Civil Court of the City of New York
County of Kings

Index Number LT-106105-2011/KI

Part 52

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1, 2, 3, 4, 5, 6, 13, 14, 15
Order to Show Cause and Affidavits Annexed...	10, 11, 12
Answering Affidavits.....	4, 5, 6, 7, 8, 9, 13, 14, 15, 19, 20, 21
Replying Affidavits.....	7, 8, 9, 16, 17, 18, 19, 20, 21
Exhibits.....	
Other.....	

AGUDAS CHASIDEI CHABAD OF THE UNITED STATES,

Petitioner-Licensor,

against

CONGREGATION LUBAVITCH, INC. ("CLI"), ZALMAN LIPSKIER, INDIVIDUALLY, AND IN HIS CAPACITY AS GABBAI, IN HIS CAPACITY AS TRUSTEE OF CLI ,AND IN HIS REPRESENTATIVE CAPACITY EQUIVALENT TO PRESIDENT OF CONGREGATION LUBAVITCH OF AGUDAS CHASIDEI CHABAD, AVROHOM HOLTZBERG, INDIVIDUALLY AND IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, MENACHEM GERLITZKY, INDIVIDUALLY, AND IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, YOSEF LOSH, INDIVIDUALLY AND, IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, SHOLOM BER KIEVMAN, INDIVIDUALLY, AS AN EMPLOYEE OF CLI AND AS AN EMPLOYEE OF CONGREGATION LUBAVITCH, PURPORTEDLY D/B/A LUBAVITCH WORLD HEADQUARTERS, CONGREGATION LUBAVITCH OF AGUDAS CHASIDEI CHABAD, AND CONGREGATION LUBAVITCH, PURPORTEDLY D/B/A LUBAVITCH WORLD HEADQUARTERS,

Respondents-Licensees.

Index Number LT-106106-2011/KI

MERKOS L'INYONEI CHINUCH,

Petitioner-Licensor,

against

CONGREGATION LUBAVITCH, INC. ("CLI"), ZALMAN LIPSKIER, INDIVIDUALLY, AND IN HIS CAPACITY AS GABBAI, IN HIS CAPACITY AS TRUSTEE OF CLI ,AND IN HIS REPRESENTATIVE CAPACITY EQUIVALENT TO PRESIDENT OF CONGREGATION LUBAVITCH OF AGUDAS CHASIDEI CHABAD, AVROHOM HOLTZBERG, INDIVIDUALLY AND IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, MENACHEM GERLITZKY, INDIVIDUALLY, AND IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, YOSEF LOSH, INDIVIDUALLY AND, IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, SHOLOM BER KIEVMAN, INDIVIDUALLY, AS AN EMPLOYEE OF CLI AND AS AN EMPLOYEE OF CONGREGATION LUBAVITCH, PURPORTEDLY D/B/A LUBAVITCH WORLD HEADQUARTERS, CONGREGATION LUBAVITCH OF AGUDAS CHASIDEI CHABAD, AND CONGREGATION LUBAVITCH, PURPORTEDLY D/B/A LUBAVITCH WORLD HEADQUARTERS,

Respondents-Licensees.

Index Number LT-106107-2011/KI

MERKOS L'INYONEI CHINUCH,

Petitioner-Licensor,

against

CONGREGATION LUBAVITCH, INC. ("CLI"), ZALMAN LIPSKIER, INDIVIDUALLY, AND IN HIS CAPACITY AS GABBAI, IN HIS CAPACITY AS TRUSTEE OF CLI ,AND IN HIS REPRESENTATIVE CAPACITY EQUIVALENT TO PRESIDENT OF CONGREGATION LUBAVITCH OF AGUDAS CHASIDEI CHABAD, AVROHOM HOLTZBERG, INDIVIDUALLY AND IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, MENACHEM GERLITZKY, INDIVIDUALLY, AND IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, YOSEF LOSH, INDIVIDUALLY AND, IN HIS CAPACITY AS GABBAI, AND IN HIS CAPACITY AS TRUSTEE OF CLI, SHOLOM BER KIEVMAN, INDIVIDUALLY, AS AN EMPLOYEE OF CLI AND AS AN EMPLOYEE OF CONGREGATION LUBAVITCH, PURPORTEDLY D/B/A LUBAVITCH WORLD HEADQUARTERS, CONGREGATION LUBAVITCH OF AGUDAS CHASIDEI CHABAD, AND CONGREGATION LUBAVITCH, PURPORTEDLY D/B/A LUBAVITCH WORLD HEADQUARTERS, 302-304 KINGSTON AVENUE, SOUTHEAST ROOM OF THE SECOND FLOOR, AS MORE SPECIFICALLY DELINEATED BY THE NON-CROSS-HATCHED AREA ON THE DIAGRAM ANNEXED HERETO AS EXHIBIT "1", BROOKLYN, NEW YORK 11213 ("THE PREMISES")

Respondents-Licensees.

Petitioners, Agudas Chasidei Chabad of the United States ("Agudas") and Merkos L'Inyonei Chinuch ("Merkos"), commenced the instant holdover proceedings by service of 10 Day Notices to Quit and subsequent service of Notices of Petition and Petitions. In their petitions, petitioners seek to recover possession of three commercial premises, 770 Eastern Parkway ("770") (Index No. 106105KLT2011), 784-788 Eastern Parkway ("784-788") (Index No. 106106KLT2011) and 302-304 Kingston Avenue, Southeast Room of the Second Floor ("302-304 Kingston") (Index No. 106107KLT2011). Petitioner Agudas claims that it is a religious corporation and the owner of the 770 premises. Petitioner Merkos L'Inyonei Chinuch

("Merkos")[1] claims it is a religious corporation and the owner of the premises 784-788 and 302-304 Kingston. Petitioners allege in their petitions that respondents are either licensees or squatters who holdover and continue in possession without the permission of the owners.

Respondents (exclusive of respondent Losh) move to consolidate and to dismiss the actions pursuant to CPLR 3211 (a) on the following grounds: 1) dismissing the proceedings under index no. 106105KLT2011 (related to premises 770) and index no. 106106KLT2011 (related to premises 784-788) as moot as against respondent Congregation Lubavitch Inc. (CLI) based upon a prior Supreme Court ejectment order; 2) dismissing the proceeding under index no. 106107KLT2011 (302-304 Kingston) on res judicata grounds; 3) dismissing all three proceedings as against all other respondents on the grounds that the dispute between the parties as to the occupancy and control of the premises is an internal religious governance dispute and not justiciable in the secular courts. Petitioners oppose the motions, except to the extent that they join respondents in their motions for consolidation. Petitioners also cross-move for summary judgment on the grounds that this is a simple property dispute and that petitioners, as the owners, are entitled to a judgment of possession as against respondents as either licensees or squatters.

Respondent Losh has failed to appear or submit an answer in this proceeding.

Petitioners subsequently moved by orders to show cause seeking to have the respondents' motions to dismiss considered as motions for summary judgment.

Background

These proceedings follow prior decisions from Kings County Supreme Court and three

---

[1] According to the copy of the deed submitted in support of the petitioners' cross-motion, the title owner to 784-788 and 302-34 Kingston is Merkos L'inyonei Chinuch Inc. Petitioner attaches a certificate of merger indicating that the non-profit corporation, Merkos L'inyonei Chinuch Inc., merged into the religious corporation Merkos L'inyonei Chinuch prior to the commencement of this action.

decisions from the Appellate Division, Second Department (referred to herein as *Merkos I, II* and *III*) which addressed, to some extent, the relationship between petitioners and respondents. In *Merkos L'Inyonei Chinuch, Inc. and Agudas Chasidei Chabad of United States v Sharf, et al.*, (59 AD3d 403 [2d Dept 2009]) ("*Merkos I*"), the Appellate Division described the background of the relationship between the parties and the prior litigation as follows:

> "Agudas Chassidei Chabad (hereinafter Agudas), a religious corporation, and the plaintiff Merkos L'Inyonei Chinuch, Inc. (hereinafter Merkos), a not-for-profit corporation, hold separate title to adjoining parcels of real property located in Brooklyn at 770 Eastern Parkway and 784-788 Eastern Parkway, respectively. Since 1940, 770 Eastern Parkway has served as the headquarters for the movement of Lubavitch Chasidism, a branch of the greater Chasidic movement of Orthodox Judaism. The properties house the central Lubavitch Synagogue, in which the congregation, known formally as Congregation Lubavitch - Agudas Chassidei Chabad, worships. The synagogue is managed by individuals known as the 'Gabboim,' or trustees, who were originally appointed by the Grand Rebbe and are now elected by the congregation. Neither the Gabboim, individually, nor the congregation itself are parties to this action.
>
> In 1994 Merkos caused a plaque to be affixed to the wall of the building at 784-788 Eastern Parkway in honor of the Grand Rebbe, Menachem Mendel Schneerson. The plaque contained an inscription which was offensive to some members of the Lubavitch community for religious reasons. On November 5, 2004, the individual defendants, Mendel Sharf, Yaacov Thaler, and Bentzion Frishman, who are not parties to this appeal, allegedly pried the plaque off the wall of the building during the night. The plaintiffs commenced this action, among other things to permanently enjoin these individuals from committing further acts of vandalism.
>
> Congregation Lubavitch, Inc. (hereinafter CLI), a not-for-profit corporation that was formed in 1996 by the Gabboim, moved for leave to intervene in the action. CLI's motion was granted and the plaintiffs, with the permission of the Supreme Court, served an amended complaint adding CLI as a defendant and seeking, inter alia, a declaration of their rights with respect to the properties, as well as a permanent injunction against CLI to prevent it from interfering with the plaintiffs' use and enjoyment of the properties."

(59 AD3d 403, 405-406 [2d Dept 2009])

In *Merkos I*, the court determined that the Supreme Court had properly denied CLI's motion to dismiss that dispute as non-justiciable. The court held that "[c]ivil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis of their resolution" (59 AD3d 403, 406, *citing Congregation Yetev Lev d'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]). In this case, the

court held "the issue of title to property and the right of possession incident thereto may be decided as among Merkos, Agudas and CLI based upon the deeds to the properties, which vest title, and concomitant right of possession" (59 AD3d 403, 406). The court also held that the Supreme Court "correctly granted plaintiff's cross-motion for summary judgment on their cause of action seeking a declaration that Agudas had all right, title, and interest in the property located at 770 Eastern Parkway, that Merkos had all right, title and interest in the property located at 784-788 Eastern Parkway, and that CLI had no such right, title, or interest in the premises" (*id.* at 407). The court held that CLI's argument that the plaintiff's held properties in trust was properly rejected by the Supreme Court because it was not established by competent evidence (*id.* at 408). However, the court made clear that, "[w]hether such a trust exists in favor of the congregation is not before us, as the congregation is not a party to this action" (*id.*).

A trial was conducted in Kings County Supreme Court with respect to Agudas and Merkos' ejectment claims against CLI. The court held that "[i]n regards to the elements plaintiffs must prove for ejectment, there is no dispute that the synagogue occupies real property at 770 and 784-788 Eastern Parkway and Merkos and Agudas are the owners of those properties, and that CLI has no right, title or interest in the synagogue space" (*Merkos L'Inyonei Chinuch, Inc. et al v Sharf et al.*, 18 Misc 3d 1111[A], *2 [Sup Ct, Kings County 2007]). By order of December 27, 2007 a judgment of possession was awarded in favor of Agudas and Merkos and against CLI "which is that congregation presently occupying a portion of 770 and 784-788 Eastern Parkway, Brooklyn, New York, purporting to be Congregation Lubavitch, whose trustees (gabboim) included, as of June 13, 1996, Zalman Lipskier, Yehuda Blesofsky, Menachem Gerlitsky, and Yosef Losh" (*Merkos L'Inyonei Chinuch, Inc., et al v Sharf, et al.*, 18 Misc 3d

1111[A], *5 [Sup Ct, Kings County 2007]). On appeal, however, the Appellate Division modified the judgment "to delete reference to the congregation and the Gabboim, since neither is a party to this action" (*Merkos L'Inyonei Chinuch, Inc. and Agudas Chasidei Chabad of United States v Sharf, et al.*, 59 AD3d 408, 410-411 [2d Dept 2009] ["*Merkos II*"]).

Agudas and Merkos subsequently moved to amend the caption and the complaint and the December 27, 2007 "judgment of ejectment", *nunc pro tunc*, to include the Gabboim and the congregation. This motion was initially granted by the Supreme Court but modified by the Appellate Division to delete the Gabboim and the congregation on the grounds that in making the amendments, "the Supreme Court improperly made a change in the pleadings and the judgment that affected substantial rights of the congregation and the Gabboim" (*Merkos L'Inyonei Chinuch, Inc. and Agudas Chasidei Chabad of United States v Sharf, et al.*, 84 AD3d 1185, 1187 [2d Dept 2011] ["*Merkos III*"]).

In the instant action, petitioners seek to recover possession from CLI, which they claim remains in possession of all three subject premises, as well as from the Gabboim and the congregation, specifically: Zalman Lipskier, individually and in his capacity as Gabbai, in his capacity as trustee of CLI and, in his representative capacity equivalent to president of Congregation Lubavitch of Agudas Chabad, Avrohom Holtzberg, individually and, in his capacity as Gabbai, and in his capacity as Trustee of CLI, Menachem Gerlitzky, individually and, in his capacity as Gabbai, and in his capacity as Trustee of CLI, Yosef Losh, individually and, in his capacity as Gabbai, and in his capacity as Trustee of CLI, Sholom Ber Kievman, individually, as an employee of CLI and as an employee of Congregation Lubavitch, purportedly d/b/a Lubavitch World Headquarters, Congregation Lubavitch of Agudas Chasidei Chabad, and

Congregation Lubavitch, purportedly d/b/a Lubavitch World Headquarters.

Consolidation

Both sides agree that consolidation of the motions and the actions for joint disposition is appropriate in this case. CPLR 602 provides that "when actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Here, there are three separate (although related) premises involved in the dispute and there has been prior litigation with respect to two of the premises (770 and 784-788). The same entity does not own all three premises. Furthermore, respondents raise different defenses with respect to certain of the premises. Accordingly, while there are doubtless common questions of law and fact there also appears to be at least the potential for divergent issues. Accordingly, the court declines, at this point, to consolidate the matters under a single index number. However, all of the motions are joined for the purpose of this decision and the actions are joined for subsequent trial.

Petitioners' Orders to Show Cause

Petitioners move by order to show cause seeking to have respondents' motions to dismiss pursuant to CPLR 3211 (a) treated as motions for summary judgment pursuant to CPLR 3211 (c) and, upon such consideration, granting summary judgment in favor of petitioners. Petitioners argue that these actions involve only issues of law which are fully appreciated by both sides and that, therefore, the court may properly treat respondents' motions as ones for summary judgment. Respondents oppose the motions on the ground that they have additional defenses beyond those set forth in their motions to dismiss and that they are statutorily entitled to put in an answer.

Respondents also argue that the petitioners' orders to show cause are unnecessary and frivolous and that petitioners should be sanctioned.

CPLR 3211 (c) provides

> "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion."

Courts may also treat a motion under CPLR 3211 (a) or (b) as a motion for summary judgment without notice to the parties under circumstances where 1) "the action involves no issues of fact, but only issues of law fully appreciated by both sides" (*Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]), or 2) "where the request for CPLR 3211 (c) is specifically made by both sides", (*id.*) or 3) "when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course" (*id.*).

It is clear to the court that there are factual issues in dispute and that the determination of these matters is not limited to issues of law fully appreciated by both sides. Accordingly, the court declines to treat respondents' pre-answer motions to dismiss as motions for summary judgment.

Respondents' cross-motions for sanctions are likewise denied as petitioners have not previously moved for the same relief, the motion is not frivolous and the court does not deem sanctions appropriate under the circumstances (*see* 22 NY ADC 130-1.1).

Respondents' Motions to Dismiss

First, respondents move to dismiss the proceedings against respondent CLI with respect to 770 and 784-788 on the grounds that the actions are moot as there is a prior Supreme Court

judgment of possession in favor of Agudas and Merkos against CLI with respect to those premises. Furthermore, respondents argue, CLI has complied with the Supreme Court judgment of ejectment and is no longer in possession of 770 and 784-788. Thus, respondents argue, the instant actions pertaining to 770 and 784-788 should be dismissed against CLI. In support of the motion respondents submit the affidavits of Gabbais Zalman Lispkier, Yosef Baruch Spielman, Uri Niasoff and Yaakov Spritzer and CLI bookkeeper Aaron Vogel. The court notes that these affidavits are all dated January 2010 and were prepared in opposition to a motion for civil contempt for CLI's alleged failure to comply with the Supreme Court judgment. The affidavits state that CLI has no presence at 770 and 784-788 and has complied with the Supreme Court order. Petitioners oppose the motions and submit the affidavit of Rabbi Avraham Shemtov, chairman of the board of petitioner Agudas and Rabbi Yehuda Krinsky chairman of the board of petitioner Merkos who attest that defendants remain in possession.

First, the existence of the Supreme Court judgment in the prior action would not necessarily preclude this subsequent holdover proceeding if, in fact, CLI continues to occupy or is currently occupying the premises at 770 and 784-788. Furthermore as the parties submit conflicting affidavits on the question of whether CLI in fact remains in possession at 770 and 784-788, respondents have failed to meet their burden on their motions to dismiss.

Second, respondents move to dismiss the action with respect to 302-304 Kingston (Index No. 106107KLT2011) on res judicata grounds. Respondents contend that respondent CLI maintains its books and records in the office of the Gabboim, located at 302-304 Kingston. Respondents argue that petitioners "had every opportunity and reason to raise and litigate their right (if any) to eject CLI from 302-304 Kingston in the Prior [Supreme Court ejectment] Action,

but did not do so" (respondents' affirmation in support at ¶21). Respondents argue that the doctrine of res judicata bars claims previously raised as well as claims which could have been raised in the prior action and, therefore, petitioners are barred from bringing the instant action against CLI with respect to 302-304 Kingston.

CPLR 3211 (a) (5) provides that a party may move for judgment dismissing one or more causes of action on the grounds of collateral estoppel or res judicata (CPLR 3211 [a] [5]). Pursuant to the doctrine of res judicata, "a valid final judgment, or a stipulation of settlement withdrawing a cause of action 'with prejudice' bars future actions between the same parties on the same cause of action" (*Chiantella v Vishnick*, 84 AD3d 797, 798 [2d Dept 2011] [internal citations omitted]). New York uses the "transactional analysis approach" to determining res judicata issues (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Thus, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*id.*).

In the prior action petitioners sought to eject CLI from the premises at 770 and 784-788. 302-304 Kingston is a separate property with a separate deed. While the underlying issues may be similar, petitioner was not required to seek to recover possession of that premises in the prior action simply because it was seeking to recover possession of 770 and 784-788. Accordingly, that branch of respondents' motion to dismiss is likewise denied.

Third, respondents move to dismiss on the grounds that the respondents congregation and the Gabboim are not "intruders" or "squatters" or "licensees" whose license has been revoked by petitioners. Rather, respondents contend that the congregation ("Agudas Chasidei Chabad") is

the congregational arm of petitioner Agudas. Respondents argue that as between petitioner Agudas and the religious congregation, "this is nothing more than a dispute over the internal governance of Agudas and the Congregation, deeply rooted in a religious doctrinal dispute between two factions of Chabad Lubavitch over the theological status of Grand Rabbi Menachem Mendel Schneerson" (respondents' affirmation in support at 10). Petitioners in opposition contend that this is a simple property dispute which can be resolved by the application of neutral principles of law.

CPLR 3211 (a) (2) provides that a party may move for judgment dismissing one or more causes of action on the grounds of lack of subject matter jurisdiction. "[A] court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when attention is called to the facts, refuse to proceed further and dismiss the action" (*Financial Industry Regulatory Authority, Inc. v Fiero*, 10 NY3d 12, 17 [2008], *quoting Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]).

Petitioners commenced this proceeding alternatively under RPAPL 713 (7) and RPAPL 713 (3) seeking to recover possession of the premises from respondents on the grounds that they are either licensees whose license has been revoked or squatters. RPAPL 713 provides that

> "a special proceeding may be maintained pursuant to RPAPL article 7 after a ten-day notice to quit is served upon the respondents in the manner prescribed in section 735, upon the following grounds:[...]
> 3. He or the person to whom he has succeeded has intruded into or squatted upon the property without the permission of the person entitled to possession and the occupancy has continued without permission or permission has been revoked and notice of the revocation given to the person to be removed[...]
> 7. He is a licensee of the person entitled to possession of the property at the time of the license, and (a) his license has expired, or (b) his license has been revoked by the licensor, or (c) the licensor is no longer entitled to possession of the property; provided however, that a mortgagee or vendee in possession shall not be deemed to be a licensee

within the meaning of this subdivision."

A squatter has been defined by case law as "one who settles upon the land of another without any legal authority " (*Williams v Alt*, 226 NY 283, 290 [1919]). In contrast a licensee has been granted "a revocable, non-assignable privilege to do one or more acts upon the land of the licensor, without granting any possessory interest therein" (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Here, although the facts regarding the relationship between the petitioners and respondents are disputed, respondents fail to produce sufficient evidence in support of their motions to establish, at this point, that they have any greater legal rights to possession of the property than that of licensees. Accordingly, without further documentary and testimonial evidence the court declines to dismiss the matter at this time on the grounds that the legal relationship between the parties does not form the basis for a summary proceeding. It does appear to the court, however, that a dispute of this nature more properly belongs in the Supreme Court which has the power to make declarations regarding the respective rights of the parties and possesses equitable powers beyond those of this court.

Respondents argue that these proceedings should be dismissed as against the remaining respondents (exclusive of CLI and respondent Losh) on the grounds that this controversy is a dispute over religious doctrine and, therefore the matter is not justiciable in secular courts. In the prior litigation the Supreme Court determined that as between Merkos, Agudas and CLI, the property dispute could be determined based upon neutral principles of law. However, the issue was not decided in the prior litigation as between Merkos, Agudas and the congregation or the Gabboim. Thus, the court must address the question of whether the instant holdover

proceedings, commenced by religious corporations and apparent deed holders against, among others, a faction of a religious congregation practicing on the subject premises should be dismissed as non-justiciable because their adjudication would violate the First Amendment.

The Constitution of the United States prohibits courts from deciding "controversies over religious doctrine and practice" (*Presbyterian Church v Mary Elizabeth Blue Hull Meml. Presbyterian Church*, 393 US 440, 449 [1978]). "Such rulings violate 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" (*First Presbyt. Church of Schenectady v United Presbyt.Church in U.S. of Am.*, 62 NY2d 110, 116-117 [1984]). Thus, "religious bodies are to be left free to decide church matters for themselves, uninhibited by State interference," (*id.* at 116-117) except for matters that can be resolved through the application of "neutral principles of law" (*id.*).

The "neutral principles of law" analysis "contemplates the application of objective, well-established principles of secular law to the dispute [citation omitted], thus permitting judicial involvement to the extent that it can be accomplished in purely secular terms" (*Avitzur v Avitzur*, 58 NY2d 108, 115 [1983]; *see Jones v Wolf*, 443 US 595 [1979]). In *Jones v Wolf*, (443 US 595, 602 [1979]) the United States Supreme Court explained that the State "has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." The "neutral principles of law" approach "relies exclusively on the objective, well-established concepts of trust and property law familiar to lawyers and judges ... [and] promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice" (*id.* at 603).

This approach "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 the church property" (*Episcopal Diocese of Rochester v Harnish*, 11 NY3d 340, 350 [2008] [internal quotation marks and citation omitted]).

In support of their argument that this is a non-justiciable religious dispute, respondents rely primarily upon two cases, *Congregation Yetev Lev D'Satmar, v Kahan*, (31 AD3d 541 [2d Dept 2006]) and *Malankara Archdioces of Syrian Orthodox Church in North America et al. v Malankara Jocobite Center of North America Inc.*, (28 Misc 3d 1221[A] [Sup Ct, Westchester County 2004]). In *Kahan*,(31 AD3d 541) the issue was the respective validity of competing elections to the Congregation's corporate board of directors. The court concluded that resolution of the parties' dispute "would necessarily involve impermissible inquiries into religious doctrine and the Congregations's membership requirements" (31 AD3d 541, 543).

In *Malankara*, (28 Misc 3d 1221[A]) the deed to the church property was in the name of the religious corporation which, pursuant to Religious Corporation § 5, had custody and control of the temporalities and property, while the unincorporated religious body conducted the services of worship and other religious activities in the church. A schism developed within the congregation over the appointment of an archbishop, with each side recognizing a different archbishop. "The gravamen of plaintiff's action [was] for a declaration of an implied trust for the benefit of those members of a divided congregation who adhere to the principles of the founders of the religion" (28 Misc 3d 1221[A], *2). The court looked to Religious Corporations Law § 5 as well as the religious corporation's certificate of incorporation and bylaws. However, the court

determined that "an implied trust for the benefit of those members of a divided congregation who adhere to the principles of the founders of the religion must be rejected, because it leaves the court in the position of determining what the original principles of the member of the religious corporation were" those espoused by one religious leader or those espoused by another (*id.*). Accordingly, the court concluded that the matter was a non-justiciable religious dispute.

In opposition, petitioners rely upon *Jones v Wolf*, (443 US 595 [1979]) for the principle that religious property disputes may be adjudicated by secular courts if such determination can be made through the application of "neutral principles of law." Petitioners also rely upon *Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, (250 AD2d 282 [3d Dept 1999]). In *Albany* a local Episcopal Church withdrew from the national church and the national church sought, among other things, to impress an express and constructive trust on the real and personal property controlled by the local church and an order for the possession of the subject property. The court looked to the statutes, bylaws and certificates of incorporation and church constitution and determined that the matter was justiciable because "although the controversy at hand was borne out of a schism between church officials..., the resolution of this property dispute can still be achieved through neutral principles of law without resort to judicial intrusion into matters of religious doctrine" (250 AD2d 282, 286 [3d Dept 1999]). In granting the national church's motion for summary judgment, the court determined that while the subject property was deeded to the local church, the local church was incorporated in accordance with the canons and constitution of the national church pursuant to Religious Corporation Law Art 3 which established that the church property was to be held solely for the over-all mission and benefit of the national church and its dioceses (*see id.*). The court also found that an amendment to the

national canons expressly provided that all real property held by a local parish was held in trust for the national church (*see id.*).

In this case it appears that the instant proceedings originate from a dispute within the Lubavitch community/congregation over the theological status of Grand Rabbi Menachem Mendel Schneerson. However, while this brings the matter under the scrutiny of the First Amendment, it does not necessarily render the matter non-justiciable if resolution can be achieved through the application of neutral principles of law. In determining whether neutral principles of law can be applied, courts look to the deeds, by-laws, certificates of incorporation, other corporation governance documents and relevant state statutes. Here, respondents fail to attach any of the relevant documentation to its moving papers. Respondents do not attach the deeds, petitioners' bylaws, or the certificates of incorporation or any other documents related to corporate governance and the administration of the subject property to their original motion papers.

Respondents do attach what they purport to be the bylaws of petitioner Agudas to their reply papers, however, petitioners contend that the bylaws are not those of petitioner Agudas but those of the predecessor corporation "Agudas Chasidei Chabad of the United States and Canada." However, petitioners do not attach a copy of the "correct" bylaws or copies of their own certificates of incorporation. Thus, respondents fail to establish conclusively that this court could not resolve these issues by applying neutral principles of law based upon the relevant documents and/or testimony related to ownership and corporate governance. At this stage of the proceedings, and without access to the facts regarding the structure and governance of the parties it is not possible to conclude whether determination of this matter will necessarily involve an

impermissible inquiry into religious doctrine. Accordingly, respondents' motions are denied.

Petitioners Cross-Motion for Summary Judgment

Petitioners' cross-motions for summary judgment are denied as premature. CPLR 3212 (a) provides that "any party may move for summary judgment in any action, *after issue has been joined*" (CPLR 3212[a]) (emphasis added). "A motion for summary judgment may not be made before issue is joined (CPLR 3212 [a]) and the requirement is strictly adhered to" (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]; *Grossman v Laurence Handprints-N.J.*, 90 AD2d 95 [2d Dept 1982] [prior to joinder of issue, courts are "powerless to grant summary judgment pursuant to CPLR 3212"]; *Chakir v Dime Sav. Bank of N.Y.*, 234 AD2d 577 [2d Dept 1996]; Siegel N.Y.Prac. § 279). "The standards governing motions for summary judgment are applicable to special proceedings generally of which the summary proceeding to recover possession of real property is a species" (*Brusco v Braun*, 199 AD2d 27 [1st Dept 1993]). "The court is required to make a summary determination 'upon *the pleadings*, papers and admissions' (CPLR 409 [b])" (*id.* [*emphasis added*]).

Here, issue has not been joined and therefore, petitioners' motions must be denied as premature. However, even if petitioners' motions were not premature, the motions must be denied as factual issues remain for trial. First, the court notes that the affidavits of Rabbis Shemtov and Krinsky submitted in support of its cross-motion and in opposition to respondents' motion to dismiss are largely conclusory alleging only that the properties are owned by the petitioners and that the matter is a simple property dispute. The affidavits fail to substantively address respondents' arguments regarding non-justiciability or provide any information regarding petitioners' corporate governance. Furthermore, as discussed above, while petitioners challenge

the copy of the bylaws submitted by respondents as the "incorrect" bylaws, petitioners do not attach a copy of the "correct" bylaws or copies of their certificates of incorporation. In the court's opinion, this information is necessary to determine the justiciability of this dispute. Moreover, certain copies of the deeds submitted by petitioners in support of their motions are illegible.

Respondents argue, in opposition to petitioners' cross-motions, that they have additional defenses to the action which they intend to raise in their answers in the event their pre-answer motions are denied. Specifically, respondents argue that, pursuant to Religious Corporation Law § 5, the trustees of Agudas and Merkos hold the properties in trust in accordance with the "discipline, rules and usages" of Lubavitch Hasidism. Respondents contend that the "discipline, rules and usages" of Lubavitch Hasidism "require the Synagogue to be maintained as the main house of worship for Lubavitch Hasids, as it has since 1940, under the control and management of the Gabboim" (Lipskier aff in support of reply at 19). Respondents attach to their opposition papers what they purport to be a translated copy of the bylaws of "Agudas Chasidei Chabad of the United States and Canada" which provide for the creation of a "special committee" for 'the maintenance of the [good] condition of our life house and to strive to appoint special treasurers.'" Respondents contend that the Gabboim have fulfilled that role and that this action, seeking to evict the Gabboim and the congregation in fact intends to impact the governance of the Lubavitch Chasidic movement.

Respondents also identify themselves as "members" of the corporation Agudas. Petitioners deny this assertion but present no certificates of incorporation or other corporate documentation establishing the corporate structure. Additionally, respondents contend that

Agudas and Merkos hold the property pursuant to an implied charitable trust for Lubavitch Hasidism. While the respondents trust arguments were rejected with respect to CLI in the prior proceeding, they were not addressed with respect to respondents congregation and the Gabboim.

In part, because of the parties' failure to include complete and correct copies of the parties' governing documents in the various motion papers, significant questions of fact remain regarding petitioners' corporate structure and respondents' congregation. There are also significant factual issues to be resolved regarding the Gabboim's relationship to the petitioner religious corporations, both as individual congregants, and in what respondents contend is their capacity as appointed and elected leaders within the governance structure of the Lubavitch movement. In that context, one might address the Gabboim's ability and authority to function as gabboim if dispossessed from the movement's headquarters. These factual determinations may impact on the ultimate justiciability of this matter, particularly as to the individual gabboim.

Conclusion

Petitioners' orders to show cause and respondents' cross-motions for sanctions are granted solely to the extent that the motions are joined for resolution with the respondents' pending pre-answer motions and petitioner's pending cross-motions for summary judgment. Respondents' pre-answer motions to consolidate and to dismiss and petitioner's cross-motions to consolidate and for summary judgment are granted solely to the extent that the actions are joined for the purposes of this decision and for joint trial. The motions are denied in all other respects. Respondents are directed to serve and file answers on or before February 1, 2013.

In light of the current Supreme Court stay of trial in this matter, a trial date is held in abeyance pending that declaratory judgment action. Questions of discovery in this action are,

likewise, deferred pending further guidance in the Supreme Court action.

This constitutes the decision and order of the court.

November 30, 2012
DATE

DEVIN P. COHEN
Judge, Civil Court