EXHIBIT A

ORDER OF HON. MARQUETTE L. FLOYD, DATED NOVEMBER 25, 1996 AND ENTERED DECEMBER 4, 1997
(pp. 14-18)

SHORT FORM ORDER

INDEX No. 15272-96

Chambers No. 96-601

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 22 SUFFOLK COUNTY

P R E S E N T :

Hon. MARQUETTE L. FLOYD
Justice of the Supreme Court

MOTION DATE 9/13/96
ADJ. DATES
Mot. Seq. #002 - MG:
Mot. Seq. #001 - CASEDISPSUBJ

In the Matter of the Application of	HUNTON & WILLIAMS, ESQS. Attys. for Petitioner 200 Park Ave. New York, NY 10166
FRIENDS WORLD COLLEGE	
Pursuant to Sections 510-511 of the New York Not-For-Profit Corporations Law, for an Order Granting Leave to Dispose of Certain Real Property.	PETER D. ORAM, ESQ. Atty. for Nicklin & Raphael 420 Lexington Ave. New York, NY 10170
Petitioner	

Upon the following papers numbered 1 to 33 read on this motion by petitioner to strike the answer filed by George Nicklin and Dana Raphael ; Notice of Motion, supporting Memos and other supporting papers 1 to 10 ; Answering Affidavits and supporting papers by Minority Trustees 11 ; Affirmation of Attorney General in support of Motion to of Petitioner and supporting papers 12-16 ; Affirmation in Opposition of Attorney Oram to Petitioner's Motion and supporting papers 17-18 ; Memorandum in support of the opposition to Petitioner's Motion 19 ; Affirmation of Attorney General 20-22 ; Attorney General's Statement of Position 23 ; Position Statement of New York Yearly Meeting 24 ; Reply affirmation in support of Petitioner's motion 25-27 ; Notice of verified petition and verified petition 28-33 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the petition is granted, the answer of Messrs. Nicklin and Raphael is stricken, and their request to dismiss the petition is denied. Petitioner is granted the relief requested and may submit a judgment incorporating such relief.

In this proceeding by a not-for-profit corporation for leave to dispose of its 29.1 acre waterfront property located in Lloyd Harbor, Town of Huntington, petitioner, Friends World College, has moved to strike the answer of George Nicklin and Dana Raphael. The answer contains only denials and affirmative defenses. It does not state any counterclaim. These persons move (no notice of motion) to dismiss the petition.

Due to straitened economic conditions, Friends World College has entered into an affiliation agreement with Long Island University whereby the former's students will pursue their studies at that institution, and has now made an agreement, pursuant to Not-For-Profit Law (N-PCL) §511(d) for the sale of its remaining real property in Lloyd Harbor to Dillon Development, LC for the sum

of $3,600,000. Such proceeds shall be used to pay off existing debts and liabilities which total some $3,444,197.63, the balance is to be transferred to an endowment fund established at Long Island University.

The proposed sale was approved on June 29, 1996, by a vote of 10 Trustees of the College, out of 12 such Trustees, a sufficient majority under the Corporation's By-Laws to effectuate such a transaction.

It was not until July 12, 1996, after this present petition was filed and long after the Board had approved the proposed sale, that one, Glenn Mallinson, purportedly acting on behalf of the Friends World College Association (members of the Religious Society of Friends interested in the welfare of the college), designated Messrs. Nicklin, Raphael and another, Hans Jaitschek, as Trustees.

Under the By-Laws, however, such Association does not have the right to elect Trustees as contrasted to designating them. These can only be elected by the Board itself and this was not done.

The Nicklin and Raphael designation not only came after the legal vote of a sufficient majority of the Trustees, but they themselves were not Trustees.

In ***Braker Memorial Home v White*** (121 Misc2d 544, 468 NYS2d 430, 432, 433 [1983]), wherein residents of a domiciliary care facility sought to challenge the facility's termination of an agreement on the ground that the operating certificate was being surrendered, the Court said:

> This Court finds no authority granting respondents standing to challenge petitioner's corporate action on such grounds. Petitioner is a not-for-profit corporation, funded by the income from a trust under the will of Henry J. Braker. Respondents are residents of a domiciliary care facility maintained by said corporation. The Attorney General is authorized to challenge petitioner's actions under his powers of representation and enforcement (Estates, Powers and Trust Law, Section 8-1.1[b]). These powers extend beyond express trusts to include charitable dispositions where property has been donated for a specific purpose. . . He may also take appropriate action pursuant to Sections 112 and 720 of the Not-For-Profit Corporation Law. Furthermore an officer or director of the corporation may bring an action to redress any alleged illegality under Sections 623 and 720 of the Not-For-Profit Corporation Law. However nowhere does it appear that a resident of such home has standing to challenge the administration of the corporation.

Although not counterclaiming herein, the effect of Nicklin and Raphael's affirmative defenses, as proposed, would be to limit the corporation's activities, and as such, they may be considered to come within §720 N-PCL as to

actions against directors and officers, to set aside or enjoin conveyances, an accounting, neglect of duties, etc. This statute specifies who may bring such action (in relevant part): "(a) a director or officer of the corporation." Nicklin or Raphael are neither.

In a 1991 case in Supreme Court, New York County, brought by "New York Yearly Meeting of the Religious Society of Friends, George Nicklin et al, against Virginia Barmens . . . Trustees of the Friends World College et al" (Index No. 5800/91, Cahn, J. 9/17/92), the Court held that plaintiff George Nicklin was not a trustee of World College and, therefore, had no standing in an attempt to stay the College Trustee's from taking certain actions on behalf of the College.

Messrs. Nicklin and Raphael are not trustees, officers or directors of the College and lack standing to object to the proposed sale of the former campus in Lloyd Harbor.

Sections 720 and 112 of N-PCL grants to the Attorney General the right to bring action for the type of relief sought by Messrs. Nicklin and Raphael. The Attorney General has appeared herein and specifically stated that "it has no objection to this Court approving the Friends World College application to sell the real property as described in the petition, pursuant to N-PCL §§510-511."

The Attorney General elaborated on his position herein, saying, in part:

> 6. From a review of all the papers it appears that Friends has met all the requirements of §§510-511 of the N-PCL which entitle it to transfer the Huntington Property to Dillon Development, LC for the purchase price of $3,600,000.
>
> 7. Petitioner has met the two prong test under N-PCL, §§510-511 that it is receiving fair and reasonable consideration and that the transaction promotes the interest of the corporation.
>
> * * *
>
> 10. Friends World College trustees by resolution, properly authorized the transaction at a meeting of March 22, 1996, which was subsequently ratified and confirmed by the trustees on June 29, 1996 at which a quorum of seven members was present. There has been no demonstration by credible evidence that the trustees were not qualified to approve the transaction.
>
> 11. Whether there was a quorum technically present at the March 22, 1996 meeting is not relevant since the resolution was subsequently confirmed at the June 29, 1996 meeting,

and it should be considered as an amendment of the petition properly authorizing approval of the transaction. The fact that the petition for approval of the sale was filed before the ratification vote of June 29, 1996 is also not fatal to approval by the court, as the vote remedies the technical quorum deficiency.

12. This Court has subject matter jurisdiction of the application for approval of the sale under N-PCL, §§510-511 and should determine that all the statutory requirements for approval have been met.

Section 511(d) of the N-PCL provides:

(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.

The Court is satisfied that the above stated requisites for the sale transaction proposed have been met, and that the objectants thereto lack standing to challenge the transaction.

Accordingly, the petition is granted and petitioner may submit a judgment incorporating the relief granted herein. The answer of Messrs. Nicklin and Raphael is stricken and their "Notice" to dismiss is denied.

DATED: November 25, 1996

J.S.C.

TO: BENJAMIN JONES FITT, ESQ.
Assist. Atty. General
The Capital
Albany, NY 12224-7341

GEORGE SUTTON, ESQ.
Atty. for LI University
University Center
Brookville, NY 11548

EXHIBIT B

SPECIAL TERM
PART 30

BY: HON. HARRY E. SEIDELL
Justice

SUPREME COURT, SUFFOLK COUNTY

In The Matter of the Petition of

THE BRIDGE TO SPIRITUAL FREEDOM INC., a Delaware Not-for-Profit Corporation,

for leave to sell and convey title to real property.

DATE: July 24, 2001

SUBMIT DATE: 06/13/2001

INDEX NO.: 24793/00

MOTION DATE: 06/29/2001

MOTION NO.: CDISPSUBJ

ANGELA CUBIDES, et al,

Plaintiff,

- against -

INDEX NO. 12239/98

THE BRIDGE TO SPIRITUAL FREEDOM INC., and REBECCA ANN LAYCOCK, NORMA TAYLOR, PATRICIA DILLON, MARION OLES, and HILDA GAWLIK,

Defendants.

Meyer Swozzi Englich & Klein P.C.
Brinan Seltzer, Esq.
Atty. for Plaintiffs
1505 Kellum Place
Mineola, N.Y. 11501

Attorney General of the State of New York
Dennis McElligott, Esq.
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Defendants Index # 12239/98
Petitioner Index # 24793/00
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Atty. for Defendant Dillon
Index # 12239-98
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Garden City, N.Y. 11530

Lamb & Barnosky, LLP
Eugene Barnosky, Esq.
Atty. for Forestbrook Homes Inc.
534 Broadhollow Rd.
Box CS90344
Melville, N.Y. 11747

Pursuant to a prior order of this Court dated April 19, 2001 this matter was set down for trial to determine the membership roll of Petitioner, if any, prior to March 5, 1998, the date of the adoption of new by-laws for the Petitioner.

The trial commenced on June 7, 2001 and concluded on June 13, 2001. Based upon the credible testimony of the witnesses and the Exhibits introduced into evidence the Court makes the following findings of fact and conclusions of law.

Not For Profit Corporation Law section 510(a) provides in pertinent part as follows:

"(1) If there are members entitled to vote thereon, the board shall adopt a resolution recommending such sale, lease, exchange or other disposition. The resolution shall specify the terms and conditions of the proposed transaction, including the consideration to be received by the corporation and the eventual disposition to be made of such consideration together with a statement that the dissolution of the corporation is or is not contemplated thereafter. The resolution shall be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Notice of the meeting shall be given to each member and each holder of subvention certificates or bonds of the corporation, whether or not entitled to vote. At such meeting by two-thirds vote as provided in paragraph (c) of section 613 (Vote of members) the members may approve the proposed transaction according to the terms of the resolution of the board, or may approve such sale, lease, exchange or other disposition and may authorize the board to modify the terms and conditions thereof."

Petitioner's by-laws prior to March 5, 1998 set forth the following requirements for membership:

"ARTICLE IV - MEMBERSHIP

Section 1. A person, male or female, to be eligible for membership in this corporation shall be at least twenty-one (21) years of age.

Section 2. The name of every proposed member shall be presented to the Membership Committee by a member in good standing.

Section 3. A further requirement for membership shall be the approval of the application for membership by the Membership Committee.

Section 4. A further requirement for membership shall be the unanimous approval of the application for membership by the Executive Council.

Section 5. No payment of dues or fees shall be required of any member as a requisite for membership."

It is beyond dispute that the formal requirements for membership in the Petitioner have never been complied with and that as a result of this utter failure to adhere to the membership provisions of its own Certificate of Incorporation and by-laws, there were in fact no members of the Petitioner, within the meaning of the statute, prior to March 5, 1998.

Although the Court permitted the Respondents to participate in the trial they in fact have no standing because they are not members of Petitioner. Therefore, defendants' motion for summary judgment dismissing the complaint in the related action under Index No. 12239-98 is granted.

The fact that various individuals may have been treated as members from time to time is of no moment since the formal requirements of membership were never satisfied.

Finally, the Court finds that Respondents have failed to demonstrate to the satisfaction of this Court that the removal of Evelyn Conner and Helga Karttunen was in any manner part of an alleged fraudulent conspiracy to sell the subject premises.

Accordingly, the Court concludes that all actions taken by Petitioner on March 5, 1998 and subsequent thereto were valid and the application for leave to sell the subject premises, 20 Meadow Glen Road, Fort Salonga, New York, is granted.

Submit Judgment.

DATED: July 24, 2001

HARRY E. SEIDELL
J.S.C.

EXHIBIT C

At an IAS Term, Part 14 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of July, 2004

PRESENT:

HON. THEODORE T. JONES,

Justice.

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CONGREGATION ATZEI CHAIM,

Plaintiff,

- against -

Index No. 47047/96

26 ADAR N.B.CORP., BETH FEIGE INC., NACHMAN BRACH, JUDA TYNAUER, NYC DEPARTMENT OF FINACE, NYS DEPARTMENT OF TAXATION AND FINANCE,[1]

Defendants.

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The following papers numbered 1 to 14 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4 5-6 7-10
Opposing Affidavits (Affirmations)	11 12
Reply Affidavits (Affirmations)	13 14
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, the parties and counsel for a former and prospective party collectively present five motions. Defendants 26 Adar N.B. Corp. (Adar) and

[1] The above caption reflects the revisions made by the court's order, dated Match 18, 1998, which, in part, granted a motion (1) to voluntarily discontinue the action against former defendant Mayer Spitz (Spitz) and (2) to amend the caption by deleting Spitz, "John Toe" and "Jane Toe" as defendants.

Nachman Brach (Brach). Adar's owner and principal, move for an order dismissing this action and vacating the appointment of a receiver. By separate motion, they seek an order to expedite the decision on that motion.

Plaintiff, Congregation Atzei Chaim (CAC), by its now outgoing counsel, moves for an order (1) setting an amount owed for use and occupancy of the applicable property in this case. CAC requests that such order direct payment from January 2001, when the court appointed a receiver herein, through the present time, and that initial payment occur within 30 days of the order. CAC coordinately seeks that all future use and occupancy payments follow on the first day of each succeeding month lest striking the answer result as a consequence for noncompliance.

In addition, CAC seeks (2) to restore Congregation Bais Rabbenu (CBR) as a plaintiff herein, (3) denial of the above motion to dismiss with leave to renew such motion at trial, (4) a directive that the sole outstanding deposition occur on a date certain at the courthouse and (5) designation of a trial date for this matter.

Robert Allan Muir & Associates, LLP (RAM), the law firm that has represented plaintiff CAC, moves for an order, pursuant to CPLR 321 (b) (2), permitting (1) its withdrawal as attorneys for plaintiff CAC and (2) its withdrawal as attorneys for former and prospective plaintiff CBR. RAM's motion also seeks (3) withdrawal as attorneys for various individuals involved with either CAC and/or CBR, namely, Moshe Kestenbaum, Louis Kestenbaum and Rabbi Jacob Teitelbaum.

RAM's motion additionally seeks (4) granting the parties "the statutory stay," presumably referring to CPLR 321 (c),[2] to permit obtaining new counsel, (5) imposing a lien to protect the funds owed to RAM for services rendered to plaintiff(s) and related parties herein, (6) providing for the orderly transfer of files between RAM and replacement counsel and/or clients, including an order providing for copying of files and their transportation as well as payment of incurred expenses, (7) directing a hearing to determine the amount of the lien due RAM as well as the time and method for paying that amount and (8) declaring the rights and interest(s) of the parties and clients regarding documents presently in RAM's possession.

CAC, by new counsel, cross-moves for an order (a) granting summary judgment, pursuant to CPLR 3212, dismissing the answer and each of the affirmative defenses asserted by defendants, (b) amending the action to add CBR as a party to the extent of any interest it may have,[3] (c) resolving the issues raised by the withdrawal of CAC's former counsel and (d) appointing a referee to compute the amount due to plaintiff under the applicable note and mortgage herein.

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[2] That provision pertinently provides that: "[i]f an attorney . . . is removed . . . at any time before judgment, no further proceedings shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs."

[3] CAC's cross motion also seeks to strike "John Toe" and "Jane Toe" as party defendants but the court's prior order, dated March 18, 1998, mentioned in fn 1, which already granted that relief, moots this aspect of the request.

Background

The Initial Proceedings and Conveyances

This mortgage foreclosure action, commenced in 1996, traces its origin to litigation begun in 1978, more than a quarter century ago. Reviewing the extensive ensuing history of entangled proceedings provides a useful perspective in resolving the issues herein. Such review also helps understand the development of this long-running dispute between competing real property claims. It also explains how a series of transactions has evolved into a third assignee's effort to foreclose against owners who (1) currently maintain unresolved counterclaims for use and occupancy against a former owner in another action and who (2) regard at least the present and prior plaintiff in this action as that former owner's alter ego.

The court's order, dated March 18, 1998, and other relevant decisions and documents in court files, have recounted that Congregation Yetev Lev D'Satmar, Inc. (Yetev Lev) initiated a proceeding in May 1978 for leave to convey the premises located at 535-541 Bedford Avenue in Brooklyn, the same premises involved herein, to Congregation Beth Joel (Beth Joel). Those premises included a synagogue and a residence built for the late Joel Teitelbaum, Yetev Lev's Grand Satmar Rabbi and his now deceased wife, Alte Feige

Teitelbaum. Today, such structures constitute a religious shrine, respected by Hasidic Satmar Jews.[4]

The Hon. Frank J. Pino, now retired, by order dated June 6, 1978, permitted conveyance of the property to Beth Joel for $100,000 ($35,000 in cash and subject to a then existing mortgage of $65,000 held by the Dime Savings Bank of Williamsburg). Beth Joel soon thereafter mortgaged the property in August 1978, obtained a $1,000,000 building mortgage loan from Manufacturers Hanover Trust Company and built another synagogue in Orange County, New York as part of a new community, the Village of Kiryas[5] Joel, established in the Town of Monroe.

Beth Joel transferred the Bedford Avenue property in 1980 to another religious corporation, defendant Congregation Beth Feige, Inc. (Beth Feige), pursuant to an order dated November 12, 1980, of the late Hon. Anthony T. Jordan. Execution and delivery of a $1,125,000 note and mortgage by Beth Feige to Bay Ridge Federal Savings & Loan Association (Bay Ridge), secured by the property involved herein, occurred nine years later in December 1989. Bay Ridge also received a guaranty agreement executed by defendants

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[4] The front of the synagogue, as noted in an appellate decision herein, bears the legend: "House of Worship-House of Joel; To the Memory of the Satmar Rabbi - - Provided by Rebbitzin Alte Feige Teitelbaum" (*Congregation Yetev Lev D'Satmar, Inc. v 26 Adar N.B. Corp.*, 219 AD2d 186, 188 [1996]). (A "rebbitzin" in Yiddish means rabbi's wife. "Alte," one of Ms. Teitelbaum's names, and in Yiddish a word meaning older, in this context also means esteemed, revered or venerable).

[5] A Hebrew word meaning "City of."

Brach and Judd Tynauer (Tynauer) and former defendant Mayer Spitz (Spitz), whereby they personally and unconditionally guaranteed the payments under the note and mortgage.[6]

Beth Feige then sold the property, in early 1990, to defendant Adar, subject to the mortgage, after gaining approval of now retired Supreme Court Justice Edward M. Rappaport, as reflected in an order dated March 21, 1990. Brach has claimed that Adar acquired the Bedford Avenue property, in part, to preserve the memory of Grand Satmar Rabbi Joel Teitelbaum and to purportedly construct apartments above the residence and synagogue.

Yetev Lev's 1990 Action

A schism, though, had developed in the Hasidic Satmar community following the death of Grand Satmar Rabbi Joel Teitelbaum, who left no male heir. The internal dispute divided worshipers into factions at the synagogue portion of the Bedford Avenue property and Brach elected to follow the rabbi's widow. He declined to accept the leadership of Yetev Lev and its eventual new leader, Grand Satmar Rabbi Moses Teitelbaum, nephew of the late Grand Satmar Rabbi Joel Teitelbaum. Such allegiance, Brach has claimed, resulted in a prohibition forbidding him from entering any synagogue controlled by Yetev Lev. Adar and Brach, exercising ownership authority in response to this situation, installed metal roll-

[6] Former defendant Spitz subsequently listed this debt to Bay Ridge in a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York, Brooklyn Division (Case No 93-11333, filed February 18, 1993). He received a discharge, dated June 4, 1993, from that Bankruptcy Court, which thereafter closed the case by final decree, dated July 14, 1993. Consequently, this court's order, dated March 18, 1998, as mentioned in fn 1, in part, granted a motion to voluntarily discontinue the action against Spitz.

down gates over the entrance to the Bedford Avenue synagogue on April 19, 1990, apparently to try to keep out Yetev Lev members who had been using the property for the prior 12 years.

Placing such gates in front of the synagogue barring entrance and prayer therein immediately created a riotous situation amongst the rival factions,[7] especially considering that Yetev Lev's leader allegedly resided on Bedford Avenue across from the site of the subject premises. Consequently, Yetev Lev (and two members, Ludovick Weisz and Jacob Schonfeld, collectively, still designated as Yetev Lev) commenced an action in May 1990, pending yet today, against Adar, Beth Joel, Beth Feige, Brach and Bay Ridge (*Congregation Yetev Lev D'Satmar, Inc., et al. v 26 Adar N.B. Corp., et al.*, Kings County Clerk's Index No. 13224/90).[8]

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[7] Factionalism within Yetev Lev, itself, has also generated legal proceedings as evidenced by pending actions before Justice Barasch regarding who will succeed current Grand Satmar Rabbi Moses Teitelbaum, and eventually control the Congregation, its businesses, schools and services (*Congregation Yetev Lev D'Satmar, Inc. v Kahana, et al.*, Kings County Clerk's Index No. 28989/01 and *Friedman v Kahan*[a], Kings County Clerk's Index No. 41256/01).

[8] Yetev Lev, under the name Congregation Bais Joel D'Satmar, had instituted a Civil Court proceeding on April 20, 1990, the day after the gate installation, to recover possession of the property and prevent Adar from interfering with its possession of the premises (*Congregation Bais Joel D'Satmar v 26 Adar N.B. Corp.*, Kings County Civil Court, Index No. L & T 79386). The Hon. Ira B. Harkavy, then a Civil Court judge, by order dated April 20, 1990, reinstated Yetev Lev into possession, pending hearing and determination of that proceeding, and stayed Adar from re-entering, re-letting or otherwise interfering with the premises.

An April 25, 1990 Civil Court order, in turn, restrained Yetev Lev from barring Adar access to the premises. However, the Hon. Yvonne Lewis, also at that time a Civil Court judge, stayed that restraint in an order, dated April 27, 1990, and barred Adar from entering the premises pending hearing and determination of the motion. Yetev Lev then applied, as part of its preliminary injunction motion in the Supreme Court action, to remove and consolidate the Civil Court proceeding with the Supreme Court action.

Yetev Lev's Supreme Court action, brought pursuant to Real Property Actions and Proceedings Law (RPAPL) Article 15, sought to invalidate the 1978 property transfer and all subsequent property transfers and mortgages chronicled above. The action alleged that numerous false and fraudulent representations had misled courts to approve the transfers. Consequently, Yetev Lev claimed that it retained title, that Adar and Brach never acquired title and that Bay Ridge's mortgage failed to constitute a valid lien on the property.

Yetev Lev's first priority, though, concerned preserving its reinstated possession of the synagogue, as Kings County Civil Court had permitted (*see* fn 8). Hence, it initially pursued an ex parte temporary restraining order, which the Hon. Nicholas A. Clemente issued as part of an order to show cause, dated May 17, 1990. Justice Clemente principally directed defendants therein to obey the Kings County Civil Court order pending the hearing of the show cause order, and restrained them from entering the premises or otherwise interfering with Yetev Lev's rights under the Civil Court order.

Justice Shaw's and the Appellate Division's Rulings

The Hon. James H. Shaw, now retired, thereafter granted Yetev Lev preliminary injunctive relief, conditioned upon posting a $50,000 undertaking, while also removing and consolidating the Civil Court proceeding with the Supreme Court action. Justice Shaw's decision, dated August 2, 1990, stressed the importance "to keep peace between the two factions and to maintain the status quo pending trial of the issues." His resulting order, dated

August 27, 1990, restrained the defendants therein from interfering with use and possession of the synagogue.

The Appellate Division, Second Department upheld the preliminary injunction in April 1993 (192 AD2d 501 [1993]) while also modifying subsequent orders of Justice Shaw and dismissing Yetev Lev's causes of action for fraud, adverse possession, unjust enrichment and to impose a constructive trust.

Adar, Brach and Bay Ridge thereafter moved and Yetev Lev cross-moved for summary judgment with Yetev Lev arguing that two of its trustees, Leopold Lefkowitz and Solomon Sender, had made false statements in the 1978 petition to obtain court approval of that initial property transfer. Justice Shaw granted summary judgment in Yetev Lev's favor, by order dated January 24, 1994. He declared Yetev Lev owner of the property and enjoined the relevant defendants from interfering with Yetev Lev's use and possession of the property. He subsequently granted leave to reargue the summary judgment motions by order dated April 22, 1994 but, upon reargument, adhered to his January 24, 1994 decision.

Adar appealed and the Appellate Division, Second Department, by order dated April 22, 1996, exactly two years after Justice Shaw's decision and order upon reargument, reversed that order. The appellate ruling also vacated Justice Shaw's original January 24, 1994 order, denied Yetev Lev's cross motion for partial summary judgment and dismissed Yetev Lev's complaint by granting Adar's and the other defendants' summary judgment motions (*Congregation Yetev Lev D'Samar, Inc. v 26 Adar N.B. Corp.*, 219 AD2d 180 [1996]). The Court of Appeals thereafter denied leave to appeal (88 NY2d 808 [1996]).

The Bay Ridge Bank Action

Adar and Brach, who had allegedly made about $550,000 in mortgage and other carrying charge payments until 1994, chose to stop making the interest only monthly mortgage payments of about $11,000 on Beth Feige's note and mortgage pending appeal of Justice Shaw's order. That order declaring Yetev Lev the property owner and granting injunctive relief allowing Yetev Lev use and occupancy of the property had concurrently prevented Adar and the other applicable defendants from using the property. They therefore unilaterally decided that Bay Ridge's allegedly defective title rights allowed them to stop making otherwise required monthly mortgage payments during the appellate proceedings recited above.

Bay Ridge responded by seeking to collect the money due and owing on the note and mortgage executed by Beth Feige. However, Bay Ridge, recognizing the potential impact of Justice Shaw's decision, chose to solely pursue the note for the borrowed money. Such an approach highlighted the repayment obligation despite the uncertain validity of the mortgage lien. Bay Ridge thus commenced an action on only the note against Beth Feige, Brach, Tynauer and Spitz *(Bay Ridge Federal Savings Bank f/k/a Bay Ridge Federal Savings and Loan Association v Beth Feige, Inc., et al.*, Kings County Clerk's Index No. 6787/95). That action, filed March 3, 1995, began more than 11 months before the Appellate Division, Second Department's April 22, 1996 decision reversing Justice Shaw's rulings.

Independence Savings Bank (Independence), successor by merger to Bay Ridge, advised Adar and Brach in July 1996, after the Court of Appeals had denied Yetev Lev leave to appeal the Appellate Division's reversal of Justice Shaw's decision, that nearly $1.5 million remained due and owing on the indebtedness. Independence sought payment and further asserted its right to assign Beth Feige's note and mortgage.

The Action Against Independence, Bay Ridge's Successor

Adar and Brach, unable to make full payment to redeem the note, expressed their concern to Independence's counsel that Yetev Lev or its congregants or followers would, by assignment, get Beth Feige's note and mortgage. Such recipients, they feared, intended to then obtain possession and ownership of the property by foreclosing the mortgage. Adar and Brach thus sought to preemptively prevent Independence from initiating and prosecuting a mortgage foreclosure action.

Foreclosure particularly threatened Adar and Brach once the Court of Appeals denied the Yetev Lev plaintiffs leave to appeal on July 2, 1996. Adar and Brach thus filed their own action about one month later, on August 1, 1996, seeking an injunction against Independence to restrain it from foreclosing against them (*Nachman Brach and 26 Adar N.B. Corp. v Independence Savings Bank, Successor in Interest to Bay Ridge Federal Savings and Loan Association*, Kings County Clerk's Index No. 26280/96).

The Instant Mortgage Foreclosure

Independence addressed Adar's and Brach's injunction action by assigning Beth Feige's note and mortgage on September 26, 1996 to 535 Bedford Assoc. Corp. (BAC)

before a decision occurred on motions in that injunction action. BAC, in turn, reassigned Beth Feige's note and mortgage, one month later, in October 1996, to CBR, who filed this present mortgage foreclosure proceeding on December 5, 1996.[9]

CBR, another religious corporation formed pursuant to Religious Corporations Law, Article 10, § 192 and incorporated on October 9, 1996, purchased Beth Feige's note and mortgage from BAC with borrowed funds. CAC provided $850,000 and Star City Sportswear, the corporate interest of Moshe Kestenbaum, a trustee of CBR, provided the remaining $200,000. CBR's failure to repay $934,000 to CAC within three years (representing the $850,000 borrowed plus an agreed contractual profit) resulted in a Rabbinical Court, MISHPOT SHOLEM,[10] entering judgment for the $934,000 amount. The Rabbinical Court also recognized CBR's $200,000 repayment obligation to the Kestenbaum interest but subordinated that obligation to CAC's interest.

In addition, the Rabbinical Court, recognizing CBR's inability to make the repayment, further ordered CBR, in a March 2, 2000 directive, to assign the mortgage interest to CAC. Such assignment then occurred on April 19, 2000 and thereafter this court, by order dated September 13, 2000, permitted CAC's substitution as the plaintiff herein.

Robert Allen Muir & Associates, LLP (RAM), CBR's counsel, separately applied during this same time period to withdraw as CBR's counsel and the court, by order dated

[9]An affirmation of Robert Allan Muir, Jr., dated January 21, 2003, submitted as part of CAC's motion to restore CBR as a plaintiff herein, erroneously claims (in paragraph 3) that the filing of the summons and complaint in CBR's foreclosure action occurred "on or about April, 1996."

[10] Translated from Hebrew as "Accurate Judgment Court."

April 19, 2000, relieved RAM from representing CBR. However, RAM informed the court, when orally arguing the present motions, that the April 19, 2000 order had gone unserved since CAC subsequently retained RAM.[11] Such retention, in fact, resulted in RAM making the successful show cause application that allowed CAC's substitution for CBR as the plaintiff herein. Now, RAM, as mentioned at the outset of this decision, seeks to withdraw as counsel for CAC, and broadens this request to include CBR, Moshe and Louis Kestenbaum and Rabbi Jacob Teitelbaum.

Justice Jackson's Decisions and Orders:

The March 4, 1997 Decision

Adar and Brach, having filed their injunction action on August 1, 1996, separately moved four days later, by order to show cause dated August 5, 1996, to recover against Yetev Lev. They requested a hearing in Yetev Lev's 1990 action to determine damages and costs, pursuant to CPLR 6315,[12] allegedly sustained from issuance of Justice Shaw's vacated preliminary injunction and recoverable from the $50,000 undertaking. The motion also requested leave to assert additional counterclaims including one for damages resulting from Yetev Lev's use and occupancy of the premises for the period when restrained from interfering with that use and occupancy.

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[11] *See* Transcript of April 14, 2004, pp. 51-52.

[12] That provision pertinently provides that: "[t]he damages sustained by reason of a preliminary injunction or temporary restraining order may be ascertained upon motion . . ."

The Hon. Randolph Jackson[13] subsequently granted Adar's and Brach's motion for a hearing to determine damages attributable to the preliminary injunction and referred this damages issue to Judicial Hearing Officer (JHO) Luigi Marano to hear and report. Justice Jackson's decision, dated March 4, 1997, also granted Adar and Brach leave to assert a use and occupancy counterclaim. Justice Jackson observed that an exception existed to the general rule limiting damages to the amount of the undertaking. Case law, he noted, held "that a landlord was entitled to recover damages for possession of the premises by a tenant, notwithstanding a preliminary injunction, on the grounds that it would only be fair to compel the tenant to pay for use and occupancy."

A possible landlord-tenant relationship existed amongst the parties in Justice Jackson's view considering that the Appellate Division, Second Department's 1996 decision and order "expressly found that Yetev Lev made certain payments to both Beth Joel and Beth Feige in connection with [Yetev Lev's] continued possession of the premises after 1978." Justice Jackson regarded that finding as at least raising a question of fact as to "whether Yetev Lev agreed to make payments in exchange for its use of the premises." Hence, Justice Jackson ruled that Adar and Brach, successors to Beth Joel and Beth Feige, could permissibly assert a use and occupancy counterclaim against Yetev Lev.

[13]Justice Shaw had recused himself from the case on November 27, 1996 after his September 4, 1996 judgment, entered September 9, 1996, had awarded exclusive possession of the premises to Adar and Brach and had directed the Yetev Lev plaintiffs to vacate the premises. That judgment occurred after the Appellate Division had remitted the matter on April 22, 1996 and the Court of Appeals had denied leave to appeal on July 2, 1996.

His subsequent order, dated November 13, 1997, denied Yetev Lev's reargument motion, reiterated his decision to allow the use and occupancy counterclaim and denied Adar's and Brach's summary judgment cross motion on the liability aspect of the use and occupancy counterclaim. Justice Jackson explained that his prior decision "simply permitted defendants an opportunity to amend their answer to assert a counterclaim for use and occupancy . . . [and that] there appeared to be an issue of fact as to whether or not a landlord-tenant relationship existed between the parties."

The Appellate Division, Second Department agreed, and by decision and order dated February 8, 1999, affirmed Justice Jackson's November 13, 1997 order (*Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 258 AD2d 494 [1999]). The appellate decision held that "[t]he Supreme Court properly found that questions of fact precluded summary judgment . . . to recover damages . . . because of the plaintiffs' 'use and occupancy' of the appellants' property in the period following the improperly issued preliminary injunction" (*id.* at 494).

That appellate decision also affirmed Justice Jackson's March 20, 1998 order which had confirmed the findings of JHO Marano denying damages under the bond. The appellate opinion concurred with both Justice Jackson and the JHO that a failure to prove claims for debt service damages and counsel fees had occurred.[14]

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[14] JHO Marano had found in this regard, in an order dated March 11, 1998, that Adar's counsel had already received $250,000 reimbursement from Stewart Title Co.

The Appellate Division subsequently denied reargument or, alternatively, leave to appeal, by order dated May 6, 1999, and the Court of Appeals, by order dated September 2, 1999, also denied leave to appeal from the portion of the Appellate Division order that affirmed Justice Jackson's March 20, 1998 order (93 NY2d 1030 [1999]). In addition, the Court of Appeals dismissed the portion of Adar's and Brach's motion for leave to appeal from the affirmed denial of summary judgment seeking use and occupancy counterclaim damages. The jurisdictional ruling concluded that the Appellate Division orders, upon the appeal and reargument, "do not finally determine the action" (*id.*).

The December 9, 1998 and January 19, 2000 Orders and Related Counterclaim Rulings

Adar and Brach generated a second amended verified answer with counterclaims, pursuant to Justice Jackson's permission. However, his March 20, 1998 order, discussed above, denying damages under the bond, induced Yetev Lev to seek dismissal of related counterclaims. Justice Jackson's further order, dated December 9, 1998, dismissed such related counterclaims, but still recognized that the "failure to establish damages under the bond does not preclude defendants from seeking restitution under their fifth counterclaim for use and occupancy/unjust enrichment . . ."

Justice Jackson's subsequent order, dated January 19, 2000, denied summary judgment to dismiss the use and occupancy counterclaim. There, he expanded the basis for such potential recovery after reviewing cases awarding use and occupancy without regard to the parties' relationship and without privity of contract. Such cases, which he analyzed,

applied the equitable doctrine of quantum meruit and also allowed recovery on a claim of ownership basis. He observed that "it is beyond dispute that movants were wrongfully denied the possession of their property during the time that the injunction was in place . . . [M]ovants are . . . entitled to recover use and occupancy for that period based upon the theory of restitution, since such right is not limited to circumstances where a landlord/tenant relationship can be established."[15]

An additional Appellate Division, Second Department ruling, dated December 9, 2002, which reversed a portion of this court's order, dated August 27, 2001,[16] also addressed the use and occupancy counterclaim (*Congregation Yetev Lev D'Satmar, Inc. v 26 Adar N.B. Corp.*, 300 AD2d 338 [2002]). There, the Appellate Division held that triable questions of fact also existed regarding damages for use and occupancy of the residential portion of the property.

Issues about using the residential area for religious study, in other words, warranted denying summary judgment to Yetev Lev. Such questions therefore required reinstating that aspect of Adar's and Brach's counterclaim concerning the residential portion of the property in figuring use and occupancy damages. This fully reinstated counterclaim presently remains unresolved in Yetev Lev's 1990 action. The counterclaim also potentially impacts this case, as highlighted in this court's rulings, discussed within, regarding CBR's and now CAC's pursuit of summary judgment.

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[15] The Appellate Division, Second Department, by order dated December 21, 2000, dismissed Yetev Lev's resulting appeal for failure to timely perfect.

[16] Justice Jackson, by order dated June 11, 2001, referred Yetev Lev's 1990 action to this court.

Justice Greenstein's Decision Trilogy

Three concurrently issued August 1997 rulings of the Hon. Samuel Greenstein, now retired, like Justice Jackson's just discussed decisions, have also helped influence and streamline the present litigation. Justice Greenstein, by decision dated August 11, 1997, allowed CBR's substitution as the plaintiff in Bay Ridge's action on the note and concurrently granted CBR's motion to discontinue that action. He also granted Adar's and Brach's cross motion to consolidate the injunction action against Independence and CBR's present mortgage foreclosure action.

However, Justice Greenstein, by separate decision, also dated August 11, 1997, dismissed the injunction action. He made that ruling after denying injunctive relief as academic since Independence no longer held Beth Feige's mortgage in view of its assignments to BAC and then CBR. He also rejected an attempt to amend the complaint to add more than ten new defendants and six causes of action unrelated to the complaint against Independence itself. Adar and Brach, in fact, had asserted some of those causes of action[17] as counterclaims in Yetev Lev's 1990 action, referenced above. Consequently, Justice Greenstein's decision in Bay Ridge's case recognized that consolidation, which has occurred under the index number in this case, only involved CBR's present foreclosure action.

In addition, a third opinion of Justice Greenstein, again dated August 11, 1997, granted, in part, a preliminary injunction in this case enjoining Adar and Brach from

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[17] The causes of action purported to set forth claims for malicious prosecution, libel, tortious interference to contract, improper attainment of a preliminary injunction, use and occupancy and civil conspiracy.

constructing a mikvah (that is, a ritual bath) or from otherwise substantially altering the premises during the pendency of this action. The resulting order, dated November 6, 1997, conditioned such injunction on the posting of a $25,000 undertaking. Filing of that undertaking, on CBR's behalf, subsequently occurred on December 31, 1997.

The Summary Judgment Trilogy Herein and Its Aftermath

CBR thereafter repeatedly and unsuccessfully sought summary judgment on the foreclosure action herein. This court first denied that relief by order dated March 18, 1998, mentioned earlier, which recounted some of the foregoing litigation history. That order stressed Adar's and Brach's contention that CBR, then the plaintiff herein, "is the alter ego of Yetev Lev." The order further related Adar's and Brach's position that CBR obtained the mortgage to acquire title to the property for Yetev Lev without CBR having to confront the defenses and counterclaims maintainable against Yetev Lev. The order also noted that CBR, in pursuing title to the premises, seeks to assist the same group of Satmar Jews associated with Yetev Lev, CBR's alleged alter ego. Consequently, this alter ego issue of fact alone warranted denying CBR's summary judgment motion.[18]

An order, dated October 30, 1998, thereafter highlighted the failure to present proper papers and denied CBR's motion for leave to renew to consider the impact of proceedings before Justice Jackson. However, that order allowed such renewal upon rectifying this defect, but an appropriate presentation thereafter resulted in an order, dated June 2, 1999, which again denied CBR's motion for leave to renew its unsuccessful summary judgment

[18] The Appellate Division, Second Department, by order dated December 17, 1998, dismissed CBR's resulting appeal for failure to timely perfect.

Yetev Lev's Election Controversy

Proceedings concerning election disputes affecting the leadership of Yetev Lev, in part, brought under the 1990 real property action, unfortunately delayed disposition of that dismissal motion herein. This court's order, dated January 9, 2002, administratively transferred the 1990 action and one other case involving a Yetev Lev election challenge to Justice Barasch, already assigned another case involving the Yetev Lev election dispute, to enable his consideration of all such Yetev Lev election related disputes. A 12-page explanatory decision and order, dated February 6, 2002, issued by Justice Pesce, then Administrative Judge, reiterating the value of having the same justice resolve the election controversy, then administratively transferred Yetev Lev's 1990 action to Justice Barasch, stayed that action and the two others involving the election controversy, and granted permission to appeal.

The Appellate Division, Second Department, subsequently dismissed the ensuing appeal by holding that "[Justice Pesce's] administrative decision is not subject to review" (*Congregation Yetev Lev D'Satmar, Inc., v Kahana*, 308 AD2d 446, 447 [2003]). Uncertainty whether the stay in those cases applied to the present litigation, and waiting for appellate review of Justice Pesce's order caused deferring a decision on Adar's and Brach's dismissal motion. The other motions as well as developments concerning CAC's representation have occurred in the interim.

The Parties' Positions

Adar's and Brach's Position

Adar and Brach argue that CBR assigned Beth Feige's note and mortgage to CAC without notifying the New York State Attorney General and obtaining court approval. Failing to take such purportedly necessary steps, they claim, voids the transfer. Consequently, they seek to dismiss this foreclosure action and to vacate the receiver's appointment by contending that CAC has neither title to the note or mortgage nor standing to proceed.

They concurrently oppose allowing CBR to return as a plaintiff. They contend that the six year statute of limitations in CPLR 213 (4)[20] would time bar CBR from now initiating an action to recover on the default and the doctrine of judicial estoppel, which prohibits litigants from asserting inconsistent positions, they further argue, precludes CBR's re-entry or re-joinder as a plaintiff. They similarly oppose RAM's application to withdraw from representing CBR as superfluous considering that CBR no longer presently appears as a party herein. In addition, Adar and Brach cite the court's prior denial of CBR's summary judgment motion and its unsuccessful reargument/renewal effort, particularly emphasizing the champerty analysis, as a law of the case basis for now similarly denying CAC's summary judgment cross motion.

[20] That provision pertinently provides that: "[t]he following actions must be commenced within six years: . . . 4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein; . . ."

CAC's Position (via RAM) and RAM's Position

CAC contends, through RAM, its outgoing counsel, that the earlier substitution application "would have better represented the interest[s] of all parties if it had requested the addition of CAC rather than the substitution thereof for CBR."[21] RAM contends that CBR retains some residual rights to share with CAC in the potential proceeds of this action, at least to repay the Kestenbaum interest, which thus allegedly warrants CBR's return as a plaintiff.

RAM observes that CAC, CBR, the Kestenbaums and Rabbi Teitelbaum present no opposition to its withdrawal, though it acknowledges that the Kestenbaums and Rabbi Teitelbaum believe that they received no representation herein. RAM pledges to commence a plenary action for fees against those individuals and to consolidate such action with this case. It also acknowledges notification that CAC retained Herzfeld & Rubin, P.C. as its new counsel and urges copying and Bates-stamping any documents given to the new counsel. RAM suggests that it retain original loan documents to insure its lien for services rendered and separately requests that the court grant CBR a 30-day stay to obtain new counsel.

CAC's Position (via incoming counsel)

CAC, through its new counsel, retained September 16, 2003, offers no objection to CBR's return as a plaintiff and also agrees to hold any proceeds from this action subject to RAM's claimed lien. It asserts that CBR transferred personal property which makes the Attorney General notification and court approval requirements inapplicable herein.

[21]*See* Affirmation of Robert Allan Muir, Jr., dated January 21, 2003, p. 6, paragraph 9.

In addition, it argues that completed discovery indicates that champerty fails to apply in this case and that Adar's and Brach's alleged $4 million indebtedness now permits summary judgment. It also challenges the viability and applicability of Adar's and Brach's counterclaims and their position that CBR and CAC function as Yetev Lev's alter ego. CAC urges, in any event, striking defendants' affirmative defense premised upon noncompliance with RPAPL's notice of pendency requirements considering that time remains for filing a successive notice of pendency to maintain this foreclosure proceeding.

Discussion

Adar's and Brach's Motion To Dismiss

Not-For-Profit Corporation Law (N-PCL) §§ 510 (a) (3) and 511 collectively require Supreme Court approval with attendant Attorney General notification for the disposition of all or substantially all of the assets of a not-for-profit corporation, which includes a religious corporation. Failure to gain such approval nullifies a conveyance (*Rose Ocko Foundation, Inc. v Lebovits*, 259 AD2d 685 [1999], *appeal dismissed and lv denied* 93 NY2d 997 [1999]).

However, Religious Corporations Law § 12 (1)[22] specifically exempts a purchase money mortgage or purchase money security agreement from such requirement (*see Wolkoff v Church of St. Rita*, 133 Misc 2d 464, 469 [1986], *affd* 133 AD2d 267 [1987] ["judicial approval did not extend . . . to purchase money mortgages, *South Baptist Society v Clapp*, 18 Barb 35 (1853)"]. Here, CBR, a religious corporation, borrowed money from CAC to purchase Beth Feige's note and mortgage and gave CAC a security interest in the purchased

[22]That provision pertinently provides 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."

note and mortgage. Such transaction constitutes a purchase money security agreement exempt from court approval and attorney general notification requirements. In addition, Adar and Brach, as neither trustees, officers or directors of CBR, lack standing to challenge this transaction, even if the above N-PCL requirements applied (*Matter of Friends World College v Nicklin*, 249 AD2d 393, 394 [1998]). Consequently, CBR permissibly assigned its interest in Beth Feige's note and mortgage to CAC, who can maintain this proceeding. CBR's assignment to CAC, in other words, provides no basis for Adar's and Brach's motion to dismiss.[23]

Adar's and Brach's Motion To Vacate and CAC's Motion for Use and Occupancy

The unappealed portion of the court's previously mentioned August 27, 2001 order in Yetev Lev's 1990 action recognized a receiver's right "to all rents, including those due but unpaid at the time of his or her appointment, which have not been reduced to the possession of the landlord at the time the receiver qualifies [citations omitted]." However, that order also noted that "there has been no determination made that any rent (or use and occupancy) is due" regarding the Bedford Avenue premises. That fact, still true now, means that Adar and Brach, on one hand, and CAC, on the other, have prematurely moved either to vacate the

[23] This disposition makes CBR's re-entry as a plaintiff to maintain the proceeding irrelevant and moots considering Adar's and Brach's contention that statute of limitations grounds would have prevented CBR's return upon invalidating the assignment.

No statute of limitations bars CAC from continuing this action after CBR made its assignment considering that CBR's initiation of the action in 1996, two years after Adar's and Brach's default, governs the action's timeliness. "[S]ubstitution of . . . the subsequent assignee of the mortgage . . . relates back to the original commencement of the action . . . for purposes of the Statute of Limitations, given that the substitution [as here,] did not result in any prejudice or surprise to [the opposing party]" (*Fairbanks Capital Corp. v Nagel*, 289 AD2d 99, 100 [2001]).

receiver's appointment or to collect rent or use and occupancy. Each side's request

more properly awaits future determination of an entitlement to such payment.

CAC's Motion To Add CBR As A Plaintiff

CBR indisputably owes $200,000 to Star City Sportswear, Moshe Kestenbaum's corporate interest, as repayment for helping to finance CBR's acquisition of Beth Feige's note and mortgage from BAC in October 1996. CAC acknowledges that CBR may ultimately validly assert some residual rights to share in the proceeds potentially recoverable from the defendants herein. Such situation, it appears, could have provided a basis for allowing CBR to re-enter this proceeding as a plaintiff.

However, CBR's April 19, 2000 assignment to CAC, to resolve its debt to CAC, fully transferred its interest regarding Beth Feige's note and mortgage asserted herein. Consequently, CBR's re-entry as a plaintiff in this case requires a revised or new assignment with CAC. Such assignment would need to preserve for CBR a portion of the claim against Beth Feige's note and mortgage to the extent of at least re-paying the $200,000 owed to the Kestenbaum corporate interest and subordinating that right to CAC's rights. Consequently, CBR may eventually resolve with CAC the alleged residual rights stemming from the Rabbinical Court's decree, but presently CBR's assignment to CAC precludes its re-entry as a plaintiff in this case.[24]

[24] This disposition moots addressing Adar's and Brach's judicial estoppel argument.

RAM's Motion To Withdraw

CAC agrees to RAM's withdrawal as its attorney and has retained Herzfeld & Rubin, P.C. An order, dated April 19, 2000, has already relieved RAM as CBR's counsel. Such order moots RAM's current application for this relief regarding CBR now, and since September 13, 2000, a non-party. No basis exists, though, to fashion a withdrawal order regarding the previously mentioned individuals, Moshe Kestenbaum, Louis Kestenbaum and Rabbi Jacob Teitelbaum, as they are non-parties from the case's inception. RAM, in any event, has pledged to pursue a separate proceeding against them for fees.

Therefore, the only issues concern RAM's lien for fees and transfer of files. CAC, through its new counsel, has agreed to hold any proceeds from this action subject to RAM's claimed lien. A hearing regarding that lien and its amount should properly follow after full disposition of the underlying disputes herein, especially if a related proceeding regarding the above individuals exists at that time.

Orderly transition also dictates that CAC's new firm, at CAC's expense, copy and Bates-stamp any documents from RAM's understandably voluminous files. Such an approach will enable RAM to retain original loan documents, as it has requested, in connection with its lien for its services. However, RAM must serve CBR with a copy of the court's order, dated April 19, 2000, which relieved RAM from representing CBR, and a copy of this decision and order. RAM must then file proof of such service.

CBR's non-party status and the denial of the motion to allow CBR's re-entry as a plaintiff technically moots RAM's request for a 30-day stay to allow CBR to obtain new counsel. Nonetheless, equity in this litigation dictates issuing a 30-day discretionary stay, pursuant to CPLR 2201,[25] prohibiting any proceedings against CBR.

CAC's Deposition Motion

This court's order, dated April 4, 2001, permitted the deposition of Martin Berkowitz on behalf of the plaintiff. However, Adar's and Brach's dismissal motion, pending until now, caused deferral of that deposition. CAC's departing counsel agreed, though, to produce Mr. Berkowitz "if the request for dismissal is . . . denied . . ."[26] Consequently, such deposition will now occur, at either the courthouse or at the offices of a court reporter, wherever defendants' counsel chooses, following service of this order with notice of entry on counsel for defendants.

However, the deposition will occur after RAM serves CBR with both this order and decision and this court's April 19, 2000 order, which relieved RAM as CBR's counsel, together with notice of entry of each order. The deposition will then occur no sooner than 35 days following RAM's service on CBR and no later than 65 days after such service.

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[25] That provision provides that: "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

[26] *See* Affirmation of Robert Allan Muir, Jr., dated January 21, 2003, p. 8, paragraph 16.

(a)

Judiciary Law § 489, as discussed in the court's order. dated June 2, 1999, statutorily codifies and prohibits champerty.[27] A violation occurs if "the foundational intent to sue on th[e] claim [was] at least . . . the primary purpose . . ., if not the sole motivation behind, entering into the transaction" (*Bluebird Partners, L.P. v First Fidelity Bank, N.A.*, 94 NY2d 726, 736 [2000]). Hence, "Judiciary Law § 489 prohibits a corporation from taking assignment of a note with the intent of bringing an action thereon as long as it is established that commencement of the suit was the primary purpose of the assignment" (*Aubrey Equities, Inc. v SMZH 73rd Associates*, 212 AD2d 397, 398 [1995]; *see also Gellens v 11 West 42nd Street, Inc.*, 259 App Div 435, 436 [1940] ["a corporation is prohibited from accepting the assignment of a claim for the purpose of bringing action thereon (*Bennett [N.Y. Co. Lawyers' Assn. v Supreme Enf. Corp.*, 250 App Div 265 [1937], affd. [without op], 275 NY 502 [1937]), and a corporation may not recover in a suit based upon such an assignment. (*Zindle, Inc. v Friedman's Express, Inc.*, 258 App Div 636 [1940])"]. "Violation of [Judiciary Law § 489, in other words,] has been held to be a defense to an action by an assignee corporation" (*Knobel v Estate of Eugene A. Hoffman Inc.*, 105 Misc 2d 333, 335 [1980]).

Here, the court's June 2, 1999 order regarding CBR's prior summary judgment motion quoted the affidavit of Moshe Kestenbaum, a CBR trustee, that CBR "acquired the mortgage

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[27] That provision, derived from the Penal Law, pertinently provides: "no corporation or association, directly or indirectly, . . . shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon."

documents for only one reason - to obtain title to the property." The above order, citing the history between the parties, then recognized that "there is a material and triable issue of fact as to whether the assignment to plaintiff was made solely for the purpose of bringing this foreclosure action . . . the very mischief prohibited by Judiciary Law § 489." This issue remains and CAC, in fact, acknowledges in its brief (at pp 9-10) that "Congregation Bais Rabbenu's purpose in acquiring the mortgage was to obtain title to the property because of its great religious significance in the Hasidic Satmar community."

The Court of Appeals decision in the *Bluebird Partners* case, dated 11 months after this court's June 2, 1999 order discussed above, only reinforces the propriety of denying summary judgment herein. There, the decision noted that evaluating proffered reasons in an allegedly champertous situation often involves weighing evidence or making a credibility determination. "Indeed, 'the question of intent and purpose of the purchaser or assignee of a claim is usually a factual one to be decided by the trier of facts' (*Fairchild Hiller Corp. v McDonnell Douglas Corp., supra,* [28 NY2d] at 330 [1971], citing *(Sprung v Jaffe, supra* [3 NY2d 539 (1957)])" (*Bluebird Partners, L.P.*, 94 NY2d at 738 [2000]). Such a prudent approach equally applies herein and CAC makes an insufficient showing to alter denying summary judgment

(b)

CAC also fails to present facts or arguments to induce this court from departing from the reasoning in this court's June 2, 1999 order that "if Yetev Lev is, in fact, the alter ego of plaintiff [now CAC], then [the] use and occupancy counterclaim is inextricably intertwined

with plaintiff's cause of action to foreclose [citations omitted]." Here, several rulings have found a viable and inseparable counterclaim for use and occupancy against Yetev Lev arising from the same transaction as involved in the main action. In addition, CAC, who primarily financed acquiring the note and mortgage it seeks to foreclose, purportedly in Yetev Lev's behalf, has made no conclusive showing, following its substitution, to eliminate the alter ego triable issue. These circumstances and legal principles thus continue to make summary judgment inappropriate herein (*Alsheimer v Evarts*, 289 AD2d 1004 [2001] and *Tibball v Catalanotto*, 269 AD2d 386 [2000]).

CAC's Cross Motion To Strike

However, CAC correctly urges striking defendants' second affirmative defense regarding compliance with RPAPL's applicable provisions. Filing a notice of pendency constitutes a condition precedent under RPAPL 1331 to obtaining judgment in a mortgage foreclosure action.[28] "The notice of pendency . . . alerts the public that the mortgage will be merged into the judgment of foreclosure" (*Campbell v Smith*, 309 AD2d 581, 582 [2003]). A notice of pendency, though, unless extended, only remains effective, pursuant to CPLR 6513, for a three-year period[29] and "a lapsed notice of pendency may not be revived" (*Matter of Sakow*, 97 NY2d 436, 442 [2002]).

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[28] That provision pertinently provides that: "[t]he plaintiff, at least twenty days before a final judgment directing a sale is rendered, shall file in the clerk's office of each county where the mortgaged property is situated a notice of the pendency of the action . . ."

[29] That provision pertinently provides that: "[a] notice of pendency shall be effective for three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. . ."

Here, the now expired original notice of pendency, filed December 3, 1990, nonetheless fails to bar CAC from pursuing mortgage foreclosure considering case law permitting successive notice of pendency filing. The *Campbell* case explained that "the recorded mortgage itself gives notice of an encumbrance on the property and . . . concerns regarding the notice of pendency restricting the alienability of the property are eliminated" (*Campbell*, 309 AD2d at 582 [2003]). Consequently, the Appellate Division, Second Department recently reiterated its "longstanding rule that a new notice of pendency may be filed in a mortgage foreclosure action despite the cancellation or expiration of a previous notice (*see Horowitz v Griggs*, 2 AD3d 404 [2003]; *Campbell v Smith*, 309 AD2d 581 [2003]; *Wasserman v Harriman*, 234 AD2d 596, 598 [1996]; *Slutsky v Blooming Grove Inn*, 147 AD2d 208, 212-13 [1989]; *Robbins v Goldstein*, 36 AD2d 730, 731 [1971])" (*Bankers Trust Co. of California, N.A. v Lifson*, 5 AD3d 710, 710 [2004]; *see also NYCTL 1997-1 Trust v Oneg Shabbos, Inc.*, 5 AD3d 568 [2004] and *Chiarelli v Kotsifos*, 5 AD3d 345 [2004]).

The Appellate Division, Fourth Department further explained that "[w]e agree with the First and Second Departments that [*Matter* of] Sakow [, 97 NY2d 436, 442 (2003)], which holds that a second notice of pendency in a partition action cannot be filed after the expiration or cancellation of the original notice, is not applicable to a mortgage foreclosure action [citations omitted]" (*Atlantic Mortgage & Investment Corp. v Wynn*, _ AD3d _, 2004 NY Slip Op 05086 *1 at *1 [2004]). Consequently, CAC, which can still file a successive notice of pendency, can currently maintain this foreclosure proceeding.

CAC's Application To Appoint A Referee To Compute

CAC prematurely seeks appointment of a referee to compute the amount due under the defaulted note and mortgage considering the previously identified triable issues herein. Indeed, "[a] reference to compute the amount due is prescribed only when the defendant is in default in answering the complaint within the time allowed, or the right of the plaintiff is admitted by the answer" (*Scharaga v Schwartzverg*, 149 AD2d 578, 578-579 [1989]). Here, defendants neither defaulted in anwering the complaint nor admitted CBR's right to payment which, pursuant to RPAPL § 1321 (1),[30] negates appointing a referee to compute at this time. Such appointment, as with the collection of rent or use and occupancy, more properly awaits future determination of an entitlement to such payment.

CAC's Application To Designate A Trial Date

CAC also prematurely seeks setting a trial date in this action when the use and occupancy counterclaim issue that impacts this action remains unresolved in Yetev Lev's 1990 action presently pending before Justice Barasch. A resolution of that issue in the earlier filed case would undoubtedly somewhat streamline the trial in this case. A no liability finding in the Yetev Lev case would at least moot the previously discussed alter ego issue and help limit the scope of the trial herein. A determination in the Yetev Lev action establishing entitlement to use and occupancy and the applicable amount, on the other hand,

[30] That provision pertinently provides that: "[i]f the defendant fails to answer within the time allotted or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to determine the amount due to a plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises . . ."

it is

ORDERED that Adar's and Brach's dismissal motion is denied; and it is further

ORDERED that Adar's and Brach's motion to expedite the decision on their dismissal motion is denied as moot; and it is further

ORDERED that Adar's and Brach's motion to vacate the appointment of the receiver herein and CAC's motion for rent or use and occupancy are denied with leave to renew after future determination regarding whether an entitlement exists to collect rent or use and occupancy; and it is further

ORDERED that the motion to add CBR as a plaintiff herein is denied; and it is further

ORDERED that RAM, having previously been relieved as CBR's counsel, by order dated April 19, 2000, is relieved as CAC's counsel with subsequent proceedings after the trial herein to determine the amount of its lien; and it is further

ORDERED that RAM shall retain original loan documents in connection with its lien for its services; and it is further

ORDERED that Herzfeld & Rubin, P.C. is substituted as CAC's counsel, and, pursuant to its pledge to the court, will hold any proceeds from this action subject to RAM's claimed lien; and it is further

ORDERED that CAC's newly substituted counsel, at CAC's expense, copy and Bates-stamp any documents from RAM's files; and it is further

ORDERED that RAM shall concurrently serve CBR with a copy of this court's order, dated April 19, 2000, with notice of entry, as well as with a copy of this decision and order,

with notice of entry, and shall file proof of such service within five days thereafter; and it is further

ORDERED that any proceedings against CBR are stayed for 30 days following concurrent service of a copy of this court's order, dated April 19, 2000, with notice of entry as well as a copy of this decision and order, with notice of entry; and it is further

ORDERED that CAC's motion to schedule a deposition is granted and the deposition of Martin Berkowitz shall occur after service of a copy of this decision and order with notice of entry on defendants' counsel and after RAM serves CBR with a copy of both this decision and order and a copy of this court's order, dated April 19, 2000, which relieved RAM as CBR's counsel, with notice of entry of each order; and it is further

ORDERED that the deposition of Martin Berkowitz shall occur at either the courthouse or at the office of a court reporter, wherever defendants' counsel chooses, but no sooner than 35 days after RAM serves CBR, as provided above, and no later than 65 days thereafter; and it is further

ORDERED that CAC's summary judgment cross motion, brought by its newly substituted counsel, is denied; and it is further

ORDERED that CAC's cross motion to strike defendants' second affirmative defense regarding compliance with notice of pendency filing is granted on condition that CAC file a successive notice of pendency in the Kings County Clerk's Office at least 20 days before a final judgment directing a sale is rendered herein; and it is further

ORDERED that CAC's application to appoint a referee to compute the amount due under the applicable note and mortgage is denied with leave to renew after future determination regarding whether an entitlement exists for such payment; and it is further

ORDERED that CAC's application to designate a trial date for this matter is denied with leave to renew after resolution of the use and occupancy counterclaim in *Congregation Yetev Lev D'Satmar, Inc., et al. v 26 Adar N.B. Corp., et al.*, Kings County Clerk's Index No. 13224/90, pending before Justice Barasch.

This constitutes the order and decision of this court.

E N T E R,

J. S. C.

HON. THEODORE T. JONES

EXHIBIT D

Attorney General's Order to Show Cause
[pp. 25 - 27]

At I.A.S. Part 12 of the Supreme Court of the State of New York, County of Kings, at the County Courthouse, 15 Willoughby Street, Brooklyn, New York, on the ___ day of April, 2003

P R E S E N T :

Hon. Gerard H. Rosenberg,

Justice.

----------x

In the Matter of the Application of

Index No. 28902/02

NOBLE DREW ALI PLAZA HOUSING CORPORATION,

ORDER TO SHOW CAUSE

Petitioner,

for an Order Approving the Sale of Assets

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Upon the annexed affirmation of Assistant Attorney General James Robert Pigott, Jr., dated April 15, 2003, and the exhibits thereto, and all pleadings, papers and proceedings herein, it is

ORDERED that petitioner Noble Drew Ali Plaza Housing Corporation, or any other interested person upon whom service of this order to show cause is directed hereby, show cause before this Court, at I.A.S. Part 12, Room 210A, 15 Willoughby Street, Brooklyn, New York, on the ____ day of April, 2003, at _____, or as soon thereafter as counsel may be heard, why, pursuant to pursuant to CPLR 5015(a)(2)-(3), an order should not

be entered directing reconsideration or vacatur of the Order of this Court dated July 31, 2002, which granted the petition of Noble Drew Ali Plaza Housing Corporation pursuant to Section 511 of the Not-for-Profit Corporation Law for Court approval of the sale of all or substantially all of its assets.

IT IS FURTHERED ORDERED that, pursuant to Section 511(b) of the Not-for-Profit Corporation Law, the following persons shall be "interested persons" entitled to notice of this application and the opportunity to be heard in support of or in opposition to the application: (i) New Lots Towers, LLC, (ii) Noble Drew Ali Tenants Association, (iii) The United States Department of Housing and Urban Development, (iv) The City of New York, attention: (a) Assistant Corporation Counsel Kathleen J. Cahill and (b) The City of New York Department of Homeless Services, (v) New Lots Family Transitional Center LLC, (vi) Women in Need, Inc., (vii) Charles E. Simpson, Esq. and (viii) Consolidated Edison Co. of New York, Inc.

IT IS FURTHERED ORDERED that, pending hearing and determination of this motion, (a) petitioner is enjoined from taking any further steps to complete the transaction approved by the July 31, 2002 Order herein, including, without limitation, closing on the real estate conveyance approved thereunder and (b) the July 31, 2002 Order is temporarily stayed.

IT IS FURTHERED ORDERED that service of a copy of this

Order, and the papers upon which it is based, shall be deemed good and sufficient if made by (i) hand delivery or (ii) overnight delivery service on or before April ____, 2003 on petitioner Noble Drew Ali Plaza Housing Corporation and on each above "interested person"

(a) by serving its counsel of record herein or in the following related proceedings: Noble Drew Ali Tenants Association v. Noble Drew Ali Plaza Housing Corp. *et al.*, Index No. 53655/02) (Supreme Court Kings County) and In re New Lots Towers LLC, Case No. 02-13722 (CB) (S.D.N.Y. Bankruptcy Court) and

(b) where no has counsel of record has appeared, by serving such interested person directly.

E N T E R

_____

J.S.C.

EXHIBIT E

Order of the Hon. Gerard H. Rosenberg, dated August 29, 2003
with Notice of Entry, dated September 9, 2003
[pp. 19 - 24]

At an IAS Term, Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of August, 2003

PRESENT:

HON. GERARD H. ROSENBERG,
Justice.

----------X

In the Matter of the Application of

NOBLE DREW ALI PLAZA HOUSING CORPORATION,

Index No. 28902/02

Petitioner,

for an Order Approving the Sale of Assets.

----------X

The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
_____ (Affirmations)	
Other Papers	

Upon the foregoing papers, the Attorney General of the State of New York moves pursuant to CPLR 5015 (a) (2) and (3) for "reconsideration" of this court's order, dated July 31, 2002, which granted the petition of charitable not-for-profit corporation Noble Drew Ali Plaza Housing ("NDA") for approval of the sale of all or substantially all of its assets to New Lots Towers, LLC ("New Lots") pursuant to Not-For-Profit Corporation Law ("N-PCL") § 511, and for an order pursuant to N-PCL § 511(b) entitling notice of this

application and the opportunity to be heard in support of or in opposition thereto to certain "interested persons."

Analysis

Court approval of a sale pursuant to N-PCL § 511 requires a judicial determination that a) "the consideration and the terms of the sale . . . are fair and reasonable to the corporation" and (b) "the purposes of the corporation, or the interests of the members will be promoted thereby" (N-PCL § 511[a][6]). "[T]he purpose of the statute[] is to protect the beneficiaries of a charitable organization from 'loss through unwise bargains and from perversion of the use of the property'" (*Rose Ocko Found., Inc. v. Lebovits*, 259 AD2d 685, 688, *quoting Church of God of Prospect Plaza v Fourth Church of Christ, Scientist*, 76 AD2d 712, 716, *affd* 54 NY2d 742). "The Attorney General is made a statutory party to such petitions, and his 'active participation' is presumed . . . [t]his is to ensure that the interests of the ultimate beneficiaries of the corporation, the public, are adequately represented and protected from improvident transactions" (*Manhattan Eye, Ear & Throat Hosp. v Spitzer*, 186 Misc.2d 126, 151, *quoting* Bjorklund, Fishman and Kurtz, New York Nonprofit Law and Practice: With Tax Analysis § 8-2 [a], at 238). In this regard, the provisions of N-PCL § 511 for court approval on notice to the Attorney General, in his *parens patriae* capacity and statutory role, serves to prevent the not-for-profit corporation from making an improvident transaction, since not-for-profit corporations lack the "effective internal mechanisms to guard against directors' improvident use of charitable assets," such as "shareholder power" or "'owners' or private parties" "with a pecuniary stake to monitor and scrutinize actions by the directors" (*id.*).

In support of his motion, the Attorney General argues that this court's prior approval of the sale of the Noble Drew Housing Complex — a low income five building apartment complex consisting of 385 residential apartment units located in the Brownsville section of Brooklyn (the "complex") — was based upon an incomplete record which failed to disclose to this court and him, whose office also approved the sale via a "no objections" endorsement — that the proposed purchaser of the complex, New Lots: (1) had already begun to covert rent-stabilized apartments in the complex to Tier II and scatter-site homeless shelters, notwithstanding NDA's corporate purposes to provide low and moderate income housing and (2) was contemplating filing a Chapter 11 petition in Bankruptcy Court, which it filed the day after the sale was approved, despite the fact that the primary consideration for the complex was the assumption or payment of NDA's liabilities. As noted, the Attorney General also seeks permission of this court to allow certain interested persons to participate in this motion.

New Lots opposes, arguing that the Attorney General is not entitled to this relief because: (1) the newly discovered evidence upon which he relies was readily discoverable with due diligence; 2) he has not alleged that the newly discovered evidence "probably" should result in vacatur of this sale; and 3) he has not alleged any fraud, misrepresentation or misconduct of an adverse party.

New Lots also contends that the court should not vacate the sale since: (1) NDA is receiving fair value for the property; (2) the sale will further the corporate purposes of NDA; and (3) approval of the sale does not constitute approval of the complex for housing the homeless. New Lots also maintains that if the court reconsiders the sale, it should not be vacated in its

entirety, but should be approved on condition that New Lots comply with this court's March 7, 2003 preliminary injunction to the extent the order is not modified or vacated in response to its motion for renewal/reargument *sub judice*, on appeal or otherwise. Finally, New Lots agrees with the Attorney General that certain interested persons should be invited to participate in this motion and reserves the right to comment on their submissions.

In view of the compelling interests in compiling a complete record upon which an informed judgment may be made, the importance of determining the propriety of the sale of this not-for-profit corporation, and the agreement between the parties that certain persons considered "interested" within the meaning of N-PCL § 511(b) should be invited to participate in this motion, the court grants the instant motion of the Attorney General to the extent of directing that the "interested persons" named in the Attorney General's application* shall, if they be so advised, serve and file papers responding to the Attorney General's application to vacate this court's July 31, 2002 order within 20 days of service of this order with notice of entry by the Attorney General.

This constitutes the decision and order of the court.

E N T E R,

/s/ HON. GERARD H. ROSENBERG

J. S. C.

*New Lots Towers, LLC; Noble Drew Ali Tenants Association; The United States Department of Housing and Urban Development [HUD];The City of New York; Charles E. Simpson, Esq.; Consolidated Edison Co. of New York, Inc.; Women In Need, Inc.; and New Lots Family Transitional Center, LLC.

EXHIBIT F

Order of the Hon. Gerard H. Rosenberg, Appealed from, dated February 19, 2004 with Notice of Entry, dated March 11, 2004 [pp. 5 - 18]

At an IAS Term, Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of February, 2004

PRESENT:

HON. GERARD H. ROSENBERG,

Justice.

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In the Matter of the Application of

NOBLE DREW ALI PLAZA HOUSING CORPORATION,

Petitioner,

Index No. 28902/02

for an Order Approving the Sale of Assets.

----------X

The following papers number 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5
_____ (Affirmations) Attorney General	6
Other Papers Memorandum of Law/Papers in Support	7, 8, 9

Upon the foregoing papers, and upon consideration of the submissions of "interested persons" Noble Drew Ali Plaza Tenants Association (the Tenants Association) and SEIU Local 32BJ (Local 32BJ) pursuant to Not-For-Profit Corporation Law (N-PCL) § 511 (b), the court grants the motion of the Attorney General of the State of New York pursuant to CPLR 5015 (a) (2) and (3) to vacate this court's order, dated July 31, 2002, which granted the petition of charitable not-for-profit corporation Noble Drew Ali Plaza Housing Corporation

(NDA) for approval of the sale of all or substantially all of its assets to New Lots Towers, LLC (New Lots) pursuant to N-PCL § 511.

By order dated August 29, 2003, this court granted the motion of the Attorney General "to the extent of directing that the 'interested persons' named in the Attorney General's application shall, if they be so advised, serve and file papers responding to the Attorney General's application to vacate this court's July 31, 2002 order. . ." Thereafter, Local 32BJ, a union representing eight workers employed by NDA at the Noble Drew Ali Housing complex, sought permission to submit papers in support of the Attorney General's motion, which the court now grants. The Tenants Association also submitted a memorandum of law and an affidavit in support of the Attorney General's motion.

In the August 29, 2003 decision, the court set forth the law with respect to court approval of a sale pursuant to N-PCL § 511, as follows:

> Court approval of a sale pursuant to N-PCL § 511 requires a judicial determination that a) "the consideration and the terms of the sale . . . are fair and reasonable to the corporation" and (b) "the purposes of the corporation, or the interests of the members will be promoted thereby" (N-PCL § 511 [a] [6]). "[T]he purpose of the statute[] is to protect the beneficiaries of a charitable organization from 'loss through unwise bargains and from perversion of the use of the property'" (*Rose Ocko Found., Inc. v. Lebovits*, 259 AD2d 685, 688, *quoting Church of God of Prospect Plaza v Fourth Church of Christ, Scientist*, 76 AD2d 712, 716, *affd* 54 NY2d 742). "The Attorney General is made a statutory party to such petitions, and his 'active participation' is presumed . . . [t]his is to ensure that the interests of the ultimate beneficiaries of the corporation, the public, are adequately represented and protected from improvident transactions" (*Manhattan Eye, Ear & Throat Hosp. v Spitzer*, 186 Misc.2d 126,

> 151, *quoting* Bjorklund, Fishman and Kurtz, New York Nonprofit Law and Practice: With Tax Analysis § 8-2 [a], at 238). In this regard, the provisions of N-PCL § 511 for court approval on notice to the Attorney General, in his *parens patriae* capacity and statutory role, serves to prevent the not-for-profit corporation from making an improvident transaction, since not-for-profit corporations lack the "effective internal mechanisms to guard against directors' improvident use of charitable assets," such as "shareholder power" or "'owners' or private parties" "with a pecuniary stake to monitor and scrutinize actions by the directors" (*id.*).

The court also outlined the positions of the Attorney General and New Lots, as follows:

> In support of his motion, the Attorney General argues that this court's prior approval of the sale of the Noble Drew Housing Complex - a low income five building apartment complex consisting of 385 residential apartment units located in the Brownsville section of Brooklyn (the "complex") - was based upon an incomplete record which failed to disclose to this court and him, whose office also approved the sale via a "no objections" endorsement - that the proposed purchaser of the complex, New Lots: (1) had already begun to covert rent-stabilized apartments in the complex to Tier II and scatter-site homeless shelters, notwithstanding NDA's corporate purposes to provide low and moderate income housing and (2) was contemplating filing a Chapter 11 petition in Bankruptcy Court, which it filed the day after the sale was approved, despite the fact that the primary consideration for the complex was the assumption or payment of NDA's liabilities.
>
> New Lots opposes, arguing that the Attorney General is not entitled to this relief because: (1) the newly discovered evidence upon which he relies was readily discoverable with due diligence; 2) he has not alleged that the newly discovered evidence "probably" should result in vacatur of this sale; and 3) he has not alleged any fraud, misrepresentation or misconduct of an adverse party. New Lots also contends that the court should not vacate the sale since: (1) NDA is receiving fair value for the property; (2) the sale will further the corporate purposes of NDA; and (3)

> approval of the sale does not constitute approval of the complex for housing the homeless. New Lots also maintains that if the court reconsiders the sale, it should not be vacated in its entirety, but should be approved on condition that New Lots comply with this court's March 7, 2003 preliminary injunction to the extent the order is not modified or vacated in response to its motion for renewal/reargument *sub judice*, on appeal or otherwise.

As for the remainder of the interested persons' positions, the Tenants Association, the plaintiff in the underlying suit,[1] argues, as a threshold matter, that it has demonstrated excusable default for its failure to intervene in or contest the petition because neither it nor any of its members received notice of the proposed sale.

On the merits, in addition to asserting that the sale of the assets of NDA does not serve NDA's corporate purpose or promote the interests of its members (N-PCL 511 [d]), the Tenants Association argues that NDA's petition omitted information the inclusion of which would have demonstrated to the court that the terms of the transaction were not fair and reasonable to NDA. First, the Tenants Association asserts that NDA's petition failed to disclose that the deed to the property contained six restrictive covenants, including one rider requiring the property to be "maintained as rental or cooperative housing for a period of twenty years," which precluded the court and the Attorney General from taking the riders into account when determining the propriety of the sale. Second, the Tenants Association maintains that the petition failed to disclose the agreement between NDA and New Lots Family Transitional Center LLC (NLFTC) to lease two of the five buildings for use as

[1] *Noble Drew Ali Plaza Tenants Association v Noble Drew Ali Plaza Housing Corp. et al* (Index No. 53655/02).

transitional homeless shelters, of which NDA purportedly had either actual or constructive notice, the implementation of which directly controverted the statement in the petition that the purchase was to effectuate NDA's original plan to renovate and rehabilitate the complex. Third, the Tenants Association asserts that but for its failure to secure sufficient public and private funding, NDA failed to explain in its petition the "unforeseen circumstances" which prevented it from renovating and rehabilitating the complex, despite its receipt of at least $1.5 million in grant money from HUD in 1999 and federal Section 8 subsidies from the New York City Housing Authority. Lastly, the Tenants Association asserts that the petition failed to disclose that Mr. Farrakhan, an officer and principal of NDA, was also a principal of New Lots, the buyer, which may indicate a conflict of interest violative of Mr. Farrakhan's fiduciary duty to NDA. The Tenants Association seeks a hearing so the court can consider the nature of Mr. Farrakhan's interest in New Lots and the possibility of self-dealing.

As for Local 32BJ, it supports the position of the Attorney General.

CPLR 5015 (a) (2) and (3), provide:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404;
>
> 3. fraud, misrepresentation, or other misconduct of an adverse party;

The words "could not have been discovered" in CPLR 5015 (a) (2) refer to evidence not discoverable with due diligence (*Corpuel v Galasso*, 240 AD2d 531, 533, *appeal dismissed* 91 NY2d 922). However, a court may vacate a prior order in the interests of justice (*Evergreen Bank, N.A. v Dashnaw*, 262 AD2d 737, 738; *McCarthy v Port of New York Authority*, 21 AD2d 125, 128; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5015:11, at 476; 5 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 5015.12).

The court grants the motion to vacate its order approving the sale pursuant to CPLR 5015 (a) (2) and in the exercise of its interests of justice jurisdiction. First, if the newly discovered evidence that New Lots had already begun converting rent-stabilized low income housing into homeless shelters been disclosed in the N-PCL § 511 petition, the court would have denied the sale application inasmuch as it appears to directly contravene NDA's corporate purpose. In this regard, NDA's Certificate of Incorporation states:

> The purposes for which the corporation is formed are to conduct the following activities, which are exclusively charitable: to develop, on a non-profit basis, a housing project of low and moderate income households, including project -based facilities and services for the benefit of project residents and the community, in order to preserve the supply of decent, affordable housing, combat community deterioration and promote community revitalization, and raise the social, physical and economic well-being of the project residents and the community; and to do anything incidental to or connected with the foregoing purposes or in advancement thereof, but not for the pecuniary profit or financial gain of its members, directors, or officers, except as permitted under Article 5 of the Not-for-Profit Corporation Law
>
> The lawful public or quasi-public objective of the corporation is to provide housing and project-based services and facilities to

> families of low and moderate income (Certificate of Incorporation of NDA, Atty. Gen., Exh. 10).

In the court's view, the corporate purpose of providing a housing project for low and moderate income households is inconsistent with New Lots' use of the property as short-term housing for the homeless.

Although the additional evidence that New Lots had begun converting the complex from rent-stabilized apartments to homeless shelters prior to approval of the sale was likely available to the Attorney General as a matter of public record (*see A Resnick Textile Co. Inc. v Ramapo Trading Corp.*, __ Misc.2d __, 2003 NY Slip Op 50634U [App. Term, First Dept 2003]), or could have been available to the Attorney General had he merely asked New Lots about its proposed use for the property, the Attorney General had no reason to believe that NDA's representations in its N-PCL § 511 petition - that the order permitting the sale would allow "implementation of the renovation and rehabilitation plan for the premises and *the benefit of the tenant residents*" - failed to disclose the real use to which New Lots put the property, which benefitted the homeless, rather than the tenant residents (*see McCarthy,* 21 AD2d at 128) (emphasis added). Moreover, as the Attorney General properly notes, in light of this representation, NDA should have disclosed to the court any use to which the property was put which was inconsistent with NDA's corporate purpose. Under the circumstances, the

Attorney General was not bound to have discovered this evidence prior to the entry of the order.[2]

The filing by New Lots for bankruptcy the day after the sale was approved also serves as a basis to vacate the order. As the Attorney General asserts, had it been aware of New Lots' intention to file for bankruptcy, it "would not have given a 'no objections' endorsement [to the sale] when it did, if ever," rather "[s]ubstantial inquires would have been first pursued by the Charities Bureau as to the need for and effects of such a filing and whether some other transaction might not better further the interests of NDA under the standards set forth in N-PCL § 511 (d)." Moreover, had this fact been disclosed to the court, it would have denied NDA's application inasmuch as the transaction requires New Lots to assume substantial liabilities of NDA, and the consideration to NDA includes an interest in New Lots. While the July 31, 2003 order provided for the protection of the rights of NDA's creditors, New Lots does not dispute that its Plan for Reorganization approved by the Bankruptcy Court does not refer to this obligation. In this regard, Local 32BJ asserts, and neither New Lots nor NDA disputes, that NDA owes money to eight of its workers at the complex, which is not reflected in the sales agreement or NDA's petition seeking approval of the sale, and is not addressed in the Chapter 11 proceeding.

[2]As the Attorney General properly argues, the cases upon which New Lots relies to support its position that relief may not be granted pursuant to CPLR 5015(a)(2) involve private litigants with pecuniary interests in vacating an order or judgment, and thus are inapposite where, as here, the court is called upon to determine the propriety of a transaction of a charitable not-for-profit corporation.

New Lots argues that to the extent its use of two of the buildings in the complex as homeless shelters affects the court's July 31, 2002 decision approving the sale, the court should approve the sale on condition that it: (1) comply with the preliminary injunction previously issued by this court and (2) comply with the July 31, 2002 approval order, which directed, *inter alia,* that "no creditors rights of the petitioner as described in the petition and its attached exhibits shall be impaired and shall be paid as set forth in the petition and exhibits by the sale authorized herein." New Lots premises this argument upon NDA's demonstrated inability to properly manage the premises. While even NDA has conceded in its petition that it has failed to "effectuate its plans for the premises in a manner consistent with the delivery of safe, decent and habitable housing to the resident tenants of the premises," equally significant to the court's determination is the disregard New Lots has shown in fulfilling NDA's corporate purpose of developing a "housing project of low and moderate income households, including project-based facilities and services for the benefit of the project residents and the community . . ." by its conversion of two of the buildings in the complex to homeless shelters, and by failing to rehabilitate the remainder of the complex and to provide basic services to the permanent tenants still living there. The court notes that if the sale is conditionally granted based upon New Lots' compliance with the preliminary injunction, and

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hould the Tenants Association be unsuccessful in the underlying action against NDA, the enants at the complex will be left with an owner likely disinterested in addressing the needs f its permanent residents. Even assuming the Tenants Association is successful in the derlying action, and New Lots is precluded from housing the homeless at the complex as

a result, New Lots' past performance suggests it will be an unwilling participant in the implementation of NDA's corporate purpose. As for the suggestion by New Lots to condition approval of the sale upon its compliance with the July 31, 2002 order as it relates to the protection of NDA's creditors, the court rejects this argument for the reasons noted above.

With respect to that branch of the Attorney General's application requesting the court to address the consequences of vacatur of the sale, the court notes that as to the effect of vacatur upon NDA's creditors, most significantly Consolidated Edison, any direction by this court with respect to this issue is premature. With respect to the effect of vacatur on the management of the complex, NDA replaced Eshel Management, the former management company which was unable to operate the complex properly, with a new managing agent on or about April or May, 2003. As for the effect of vacatur on the homeless programs run at the complex, the lease between NDA and NLFTC shall remain in effect and the programs may continue to serve as transitional homeless shelters pending a final judgment in the underlying action. With respect to that branch of the Attorney General's application requesting the court to establish procedures for the selection of a new transferee of the complex, and of the Tenants Association's request for additional time to choose among reputable not-for-profit organizations that have expressed interest in working with the tenants at the complex,

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sumably to purchase the property, NDA, as owner thereof, is directed to fully consider the mmunity not-for-profit organizations suggested by the Tenants Association as potential chasers of the property.

As to the Tenant Associations' request that the court consider appointing an Article 7-A administrator pursuant to Real Property Actions and Proceedings Law (RPAPL) § 778, such appointment is made "in implementation of a judgment rendered" upon a petition brought by special proceeding pursuant to RPAPL § 769, which has not been commenced by the Tenants Association or any other entity or individual. As to the Tenants Associations' request that the court consider appointing a receiver pursuant to RPAPL § 1325 and Multiple Dwelling Law (MDL) § 309, RPAPL § 1325 is only implicated in an action for foreclosure, and MDL § 309 (5) is a provision which entitles a municipal department, bureau or agency to seek the appointment of a receiver. Finally, the court finds insufficient support in the record to take any further action suggested by the Tenants Association. The court notes in this regard that the Tenants Association has merely submitted a memorandum of law and an affidavit in support of the Attorney General's motion, and has not moved for any affirmative relief.

Accordingly, that branch of the motion of the Attorney General to vacate this court's July 31, 2002 order approving the sale of the NDA complex is granted.

This constitutes the decision and order of the court.

E N T E R,

HON. GERARD H. ROSENBERG
J. S. C.