

11 Misc.3d 1055(A), 815 N.Y.S.2d 493, 2006 WL 431367 (N.Y.Sup.), 2006 N.Y. Slip Op. 50214(U)

Unreported Disposition

(Cite as: 11 Misc.3d 1055(A), 2006 WL 431367 (N.Y.Sup.))

▶ (The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Orange County, New York.
CONGREGATION YETEV LEV D'SATMAR OF
KIRYAS JOEL, INC. and Moshe Scher, Plaintiffs,

v.

CONGREGATION YETEV LEV D'SATMAR,
INC., Manual Mangual, Jeno Kahan, Sol Perlstein,
Jacob Schoenfeld, Solomon Sander, John Doe "1-
50," U.T.A. Mesivta of KJ, United Talmudical Semi-
nary and United Talmudical Academy Torah V'Y-
irah, Inc., Defendants.

No. 4495/2005.

Feb. 9, 2006.

Katlowitz & Associates, New York.

Rider, Weiner & Frankel, P.C., New Windsor.

Herrick, Feinstein LLP, New York.

Feerick Lynch PLLC, South Nyack.

The Gordon Law Offices, New York.

Goldberg, Rimberg & Friedlander LLC, Goshen.

Smith, Buss & Jacobs, LLP, Yonkers.

STEWART A. ROSENWASSER, J.

*1 The plaintiffs have brought an Order to Show Cause seeking a preliminary injunction which would preclude the defendants from changing or interrupting the traditional relationship and roles played by the parties regarding access and use of a cemetery in the Town of Monroe.

The Order to Show Cause was brought in the context of an action to quiet title of real property used a cemetery and located within the Town of Monroe, Orange County, New York, pursuant to Article 15 of the Real Property Actions and Proceedings Law and Articles 30 and 63 of the Civil Practice Law and

Rules. In addition, the plaintiffs bring causes of action of breach of contract, tortious interference with contract, declaratory judgment and constructive trust all related to the real property. The defendants generally counterclaim on the same common law principles. Finally, the plaintiffs seek to clarify their rights to an easement over an adjoining parcel to the cemetery to which there is a dispute in title between U.T.A. Mesivta of KJ, United Talmudical Seminary and United Talmudical Academy Torah V'yirah, Inc. which may affect the plaintiff's alleged rights to the easement.

The Court decides this application having considered:

The Pleadings:

A. the summons dated July 11, 2005 and the verified complaint together with Exhibits A through I;

B. the answer dated August 17, 2005 of the defendants Congregation Yetev Lev D'Satmar, Inc., Jeno Kahan, Sol Perlstein, Jacob Schoenfeld and Solomon Sander;

C. the Amended Verified Complaint dated August 4, 2005;

D. the Verified Amended Answer With Counterclaims dated September 6, 2005 by the defendants Congregation Yetev Lev D'Satmar, Inc., Jeno Kahan, Sol Perlstein, Jacob Schoenfeld and Solomon Sander;

E. the Second Amended Verified Complaint dated September 6, 2005 with attached Exhibits A through I;

F. the Verified Amended Answer With Counterclaims dated September 6, 2005 of defendants Congregation Yetev Lev D'Satmar, Inc., Jeno Kahan, Sol Perlstein, Jacob Schoenfeld and Solomon Sander

G. the verified answer with cross-claim of the defendants Congregation Yetev Lev D'Satmar, Inc., Berl Friedman, president dated September 12, 2005;

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H. the Exhibit Book in Support of Defendant Congregation's Answer and Cross-Claim consisting of Exhibits A through BB;

The Submitted Papers:

1. the Order to Show Cause for Injunctive Relief dated July 12, 2005, the Affirmation in Support of Injunctive Relief, Exhibits A though I attached to the complaint and incorporated into the Order to Show Cause, the Supporting Affidavit of Moshe Scher;

2. the Brief in Opposition to Plaintiffs' Order to Show Cause dated August 15, 2005;

3. the Affirmation of Rabbi Herman (Ezriel) Gluck dated August 15, 2005.

4. the Affirmation of Sol Perlstein in Opposition to Plaintiffs' Order to Show Cause dated August 16, 2005 with Exhibits A through J;

5. the Supporting Affirmation of Berl Friedman dated August 22, 2005 with Exhibits A through M;

*2 6. the Reply Affirmation of Martin Brach in Further Opposition to Plaintiffs' Order to Show Cause dated August 23, 2005

7. the Reply Affirmation of Sol Perlstein in Further Opposition to Plaintiffs' Order to Show Cause dated August 23, 2005 with Exhibit A

8. the Sur-Reply Affidavit of Scott E. Mollen in Opposition to Plaintiffs' Order to Show Cause dated August 24, 2005 with Exhibits A through M;

9. the notice of motion and affidavit of Scott E. Mollen, Esq. dated September 28, 2005 together with Exhibits A through J;

10. the notice of motion and affirmation of Jacob Schoenfeld dated September 28, 2005 together with Exhibits A through M;

11. the affirmation of Benjamin Ostrer, Esq., dated September 28, 2005, the affirmation of Thomas A. Kissane, Esq., the affirmation of Isaac Mandel, the affirmation of Isaac Wertheimer and Exhibits A

through R;

12. the supplemental affirmation of Moshe Scher with Exhibits A through C;

13. the undated notice of cross-motion of Jeffrey D. Buss, Esq.;

14. the affidavit of Shaul Friedman dated October 6, 2005 with Exhibit A;

15. the affidavit in support of cross-motion of Moshe Sher dated October 6, 2005;

16. the affidavit in support of cross-motion of Zalman Lichtman dated October 6, 2005;

17. the affidavit in support of cross-motion of Isack Rosenberg dated October 10, 2005; with Exhibits A through V;

18. the affirmation of Israel Goldberg, Esq. dated October 10, 2005 with Exhibits A through E;

19. the reply affidavit of Scott E. Mollen in support of the motion by defendant Congregation Yetev Lev D'Satmar, Inc. for an order finding that Herrick Feinstein LLP and Rider Weiner & Frankel, P.C. are Authorized to Represent it in this action dated October 17, 2005;

20. the reply affirmation of Jacob Schoenfeld in support of the motion by defendant Congregation Yetiv Lev D'Satmar, Inc. for an order finding that Herrick Feinstein LLP and Rider Weiner & Frankel, P.C. are Authorized to Represent it in this action dated October 14, 2005 with Exhibits A and B;

21. the Exhibits to the reply affidavit of Scott E. Mollen in support of the motion by defendant Congregation Yetiv Lev D'Satmar, Inc. for an order finding that Herrick Feinstein LLP and Rider Weiner & Frankel, P.C. are Authorized to Represent it in this action (Exhibits A through Z);

22. the reply affirmation of Martin Branch in support of the motion by defendant Congregation Yetiv Lev D'Satmar, Inc. for an order finding that Herrick Feinstein LLP and Rider Weiner & Frankel, P.C. are Authorized to Represent it in this action dated October

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- 16, 2005 with Exhibit A;
23. the affirmation in support of cross-motion of Jeffrey D Buss, Esq. which is undated;
24. the affirmation of Jeffrey D. Buss, Esq. dated October 24, 2005;
25. the order to Show Cause dated October 24, 2005 and the affirmation of Bruce C. Dunn, Sr., Esq. with Exhibits A and B and the affirmation of Sol Perlstein dated October 23, 2005;
- *3 26. the affirmation of Benjamin Ostrer, dated October 28, 2005, the affirmation of Sol Perlstein, the affirmation of Jacob Cohen and Exhibits A through F;
27. the affirmation of Israel Goldberg, Esq. dated November 21, 2005 with Exhibit A;
28. the notice of motion to reargue or modify or renew dated November 28, 2005, the affirmation of Scott E. Mollen, Esq. with Exhibits A through D;
29. the supporting affirmation of Rabbi Zalmen Leib Teitelbaum, dated November 27, 2005 with Exhibits A and B;
30. the supporting affirmation of Rabbi Moses Friedman dated November 27, 2005 with Exhibits A through F;
31. the affirmation of Jenö (Yaakov) Kahan dated November 27, 2005 with Exhibits A through D;
32. the supporting affirmation of Shulem Stern dated November 27, 2005 with Exhibit A;
33. the supporting affirmation of Jacob Schoenfeld dated November 27, 2005 with Exhibits A and B;
34. the undated affirmation of Abe Rubin submitted by Smith, Buss & Jacobs, LLP;
35. the undated affirmation of Abe Deutsch submitted by Smith, Buss & Jacobs, LLP;
36. the affirmation of Jacob Schoenfeld in support of the offer of proof dated December 6, 2005 with Exhibit A;
37. the affirmation of Scott E. Mollen in support of offer of proof dated December 7, 2005 with Exhibits 1 through 13;
38. the opposing affirmation of David Markowitz dated December 7, 2005 with Exhibit A;
39. the letter of protest dated December 5, 2005 and the document entitled "State of the Holy Torah" dated December 5, 2005 submitted by Smith, Buss & Jacobs, LLP;
40. the memorandum of law submitted by Feerick Lynch PLLC dated December 8, 2005;
41. the affidavit in support of cross-motion of Abraham Rubin dated December 8, 2005;
42. the affidavit of Rabbi S. Frankel in support of cross-motion December 8, 2005;
43. the affidavit in support of cross-motion of Leon Teitelbaum dated December 8, 2005;
44. the affidavit in support of cross-motion of Isaac Rosenberg dated December 8, 2005;
45. the joint affidavit in support of cross-motion of Congregation Yetev Lev D'Satmar members dated December 8, 2005;
46. the affirmation of Mark J. Gordon, Esq. dated December 9, 2005 with Exhibit A;
47. the affirmation of Scott E. Mollen in objection to recent filings dated December 13, 2005;
48. the affirmation of Jeffrey D. Buss dated December 16, 2005 with Exhibits A and B;
49. the affirmation of Leib Glanz dated December 20, 2005;
50. the affirmation of Isreal Goldberg, Esq. dated January 24, 2006;

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51. the affirmation of Joseph Gross, dated December 15, 2005

52. the affirmation of Andrew Sulner, M.S., J.D. in support of summary judgment with Exhibits A through C;

53. the memorandum in support of summary judgment, dated January 25, 2006;

54. the supplemental affirmation of Scott E. Mollen in response to court's conversion of motion for preliminary injunction into motion for summary judgment dated January 24, 2006 with Exhibits A through C;

*4 55. the affirmation of Sol Perlstein in response to court's conversion of motion for preliminary injunction into motion for summary judgment dated January 24, 2006 with Exhibits A through C;

56. the verified answer to second amended complaint with counterclaims dated January 25, 2006;

57. the affirmation in support of summary judgment of Moshe Katlowitz, Esq. with Exhibits A through I;

58. the affirmation of Andrew Sulner in support of summary judgment dated January 24, 2006 and Exhibits A through C;

59. the memorandum in support of summary judgment of Jeffrey D. Buss, Esq. dated January 25, 2006;

60. the affirmation of Mark J. Gordon, Esq. dated January 25, 2006.

61. the affirmation of Rabbi Moses Friedman dated January 31, 2006.

62. the supplemental affirmation of Scott E. Mollen, Esq., dated January 30, 2006.

63. the affirmation of Jeffrey D. Buss, Esq., dated February 1, 2006, with Exhibits A and B.

Background

The plaintiff, Congregation Yetev Lev D'Satmar of

Kiryas Joel, Inc. (the Kiryas Joel Congregation), and Congregation Yetev Lev D'Satmar, Inc. (the Brooklyn Congregation) are co-owners of a cemetery in the Town of Monroe, New York. This action was commenced pursuant to Article 15 of the Real Property Actions and Proceedings Law to quiet title to the cemetery which is identified as Section 305, Block 1, Lot 1.11 on the Town of Monroe Tax Map. In addition to other relief related to the use of the property, the action seeks to void a filed declaration of the defendants Kahan, Perlstein, Schoenfeld and Sander (the named defendants) who are associated with Congregation Yetev Lev D'Satmar, Inc. in Brooklyn, New York, which restricts transfer of any right associated with the property except with the express consent of the signatories of the declaration. Finally, much of the relief sought which relates to the operation of the cemetery relates to a letter dated June 30, 2005. This letter is purportedly from Mr. Perlstein, one of the named defendants in this action, and it states in substance that members of the Kiryas Joel congregation would thereafter be prohibited from burying its members at the cemetery, from erecting headstones and from participating in other activities at the property.

Accordingly, the plaintiffs brought this action to have the restrictive declaration signed by defendants Kahan, Perlstein, Schoenfeld and Sander voided by the court, to have the plaintiff Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. declared the co-owner of the real estate and further to be declared trustee of the property and for *nunc pro tunc* approval of the January 19, 2001 transfer of the one-half interest in the cemetery property and for other related relief.

The plaintiffs by way of order to show cause dated July 12, 2005, brought an application seeking a preliminary injunction prohibiting the defendants from changing the manner in which the cemetery has historically been operated. As part of this order to show cause, a temporary order was issued that prohibited either party from changing the manner of operation of the cemetery and prohibiting any party from transferring or encumbering title to the property.

*5 Two representatives of the defendant Congregation Yetev Lev D'Satmar, Inc. (Brooklyn Congregation) appeared in this action. The law firms of Rider, Weiner & Frankel, P.C. and Herrick, Feinstein LLP appeared on behalf of the Brooklyn Congregation. In

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addition Smith, Buss & Jacobs, LLP also appeared on behalf of the Brooklyn Congregation. Each firm represents a faction of the Brooklyn Congregation and each claims sole authority to operate the congregation and to retain counsel. Each faction alleges that they are the legitimate officers of the organization. The firm of Buss & Jacobs, LLP represents Berl Friedman and the officers of the corporation who claim to hold these positions at the time of the transfer of the property in question. The other two law firms represent parties who claim that Berl Friedman was expelled from the congregation prior to the transfer of title in January, 2001. They also claim that new officers were elected in an election held in May 2001. This election was challenged by the Friedman faction. The action in Kings County, of which the challenge was a part, is now on appeal before the Appellate Division, Second Department.

In a second amended verified complaint, the plaintiff named U.T.A. Mesivta of KJ, United Talmudical Seminary and United Talmudical Academy Torah V'Yirah, Inc. as defendants because of their ownership of a parcel of property adjacent to the cemetery through which the plaintiff, Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. uses as a means of accessing the cemetery. The plaintiffs assert that because of a dispute which has arisen over ownership of the parcels, court intervention is necessary to establish the rights of the parties including the plaintiffs, who claim an easement over the property.

Similarly, there exists a dispute regarding the representation of the United Talmudical Seminary (UTS) and United Talmudical Academy Torah V'Yirah, Inc. (UTA). Both Isreal Goldberg, Esq. and Mark J. Gordon, Esq. have been retained to represent these entities in this action and each seek a court order determining which party has the authority to retain counsel on behalf of these organizations.

The Brooklyn Congregation is currently embroiled in a dispute between two factions over its leadership. One group is comprised of President Berl Friedman and board members Isack Rosenberg, Samuel Markowitz and Chiam Lazer Gross who were the officers of the corporation in December 2000. It was this group who authorized the transfer of the cemetery in January 2001 after a meeting of the Board of Directors which, by unanimous vote, approved the transfer of an undivided fifty percent interest in the

cemetery property. This approval was recorded in the minutes of a special joint meeting of the board of trustees of the Brooklyn Congregation and the Kiryas Joel Congregation. The deed effecting this transfer was executed on January 19, 2001, and recorded on May 14, 2001.

The named defendants executed a declaration dated January 19, 2001, in which they identified themselves as the officers of the corporation. The declaration, which was filed with the Orange County Clerk, acts as a restriction on the transfer and use of the cemetery property at issue in this litigation. It relates to the title of the cemetery property as it existed with the deed filed November 23, 1988, which granted sole title to the Brooklyn Congregation. It does not recognize or relate to the January 19, 2001, deed.

*6 Thereafter, in May 2001,^{FN1} an election was held to choose the officers of the Brooklyn Congregation as well as other related congregations including the Kiryas Joel Congregation. The May vote resulted in the election of Berl Friedman as president of the corporation. This election was certified in accordance with the by-laws by the election committee. Later in May 2001, another election was held which resulted in Jenö Kahan's election as president. This election, it is alleged, was certified by a commissioner of deeds and ratified by the Grand Rebbe despite the fact that such certification and/or ratification is not provided for in the by-laws and, furthermore, there is no evidence presented that these types of certifications ever occurred following any election since the congregation's incorporation in 1948.

^{FN1}. In the decision and order of October 22, 2004, the Kings County Supreme Court (Barasch, J.), this was referred to as the May 12-13, 2001, election.

Each side in this litigation contests the legitimacy of other side's election. Mr. Friedman's election is contested because it is alleged that he was expelled from the congregation prior to the transfer of title. It is also claimed that he could not have been elected president in May 2001 because when he was expelled from the congregation, his authority as president was stripped from him. Moreover, as result of expulsion, he could not have called for elections according to the by-laws of the corporation.

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The election of Mr. Kahan is contested because it is alleged that he could not call for elections because only the president of the corporation may call for elections and he was not president. Only the president can call for elections according to the by-laws. The by-laws do not provide for a co-presidency. Accordingly, it is claimed that the election of Mr. Kahan was not an authorized election and he and the rest of the officers under him, including Mr. Perlstein who sent the July 30, 2005 letter, have improperly assumed control of the corporation.

Issues

To establish whether the transfer of property in 2001 was proper or not, the court must determine whether or not Mr. Friedman was the president at the time of the transfer and whether he was authorized to transfer an undivided one-half interest in the property to the Kiryas Joel Congregation. This, in turn, requires the court to decide whether Mr. Friedman was expelled from the congregation prior to the transfer. No issues were raised regarding the conduct of the subsequent election in May 2001, which resulted in his election as president. The issue which was raised is his right under the by-laws to call for an election.

The issue of the legitimacy of Mr. Friedman's presidency affects the actions taken by Mr. Kahan. If Mr. Friedman was president at the time of the transfer and could call for the subsequent election, Mr. Kahan is in no position to challenge the transfer of property or to file any document which restricts title or use of the real property.

The remaining issues in the case rise or fall to a large extent with the determination of Mr. Friedman's position in the congregation on January 19, 2001.

Conclusions of Law

*7 The Brooklyn Congregation, as a religious group, is no different than any other religious corporation. If created as a legal entity pursuant to New York Religious Corporation Law, then it is a product of and exists pursuant to that law. To contend, once established, that civil courts cannot be resorted to resolve non-religious disputes and to go yet further and urge that the spiritual leader is the ultimate authority as to all matters occurring within the religious corporation whatever their character, is to disembowel the very

statutory scheme which created the corporation in the first instance. Courts have consistently been called upon to resolve disputes arising out of internal schisms within a religious sect which relate to secular issues such as control of real property and are unavoidably put to the task of identifying the legitimate and ultimate authority for corporate decisions regarding these issues [see *First Presbyterian Church of Schenectady v. United Presbyterian Church*, 62 N.Y.2d 110 (1984)]. To do otherwise denies all legal protection to the congregation, its members and assets. A civil court must not allow these disputes to be resolved by force or violence.

Those who urge the court to refrain from resolving the disputes herein on First Amendment grounds frame the case and the apparent internal strife of the Brooklyn Congregation as arising solely from the issue of who will succeed the Grand Rebbe as the congregation's spiritual leader. It is alleged that the competing factions of the Brooklyn Congregation are in reality the followers of the two sons of the Grand Rebbe who are vying for control, and the current dispute is nothing more than an attempt to disrupt the Grand Rebbe's apparent choice of who should succeed him.

Assuming arguendo that the overarching controversy herein, control of the Brooklyn Congregation, grew out of a schism between the two sons of the Grand Rebbe over the issue of who would succeed him as the spiritual leader of the Satmar sect, this Court is of the view that this property dispute can be resolved through neutral principles of law without resort to judicial intrusion into matters of religious doctrine or succession [see *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 286 (3rd Dept 1999)].

To be sure, however, the instant case has nothing to do with issues of succession nor would the court venture into such a dispute as it deals with religious matters of the congregation as opposed to an issue affecting title to real property which can be decided upon "neutral principles of law" [see *Park Slope Jewish Center v. Congregation B'Nai Jacob*, 90 N.Y.2d 517 (1997); *First Presbyterian Church of Schenectady v. United Presbyterian Church*, *supra.*, *Jones v. Wolf*, 443 U.S. 595 (1979), *Presbyterian Church v. Hull Church* 393 U.S. 440 (1969)]. Here, "the resolution of this internal dispute by a civil court does not vio-

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late the First Amendment prescription that religious bodies be left free to decide church matters for themselves, uninhibited by state interference, because the [matter] can be decided on the basis of statutory interpretation and common law precedent without reference to matters of religious belief or dogma" [*Morris v. Scribner* 69 N.Y.2d 418 (1987)].

*8 While the parties agree upon virtually nothing, they do agree that the issues herein rise and fall on whether or not Berl Friedman, who was president of the religious corporation, was expelled prior to January 19, 2001 by any means. This court finds that he was not.

Both sides in this litigation claim that the October 22, 2004 decision of the Kings County Supreme Court (Barasch, J.) support their respective claims regarding the issues of expulsion and authority based conversely on what the decision does say and what it does not. In keeping with the language of this decision, this court in an Order dated October 21, 2005, directed that the attorneys representing Jenö Kahan produce the Grand Rebbe to present evidence of the expulsion of Berl Friedman. The Court directed that the Grand Rebbe would be accommodated in any way consistent with his sacred office. The Grand Rebbe was not produced and, instead, a large number of affidavits, affirmations and other papers presenting factual and legal argument were provided to the Court, including numerous reasons designed to explain the Grand Rebbe's non-appearance. It was brought to this Court's attention that a Judge spoke to the Grand Rebbe in connection with an unrelated Article 81 proceeding in Kings County, only a couple of weeks following this Court's request for access.

The Court has reviewed the submissions and must conclude that they do not establish the alleged fact of Berl Friedman's expulsion. The identical or similar submissions were presented during the four years of litigation in Kings County. It is not disputed that he was the president of the corporation in 2000 and absent competent evidence which shows otherwise, there is no reason to find that he was not the president at the time of the transfer.

To the extent that it may be argued that the presence of this issue precludes summary judgment because the mass of papers submitted represents a question of fact, such argument is without merit. An opportunity

to present competent evidence by the parties who have argued that Mr. Friedman was expelled was granted and was rejected. Much of the argument in favor of expulsion rests upon an allegation that a panel of judges voted to expel Mr. Friedman and that this decision was ratified by the Grand Rebbe. Accordingly, an opportunity was granted to present testimony in support of this allegation. The opportunity was not seized. Further, it is not clear that even this testimony would ultimately resolve the issue in favor of those who argue expulsion. Despite litigation which has now spanned more than six months in this jurisdiction and four years elsewhere, those arguing in favor of expulsion have failed to submit competent, admissible proof of evidentiary value sufficient to establish their assertion and thereby defeat summary judgment [*Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 290 (3rd Dept 1999)].

Each of the religious corporations in this action are organized, operate and are bound by New York State Law. It should go without saying that there is no requirement that any organization incorporate under New York State Law. However, certain benefits are conferred by organizing under state law and at the same time certain obligations are created as well, none of which affect the nature of the religious activities of the religious corporations. One such obligation is an adherence to the by-laws of the organization and the keeping of records of actions taken by the board [see, *Not-For-Profit Corporation Law* § 621].

*9 Although, the courts should not interfere in issues concerning the establishment of membership criteria by a church or congregation, there is authority that a court may decide whether the church or congregation in question has adhered to its own by-laws when making a determination as to the membership status of individual congregant [see *Watson v. Christie*, 288 A.D.2d 29 (1st Dept 2001); *Islamic Center of Harrison, Inc. v. Islamic Science Foundation, Inc.*, 262 A.D.2d 362 (2nd Dept 1999)]. The determination of whether or not a religious corporation followed its own procedures and by-laws regarding the election of officers is a matter which the courts may address [see, *Matter of Venigalla v. Alagappan*, 307 A.D.2d 1041 (2nd Dept 2003)]. The issue of whether or not a particular member should have or could have been expelled is not a consideration here [see e.g.; *Karageorgious v. Laoudis*, 271 A.D.2d 653 (2nd

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Dept 2000]. The only consideration before this court regarding membership and the election of officers is whether there has been compliance with the laws of the State of New York and the by-laws of the corporation.

No competent evidence has been presented to this court during the course of this litigation that any person has been expelled from the congregation in accordance with the clear requirements of the by-laws (Article X, paragraph C). Of the many affirmations, affidavits and other evidence which have been submitted as a result of this Court's order dated October 21, 2005, none has provided the court with competent, admissible evidence to prove any allegation of expulsion and accordingly, it follows that Mr. Friedman was not removed from his position as president. The evidence submitted in support of expulsion does not consist of the official records of the corporation and generally rest upon hearsay and documents of little or no evidentiary value. It must be noted that Mr. Friedman's status as president prior to the alleged expulsion is not contested. Accordingly, if not expelled, he was president of the corporation at the time of the transfer of the real property and was subsequently re-elected president during the first election held in May 2001, along with three other board members. Furthermore, in the action in the Supreme Court, Kings County, the 2001 election of Berl Friedman was not challenged.

The fact that certain individuals are now acting in positions of authority and have been for the past four (4) years is of no moment. In a series of interim decisions, particular individuals were given the authority to carry out specific tasks to ensure the continued functioning of the congregation during the Kings County litigation. These orders did not confer any additional authority upon these individuals beyond the temporary duties imposed by the orders [see Matter of Venigalla v. Alagappan, 307 A.D.2d 1041, 1042 (2nd Dept 2003)]. In addition, these orders did not validate or install any of the alleged officers or board members resulting from the two contested elections. In any event, these orders terminated upon the issuance of the final decision and order.

*10 The final decision and order also did not confer any status upon any individual. It is clear from a reading of the decision that the arguments of each side were not reached by Justice Barasch, contrary to

the contentions raised here. This decision found that the issues surrounding the authority of certain individuals to act as officers of the religious corporation is a matter of religious practice and, therefore, beyond the reach of the court. As a result, the court specifically declined to find that Mr. Friedman was expelled or to invalidate either election and ordered that the status quo be maintained without specifically explaining in the October 22, 2004 decision what the status quo was. To the extent that this Court resolves factual issues not resolved by the Kings County decision, it departs therefrom.

“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 N.Y.2d 418 (1987)]. To view the facts as being in compliance with the by-laws supports the fact that Mr. Friedman was president at the time of the transfer of the real property which is the subject of this action. The Kahan-led faction argues that compliance with the by-laws is essentially irrelevant since their authority flows directly from the Grand Rebbe who was deemed to be the ultimate authority in the Kings County action. Even if this principle is affirmed, this faction cannot be permitted to assume control in a manner inconsistent with the religious corporation's by-laws and validly adopted resolutions by wrapping themselves in a cloak of religious authority and then use that as a shield against this Court's ability and indeed its obligation to resolve the instant dispute and issues incidental thereto [see Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc., 968 F.2d 286 (2nd Cir1992); Lawrence v. Union of Orthodox Jewish Congregations of America, [NYLJ, Feb. 1, 2006, at 19, col. 1 (Sup Ct, N.Y. County, Solomon, J.)].

The facts in this case must be viewed in accordance with the by-laws of the corporation, the Religious Corporation Law and all other applicable laws. The fact of Mr. Friedman's presidency at the time of the transfer of the fifty percent interest in the property is indisputable unless one chooses to ignore the by-laws and governing statutes. There has been no credible evidence presented which complies with the by-laws that supports the position that Mr. Friedman was expelled from the congregation and stripped of his au-

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thority as president.

Therefore, it must be concluded that there is no issue of fact with respect to this issue.

Motions to Declare Proper Counsel

The issue presented may be explained as follows. The law firm of Rider, Weiner & Frankel, P.C. filed a motion dated September 28, 2005 on behalf of the Brooklyn Congregation and Jenó Kahan, Sol Perlstéin, Jacob Schoenfeld and Solomon Sander (the individual defendants) seeking to have themselves and the law firm of Herrick, Feinstein LLP declared counsel for the Brooklyn Congregation. The law firm of Smith, Buss & Jacobs, LLP has also appeared in this action claiming to represent the Brooklyn Congregation. Each of the law firms in this dispute claim to have been retained by the legitimate officers of the Brooklyn Congregation. Unfortunately, there are two groups of officers who claim to be the duly elected representatives of the Congregation.

*11 The law firm of Smith, Buss & Jacobs, LLP was retained by the Brooklyn Congregation through Berl Friedman who claims to be president of the congregation as the result of elections held in May 2001. The other firms claim authority to represent the congregation through Jenó Kahan who claims to have been elected in a separate election held later that same month. Mr. Kahan claims authority because he alleges that Mr. Friedman was expelled from the congregation by the Grand Rebbe and could not have called for new elections as president after having been expelled. Mr. Kahan's position is that the act of expulsion stripped Mr. Friedman of his position as president and only the president could call for new elections.

Based upon the findings herein, Mr. Friedman was not expelled from the congregation. He was thereafter re-elected president along with three board members and was, therefore, conferred the authority to protect and preserve the assets of the Brooklyn Congregation, of which the cemetery property is one. This authority extends to retaining lawyers to engage in litigation regarding corporate assets. However, since all of the attorneys' submissions for each of the factions of the Brooklyn Congregation as well as the other parties have been considered in deciding the various issues herein, the motion and cross-motion to

declare proper counsel for the defendant Brooklyn Corporation are denied as moot.

Preliminary Injunction

The main action seeks to establish title to property in Orange County used as a cemetery by both of the congregations in Orange County. The property is significant to all parties because the founder of the organizations involved in this suit is interred at this cemetery. Not only are members of the congregation buried at this location but events are held there to commemorate the founder of the religious organization. The preliminary injunction sought here specifically relates to the peaceful use of the cemetery property but in order to succeed in the applications the moving party must establish a great many facts. In this regard, the motion for a preliminary injunction will be considered an application for summary judgment. The parties have been given notice of the treatment of this application as a summary judgment application and were given an opportunity to submit papers as a result.

The party seeking a preliminary injunction must establish (1) a likelihood of success on the merits; (2) the Plaintiff will suffer irreparable harm in the absence of an injunction; and (3) a balancing of the equities favors the granting of an injunction [*Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *Doe v. Axelrod*, 73 N.Y.2d 748 (1988); *Olabi v. Mayfield*, 8 AD3d 459 (2nd Dept.2004)]. A preliminary injunction may be issued to preserve the status quo pending a full hearing on the merits of the action [*Olympic Tower Condominium v. Cocozello*, 306 A.D.2d 159 (1st Dept.2003); *Livas v. Mitzner*, 303 A.D.2d 381 (2nd Dept.2003)]. The injunction sought in this matter is to maintain the status quo between the parties as it existed prior to the submission of the Perlstéin letter which threatens to restrict access to the cemetery.

*12 The parties have been permitted to submit legal argument and to present evidence, virtually without limitation. Accordingly, the motion for a preliminary injunction will be treated as a motion for summary judgment. Treatment of the motion in this manner will permit the court to deal with the issues presented in the most efficient manner while reducing the possibility of gamesmanship [see, *Farrell v. Kiernan* 213 A.D.2d 373 (2nd Dept 1995), citing *Rich v. Lefkovits*, 56 N.Y.2d 276 (1982)]. The continuation of this ac-

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tion for the purpose of presenting additional facts is unnecessary as the court has given all parties all possible leeway to present evidence supporting their respective positions, even long after established submission dates have passed.

To obtain summary judgment, the moving party must meet a heavy burden of showing entitlement to the judgment as a matter of law and it must tender sufficient evidence to eliminate any material issues of fact (see *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Once shown, the opposing party must come forward with facts sufficient to show a triable issue is present (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Each showing must be made by producing evidentiary proof in admissible form (*Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]). Here, in light of the evidence presented, the appropriate analysis may be conducted to permit this court to consider this application as a motion for summary judgment.

In order to both meet and refute the necessary showings for a preliminary injunction in this matter, the parties have supplied sufficient proof of an evidentiary character which would permit the court to consider this application as a motion for summary judgment. The issues submitted include affirmations and affidavits directed to the authority of Berl Friedman to represent the Brooklyn Congregation when he acted as the signatory who transferred the cemetery property from the Brooklyn Congregation to both the Brooklyn Congregation and the Kiryas Joel Congregation in 2001. The determination of the authority of Berl Friedman to represent the Brooklyn Congregation in the transfer of the real property at issue is necessary to the declaration of ownership of this property [see, *St. Andrey Bulgarian Eastern Orthodox Cathedral Church, Inc., et al., v. Joseph Bosakov et al.*, 272 A.D.2d 55 (1st Dept 2000)]. The Court has herein determined this issue in favor of Berl Friedman.

Accordingly, there is no basis to invalidate the transfer of the property in question to the Brooklyn Congregation and the Kiryas Joel Congregation in 2001. This determination is made using "neutral principles of law" and the court need not involve itself in the religious matters of any of the congregations involved in this lawsuit in order to resolve this dispute [see, *Trustees of the Diocese of Albany v. Trinity*

Episcopal Church of Gloversville 250 A.D.2d 282 (3rd Dept 1999)].

*13 Finally, there is no question of fact that Mr. Friedman could sit as president of the religious corporation and execute the subject deed in such capacity at the time of the disputed transfer.

The remaining issue is the failure of the transferor of the property to give notice to the Attorney General of the State of New York and obtain the approval of the Supreme Court prior to the transfer in accordance with the Not-For-Profit Corporation Law and the Religious Corporation Law [*Not-For-Profit Corporation Law § 511*, Religious Corporation Law §§ 12(8),(9)]. Under the circumstances presented, the transfer of the property is approved [Religious Corporation Law §§ 12(8), (9)]. There is no question that the cemetery has been jointly operated since its beginning without major incident. It has been jointly owned since 2001 and prior to that the ownership has passed between each congregation without effect upon the operation of the cemetery for the mutual benefit of each of the two congregations. There is no issue of wasting or diminishing the assets of either religious corporation under the circumstances presented.

Accordingly, the application for *nunc pro tunc* approval of the transfer of an undivided one-half interest in the property is granted and all subsequent declarations filed which affect title to this property are hereby vacated. The plaintiff Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. is directed to file a judgement reflecting this decision with the court which will thereafter be filed with the Orange County Clerk.

Remaining Claims, Cross-Claims and Counter Claims

The remaining claims and cross-claims are denied. As a result of the foregoing, there exists no question of fact as to the management of the cemetery or the orderly manner in which it is operated. The Perlstein letter, dated June 30, 2005, the document which gave rise to the instant controversy, has been alleged to be a forgery. As it turns out, the letter of Mr. Perlstein which was received by Moshe Scher, President and a member of the Board of Trustees of the Kiryas Joel congregation was not an original at all. Instead, it was

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a photocopy and did not have an original signature on it. Neither side in this litigation claims to have authorized or to have made this letter. ^{FN2}

FN2. Curiously, the signature of the Grand Rebbe on the ratification of Mr. Kahan in the Yiddish language newspaper, *Der Yid*, is also a photocopy or facsimile of some type. It is argued by the defendants that this signature be accepted by the Court as if it were an original.

Therefore, there is no real issue created by this letter despite the fact that it caused fear about the future conduct of the parties which resulted in the commencement of this application. Whether or not the letter is a forgery is irrelevant, however. In light of the findings herein, the election of Mr. Perlstein and the others allegedly elected with him is a nullity and no authority over the assets of the corporation is conferred thereby [see *Matter of Venigalla v. Alagappan*, 307 A.D.2d 1041, 1042 (2nd Dept 2003)]. Therefore, they are in no position to interfere with the use or management of the cemetery by the titled owners. Therefore, there is no basis to believe that further orders are necessary. Certainly, there is no necessity to impose a constructive trust on the subject property or to enjoin the defendants from interfering with burials.

*14 In light of the resolution of the issue of title of the property at issue, the claims against UTA and UTS are dropped from this action pursuant to CPLR 1003. It is not clear that this action was properly joined in the first instance as the action against defendants UTS and UTA involve an allegation of the possibility of a future impediment to the use of an easement on a completely separate piece of real property as access to the cemetery property. Access to the property has not been impeded at this time and in light of the resolution of the main action, there is no reason to continue this action or to decide any issues with respect to the representation of UTS or UTA. In addition, the counterclaims of UTS and UTA seek to have certain alleged transfers of property unrelated to any issue in this action invalidated. These claims sound the same theme of lack of authority based on the existence of two competing boards. The Court need not address these issues and declines to do so. The parties are free to litigate the issues raised by way of a separate action. The action is

dropped without prejudice to any of the parties.

The foregoing constitutes the decision and order of the Court.

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