial matter, their entitlement to the benefit of *N-PCL 720-a* immunity. Therefore, we must determine "whether there is a reasonable probability that the specific conduct of such **[***30]** defendant[s] alleged constitutes gross negligence or was intended to cause the resulting harm" (*CPLR 3211 [a] [11]*).

Initially, we note that the qualified immunity afforded by *N-PCL 720-a* is not applicable to the sixth cause of action, since that claim seeks a declaratory judgment and injunctive relief rather than money damages.

With regard to the remaining causes of action which seek money damages based on the defendants' conduct in usurping the Congregation's authority, the gravamen of the plaintiffs' claims are that the defendants, "in bad faith and with malice," usurped the Congregation's authority **[****10]** in "refusing to allow the congregation to" vote on the issue of the Rabbi's retention. The plaintiffs have alleged that the defendants refused to allow the congregants to vote on the matter in violation of *Religious Corporations Law § 200* and the Congregation's bylaws, and notwithstanding several petitions and letters delivered to the defendants requesting that the Congregation be permitted to vote on the matter. Additionally, with regard to the defamation cause of action, as concluded above, the plaintiffs alleged malice. In short, essentially all of the plaintiffs' allegations involve the intentional infliction of harm by **[**184]** the defendants (*see generally CPLR 3211 [a] [11]*). **[***31]**

It has been held that

> *HN21*[↑] "[u]nlike the low threshold for defeating a motion to dismiss under other provisions of *CPLR 3211*, a plaintiff faced with a motion pursuant to *CPLR 3211 (a) (11)* should lay bare proof supporting the alleged grossly negligent or intentional conduct and '[t]he mere possibility that such proof can develop does not suffice to keep the case alive' " (*Krackeler Scientific, Inc. v Ordway Research Inst., Inc., 97 AD3d 1083, 1084, 949 NYS2d 286 [2012]* [citation omitted], quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:34a at 55).

However, given the nature of the specific allegations as well as certain undisputed circumstances in this case, including the Board's refusal to allow the Congregation to vote notwithstanding **[*162]** several demands, on this record, we conclude that there is a reasonable probability that the plaintiffs can establish that the defendants' actions constituted gross negligence or were intended to cause the resulting harm (*see CPLR 3211 [a] [11]*; *see also Norment v Interfaith Ctr. of N.Y., 98 AD3d at 956*; *cf. Pontarelli v Shapero, 231 AD2d 407, 410-411, 647 NYS2d 185 [1996]*). Accordingly, at this stage, the defendants are not entitled to the benefit of the qualified immunity conferred by *N-PCL 720-a*.

Based on all of the foregoing, the Supreme Court erred in granting that branch of the defendants' motion which was to dismiss the complaint pursuant to *CPLR 3211 (a) (7)* for failure to state a cause of action. Moreover, **[***32]** the defendants were not entitled to dismissal of the complaint pursuant to *CPLR 3211 (a) (11)* on the ground that their conduct was protected by a qualified immunity.

Accordingly, the order is reversed, on the law, with costs, and the defendants' motion to dismiss the complaint is denied.

Skelos, J.P., Leventhal and Hall, JJ., concur.

Ordered that the order is reversed, on the law, with costs, and that branch of the defendants' motion which was pursuant to *CPLR 3211 (a) (7)* to dismiss the complaint for failure to state a cause of action is denied.

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Cited
As of: January 23, 2017 5:05 PM EST

Hafif v Rabbinical Council of Syrian & Near E. Jewish Communities in Am.

Supreme Court of New York, Appellate Division, Second Department

June 22, 2016, Decided

2014-00208

Reporter
140 A.D.3d 1017 *; 34 N.Y.S.3d 160 **; 2016 N.Y. App. Div. LEXIS 4765 ***; 2016 NY Slip Op 04909 ****

[****1] Dibo Hafif, appellant, v Rabbinical Council of Syrian & Near Eastern Jewish Communities in America, etc., et al., respondents. (Index No. 6719/11)

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Core Terms

religious, principles, documents

Counsel: [***1] Dibo Hafif, Brooklyn, NY, appellant Pro se.

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Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola, NY (Andrew Giuseppe Vassalle and Ondine Slone of counsel), for respondents Rabbi Yehuda A. Azancot, Rabbi of Beth Torah Congregation, and Rabbi Yaacov Ben-Haim, Rabbi of B'Nei Shaare Zion.

Judges: RUTH C. BALKIN, J.P., L. PRISCILLA HALL, BETSY BARROS, FRANCESCA E. CONNOLLY, JJ. BALKIN, J.P., HALL, BARROS and CONNOLLY, JJ., concur.

Opinion

[**160] [*1017] DECISION & ORDER

In an action to recover damages for defamation, the plaintiff appeals from an order of the Supreme Court, Kings County (Partnow, J.), dated August 12, 2013, which granted the defendants' motion pursuant to CPLR 3211(a) to dismiss [***2] the complaint.

ORDERED that the order is affirmed, with one bill of costs to the defendants appearing separately and filing separate briefs.

As the defendants correctly contend, the Supreme Court properly directed the dismissal of the complaint pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction. The plaintiff's claims cannot be decided solely upon the application of neutral principles of law, without reference to religious principles (*see* ***Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana, 9 NY3d 282, 286, 879 N.E.2d 1282, 849 N.Y.S.2d 463***; *Rodzianko v Parish of [**161] the Russian Orthodox Holy Virgin Protection Church, Inc., 117 AD3d 706, 984 N.Y.S.2d 614*). In particular, the courts would be involved in determining the proper interpretation and understanding of the Hebrew word "mizuyaf," the authenticity requirements for documents being submitted on an application to a Jewish religious tribunal for permission to remarry, and the validity of the documents submitted in the context of a Jewish religious divorce dispute. Thus, the court would be impermissibly entangled in the application of religious customs, laws, and procedures (*see Drake v Moulton Mem. Baptist Church of Newburgh, 93 AD3d 685, 940 N.Y.S.2d 281*). In light of our determination, we need not reach the parties' [*1018] remaining contentions.

BALKIN, J.P., HALL, BARROS and CONNOLLY, JJ., concur.

End of Document

§ 12. Sale, mortgage and lease of real property of religious corporations

1. 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 the attorney general therefor pursuant to section five hundred eleven of the not-for-profit corporation law as that section is modified by paragraph (d-1) of subdivision one of section two-b of this chapter or section five hundred eleven-a of the not-for-profit corporation law, except that a religious corporation may execute a purchase money mortgage or a purchase money security agreement creating a security interest in personal property purchased by it without obtaining leave of the court therefor.

2. The trustees of an incorporated Protestant Episcopal church shall not vote upon any resolution or proposition for the sale, mortgage or lease of its real property, unless the rector of such church, if it then has a rector, shall be present, and shall not make application to the court for leave to sell or mortgage any of its real property without the consent of the bishop and standing committee of the diocese to which such church belongs, or execute and deliver a lease of any of its real property for a term exceeding five years without similar consent of the bishop and standing committee of the diocese to which such church belongs; but in case the see be vacant, or the bishop be absent or unable to act, the consent of the standing committee with their certificate of the vacancy of the see or of the absence or disability of the bishop shall suffice.

3. The trustees of an incorporated Roman Catholic church shall not make application to the court for leave to mortgage, lease or sell any of its real property without the consent of the archbishop or bishop of the diocese to which such church belongs or in case of their absence or inability to act, without the consent of the vicar-general or administrator of such diocese.

4. The trustees of an incorporated Ruthenian Catholic church of the Greek rite shall not make application to the court for leave to mortgage, lease or sell any of its real property without the consent in writing of the Ruthenian Greek Catholic bishop of the diocese to which such church belongs, or, in case of his absence or inability to act, without the consent of the vicar-general of such bishop or of the administrator of such diocese.

5. The trustees of an incorporated African Methodist Episcopal Zion church shall not make application to the court for leave to mortgage, lease or sell any of its real property without the consent of the bishop of the diocese to which said church belongs, or in case of his absence or inability to act, without the consent of the annual conference having jurisdiction over such church.

5-a. The trustees of an incorporated Presbyterian church in connection with the General Assembly of the Presbyterian Church (U.S.A.) shall not make application to the court for leave to mortgage, lease or sell any of its real property without the consent in writing of the particular Presbytery with which said church is connected.

5-b. The trustees of an incorporated United Methodist church shall not make application to the court for leave to mortgage, lease, or sell any of its real property without the written consents of the district superintendent and the preacher in charge and the authorization of the charge conference by a majority of those present and voting at a meeting of the charge conference, provided that not less than ten days' notice of such meeting and proposed action shall have been given from the pulpit of the charge, or, if no regular services are held, by mail to the members of the charge conference.

5-c. The trustees of an incorporated Reformed Church in connection with the General Synod of the Reformed Church in America, shall not make application to the court for leave to mortgage, lease or sell any of its real property without the consent in writing of the trustees of the Classis with which said church is connected.

6. The petition of the trustees of an incorporated Protestant Episcopal church or Roman Catholic church shall, in addition to the matters required by article five of the not-for-profit corporation law to be set forth therein, set forth that this section has also been complied with. The petition of the trustees of an incorporated African Methodist Episcopal Zion church shall in addition to the matters required by article five of the not-for-profit corporation law to be set forth therein, set forth that this section has also been complied with. The petition of the trustees of an incorporated Presbyterian church in connection with the General Assembly of the Presbyterian Church (U.S.A.), shall, in addition to the matters required by article five of the not-for-profit corporation law to be set forth therein, set forth that this section has also been complied with. The petition of the trustees of an incorporated United Methodist church shall, in addition to the matters required by article five of the not-for-profit corporation law to be set forth therein, set forth that this section has also been complied with.

7. Lots, plots or burial permits in a cemetery owned by a religious corporation may, however, be sold, also all or part of such cemetery may be conveyed to a cemetery corporation, without applying for or obtaining leave of the court. No cemetery lands of a religious corporation shall be mortgaged while used for cemetery purposes.

8. Except as otherwise provided in this chapter in respect to a religious corporation of a specified denomination, any solvent religious corporation may, by order of the court, obtained as above provided in proceedings to sell, mortgage or lease real property, convey the whole or any part of its real property to another religious corporation, or to a membership, educational, municipal or other nonprofit corporation, for a consideration of one dollar or other nominal consideration, and for the purpose of applying the provisions of article five of the general corporation law, a proposed conveyance for such consideration shall be treated as a sale, but it shall not be necessary to show, in the petition or otherwise, nor for the court to find that the pecuniary or proprietary interest of the grantor corporation will be promoted thereby; and the interests of such grantor shall be deemed to be promoted if it appears that religious or charitable objects generally are conserved by such conveyance, provided, however, that such an order shall not be made if tending to impair the claim or remedy of any creditor.

9. If a sale, mortgage or lease for a term exceeding five years of any real property of any such religious corporation has been heretofore or shall be hereafter made and a conveyance or mortgage executed and delivered without the authority of a court of competent jurisdiction, obtained as required by law, or not in accordance with its directions, the court may, thereafter, upon the application of the corporation, or of the grantee or mortgagee in any such conveyance or mortgage or of any person claiming through or under any such grantee or mortgagee upon such notice to such corporation, or its successor, and such other person or persons as may be interested in such property, as the court may prescribe, confirm said previously executed conveyance or mortgage, and order and direct the execution and delivery of a confirmatory deed or mortgage, or the recording of such confirmatory order in the office where deeds and mortgages are recorded in the county in which the property is located; and upon compliance with the said order such original conveyance or mortgage shall be as valid and of the same force and effect as if it had been executed and delivered after due proceedings had in accordance with the statute and the direction of the court. But no confirmatory order may be granted unless the consents required in the first part of this section for a Protestant Episcopal, Roman Catholic, Presbyterian church or an incorporated African Methodist Episcopal Zion church or an incorporated United Methodist church have first been given by the prescribed authority thereof, either upon the original application or upon the application for the confirmatory order.

10. The provisions of this section shall not apply to real property heretofore or hereafter acquired on a sale in an action or proceeding for the foreclosure of a mortgage owned by a religious corporation or held by a trustee for or in behalf of a religious corporation or to real property heretofore or hereafter acquired by a religious corporation or held by a trustee for or in behalf of a religious corporation by deed in lieu of the foreclosure of a mortgage owned, either in whole or in part, whether in certificate form or otherwise, by a religious corporation.

History

Add, L 1909, ch 53, eff Feb 17, 1909; amd, L 1942, ch 524, eff Apr 25, 1942; L 1943, ch 368, and L 1949, ch 660; L 1953, ch 772; amd, L 1954, ch 476, § 1; L 1954, ch 578, §§ 1, 2, eff April 8, 1954; L 1954, ch 578, § 3; L 1958, ch 600; L 1960, ch 489, eff Apr 12, 1960; L 1962, ch 552; L 1969, ch 962, §§ 1–3, eff May 26, 1969; L 1971, ch 956, eff Sept 1, 1972; L 1973, ch 715,

eff Sept 1, 1973; L 1981, ch 244, § 3, eff Sept 13, 1981; L 1985, ch 193, § 2, eff July 11, 1985; L 1985, ch 381, § 1, eff July 19, 1985, 2, eff July 19, 1985; *L 2015, ch 555, § 17*, eff Dec 11, 2015.

Annotations

Notes

Amendment Notes:

1981. Chapter 244, § 3 amended:

Sub 1, by deleting "(c)".

1985. Chapter 381, § 1 amended:

Sub 5-a, by deleting "general assembly" and "United" and "church in the United States of America".

1985. Chapter 381, § 2 amended:

Sub 6, by deleting "general assembly" and "United" and "church in the United States of America."

The 2015 amendment by ch 555, § 17, in 1., added "or the attorney general," substituted "subdivision" for "subsection," and added "or section five hundred eleven-a of the not-for-profit corporation law."

Notes to Decisions

1. In general

This section does not require a foreign religious corporation to obtain permission of the court before conveying its real property in this state as is required of a domestic corporation. *Muck v Hitchcock, 212 N.Y. 283, 106 N.E. 75, 212 N.Y. (N.Y.S.) 283, 1914 N.Y. LEXIS 869 (N.Y. 1914)*.

Although approval of the court, under this section, is necessary for the conveyance of property of a religious corporation, such approval is not necessary when the agreement is one restricting the use of the premises to religious purposes. *Second Reformed Protestant (Dutch) Church v Trustees of Reformed Protestant Dutch Church, 220 A.D. 244, 221 N.Y.S. 396, 1927 N.Y. App. Div. LEXIS 9281 (N.Y. App. Div. 1927)*.

At trial of action by prospective purchasers for specific performance of religious corporation's contract to sell property, it would not be necessary to litigate questions of fairness of contract's terms and its promotion of interests of religious corporation (as required by CLS *N-PCL § 511*), since such questions had been determined by prior Supreme Court order approving sale of property, and that order had never been challenged by parties. *Levovitz v Yeshiva Beth Henoch, Inc., 120 A.D.2d 289, 508 N.Y.S.2d 196, 1986 N.Y. App. Div. LEXIS 60614 (N.Y. App. Div. 2d Dep't 1986)*.

§ 511. Petition for court approval

(a) To obtain court approval to sell, lease, exchange or otherwise dispose of all or substantially all its assets, a corporation shall present a verified petition to the supreme court of the judicial district, or the county court of the county, wherein the corporation has its office or principal place of carrying out the purposes for which it was formed. The petition shall set forth:

1. The name of the corporation, the law under or by which it was incorporated.
2. The names of its directors and principal officers, and their places of residence.
3. The activities of the corporation.
4. A description, with reasonable certainty, of the assets to be sold, leased, exchanged, or otherwise disposed of, or a statement that it is proposed to sell, lease, exchange or otherwise dispose of all or substantially all the corporate assets more fully described in a schedule attached to the petition; and a statement of the fair value of such assets, and the amount of the corporation's debts and liabilities and how secured.
5. The consideration to be received by the corporation and the disposition proposed to be made thereof, together with a statement that the dissolution of the corporation is or is not contemplated thereafter.
6. That the consideration and the terms of the sale, lease, exchange or other disposition of the assets of the corporation are fair and reasonable to the corporation, and that the purposes of the corporation, or the interests of its members will be promoted thereby, and a concise statement of the reasons therefor.
7. That such sale, lease, exchange or disposition of corporate assets, has been recommended or authorized by vote of the directors in accordance with law, at a meeting duly called and held, as shown in a schedule annexed to the petition setting forth a copy of the resolution granting such authority with a statement of the vote thereon.
8. Where the consent of members of the corporation is required by law, that such consent has been given, as shown in a schedule annexed to the petition setting forth a copy of such consent, if in writing, or of a resolution giving such consent, adopted at a meeting of members duly called and held, with a statement of the vote thereon.
9. A request for court approval to sell, lease, exchange or otherwise dispose of all or substantially all the assets of the corporation as set forth in the petition.

(b) Upon presentation of the petition, the court shall direct that a minimum of fifteen days notice be given by mail or in person to the attorney general, and in its discretion may direct that notice of the application be given, personally or by mail, to any person interested therein, as member, officer or creditor of the corporation. The court shall have authority to shorten the time for service on the attorney general upon a showing of good cause. The notice shall specify the time and place, fixed by the court, for a hearing upon the application. Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

(c) If the corporation be insolvent, or if its assets be insufficient to liquidate its debts and liabilities in full, the application shall not be granted unless all the creditors of the corporation shall have been served, personally or by mail, with a notice of the time and place of the hearing.

(d) If it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the

corporation, as described in the petition, for such consideration and upon such terms as the court may prescribe. The order of the court shall direct the disposition of the consideration to be received thereunder by the corporation.

History

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970, with substance derived from Gen Corp Law §§ 50, 51, 52, 53; amd, L 1970, ch 847, § 23; L 1972, ch 961, eff Sept 1, 1972; L 1985, ch 102, § 1, eff May 21, 1985; *L 2013, ch 549, § 55*, eff July 1, 2014.

Annotations

Notes

Revision Notes:

Source: Gen Corp L §§ 50, 51, 52 and 53.

Changes: Revised, rewarded and combined; new provisions.

Comment: Paragraph (a) is adapted from Gen Corp L § 50. The information required to be stated in the verified petition includes several new provisions, as well as revisions of the requirements of Gen Corp L § 50, in line with the changes made from the provisions of the Mem Corp L. Paragraph (b) is derived from Gen Corp L § 51, with the addition of a provision requiring notice to the Attorney General of the filing of an application under paragraph (a). Paragraph (c) incorporates, without change, the provisions of Gen Corp L § 53. Paragraph (d) is based on Gen Corp L § 52. If the court determines that either the purposes of the corporation or the interests of the members will be promoted, it may authorize the disposition of all or substantially all of the assets, as provided.

Editor's Notes:

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes:

2013. Chapter 549, § 55 amended:

Section heading by deleting at fig 1 "leave of" and adding the matter in italics.

Par (a), opening par, by deleting at fig 1 "A corporation required by law to", at fig 2 "leave of" and adding the matter in italics.

Par (a), subpar 9 by deleting at fig 1 "prayer", at fig 2 "leave" and adding the matter in italics.

Notes to Decisions

1. Generally

Charitable foundation's sale of 34 acres of land to defendants fell within ambit of CLS *N-PCL §§ 510* and *511* where property in question was foundation's largest, most significant and single most valuable possession, and its sale for inadequate consideration severely hampered foundation's ability to carry out its mission of constructing and operating senior citizens' center thereon; accordingly, contract of sale and deed were null and void where transaction was never subjected to requisite judicial scrutiny, and there was no proof that it was approved by foundation's membership or board of trustees. *Rose Ocko Found., Inc. v Lebovits, 93 N.Y.2d 997, 696 N.Y.S.2d 107, 718 N.E.2d 412, 1999 N.Y. LEXIS 1964 (N.Y. 1999)*.

Positive
As of: February 7, 2017 10:25 AM EST

Church of God v. Fourth Church of Christ, Scientist

Court of Appeals of New York

June 8, 1981, Argued ; July 7, 1981, Decided

No Number in Original

Reporter
54 N.Y.2d 742 *; 426 N.E.2d 480 **; 442 N.Y.S.2d 986 ***; 1981 N.Y. LEXIS 2658 ****

Church of God of Prospect Plaza, Appellant, v. Fourth Church of Christ, Scientist, of Brooklyn, Respondent

Prior History: [****1] Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 22, 1980, which (1) reversed, on the law and the facts, a judgment of the Supreme Court (Abraham J. Multer, Referee), in favor of plaintiff, entered in Kings County, and (2) dismissed the complaint. Defendant church had elected to sell its church building because of declining membership and planned to transfer to another facility. Thereafter, defendant prepared and sent a contract of sale for the property to plaintiff, which signed the contract and returned it to defendant. At approximately the same time, defendant received an offer from another church to merge congregations and also received a purchase offer from a third party. The merger was originally disapproved by defendant's mother church, and when defendant attempted to sell its church building to the third party, plaintiff commenced the present action, seeking specific performance. Subsequently, the merger of defendant with its sister church was approved and the property of the sister church was sold to the third party. On a prior appeal (*59 AD2d 732*), the matter was remanded for a determination of [****2] whether signed corporate minutes of defendant authorizing the sale to plaintiff constituted a sufficient memorandum to satisfy the Statute of Frauds. Special Term answered to that question in the affirmative and referred the matter to a referee to determine whether the contract should be approved under *section 12 of the Religious Corporations Law*, which required court authorization before a religious corporation may sell any of its real property. The referee determined that such approval should be granted and offered defendant the alternative of specific performance or the payment of damages. Judgment was then entered for damages in the amount of $ 75,000 plus interest. On the present appeal, the Appellate Division concluded that although the contract of sale was valid and enforceable, the contract could not be approved under *section 12 of the Religious Corporations Law* because the contract was not in the best interests of the membership, in view of its merger with another congregation whose building had already been sold, and that the contract should therefore be voided, with the result that plaintiff was not entitled either to damages or to specific performance.

*Church of [****3] God of Prospect Plaza v Fourth Church of Christ, Scientist, of Brooklyn, 76 AD2d 712*.

Disposition: Order affirmed, with costs, in a memorandum.

Core Terms

conveyance, Corporations, Religious, religious corporation, executed and delivered, real property, parties, specific performance, court approval, leave of court, sale contract, Congregation, disapproval, approve, becomes, confirm, courts, vendee

Case Summary

Procedural Posture
Plaintiff buyer sought review of an order from the Appellate Division of the Supreme Court in the Second Judicial Department (New York), reversing the judgment of the trial court entered for the buyer in its action seeking specific performance of a contract for the sale of real property from defendant religious corporation.

Overview

The parties entered into a contract for the sale of real property belonging to a religious corporation. After the agreement was signed by the buyer, the religious corporation received another more favorable offer and refused to perform under the contract. The buyer brought an action for specific performance. The trial court entered judgment for the buyer. The appellate division reversed the judgment, holding that *N.Y. Relig. Corp. Law § 12* required court approval for the sale of property of a religious corporation and that court approval could not be given because the transaction was not

fair to the members. The court affirmed the order, holding that the appellate division's factual finding that the contemplated sale would not promote the purposes of the religious corporation or the interests of the members of its congregation was supported by the weight of the evidence.

Outcome
The court affirmed the order.

LexisNexis® Headnotes

Business & Corporate Law > ... > Corporate Formation > Corporate Existence, Powers & Purpose > General Overview

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Contracts Law > Remedies > Specific Performance

Real Property Law > Deeds > General Overview

Real Property Law > Deeds > Validity Requirements > Enforceability

Real Property Law > Purchase & Sale > Contracts of Sale > General Overview

Real Property Law > ... > Contracts of Sale > Enforceability > General Overview

Real Property Law > Purchase & Sale > Remedies > Specific Performance

HN1[] Until and unless both leave of the court and appropriate denominational authorization have been obtained as required by *N.Y. Relig. Corp. Law § 12*, such a corporation may not sell any of its real property. While under that statute it cannot make a valid conveyance without judicial sanction, it is established that it may enter into a contract to sell conditioned upon obtaining court approval. Moreover, in an action for specific performance, a court of equity has ample power to inquire into the fairness of the contract and as to its advantage or disadvantage to the religious corporation, and to approve the proposed conveyance and direct it to be made where, upon all the facts, no valid reason appears for refusing such relief.

Headnotes/Syllabus

Headnotes

Religious Corporations and Associations -- Sale of Church Property

In an action for specific performance of a contract to sell real property upon which defendant's church building was situated, an order of the Appellate Division, which reversed a judgment awarding damages to plaintiff and dismissed the complaint, is affirmed. The Appellate Division's factual finding that the contemplated sale would not promote the purposes of the respondent religious corporation or the interests of the members of its congregation is supported by the weight of the evidence and, under the circumstances, it cannot be said that judicial consent to the sale as required by *section 12 of the Religious Corporations Law* was not properly withheld; it follows that the purported agreement would be invalid and did not entitle the plaintiff to either specific performance or monetary damages.

Counsel: *Stephen A. Humsjo* for appellant.

Dwight B. Demeritt, Jr., and *Paul V. Nunes* for respondent.

Judges: Judges Jasen, Jones, Wachtler and Fuchsberg concur; Chief [****4] Judge Cooke concurs in result in a concurring opinion in which Judges Gabrielli and Meyer concur.

Opinion

[*743] [**480] [***987] **OPINION OF THE COURT**

Memorandum.

The order of the Appellate Division should be affirmed.

[**481] *HN1*[] Until and unless both leave of the court and appropriate denominational authorization have been obtained as required [*744] by *section 12 of the Religious Corporations Law*, such a corporation may not sell any of its real property. While under that statute it cannot make a valid conveyance without judicial sanction, it is established that it may enter into a contract to sell conditioned upon obtaining court approval. Moreover, in an action for specific performance, a court of equity "has ample power to inquire into the fairness of the contract and as to its advantage or disadvantage to the religious corporation, and to approve the proposed conveyance and direct it to be made where, upon all the facts, no valid reason appears for refusing such relief" (*Muck v Hitchcock, 149 App Div 323, 328-329*, revd on other grounds *212 NY 283*; *Sun Asserts Corp. v English Evangelical Lutheran Church, 19 Misc 2d 187, 192* [Martuscello, J.]; [****5] accord *Bounding Home Corp. v Chapin Home for Aged & Infirm, 19 Misc 2d 653, 654* [Margett, J.]; *Congregation Beth Elohim v Central Presbyt. Cong.*, 10 Abb Prac [NS] 484, 489; *Bowen v Trustees of Irish Presbyt. Cong. in City of N. Y.*, 6 Bosw 245; but see *Wilson v Ebenezer Baptist Church, 17 Misc 2d 607*).

In the present case, the Appellate Division's factual finding that the contemplated sale would not promote the purposes of the respondent religious corporation or the interests of the members of its congregation is supported by the weight of the evidence *(Electrolux Corp. v Val-Worth, Inc., 6 NY2d 556, 563)*. Under the circumstances, we cannot say that judicial consent was not properly withheld *(Wyatt v Benson, 4 Abb Prac 182, 189)*. It follows that the purported agreement would be invalid and did not entitle the plaintiff to either specific performance or monetary damages *(Associate Presbyt. Cong. of Hebron v Hanna, 113 App Div 12, 14; Sun Assets v English Evangelical Lutheran Church, 19 Misc 2d 187, 192, supra)*.

True, in most cases it would be preferable for the approval to have been sought in an independent proceeding instituted pursuant to *section [****6] 511 of the Not-For-Profit Corporation Law*, a matter, however, of no moment here since approval was not granted. For the same reason, it is now unnecessary for us to consider the propriety of a grant of permission in a proceeding such as the present **[*745]** one in which all the requirements of *section 511* would have been met.

Finally, it having been determined that judicial approval was properly refused, it becomes unnecessary for us to pass on whether, absent the requirement for such consent, the agreement between the parties would have constituted an enforceable contract.

Concur by: COOKE

Concur

Chief Judge Cooke (concurring). I concur in the result, said accord being reached on the narrow ground that *section 12 of the Religious Corporations Law* confers no power upon the courts to consider approval of the transaction at issue.

By statute, a religious corporation may not "sell * * * any of its real property **[***988]** without applying for and obtaining leave of court" (*Religious Corporations Law, § 12, subd 1*). Since a sale occurs when a contract of sale is made (e.g., *Fries v Merck, 167 NY 445, 449* - 451; *Madison Ave. Baptist Church v Baptist Church in Oliver St., 46 [****7] NY 131, 139-141*), court approval is required before the contract becomes binding. As an exception to this rule the statute permits the court to confirm a conveyance after the sale has been made *and the conveyance "executed and delivered"* (*Religious Corporations Law, § 12, subd 9* [emphasis added]). Here, prior approval of the sale had not been obtained and no conveyance has been executed and delivered. Thus, the courts have no statutory power to approve or disapprove the transaction.

Moreover, approval of the sale pursuant to subdivision 1 of *section 12* may only be obtained by petition of the religious corporation itself (see *Not-For-Profit Corporation Law, § 511; Wilson v Ebenezer Baptist Church, 17 Misc 2d 607, 609-610)*, except that the grantee may seek to "confirm" once the conveyance has been executed and delivered (*Religious Corporations Law, § 12, subd 9*). An obvious purpose of this statutory scheme is to prevent a forced conveyance of the religious corporation's real property at the behest of the vendee (see *Wilson v Ebenezer Baptist [**482] Church, supra)*. Inasmuch as the religious corporation here has not *sought* leave to sell its property, **[****8]** but rather this action was initiated by the vendee, the court may not even consider approval or disapproval of the sale.

[*746] For these reasons, the alleged contract between the parties could have no legal effect. On this view of the case, it is unnecessary to consider whether, under the general principles of contract law, the parties actually entered into a contract of sale.

Accordingly, the order of the Appellate Division should be affirmed.

End of Document

NY CLS N-PCL § 511-a

Current through 2016 released chapters 1-519

New York Consolidated Laws Service > *Not-For-Profit Corporation Law* > *Article 5 Corporate Finance*

§ *511-a*. Petition for attorney general approval

(a) In lieu of obtaining court approval under section 511 (Petition for court approval) of this article to sell, lease, exchange or otherwise dispose of all or substantially all of its assets, the corporation may alternatively seek approval of the attorney general by verified petition, except in the following circumstances: (1) the corporation is insolvent, or would become insolvent as a result of the transaction, and must proceed on notice to creditors pursuant to paragraph (c) of section 511 of this article; or (2) the attorney general, in his or her discretion, concludes that a court should review the petition and make a determination thereon.

(b) The verified petition to the attorney general shall set forth (1) all of the information required to be included in a verified petition to obtain court approval pursuant to subparagraphs one through nine of paragraph (a) of section 511 of this article; (2) a statement that the corporation is not insolvent and will not become insolvent as a result of the transaction; and (3) a statement as to whether any persons have raised, or have a reasonable basis to raise, objections to the sale, lease, exchange or other disposition that is the subject of the petition, including a statement setting forth the names and addresses of such persons, the nature of their interest, and a description of their objections. The attorney general, in his or her discretion, may direct the corporation to provide notice of such petition to any interested person, and the corporation shall provide the attorney general with a certification that such notice has been provided.

(c) If it shall appear, to the satisfaction of the attorney general that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, the attorney general may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, as described in the petition, for such consideration and upon such terms as the attorney general may prescribe. The authorization of the attorney general shall direct the disposition of the consideration to be received thereunder by the corporation.

(d) At any time, including if the attorney general does not approve the petition, or if the attorney general concludes that court review is appropriate, the petitioner may seek court approval on notice to the attorney general pursuant to section 511 (Petition for court approval) of this article.

History

Add, *L 2013, ch 549, § 56*, eff July 1, 2014.

Annotations

Notes

Editor's Notes:

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Research References & Practice Aids

Hierarchy Notes:

NY CLS N-PCL, Art. 5

End of Document

A Guide to Sales and Other Dispositions of Assets Pursuant to Not-for-Profit Corporation Law §§ 510-511 and Religious Corporations Law § 12

NEW YORK STATE OFFICE
of the
ATTORNEY GENERAL

Charities Bureau

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A GUIDE TO SALES AND OTHER DISPOSITION OF ASSETS PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW §§ 510, 511 and 511-a AND RELIGIOUS CORPORATIONS LAW § 12

Attorney General
ERIC T. SCHNEIDERMAN
Charities Bureau
www.charitiesnys.com

Guidance Document 2014-2, V. 3
Issue date: February 3, 2016

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A GUIDE TO SALES AND OTHER DISPOSITION OF ASSETS PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW §§ 510, 511 and 511-a AND RELIGIOUS CORPORATIONS LAW § 12

INTRODUCTION

New York State Attorney General Eric T. Schneiderman's Charities Bureau has prepared this guidance (1) to assist not-for-profit corporations seeking approval of the Attorney General and/or the Court for sales and other dispositions of their assets, including real and/or personal property, as well as intangible property such as bonds, stocks or certificates of deposit and (2) to assist religious corporations seeeking approval of a lease for a period exceeding five years or the sale or mortgage of any real property pursuant to the Not-for-Profit Corporation Law ("N-PCL"). N-PCL §§ 510, 511 and 511-a and Religious Corporations Law ("RCL") § 12(1).

New York law governing not-for-profit and religious corporations provides certain protections against the inappropriate transfer of assets of such corporations, including internal procedural rules for authorizing transfers. The law also provides for review by the Attorney General and/or by New York State Supreme Court for certain transactions.

Because of the unique role and responsibility of not-for-profit and religious organizations in the lives of our citizens and communities, and because of their legal responsibility to safeguard their assets and provide for the interests of their members and beneficiaries, the law requires the Court's or the Attorney General's approval of certain transactions by such corporations..

The procedures described in this guidance reflect amendments to the N-PCL that were included in the Nonprofit Revitalization Act of 2013 ("the Act" or "NPRA") that became effective on July 1, 2014 and amendments to the NPRA that became effective on December 11, 2015. Those laws set forth the procedures to be followed by not-for-profit corporations and religious corporations when they transfer certain assets, giving such corporations the option of submitting a verified petition for approval such transactions to either the Attorney General or the Court. As more fully described below, if an application is made to the Attorney General, the Attorney General may, determine that Court review of a particular application is appropriate. In such cases, the verified petition must be submitted to the Court on notice to the Attorney General.

This booklet is not a substitute for legal advice from an attorney but is intended to provide guidance to not-for-profit and religious corporations that are seeking to sell or otherwise dispose of their assets and the lawyers who represent them. The information in this guidance is general in nature. Each transaction is governed by its own facts, and the Attorney General reviews each one on a case-by-case basis. You are encouraged to discuss the proposed transaction in advance with the Attorney General's Charities Bureau in New York City or Albany or with an Assistant Attorney General in the appropriate

Regional Office of the Attorney General to which you should submit your application. A list of the offices of the Attorney General, their contact information and the New York counties they serve is in Appendix F. If you anticipate that members or employees of the organization, members of the public served by the organization, a public agency with regulatory oversight or contractual relationships with the organization, or members of the local community may have concerns about the proposed transaction, it is prudent to advise them of the planned transaction in order to address their concerns to the extent feasible consistent with the mission of the organization, and to document these outreach and consultation efforts.

WHAT TRANSACTIONS ARE COVERED

Not-for-Profit Corporations:

The sale, lease, exchange or other disposition of all or substantially all of the assets[1] of a Type B or charitable not-for-profit corporation[2] requires approval of the Attorney General or the Court, with notice to the Attorney General, pursuant to the procedures set forth in the N-PCL. N-PCL §§ 510, 511 and 511-a. The assets may be real and/or personal property, including intangible property such as bonds, stocks or certificates of deposit. N-PCL § 510(a). Transactions by foreign corporations that do business in New York are also covered. N-PCL § 103.

There is no fixed numerical or arithmetic measure of "all or substantially all." Approval of the Attorney General or the Court is required when the transaction involves a large proportion of the corporation's total assets or when it may affect the ability of the corporation to carry out its purposes, regardless of the percentage of the corporation's total assets that are the subject of the transaction.

Exceptions to Covered Transactions by Not-for-Corporations

Mortgages, unless a component of the transaction involves a conveyance or lease that would otherwise come within N-PCL §§ 510-511, and 511-a and transactions by Type A[3] or non-charitable corporations[4] are not subject to the provisions of N-PCL §§ 510, 511 or 511-a.

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[1] Throughout this booklet, the term "transaction" will also be used to refer to the sale, lease exchange or other disposition of all or substantially all of a not-for-profit corporation's assets, and, in the case of religious corporations, it also refers to leases and mortgages.

[2] See N-PCL §§ 102(a)(3-a) and (3-b) for the definitions of charitable corporation and charitable purposes. Corporations formed as Type B corporations are, effective July 1, 2014, deemed to be charitable corporations. N-PCL § 201(c).

[3] Corporations formed as Type A corporations are, effective July 1, 2014, deemed to be non-charitable corporations. N-PCL § 201(b).

[4] See N-PCL § 102(a)(9-a) for the definition of non-charitable corporation.

Religious Corporations:

Except as noted below, a lease for a period exceeding five years or the sale or mortgage of any real property of a religious corporation requires approval of the Attorney General or the Court, with notice to the Attorney General, pursuant to N-PCL §§ 511 or 511-a and RCL § 12(1). **NOTE:** Such approval is required even if the subject property does not constitute all or substantially all of the religious corporation's assets.

Exceptions to Covered Transactions by Religious Corporations

Purchase money mortgages or purchase money security agreements and real property acquired as a result of a mortgage foreclosure proceeding or by a deed in lieu of the foreclosure of a mortgage owned by a religious corporation are not subject to the provisions of N-PCL §§ 510, 511 or 511-a. RCL §§ 12(1) and § 12(10). In addition, the following churches formed under the Religious Corporations Law are required to seek Court approval of a lease for a period exceeding five years or the sale or mortgage of any real property, but the law does not require them to give notice to the Attorney General: Protestant Episcopal Church, Roman Catholic Church, Ruthenian Catholic Church of the Greek Rite, African Methodist Episcopal Zion Church, Presbyterian Church of the General Assembly of the Presbyterian Church U.S.A., United Methodist Church, Reformed Church of the General Synod of the Reformed Church in America. RCL §§ 2-b (1)(d-1) and 12(2)-(5-c).

ROLE OF THE ATTORNEY GENERAL

The N-PCL requires not-for-profit corporations seeking to sell or otherwise dispose of all or substantially all of their assets and religious corporations (other than those described above) seeking to lease for a period exceeding five years or sell or mortgage any real property to submit a verified petition for approval of such transaction to *either* the Attorney General or the Court, on notice to the Attorney General.

Where Court approval is sought, the N-PCL requires that, upon filing the verified petition with the Court, the Attorney General be given a minimum of 15 days notice before a hearing on the application. N-PCL § 511. However, the procedure preferred by the Charities Bureau and most Courts, is submission of a verified petition and proposed order, in draft form with tabs identifying any exhibits, to the Attorney General for review in advance of filing with the Court. A sample petition to the Court is attached as Appendix B, and a sample order is attached as Appendix D. This procedure enables the Attorney General to review the papers to ensure that all statutory requirements are met, that all necessary documents are included as exhibits, and that any concerns of the Attorney General are resolved *before* submission to the Court. A checklist of documents needed to request approval of a transaction is attached as Appendix C.

In the case of an application to the Court, on notice to the Attorney General, if the Attorney General has no objection to the transaction, the Attorney General's Office will provide the petitioner with a "No Objection" endorsement. Such endorsement, typically

provided in a letter to the petitioner or stamped on the proposed order approving the transaction, will waive statutory service of the petition since the papers will have already been submitted to and reviewed by the Office of the Attorney General. The petition can then be submitted to the Court and, if a hearing or other court proceeding is scheduled, the petitioner must give notice of such proceeding to the Attorney General. In addition, a copy of the order, signed by the judge, must be submitted to the Attorney General.

If the Attorney General does not approve the petition or there are parties who object to the transaction and wish to be heard by the Court, the application must then be made to the Court, on notice to the Attorney General and any other appropriate parties, for an order approving the transaction.

If approval of the Attorney General alone is sought, the verified petition will be reviewed by the office of the Attorney General to ensure that all statutory requirements are met, that all necessary documents are included as exhibits, and that any issues raised during the review are resolved. A sample petition to the Court is attached as Appendix B. The Attorney General may request the petitioner to provide additional information needed to complete the review. If, after the review, the Attorney General has no objection to the relief requested, the Attorney General will indicate approval of the transaction, in writing, on the "Attorney General's Approval," a sample of which is attached in Appendix E. A copy of the Attorney General's Approval will be sent to the petitioner's attorney and posted on the internet at www.charitiesnys.com.

If the Attorney General does not approve a petition, if the Attorney General concludes that Court review of the petition is appropriate, or if the corporation chooses to do so, the corporation may apply to the Court, on notice to the Attorney General, in the judicial district where the corporation's principal office is located for an order approving the transaction. Please note that, if the Attorney General has no objection to the transaction but determines that Court review is appropriate, the petition must be submitted to the Court.

Circumstances in which the Attorney General may determine that Court approval, on notice to the Attorney General, rather than approval of the Attorney General is appropriate, include:

- The corporation is insolvent and must proceed on notice to creditors pursuant to NPCL § 511(c).
- The Attorney General has received complaints or objections from members, creditors of the organization or other interested persons who are entitled to notice pursuant to N-PCL § 511(b).
- The Attorney General has objections to the transaction which have not been resolved after review of the petition and discussion with the corporation's attorney.

In addition, there may be circumstances when the Attorney General has no objection to a transaction but determines that review by the Court is appropriate, including transactions that are unusually complex or will have an impact on the public.

STATUTORY STANDARD

Under the N-PCL's two-prong test, the Attorney General or the Court must be satisfied that (1) that the consideration and the terms of the transaction are fair and reasonable to the corporation and (2) that the purposes of the corporation or the interests of its members will be promoted by the transaction. N-PCL §§ 511(d) and 511-a(c). These statutory standards and other statutory requirements are discussed more fully below.

THE CORPORATION'S PREPARATION FOR THE TRANSACTION

Approval of the Transaction by the Board

The corporation's board of directors or trustees must approve the proposed transaction, or, if there are members entitled to vote (see *Approval of the Transaction by Members* below), the board must adopt a resolution recommending the transaction. A vote of at least two-thirds of the corporation's entire board is required unless the board has 21 or more directors, in which case a vote of a majority of the entire board is sufficient. Please note that a corporation's certificate of incorporation or by-laws may provide for greater quorum or voting requirements. The resolution must specify the terms and conditions of the proposed transaction, including the consideration to be received by the corporation and the eventual use to be made of such consideration, and a statement of whether or not dissolution of the corporation is contemplated. N-PCL §§ 510(a)(1) and (2).

If the transaction involves a sale or transfer to a "related party,"[5] the corporation must follow the procedures set forth in the N-PCL § 715, including ensuring that the transaction is in the best interest of and fair and reasonable to the corporation and that any officer, director or key employee who has an interest in the transaction discloses the facts of that interest. Where an officer, director, or key employee has such an interest, the officer, director or key employee must not participate in deliberations or votes of the Board in considering or approving the action. In addition, in certain circumstances, the Board must explicitly consider reasonable alternatives to the transaction. The abstention of the officer, director, or key employee, and the consideration of reasonable alternatives to the transaction must be documented in the minutes of the Board. Organizations

[5] "Related party" means (i) any director, officer or key employee of the corporation or any affiliate of the corporation; (ii) any relative of any director, officer or key employee of the corporation or any affiliate of the corporation; or (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent. N-PCL § 102 (23).

planning a transaction should review and assess their compliance with the requirements of the N-PCL before entering into the transaction. N-PCL § 715.

Approval of the Transaction by Members

If a corporation has members with voting rights, the membership must approve the transaction. First, the board must adopt a resolution recommending the transaction. The resolution must describe the parties to and the terms and conditions of the proposed transaction, including the consideration to be received by the corporation, an explanation as to how the proceeds will be used and a statement of whether or not dissolution of the corporation is contemplated. The board resolution must then be submitted to a vote at an annual or special meeting of members entitled to vote on it. N-PCL § 510(a)(1).

Each member and each holder of subvention certificates or bonds of the corporation, whether or not entitled to vote, is entitled to notice of the meeting. The members may approve the proposed transaction according to the terms of the board resolution, or authorize the board to modify the terms and conditions of the proposed transaction, by a two-thirds vote of the members present at the meeting, provided that the number of affirmative votes is at least equal to the quorum. N-PCL §§ 510(a)(1) and 613.

The quorum for a membership meeting is a majority of the members, unless the corporation's certificate of incorporation or by-laws provides for a greater or lesser quorum requirement. If the certificate of incorporation or by-laws provide for a lesser quorum, the quorum may not be less than the number entitled to cast one hundred votes or one-tenth of the total number of votes entitled to be cast, whichever is less. N-PCL § 608(a) and (b) and 615. For religious corporations, where the RCL provides a different quorum, the RCL governs. The applicable sections of the RCL should be consulted as to the quorum requirements for members. *See, e.g.,* RCL §§ 134, 164 and 195.

Voting by proxy is permitted for members of not-for-profit corporations and for members of Jewish religious corporations, provided that the by-laws or certificate of incorporation permit proxy voting. N-PCL § 609 and RCL § 207.

PREPARING TO PETITION FOR APPROVAL OF A TRANSACTION

Fair and Reasonable Consideration: Appraisals

In preparing to petition, either the Court or the Attorney General, for approval of a transaction, the corporation must determine whether or not the proposed consideration is fair and reasonable. To do so, there must be an appraisal of the assets, whether real or personal property, that are the subject of the transaction. Although the statute does not explicitly require an appraisal, Court decisions have established that fair market value can best be determined by means of an appraisal, and the Court and the Attorney General will generally reject the petition if it is not supported by an appraisal. The appraisal should be done by a licensed appraiser who is completely independent of both buyer and seller. The appraisal cannot be done by a broker involved in the sale of the property.

If the asset is real property, the appraisal should be based on at least three comparable sales, unless a different valuation method is more appropriate. If the transaction is not an arm's length transaction (i.e., if it involves a sale or transfer to a director, officer, employee or other person with some connection to the corporation), the Attorney General may require two appraisals.

An appraisal is not necessary where a solvent religious corporation seeks leave of court to convey real property to another religious corporation or to a membership, educational, municipal or not-for-profit corporation for nominal consideration and the purpose of such conveyance is the furtherance of the religious and charitable purposes of the corporation. RCL § 12(8). Conveyance for more than nominal consideration, however, generally indicates that the sale is not solely for religious or charitable purposes, and an appraisal is required under such circumstances to demonstrate that the interests of the corporation and its members are served by the conveyance.

Use of Proceeds of a Transaction

The use of the proceeds must be consistent with the corporation's purposes. Proceeds cannot be used for the personal benefit of a director, officer, employee, member or other interested party.

If the property being sold is a religious corporation's house of worship or a not-for-profit corporation's main premises and, as of the date of the sale, the corporation has not yet entered into a contract to purchase or lease new premises, the Attorney General will require, as a condition of approval, that the sale proceeds be placed in escrow to ensure that funds will be available to obtain new premises so that the corporation can continue to carry out its corporate purposes.

VERIFIED PETITION FOR ATTORNEY GENERAL OR COURT APPROVAL

The N-PCL requires that charitable not-for-profit corporations seeking to sell, lease, exchange or otherwise dispose of all or substantially all of their assets must seek approval of the Attorney General or the Supreme Court. N-PCL § 510(a)(3). A request for approval of such a transaction must be in the form of a verified petition to the Attorney General or to the Court. The requirements for the petition also apply to a religious corporation seeking to mortgage or sell property or to lease real property for more than five years.

Verified Petition to the Attorney General or the Court

A verified petition to the Attorney General or the Court must include the following information:

- The name of the corporation as it appears on its certificate of incorporation or an amendment. N-PCL § 511(a)(1). A copy of the certificate of incorporation and all

amendments and a certified copy of the corporation's by-laws should be attached as exhibits.

- The address of the corporation's principal location.

- The section of the law under which the corporation was incorporated. N-PCL § 511(a)(1).

- The names of the corporation's directors and principal officers, and their home addresses. N-PCL § 511(a)(2).

- A description of the corporation's activities. N-PCL § 511(a)(3).

- A description of the assets that are the subject of the transaction. N-PCL § 511(a)(4). If the subject asset is real property, a copy of the deed should be attached as an exhibit. In addition, a copy of the contract, lease, or mortgage commitment should be attached as an exhibit. If the contract has been assigned or will be assigned prior to closing, the assignment agreement should also be attached as an exhibit.

- A statement of the fair value of the asset. N-PCL § 511(a)(4). A copy of the appraisal should be attached as an exhibit.

- A statement of the amount of the corporation's debts and liabilities and how they are secured. N-PCL § 511(a)(4). The statement should be current, include the name of each payee, any security and if past due. In addition, a copy of the corporation's most recent annual financial report (i.e., IRS Form 990 or 990-PF) or audited or unaudited financial statements should be attached as an exhibit. If the corporation is not required to file a 990 or 990-PF and does not have annual financial reports, it should prepare a schedule, certified by its Treasurer, of all assets, liabilities, income and expenses of the corporation as of the most immediately completed prior fiscal year and attach it as an exhibit. In certain circumstances, the Attorney General may decide that financial statements certified by an independent accountant are required.

- The consideration to be received by the corporation. N-PCL § 511(a)(5). If any consideration is to be delivered other than in cash at closing, there should be evidence in the appraisal or other independent support as to the fair value of that consideration. If the consideration is less than the appraised value of the assets, a documented explanation of why the consideration is fair and reasonable must be provided.

- A description of the proposed use of the consideration. N-PCL § 511(a)(5). If the corporation is purchasing or leasing new premises, a copy of the contract or lease should be attached as an exhibit. The description should include disclosure of all existing commitments for use of the consideration. Support for all commitments

for use of proceeds should be attached to the petition as exhibits (evidence of debt, invoices, and a closing statement).

- A statement as to whether dissolution of the corporation is contemplated. N-PCL § 511(a)(5). In certain circumstances, the Attorney General will require that the proceeds be placed in escrow if the corporation plans to dissolve. In addition, if the corporation plans to dissolve after the sale, the legal doctrine of *quasi cy pres* requires that the net proceeds be distributed under a Plan of Dissolution and Distribution of Assets to organizations engaged in substantially similar activities.[6]

- A statement that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation, or the interests of its members, will be promoted by the transaction, and a statement of the reasons for that determination. N-PCL § 511(a)(6).

- A statement that the transaction was recommended or authorized by a vote of the directors in accordance with law, at a meeting duly called and held. N-PCL § 511(a)(7). Include the total number of directors, the number of the directors present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the board resolution, certified by the secretary, should be attached as an exhibit. (See also above "Approval of the Transaction by the Board".)

- If consent of members of the corporation is required by law, a statement that such consent was given in accordance with law, at a meeting of the members duly called and held. N-PCL § 511(a)(8). Include the total number of members, the number of members present at the meeting, the vote pro and con, and what constitutes a quorum. A copy of the membership resolution, certified by the secretary, should be attached as an exhibit. (See also above "Approval of the Transaction by the Members.")

- If approval of any denominational governing bodies or officials is required, a statement that consent was given. A copy of any such approval should be attached as an exhibit.

- A statement that the transaction is arms-length and none of the directors, officers, key employees or members of the corporation or their relatives will receive a direct or indirect financial benefit as a result of the transaction or commitments for distribution of proceeds. If any exceptions to the prior statement are necessary, include a statement of how the related party arrangement was approved by the corporation, including but not limited to compliance with N-PCL § 715, and exhibits evidencing such approval.

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[6] Not-for-profit corporations contemplating dissolution should consult the Attorney General's guidance on dissolution posted at http://www.charitiesnys.com/home.jsp. Religious Corporations should consult RCL § 18.

- If other government agency approvals are required for the proposed transaction, a statement that such approvals have been obtained. A copy of the approval received from each government agency should be attached as an exhibit.

- A statement as to whether or not an application for similar approval was previously made to the Attorney General or the Court, and, if so, the determination made concerning the application.

- If the application for approval is made to the Attorney General, a statement that the corporation is not insolvent and will not become insolvent as a result of the transaction. N-PCL § 511-a(b).

- If the application for approval is made to the Attorney General, a statement as to whether any persons or entities have raised, or have a reasonable basis to raise, objections to the transaction, including a statement setting forth the names and addresses of such persons, the nature of their interest, and a description of their objections. N-PCL § 511-a(b).

- A statement of the relief requested (approval to sell real property, approval of mortgage, etc). N-PCL § 511(a)(9).

Venue

If the application for approval of the transaction is made to the Court, the verified petition must be submitted to the Supreme Court of the judicial district or county Court of the county where the corporation has its office or principal place of carrying out the purposes for which it was formed, even if the asset to be sold is located elsewhere. N-PCL §§ 510(a)(3) and 511(a).

If the application for approval of the transaction is made to the Attorney General, the verified petition must be submitted to the office of the Attorney General's Charities Bureau in New York City or Albany or to the appropriate Regional Office of the Attorney General that handles such applications. A list of the offices of the Attorney General, the New York counties they serve and their contact information is in Appendix F.

Notice to Interested Persons

The Court in its discretion may direct that notice of the application be given to any interested person, such as a member, officer or creditor of the corporation. N-PCL § 511(b). The notice must specify the time and place, fixed by the Court, for a hearing upon the application. Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

In certain circumstances, the Attorney General may ask the Court to give notice to interested parties (including tenants or other occupants of the premises) and/or hold an evidentiary hearing. For example, if there is a membership dispute, a dispute as to who

constitutes a duly authorized board or a question about the adequacy of the consideration, the Attorney General may ask the Court to hold an evidentiary hearing to resolve the dispute.

Notice to Creditors

If the corporation is insolvent or if its assets are insufficient to liquidate its debts and liabilities in full, all creditors of the corporation must be served with a notice of the time and place of the hearing. N-PCL 511(c). In such circumstances, notice to creditors is required by statute, and the petition must be approved by the Court on notice to the Attorney General alone.

REQUIREMENTS FOR THE COURT ORDER OR ATTORNEY GENERAL APPROVAL

If the petition requests Court approval, a copy of the proposed order should be submitted to the Attorney General with the verified petition. The order should set forth the terms of the transaction and the consideration. For sales, include the sale price, the purchaser and the address of the property. For leases, include the amount of rent, the term of the lease, the lessee and the address of the property. For mortgages, include the name and address of the lender, the amount of the loan, the interest rate, the length of the mortgage, and any period of amortization, and the address of the property.

The order must also set forth how the corporation will use the proceeds to be received by the corporation. N-PCL § 511(d). If all or part of the proceeds is to be placed in escrow, this must be stated in the order. Funds in escrow may only be released by further order of the Court on notice to the Attorney General.

In addition, the Attorney General requires that the order contain the following: a statement that a copy of the signed Court order shall be served on the Attorney General, and that the Attorney General shall receive written notice that the transaction has been completed (i.e., upon closing), if the transaction has been abandoned, or if it is still pending 90 days after Court approval.

If the verified petition requests approval of the Attorney General, a copy of the proposed Attorney General Approval should be submitted to the Attorney General with the petition. The Attorney General Approval should include all of the information described above that is required to be included in a proposed order.

REGISTRATION WITH THE ATTORNEY GENERAL'S CHARITIES BUREAU

If the corporation is required to register with the Attorney General pursuant to Executive Law Article 7-A or Estates, Powers and Trusts Law § 8-1.4, the Attorney General will check to ensure that the corporation is registered and that its annual financial reports are up to date before completing the review of the transaction. If the corporation

is not registered, or if its reports are delinquent, it will have to register and file all required annual financial reports before the Attorney General's review can be completed. If the purchaser is required to register, its registration and reports must also be current before the Attorney General's review can be completed. Note that certain corporations, such as religious corporations, are exempt from registration.

GOVERNMENT AGENCY APPROVALS

If other government agency approvals are required for the proposed transaction (i.e., NYS Department of Health, NYS Public Health and Health Planning Council, NYS Education Department, US Department of Housing and Urban Development, etc.), the Attorney General will require that such approvals be obtained before the Attorney General review is completed. A copy of each government agency approval should be attached as an exhibit to the petition.

CONCLUSION

If you have any questions about the information contained in this booklet or about the procedures for obtaining Attorney General review and Court approval of a transaction, you may contact the Attorney General's Charities Bureau in New York City or Albany or any of the Attorney General's regional offices for assistance. A list of regional offices and their contact information is included in Appendix F of this booklet.

Appendix A - Checklist for Petitions for Approval of Property Transactions

Verified Petition to the Attorney General or the Court

____ Petition

____ Verification of Petition

Attachments to Verified Petition

- ___ Copy of the corporation's Certificate of Incorporation and all amendments
- ___ Copy of the corporation's by-laws or constitution and all amendments
- ___ Copy of the deed to any real property that is the subject of the transaction
- ___ Copy of the contract, lease, or mortgage commitment
- ___ If the contract has been or will be assigned, a copy of the assignment agreement
- ___ If the corporation seeks to use the proceeds to purchase or lease new premises, a copy of the contract or lease
- ___ If the corporation intends to use any of the proceeds to pay existing commitments or debts, including closing costs, copies of the evidence of the commitments or debts (invoices, executed notes, etc.) and proposed closing statement.
- ___ Copy of the appraisal
- ___ Copy of the corporation's most recent financial statement and, if not reflected in the financial statement, a schedule of existing debts and liabilities (amount, owned to whom, if overdue, if secured).
- ___ Copy of the resolution of the board, certified by the corporation's secretary, authorizing or adopting or recommending the key terms of the proposed transaction and use of proceeds and stating the total number of directors present at the meeting, the number of votes for and against the resolution and the number of board members constituting a quorum.
- ___ A copy of the resolution of the members of the corporation or the religious congregation, certified by the corporation's secretary, approving the key terms of the transaction and the use of the proceeds and stating the total number of members, the number of members present at the meeting, the number of votes for and against the resolution and the number of members constituting a quorum.

- ___ If approval of any government agencies is required, copies of such approvals

- ___ If approval of any denominational governing bodies or officials is required, copies of such approvals (religious corporations)

- **Approval of the Attorney General or Order of the Court**

- ___ If the Court's approval is sought, a proposed Order (see Appendix D)

- ___ If the Attorney General's approval is sought, a proposed Attorney General Approval (see Appendix E)

Appendix B - Sample Petition for Court Approval of Sale of Assets

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

----------X

In the Matter of the Application of :	
(NAME OF CORPORATION)	VERIFIED PETITION
For Approval to (type of transaction) :	
pursuant to Sections 510 and 511 of the	Index No.
Not-for-Profit Corporation Law (or Religious :	
Corporations Law § 12)	

----------X

TO: THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Petitioner, (name of corporation) by (name and title of officer) of the corporation for its Verified Petition herein respectfully alleges:

TEXT OF THE PETITION (See Appendix A)

WHEREFORE, petitioner requests that the Court approve the (type of transaction) by (Name of Corporation), a not-for-profit corporation, pursuant to the Not-for-Profit Corporation Law Sections 510 and 511 (or Religious Corporations Law § 12).

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed this ___day of _(Month)_, 20___ by

_____
(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

Verification

STATE OF NEW YORK)
SS
COUNTY OF _____)

__(Name___ , being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation) , the corporation named in the above Petition and make this verification at the direction of its Board of Directors. I have read the foregoing Petition and know the contents thereof to be true of my own knowledge, except any matters that are stated on information and belief and as to those matters I believe them to be true.

_____
(Signature)

Sworn to before me this
____day of __(Month)__, 20__.

_____
Notary Public

Appendix C - Sample Petition for Attorney General Approval of Sale of Assets

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

----------X

In the Matter of the Application of	:	
(NAME OF CORPORATION)		VERIFIED PETITION
For Approval to (type of transaction)	:	
pursuant to Sections 510 and 511-a of the		OAG No.[7]
Not-for-Profit Corporation Law	:	

----------X

TO: OFFICE OF THE ATTORNEY GENERAL
_____(Street Address)
_____(City/Town)__, New York ___(Zip Code)

Petitioner, (name of corporation) by (name and title of officer) of the corporation for its Verified Petition herein respectfully alleges:

TEXT OF THE PETITION (See Appendix A)

WHEREFORE, petitioner requests that the Attorney General approve the (type of transaction) by (Name of Corporation), a not-for-profit corporation, pursuant to the Not-for-Profit Corporation Law Sections 510 and 511-a.

IN WITNESS WHEREFORE, the corporation has caused this Petition to be executed this ___day of _(Month)_, 20____ by

_____
(Name of Officer and Title)

Name of Attorney
Address of Attorney
Telephone Number of Attorney
Email Address of Attorney

[7] The office of the Attorney General will assign an identification number to each petition and advise petitioner of that number. The identification number must be placed on all subsequent filings and correspondence.

Verification

STATE OF NEW YORK)
SS
COUNTY OF _____)

__(Name)___ , being duly sworn, deposes and says:

I am the (Title) of (Name of Corporation) , the corporation named in the above Petition and make this verification at the direction of its Board of Directors. I have read the foregoing Petition and know the contents thereof to be true of my own knowledge, except those matters that are stated on information and belief and as to those matters I believe them to be true.

_____
Signature

Sworn to before me this
____day of _(Month)_, 20__.

_____

Notary Public

APPENDIX D - Sample Court Order Approving Sale of Assets

At the Supreme Court of
the State of New York,
held in and for the
the County of _____
on the __ day of _(Month)_, 20___.

P R E S E N T :
HON.
Justice.

----------X

In the Matter of the Application of	:	
(NAME OF CORPORATION)		ORDER
For Approval to (type of transaction)	:	
pursuant to Sections 510 and 511 of the		Index No.
Not-for-Profit Corporation Law (or Religious	:	
Corporations Law § 12)		

----------X

ADD BODY OF ORDER WITH RECITATIONS

AND DECRETAL PARAGRAPHS REGARDING THE TERMS OF THE TRANSACTION AND THE USE OF PROCEEDS

E N T E R:

_____
Justice of the Supreme Court

_____
Date

APPENDIX E - Sample Attorney General's Approval of Transactions

ATTORNEY GENERAL OF THE STATE OF NEW YORK
COUNTY OF _____

In the Matter of the Application of	:	
(NAME OF CORPORATION)		ATTORNEY GENERAL
for Approval to (type of transaction)	:	APPROVAL
pursuant to Sections 510 and 511-a of the		
Not-for-Profit Corporation Law	:	OAG No.[8]

1. By Petition verified on (Date), (Name of Corporation) applied to the Attorney General pursuant to Sections 510 and 511-a of the Not-for-Profit Corporation Law for approval of an application of (TYPE OF TRANSACTION)

2. The assets that are the subject of the Petition are (DESCRIBE ASSETS)

3. The terms of the transaction and the consideration are as follows:

Note - For sales, include the sale price, the purchaser and the address of the property. For leases, include the amount of rent, the term of the lease, the lessee and the address of the property. For mortgages, include the amount of the loan, the interest rate, the length of the mortgage and the name of the lender.

4. The proceeds will be used for the following purposes:

Note - If all or part of the proceeds is to be placed in escrow, this should be set forth. Funds in escrow may only be released by further approval of the Attorney General.

5. Based on a review of the Petition and the exhibits thereto (and the additional documents and information requested by the Attorney General), and the verification of (Name of Certifier) that (Name of the Corporation) has complied with the provisions of the Not-for-Profit Corporation Law applicable to the sale or other disposition of all or substantially all of its assets, and neither the Petitioner or any third party having raised with the Attorney General any objections to the proposed transaction, the transaction is approved.

[8] The office of the Attorney General will assign an identification number to each petition and advise petitioner of that number. The identification number must be placed on all subsection filings and correspondence.

6. Petitioner shall provide written notice to the Attorney General that the transaction has been completed, if it has been abandoned, or if it is still pending 90 days after approval.

Eric T. Schneiderman
Attorney General of the State of New York

By:_____ Date: _____
Assistant Attorney General

Appendix F - Offices of the Attorney General and the counties covered by each:

ALBANY - New York State Attorney General
Charities Bureau
The Capitol
Albany, NY 12224-0341
518-776-2160
Counties: Albany, Columbia, Fulton, Greene, Hamilton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie,
Warren and Washington (note: Sullivan and Ulster for trusts and estates matters only)

BINGHAMTON
New York State Attorney General
Binghamton Regional Office
44 Hawley Street, 17th Floor
Binghamton, NY 13901-4433
607-721-8771
Counties: Broome, Chemung, Chenango, Delaware, Otsego, Schuyler, Tioga and Tompkins

BUFFALO
New York State Attorney General
Buffalo Regional Office
Main Place Tower - Suite 300A
Buffalo, NY 14202
716-853-8400
Counties: Allegheny, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming

NASSAU (not for trusts & estates matters)
New York State Attorney General
Nassau Regional Office
200 Old Country Road, Suite 240
Mineola, NY 11501-4241
516-248-3302
Counties: Nassau (note: trusts and estates matters are handled
by NYC)

NEW YORK CITY
New York State Attorney General
Charities Bureau
Transactions Section
120 Broadway, 3rd Floor
New York, NY 10271-0332
212-416-8401
Counties: Bronx, Kings, New York, Queens and Richmond
(note: NYC also handles Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester – trusts and estates
matters only)

PLATTSBURGH
New York State Attorney General
Plattsburgh Regional Office
70 Clinton Street - Suite 700
Plattsburgh, NY 12901-2818
518-562-3288
Counties: Clinton, Essex and Franklin

POUGHKEEPSIE (not for trusts & estates matters)
New York State Attorney General
Poughkeepsie Regional Office
One Civic Center Plaza - Suite 401
Poughkeepsie, NY 12601-3157
845-485-3900
Counties: Dutchess, Orange, Sullivan and Ulster (note: Dutchess and Orange County trusts and estates matters are handled by NYC; Sullivan and Ulster County trusts and estates matters are handled by Albany)

ROCHESTER
New York State Attorney General
Rochester Regional Office
144 Exchange Boulevard
Rochester, NY 14614-2176
716-546-7430
Counties: Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates

SUFFOLK (not for trusts & estates matters)
New York State Attorney General
Suffolk Regional Office
300 Motor Parkway
Hauppauge, NY 11788-5127
631-231-2424
Counties: Suffolk (note: trusts and estates matters are handled by NYC)

SYRACUSE
New York State Attorney General
Syracuse Regional Office
615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
315-448-4800
Counties: Cayuga, Cortland, Madison, Onondaga and Oswego

UTICA
New York State Attorney General
Utica Regional Office
207 Genesee Street, Room 508
Utica, NY 13501-2812
315-793-2225
Counties: Herkimer and Oneida

WATERTOWN
New York State Attorney General
Watertown Regional Office
Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3744
315-785-2444
Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER (not for trusts & estates matters)
New York State Attorney General
Westchester Regional Office
44 South Broadway
White Plains, NY 10601
914-422-8755
Counties: Putnam, Rockland and Westchester (note: trusts and estates matters are handled by NYC)

NY CLS Relig Corp § 208

Current through 2016 released chapters 1-396

New York Consolidated Laws Service > *Religious Corporations Law* > *Article 10 Other Denominations*

§ *208*. Consolidation

Any two or more religious corporations of the Jewish faith, incorporated under or by general or special laws, may enter into an agreement for the consolidation *or merger* of such corporations, setting forth the terms and conditions of consolidation, the name of the proposed *or surviving* corporation, the number of its trustees, the time of the annual election and the names of the persons to be its trustees until the first *or next* annual meeting. Each corporation may petition the supreme court for an order consolidating *or merging* the corporations, setting forth the agreement for consolidation *or merger* and a statement of its real property and of its liabilities. Before the presentation of the petition to the court the agreement and petition must be approved by two-thirds of the votes cast in person or by proxy at a meeting of the members of each corporation called for the purpose of considering the proposed consolidation *or merger* in the manner prescribed by section [1] *six hundred five of the not-for-profit corporation law*. An affidavit by the president and the secretary of each corporation stating that such approval has been given shall be annexed to the petition. On presentation to the court of such petition and agreement for consolidation *or merger* and on such notice as the court may direct, the court after hearing all the parties interested desiring to be heard, may make an order approving the consolidation *or merger*. When such order is made and duly entered and a certified copy thereof filed with the secretary of state and in the offices of the clerks of the counties in which the certificates of incorporation of the several constituent corporations were recorded, or if no such certificate was recorded, then in the office of the clerk of the county in which the principal place of worship of the new *or surviving* corporation is intended to be situated, such corporations shall become one corporation by the name designated in the order and the trustees named in the agreement for consolidation *or merger* shall be the [2] trustees of the consolidated corporation.

History

Add, L 1927, ch 117, eff March 11, 1927; amd, *L 2013, ch 549, § 26*, eff July 1, 2014.

Annotations

Notes

Editor's Notes:

Laws 2013, ch 549, § 1, eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes:

2013. Chapter 549, § 26 amended:

Section by deleting at fig 1 "forty-three of the membership corporations law", at fig *2* "first" and adding the matter in italics.

Notes to Decisions

Where there was a substantial controversy between parties, and moving papers were voluminous, motion for injunction pendente lite was denied. *Sorokin v Young Israel of Kings Bay, 133 N.Y.S.2d 242, 1954 N.Y. Misc. LEXIS 2158 (N.Y. Sup. Ct. 1954)*.

Because a member of a ***religious corporation*** did not identify anything in a *N.Y. Relig. Corp. Law § 208* consolidation petition that was not known by the congregations before a vote of approval was taken, and because the member did not identify any procedural rule that was violated, the member's motion to vacate the order of consolidation was denied. *Matter of Midway Jewish Ctr., 838 N.Y.S.2d 879, 2007 NY Slip Op 27231, 238 N.Y.L.J. 3, 2007 N.Y. Misc. LEXIS 3967 (N.Y. Sup. Ct. 2007)*.

Research References & Practice Aids

Jurisprudences:

66 Am Jur 2d, Religious Societies §§ 64–66.

Texts:

Bjorklund, Fishman & Kurtz, New York Nonprofit Law and Practice with Tax Analysis § 8-3(c).

Hierarchy Notes:

NY CLS Relig Corp, Art. 10

New York Consolidated Laws Service

End of Document

Matter of Midway Jewish Ctr.

Supreme Court of New York, Nassau County

June 5, 2007, Decided

3881/07

Reporter
16 Misc. 3d 607 *; 838 N.Y.S.2d 879 **; 2007 N.Y. Misc. LEXIS 3967 ***; 2007 NY Slip Op 27231 ****; 238 N.Y.L.J. 3

[****1] In the Matter of ***Midway Jewish Center*** et al., Petitioners.

Core Terms

consolidation, Movant, Religious, voting, Congregation, membership, notice, obligations, applicants, contends, parties, religious corporation, Senior, entity, vacate

Case Summary

Procedural Posture

Movant, a member of a religious corporation, sought to vacate an amended order that approved petitioner joint applicants' petition for an order of consolidation pursuant to *Religious Corporations Law § 208*; the member claimed, inter alia, that no notice of the petition was given.

Overview

Due to a declining membership and potential financial difficulties, one of the joint applicants sought to consolidate with the other joint applicant. A series of meetings were held during which the proposed consolidation was discussed. The consolidation was approved by more than a two-thirds vote. Pursuant to *CPLR 2001*, a notice was posted prominently at each of the two houses of worship stating that any interested person would be given a further opportunity to be heard with respect to the consolidation application in open court. The court found, inter alia, that the member did not identify anything contained in the *Religious Corporations Law § 208* petition that was not made known to the two congregations before the vote of approval was taken. It was not clear how the member was prevented from making a protest. The member identified no rule of procedure that was violated. Consequently, there was no issue for the court to review.

Outcome

The motion was denied.

LexisNexis® Headnotes

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Mergers & Acquisitions Law > Mergers > General Overview

HN1 See *Religious Corporations Law § 208*.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Mergers & Acquisitions Law > Mergers > General Overview

HN2 In consolidating religious corporations, any application must be made by an order to show cause with notice as directed by a court to interested parties.

Civil Procedure > Judgments > Entry of Judgments > General Overview

HN3 *CPLR 2001* permits a court to correct a mistake, omission, defect, or irregularity, upon such terms as may be just.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN4 The Religious Corporations Law does not run afoul of the constitutional separation of church and state because, in conferring upon the courts powers over religious corporations, it distinguishes between the property and temporalities dedicated to use by religious groups that the State may supervise and regulate and the spiritual affairs that remain within the sphere of the group's religious leadership.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Mergers & Acquisitions Law > Mergers > General Overview

HN5 See Religious Corporations Law § 204.

Governments > Legislation > Interpretation

HN6 A statute should be construed so as to harmonize its various provisions with each other and with the general intent of the statute.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Mergers & Acquisitions Law > Mergers > General Overview

HN7 In a religious corporation consolidation context, so long as all of the information that *Religious Corporations Law § 204* requires to be presented to the membership of the two entities was in fact submitted, the purpose of the statute has been accomplished.

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

HN8 The Board of a not-for-profit corporation enjoys the benefit of the business judgment rule, which bars judicial review of actions taken in good faith and in the exercise of honest judgment. Absent a showing of bad faith in the form of self-dealing, fraud, or unconscionability, a court will not overturn or invalidate the decisions made by directors.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Mergers & Acquisitions Law > Mergers > General Overview

HN9 *Religious Corporations Law § 208* provides only that a consolidation agreement contain the names of the persons to be its trustees until the first annual meeting.

Business & Corporate Law > Nonprofit Corporations & Organizations > Dissolution & Winding Up

HN10 *Religious Corporations Law § 18*, which governs the dissolution of a religious corporation, provides that upon dissolution of a religious corporation, any surplus left after the payment of debts and obligations shall be devoted and applied to any such religious, benevolent, or charitable objects or purposes the trustees may indicate by their petition.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN11 Under *N-PCL 515*, benefits may be conferred upon members in conformity with the purposes of the corporation. Inducements that promote membership and increase the resources available to a religious corporation would appear consistent with the corporate and religious purposes of the consolidated entity.

Headnotes/Syllabus

Headnotes

Religious Corporations and Associations -- Consolidation and Merger -- Business Judgment Rule

The consolidation of two houses of worship of the Jewish religion into a single entity was properly approved by a vote of two thirds of the membership of the merged congregation in accordance with *Religious Corporations Law § 208*. The notice requirements were satisfied by the prominent posting of notices in both congregations stating that any person interested in the consolidation petition could be heard in open court on specified dates. The objections raised by individual congregants with respect to theological and spiritual differences between the two congregations were not matters that the court could address. In addition, in the absence of a showing of bad faith in the form of self-dealing, fraud, or unconscionability, the business judgment rule applied to preclude the consolidation decision of the board of trustees of the affected congregation from being overturned or invalidated. Furthermore, the benefits bestowed upon "senior members" and other members in good standing of the merged congregation with regard to the payment of membership dues and building fund obligations to the new entity were authorized by law (*see N-PCL 515*; *Religious Corporations Law § 2-b*), and therefore did not warrant rejection of the consolidation plan as violative of public policy.

Counsel: *Jerome Dorfman*, Oyster Bay, movant pro se. *Dresner & Dresner*, New York City (*Byron Dresner* of counsel), for ***Midway Jewish Center***, petitioner.

Judges: Geoffrey J. O'Connell, J.S.C.

Opinion by: Geoffrey J. O'Connell

Opinion

[*607] [881]** Geoffrey J. O'Connell, J.

[*608] Movant Jerome T. Dorfman, a member of Bethpage Jewish Community Center, applies for an order vacating the amended order of this court dated March 13, 2007 that approved the joint application of Bethpage Jewish Community Center and ***Midway Jewish Center*** for consolidation pursuant to *Religious Corporation Law § 208* and, after vacating that order, for an order denying the application. The joint applicants oppose.

Background

On March 9, 2007, this court granted the joint applicants' ex parte application and issued an order to that effect. Thereafter, an amended order was granted on March 13, 2007 which corrected a technical error in the original. On April 27, 2007, movant presented the order to show cause by which the instant application was made. The application was randomly assigned to Justice Mahon who, after determining that the application was for relief from an order that I had granted, referred the matter to me with the consent of the parties. After a conference, [***2] the parties stipulated to a modified temporary restraining order and to a schedule for submission of papers. All motion papers were submitted to me and movant faxed a stipulation to a one-day extension of the due date for his reply to my chambers. On the submission date, Justice Mahon who was still listed as the IAS justice on the court's computer system issued an order formally referring the matter to me.

Movant initially requested that the matter be referred back to Justice Mahon citing *CPLR 2221 (a) (2)*, but withdrew that request upon receiving Justice Mahon's order. Parenthetically, [****2] where an application made without notice is granted, *CPLR 2221 (a) (2)* permits a motion to vacate or modify the resulting order to be made to any justice of the court. However, it does not *require* that the motion to vacate or modify be made to a justice other than the one who granted the original order. Both sides appeared before me on April 27, 2007, the order to show cause was signed and the parties agreed that it was to be returnable before me.

The Bethpage Jewish Community Center was incorporated on September 6, 1955. There is no dispute that by 2006 there was a declining membership and potential financial [***3] difficulties. The Board of Trustees of the Bethpage Jewish Community Center undertook to explore options for addressing the perceived problems and one option was consolidation with another Jewish congregation. The parties agree that there were ultimately three [*609] consolidation offers. However, as of May 2006 the applicants had only received an offer from the ***Midway Jewish Center*** and that offer was discussed with the membership of the Bethpage Jewish Community Center at its annual meeting held on May 16, 2006. The Board of Trustees determined to enter into negotiations with the ***Midway Jewish Center***.

According to the applicants there were a series of meetings with the membership of the Bethpage Jewish Community Center at which the proposed consolidation with the ***Midway Jewish Center*** was discussed. Applicants assert that among the matters discussed was the possible retention of the cantor's house. They further state that the Board of Trustees of the Bethpage Jewish Community Center approved the proposed consolidation with the ***Midway Jewish Center*** on December 5, 2006. Thereafter, the membership was notified of meetings to be held on December 10 and December 17 of 2006 with regard to the plan. A vote was taken on [***4] December 17, 2006 and the result was recorded [**882] as 131 in favor and 57 against. Thus, the consolidation was approved by more than a two-thirds vote.

Discussion

Movant contends that the court's order approving the consolidation should be vacated because notice of the petition was not given. The applicants in opposition assert that, although the movant was not given notice of the petition, he was aware that its submission was planned and was imminent. They have also argued orally that measures are in progress to effectuate the consolidation and delay would result in prejudice.

The governing statute, *Religious Corporation Law § 208*, provides: ***HN1*** "On presentation to the court of such petition and agreement for consolidation and on such notice as the court may direct, the court after hearing all parties interested desiring to be heard, may make an order approving the consolidation." Movant correctly argues that similar language in other statutes has been construed to require that ***HN2*** any application be made by order to show cause with notice as directed by the court to interested parties. (*Cf. Smith v Smith, 291 AD2d 828, 736 NYS2d 557 [4th Dept 2002]; Dominguez v Reardon, 14 Misc 3d 882, 828 NYS2d 791 [Sup Ct, NY County 2007]; Bynoe v Riverside Church in City of N.Y., 13 Misc 3d 628, 823 NYS2d 853 [Sup. Ct, NY County, 2006]*) [***5] Certainly, where, as here, a number of congregants voted against the consolidation, [*610] proceeding by order to show cause on notice to the congregants would be the better practice.

HN3 *CPLR 2001* permits the court to correct a mistake, omission, defect or irregularity upon such terms as may be just. In the exercise of that power the court notified movant that any [****3] person interested in the application would be heard in open court on May 16, 2007. On May 16, 2007 the court further directed that a notice be posted forthwith prominently at each of the two houses of worship stating that any interested person not heard on May 16 would be given a further opportunity to be heard with respect to the consolidation application in open court on May 29, 2007. Such notice is comparable to that required by *Religious Corporation Law § 194*.

The court entertained oral argument on the motion on May 16, 2007 and heard anyone who expressed a desire to be heard

on both May 16 and May 29.

At the hearings on May 16, 2007 and May 29, 2007 a number of members of the Bethpage Jewish Community Center expressed their disappointment that the institution to which they had contributed and helped build and in which they worshiped [***6] was being consolidated with the ***Midway Jewish Center*** with the new entity continuing at the ***Midway Jewish Center***'s facilities. While such concerns are only natural, they do not raise justiciable issues.

Additionally, although both the Bethpage Jewish Community Center and the ***Midway Jewish Center*** were part of the conservative movement within Judaism, there were differences with regard to the level of joint participation by persons of both genders which some members of the Bethpage Jewish Community Center found disturbing. Since these matters fall within the realms of theology and ritual, they are not matters which the court may address. *HN4* The Religious Corporations Law does not run afoul of the constitutional separation of church and state because, in conferring upon the courts powers over religious corporations, it distinguishes between the property and temporalities dedicated to use by religious groups which the state may supervise and regulate and the spiritual affairs which remain within the sphere of the group's religious leadership. (*Matter of Congregation Yetev Lev D'Satmar [**883] v Kahana, 31 AD3d 541, 542-543, 820 NYS2d 62 [2d Dept 2006]*.)

The remaining issues addressed by those who spoke on the two hearing [***7] dates merely echoed the issues raised by movant.

[*611] Movant contends that the approval of the consolidation by the two congregations is fatally defective because only the consolidation agreement was presented for their consideration. He relies upon a literal reading of *Religious Corporation Law § 204* which states: *HN5* "Before the presentation of the petition to the court the agreement and petition must be approved by two-thirds of the votes . . . ." *HN6* A statute should be construed so as to harmonize its various provisions with each other and with the general intent of the statute. (*Matter of Anderson v Board of Educ. of City of Yonkers, 46 AD2d 360, 364-365, 362 NYS2d 536 [2d Dept 1974]*.) *HN7* So long as all of the information which the statute requires to be presented to the membership of the two entities was in fact submitted, the purpose of the statute has been accomplished. Movant has not identified anything contained in the petition which was not made known to the two memberships before the vote of approval was taken.

Movant contends that the vote of approval was defective because no meeting was held on December 17, 2006 when the voting took place. The notice sent to the membership of the Bethpage Jewish Community Center stated:

> "I have [***8] made a small change to the previously announce schedule that will allow this general congregation meeting while still allowing us to meet our deadline. [****4] The previously announced Special Congregation Meeting on December 10, 2006 at 7:30 PM will provide an opportunity for all members to meet and share their thoughts. *To allow additional time for you to make a decision, the vote scheduled for that evening has been postponed to a second Special Congregation Meeting to be held on December 17, 2006 at 7:30 PM.* Voting will take place that evening between 7:30 PM and 9:30 PM."

Movant asserts that, since no formal meeting was called to order on December 17, 2006, there was no opportunity to challenge the manner in which the voting was conducted. However, sworn testimony was taken at the May 16, 2007 hearing that the meeting was formally convened with the announcement that the voting could begin. It is not clear how movant claims to have been prevented from making a protest. Moreover, he does not allege that he wished to make a protest and only offers speculation that "[t]here was, in fact, a basis upon which the vote *could have been* challenged." (Emphasis supplied.) He then speculates [***9] that members not in good standing were either allowed to vote or influenced as to how to vote without any substantiation in evidentiary form.

[*612] Neither movant nor any other person present during the voting challenged the right of any person to vote except that after the voting had finished, the financial secretary who had forgotten to vote asked that he be allowed to vote and his request was denied. Rita Goldman who acted as a teller or vote counter following the balloting testified that at least two votes were removed and disregarded during the counting upon it being determined that the voters were not members in good standing entitled to vote. The votes were tallied and the results recorded.

Movant has identified no rule of procedure adopted by the Bethpage Jewish Community Center that was violated. Whether having adopted Robert's Rules of [**884] Order, its own rules of procedure or no set rules of procedure, an assembly is itself the judge of all questions incidental to voting or the counting of votes. (Scott, Foresman's Robert's Rules of Order Newly Revised § 44 [8th ed 1981]; *see, Osrom v Greene, 161 NY 353, 362, 55 NE 919 [1900]*.) Having failed to raise any issue before the assembly, there is no [***10] issue for the court to review.

Movant contends that the Board of Trustees of the Bethpage

Jewish Community Center failed to disclose other consolidation offers and failed to explore other financial alternatives. *HN8* The board of a not-for-profit corporation enjoys the benefit of the business judgment rule which bars judicial review of actions taken in good faith and in the exercise of honest judgment. (*Consumers Union of U.S., Inc. v State of New York, 5 NY3d 327, 360, 840 NE2d 68, 806 NYS2d 99 [2005].*) Absent a showing of bad faith in the form of self-dealing fraud, or unconscionability, a court will not overturn or invalidate the decisions made by directors. (*Dennis v Buffalo Fine Arts Academy, 15 Misc 3d 1106[A], 836 NYS2d 498, 2007 NY Slip Op 50520[U] [Sup Ct, Erie County 2007].*) There is no reason why the business judgment rule should not apply here and there has been no allegation of bad faith.

Movant alleges that the consolidation agreement improperly named interim trustees rather than requiring an election. *HN9* *Religious Corporations Law § 208* provides only that a [****5] consolidation agreement contain "the names of the persons to be its trustees until the first annual meeting."

Finally, movant contends that a provision of the consolidation agreement which exempts the members [***11] of the Bethpage Jewish Community Center for 10 years, and senior citizen members for life, from the payment of membership dues and building fund obligations to the new entity violates public [*613] policy and requires that the consolidation be rejected. In support of this claim he cites *HN10* *Religious Corporations Law § 18* which governs the dissolution of a religious corporation. That statute provides that upon dissolution of a religious corporation any surplus left after the payment of debts and obligations "be devoted and applied to any such religious, benevolent, or charitable objects or purposes as the said trustees may indicate by their petition." Movant contends that use of any funds derived from the assets of Bethpage Jewish Community Center to pay members' dues violates this statute.

Simply put, the Bethpage Jewish Community Center is not being dissolved. Moreover, the permanent waiver of dues for "Senior Members," the 10-year waiver of dues for all Bethpage Jewish Community Center members in good standing and the waiver of "Building Fund" obligations for both do not relieve them of all financial obligations to the new ***Midway Jewish Center***. "All other fees and obligations levied [***12] on members of MJC-New, including but not limited to Hebrew School, B'nai Mitzvah, United Synagogue, Benevolent Fund, additional High Holiday seats and Assessments on all members effective after June 30, 2007 are not waived." (Plan of consolidation at 2.) No effort was made to quantify the relative benefit of the waivers of dues and "Building Fund" obligations.

Whatever its magnitude, the plan of consolidation does confer some benefit upon "Senior Members" and members in good standing of the Bethpage Jewish Community Center. However, *HN11* under *section 515 of the Not-For-Profit Corporation Law*, applicable here pursuant *section 2-b of the Religious Corporation Law*, benefits may be conferred upon members in conformity with the purposes of the corporation. Inducements which promote [**885] membership and increase the resources available to a religious corporation would appear consistent with the corporate and religious purposes of the consolidated entity. Nor does there appear to be anything objectionable in acknowledging the past contributions of "Senior Members" to the assets being acquired by the new entity since seniors are generally assumed to have fixed incomes and increased expenses. While [***13] a benefit disproportionate to the resources of the religious corporation or the purposes it seeks to advance might attract scrutiny, there is no such evidence before this court. Finally, the existence of [*614] this benefit was not concealed, but fully divulged to the congregants of both the Bethpage Jewish Community Center and the ***Midway Jewish Center*** and both nevertheless approved the consolidation.

The motion is in all respects denied.

End of Document

Plan of Consolidation

I. The consolidation will be effective as of the date the petition for consolidation is approved by the Supreme Court of the State of New York.

II. The consolidated corporation, Midway Jewish Center, Inc. ("MJC-New"), will continue to hold separate services in both the Midway Jewish Center ("MJC - Old") facility (330 South Oyster Bay Rd., Syosset) and the Bethpage Jewish Community Center ("BJCC") facility (600 Broadway, Bethpage) until June 30, 2007, when all services will be combined and held in the Syosset facility.

III. Rabbi Perry Raphael Rank of MJC-Old will be the Rabbi of the consolidated congregation, under a contract expiring on June 30, 2022.

IV. The contract between Rabbi Seth Gordon and BJCC will be terminated as of August 31, 2007, according to existing terms in this contract.

V. The contract between Cantor Mordechai Dier and BJCC expires July 31, 2007 and will not be renewed but may be terminated earlier by mutual agreement.

VI. The consolidated congregation will be egalitarian, as currently practiced by MJC-Old.

   a. MJC-New believes that both egalitarian and non-egalitarian services are equally legitimate halakhic approaches to prayer within the framework of Conservative Judaism.

   b. MJC-New will promote, as one of its Shabbat and holiday minyanim, a non-egalitarian service, to be conducted in the synagogue minyan chapel. This new minyan would not be a "Bethpage" minyan; rather it would be a bona fide Midway minyan, advertised and fully promoted within Midway and the community.

   c. To help create an environment conducive to success, MJC-New will provide the non-egalitarian minyan with a qualified minyan leader and Torah reader and is prepared to do so for at least one full year after consolidation. It is the hope and intent of MJC-New that this non-egalitarian minyan will become self-sustaining and viable within the consolidated organization. Full support for this minyan will continue for as long as this minyan remains viable.

VII. Memorial plaques or their approved equivalents for both congregations will be combined and displayed as one set. However, due to current space limitations, only the approximately 200 memorial plaques owned by BJCC members at the time of consolidation will be displayed immediately in the MJC-New Minyan Chapel. It is intended that room will be created to appropriately mount and display all memorial plaques, or their approved equivalents, currently displayed at BJCC and MJC-Old. All memorial plaques not immediately mounted will be safely stored until such time as appropriate space is available.

VIII. The BJCC and MJC-Old Trees of Life or their approved equivalents and other commemorative plaques will be displayed as one collection. Appropriate space is to be allotted as part of the MJC-New Building Renovation, currently titled the "Historical Hallway" or an equivalent approved space.

IX. Permanent seating rights to pew seats in its sanctuary have been purchased by members of BJCC. There is a similar program at MJC-Old where members can purchase a permanent "right of first refusal" to pew seats. These seating rights will be joined by applying the following rules:

a) It is intended that the consolidated congregation will renovate the existing sanctuary so that additional pew seats are added.

b) Immediately after consolidation, all rights to pew seats owned at BJCC will be transferred to available pew seats at MJC-New, up to a limit of two pew seats per family. Additionally, "right of first refusal" to any folding chairs placed immediately adjacent to the pew seats will be offered to former BJCC seat owners, up to the total number of BJCC pew seats owned by that family.

c) After renovation of the sanctuary, all rights to pew seats owned by BJCC members on the date of approval of this plan, pew seats owned by MJC-Old members and rights purchased after consolidation will be placed in a pool and all assignments of pew seat rights will be handled equally. No class of pew seat will be given preferential status or treatment.

Membership

X. All members in good standing of BJCC on December 31, 2006 and who remain so as of May 31, 2007 and all voting members in good standing of MJC-Old at the date of Consolidation shall be members of MJC-New with equal voting rights and with the same rights and privileges as set forth in the Constitution and By-Laws of MJC-Old and which shall continue unchanged except as modified in the Constitution and/or By-Laws adopted by MJC-New, and except that Members of the Board of Trustees shall be those persons specified in Paragraph XX, and except as set forth below for BJCC members.

XI. All BJCC members in good standing classified as "Senior Members" by BJCC as of June 1, 2006 shall have annual dues waived.

XII. All other BJCC members in good standing as of December 31, 2006 and who remain so as of May 31, 2007 shall have annual dues waived for a period of 10 years starting July 1, 2007.

XIII. All "Building Fund" obligations will be waived for BJCC members in good standing. All other fees and obligations levied on members of MJC-New, including but not limited to Hebrew School, B'nai Mitzvah, United Synagogue, Benevolent Fund, additional High Holiday seats and Assessments on all members effective after June 30, 2007 are not waived.

Name and Affiliation of the Consolidated Corporation

XIV. The new congregation will be called: Midway Jewish Center, Inc.

XV. The new congregation will affiliate with the United Synagogue for Conservative Judaism.

Number of Trustees

XVI. The new congregation will be governed by a Board of Trustees and a slate of 13 officers.

XVII. The Board of Trustees shall consist of 42 members. They are classified so that the terms of 27 shall expire on June 30, 2007 and the terms of 9 shall expire on June 30, 2008. These Trustees shall be replaced in accordance with the By-Laws of the consolidated corporation. The terms of the 6 "BJCC" Trustees shall expire on the first June 30 after having served at least 22 months in office after consolidation. After the terms of the "BJCC" Trustees have expired, these additional six positions will be eliminated so that the Board of Trustees shall then consist of 36 members.

Time of First Annual Meeting and Elections

XVIII. The first Annual elections will be held at the first annual meeting of the Congregation to be held on or about June 1, 2007 after the effective date of the consolidation.

XIX. The individuals named below shall serve as Trustees and Officers until June 30 in the year specified.

Names of Persons to be Members of the Board of Trustees Until the Annual Meeting Specified

XX. The trustees of MJC-New will be the existing Trustees of MJC-Old. In addition, six additional Trustees have been determined by the Board of Trustees of BJCC, on the basis of proportional representation in the new congregation. The following MJC-Old Trustees shall serve until June 30 of the year noted. The six BJCC Trustees shall serve until the first June 30 after having served 22 months in office after consolidation, after which time these additional six Trustee positions will be eliminated:

MJC-Old Term Expires	Members From MJC-Old		Members From BJCC
2007	Joel Podell	Mark Gelfand	Lawrence Schwartz
2007	Mason Salit	Deidre Siegel	William Mayo
2007	Anne Recht	Mark Friedman	Lawrence Schweitzer
2007	Rick Schwartz	Ken Wurman	Saul Schessler
2007	Lori Zaffos	Ken Maltz	Barry J. Charles
2007	David Gary	Harry Malinowski	Steven M. Greenblatt
2007	Walter Hoffman	Michael Adges	
2007	Carol Rubin	Barry Macklin	
2007	Keith Senzer	Ira Rubin	
2007	Mitchel Chodes	Gary Seinfeld	
2007	Sandy Klein	Gene Brickman	
2007	Doris Brody	Glenn Spiller	
2007	Beth Haft	Marilyn Podell	
2007	Erez Barak		
2008	Joan Breidbart	Howard Rosen	
2008	Scott Gilder	Stefanie Linakis	
2008	Harold Guttenplan	Bernie Tessler	
2008	Al Kanegis	George Toscano	
2008	Kathi Salzman		

Name of Persons to be Officers Until Their Term Expires

XXI. The officers have been determined by the Boards of Trustees of each of the consolidating congregations as in the following table. These officers shall serve until their term as Trustee expires. At the expiration of the term for the 5th Vice President, this position will be eliminated:

President	MJC-OLD	Joel Podell
1st Vice President	MJC-OLD	Mark Gelfand
2nd Vice President	MJC-OLD	Mason Salit
3rd Vice President	MJC-OLD	Deidre Siegel
4th Vice President	MJC-OLD	Anne Recht
5th Vice President	BJCC	Lawrence Schwartz
Treasurer	MJC-OLD	Mark Friedman
Financial Secretary	MJC-OLD	Rick Schwartz
Corresponding Secretary	MJC-OLD	Lori Zaffos
Recording Secretary	MJC-OLD	Ken Wurman
President – Sisterhood	MJC-OLD	Lynne Podell
President – Men's Club	MJC-OLD	Erez Barak
Chairman – Bd. Of Ed.	MJC-OLD	Kathi Salzman
Chairman – Bd. Nursery School	MJC-OLD	Beth Haft
Sergeants-at-arms (3)	MJC-OLD	Ken Maltz
		David Gary
		Harry Malinowski

XXII. All committees shall continue as constituted and organized by MJC-Old as on the date of consolidation, except:

a) Building Renovation Committee will be re-constituted to have 50% representation from BJCC
b) Ritual Committee will have 4 additional members from BJCC
c) Religious School Board will have one additional member from BJCC
d) After approval of this Plan of Consolidation by two thirds of the votes cast by each congregation, both congregations agree that the 50% BJCC representation on the Building Renovation Committee will begin immediately.

Disposition of Assets

XXIII. All the assets of the constituent congregations shall be transferred to the new consolidated congregation.

XXIV. The Board of Trustees of MJC-New must retain their fiduciary responsibility to manage funds as they deem appropriate. However, it is the intention of BJCC that the funds received from the sale of its assets be used only toward the planned building renovation on the facility at 330 South Oyster Bay Rd.

Assets and Liabilities

XXV. The real assets of the consolidated congregations consist of the BJCC facility at 600 Broadway, Bethpage, the BJCC "Cantor's House" at 63 Ellen Street, Bethpage, the MJC-Old facility at 330 South Oyster Bay Rd., Syosset, the "Nursery School" at 344 South Oyster Bay Rd., Syosset, the MJC-Old Rabbi's House at 315 South Oyster Bay Rd., Syosset and the MJC-Old "Cantor's House" at 20 Circle Dr., Syosset.

XXVI. The liabilities of the consolidating congregations consist of the rabbinical contracts for both MJC-Old and BJCC, the Cantor's contracts for both MJC-Old and BJCC, an existing $300,000.00 mortgage with Bethpage Federal Credit Union on the BJCC property, a lease on portions of the BJCC facility at 600 Broadway, Bethpage and service contracts for office equipment; all of which shall be assumed by the consolidated corporation.

Constitution and/or By-Laws

XXVII. A Constitution and/or By-Laws shall be proposed by a Special Committee appointed by the President, for adoption by the membership of the Consolidated Corporation, at the first annual meeting or at a Special Meeting called for that purpose prior to the annual meeting.

Abandonment of Plan

XXVIII. This Plan of Consolidation may be abandoned by either MJC-Old or BJCC prior to the approval by and entry of an order of the Supreme Court of the State of New York consolidating these Corporations if it becomes the opinion of the Board of Trustees of either of the Corporations that events or circumstances have occurred that render it inadvisable to consummate this Plan of Consolidation.

Expenses of Consolidation

XXIX. Expenses of preparing this Plan of Consolidation, incurred before approval of this Plan by MJC-Old and BJCC shall be borne equally. Expenses of carrying this Plan of Consolidation into effect, incurred after such approval of this Plan shall be borne solely by MJC-Old. In the event of an Abandonment of Plan by either party, BJCC shall reimburse MJC-Old so that each Corporation shall bear an equal part of the expenses of carrying this Plan of Consolidation into effect.

Adoption of the Plan of Consolidation

The foregoing plan has been duly approved and adopted by the respective boards and members of each Constituent Corporation.

Dated: December 2006

Bethpage Jewish Community Center

By:_____
Lawrence Schwartz – President

Midway Jewish Center

By: _____
Joel Podell – President

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

In the Matter of the Joint Application of Petitioners, MIDWAY JEWISH CENTER, and BETHPAGE JEWISH COMMUNITY CENTER, each a religious corporation of the Jewish Faith Organized pursuant to the Religious Corporations Law, for an ORDER OF CONSOLIDATION, consolidating said religious Corporations into MIDWAY JEWISH CENTER, INC., pursuant to Section 208 of the Religious Corporations Law.

Index No.:

PETITION

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TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU:

PETITIONER, MIDWAY JEWISH CENTER, by its attorneys, Dresner & Dresner, respectfully alleges:

1. The Petitioner, MIDWAY JEWISH CENTER, (hereafter "MJC") is a religious corporation duly organized and existing under the Religious Corporations Law of the State of New York. A Certificate of Incorporation of Midway Jewish Community Center was filed in the Office of the Clerk of the County of NASSAU on the 20th day of October 1953 and thereafter an Amendment of the Certificate of Incorporation was filed on 23rd day of June, 1982 changing the name of Petitioner to Midway Jewish Center.

2. BETHPAGE JEWISH COMMUNITY CENTER (hereafter "BJCC") is a religious corporation duly organized and existing under the Religious Corporations Law of the State of New York. A Certificate of Incorporation of BJCC was filed in the office of the Clerk of the County of Nassau on the 6th day of September 1955.

3. This petition requests an order of this Court approving the consolidation of Petitioner and BJCC (the "Constituent Corporations") pursuant to Section 208 of the Religious Corporations Law.

4. In or about September, 2006, the Petitioner established a special committee of its members and authorized that committee to meet with a similar committee established by BJCC, for the purpose of studying the feasibility of consolidating the two religious corporations into a single entity.

5. The special committees met jointly on at least 8 occasions and diligently explored a combination of the resources of the two corporations into a single entity which would advance the religious purpose for which the individual corporations had been created and create a single entity that would best serve the Jewish community.

6. In or about December, 2006 the special committees completed their efforts and jointly recommended to their respective Boards and Congregation members the adoption of a Plan of Consolidation.

7. On December 13, 2006, the Board of Trustees of Petitioner duly adopted a motion approving the Plan of Consolidation. A copy of the resolution approving the Plan of Consolidation is annexed hereto as Exhibit "A".

8. As required by Section 208 of the Religious Corporations Law, notice was given to all members of Petitioner, whether entitled to vote or not, of a Special Membership Meeting called for December 19, 2006 for the purpose of considering the proposed consolidation and authorizing the filing of this Petition with the Court. The notice for said meeting included a copy of the Plan of Consolidation. A copy of the notice provided to members of Petitioner is attached hereto as Exhibit C.

9. At the Special Membership Meeting held on December 19, 2006, the members of Petitioner adopted, by a vote of 497 in favor and 63 against (more than the necessary two-thirds of the votes cast in person or by proxy, required for approval), a resolution approving the Plan of Consolidation and authorizing the officers to enter into an agreement with BJCC of the Plan of Consolidation and to make the instant petition to this Court. An Affidavit of the President and the Secretary of Petitioner stating that such approval has been duly given is annexed hereto as Exhibit B.

10. On information and belief, on December 17, 2006, the Plan of Consolidation was also approved by the Congregation members of the BJCC at a Special Meeting called

for the purpose of reviewing and explaining the proposed consolidation and to authorize the consolidation which approval and authorization was given by affirmative votes of more than two-thirds of the votes cast in person or by proxy.

11. The Plan of Consolidation approved by the Board of Trustees of Petitioner and by the members of Petitioner on December 19, 2006 is appended to this Petition as Exhibit D. The Plan of Consolidation describes, inter alia, that the principal place of worship of the Consolidated Corporation would be the structure presently occupied by MJC; that all assets owned by MJC and BJCC including the place of worship of BJCC is to be transferred to the Consolidated Corporation; that services in the Consolidated Congregation will be "egalitarian" but a non-egalitarian service will also be offered; that the current Rabbi of MJC will be the Rabbi of the Consolidated Congregation and the services of the current Rabbi of BJCC will be terminated according to the terms of his contract. The plan also sets forth the names of the initial trustees; the date of the first annual meeting of the Consolidated Corporation; the names of the initial officers; and the rights of membership in the Consolidated Corporation.

12. The Plan of Consolidation was then entered into by the respective executive officers of each Corporation on December 26, 2006. The Plan of Consolidation sets forth, as required by Section 208 of the Religious Corporations Law, "the terms and conditions of consolidation; the name of the proposed corporation; the number of its trustees; the time of the annual election and the names of the persons to be its trustees until the first annual meeting."

13. The following persons were designated by the respective Corporations to serve as trustees of the Consolidated Corporation until the first annual meeting on June 1, 2007 and thereafter the persons designated by MJC shall continue to serve as Trustees until June 30, of the year set forth next to their respective names and the persons designated by BJCC shall continue to serve as Trustees until the first June 30 after having served 22 months after Consolidation.

MJC Trustees would be:

Joel Podell	Mark Gelfand
Mason Salit	Deidre Siegel
Anne Recht	Mark Friedman
Rick Schwartz	Ken Wurman
Lori Zaffos	Ken Maltz
David Gary	Harry Malinowski
Walter Hoffman	Michael Adges
Carol Rubin	Barry Macklin
Keith Senzer	Ira Rubin
Mitchel Chodes	Gary Seinfeld
Sandy Klein	Gene Brickman
Doris Brody	Glen Spiller
Beth Haft	Marilyn Podell
Erez Barak	Joan Breidbart
Scott Gilder	Stephanie Linakis
Harold Guttenplan	Bernie Tessler
Al Kanegis	George Toscano
Kathi Salzman	Howard Rosen

BJCC Trustees would be:

Lawrence Schwartz	William Mayo
Lawrence Schweitzer	Saul Schessler
Barry J. Charles	Steven M. Greenblatt

14. The following persons were designated to serve as officers of the Consolidated Corporation until their respective terms as Trustee expire.

Officers:

President	Joel Podell
1st Vice President	Mark Gelfand
2nd Vice President	Mason Salit
3rd Vice President	Deidre Siegel
4th Vice President	Anne Recht
5th Vice President	Lawrence Schwartz
Treasurer	Mark Friedman
Financial Secretary	Rick Schwartz
Corresponding Secretary	Lori Zaffos
Recording Secretary	Ken Wurman
President – Sisterhood	Lynne Podell
President – Men's Club	Erez Barak
Chairman – Bd. of Ed.	Kathi Salzman
Chairman – Bd. Nursery School	Beth Haft
Sergeants at arms (3)	Ken Maltz
	David Gary
	Harry Milinowski

15. The following is a statement setting forth the real property of Petitioner and its liabilities, pursuant to Section 208 of the Religious Corporations Law. Petitioner owns real property situated in the County of Nassau consisting of buildings and land located at

330 South Oyster Bay Road, Syosset, its place of worship, and the Nursery School property located at 344 South Oyster Bay Road, Syosset, both having an estimated market value of $3,000,000.00; the house in which the Rabbi of the Congregation resides at 315 South Oyster Bay Road Syosset, which has an estimated market value of $600,000.00 and the house in which the Cantor of the congregation resides at 20 Circle Drive, Syosset which has an estimated market value of $600,000.00. All values set forth are approximations based upon market values of similar properties in the immediate area. The real property is subject to a mortgage on which there is a balance of $908,622.00 owed. Petitioner has no notes payable and no other liabilities except those necessary for its continued operation (such as contracts with its Rabbi, Cantors, Principal and teachers of its Religious School, other Clergy, Custodian, Nursery School Director and Nursery School Teachers and contracts for maintenance services).

WHEREFORE, Petitioner requests that the Court issue an Order approving the Plan of Consolidation and consolidating the Petitioner with BJCC, into the Midway Jewish Center, Inc.

Respectfully submitted,

Dresner & Dresner
Attorneys for Petitioner

By: _____
Byron Dresner
A Member of the Firm
276 Fifth Avenue, Suite 1007
New York, NY 10001
(212) 679-6240

Dated: January 26, 2007
New York, NY

EXHIBIT A

RESOLUTION OF BOARD OF TRUSTEES OF MIDWAY JEWISH CENTER
ADOPTING PLAN OF CONSOLIDATION
MADE AT ITS MEETING DECEMBER 13, 2006 AT WHICH
A QUORUM WAS PRESENT

After discussion, and on an open ballot (a motion for a closed vote had been defeated), the following resolution was passed by a vote of 30 in favor, 2 against, and 2 abstentions:

"Resolved that pending the results of the Membership vote, as required in the Religious Corporations Law of the State of New York, the Board of Trustees of Midway Jewish Center approves the Plan of Consolidation of Midway Jewish Center and Bethpage Jewish Community Center and directs the president of Midway Jewish Center to submit an affidavit to the New York State Courts stating that such approval has been given which will be annexed to the petition and submitted to the courts along with the agreement of consolidation."

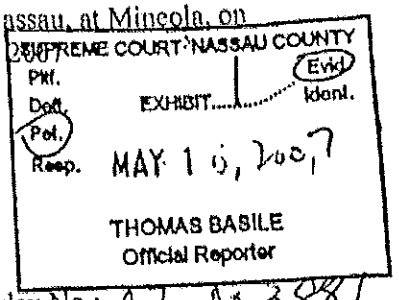
Bethpage Jewish Community Center

VOTING RESULTS: PLAN OF CONSOLIDATION
12/17/06

	FOR	*AGAINST*	*TOTAL*
PROXY:	79	32	111
BALLOTS:	52	25	77
TOTAL:	**131**	**57**	**188**

RESPECTUFULLY SUBMITTED
PAUL CHERNOSKY
RECORDING SECRETARY

At an IAS, Part of the Supreme Court of the State of New York, held in and for the County of Nassau, at Mineola, on the day of



Present: Hon , Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

In the Matter of the Joint Application of Petitioners, MIDWAY JEWISH CENTER, and BETHPAGE JEWISH COMMUNITY CENTER, each a religious corporation of the Jewish Faith Organized pursuant to the Religious Corporations Law, for an ORDER OF CONSOLIDATION, consolidating said religious Corporations into BETHPAGE JEWISH COMMUNITY CENTER, INC., pursuant to Section 208 of the Religious Corporations Law.

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Index No.: 07-003881

ORDER

Upon reading and filing of the Verified Petitions of MIDWAY JEWISH CENTER and BETHPAGE JEWISH COMMUNITY CENTER, dated and verified the 26th day of January 2007, and the Exhibits and Affidavits annexed thereto, from which Petitions it appears:

(a) that Petitioners propose, pursuant to a Plan of Consolidation, to consolidate into a new consolidated entity to be named MIDWAY JEWISH CENTER, INC., in accordance with Section 208 of the Religious Corporations Law of New York, and

(b) that the Plan of Consolidation was approved, upon due notice, by the respective Boards of each Petitioners; and

(c) that the Plan of Consolidation was approved, upon due notice, by respective Members of each Petitioner by affirmative votes of more than the required two-thirds of the votes cast in person or by proxy.

Now upon motion of Dresner & Dresner, Attorneys for the Petitioners, it is

ORDERED AND ADJUDGED that the Petitioner MIDWAY JEWISH CENTER and the Petitioner BETHPAGE JEWISH CENTER COMMUNITY CENTER are hereby consolidated into MIDWAY JEWISH CENTER, INC. pursuant to Section 208 of the Religious Corporations Law, and the Consolidated Corporation shall possess all the powers of the constituent corporations and be subject to the duties and obligations of a

congregation of the Jewish faith formed for like purposes under the Religious Corporations Law; and it is further

ORDERED, that the MIDWAY JEWISH CENTER, INC., the Consolidated Corporation, is organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501 (c) (3) of the Internal Revenue Code, or corresponding section of any future federal tax code, and it is further

ORDERED, that upon the dissolution of the Consolidated Corporation, assets shall be distributed for one or more exempt purposes with the meaning of section 501 (c) (3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose; and it is further

ORDERED, that the first annual meeting of MIDWAY JEWISH CENTER, INC. shall be held on or about June 1, 2007 and that the individuals named in the Plan of Consolidation shall serve as the first trustees of the Consolidated Corporation until the first annual meeting and thereafter as set forth in the Plan of Consolidation and it is further

ORDERED, that pursuant to Section 208 of the Religious Corporations Law, a certified copy of this Order shall be filed with the Secretary of State and in the Office of the Clerk of the County of Nassau in which County the certificates of incorporation of the constituent corporations were recorded and in which County the principal place of worship of the consolidated corporation is intended to be situated; and it is further

ORDERED, that a copy of the Order be served upon all parties entitled to notice and upon the first trustees of the Consolidated Corporation.

ENTER

_____

J.S.C

PROXY

The undersigned, Member of Bethpage Jewish Community Center ("BJCC"), entitled to vote at a Special Congregation meeting, appoints Lawrence Schwartz, President of BJCC or Steven M. Greenblatt, 3rd Vice President, as my proxy to attend the Special Congregation meeting of BJCC to be held on December 17, 2006, or at any adjournment of the meeting, with full power to vote and act for me in my name to the same extent as if I were personally present.

This proxy revokes any prior proxy that I may previously have given.

The Proxy shall have the full power, as the Member's substitute, to represent the Member and vote on all issues and motions that are properly presented at the meetings for which this designation of proxy is effective. The Proxy shall have the authority to vote entirely in the discretion of the Proxy.

Provided, however, with respect to the following issue, the Proxy shall vote as follows:

RESOLVED: The members of Bethpage Jewish Community Center authorize its Officers and Trustees to enter into a Plan of Consolidation with Midway Jewish Center and to petition the Supreme Court of the State of New York, County of Nassau for an Order of Consolidation.

YES (IN FAVOR OF THE RESOLUTION) ☐

NO (OPPOSED TO THE RESOLUTION) ☐

NAME _____
(Please Print)

SIGNATURE: _____
(Must be signed to be valid)

DATE: _____

EFFECTIVE UNTIL JULY 1, 2014

to remove the president, and thus appeals by board of directors of the association were moot. Stuart v. Board of Directors of Police Benevolent Ass'n of New York State Police, Inc. (3 Dept. 1980) 74 A.D.2d 957, 425 N.Y.S.2d 879. Appeal And Error ⇐ 781(4)

§ 715. Interested directors and officers

(a) No contract or other transaction between a corporation and one or more of its directors or officers, or between a corporation and any other corporation, firm, association or other entity in which one or more of its directors or officers are directors or officers, or have a substantial financial interest, shall be either void or voidable for this reason alone or by reason alone that such director or directors or officer or officers are present at the meeting of the board, or of a committee thereof, which authorizes such contract or transaction, or that his or their votes are counted for such purpose:

(1) If the material facts as to such director's or officer's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the board or committee, and the board or committee authorizes such contract or transaction by a vote sufficient for such purpose without counting the vote or votes of such interested director or officer; or

(2) If the material facts as to such director's or officer's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the members entitled to vote thereon, if any, and such contract or transaction is authorized by vote of such members.

(b) If such good faith disclosure of the material facts as to the director's or officer's interest in the contract or transaction and as to any such common directorship, officership or financial interest, is made to the directors or members, or known to the board or committee or members authorizing such contract or transaction, as provided in paragraph (a), the contract or transaction may not be avoided by the corporation for the reasons set forth in paragraph (a). If there was no such disclosure or knowledge, or if the vote of such interested director or officer was necessary for the authorization of such contract or transaction at a meeting of the board or committee at which it was authorized, the corporation may avoid the contract or transaction unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the corporation at the time it was authorized by the board, a committee or the members.

(c) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board or of a committee which authorizes such contract or transaction.

(d) The certificate of incorporation may contain additional restrictions on contracts or transactions between a corporation and its directors or officers or other persons and may provide that contracts or transactions in violation of such restrictions shall be void or voidable.

(e) Unless otherwise provided in the certificate of incorporation or the by-laws, the board shall have authority to fix the compensation of directors for services in any capacity.

(f) The fixing of salaries of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws.

(L.1969, c. 1066, § 1; amended L.1970, c. 847, § 48; L.1971, c. 1057, § 7.)

Historical and Statutory Notes

L.1971, c. 1057 legislation

Par. (f). L.1971, c. 1057, § 7, eff. July 2, 1971, inserted "or pursuant to" following "if not done in."

Derivation

Mem.Corp.Law § 47. Said section was added as § 12, L.1909, c. 40; renumbered 47 and amended L.1926, c. 722; repealed L.1969, c. 1066, § 2. It derived from § 12 of Mem.Corp.Law of 1895, added L.1895, c. 559; repealed L.1909, c. 40; originally revised from L.1872, c. 104; L.1889, c. 95, § 9.

Practice Commentaries

by E. Lisk Wyckoff, Jr.

This section deals with the treatment of contracts or other transactions between a not-for-profit corporation and its officers or directors, or between the corporation and another entity in which one or more of the corporation's directors or officers has a financial interest, or of which one or more of the corporation's directors or officers are also directors or officers of the entity. The section requires fairness in all contracts and dealings involving interested directors or officers and, in the alternative, disclosure to directors or members. In contrast, Business Corporation Law provides that a contract or transaction cannot be rescinded by the corporation if any one of three elements (namely, disclosure to shareholders, disclosure to directors, or fairness of the transaction to the corporation) is present.

N–PCL § 715 is a departure from Membership Corporations Law, which allows contracts with interested directors and officers to be authorized in by-laws or by the vote of two-thirds of the

LexisNexis

User Name: NEIL MILLER
Date and Time: Dec 28, 2016 10:03
Job Number: 41247957

Document (1)

1. *NY CLS N-PCL § 717*

Client/Matter: -None-
Search Terms: "Not for Profit" /s 716
Search Type: Terms and Connectors
Narrowed by:

Content Type	Narrowed by
Statutes and Legislation	All Jurisdictions: New York

NY CLS N-PCL § 717

Current through 2016 released chapters 1-503

New York Consolidated Laws Service > *Not-For-Profit Corporation Law* > *Article 7 Directors and Officers*

§ 717. Duty of directors and officers

(a) Directors and officers shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. The factors set forth in subparagraph one of paragraph (e) of section 552 (Standard of conduct in managing and investing an institutional fund), if relevant, must be considered by a governing board delegating investment management of institutional funds pursuant to section 514 (Delegation of investment management)[.][1] For purposes of this paragraph, the term institutional fund is defined in section 551 (Definitions).

(b) In discharging their duties, directors and officers, when acting in good faith, may rely on information, opinions, reports or statements including financial statements and other financial data, in each case prepared or presented by: (1) one or more officers or employees of the corporation, whom the director believes to be reliable and competent in the matters presented, (2) counsel, public accountants or other persons as to matters which the directors or officers believe to be within such person's professional or expert competence or (3) a committee of the board upon which they do not serve, duly designated in accordance with a provision of the certificate of incorporation or the bylaws, as to matters within its designated authority, which committee the directors or officers believe to merit confidence, so long as in so relying they shall be acting in good faith and with that degree of care specified in paragraph (a) of this section. Persons shall not be considered to be acting in good faith if they have knowledge concerning the matter in question that would cause such reliance to be unwarranted. Persons who so perform their duties shall have no liability by reason of being or having been directors or officers of the corporation.

History

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970; amd, L 1978, ch 690, § 8, eff July 25, 1978; L 1988, ch 734, § 1, eff Dec 16, 1988; *L 2010, ch 490, § 7*, eff Sept 17, 2010.

Annotations

Notes

Revision Notes::

Source: None.

Changes: Completely new.

Comment: This section is the same as *Bus Corp L § 717*, revised only in that the single paragraph of *Bus Corp L § 717* has been divided into paragraph (a), stating the standard of care, and paragraph (b), creating a presumption that a director or officer performs his duties as defined if his decisions are made in good faith reliance on reports of properly designated corporate officers and accountants. As the comments to *Bus Corp L § 717* make clear, the standard of care may vary according to the kind of corporation involved, and the particular circumstances in which the director is called upon to act. Accordingly, the

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[1] The bracketed punctuation has been inserted by the Publisher.

standard as set forth in paragraph (a) is considered flexible enough to meet the many differing circumstances of the various types of non-profit corporations.

Editor's Notes:

Laws 1978, ch 690, § 11 provides as follows:

§ 11. This act may be cited as the "New York management of institutional.funds act".

Amendment Notes:

2010. Chapter 490, § 7 amended:

Par (a) by deleting at fig 1 "that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions", at fig 2 "In the administration of the powers to make and retain investments pursuant to section 512 (Investment authority), to appropriate appreciation pursuant to section 513 (Administration of assets received for specific purposes), and to delegate", at fig 3 ", a governing board shall consider among other relevant considerations the long and short term needs of the corporation in carrying out its purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions" and adding the matter in italics.

Commentary

PRACTICE INSIGHTS:

NOT ALL GIFTS ARE CREATED EQUAL - SPECIAL CONSIDERATIONS FOR ENDOWMENT FUNDS, NEW YORK'S PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT.

INSIGHT

A donor may designate a gift as an "endowment fund," a label that is more important than it may appear at first glance. Essentially, an endowment is a gift that establishes a permanent source of income to a not-for-profit corporation for a designated purpose. It should be determined immediately upon receipt if a gift is (or could be) an endowment fund. If so, the funds should be administered and accounted for appropriately.

Prior to September 17, 2010, a not-for-profit corporation could not spend the principal, "historic dollar value", of endowment funds. The entity could only spend the "net appreciation" on principal. After adoption of the New York Prudent Management of Institutional Funds Act ("NYPMIFA"), not-for-profit corporations now have greater flexibility in using these funds and in obtaining relief from restrictions imposed on use of these funds. The new law ought be carefully reviewed in determining how to expend endowment funds created both before and after adoption of the NYPMIFA.

ANALYSIS

The analysis begins with a look at the gift instrument itself. This instrument can be any written document in which the gift is made and defined (for example, will, trust, court order). *See* , *Not-For-Profit Corp. Law § 551*.. If the gift instrument expressly establishes an "endowment" or "permanent" fund that is "not wholly expendable by institution on a current basis" it is an endowment fund. *Not-For-Profit Corp. Law § 551(b)*..

Prior to adoption of the NYPMIFA, a not-for-profit corporation was only permitted to spend the net income of a fund and net appreciation on a fund. The funds' "historic dollar value" or principal needed to be preserved. The NYPMIFA removes the prohibition on appropriations below the historical dollar value. However, donors who are "available" with respect to funds established before September 17, 2010 may elect to retain the old historical value limit by responding to a notice from the institution. *See* , *Not-For-Profit Corp. Law § 553(e)*..

New § 553(a) of the Not-For-Profit Law. provides that "In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

Levandusky v. One Fifth Ave. Apartment Corp.

Court of Appeals of New York

February 14, 1990, Argued ; April 5, 1990, Decided

No Number in Original

Reporter
75 N.Y.2d 530 *; 553 N.E.2d 1317 **; 554 N.Y.S.2d 807 ***; 1990 N.Y. LEXIS 753 ****

In the Matter of Ronald Levandusky, Respondent, v. One Fifth Avenue Apartment Corp., Appellant

Prior History: [****1] Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 2, 1989, which, with two Justices dissenting, modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (William P. McCooe, J.), entered in New York County in a proceeding pursuant to CPLR article 78 to set aside a "stop work" order issued by respondent with respect to certain renovations of petitioner's cooperative apartment, (1) granting a motion by respondent for reargument, and, upon reargument, (2) withdrawing its prior decision, (3) granting that branch of a cross motion by respondent to dismiss the petition, (4) directing petitioner to restore a steam riser in his cooperative apartment to the position in which it was prior to the commencement of the subject renovations and to submit redrawn renovation plans to respondent, and severing and setting down for assessment the issue of damages, and (5) denying that branch of respondent's cross motion to compel petitioner to remedy certain alleged violations of the Landmarks Preservation Commission's requirements and for related damages. The modification consisted of granting the petition and [****2] annulling the "stop work" order.

Matter of Levandusky v One Fifth Ave. Apt. Corp., 150 AD2d 167, modified.

Disposition: Order modified, with costs to appellant, in accordance with the opinion herein and, as so modified, affirmed.

Core Terms

cooperative, decisions, business judgment rule, riser, arbitrary and capricious, business judgment, judicial review, shareholder's, condominium, courts, cases, renovation, board decision, plans, residents, steam, board's action, corporation's, disputes, boards, pipe, cooperative apartments, motives, rights, standard of review, governing board, shareholder-tenant, management's, Alteration, building's

Case Summary

Procedural Posture
Appellant residential cooperative corporation sought review of a decision from the Appellate Division of the Supreme Court in the First Judicial Department (New York) which modified a decision of the trial court setting aside appellant's stop work order. The order prevented petitioner tenant from making certain renovations to his apartment.

Overview
Petitioner tenant decided to enlarge his kitchen and install air conditioners. Petitioner's lease contained a clause requiring prior written consent for the alteration of steam risers and pipes. Petitioner moved a riser despite appellant residential cooperative corporation's denial of petitioner's application for a variance to move the riser. Appellant issued a stop work order to petitioner. The trial court ordered petitioner to restore the riser to its original position and dismissed for lack of standing appellant's counterclaim regarding the air conditioners. The appellate court modified the trial court's decision as to the stop work order and annulled the order on the ground that there was no evidence that relocation of the riser had caused any damage. This court modified the appellate court's decision as to the stop work order, holding that the business judgment rule applied to appellant's decision to issue the order to petitioner. Because appellant acted in good faith and in the interests of the cooperative in refusing to allow petitioner to move the riser, its stop work order was not annulled. Petitioner was required to move the riser back to its original position.

Outcome
The appellate court's decision setting aside appellant residential cooperative corporation's stop work order was modified. The business judgment rule was applied to determine that appellant's stop work order, issued to prevent

petitioner tenant from making certain renovations to his kitchen, was issued in good faith and in the interests of the cooperative.

LexisNexis® Headnotes

Business & Corporate Law > Cooperatives > General Overview

Governments > Local Governments > Finance

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Cooperatives > General Overview

HN1[] The cooperative or condominium association is a quasi-government, a little democratic sub society of necessity. The proprietary lessees or condominium owners consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decisionmaking to promulgating regulations regarding pets and parking spaces. Authority to approve or disapprove structural alterations is commonly given to the governing board.

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Cooperatives > General Overview

HN2[] Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Cooperatives > General Overview

HN3[] Even when the governing board acts within the scope of its authority, some check on its potential powers to regulate residents' conduct, life-style, and property rights is necessary to protect individual residents from abusive exercise, notwithstanding that the residents have, to an extent, consented to be regulated and even selected their representatives. These goals are best served by a standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Defenses > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Business & Corporate Law > ... > Directors & Officers > Scope of Authority > General Overview

Governments > Fiduciaries

HN4[] Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of their powers for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.

Administrative Law > Judicial Review > Standards of Review > General Overview

Business & Corporate Law > Cooperatives > General Overview

Business & Corporate Law > Cooperatives > Directors & Officers

Real Property Law > Common Interest Communities > Cooperatives > General Overview

HN5[] A governing board owes its duty of loyalty to its cooperative -- that is, it must act for the benefit of the residents collectively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available.

Business & Corporate Law > Cooperatives > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Governments > Fiduciaries

Real Property Law > Common Interest Communities > Condominiums > General Overview

Real Property Law > Common Interest Communities > Cooperatives > General Overview

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN6[] A primary focus of the reasonableness inquiry is whether board action is in furtherance of a legitimate purpose of the cooperative or condominium, in which case it will generally be upheld. The difference between the reasonableness test and the business judgment rule is twofold. First, unlike the business judgment rule, which places on the owner seeking review the burden to demonstrate a breach of the board's fiduciary duty, reasonableness review requires the board to demonstrate that its decision was reasonable. Second, although in practice a certain amount of deference appears to be accorded to board decisions, reasonableness review permits, indeed, in theory requires, the court itself to evaluate the merits or wisdom of the board's decision.

Administrative Law > Judicial Review > Standards of Review > General Overview

Business & Corporate Law > Cooperatives > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Real Property Law > Common Interest Communities > Cooperatives > General Overview

HN7[] The business judgment rule protects a cooperative's governing board's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority.

Headnotes/Syllabus

Headnotes

Condominiums and Cooperatives -- Standard of Judicial Review for Actions of Cooperative Governing Board -- Business Judgment Rule

1. A standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors is the correct standard of review when a board of directors of a cooperative corporation seeks to enforce a matter of building policy against a tenant-shareholder. The board owes its duty of loyalty to the cooperative. It must act for the purposes of the cooperative, within the scope of its authority and in good faith. Unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available. Accordingly, the petition was properly dismissed in a CPLR article 78 proceeding to set aside a "stop work" order issued by the board of directors of a residential cooperative corporation with respect to certain apartment renovations by petitioner, a tenant-shareholder, since petitioner failed to meet his burden of demonstrating a breach of the board's duty of loyalty to the cooperative. Petitioner has not demonstrated that the board's action in adhering to its policy of refusing to permit the type of renovation contemplated by petitioner had no legitimate relationship to the welfare of the cooperative, deliberately singled out individuals for harmful treatment, was taken without notice or consideration of the relevant facts, or was beyond the scope of the board's authority.

Municipal Corporations -- Landmarks Preservation

2. In a CPLR article 78 proceeding to set aside a "stop work" order issued by the board of directors of a residential cooperative corporation with respect to a tenant-shareholder's relocation of a steam riser in his apartment, the cooperative corporation's cross claim to compel the tenant-shareholder to remove certain air-conditioning units he installed, which had been cited for violation of the Landmarks Preservation Commission's requirements, was properly dismissed. The appropriate forum for resolution of that complaint at this stage is an administrative review proceeding.

Counsel: *Joel David Sharrow* and *Arthur F. Abelman* for appellant. I. The court below failed to apply the business judgment rule. (*Auerbach v Bennett, 47 NY2d 619*; *Matter of Frishman v Schmidt, 96 AD2d 1043, 61 NY2d 823.*) II. The court below erred in attempting to rewrite the contracts between the parties contrary to their terms, and the nonstated contractual standard adopted by that court has no basis in law, nor on this record. (*Rodolitz v Neptune Paper Prods., 22 NY2d 383*; *Slatt v Slatt, 64 NY2d 966*; *Goodstein Constr. Corp. v City of New York, 111 AD2d 49, 67 NY2d 990*; *Grace v Nappa, 46 NY2d 560*; *Frankel v Tremont Norman Motors*

Corp., 21 Misc 2d 20, 10 AD2d 680, 8 NY2d 901; *Grawunder v Beth Israel Hosp. Assn., 242 App Div 56, 266 NY 605*; *Chickering v Colonial Life Ins. Co., 51 AD2d 566*; *Maigold Assocs. v City of New York, 64 NY2d 1121*; *Quinlan v Providence Washington Ins. Co., 133 NY 356*.) [****3] III. The court below erred by ignoring petitioner's self-dealing and breach of duties in violation of *section 717 of the Business Corporation Law*. (*Alpert v 28 Williams St. Corp., 63 NY2d 557*; *Jacobson v Brooklyn Lbr. Co., 184 NY 152*; *Foley v D'Agostino, 21 AD2d 60*; *Schachter v Kulik, 96 AD2d 1038*; *Lyon v Holton, 167 Misc 585*; *Kavanaugh v Commonwealth Trust Co., 223 NY 103*; *Barr v Wackman, 36 NY2d 371*.) IV. The court below erred by reversing the IAS court decision because One Fifth's actions were not arbitrary and capricious. (*Demas v 325 W. End Ave. Corp., 127 AD2d 476*; *Garrison Apts. v Sabourin, 113 Misc 2d 674*; *Matter of Boisson v 4 E. Hous. Corp., 129 AD2d 523*; *Bernheim v 136 E. 64th St. Corp., 128 AD2d 434*; *Van Camp v Sherman, 132 AD2d 453*.) V. The court below erred in affirming the decision concerning petitioner's air conditioners. (*Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52*; *Matter of Jiminez v Gross, 121 AD2d 382*; *Usen v Sipprell, 41 AD2d 251*; *Matter of Amsterdam Nursing Home Corp. v Axelrod, 135 AD2d 331*; *J.G. v Board of Educ., 830 F2d 444*; *Marte v Immigration & Naturalization [****4] Serv., 562 F Supp 92*; *People v Mantel, 88 Misc 2d 439*; *People v Federico, 88 Misc 2d 32, 96 Misc 2d 60*.) VI. The affirmance by the court below of the order to seek redress from the Landmarks Preservation Commission would violate the constitutional rights of One Fifth, by compelling it to sign an application which contains language with which One Fifth does not agree. (*Wooley v Maynard, 430 U.S. 705*; *Russo v Central School Dist. No. 1, 469 F2d 623, 411 U.S. 932*; *Estate of Hemingway v Random House, 23 NY2d 341*; *Pacific Gas & Elec. Co. v Public Utils. Commn., 475 U.S. 1*; *Matter of Consolidated Edison Co. v Public Serv. Commn., 127 Misc 2d 1085, 119 AD2d 850*; *Miami Herald Publ. Co. v Tornillo, 418 U.S. 241*.)

Irwin Brownstein for respondent. I. The decision of the court below and the IAS court's initial decision were correct in vacating appellant's stop work order because appellant could not properly revoke its prior formal approval given at a duly held meeting, and such purported revocation was in any event arbitrary and capricious, in bad faith, done to punish respondent, and directly in contradiction to the opinions of appellant's own [****5] experts. (*Demas v 325 W. End Ave. Corp., 127 AD2d 476*; *Wiles v Yorktown Prods. Corp., 36 Misc 2d 544*; *Farr v Newman, 14 NY2d 183*; *Craigie v Hadley, 99 NY 131*; *Auerbach v Bennett, 47 NY2d 619*; *Van Camp v Sherman, 132 AD2d 453*; *Bernheim v 136 E. 64th St. Corp., 128 AD2d 434*; *Matter of Boisson v 4 E. Hous. Corp., 129 AD2d 523*.) II. The court below was correct in holding that appellant's complaint about respondent's air conditioners, which were fully approved by appellant's board of directors and the Landmarks Preservation Commission and did not violate the master plan, had no merit, particularly where appellant's board of directors was obviously singling out respondent and continuing the vendetta against him led by the Harrises, and in any event any dispute should be resolved by the commission.

Judges: Chief Judge Wachtler and Judges Simons, Alexander, Hancock, Jr., and Bellacosa concur with Judge Kaye; Judge Titone concurs in a separate opinion.

Opinion by: KAYE

Opinion

[*533] [***808] [**1318] OPINION OF THE COURT [1] This appeal by a residential cooperative corporation concerning apartment renovations by one of its proprietary lessees, [****6] factually centers on a two-inch steam riser and three air conditioners, but fundamentally presents the legal question of what standard of review should apply when a board of directors of a cooperative corporation seeks to enforce a matter of building policy against a tenant-shareholder. We conclude that the business judgment rule furnishes the correct standard of review.

In the main, the parties agree that the operative events transpired as follows. In 1987, respondent (Ronald Levandusky) decided [***809] [**1319] to enlarge the kitchen area of his apartment at One Fifth Avenue in New York City. According to Levandusky, some time after reaching that decision, and while he was president of the cooperative's board of directors, he told Elliot Glass, the architect retained by the corporation, that he intended to realign or "jog" a steam riser in the kitchen area, and Glass orally approved the alteration. According to Glass, however, the conversation was a general one; Levandusky never specifically told him that he intended to move any particular pipe, and Glass never gave him approval to do so. In any event, Levandusky's proprietary lease provided that no "alteration of or [****7] addition to the water, gas or steam risers or pipes" could be made without appellant's prior written consent.

Levandusky had his architect prepare plans for the renovation, which were approved by Glass and submitted for approval to the board of directors. Although the plans show details of a number of other proposed structural modifications, [*534] including changes in plumbing risers, no change in the steam riser is shown or discussed anywhere in the plans.

The board approved Levandusky's plans at a meeting held

March 14, 1988, and the next day he executed an "Alteration Agreement" with appellant, which incorporated "Renovation Guidelines" that had originally been drafted, in large part, by Levandusky himself. These guidelines, like the proprietary lease, specified that advance written approval was required for any renovation affecting the building's heating system. Board consideration of the plans -- appropriately detailed to indicate all structural changes -- was to follow their submission to the corporation's architect, and the board reserved the power to disapprove any plans, even those that had received the architect's approval.

In late spring 1988, the building's [****8] managing agent learned from Levandusky that he intended to move the steam riser in his apartment, and so informed the board. Both Levandusky and the board contacted John Flynn, an engineer who had served as consulting agent for the board. In a letter and in a subsequent presentation at a June 13 board meeting, Flynn opined that relocating steam risers was technically feasible and, if carefully done, would not necessarily cause any problem. However, he also advised that any change in an established old piping system risked causing difficulties ("gremlins"). In Flynn's view, such alterations were to be avoided whenever possible.

At the June 13 meeting, which Levandusky attended, the board enacted a resolution to "reaffirm the policy -- no relocation of risers." At a June 23 meeting, the board voted to deny Levandusky a variance to move his riser, and to modify its previous approval of his renovation plans, conditioning approval upon an acceptable redesign of the kitchen area.

Levandusky nonetheless hired a contractor, who severed and jogged the kitchen steam riser. In August 1988, when the board learned of this, it issued a "stop work" order, pursuant to the "Renovation Guidelines." [****9] Levandusky then commenced this article 78 proceeding, seeking to have the stop work order set aside. The corporation cross-petitioned for an order compelling Levandusky to return the riser to its original position. The board also sought an order compelling him to remove certain air-conditioning units he had installed, which allegedly were not in conformity with the requirements of the Landmarks Preservation Commission.

[*535] Supreme Court initially granted Levandusky's petition, and annulled the stop work order, on the ground that there was no evidence that the jogged pipe had caused any damage, but on the contrary, the building engineer had inspected it and believed it would likely not have any adverse effect. Therefore, balancing the hardship to Levandusky in redoing the already completed renovations against the harm to the building, the court determined that the board's decision to stop the renovations was arbitrary and capricious, and should be annulled. Both counterclaims were dismissed, the court ruling that the corporation had no standing to complain of violations of the Landmarks Preservation [***810] [**1320] Law, particularly as the building had not been [****10] cited for any violation.

On reargument, however, Supreme Court withdrew its decision, dismissed Levandusky's petition, and ordered him to restore the riser to its original position and submit redrawn plans to the board, on the ground that the court was precluded by the business judgment rule from reviewing the board's determination. The court adhered to its original ruling with respect to the branch of the cross motion concerning the air conditioners, notwithstanding that the Landmarks Preservation Commission had in the interim cited them as violations.

On Levandusky's appeal, the Appellate Division modified the judgment. The court was unanimous in affirming the Supreme Court's disposition of the air conditioner claim, but divided concerning the stop work order. A majority of the court agreed with Supreme Court's original decision, while two Justices dissented on the ground that the board's action was within the scope of its business judgment and hence not subject to judicial review. Concluding that the business judgment rule applies to the decisions of cooperative governing associations enforcing building policy, and that the action taken by the board in this case falls within [****11] the purview of the rule, we now modify the order of the Appellate Division.

[2] At the outset, we agree with the Appellate Division that the corporation's cross claim concerning Levandusky's three air-conditioning units was properly dismissed, as the appropriate forum for resolution of the complaint at this stage is an administrative review proceeding. That brings us to the issue that divided the Appellate Division: the standard to be applied in judicial review of this challenge to a decision of the board of directors of a residential cooperative corporation.

[*536] As cooperative and condominium home ownership has grown increasingly popular, courts confronting disputes between tenant-owners and governing boards have fashioned a variety of rules for adjudicating such claims *(see generally,* Goldberg, *Community Association Use Restrictions: Applying the Business Judgment Doctrine,* 64 Chi-Kent L Rev 653 [1988] [hereinafter Goldberg, *Community Association Use Restrictions]*; Note, *Judicial Review of Condominium Rulemaking,* 94 Harv L Rev 647 [1981]). In the process, several salient characteristics of the governing board homeowner relationship have [****12] been identified as relevant to the judicial inquiry.

As courts and commentators have noted, *HN1*[↑] the

cooperative or condominium association is a quasi-government -- "a little democratic sub society of necessity" (*Hidden Harbour Estates v Norman, 309 So 2d 180, 182* [Fla Dist Ct App]). The proprietary lessees or condominium owners consent to be governed, in certain respects, by the decisions of a board. Like a municipal government, such governing boards are responsible for running the day-to-day affairs of the cooperative and to that end, often have broad powers in areas that range from financial decisionmaking to promulgating regulations regarding pets and parking spaces *(see generally*, Note, *Promulgation and Enforcement of House Rules*, 48 St John's L Rev 1132 [1974]). Authority to approve or disapprove structural alterations, as in this case, is commonly given to the governing board. *(See*, Siegler, *Apartment Alterations*, NYLJ, May 4, 1988, at 1, col 1.)

Through the exercise of this authority, to which would-be apartment owners must generally acquiesce, a governing board may significantly restrict the bundle of rights a property owner normally enjoys. Moreover, [****13] as with any authority to govern, the broad powers of a cooperative board hold potential for abuse through arbitrary and malicious decision-making, favoritism, discrimination and the like.

On the other hand, agreement to submit to the decisionmaking authority of a cooperative board is voluntary in a sense that submission to government authority is not; there is always the freedom not to purchase the apartment. The stability offered by community control, through a board, has its own economic and social benefits, and purchase of a cooperative apartment [***811] [**1321] represents a voluntary choice to cede certain of the privileges of single ownership to a governing body, often made up of fellow tenants who volunteer their [*537] time, without compensation. The board, in return, takes on the burden of managing the property for the benefit of the proprietary lessees. As one court observed: *HN2*[↑] "Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership [****14] demand no less." (*Sterling Vil. Condominium v Breitenbach, 251 So 2d 685, 688, n 6* [Fla Dist Ct App].)

It is apparent, then, that a standard for judicial review of the actions of a cooperative or condominium governing board must be sensitive to a variety of concerns -- sometimes competing concerns. *HN3*[↑] Even when the governing board acts within the scope of its authority, some check on its potential powers to regulate residents' conduct, life-style and property rights is necessary to protect individual residents from abusive exercise, notwithstanding that the residents have, to an extent, consented to be regulated and even selected their representatives *(see*, Note, *The Rule of Law in Residential Associations*, *99 Harv L Rev 472* [1985]). At the same time, the chosen standard of review should not undermine the purposes for which the residential community and its governing structure were formed: protection of the interest of the entire community of residents in an environment managed by the board for the common benefit.

We conclude that these goals are best served by a standard of review that is analogous to the business judgment rule applied by courts to determine challenges [****15] to decisions made by corporate directors *(see, Auerbach v Bennett, 47 NY2d 619, 629)*. A number of courts in this and other states have applied such a standard in reviewing the decisions of cooperative and condominium boards *(see, e.g., Kirsch v Holiday Summer Homes, 143 AD2d 811; Schoninger v Yardarm Beach Homeowners' Assn., 134 AD2d 1; Van Camp v Sherman, 132 AD2d 453; Papalexiou v Tower W. Condominium, 167 NJ Super 516, 401 A2d 280; Schwarzmann v Association of Apt. Owners, 33 Wash App 397, 655 P2d 1177; Rywalt v Writer Corp., 34 Colo App 334, 526 P2d 316*). We agree with those courts that such a test best balances the individual and collective interests at stake.

HN4[↑] Developed in the context of commercial enterprises, the business judgment rule prohibits judicial inquiry into actions [*538] of corporate directors "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (*Auerbach v Bennett, 47 NY2d 619, 629, supra)*. So long as the corporation's directors have not breached their fiduciary obligation to the corporation, "the exercise of [their powers] for the common [****16] and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." (*Pollitz v Wabash R. R. Co., 207 NY 113, 124*.)

Application of a similar doctrine is appropriate because a cooperative corporation is -- in fact and function -- a corporation, acting through the management of its board of directors, and subject to the Business Corporation Law. There is no cause to create a special new category in law for corporate actions by coop boards.

[1] We emphasize that reference to the business judgment rule is for the purpose of analogy only. Clearly, in light of the doctrine's origins in the quite different world of commerce, the fiduciary principles identified in the existing case law -- primarily emphasizing avoidance of self-dealing and financial self-aggrandizement -- will of necessity be adapted over time in order to apply to directors of not-for-profit homeowners' cooperative corporations *(see*, Goldberg, *Community Association Use Restrictions, op. cit.*, at 677-683). For

present purposes, we need not, nor should we determine the entire range of the fiduciary [***812] [**1322] obligations [****17] of a cooperative board, other than to note that *HN5*[↑] the board owes its duty of loyalty to the cooperative -- that is, it must act for the benefit of the residents collectively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available.

In reaching this conclusion, we reject the test seemingly applied by the Appellate Division majority and explicitly applied by Supreme Court in its initial decision. That inquiry was directed at the *reasonableness* of the board's decision; having itself found that relocation of the riser posed no "dangerous aspect" to the building, the Appellate Division concluded that the renovation should remain. Like the business judgment rule, this reasonableness standard -- originating in the quite different world of governmental agency decision-making -- has [*539] found favor with courts reviewing board decisions *(see, e.g., Amoruso v Board of Managers, 38 AD2d 845; Lenox Manor [****18] v Gianni, 120 Misc 2d 202; see,* Note, *Judicial Review of Condominium Rulemaking, op. cit.*, at 659-661 [discussing cases from other jurisdictions]).

As applied in condominium and cooperative cases, review of a board's decision under a reasonableness standard has much in common with the rule we adopt today. *HN6*[↑] A primary focus of the inquiry is whether board action is in furtherance of a legitimate purpose of the cooperative or condominium, in which case it will generally be upheld. The difference between the reasonableness test and the rule we adopt is twofold. First -- unlike the business judgment rule, which places on the owner seeking review the burden to demonstrate a breach of the board's fiduciary duty -- reasonableness review requires the board to demonstrate that its decision was reasonable. Second, although in practice a certain amount of deference appears to be accorded to board decisions, reasonableness review permits -- indeed, in theory requires -- the court itself to evaluate the merits or wisdom of the board's decision *(see, e.g., Hidden Harbour Estates v Basso, 393 So 2d 637, 640* [Fla Dist Ct App]), just as the Appellate Division did in the present [****19] case.

The more limited judicial review embodied in the business judgment rule is preferable. In the context of the decisions of a for-profit corporation, "courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments * * * by definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility." *(Auerbach v Bennett,* 47 NY2d, *supra, at 630-631.*) Even if decisions of a cooperative board do not generally involve expertise beyond the usual ken of the judiciary, at the least board members will possess experience of the peculiar needs of their building and its residents not shared by the court.

Several related concerns persuade us that such a rule should apply here. As this case exemplifies, board decisions concerning what residents may or may not do with their living space may be highly charged and emotional. A cooperative or condominium is by nature a myriad of often competing views regarding personal living space, and decisions taken to benefit the collective interest may be unpalatable [****20] to one resident or another, creating the prospect that board decisions [*540] will be subjected to undue court involvement and judicial second-guessing. Allowing an owner who is simply dissatisfied with particular board action a second opportunity to reopen the matter completely before a court, which -- generally without knowing the property -- may or may not agree with the reasonableness of the board's determination, threatens the stability of the common living arrangement.

Moreover, the prospect that each board decision may be subjected to full judicial review hampers the effectiveness of the [***813] [**1323] board's managing authority. *HN7*[↑] The business judgment rule protects the board's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority.

Levandusky failed to meet this burden, and Supreme Court [****21] properly dismissed his petition. His argument that having once granted its approval, the board was powerless to rescind its decision after he had spent considerable sums on the renovations is without merit. There is no dispute that Levandusky failed to comply with the provisions of the "Alteration Agreement" or "Renovation Guidelines" designed to give the board explicit written notice before it approved a change in the building's heating system. Once made aware of Levandusky's intent, the board promptly consulted its engineer, and notified Levandusky that it would not depart from a policy of refusing to permit the movement of pipes. That he then went ahead and moved the pipe hardly allows him to claim reliance on the board's initial approval of

his plans. Indeed, recognition of such an argument would frustrate any systematic effort to enforce uniform policies.

Levandusky's additional allegations that the board's decision was motivated by the personal animosity of another board member toward him, and that the board had in fact permitted other residents to jog their steam risers, are wholly conclusory. The board submitted evidence -- unrefuted by Levandusky -- that it was acting [****22] pursuant to the advice of its engineer, and that it had not previously approved such jogging. Finally, the fact that allowing Levandusky an exception to the policy might not have resulted in harm to the building [*541] does not require that the exception be allowed. Under the rule we articulate today, we decline to review the merits of the board's determination that it was preferable to adhere to a uniform policy regarding the building's piping system.

Turning to the concurrence, it is apparent that in many respects we are in agreement concerning the appropriate standard of judicial review of cooperative board decisions; it is more a matter of label that divides us. For these additional reasons, we believe our choice is the better one.

For the guidance of the courts and all other interested parties, obviously a single standard for judicial review of the propriety of board action is desirable, irrespective of the happenstance of the form of the lawsuit challenging that action.* Unlike challenges to administrative agency decisions, which take the form of article 78 proceedings, challenges to the propriety of corporate board action have been lodged as derivative suits, injunction [****23] actions, and all manner of civil suits, including article 78 proceedings. While the nomenclature will vary with the form of suit, we see no purpose in allowing the form of the action to dictate the substance of the standard by which the legitimacy of corporate action is to be measured.

By [****24] the same token, unnecessary confusion is generated by prescribing different standards for different categories of issues that come before cooperative boards -- for example, a standard of business judgment for choices between competing economic options, but rationality for the administration of corporate bylaws and rules governing shareholder-tenant rights *(see,* concurring [**1324] [***814] opn, at 545). There is no need for two rules when one will do, particularly since corporate action often partakes of each category of issues. Indeed, even the decision here might be portrayed as the administration of corporate bylaws and rules governing shareholder-tenant rights, or more broadly as a policy choice based on the [*542] economic consequences of tampering with the building's piping system.

Finally, we reiterate that "business judgment" appears to strike the best balance. It establishes that board action undertaken in furtherance of a legitimate corporate purpose will generally not be pronounced "arbitrary and capricious or an abuse of discretion" (*CPLR 7803 [3]*) in article 78 proceedings, or otherwise unlawful in other types of litigation. It is preferable to a [****25] standard that requires Judges, rather than directors, to decide what action is "reasonable" for the cooperative. It avoids drawing sometimes elusive semantical distinctions between what is "reasonable" and what is "rational" (the concurrence rejects the former but embraces the latter as the appropriate test). And it better protects tenant-shareholders against bad faith and self-dealing than a test that insulates board decisions "if there is a rational basis to explain them" or if "an articulable and rational basis for the board's decision exists." (Concurring opn, at 548.) The mere presence of an engineer's report, for example -- "certainly a rational explanation for the board's decision" (concurring opn, at 548) -- should not end all inquiry, foreclosing review of nonconclusory assertions of malevolent conduct; under the business judgment test, it would not .

Accordingly, the order of the Appellate Division should be modified, with costs to appellant, by reinstating Supreme Court's judgment to the extent it granted appellant's cross motions regarding the steam riser and severed and set down for assessment the issue of damages and, as so modified, affirmed.

Concur by: TITONE

Concur

[****26] Titone, J. (concurring). I concur in the majority's decision to modify, and I agree with much of its reasoning. Indeed, like the majority, I conclude that in fashioning standards for review of decisions made by cooperative apartment boards we should be guided by the need to afford these boards the greatest possible degree of deference, since excessive judicial interference would unquestionably

* We of course do not disregard the form of action. In determining whether appellant's decision was "arbitrary and capricious or an abuse of discretion" (*CPLR 7803 [3]*), we would use "business judgment," the concurrence some form of "rationality" or "reasonableness." By analogy, we hold today in *Akpan v Koch (75 NY2d 561, 574* ([decided today]) that because a governmental agency took the required "hard look" under the State's environmental protection laws, its action cannot be characterized as arbitrary and capricious or an abuse of discretion under *CPLR 7803 (3)*. So too here, board action that comes within the business judgment rule cannot be characterized as arbitrary and capricious, or an abuse of discretion.

undermine their effectiveness. My disagreement with the majority thus lies not in its rejection of a test of "reasonableness" that would embroil the courts in second-guessing the wisdom of every cooperative board decision, but rather in its choice to formulate the proper standard in terms of the "business judgment rule." That standard, which is most often applied to review of management's business decisions and use of corporate assets, is ill-suited [*543] to the entirely different task of reviewing management's implementation of the bylaws and rules governing shareholders' rights and duties. Accordingly, I write separately to express my own views as to the proper standard for judicial review in these cases.

My own analysis begins with the fact that the shareholder's challenge to [****27] the cooperative board's action in this case was made through the procedural vehicle of a CPLR article 78 proceeding. That procedural choice was not a mere "happenstance" or accident of nomenclature (majority opn, at 541). Petitioner was not making a claim of waste or self-dealing by corporate management of the type that would ordinarily be cognizable in a derivative action brought pursuant to *Business Corporation Law § 626*. Rather, petitioner was alleging misfeasance in the administration of the bylaws and rules governing shareholders' rights to use and enjoy their apartments.

In the past, similar claims involving the administration of shareholders' rights and duties vis-a-vis the other shareholders, the corporation's management and the corporation as a discrete legal entity have been treated as matters cognizable under article [***815] [**1325] 78 *(see, e.g., Matter of Crane Co. v Anaconda Co., 39 NY2d 14; Matter of Auer v Dressel, 306 NY 427; see also*, 5A Fletcher, Cyclopedia Corporations § 2214 [Perm ed 1987]). As one commentator has noted, "[mandamus] to review the discretional acts of a private corporation is commonplace since the corporation is [****28] a creature of the state" (McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C7802: 1, at 276 [and cases cited therein]; *cf., Matter of Carr v St. John's Univ., 12 NY2d 802* [decisions of educational corporations also subject to review for arbitrariness under article 78]). The justification for article 78 review in these circumstances is, quite simply, that the authority of corporations and their directors to act is derived directly from franchises issued by the State (McLaughlin, Practice Commentaries, *op. cit.*, at 276). Since the decision of which petitioner complains was a discretionary act affecting shareholders' rights and was made by a board of directors acting pursuant to the bylaws and rules of a franchised corporation, article 78 review was plainly the proper remedy.

Given that conclusion, our choice of an appropriate standard for judicial review must be guided by *CPLR 7803*, which describes with particularity "[the] only questions that may be raised in [an article 78] proceeding". It is well established that [*544] the four "questions" set forth in *CPLR 7803 (1)-(4)* are the exclusive measures of the judiciary's power of review [****29] in matters cognizable under article 78 *(see, e.g., Matter of Pell v Board of Educ., 34 NY2d 222)*. It is equally well established that the standard for reviewing discretionary decisions of "bodies or officers" is whether the challenged decision was "made in violation of lawful procedure" or was "arbitrary and capricious or an abuse of discretion" (*CPLR 7803 [3]*). It is that test which should be our starting point here.

The "arbitrary and capricious" standard of *CPLR 7803 (3)*, used judiciously, would be more than adequate to accomplish the primary goals identified by the majority, i.e., providing some check on the potential for abusive exercise of the power of cooperative apartment boards, while, at the same time, minimizing the type of judicial interference that could impair the ability of these boards to govern effectively *(cf., Matter of Olsson v Board of Higher Educ., 49 NY2d 408, 413-414; Matter of Fiacco v Santee, 72 AD2d 652; Matter of Edde v Columbia Univ., 8 Misc 2d 795, affd 6 AD2d 780, cert denied 359 U.S. 956* [all noting judicial reluctance to interfere with academic decisionmaking and applying minimal "arbitrary and capricious" scrutiny [****30] to such decisions]). Indeed, the cornerstone of article 78 review under the "arbitrary and capricious" test is that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable" *(Matter of Diocese of Rochester v Planning Bd., 1 NY2d 508, 520)*.

Given the suitability of the statutory "arbitrary and capricious" standard, I cannot concur in the majority's decision to reach out and embrace the "business judgment rule", a standard that was developed to address an entirely different class of problems. The "business judgment" rule to which the majority refers is most relevant, and has most often been applied in the past, to shareholder derivative actions brought to challenge the propriety of management's *business* decisions including such diverse matters as investment choices, the making of contractual commitments, long-range corporate planning and the decision as to whether it is in the corporate interest to pursue an action against a director for waste *(see, e.g., Auerbach v Bennett, 47 NY2d 619; Kalmanash v Smith, 291 NY 142; Pollitz v Wabash R. R. Co., 207 NY 113)*. In fact, [****31] the classic formulation of the rule is closely tailored to the open-ended decisionmaking within a virtually limitless universe of economic options that typifies business [***816] [**1326] choices: "Questions [*545] of policy of management, expediency of contracts or

action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to [the directors'] honest and unselfish decision, for their powers therein are without limitation and free from restraint" (Pollitz v Wabash R. R. Co., supra, at 124, quoted in Auerbach v Bennett, supra, at 629). Concomitantly, review under the "business judgment" rule is limited to determining whether the challenged action is "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes", because "courts are ill equipped * * * to evaluate what are and must be essentially business judgments * * * [as to which] there can be no available objective standard" for measuring their correctness (Auerbach v Bennett, supra, at 629, 630; see, Fe Bland v Two Trees Mgt. Co., 66 NY2d 556, 565).

This test may have some [****32] utility by analogy in a limited class of cases involving cooperative apartment boards. 3In Schoninger v Yardarm Beach Homeowners' Assn. (134 AD2d 1), for example, the court used the business judgment rule to rebuff a shareholder's challenge to a decision by a cooperative board to pursue a particular program of repair and rehabilitation in preference to the program suggested by the shareholder and her experts. Application of the rule to this problem was appropriate because the challenged action was, in essence, a *business* judgment, i.e., a choice between competing and equally valid economic options, albeit one not necessarily motivated by the desire to make a profit.

The justification for applying the business judgment rule to cooperative apartment board decisions falls short, however, in cases such as this one, which involves the administration of the corporate bylaws and rules governing shareholder-tenant rights (cf., Schoninger v Yardarm Beach Homeowners' Assn., supra, at 8-9 [distinguishing between the two categories of decisionmaking and recognizing that different standards of review should be applied]). First, in contrast to cases involving sheer business [****33] choices, our courts' extensive experience in reviewing licensing, zoning and other discretionary administrative matters renders them well suited, rather than "ill equipped," to deal with questions such as the rationality or arbitrariness of a board decision to grant or deny a shareholder's application for permission to renovate. Second, this test provides an objective standard and thereby minimizes the risk [*546] of excessive judicial intervention and entanglement in what, as the majority notes, are often highly emotional disputes.

In contrast, the standard of review mandated by the traditional business judgment rule focuses principally on the honesty and integrity of the decisionmaker, and the presence or absence of self-dealing or fraud in the decisionmaking process (see, e.g., Auerbach v Bennett, supra, at 629-630; Pollitz v Wabash R. R. Co., supra). However, questions of pure venality or dishonesty on the part of board members rarely enter into disputes about the use of residential cooperative apartment units. The more common sources of disputes in this area are the alleged arbitrariness of a particular board decision or, as here, the alleged existence of a [****34] vendetta or other *personally* malicious motive (see, e.g., Matter of Boisson v 4 E. Hous. Corp., 129 AD2d 523).

By its own admission, the majority's adoption of the "business judgment" rule for these intramural controversies is motivated largely by its own view that the courts *ought* to mediate in the latter class of cases. It is this choice that most clearly differentiates my position from the majority's and renders our disagreement more than a simple "matter of label" (majority opn, at 541). Unlike the majority, I believe that a rule which authorizes judicial inquiry into the personal motives and potentially vindictive aims underlying otherwise [***817] [**1327] rational decisions is fundamentally unsound -- for precisely the same reasons that have led the majority to reject the "reasonableness" test that the Appellate Division apparently used.

As the majority notes, these disputes over the use of the shareholder's own living space often pit neighbor against neighbor under circumstances that are likely to generate bitterness and distrust. Further, the very nature of cooperative apartment living, which throws relative strangers together, requires them to reside [****35] in close proximity and forces them to cede a degree of personal freedom to the collective good, provides a fertile breeding ground for festering resentments and long-standing feuds. Thus, claims of "bad faith," in the sense of personally directed animus, will be relatively easy to make in these cooperative board disputes -- and will be equally easy to support with factual allegations dredging up the details of the parties' old grievances. The likely consequence will be *more* claims capable of surviving a motion to [*547] dismiss (see, e.g., Matter of Boisson v 4 E. Hous. Corp., supra) [1] and *more* judicial interference with

[1] The majority's decision to reject petitioner's claims without an evidentiary hearing is difficult to reconcile with its expressed unwillingness to foreclose review of allegations of "malevolent conduct" (majority opn, at 542). Petitioner's papers contained factual allegations that one of the board members "has for several years been * * * causing problems for any other cooperator who needs something from the Board" and that this board member "is causing problems for [petitioner] because [he] said publicly that she had violated her proprietary lease by hooking up a sink in the rooftop greenhouse of her apartment." Petitioner further claimed that the full board knew about this violation but was "afraid to do anything because of the threat of becoming victim of [the board member's] vendettas." Although the majority describes petitioner's claims on

management decisionmaking than the "reasonableness" standard the majority rejects would produce.

[****36] Moreover, a standard that would authorize our courts to explore the board members' ulterior *personal* motives is, in my view, both impractical and undesirable as a matter of judicial policy. It is impractical because many, if not most, of the challenged decisions will involve a mixture of malevolent and legitimate motives. Exposing, separating and then measuring the role that the various motives played in the decisionmaking process is a daunting, and probably unrealistic, inquiry. Further, the undesirability of focusing on the parties' subjective motives is plain, since such a focus will encourage the combatants to bring all of their dirty laundry into the courtroom and will place the court in the distasteful role of arbiter of a myriad of petty accusations and grievances. [2]

[****37] Because of these serious pitfalls, I would simply apply the "arbitrary and capricious" standard of article 78 to these cases and hold that discretionary decisions of the cooperative board regarding individual shareholder-tenants' rights are not [*548] actionable if there is a rational basis to explain them. Contrary to the majority's suggestion (majority opn, at 541-542), there is nothing undesirable, or even particularly unusual, about applying differing standards of judicial review to cases involving different types of issues. Indeed, *CPLR 7803* mandates the use of different standards for disputes between citizens and the State, depending upon the category of issue to be considered (*CPLR 7803*). Similarly, there is no sound reason to insist [**1328] [***818] upon a single standard for judicial review for cases presenting diverse legal problems simply because they arise within the setting of cooperative apartment corporations. Again, this is not a matter of mere "happenstance" or "labeling," but rather of claims which present fundamentally different problems requiring the use of different analytical tools. Disputes in which shareholder-tenants seek to vindicate their [****38] *group* interests as against the board of directors are analogous to *Business Corporation Law § 626* derivative actions and lend themselves readily to the "business judgment" standard of review. In contrast, disputes which pit an individual shareholder-tenant against the other shareholder-tenants, acting either as a group or through their elected board, are more amenable to analysis under the *CPLR 7803 (3)* "arbitrary and capricious" standard. The distinction is not difficult to apply and is no more confusing than the well-understood distinction between representative shareholder actions for waste and mismanagement and those brought by individual shareholders to vindicate their personal rights.

Finally, despite the majority's assertions to the contrary, the arbitrary and capricious standard, when properly applied, does not entail an inquiry into the "reasonableness" or the wisdom of the challenged decision. To the contrary, as in the case of article 78 review of discretionary administrative determinations, the judicial role in these cases is limited to ascertaining that an articulable and rational basis for the board's decision exists.

Here, for example, the board's stated concern [****39] -- and its ostensible basis for refusing petitioner's request for permission to tinker with a steam riser -- was the risk of creating unforeseen problems elsewhere in the building's old, well-worn pipe system. This concern, which was articulated by the building's engineer, was certainly a rational explanation for the board's decision and was therefore sufficient to remove that decision from the category of "arbitrary and capricious" determinations [*549] that are cognizable under article 78. This conclusion should, and would, end the inquiry under the test I propose.

In sum, the business judgment rule, with its attendant focus on the honesty of the decisionmaker, is a poor fit in the context of discretionary administrative decisions such as this one. Further, I can see no reason to stretch the contours of that rule's standard of review for these cases, because a more apt test lies readily at hand, i.e., the standard set forth in *CPLR 7803 (3)*. Since application of that test leads me to the same ultimate conclusion as the majority has reached by its somewhat more circuitous route, I concur, but only in the result.

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this point as "wholly conclusory" (majority opn, at 540), these allegations seem to me to be sufficiently specific to survive a motion to dismiss under a test that looks beyond the objective rationality of the decision and mandates an inquiry into the subjective motivations of the decisionmaker. Indeed, the allegations here are indistinguishable in principle from those made in *Matter of Boisson v 4 E. Hous. Corp.* (*129 AD2d 523*), in which the court concluded that a hearing into bad faith was warranted on the basis of an alleged "vendetta" arising from a prior incident involving the petitioner and the current board president.

[2] These difficulties do not arise in the more conventional applications of the "business judgment" rule to shareholder's suits involving the actions of business corporation boards, since the focus in these applications is on the alleged ulterior *financial* motives of the directors -- a matter which is susceptible to objective verification.

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People v. Grasso

Court of Appeals of New York

June 3, 2008, Argued; June 25, 2008, Decided

No. 120

Reporter
11 N.Y.3d 64 *; 893 N.E.2d 105 **; 862 N.Y.S.2d 828 ***; 2008 N.Y. LEXIS 1821 ****; 2008 NY Slip Op 5770

[1] The People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York, Appellant, v Richard A. Grasso, Respondent, et al., Defendants. (And Other Actions.)

Prior History: Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered May 8, 2007. The Appellate Division (1) reversed, on the law, an order of the Supreme Court, New York County (Charles E. Ramos, J.; op *12 Misc 3d 384, 816 NYS2d 863*), which had denied a motion by defendant Richard A. Grasso, pursuant to *CPLR 3211 (a) (7)*, to dismiss the first, fourth, fifth, and sixth causes of action, and (2) granted the motion. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Supreme Court, properly made?"

People v Grasso, 42 AD3d 126, 836 NYS2d 40, affirmed.

People v. Grasso, 42 AD3d 126, 836 NYS2d 40, 2007 NY App Div LEXIS 5719 (1st Dept 2007)

Disposition: [****1] Order affirmed, with costs, and certified question answered in the affirmative.

Core Terms

cause of action, corporations, provisions, package, causes, not-for-profit, nonstatutory, alleges, duties, corporate assets, statutory claim

Case Summary

Procedural Posture
Appellant People, by the state attorney general (AG), sought review of a decision of the Appellate Division (New York), which reversed the trial court's decision and dismissed four nonstatutory causes of action for, inter alia, constructive trust against respondent, the former chairman of the New York Stock Exchange (NYSE), regarding his compensation. The two other causes of action against the chairman were pursuant to *N-PCL 720(a)(b)*.

Overview

The NYSE was a not-for-profit corporation under *N-PCL 201(b)*. The AG, on behalf of the People, claimed that payments contemplated by a 2003 agreement for the chairman's compensation were not reasonable and therefore violated *N-PCL 202(a)(12)* and *515(b)*. The two statutory claims against the chairman asserted unlawful transfer of corporate assets and breach of fiduciary duty. While the trial court had denied the chairman's motion to dismiss the four nonstatutory claims on the basis that the AG had the authority to maintain them under the parens patriae doctrine, the appellate division reversed, finding the nonstatutory claims were an attempt to circumvent the fault-based statutory claims. On further appeal, the court affirmed. Directors and officers of a non-profit corporation were provided with the protection of the business judgment rule under *N-PCL 717*. Because the nonstatutory claims were based on the common law with a lower burden of proof as knowledge or good faith was not required, those claims exceeded the AG's authority.

Outcome
The court affirmed the appellate division's order and answered a certified question presented in the affirmative.

LexisNexis® Headnotes

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN1 *N-PCL 201(b)* defines four types of corporations, each with a different purpose. Type A corporations may be formed for any lawful non-business purpose. Type B corporations may be formed to serve charitable, educational, religious, scientific, literary, cultural purposes, or for the prevention of

cruelty to children or animals; Type C corporations may be formed for any lawful business purpose to achieve a lawful public or quasi-public objective; Type D corporations can serve any purpose so long as their formation is authorized by any other corporate law of New York.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Governments > State & Territorial Governments > Claims By & Against

HN2 Parens patriae is a common law standing doctrine that permits the state to commence an action to protect a public interest, like the safety, health or welfare of its citizens. To invoke the doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population. In varying contexts, courts have held that a state has a quasi-sovereign interest in protecting the integrity of the marketplace.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Governments > State & Territorial Governments > Employees & Officials

HN3 *N-PCL 719* and *720* permit the Attorney General to seek redress for injuries resulting from -- to name only a few -- unlawful distributions of corporate cash, property or assets (*N-PCL 719(a)(1), (4)*), improper loans (*N-PCL 719(a)(5)*), waste of corporate assets (*N-PCL 720(a)(1)(B)*), and breach of fiduciary duties (*N-PCL 720(a)(1)(A)*). The Attorney General's authority to maintain these actions is explicitly codified under *N-PCL 720 (b)*.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN4 The Legislature's comprehensive enforcement scheme under the N-PCL is not without limitation. First, any action or special proceeding brought by the Attorney General under the N-PCL is triable by jury as a matter of right. *N-PCL 112(b)(1)*. Second, the Legislature has provided directors and officers with the protections of the business judgment rule. *N-PCL 717*. The statute provides that officers and directors must discharge the duties of their respective positions in good faith and with that degree of diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions. *N-PCL 717(a)*. Officers and directors are permitted to rely on information, opinions, or reports of reasonable reliability so long as the officer or director acts in good faith. *N-PCL 717(b)*. Moreover, the statute dictates that persons who so perform their duties shall have no liability by reason of being or having been directors or officers of the corporation. *N-PCL 717(b)*.

Governments > Legislation > Statutory Remedies & Rights

HN5 A private right of action may not be implied from a statute where it is incompatible with the enforcement mechanism chosen by the Legislature.

Constitutional Law > Separation of Powers

HN6 Although the executive branch must have flexibility in enforcing statutes, it must do so while maintaining the integrity of calculated legislative policy judgments.

Business & Corporate Law > ... > Directors & Officers > Compensation > Salaries

Business & Corporate Law > Nonprofit Corporations & Organizations > Management Duties & Liabilities

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Governments > State & Territorial Governments > Claims By & Against

HN7 *N-PCL 715* addresses circumstances relating to interested directors and officers. It provides the fixing of salaries of officers shall require the affirmative vote of a majority of the entire board of directors. *N-PCL 715(f)*. It does not, however, grant the Attorney General the authority to maintain an action for the board's failure to properly vote on a compensation package. In fact, *N-PCL 715(b)* provides the corporation -- not the Attorney General -- with the power to avoid contracts or transactions between the corporation and its officers or directors and, even then, such actions may only be maintained in the absence of good faith. *N-PCL 715(b)*.

Headnotes/Syllabus

Headnotes

Attorney General -- Powers -- Authority to Sue Officer or Director of Not-For-Profit Corporation -- Nonstatutory Causes of Action

In an action brought by the New York State Attorney General challenging as excessive the compensation paid to defendant, the former chairman and chief executive officer of the New York Stock Exchange (NYSE), a New York not-for-profit corporation regulated by the Not-For-Profit Corporation Law, in which both statutory and nonstatutory causes of action

were alleged, the Attorney General lacked authority to assert the complaint's four nonstatutory causes of action against defendant. The four nonstatutory claims were premised on provisions of the N-PCL but clothed in the common law, and included causes of action for a constructive trust and payment had and received, based on a theory of unjust enrichment; a cause of action seeking restitution of certain benefit awards alleging that a majority of the Board failed to approve them; and a cause of action alleging that the NYSE's advance payments from a retirement plan violated the prohibition against loans to officers and that the NYSE was entitled to reasonable interest thereon. The two statutory claims, alleging an unlawful transfer and breach of fiduciary duty, were brought pursuant to specific provisions of the N-PCL and required the Attorney General to prove defendant's fault. The nonstatutory causes of action, however, were devoid of any fault-based elements. As such, they were fundamentally inconsistent with the N-PCL, and reached beyond the bounds of the Attorney General's authority.

Counsel: *Andrew M. Cuomo, Attorney General,* New York City (*Barbara D. Underwood, Benjamin E. Rosenberg* and Jeffrey P. Metzler of counsel), for appellant. I. Assertion of the nonstatutory causes of action is an appropriate exercise of the Attorney General's historic common-law parens patriae authority. (*State of New York v Cortelle Corp., 38 NY2d 83, 341 NE2d 223, 378 NYS2d 654*; *People v Lowe, 117 NY 175, 22 NE 1016*; *Finger Lakes Health Sys. Agency v St. Joseph's Hosp., 81 AD2d 403, 442 NYS2d 219*; *Hawaii v Standard Oil Co. of Cal., 405 US 251, 92 S Ct 885, 31 L Ed 2d 184*; *Alfred L. Snapp & Son, Inc. v Puerto Rico ex rel. Barez, 458 US 592, 102 S Ct 3260, 73 L Ed 2d 995*; *People by Vacco v Mid Hudson Med. Group, P.C., 877 F Supp 143*; *State of N.Y. by Abrams v General Motors Corp., 547 F Supp 703*; *State of New York v Booth, 32 NY 397*; *People of State of N.Y. by Abrams v Seneci, 817 F2d 1015*; *People of State of N.Y. by Abrams v Holiday Inns, Inc., 656 F Supp 675*.) II. The N-PCL did not limit or displace the Attorney General's parens patriae authority. (*People v New York Cent. & Hudson Riv. R.R. Co., 74 NY 302*; *People v Phyfe, 136 NY 554, 32 NE 978, 10 N.Y. Cr. 246*; *People v King, 61 NY2d 550, 463 NE2d 601, 475 NYS2d 260*; *Matter of Bayswater Health Related Facility v Karagheuzoff, 37 NY2d 408, 335 NE2d 282, 373 NYS2d 49*; *Sheehy v Big Flats Community Day, 73 NY2d 629, 541 NE2d 18, 543 NYS2d 18*; *Mark G. v Sabol, 93 NY2d 710, 717 NE2d 1067, 695 NYS2d 730*; *State of New York v Cortelle Corp., 38 NY2d 83, 341 NE2d 223, 378 NYS2d 654*; *Consumers Union of U.S., Inc. v State of New York, 5 NY3d 327, 840 NE2d 68, 806 NYS2d 99*; *Alco Gravure, Inc. v Knapp Found., 64 NY2d 458, 479 NE2d 752, 490 NYS2d 116*; *Smithers v St. Luke's-Roosevelt Hosp. Ctr., 281 AD2d 127, 723 NYS2d 426*.)

Williams & Connolly LLP, Washington, D.C. (*Gerson A. Zweifach, Brendan V. Sullivan, Jr., Steven M. Farina* and Carl R. Metz of counsel), and *Flemming Zulack Williamson Zauderer LLP*, New York City (Mark C. Zauderer and Jonathan D. Lupkin of counsel), for respondent. I. The Attorney General's parens patriae power does not extend to rewriting statutes. (*Rogers v Hill, 289 US 582, 53 S Ct 731, 77 L Ed 1385*; *Eisenberg v Central Zone Prop. Corp., 306 NY 58, 115 NE2d 652*; *American Baptist Churches of Metro. N.Y. v Galloway, 271 AD2d 92, 710 NYS2d 12*; *Kalmanash v Smith, 291 NY 142, 51 NE2d 681*; *Sheehy v Big Flats Community Day, 73 NY2d 629, 541 NE2d 18, 543 NYS2d 18*; *People v Litto, 8 NY3d 692, 872 NE2d 848, 840 NYS2d 736*; *Carrier v Salvation Army, 88 NY2d 298, 667 NE2d 328, 644 NYS2d 678*; *Mark G. v Sabol, 93 NY2d 710, 717 NE2d 1067, 695 NYS2d 730*; *Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 798 NE2d 1047, 766 NYS2d 654*; *Matter of Citizens For An Orderly Energy Policy v Cuomo, 78 NY2d 398, 582 NE2d 568, 576 NYS2d 185*.) II. A suit to return compensation paid by the New York Stock Exchange is not a valid exercise of parens patriae authority. (*People v Lowe, 117 NY 175, 22 NE 1016*; *People v Ingersoll, 58 NY 1*; *Abrams v 11 Cornwell Co., 695 F2d 34*; *Matter of State of New York v New York City Conciliation & Appeals Bd., 123 Misc 2d 47, 472 NYS2d 839*; *People of State of N.Y. by Abrams v Holiday Inns, Inc., 656 F Supp 675*; *Matter of Herbert H. Lehman Coll. Found. v Fernandez, 292 AD2d 227, 739 NYS2d 375*; *Pennsylvania v New Jersey, 426 US 660, 96 S Ct 2333, 49 L Ed 2d 124*; *People v O'Brien, 111 NY 1, 18 NE 692*; *Town of Riverhead v Long Is. Light. Co., 258 AD2d 643, 685 NYS2d 792*.)

Judges: Opinion by Chief Judge Kaye. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Opinion by: KAYE

Opinion

[105] [***828]** [*66] Chief Judge Kaye.

This appeal arises out of compensation paid by the New York Stock Exchange (NYSE) to Richard A. Grasso, Chairman **[**106]** and Chief Executive Officer from 1995 until his resignation in September 2003. At all times relevant to this appeal the NYSE was a New York **[2]** not-for-profit corporation regulated by the Not-For-Profit Corporation Law (N-PCL). [1] The present challenge **[***829]** is to four of the

[1] *HN1 N-PCL 201 (b)* defines four types of corporations, each with a different purpose. Type A corporations, like the NYSE, "may be formed for any lawful non-business purpose." Type B corporations may be formed to serve "charitable, educational, religious, scientific,

eight causes of action brought by the Attorney General charging that the compensation paid to Grasso was excessive.

The Allegations of the Complaint

Three agreements, executed in 1995, 1999 and 2003, governed Grasso's compensation by the NYSE. From 1995 through 2002, his base salary was roughly $ 1.4 million, but his bonus awards escalated from $ 900,000 in 1995 to $ 10.6 million in 2002. The 2003 agreement provided Grasso with an immediate lump sum payment of $ 139.5 million and an additional $ 48 million payable over four years--compensating him for past and future work.

[*67] The Attorney General alleges that the payments contemplated by the 2003 agreement were not reasonable or commensurate with the services performed by Grasso, and therefore violated *N-PCL 202 (a) (12)* and *515 (b)*. The complaint describes the situation as "a fundamental breakdown of corporate governance" predicated on numerous breaches of fiduciary duty, beginning with the composition of the Compensation Committee--its members hand-picked by Grasso--which ignored a benchmark system [2] designed to calculate Grasso's compensation. In 1999, 2000 and 2001, the Compensation [****3] Committee provided Grasso with awards exceeding the benchmark by 64%, 141% and 65%, respectively. In addition, the Attorney General alleges that information provided to Committee and Board members regarding the extent of Grasso's compensation under various benefit programs was inaccurate, incomplete and misleading. [3]

The complaint then shifts to a description of the negotiation process for the 2003 agreement, beginning with Grasso's 2002 proposal. Instead of immediately approving the package, the Compensation Committee retained the law firm of Vedder Price to serve as independent consultant. By August 2003 an agreement still had not been reached and several Board members expressed disapproval of the $ 139.5 million figure. In light of these concerns, according to the complaint, the proposal was not included on the agenda for the August 7, 2003 Compensation [****4] Committee meeting or Board meeting. During the August 7 Committee meeting, however, the members present decided to approve the proposal and pass it on to the Board. Allegedly, as a result of this last-minute change, neither independent counsel nor opponents of the compensation package were at the meeting, and Board members who did attend had no opportunity to review the details of the package in advance of the meeting. The Board, nonetheless, approved the $ 187.5 million package.

[**107] Grasso's Resignation and the Instant Action

The negative reaction to Grasso's compensation package forced his resignation and prompted an internal investigation. Based on the investigation's results, the NYSE Interim Chairman [*68] wrote both to the Attorney General and to the Chairman of the Securities and Exchange Commission [***830] asking that they "pursue the matter on [the NYSE's] behalf and as part of [their] broader responsibilities." Five months later, the Attorney General commenced this action.

The complaint asserts eight causes of action--six against Grasso, one against Kenneth Langone (Chairman of the Compensation Committee from 1999 through June 2003), and one for declaratory and injunctive relief against the [****5] NYSE. The causes of action against Grasso can be separated into two categories--the statutory causes of action and the nonstatutory causes of action that are the subject of this appeal. The two statutory claims against Grasso--the second and third causes of action--are for unlawful transfer of corporate assets and breach of fiduciary duty (*see N-PCL 720 [a], [b]*). *Section 720 (b)* expressly authorizes the Attorney General to bring these two causes of action and that authority is uncontested in this appeal. [3] [4]

The four nonstatutory claims against Grasso are at bottom premised on provisions of the N-PCL but clothed in the common law. The first and fourth [****6] causes of action for a constructive trust and payment had and received, based on a theory of unjust enrichment, are premised on the reasonable compensation provisions of the N-PCL (*see N-PCL 202 [a] [12]; 515 [b]*). The fifth cause of action seeks restitution of certain benefit awards alleging that a majority of the Board

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literary, cultural [purposes] or for the prevention of cruelty to children or animals"; Type C corporations "may be formed for any lawful business purpose to achieve a lawful [****2] public or quasi-public objective"; Type D corporations can serve any purpose so long as their formation is authorized "by any other corporate law of this state."

[2] In 1996 the Compensation Committee adopted a policy of assessing executive compensation by comparing it to the compensation paid to senior executives of large, for-profit companies--the "Comparator Group." The basis for selecting these executives was to ensure that the NYSE offered competitive salaries to attract "world class talent."

[3] The Attorney General's authority to maintain the second and third causes of action is, however, the subject of another appeal pending in the Appellate Division. Grasso alleges that the Attorney General has lost standing to sue under *N-PCL 720* because the NYSE, after its corporate reorganization in 2006, became a for-profit company (NYSE LLC) with a not-for-profit regulatory arm (*see People v Grasso, 13 Misc 3d 1227[A], 831 NYS2d 349, 2006 NY Slip Op 52019[U], *9 [2006]*). Supreme Court denied Grasso's motion for summary dismissal of those claims.

failed to approve them as required by N-PCL 715 (f). Finally, the sixth cause of action alleges that the NYSE's advance payments from a retirement plan violated the prohibition against loans to officers under N-PCL 716 and that the NYSE is entitled to reasonable interest thereon.

Grasso moved to dismiss the four nonstatutory claims on the ground that the Attorney General lacked authority to maintain them. Supreme Court denied defendant's motion to dismiss, holding that the Attorney General had standing to sue under [*69] the parens patriae doctrine to vindicate the interests of the investing public. [4]

A majority at the Appellate Division reversed and dismissed the four nonstatutory causes of action against Grasso, viewing [**108] them as an attempt to circumvent the fault-based claims provided by the N-PCL. The dissenting Justices would have permitted the claims to proceed based on the parens patriae doctrine. We now affirm the order of the Appellate Division.

Analysis

Although several provisions of the N-PCL mirror those regulating for-profit entities under the Business Corporation Law, one unique characteristic is the legislative [***831] codification of the Attorney General's traditional role as an overseer of public corporations (*see e.g. People v Lowe, 117 NY 175, 22 NE 1016 [1889]*).

HN3 At least 18 provisions of the statute detail the Attorney General's [****8] varied enforcement powers. These powers include the ability to provide structural relief with respect to [5] the corporation and to bring actions against individual directors or officers. *Section 112* expressly authorizes actions or special proceedings to annul or dissolve corporations that have acted beyond their authority or to restrain unauthorized activities (*N-PCL 112 [a] [1]*). In addition, the Attorney General may enforce any right given to members of Type B or Type C corporations and, upon an order from Supreme Court, may do the same for Type A corporations (*N-PCL 112 [a] [7], [8]*). In addition, *sections 719* and *720* permit the Attorney General to seek redress for injuries resulting from--to name only a few--unlawful distributions of corporate cash, property or assets (*N-PCL 719 [a] [1], [4]*), improper loans (*N-PCL 719 [a] [5]*), waste of corporate assets (*N-PCL 720 [a] [1] [B]*) and breach of fiduciary duties (*N-PCL 720 [a] [1] [A]*). The Attorney General's authority to maintain these actions is explicitly codified under *N-PCL 720 (b)*.

[*70] *HN4* The Legislature's comprehensive enforcement scheme, however, is not without limitation. First, any action or special proceeding brought by the Attorney [****9] General under the N-PCL "is triable by jury as a matter of right" (*N-PCL 112 [b] [1]*). Second, and most relevant to the issue before us, the Legislature has provided directors and officers with the protections of the business judgment rule (*see N-PCL 717*). The statute provides that officers and directors must discharge "the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions" (*N-PCL 717 [a]*). Officers and directors are permitted to rely on information, opinions or reports of reasonable reliability so long as the officer or director acts in good faith (*N-PCL 717 [b]*). Moreover, the statute dictates that persons "who so perform their duties shall have no liability by reason of being or having been directors or officers of the corporation" (*N-PCL 717 [b]*).

Despite the numerous causes of action explicitly made available to the Attorney General, the four nonstatutory claims that are the subject of this appeal rest on an assertion of parens patriae authority to vindicate the public's interest in an honest marketplace. Here, however, as the dispositive [****10] defect stems from the inconsistency between the two sets of claims, we need not and do not reach the scope of any such authority. Instead, a side-by-side comparison of the challenged claims and the statutory claims reveals that the Attorney General has crafted four causes of action with a lower burden of proof than that specified by the statute, overriding the fault-based scheme codified by the Legislature and thus reaching beyond the bounds of the Attorney General's authority.

In an analogous context, we have consistently held that *HN5* a private right of action may not be implied from a statute where it is "incompatible with the enforcement [**109] mechanism chosen by the Legislature" (*Sheehy v Big Flats Community Day, 73 NY2d 629, 635, 541 NE2d 18, 543 NYS2d 18 [1989]; see also Mark G. v Sabol, 93 NY2d 710, 717 NE2d 1067, 695 NYS2d 730 [1999]; Uhr v East Greenbush Cent. School Dist., 94 NY2d 32, 720 NE2d 886,*

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[4] *HN2* Parens patriae is a common-law standing doctrine that permits the state to commence an action to protect a public interest, like the safety, health or welfare of its citizens. To invoke the doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that [****7] of a particular party and injury to a substantial segment of the state's population (*see Alfred L. Snapp & Son, Inc. v Puerto Rico, ex rel., Barez, 458 US 592, 607, 102 S Ct 3260, 73 L Ed 2d 995 [1982]*). In varying contexts, courts have held that a state has a quasi-sovereign interest in protecting the integrity of the marketplace (*see State of NY by Abrams v General Motors Corp., 547 F Supp 703 [SD NY 1982]; **People v H & R Block, Inc., 16 Misc 3d 1124[A], 847 NYS2d 903, 2007 NY Slip Op 51562[U] [2007]***).

698 NYS2d 609 [1999]). That the plaintiff here is the Attorney General as opposed to a private party does not [6] preclude the application of these decisions (*see e.g.* [***832] *People v Litto, 8 NY3d 692, 705, 872 NE2d 848, 840 NYS2d 736 [2007]*). Rather, in this context, the Attorney General's role as a member of the executive branch heightens our concerns. *HN6* Although the Executive must have flexibility in enforcing [****11] statutes, it must do so while maintaining the integrity of calculated legislative policy judgments. [*71] That balance falters where, as here, the Executive seeks to create a remedial device incompatible with the particular statute it enforces.

The two statutory claims asserted against Grasso, in addition to those provided in *N-PCL 719*, rest on the fault-based provisions enacted by the Legislature to remedy not-for-profit corporate wrongdoing. The second cause of action for an unlawful transfer permits an action "[t]o set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee *knew of its unlawfulness*" (*N-PCL 720 [a] [2]* [emphasis added]). The third cause of action for breach of fiduciary duty permits an action for the "neglect of, or failure to perform ... duties in the management and disposition of corporate assets" and for an officer's "acquisition . . . , loss or waste of corporate assets due to any neglect of, or failure to perform . . . duties" (*N-PCL 720 [a] [1] [A], [B]*). This claim requires a showing that the officer or director lacked good faith in executing his duties. The plain language of these provisions reveals a legislative policy decision [****12] to provide officers and directors of not-for-profit corporations with the "business judgment" protections afforded their for-profit counterparts. The Legislature specifically provided for the Attorney General's role as an overseer of not-for-profit corporations, and requires that he prove an officer's fault to sustain these claims.

By contrast, the four nonstatutory causes of action are devoid of any fault-based elements and, as such, are fundamentally inconsistent with the N-PCL. The first and fourth causes of action--for a constructive trust and payment had and received--rely on the reasonable compensation provisions of the N-PCL and seek the same relief as the statutory claims, yet they lack any element of knowledge or bad faith. Rather, under these claims the Attorney General need only prove that Grasso's compensation was unreasonable and, therefore, unlawful under the N-PCL and constituting an ultra vires act. Abandoning the knowledge requirement of *N-PCL 720 (a) (2)* and the business judgment rule, they would impose a type of strict liability.

The fifth cause of action asserts that Grasso's salary was not approved in accordance with *N-PCL 715 (f)*. *HN7* *Section 715* addresses circumstances [****13] relating to interested directors and officers. It provides, "[t]he fixing of salaries of officers . . . shall require the affirmative vote of a majority of the entire board" (*N-PCL 715 [f]*). It does not, however, grant the Attorney General the authority to maintain an action for the Board's failure [*72] to properly vote on a compensation package. In fact, *N-PCL 715 (b)* provides the corporation--not the Attorney General--with the power to avoid contracts or transactions between the corporation and its officers or directors and, even then, such actions may only be maintained in the absence of good faith (*N-PCL 715 [b]*).

[**110] [7] Finally, the sixth cause of action alleges that certain advance payments from Grasso's supplemental retirement plan constituted an improper loan under *N-PCL 716* and seeks interest on the loaned amounts. As distinct from the other three, the N-PCL expressly provides the Attorney General the authority to bring an action against directors who approve a loan in violation of *N-PCL 716* (*see N-PCL 719 [a] [5]*; *720 [b]*). The Attorney General's present claim fails, however, for the same reason as the other three: the statutory claim would require the Attorney [***833] General to [****14] overcome a business judgment defense, whereas the action pleaded disregards the knowledge element that other unlawful transfers must allege (*see N-PCL 719 [c]*; *720 [a] [2]*).

In summary, each of the challenged causes of action against Grasso seeks to ascribe liability based on the size of his compensation package. The Legislature, however, enacted a statute requiring more. The Attorney General may not circumvent that scheme, however unreasonable that compensation may seem on its face. To do so would tread on the Legislature's policy-making authority.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Order affirmed, etc.

End of Document

NY CLS N-PCL § 719

Current through 2016 released chapters 1-503

New York Consolidated Laws Service > *Not-For-Profit Corporation Law* > *Article 7 Directors and Officers*

§ 719. Liability of directors in certain cases

(a) Directors of a corporation who vote for or concur in any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or members or the ultimate beneficiaries of its activities, to the extent of any injury suffered by such persons, respectively, as a result of such action, or, if there be no creditors or members or ultimate beneficiaries so injured, to the corporation, to the extent of any injury suffered by the corporation as a result of such action:

(1) The distribution of the corporation's cash or property to members, directors or officers, other than a distribution permitted under section 515 (Dividends prohibited; certain distributions of cash or property authorized).

(2) The redemption of capital certificates, subvention certificates or bonds, to the extent such redemption is contrary to the provisions of section 502 (Member's capital contributions), section 504 (Subventions), or section 506 (Bonds and security interests).

(3) The payment of a fixed or contingent periodic sum to the holders of subvention certificates or of interest to the holders or beneficiaries of bonds to the extent such payment is contrary to the provisions of section 504 or section 506.

(4) The distribution of assets in violation of section 1002-a (Carrying out the plan of dissolution and distribution of assets) or without paying or adequately providing for all known liabilities of the corporation, excluding any claims not filed by creditors within the time limit set in a notice given to creditors under articles 10 (Non-judicial dissolution) or 11 (Judicial dissolution).

(5) The making of any loan contrary to section 716 (Loans to directors and officers).

(b) A director who is present at a meeting of the board, or any committee thereof, at which action specified in paragraph (a) is taken shall be presumed to have concurred in the action unless his dissent thereto shall be entered in the minutes of the meeting, or unless he shall submit his written dissent to the person acting as the secretary of the meeting before the adjournment thereof, or shall deliver or send by registered mail such dissent to the secretary of the corporation promptly after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action. A director who is absent from a meeting of the board, or any committee thereof, at which such action is taken shall be presumed to have concurred in the action unless he shall deliver or send by registered mail his dissent thereto to the secretary of the corporation or shall cause such dissent to be filed with the minutes of the proceedings of the board or committee within a reasonable time after learning of such action.

(c) Any director against whom a claim is successfully asserted under this section shall be entitled to contribution from the other directors who voted for or concurred in the action upon which the claim is asserted.

(d) Directors against whom a claim is successfully asserted under this section shall be entitled, to the extent of the amounts paid by them to the corporation as a result of such claims:

(1) Upon reimbursement to the corporation of any amount of an improper distribution of the corporation's cash or property, to be subrogated to the rights of the corporation against members, directors or officers who received such distribution with knowledge of facts indicating that it was not authorized by this chapter, in proportion to the amounts received by them respectively.

(2) Upon reimbursement to the corporation of an amount representing an improper redemption of a capital certificate, subvention or bond, to have the corporation rescind such improper redemption and recover the amount

paid, for their benefit but at their expense, from any member or holder who received such payment with knowledge of facts indicating that such redemption by the corporation was not authorized by this chapter.

(3) Upon reimbursement to the corporation of an amount representing all or part of an improper payment of a fixed or contingent periodic sum to the holder of a subvention certificate, or of interest to the holder or beneficiary of a bond, to have the corporation recover the amount so paid, for their benefit but at their expense, from any holder or beneficiary who received such payment with knowledge of facts indicating that such payment by the corporation was not authorized by this chapter.

(4) Upon payment to the corporation of the claim of the attorney general or of any creditor by reason of a violation of subparagraph (a)(4), to be subrogated to the rights of the corporation against any person who received an improper distribution of assets.

(5) Upon reimbursement to the corporation of the amount of any loan made contrary to section 716 (Loans to directors and officers), to be subrogated to the rights of the corporation against a director or officer who received the improper loan.

(e) A director or officer shall not be liable under this section if, in the circumstances, he discharged his duty to the corporation under section 717 (Duty of directors and officers).

(f) This section shall not affect any liability otherwise imposed by law upon any director or officer.

History

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970, with substance derived from Mem Corp Law § 46; amd, L 1970, ch 847, § 50, eff Sept 1, 1970; *L 2005, ch 726, § 3*, eff April 9, 2006.

Annotations

Notes

Revision Notes:

Source: Mem Corp L § 46.

Changes: Revised; new provisions.

Comment: The language of this section is derived from *Bus Corp L § 719*, modified to accord with the substantive provisions in this chapter and to take account of the differences between a business corporation and a not-for-profit corporation. The section is designed to group in one section every instance in which liability is imposed upon directors for violation of substantive requirements prescribed by other sections. The remedy for the enforcement of directors' liability is given exclusively to the corporation for the benefit of creditors or members to the extent of their respective injuries. If there are neither creditors nor members injured by the unlawful director action, the remedy is given to the corporation to the extent of any injury suffered by the corporation, and an action may be brought as provided in § 723. Paragraphs (b), (c), and (d) have the same purpose as in *Bus Corp L § 719*.

Amendment Notes:

2005. Chapter 726, § 3 amended:

Par (a), subpar (4) by deleting at fig 1 "after dissolution of the corporation" and at fig 2 "1005 (Procedure after dissolution)" and adding the matter in italics.

Commentary

NY CLS N-PCL § 720

Current through 2016 released chapters 1-519

New York Consolidated Laws Service > Not-For-Profit Corporation Law > Article 7 Directors and Officers

Notice

This section has more than one version with varying effective dates.

Second of two versions of this section.

§ 720. Actions against directors, officers and key persons

(a) An action may be brought against one or more directors, officers, or key persons of a corporation to procure a judgment for the following relief:

(1) To compel the defendant to account for his official conduct in the following cases:

(A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.

(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.

(2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

(3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.

(b) An action may be brought for the relief provided in this section and in paragraph (a) of section 719 (Liabilities of directors in certain cases) by the attorney general, by the corporation, or, in the right of the corporation, by any of the following:

(1) A director or officer of the corporation.

(2) A receiver, trustee in bankruptcy, or judgment creditor thereof.

(3) Under section 623 (Members' derivative action brought in the right of the corporation to procure a judgment in its favor), by one or more of the members thereof.

(4) If the certificate of incorporation or the by-laws so provide, by any holder of a subvention certificate or any other contributor to the corporation of cash or property of the value of $1,000 or more.

(c) In a corporation having no members, an action may be brought by a director against third parties to obtain a judgment in favor of the corporation. The complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reason for not making such efforts. The court in its discretion shall determine whether it is in the interest of the corporation that the action be maintained, and if the action is successful in whole or in part, what reimbursement if any should be made out of the corporate treasury to the plaintiff for his reasonable expenses including attorney's fees, incurred in the prosecution of the action.

History

Add, L 1969, ch 1066, § 1, eff Sept 1, 1970, with substance derived from Gen Corp Law §§ 60, 61; amd, L 1971, ch 1058, § 25, eff Sept 1, 1971; *L 2013, ch 549, § 78*, eff July 1, 2014; *L 2016, ch 466, § 12*, eff May 27, 2017.

Annotations

Notes

Revision Notes:

Source: Gen Corp L §§ 60 and 61.

Changes: Combined and reworded; new provisions.

Comment: This section is a substantial re-enactment of Gen Corp L §§ 60 and 61 with certain modifications and additions. Paragraph (a) corresponds to *Bus Corp L § 720(a)* which re-enacted Gen Corp L § 60 with slight changes in language. Paragraph (b) of *Bus Corp L § 720* does not carry over the Gen Corp L § 61 provisions authorizing the attorney-general to bring an action as provided in the section. However, the authority of the attorney-general to bring such actions in connection with a not-for-profit corporation has been expressly retained. In addition to a director or officer of the corporation, and a receiver, trustee in bankrputcy or a judgment creditor of the corporation, one or more members under § 623 (Members' derivative action brought in the name of the corporation to procure a judgment in its favor) and, if the certificate of incorporation or the by-laws so provide, any contributor to the corporation of cash or property of the value of $1,000 or more are given standing to institute an action for the relief provided in § 723 and in § 722(a) (Liability of directors in certain cases). It is believed that these additional persons should be recognized as having legitimate interests in protecting the corporation and its property. The provisions in paragraphs (3) and (4) of Gen Corp L § 60 dealing, respectively, with the suspension from office and the removal from office of a defendant have been omitted from this section as they have been provided for in § 706 (Removal of directors) and § 715 (Removal of officers).

Editor's Notes:

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes:

2013. Chapter 549, § 78 amended:

Section heading by deleting at fig 1 "on behalf of the corporation" and adding the matter in italics.

Par (a) opening par by deleting at fig 1 "or" and adding the matter in italics.

The 2016 amendment by ch 466, § 12, substituted "key persons" for "key employees" in the section heading; and substituted "key persons" for "key employees" in the introductory language of (a).

Commentary

PRACTICE INSIGHTS:

QUALIFIED IMMUNITY IS NOT BULLET-PROOF SHIELD.

By Kelly Mooney Lester, Esq.

INSIGHT

NY CLS N-PCL § 715

Current through 2016 released chapters 1-503

New York Consolidated Laws Service > *Not-For-Profit Corporation Law* > *Article 7 Directors and Officers*

Notice

This section has more than one version with varying effective dates.

First of two versions of this section.

§ 715. Related party transactions [Effective until May 27, 2017]

(a) No corporation shall enter into any related party transaction unless the transaction is determined by the board to be fair, reasonable and in the corporation's best interest at the time of such determination. Any director, officer or key employee who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.

(b) With respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, the board of such corporation, or an authorized committee thereof, shall:

(1) Prior to entering into the transaction, consider alternative transactions to the extent available;

(2) Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and

(3) Contemporaneously document in writing the basis for the board or authorized committee's approval, including its consideration of any alternative transactions.

(c) The certificate of incorporation, by-laws or any policy adopted by the board may contain additional restrictions on related party transactions and additional procedures necessary for the review and approval of such transactions, or provide that any transaction in violation of such restrictions shall be void or voidable.

(d) Unless otherwise provided in the certificate of incorporation or the by-laws, the board shall have authority to fix the compensation of directors for services in any capacity.

(e) The fixing of compensation of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws.

(f) The attorney general may bring an action to enjoin, void or rescind any related party transaction or proposed related party transaction that violates any provision of this chapter or was otherwise not reasonable or in the best interests of the corporation at the time the transaction was approved, or to seek restitution, and the removal of directors or officers, or seek to require any person or entity to:

(1) Account for any profits made from such transaction, and pay them to the corporation;

(2) Pay the corporation the value of the use of any of its property or other assets used in such transaction;

(3) Return or replace any property or other assets lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate; and

(4) Pay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.

(g) The powers of the attorney general provided in this section are in addition to all other powers the attorney general may have under this chapter or any other law.

(h) No related party may participate in deliberations or voting relating to a related party transaction in which he or she has an interest; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a related party present information as background or answer questions concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting relating thereto.

History

Add, L 1969, ch 1066, § 1, with substance deriving from Mem Corp Law § 47; amd, L 1970, ch 847, § 48, eff Sept 1, 1970; L 1971, ch 1057, § 7, eff July 2, 1971; *L 2013, ch 549, § 74*, eff July 1, 2014; *L 2015, ch 555, § 7*, eff Dec 11, 2015.

Annotations

Notes

Revision Notes::

Source: Mem Corp L § 47.

Changes: Revised; new provisions.

Comment: This section eliminates the provisions of Mem Corp L § 47 permitting contracts with interested directors and officers if authorized in the bylaws or by the concurring vote of two-thirds of the directors. It follows generally *Bus Corp L § 713*, extended to apply to officers as well as to directors. As with the Bus Corp L, the function of this section is not to provide a basis for validating for all purposes a contract or other transaction between an interested director or officer and his corporation, but simply to establish that such contract or transaction is not automatically void or voidable by reason alone of the director's or officer's interest. However, the Bus Corp L provided three independent criteria to be applied in this respect: disclosure to shareholders (members), disclosure to directors, or fairness of the transaction to the corporation. This section requires fairness in all cases, and then provides for disclosure in the alternative to members or to directors. Paragraph (c) follows the Bus Corp L with respect to compensation to directors. Paragraph (d) is new; it is designed to impede syphoning of corporate funds to officers.

Editor's Notes:

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes:

The 2015 amendment by ch 555, § 7, substituted "compensation" for "salaries" in (c); redesignated the former second version of (f) as (g); redesignated former (g) as (h); and in (h), substituted "a related party transaction in which he or she has an interest" for "matters set forth in this section" and added "as background or answer questions."

2013. Chapter 549, § 74 amended:

Section heading by substituting the words "Related party transactions" for the words "Interested directors and officers".

By deleting former pars (a)–(c), respectively.

By adding par (a).

By adding par (b).

By redesignating former par (d) as par (c).

Par (c) by deleting at fig 1 "contracts or", at fig 2 "between a corporation and its directors or officers or other persons and may", at fig 3 "contracts or transactions" and adding the matter in italics.

By redesignating former par (c) as par (d).

By redesignating former par (f) as par (e).

By adding par (f) [first setout].

By adding par (f) [second setout].

By adding par (g).

The 2016 amendment by ch 466, § 7, in (a), added "or an authorized committee thereof" in the first sentence and substituted "key person" for "key employee" in the second sentence; and added (i) and (j).

Notes to Decisions

1.Generally

2.Under former Membership Corporations Law § 47

1. Generally

Attorney general could not challenge the compensation of the former chairman of the New York Stock Exchange as not being approved in accordance with *N.Y. Not-for-Profit Corp. Law § 715(f)* as § *715* provided that only the non-profit corporation had the power to avoid contracts or transactions between the corporation and its officers or directors. *People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 2008 NY Slip Op 5770, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008)*.

Trial court denied the stock exchange chairman's motion to dismiss, as the Attorney General had the statutory responsibility to protect investors, had the authority to pursue the stock exchange chairman under the doctrine of parens patriae because they could not protect themselves from the allegedly unreasonable compensation that the New York Stock Exchange, a type A not-for-profit corporation, allowed him to receive, and the Attorney General stated four viable claims against him: for imposition of a constructive trust and for restitution for ultra vires payments allegedly received, for payment had and received, for violation of *N.Y. Not-for-Profit Corp. Law § 715* for benefits he received that were improperly approved, and for violation of N.Y. *Not-for-Profit* Corp. Law for his allegedly receiving improper loans. *People v Grasso, 816 N.Y.S.2d 863, 2006 NY Slip Op 26095, 12 Misc. 3d 384, 235 N.Y.L.J. 54, 2006 N.Y. Misc. LEXIS 484 (N.Y. Sup. Ct. 2006)*, rev'd, *42 A.D.3d 126, 836 N.Y.S.2d 40, 2007 NY Slip Op 3990, 2007 N.Y. App. Div. LEXIS 5719 (N.Y. App. Div. 1st Dep't 2007)*.

2. Under former Membership Corporations Law § 47

Where the plaintiff was a director and an officer of the defendant membership corporation, she should be denied a recovery on a lease under this section, for the by-laws of the defendant do not authorize the making of a contract with any officer or director, and it is not claimed that any such authority was given by resolution of the board which was concurred in by two-thirds of the directors. *Knapp v Rochester Dog Protective Ass'n, 235 A.D. 436, 257 N.Y.S. 356, 1932 N.Y. App. Div. LEXIS 7981 (N.Y. App. Div. 1932)*.

Directors of a membership corporation organized chiefly for charitable purposes were directed to file inventory, account and statement of transactions during 12 months next preceding the granting of the order, where it appeared that the members of the

§ 715-a. Conflict of interest policy

(a) Except as provided in paragraph (d) of this section, every corporation shall adopt a conflict of interest policy to ensure that its directors, officers and key employees act in the corporation's best interest and comply with applicable legal requirements, including but not limited to the requirements set forth in section seven hundred fifteen of this article.

(b) The conflict of interest policy shall include, at a minimum, the following provisions:

(1) a definition of the circumstances that constitute a conflict of interest;

(2) procedures for disclosing a conflict of interest to the audit committee or, if there is no audit committee, to the board;

(3) a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict, provided that nothing in this section shall prohibit the board or a committee from requesting that the person with the conflict of interest present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto;

(4) a prohibition against any attempt by the person with the conflict to influence improperly the deliberation or voting on the matter giving rise to such conflict;

(5) a requirement that the existence and resolution of the conflict be documented in the corporation's records, including in the minutes of any meeting at which the conflict was discussed or voted upon; and

(6) procedures for disclosing, addressing, and documenting related party transactions in accordance with section seven hundred fifteen of this article.

(c) The conflict of interest policy shall require that prior to the initial election of any director, and annually thereafter, such director shall complete, sign and submit to the secretary of the corporation or a designated compliance officer a written statement identifying, to the best of the director's knowledge, any entity of which such director is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. The policy shall require that each director annually resubmit such written statement. The secretary of the corporation or the designated compliance officer shall provide a copy of all completed statements to the chair of the audit committee or, if there is no audit committee, to the chair of the board.

(d) A corporation that has adopted and possesses a conflict of interest policy pursuant to federal, state or local laws that is substantially consistent with the provisions of paragraph (b) of this section shall be deemed in compliance with provisions of this section. In addition, any corporation that is a state authority or a local authority as defined in section two of the public authorities law, and that has complied substantially with section twenty-eight hundred twenty-four and subdivision three of section twenty-eight hundred twenty-five of such law, shall be deemed in compliance with this section.

(e) Nothing in this section shall be interpreted to require a corporation to adopt any specific conflict of interest policy not otherwise required by this section or any other law or rule, or to supersede or limit any requirement or duty governing conflicts of interest required by any other law or rule.

History

Add, *L 2013, ch 549, § 75*, eff July 1, 2014; amd, *L 2015, ch 555, §§ 8*, 9, eff Dec 11, 2015.

Annotations

Notes

Editor's Notes:

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes:

The 2015 amendment by ch 555, §§ 8, 9, added "provided that nothing in this section shall prohibit the board or a committee from requesting that the person with the conflict of interest present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto" in (b)(3) and in (c), added "or a designated compliance officer" in the first sentence and added "or the designated compliance officer" in the last sentence.

Research References & Practice Aids

Hierarchy Notes:

NY CLS N-PCL, Art. 7

New York Consolidated Laws Service

End of Document

NY CLS N-PCL § 102

Current through 2016 released chapters 1-503

New York Consolidated Laws Service > *Not-For-Profit Corporation Law* > *Article 1 Short Title; Definitions; Application; Certificates; Miscellaneous*

Notice

This section has more than one version with varying effective dates.

First of two versions of this section.

§ 102. Definitions [Effective until May 27, 2017]

(a) As used in this chapter, unless the context otherwise requires, the term:

(1) "Bonds" includes secured and unsecured bonds, debentures, and notes.

(2) "By-laws" means the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.

(3) "Certificate of incorporation" includes (A) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation or other certificates or instruments filed or issued under any statute; or (B) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated.

(3-a)"Charitable corporation" means any corporation formed, or for the purposes of this chapter, deemed to be formed, for charitable purposes

(3-b) "Charitable purposes" of a corporation means one or more of the following purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals.

(4) "Conducting of activities" of a corporation means the operations for the conduct of which such corporation is formed and may constitute "doing of business" or "transaction of business" as those terms are used in the statutes of this state.

(5) "Corporation" or "domestic corporation" means a corporation (1) formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute.

(6) "Director" means any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term "board" means "board of directors" or any other body constituting a "governing board" as defined in this section.

(6-a)"Entire board" means the total number of directors entitled to vote which the corporation would have if there were no vacancies. If the by-laws of the corporation provide that the board shall consist of a fixed number of directors, then the "entire board" shall consist of that number of directors. If the by-laws of any corporation provide that the board may consist of a range between a minimum and maximum number of directors, and the

number within that range has not been fixed in accordance with paragraph (a) of section seven hundred two of this chapter, then the "entire board" shall consist of the number of directors within such range that were elected or appointed as of the most recently held election of directors, as well as any directors whose terms have not yet expired.

(7) "Foreign corporation" means a corporation formed under laws other than the statutes of this state, which, if formed under the statutes of this state, would be within the term "corporation or domestic corporation" as herein defined. "Authorized", when used with respect to a foreign corporation, means having authority under Article 13 (Foreign Corporations) to conduct activities of the corporation in this state.

(7-a) "Infant" or "minor" means any person who has not attained the age of eighteen years.

(8) "Insolvent" means being unable to pay debts as they become due in the usual course of the debtor's business.

(9) "Member" means one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws.

(9-a) "Non-charitable corporation" means any corporation formed under this chapter, other than a charitable corporation, including but not limited to one formed for any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, or animal husbandry, or for the purpose of operating a professional, commercial, industrial, trade or service association.

(10) "Not-for-profit corporation" means a corporation as defined in subparagraph (5).

(11) "Office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation, or in the application for authority of a foreign corporation or an amendment thereof. Such office need not be a place where activities are conducted by such corporation.

(12) "Process" means judicial process and all orders, demands, notices or other papers required or permitted by law to be personally served on a domestic or foreign corporation, for the purpose of acquiring jurisdiction of such corporation in any action or proceeding, civil or criminal, whether judicial, administrative, arbitrative or otherwise, in this state or in the federal courts sitting in or for this state.

(13) [Repealed]

(14) [Repealed]

(15) "Governing board" means the body responsible for the management of a corporation or of an institutional fund.

(16) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the corporation is conclusive.

(17) [Repealed]

(18) "Authorized person" means a person, whether or not a member, officer, or director, who is authorized to act on behalf of a corporation or foreign corporation.

(19) An "affiliate" of a corporation means any entity controlled by, or in control of, such corporation.

(20) "Independent auditor" means any certified public accountant performing the audit of the financial statements of a corporation required by subdivision one of section one hundred seventy-two-b of the executive law.

(21) "Independent director" means a director who: (i) is not, and has not been within the last three years, an employee of the corporation or an affiliate of the corporation, and does not have a relative who is, or has been within the last three years, a key employee of the corporation or an affiliate of the corporation; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than ten thousand dollars in direct compensation from the corporation or an affiliate of the corporation (other than reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (a) of section 202 (General and special powers)); (iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial

financial interest in, any entity that has made payments to, or received payments from, the corporation or an affiliate of the corporation for property or services in an amount which, in any of the last three fiscal years, exceeds the lesser of twenty-five thousand dollars or two percent of such entity's consolidated gross revenues; or (iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit at any time during the past three years. For purposes of this subdivision, "payment" does not include charitable contributions, dues or fees paid to the corporation for services which the corporation performs as part of its nonprofit purposes, provided that such services are available to individual members of the public on the same terms.

(22) "Relative" of an individual means (i) his or her spouseor domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law; (ii) his or her ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.

(23) "***Related party***" means (i) any director, officer or key employee of the corporation or any affiliate of the corporation, or any other person who exercises the powers of directors, officers or key employees over the affairs of the corporation or any affiliate of the corporation; (ii) any relative of anyindividual described in clause (i) of this subdivision; or (iii) any entity in which any individual described in clauses (i) and (ii) of thissubdivision has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.

(24) "***Related party*** transaction" means any transaction, agreement or any other arrangement in which a ***related party*** has a financial interest and in which the corporation or any affiliate of the corporation is a participant.

(25) "Key employee" means any person who is in a position to exercise substantial influence over the affairs of the corporation, as referenced in *26 U.S.C. § 4958(f)(1)(A)* and further specified in *26 CFR § 53.4958-3(c)*, (d) and (e), or succeeding provisions to the extent such provisions are applicable.

History

Add, L 1969, ch 1066, § 1, with substance derived from Gen Corp Law § 3, subd 11, 12, 13, 15, 16, 17, and Mem Corp Law § 2; amd, L 1970, ch 847, § 2, eff Sept 1, 1970; L 1974, ch 901, § 1, eff Sept 1, 1974; L 1978, ch 690, § 1, eff July 25, 1978; *L 1998, ch 375, § 30*, eff Aug 13, 1998; *L 2005, ch 726, § 1*, eff April 9, 2006; *L 2006, ch 434, § 1*, eff July 26, 2006; *L 2010, ch 490, § 2*, eff Sept 17, 2010; *L 2013, ch 549, § 29*, eff July 1, 2014; *L 2014, ch 23, § 2*, eff July 1, 2014; *L 2015, ch 555, § 1*, eff Dec 11, 2015.

Annotations

Notes

Revision Notes:

§ 102(a).

Source: None.

Changes: Completely new.

Comment: This provision was included to make clear that the context in which a defined term is used controls the applicability of the definition set forth in this section.

§ 102(a)(1).

Source: None.

Changes: Completely new.

Comment: The Gen Corp L does not contain a definition of "bonds". For purposes of this chapter, the term "bonds" should include both secured and unsecured bonds, debentures and notes. This definition is taken from the Bus Corp L.

§ 102(a)(2).

Source: None.

Changes: Completely new.

Comment: The definition of "by-laws" is substantially taken from § 2(e) of the Model Non-Profit Corporation Act of the American Bar Association. It includes the basic code of rules whether they be called "constitution", "constitution and by-laws", "by-laws" or "charter". It is intended to cover the basic code immediately subordinate to the certificate of incorporation.

§ 102(a)(3).

Source: Gen Corp L § 3(14).

Changes: Revised and extended.

Comment: This is taken from the *Bus Corp L § 102(a)(3)*. The definition in the Gen Corp L has been extended to encompass the original certificate of incorporation or any other instrument filed or issued to form a domestic or foreign corporation, or a special act creating a domestic or foreign corporation, as amended, supplemented or restated.

§ 102(a)(4).

Source: Gen Corp L § 3(17).

Changes: Revised.

Comment: This is substantially similar to the definition of "business of a corporation" in the Gen Corp L. It is intended to be substantially the same as "doing of business" and "transaction of business".

§ 102(a)(5).

Source: Mem Corp L § 2.

Changes: Revised.

Comment: The definition of "corporation" and "domestic corporation", equating the two terms, has been included for convenience of drafting (see § 201). It includes any corporation which meets two tests, (1) formed for a purpose, not for pecuniary profit or financial gain, permitted under § 201 and (2) no flow-through of assets, income or profit to or for the benefit of its members, directors or officers except as permitted under this chapter. The use of these terms must be read with § 103 (Application) in determining the meaning of the terms as they are used in this chapter.

§ 102(a)(6).

Source: Gen Corp L § 3(13).

Changes: Revised and extended.

Comment: This is taken from *Bus Corp L § 102(a)(5)*. The word "director" means a member of the governing board of the corporation regardless of his official title. The term "board" means "board of directors" (see § 708).

§ 102(a)(7).

Source: Gen Corp L § 3(12).

Changes: Reworded.

Comment: This is similar to the definition of "foreign corporation" in *Bus Corp L § 102(a)(7)*. A requirement is added that, if it were to be formed under the statutes of this state, it would come within the definition of the term "corporation" or "domestic corporation" as defined in this chapter. Under this definition a corporation formed by or under the laws of the United States is a foreign corporation unless it otherwise comes within the definition.

§ 102(a)(8).

Source: None.

Changes: Completely new.

Comment: This is the definition from the *Bus Corp L § 102(a)(8)*. To avoid confusion between the "equity" and "bankruptcy" meanings of the word "insolvent", the term has been defined in the equity sense, which is the one that has greater applicability in this chapter. The wording of the definition is substantially that of Model Non-Profit Corporation Act § 2(n).

§ 102(a)(9).

Source: Gen Corp L § 3(15).

Changes: Revised.

Comment: This is an adaptation of the definition "member of a corporation" in Gen Corp L § 3(15). It is verbatim from the Model Non-Profit Corporation Act.

§ 102(a)(10).

Source: None.

Changes: Completely new.

Comment: See comment under definition of "corporation" or "domestic corporation" in subparagraph (5) above.

§ 102(a)(11).

Source: Gen Corp L § 3(16).

Changes: Revised and reworded.

Comment: This is an adaptation of the definition in *Bus Corp L § 102(a)(10)*. Defining "office of a corporation" (i.e., domestic corporation—see § 102(a)(5)) as the office the location of which is stated in the certificate of incorporation represents a change from Gen Corp L § 3(16) which defines the term as the "principal office within the state, or principal place of business within the state if it has no principal office therein". The same principle is applied to foreign corporations.

§ 102(a)(12).

Source: None.

Changes: Completely new.

Comment: This is the definition from the *Bus Corp L § 102(a)(11)*. The definition of the term "process" has been included for convenience of drafting.

Editor's Notes

Laws 1978, ch 690, § 11 provides as follows:

§ 11. This act may be cited as the "New York management of institutional funds act".

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes

The 2015 amendment by ch 555, § 1, in the last sentence of (a)(6-a), added "and the number within that range has not been fixed in accordance with paragraph (a) of section seven hundred two of this chapter," "or appointed," and "as well as any directors whose terms have not yet expired"; deleted "or under common control with" following "in control of" in (a)(19); in (a)(21), added "or (iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit at any time during the past three years" in the first sentence and rewrote the second sentence, which formerly read: "For purposes of this subparagraph, 'payment' does not include charitable contributions"; rewrote (a)(22) and (a)(23); added "to the extent such provisions are applicable" in (a)(25); and made a related change.

2014. Chapter 23, § 2 amended:

Par (a), subpar 3-b by deleitng at fig 1 "contained in the certificate of incorporation of the corporation that are" and adding the matter in italics.

2013. Chapter 549, § 29 amended:

By adding par (a), subpar (3-a).

Par (a), subpar (6) by adding the matter in italics.

By adding par (a), subpar (6-a).

By adding par (a), subpar (9-a).

By adding par (a), subpar (19).

By adding par (a), subpar (20).

By adding par (a), subpar (21).

By adding par (a), subpar (22).

By adding par (a), subpar (23).

By adding par (a), subpar (24).

By adding par (a), subpar (25).

2010. Chapter 490, § 2 amended:

By repealing par (a), subpar (13).

By repealing par (a), subpar (14).

By repealing par (a), subpar (17).

Amendment Notes

The 2016 amendment by ch 466, § 1, rewrote (a)(21), and (a)(23) through (a)(25).

Notes to Decisions

NY CLS N-PCL § 715

Current through 2016 released chapters 1-503

New York Consolidated Laws Service > *Not-For-Profit Corporation Law* > *Article 7 Directors and Officers*

Notice

This section has more than one version with varying effective dates.

Second of two versions of this section.

§ 715. Related party transactions [Effective May 27, 2017]

(a) No corporation shall enter into any related party transaction unless the transaction is determined by the board, or an authorized committee thereof, to be fair, reasonable and in the corporation's best interest at the time of such determination. Any director, officer or key person who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.

(b) With respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, the board of such corporation, or an authorized committee thereof, shall:

(1) Prior to entering into the transaction, consider alternative transactions to the extent available;

(2) Approve the transaction by not less than a majority vote of the directors or committee members present at the meeting; and

(3) Contemporaneously document in writing the basis for the board or authorized committee's approval, including its consideration of any alternative transactions.

(c) The certificate of incorporation, by-laws or any policy adopted by the board may contain additional restrictions on related party transactions and additional procedures necessary for the review and approval of such transactions, or provide that any transaction in violation of such restrictions shall be void or voidable.

(d) Unless otherwise provided in the certificate of incorporation or the by-laws, the board shall have authority to fix the compensation of directors for services in any capacity.

(e) The fixing of compensation of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws.

(f) The attorney general may bring an action to enjoin, void or rescind any related party transaction or proposed related party transaction that violates any provision of this chapter or was otherwise not reasonable or in the best interests of the corporation at the time the transaction was approved, or to seek restitution, and the removal of directors or officers, or seek to require any person or entity to:

(1) Account for any profits made from such transaction, and pay them to the corporation;

(2) Pay the corporation the value of the use of any of its property or other assets used in such transaction;

(3) Return or replace any property or other assets lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate; and

(4) Pay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.

(g) The powers of the attorney general provided in this section are in addition to all other powers the attorney general may have under this chapter or any other law.

(h) No related party may participate in deliberations or voting relating to a related party transaction in which he or she has an interest; provided that nothing in this section shall prohibit the board or authorized committee from requesting that a related party present information as background or answer questions concerning a related party transaction at a board or committee meeting prior to the commencement of deliberations or voting relating thereto.

(i) In an action by any person or entity other than the attorney general, it shall be a defense to a claim of violation of any provisions of this section that a transaction was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction.

(j) In an action by the attorney general with respect to a related party transaction not approved in accordance with paragraphs (a) or (b) of this section at the time it was entered into, whichever is applicable, it shall be a defense to a claim of violation of any provisions of this section that (1) the transaction was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction and (2) prior to receipt of any request for information by the attorney general regarding the transaction, the board has: (A) ratified the transaction by finding in good faith that it was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction; and, with respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, considered alternative transactions to the extent available, approving the transaction by not less than a majority vote of the directors or committee members present at the meeting; (B) documented in writing the nature of the violation and the basis for the board's or committee's ratification of the transaction; and (C) put into place procedures to ensure that the corporation complies with paragraphs (a) and (b) of this section as to related party transactions in the future.

History

Add, L 1969, ch 1066, § 1, with substance deriving from Mem Corp Law § 47; amd, L 1970, ch 847, § 48, eff Sept 1, 1970; L 1971, ch 1057, § 7, eff July 2, 1971; *L 2013, ch 549, § 74*, eff July 1, 2014; *L 2015, ch 555, § 7*, eff Dec 11, 2015; *L 2016, ch 466, § 7*, eff May 27, 2017.

Annotations

Notes

Revision Notes::

Source: Mem Corp L § 47.

Changes: Revised; new provisions.

Comment: This section eliminates the provisions of Mem Corp L § 47 permitting contracts with interested directors and officers if authorized in the bylaws or by the concurring vote of two-thirds of the directors. It follows generally *Bus Corp L § 713*, extended to apply to officers as well as to directors. As with the Bus Corp L, the function of this section is not to provide a basis for validating for all purposes a contract or other transaction between an interested director or officer and his corporation, but simply to establish that such contract or transaction is not automatically void or voidable by reason alone of the director's or officer's interest. However, the Bus Corp L provided three independent criteria to be applied in this respect: disclosure to shareholders (members), disclosure to directors, or fairness of the transaction to the corporation. This section requires fairness in all cases, and then provides for disclosure in the alternative to members or to directors. Paragraph (c) follows the Bus Corp L with respect to compensation to directors. Paragraph (d) is new; it is designed to impede syphoning of corporate funds to officers.

Editor's Notes:

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes:

The 2015 amendment by ch 555, § 7, substituted "compensation" for "salaries" in (e); redesignated the former second version of (f) as (g); redesignated former (g) as (h); and in (h), substituted "a related party transaction in which he or she has an interest" for "matters set forth in this section" and added "as background or answer questions."

2013. Chapter 549, § 74 amended:

Section heading by substituting the words "Related party transactions" for the words "Interested directors and officers".

By deleting former pars (a)–(c), respectively.

By adding par (a).

By adding par (b).

By redesignating former par (d) as par (c).

Par (c) by deleting at fig 1 "contracts or", at fig 2 "between a corporation and its directors or officers or other persons and may", at fig 3 "contracts or transactions" and adding the matter in italics.

By redesignating former par (e) as par (d).

By redesignating former par (f) as par (e).

By adding par (f) [first setout].

By adding par (f) [second setout].

By adding par (g).

The 2016 amendment by ch 466, § 7, in (a), added "or an authorized committee thereof" in the first sentence and substituted "key person" for "key employee" in the second sentence; and added (i) and (j).

Notes to Decisions

1.Generally

2.Under former Membership Corporations Law § 47

1. Generally

Attorney general could not challenge the compensation of the former chairman of the New York Stock Exchange as not being approved in accordance with *N.Y. Not-for-Profit Corp. Law § 715(f)* as § *715* provided that only the non-profit corporation had the power to avoid contracts or transactions between the corporation and its officers or directors. *People v Grasso, 11 N.Y.3d 64, 862 N.Y.S.2d 828, 2008 NY Slip Op 5770, 893 N.E.2d 105, 2008 N.Y. LEXIS 1821 (N.Y. 2008).*

Trial court denied the stock exchange chairman's motion to dismiss, as the Attorney General had the statutory responsibility to protect investors, had the authority to pursue the stock exchange chairman under the doctrine of parens patriae because they could not protect themselves from the allegedly unreasonable compensation that the New York Stock Exchange, a type A not-for-profit corporation, allowed him to receive, and the Attorney General stated four viable claims against him: for imposition of

NY CLS N-PCL § 102

Current through 2016 released chapters 1-503

New York Consolidated Laws Service > Not-For-Profit Corporation Law > Article 1 Short Title; Definitions; Application; Certificates; Miscellaneous

Notice

This section has more than one version with varying effective dates.

Second of two versions of this section.

§ 102. Definitions [Effective May 27, 2017]

(a) As used in this chapter, unless the context otherwise requires, the term:

(1) "Bonds" includes secured and unsecured bonds, debentures, and notes.

(2) "By-laws" means the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.

(3) "Certificate of incorporation" includes (A) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, as amended, supplemented or restated by certificates of amendment, merger or consolidation or other certificates or instruments filed or issued under any statute; or (B) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated.

(3-a)"Charitable corporation" means any corporation formed, or for the purposes of this chapter, deemed to be formed, for charitable purposes

(3-b) "Charitable purposes" of a corporation means one or more of the following purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals.

(4) "Conducting of activities" of a corporation means the operations for the conduct of which such corporation is formed and may constitute "doing of business" or "transaction of business" as those terms are used in the statutes of this state.

(5) "Corporation" or "domestic corporation" means a corporation (1) formed under this chapter, or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under this chapter, and (2) no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute.

(6) "Director" means any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term "board" means "board of directors" or any other body constituting a "governing board" as defined in this section.

(6-a)"Entire board" means the total number of directors entitled to vote which the corporation would have if there were no vacancies. If the by-laws of the corporation provide that the board shall consist of a fixed number of directors, then the "entire board" shall consist of that number of directors. If the by-laws of any corporation provide that the board may consist of a range between a minimum and maximum number of directors, and the

number within that range has not been fixed in accordance with paragraph (a) of section seven hundred two of this chapter, then the "entire board" shall consist of the number of directors within such range that were elected or appointed as of the most recently held election of directors, as well as any directors whose terms have not yet expired.

(7) "Foreign corporation" means a corporation formed under laws other than the statutes of this state, which, if formed under the statutes of this state, would be within the term "corporation or domestic corporation" as herein defined. "Authorized", when used with respect to a foreign corporation, means having authority under Article 13 (Foreign Corporations) to conduct activities of the corporation in this state.

(7-a)"Infant" or "minor" means any person who has not attained the age of eighteen years.

(8) "Insolvent" means being unable to pay debts as they become due in the usual course of the debtor's business.

(9) "Member" means one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws.

(9-a)"Non-charitable corporation" means any corporation formed under this chapter, other than a charitable corporation, including but not limited to one formed for any one or more of the following non-pecuniary purposes: civic, patriotic, political, social, fraternal, athletic, agricultural, horticultural, or animal husbandry, or for the purpose of operating a professional, commercial, industrial, trade or service association.

(10) "Not-for-profit corporation" means a corporation as defined in subparagraph (5).

(11) "Office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation, or in the application for authority of a foreign corporation or an amendment thereof. Such office need not be a place where activities are conducted by such corporation.

(12) "Process" means judicial process and all orders, demands, notices or other papers required or permitted by law to be personally served on a domestic or foreign corporation, for the purpose of acquiring jurisdiction of such corporation in any action or proceeding, civil or criminal, whether judicial, administrative, arbitrative or otherwise, in this state or in the federal courts sitting in or for this state.

(13) [Repealed]

(14) [Repealed]

(15) "Governing board" means the body responsible for the management of a corporation or of an institutional fund.

(16) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the corporation is conclusive.

(17) [Repealed]

(18) "Authorized person" means a person, whether or not a member, officer, or director, who is authorized to act on behalf of a corporation or foreign corporation.

(19) An "affiliate" of a corporation means any entity controlled by, or in control of, such corporation.

(20) "Independent auditor" means any certified public accountant performing the audit of the financial statements of a corporation required by subdivision one of section one hundred seventy-two-b of the executive law.

(21) "Independent director" means a director who: (i) is not, and has not been within the last three years, an employee or a key person of the corporation or an affiliate of the corporation, and does not have a relative who is, or has been within the last three years, a key person of the corporation or an affiliate of the corporation; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than ten thousand dollars in direct compensation from the corporation or an affiliate of the corporation; (iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a current officer of or has a substantial financial interest in, any entity that has provided payments, property or services to, or received payments, property or services from, the corporation or an affiliate of the corporation if

the amount paid by the corporation to the entity or received by the corporation from the entity for such property or services, in any of the last three fiscal years, exceeded the lesser of ten thousand dollars or two percent of such entity's consolidated gross revenues if the entity's consolidated gross revenue was less than five hundred thousand dollars; twenty-five thousand dollars if the entity's consolidated gross revenue was five hundred thousand dollars or more but less than ten million dollars; one hundred thousand dollars if the entity's consolidated gross revenue was ten million dollars or more; or (iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit at any time during the past three years. For purposes of this subparagraph, the terms: "compensation" does not include reimbursement for expenses reasonably incurred as a director or reasonable compensation for service as a director as permitted by paragraph (a) of section 202 (General and special powers) of this chapter; and "payment" does not include charitable contributions, dues or fees paid to the corporation for services which the corporation performs as part of its nonprofit purposes, or payments made by the corporation at fixed or non-negotiable rates or amounts for services received, provided that such services by and to the corporation are available to individual members of the public on the same terms, and such services received by the corporation are not available from another source.

(22) "Relative" of an individual means (i) his or her spouseor domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law; (ii) his or her ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.

(23) "***Related party***" means (i) any director, officer or key person of the corporation or any affiliate of the corporation; (ii) any relative of any individual described in clause (i) of this subparagraph; or (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.

(24) "***Related party*** transaction" means any transaction, agreement or any other arrangement in which a ***related party*** has a financial interest and in which the corporation or any affiliate of the corporation is a participant, except that a transaction shall not be a ***related party*** transaction if: (i) the transaction or the ***related party***'s financial interest in the transaction is de minimis, (ii) the transaction would not customarily be reviewed by the board or boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms, or (iii) the transaction constitutes a benefit provided to a ***related party*** solely as a member of a class of the beneficiaries that the corporation intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of the same class on the same terms.

(25) Key person means any person, other than a director or officer, whether or not an employee of the corporation, who (i) has responsibilities, or exercises powers or influence over the corporation as a whole similar to the responsibilities, powers, or influence of directors and officers; (ii) manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation; or (iii) alone or with others controls or determines a substantial portion of the corporation's capital expenditures or operating budget.

History

Add, L 1969, ch 1066, § 1, with substance derived from Gen Corp Law § 3, subd 11, 12, 13, 15, 16, 17, and Mem Corp Law § 2; amd, L 1970, ch 847, § 2, eff Sept 1, 1970; L 1974, ch 901, § 1, eff Sept 1, 1974; L 1978, ch 690, § 1, eff July 25, 1978; *L 1998, ch 375, § 30*, eff Aug 13, 1998; *L 2005, ch 726, § 1*, eff April 9, 2006; *L 2006, ch 434, § 1*, eff July 26, 2006; *L 2010, ch 490, § 2*, eff Sept 17, 2010; *L 2013, ch 549, § 29*, eff July 1, 2014; *L 2014, ch 23, § 2*, eff July 1, 2014; *L 2015, ch 555, § 1*, eff Dec 11, 2015; *L 2016, ch 466, § 1*, eff May 27, 2017.

Annotations

Notes

Revision Notes:

§ 102(a).

Source: None.

Changes: Completely new.

Comment: This provision was included to make clear that the context in which a defined term is used controls the applicability of the definition set forth in this section.

§ 102(a)(1).

Source: None.

Changes: Completely new.

Comment: The Gen Corp L does not contain a definition of "bonds". For purposes of this chapter, the term "bonds" should include both secured and unsecured bonds, debentures and notes. This definition is taken from the Bus Corp L.

§ 102(a)(2).

Source: None.

Changes: Completely new.

Comment: The definition of "by-laws" is substantially taken from § 2(e) of the Model Non-Profit Corporation Act of the American Bar Association. It includes the basic code of rules whether they be called "constitution", "constitution and by-laws", "by-laws" or "charter". It is intended to cover the basic code immediately subordinate to the certificate of incorporation.

§ 102(a)(3).

Source: Gen Corp L § 3(14).

Changes: Revised and extended.

Comment: This is taken from the *Bus Corp L § 102(a)(3)*. The definition in the Gen Corp L has been extended to encompass the original certificate of incorporation or any other instrument filed or issued to form a domestic or foreign corporation, or a special act creating a domestic or foreign corporation, as amended, supplemented or restated.

§ 102(a)(4).

Source: Gen Corp L § 3(17).

Changes: Revised.

Comment: This is substantially similar to the definition of "business of a corporation" in the Gen Corp L. It is intended to be substantially the same as "doing of business" and "transaction of business".

§ 102(a)(5).

Source: Mem Corp L § 2.

Changes: Revised.

Comment: The definition of "corporation" and "domestic corporation", equating the two terms, has been included for convenience of drafting (see § 201). It includes any corporation which meets two tests, (1) formed for a purpose, not for pecuniary profit or financial gain, permitted under § 201 and (2) no flow-through of assets, income or profit to or for the benefit

of its members, directors or officers except as permitted under this chapter. The use of these terms must be read with § 103 (Application) in determining the meaning of the terms as they are used in this chapter.

§ 102(a)(6).

Source: Gen Corp L § 3(13).

Changes: Revised and extended.

Comment: This is taken from *Bus Corp L § 102(a)(5)*. The word "director" means a member of the governing board of the corporation regardless of his official title. The term "board" means "board of directors" (see § 708).

§ 102(a)(7).

Source: Gen Corp L § 3(12).

Changes: Reworded.

Comment: This is similar to the definition of "foreign corporation" in *Bus Corp L § 102(a)(7)*. A requirement is added that, if it were to be formed under the statutes of this state, it would come within the definition of the term "corporation" or "domestic corporation" as defined in this chapter. Under this definition a corporation formed by or under the laws of the United States is a foreign corporation unless it otherwise comes within the definition.

§ 102(a)(8).

Source: None.

Changes: Completely new.

Comment: This is the definition from the *Bus Corp L § 102(a)(8)*. To avoid confusion between the "equity" and "bankruptcy" meanings of the word "insolvent", the term has been defined in the equity sense, which is the one that has greater applicability in this chapter. The wording of the definition is substantially that of Model Non-Profit Corporation Act § 2(n).

§ 102(a)(9).

Source: Gen Corp L § 3(15).

Changes: Revised.

Comment: This is an adaptation of the definition "member of a corporation" in Gen Corp L § 3(15). It is verbatim from the Model Non-Profit Corporation Act.

§ 102(a)(10).

Source: None.

Changes: Completely new.

Comment: See comment under definition of "corporation" or "domestic corporation" in subparagraph (5) above.

§ 102(a)(11).

Source: Gen Corp L § 3(16).

Changes: Revised and reworded.

Comment: This is an adaptation of the definition in *Bus Corp L § 102(a)(10)*. Defining "office of a corporation" (i.e., domestic corporation—see § 102(a)(5)) as the office the location of which is stated in the certificate of incorporation represents a change

from Gen Corp L § 3(16) which defines the term as the "principal office within the state, or principal place of business within the state if it has no principal office therein". The same principle is applied to foreign corporations.

§ *102*(a)(12).

Source: None.

Changes: Completely new.

Comment: This is the definition from the *Bus Corp L § 102(a)(11)*. The definition of the term "process" has been included for convenience of drafting.

Editor's Notes

Laws 1978, ch 690, § 11 provides as follows:

§ 11. This act may be cited as the "New York management of institutional funds act".

Laws 2013, ch 549, § 1 eff July 1, 2014, provides as follows:

Section 1. This act shall be known and may be cited as the "non-profit revitalization act of 2013".

Amendment Notes

The 2016 amendment by ch 466, § 1, rewrote (a)(21), and (a)(23) through (a)(25).

The 2015 amendment by ch 555, § 1, in the last sentence of (a)(6-a), added "and the number within that range has not been fixed in accordance with paragraph (a) of section seven hundred two of this chapter," "or appointed," and "as well as any directors whose terms have not yet expired"; deleted "or under common control with" following "in control of" in (a)(19); in (a)(21), added "or (iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the corporation's outside auditor or who has worked on the corporation's audit at any time during the past three years" in the first sentence and rewrote the second sentence, which formerly read: "For purposes of this subparagraph, 'payment' does not include charitable contributions"; rewrote (a)(22) and (a)(23); added "to the extent such provisions are applicable" in (a)(25); and made a related change.

2014. Chapter 23, § 2 amended:

Par (a), subpar 3-b by deleitng at fig 1 "contained in the certificate of incorporation of the corporation that are" and adding the matter in italics.

2013. Chapter 549, § 29 amended:

By adding par (a), subpar (3-a).

Par (a), subpar (6) by adding the matter in italics.

By adding par (a), subpar (6-a).

By adding par (a), subpar (9-a).

By adding par (a), subpar (19).

By adding par (a), subpar (20).

By adding par (a), subpar (21).

By adding par (a), subpar (22).

Conflicts of Interest Policies Under the Nonprofit Revitalization Act of 2013

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Guidance Document 2015 - 4, V. 1.0
Issue date: April 13, 2015

The Nonprofit Revitalization Act of 2013 ("NPRA") follows both common law and best practices literature in requiring directors to make disclosures about potential conflicts of interest at the beginning of their service, and on an annual basis thereafter. It also requires directors, officers and key employees to disclose potential conflicts of interest in issues which come before the Board and to refrain from participating in board deliberations and decisions on those issues. The NPRA requires that a nonprofit's procedures for disclosing and resolving conflicts of interest be set forth in a Conflict of Interest Policy adopted by the board.

This guidance has been drafted to assist nonprofits that are drafting or revising their Conflict of Interest Policies and adopting and implementing those policies. It is not intended to serve as a substitute for advice from a nonprofit's attorney nor should it be construed to have anticipated or addressed every issue that a nonprofit should consider or address when drafting or implementing its policy.

Where a director, officer, or key employee has a conflict of interest, as defined by a nonprofit's Conflict of Interest Policy, in an issue coming before the board, the entity has an obligation to make a record of the existence of the conflict and how it

was addressed, both with respect to that individual and with respect to the transaction.

If a director, officer, or key employee has a conflict of interest concerning an issue coming before that director, officer, or key employee, that individual must disclose the circumstances giving rise to the conflict of interest to the person or entity designated by the organization's conflict of interest policy.

Director, officer, key employee, related party and relative are all terms that are defined in the Not-for-Profit Corporation Law ("N-PCL"). *See* N-PCL §§ 102(a)(6), 102(a)(22), 102(a)(23), 102(a)(25), 713. However, because the NPRA's definition of "key employee" only refers to a federal statute and federal regulation, it merits explanation here. As defined in the Internal Revenue Code, a key employee is a current employee who is in a position to exercise substantial influence over the affairs of the corporation. It includes the president, chief executive officer, chief operating officer, treasurer, chief financial officer, and any other person who has ultimate responsibility for implementing the decisions of the governing body, supervising the management, administration, or operation of the organization, or managing the finances of the organization. A person may also be a key employee, required to be named in IRS form 990, if his or her compensation is primarily based on revenues derived from activities of the organization, or of a particular department or function of the organization, that the person controls; if the person has or shares authority to control or determine a substantial portion of the organization's capital expenditures, operating budget, or compensation for employees; or if the person manages a discrete segment or activity of the organization that represents a substantial portion of the activities, assets, income, or expenses of the organization.

Conflict of Interest Policy: Minimum Statutory Requirements

Each nonprofit must have a Conflict of Interest Policy "to ensure that its directors, officers, and key employees act in the [nonprofit's] best interest and comply with applicable legal requirements." The policy must cover related party transactions, which are defined by the N-PCL as transactions, agreements or arrangements in which a related party has a financial interest and in which the nonprofit or an affiliate is a participant. The policy may also cover other types of conflicts that

may exist even though there is no financial interest at stake or the circumstances are otherwise outside the definition of a related party transaction.

The Conflict of Interest Policy must include:

1. A definition of the circumstances that constitute a conflict of interest (N-PCL § 715-a(b)(1)).

The statute gives the Board of Directors discretion to define the circumstances that constitute a conflict of interest, including the discretion to define exceptions for de minimis transactions and ordinary course of business transactions not covered by the policy. The board also has discretion to define the procedures that should be followed for different types of conflicts. This discretion includes the power to define additional restrictions on transactions between a board member and the corporation, or between the nonprofit's employees and third parties (for example, by articulating a no acceptance of gifts policy, a no nepotism policy, or by incorporating Food and Drug Administration or Public Health Service conflict standards into a university's conflict policy).

In addition, there may be circumstances specific to the organization that involve dual interests but do not present a significant risk of conflicting loyalties. For example, religious corporations in their charter or by-laws frequently will include directors who are members of religious orders, employees of sponsoring or related churches, or bishops who, by canon law, hold title to all property of related religious corporations and may be called upon to approve the disposition of that property. City-related nonprofits may define "circumstances that constitute a conflict of interest" to exclude the responsibility of an ex-officio director to the electorate or the city appointing official, particularly where such *ex-officio* role is specifically set forth in the nonprofit's enabling legislation, charter or certificate of incorporation, since the role and definition of the *ex-officio* includes the responsibility of advocating a broader public interest in board discussions, and that role is clear to all non-city directors.

2. Procedures for disclosing a conflict of interest to the audit committee or the board (N-PCL § 715-a(b)(2)).

These procedures may include expectations for each class of conflict reporters, forms, record-keeping, custodians; disclosure to other persons within the nonprofit or to third parties, timing, and committee review and action.

3. Requirement that the person with the conflict of interest not be present at or participate in board or committee deliberations or vote on the matter giving rise to such conflict. (N-PCL § 715-a(b)(3)).

The language of the statute refers only to board or committee deliberations and votes. It is recommended that the board adopt a more comprehensive policy that articulates standards of conduct for board members, officers and key employees regarding conflicts of interest, disclosure requirements, reporting requirements, and procedures for mitigation.

In the board or committee setting, however, the board may request that the person with the conflict of interest present information as background or answer questions at a committee or boards meeting prior to the commencement of deliberations or voting.

4. Prohibition of any attempt by the person with the conflict to improperly influence the deliberations or voting on the matter giving rise to such conflict. (N-PCL § 715-a(b)(4)).

"Improperly influence" in this context should have a meaning similar to that used by the Securities and Exchange Commission in addressing improperly influencing audits: "coercing, manipulating, misleading, or fraudulently influencing (collectively referred to herein as "improperly influencing") the "decision-making " when the officer, director or other person knew or should have known that the action, if successful, could result " in the outcome which the officer or director could not deliberate or vote on directly. ("Improper Influence on Conduct of Audits," http://www.sec.gov/rules/final/34-47890.htm).

5. Requirement that existence and resolution of a conflict be properly documented, including in the minutes of any meeting at which the conflict was discussed or voted upon. (N-PCL § 715-a(b)(5)).

6. Procedures for disclosing, addressing, and documenting related party transactions pursuant to N-PCL section 715. Related party transactions include any transaction, agreement, or other arrangement in which a related party has a direct or indirect financial interest and in which the nonprofit or an affiliate participates. (N-PCL § 715-a(b)(6)).

A person has an indirect financial interest in an entity if a relative, as defined by the N-PCL, has an ownership interest in that entity or if the person has ownership in an entity that has ownership in a partnership or professional corporation. This is consistent with the definition of "indirect ownership interest" that is found in the instructions to Form 990, Schedule L.

A director, officer, or key employee must disclose his or her interest in a transaction, agreement or arrangement *before* the board enters into that related party transaction.

The record-keeping requirements of section 715 of the N-PCL that apply when a related party has a financial interest may not apply to four types of transactions that involve a transaction or relationship which is of a sort that does not usually require Board action or approval: a) de minimis transactions, b) transactions or activities that are undertaken in the ordinary course of business by staff of the organization, c) benefits provided to a related party solely as a member of a class that the corporation intends to benefit as part of the accomplishment of its mission, and d) transactions related to compensation of employees or directors or reimbursement of reasonable expenses incurred by a related party on behalf of the corporation.

While these transactions may not require the statutory process mandated by section 715 of the N-PCL, both the related party and the decision-maker have other obligations defined by governing law. The Board member or other related party in each of these cases may not intervene or seek to influence the decision-maker or reviewer in these transactions. The decision-maker, and those responsible for reviewing or influencing these transactions, should not consider or be affected by a related party's involvement in decisions on matters that may affect the decision-maker or those who review or influence the decision.

- What constitutes a "de minimis" transaction will depend on the size of the corporation's budget and assets and the size of the transaction. A

transaction that merits review by the Board of a smaller corporation might not merit review by the Board of a larger organization.

- A transaction or activity is in the ordinary course of business if it is consistent either with the corporation's consistently applied past practices in similar transactions or with common practices in the sector in which the corporation operates.

Examples of ordinary course of business transactions:

A. The library of a nonprofit university buys a book written by a member of the board, pursuant to a written library acquisitions policy.
B. A nonprofit hospital uses the local electric utility for its electrical service and supply, and a 35% shareholder of the local electric utility is a member of the board.
C. General counsel of a health system has a written, established, and enforced policy for the selection, retention, evaluation, and payment of outside counsel. A board member is a partner of and has a greater than 5% share in one of the firms retained by general counsel.
D. The curatorial department of a museum has a paid summer intern selection process involving resume review and evaluation and group interviews. The daughter of a board member is selected pursuant to the process as a summer intern.
E. The grandson of a board member of a hospital has just graduated from a university nursing school. He applies for and is selected by the Nursing Department of the hospital for a tuition repayment benefit and will receive a salary and overtime, consistent with the hospital's written policy regarding recruitment of new nursing graduates.
F. A board member is the sole owner of a fuel delivery company. In the ordinary course of business, the facilities department of a nonprofit housing project puts out a written request for proposals for fuel supply for its properties, evaluates, and documents the selection of the board member's company based upon cost and service.
G. A university board member owns a 35% share of a restaurant conveniently located near the campus of the university. Some faculty members responsible for arranging staff holiday lunches buy food from this restaurant,

using university credit cards. Each department has a modest authorized budget for these lunches, and faculty members have discretion about where to buy food for the lunches.

To qualify for the exception for benefits provided to a related party solely as a member of a class that the corporation intends to benefit as part of the accomplishment of its mission, the benefits must be provided in good faith and without unjustified favoritism towards the related party.

Example of a transaction in this category: A legal services program agrees to handle the eviction case of one of its board members who is eligible to be a client, and who is serving as one of the minimum number of client-eligible board members that is required by federal regulations. The decision to accept the case is made pursuant to the organization's established case acceptance policy, without regard to the client's status as a board member.

Transactions related to compensation of employees, officers or directors or reimbursement of reasonable expenses incurred by a related party on behalf of the corporation are not considered related party transactions, unless that individual is otherwise a related party based on some other status, such as being a relative of another related party . However, such transactions must be reasonable and commensurate with services performed, and the person who may benefit may not participate in any board or committee deliberation or vote concerning the compensation (although he or she may be present before deliberations at the request of the board in order to provide information).

7. The Policy must require that each director submit to the Secretary prior to initial election to the board, and annually thereafter, a written statement identifying, to the best of the director's knowledge, any entity of which the director is an officer, director, trustee, member, owner, or employee and with which the corporation has a relationship, and any transaction in which the corporation is a participant and in which the director might have a conflicting interest. Likewise, officers and key employees must submit an annual conflicts statement to the Secretary.

Disclosure of conflicts is required; the requirement of disclosure to the Secretary can be satisfied by disclosure to the Secretary's designee as custodian (e.g., the compliance officer), if set forth in the conflict of interest policy.

When initial election to the board is not reasonably foreseeable, for example when board candidates are nominated from the floor at an annual meeting of members held to elect directors, the written statement may be provided to the Secretary promptly after the initial election.

A conflict of interest disclosure statement is required from directors, officers, and key employees of nonprofits. All types of nonprofits are covered, including religious corporations.

The Secretary must provide a copy of the completed statements to the Chair of the Audit Committee or Board Chair.

The Secretary may direct his/her designee/custodian to provide a copy of the completed statements to the Chair of the Audit Committee or Board Chair.

BIOGRAPHIES

RICHARD S. KESTENBAUM, ESQ. is a 1974 graduate of Hofstra University School of Law, where he was a member of Hofstra Law Review, and maintains a practice in Great Neck, New York. He was admitted to practice in 1975, and since then has represented corporations, individuals and estates concerning sensitive domestic and foreign tax issues that result in civil and criminal controversies with state and local tax authorities and the Internal Revenue Service. He is also the Associate Village Justice for the Villages of Great Neck Plaza and Kensington, a member of the Town of North Hempstead Board of Ethics and was the President of the Nassau County Magistrates Association during the 2003-2004 calendar year. He was selected as a New York Metro Area Super Lawyer in Taxation in 2015 and 2016, a Long Island Top Legal Eagle in 2010, 2015, 2016 and 2017. He received his undergraduate degree from Long Island University.

HON. FRED HIRSH is a former Judge of the Nassau County District Court having served from March 2002 through December 2002, and from March 2008 through December 2015. Between January 2003 and his appointment to the District Court in March 2008, Judge Hirsh was law secretary to then Nassau County Supreme Court Justice Leonard B. Austin, who now sits in the Appellate Division, Second Department. Prior to March 2002, Judge Hirsh was an attorney in private practice. He is a graduate of Brooklyn Law School and Hamilton College.

S. ROBERT KROLL, ESQ. is a 1958 graduate of Brooklyn Law School and maintains a general practice in Merrick. He was admitted to the practice of law in New York in 1958, and was admitted to practice in Florida in 1982. He has been counsel New York State Senators Norman J. Levy and James J. Lack, a former member of NYS Public Safety Transportation Board and is currently member of MTA Citizens Advisory Committee to the MTA Inspector General. He is a past member of the Board of Directors of the Nassau County Bar Association and the current Vice-Chair of its District Court Committee. He is a past President, Treasurer and Secretary of Merrick Jewish Center, and is currently a member of its legal committee. He received the New York State Bar Association President's Pro Bono Service Award for Tenth Judicial District in May, 2016. He received his undergraduate degree from Hofstra College

NEIL A. MILLER, ESQ. is a 1981 graduate from University of Chicago Law School is currently a partner in the firm of Miller, Rosado & Algios, LLP, in Garden City. He was admitted to the practice of law in 1982, and has been in private practice since then, primarily in the area of commercial litigation, both at the trial and appellate levels, since that time. His firm has been appointed by several different title insurance companies over the years to represent homeowners and lenders facing title claims, as well as directly representing title insurance companies in efforts to recoup monies

expended by the insurers to settle title claims from parties responsible for the loss or defending against losses claimed by insureds. He has been selected in various years as a New York Metro Area Super Lawyer in Commercial Litigation. He is currently a Vice President of Temple Or Elohim in Jericho and serves as the temple attorney. He received his undergraduate degree from Franklin & Marshall College.

ANDRES BAENA is a third year student at Touro Law Center.

HAILEY KANTROW is a second year student at Touro Law Center.

JORGE MACIAS is a third year student at Touro Law Center and a retired New York City Police Department Detective.

KARIN KUNSTLER GOLDMAN, ESQ. is the Deputy Bureau Chief in the New York State Attorney General's Charities Bureau. Karin was the 2001-2002 president of the National Association of State Charity Officials and is a founding member of the Governance Matters. From 2003 to 2007 she served on the advisory board of New York University's National Center on Philanthropy and the Law and from 2008 to 2011 was a member of the Internal Revenue Service's Advisory Committee on Tax Exempt Entities. As an Eisenhower Exchange Fellow in Hungary, Karin worked with nonprofit organizations, government officials and legislative drafters in developing the law and regulations affecting Hungary's nonprofit sector. Karin has consulted with government officials and legislative drafters in Ukraine and China on the development of statutory regulation of charitable organizations in those countries. Karin was a guest of the People's Republic of China at its 2007 *International Symposium on Charity Legislation in China* at which she was a speaker and in 2015 when she participated in workshops in China on the developing nonprofit law. Karin has a law degree from Rutgers University Law School, a BA from Connecticut College and an MA from Columbia University.

LINDA HEINBERG, ESQ. recently joined the Charities Bureau as an Assistant Attorney General in the Transactions Section. Prior to joining the AG's office, Ms. Heinberg provided pro bono legal counsel to nonprofits and served as Assistant General Counsel at Hanover Direct, Inc. Ms. Heinberg began her career in the corporate departments of the law firms Skadden, Arps, Slate, Meagher & Flom and Shereff, Friedman, Hoffman & Goodman. Ms. Heinberg holds a J.D. from Yeshiva University, Cardozo School of Law, where she was a member of the Law Review and a B.A. from the University of Pennsylvania.

ABIGAIL YOUNG, ESQ. is an Assistant Attorney General in the Charities Bureau Transaction Section. She is among the team of experienced attorneys reviewing petitions of not-for-profit corporations seeking court or attorney general approval of sales, dissolutions and mergers. She joined the Charities Bureau in 2015 after nearly 20

years practicing corporate law in the private sector. She is a graduate of Yale College and Columbia Law School.