

Washington v Paris

2012 NY Slip Op 32879(U)

December 3, 2012

Supreme Court, Queens County

Docket Number: 5978/2012

Judge: Allan B. Weiss

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Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

G TOE S. WASHINGTON, LUELLA KING
and ANNA WASHINGTON, as Trustees of the
Ezekiel House of Prayer

Index
Number 5978 2012

Petitioners

Motion
Date May 30, 2012

-against

Motion
Cal. Number 31

CARL L. PARIS, ERNEST HARMON, WILLIE
RHETT, JAMES RAILEY, ERIC SCOTT, KOU
PARIS, DIANE BARNES, BEATRICE WOART
and FLORENCE JOHNSON

Motion Seq. No. 1

Respondents

The court's prior Short Form Order and Judgment dated November 16, 2012 is withdrawn to correct a scrivener's error and the following is substituted in its place.

The following papers numbered 1 to 56 read on this special proceeding by petitioners to (1) declare that (a) Ezekiel House of Prayer, Inc. (the Church) is a free church, not a membership organization, (b) respondents are not trustees of the Church and their election as trustees is null and void ab initio, (c) petitioners and Faye Rhoden, a nonparty, are the only trustees of the Church, (d) respondents Carl L. Paris, Jr., Ernest Harmon and Willie Rhett are no longer trustees of the Church, (e) respondents Carl L. Paris, Jr. and Ernest Harmon are no longer vice-president and secretary treasurer, respectively of the Church and (f) there are three vacancies on the Church's board of trustees which are to be filled by the "remaining trustees" pursuant to section 182 of the Religious Corporations Law, and (2) direct respondents immediately to cease and desist acting as trustees and/or officers of the Church; and this cross motion by respondents to disqualify Harry Raptakis, Esq. from representing petitioners in this proceeding, and to declare the Church to be a membership organization as if formed and established pursuant to article 10 of the Religious Corporations Law, and the election of a new board of trustees held on March 11, 2012 was valid, or in the alternative, that petitioners are no longer trustees of the Church.

	Papers <u>Numbered</u>
Order to Show Cause - Petition -Affidavits - Exhibits	1-5
Notice of Cross Motion - Affidavits - Exhibits	6-38
Answering Affidavits - Exhibits	39-52
Reply Affidavits	53-56

Upon the foregoing papers it is ordered that the petition and cross motion are determined as follows:

Petitioners commenced this proceeding, alleging the Church is a “free church” with a self-perpetuating board of trustees, and that they and nonparty Faye Rhoden are trustees on the Church’s board. Petitioners allege that the certificate of incorporation originally named Lovella King a/k/a Louella King, Carl Paris, Willie Rhett, Faye Rhoden, Catherine Railey, Gertrude Howard and Cora Garnett Paris as trustees. Petitioners also allege that following the deaths of Catherine Railey, Gertrude Howard and Cora Garnett Paris,¹ a duly-noticed meeting of the board of trustees was held on August 29, 2010, and with a quorum of the board of trustees in attendance, G Toe S. Washington, Anna Washington and Ernest Harmon were elected, by unanimous vote, as trustees to fill the vacancies on the board. Petitioners further allege that at the same meeting, G Toe S. Washington, Carl L. Paris, Jr. and Ernest Harmon were chosen by the board of trustees to serve as president, vice president and secretary/treasurer, respectively. Petitioners additionally allege that on November 22, 2011, a set of by-laws for the Church was adopted by a majority of the board of trustees. The by-laws provide for a board of trustees with not less than seven nor more than eleven members, and for elections of trustees by the board of trustees at a meeting called for such purpose.

Petitioners also allege that on November 13, 2011, a notice signed by various members of the congregation of the Church was posted at the Church, indicating the consent of the signers thereto, including respondents Carl L. Paris, Jr., Willie Rhett and Ernest Harmon, to the dissolution of the board of trustees (as then constituted) and calling for a meeting to “set-up a new board.” At a meeting convened at the Church on March 11, 2012 in response to the posted notice, a new board of trustees allegedly was elected by certain members of the congregation then in attendance. Petitioners claim that such election was invalid under article 9 of the Religious Corporation Law, insofar as trustees to the Church’s

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Catherine Railey and Gertrude Howard predeceased Cora Garnett Paris.

board are not elected by the body's members, but rather by the votes of the trustees themselves. Petitioners also claim that respondents Carl L. Paris, Jr., Willie Rhett and Ernest Harmon, by calling for the dissolution of the board of trustees and participating in the March 11, 2012 election, in effect relinquished their positions as trustees of the board, and their respective positions as officers of the Church. Petitioners seek to declare that they and Faye Rhoden are trustees of the Church, the March 11, 2012 election of respondents as trustees of the Church is null and void, respondents Carl L. Paris, Jr., Ernest Harmon and Willie Rhett have relinquished their positions as trustees and officers of the Church, and petitioners now may fill those respondents' positions on the board.

Petitioners obtained the order to show cause seeking to declare the Church is a free church, not a membership organization, respondents are not trustees of the Church and their election as trustees is null and void ab initio, petitioners and Faye Rhoden, a nonparty, are the only trustees of the Church, respondents Carl L. Paris, Jr., Ernest Harmon and Willie Rhett are no longer trustees of the Church, respondents Carl L. Paris, Jr. and Ernest Harmon are no longer vice-president and secretary treasurer, respectively of the Church and there are three vacancies on the Church's board of trustees which are to be filled by the "remaining trustees" pursuant to section 182 of the Religious Corporations Law and to enjoin respondents from acting as trustees or officers of the Church.

Respondents cross move to disqualify Harry Raptakis, Esq. from representing petitioners in this proceeding, and declare the Church to be a defacto membership organization pursuant to article 10 of the Religious Corporations Law and the March 11, 2012 election of a new board of trustees was valid, or in the alternative, that petitioners are no longer trustees of the Church. Respondents contend the Church from the inception, was operated by Cora Garnett Paris, the pastor, in conjunction with the members. Respondents also contend that following the death of Cora Garnett Paris, various members of the Church raised questions regarding the authority of Faye Rhoden to act with respect to the Church's finances, and consulted with Mr. Raptakis regarding the Church's structure and finances. According to respondents, Mr. Raptakis advised them the vacancies on the board needed to be filled so that the board could properly authorize the bringing of a lawsuit in the name of the Church against Faye Rhoden. Respondents further assert that Mr. Raptakis prepared corporate documents and minutes, and brought a proceeding on behalf of the Church against Faye Rhoden. Respondents also assert that although G Toe S. Washington, Anna Washington and Ernest Harmon were elected to fill the vacancies created by the deaths of Catherine Railey, Gertrude Howard and Cora Garnett Paris, the congregation nevertheless expected and agreed that the Church would continue to be operated with the participation of the membership, rather than by the board of trustees. Respondents contend that petitioners, however, attempted to dictate to the congregation, and failed to act in the best interests of the

Church, and as a consequence, the congregation voted to dissolve the board of trustees and elect respondents as a new board of trustees.

With respect to that branch of the cross motion by respondents to disqualify Mr. Raptakis, a party seeking disqualification of an adversary's lawyer under Code of Professional Responsibility DR 5-108 (a) (1) (22 NYCRR 1200.27 [a] [1]) must prove "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]; *Solow v Grace & Co.*, 83 NY2d 303, 308 [1994]; *Edelson v Poughkeepsie Iron & Metal Co.*, 262 AD2d 445 [1999]). The minutes of the meeting of the board of trustees held on August 29, 2010 indicates Mr. Raptakis was retained to act on behalf of the Church with respect to legal matters, and he thereafter prepared corporate documents and appeared on behalf of the Church in an action entitled *The Ezekiel House of Prayer, Inc. v Rhoden* (Supreme Court, Queens County, Index No. 2435/2010), seeking the return of corporate documents and financial records from Faye Rhoden.² As no prior attorney-client relationship exists between respondents and counsel for petitioners, that branch of the cross motion by respondents to disqualify Mr. Raptakis from representing petitioners in this special proceeding is denied.

With respect to that branch of the cross motion by respondents for declaratory relief, respondents did not serve a cross petition for affirmative relief. Therefore, the court deems respondents' opposition papers to constitute an answer to the petition with objections in points of law (CPLR 404).

With respect to petitioner's application, the Church's certificate of incorporation, filed with the New York State Department of State on October 13, 1981, indicates the Church was incorporated as a free church under article 9 of the Religious Corporations Law, provided for a self-perpetuating board of trustees, and named seven original trustees (*see Matter of Venigalla v Nori*, 11 NY3d 55 [2008]; *Matter of Agudist Council of Greater New York v Imperial Sales Co.*, 158 AD2d 683 [1990]; *Watt Samakki Dhammikaram, Inc. v Thenjitto*, 166 Misc 2d 16 [1995]).³ Although respondents assert there was no specific intention by the founding members to incorporate under article 9, as opposed to article 10,

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By order dated March 2, 2011, Fay Rhoden was directed to turn over all of the property, books and records of the Church which were in her possession.

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There is no claim by respondents that not less than five of the originally named trustees were not ministers of the gospel or priests of any denomination (*see Religious Corporations Law* § 180).

of the Religious Corporations Law, the certificate of incorporation contains the signatures of the trustees, thereby indicating their assent to the statements made therein (*see generally Pimpinello v Swift & Co.*, 253 NY 159 [1930]). Furthermore, to the extent respondents assert that the Church should be deemed to have been incorporated under article 10 based upon the actual practices of the Church, article 10 provides for the election of trustees by the body's members (*see Matter of Venigalla v Nori*, 11 NY3d at 62), and respondents make no claim that any trustees ever were elected by the congregation prior to the date of the challenged election. Rather, respondents assert that the Church was operated and governed for years without regard to corporate formalities. Respondents additionally have failed to demonstrate the court may disregard the statements found in the certificate of incorporation and deem the Church to be a *de facto* article 10 corporation with a board of trustees elected by the body's members.

Under section 182 of the Religious Corporations Law, vacancies which occur on self-perpetuating board of trustees are supplied by the remaining trustees at a legal meeting of the members of the board of trustees, so long as the resulting board contains at least five members of the board who are not ministers of the gospel or priests of any denomination (Religious Corporations Law § 182). In this instance, upon the occurrence of vacancies as a result of three board members' deaths, the board of trustees of the Church noticed a meeting, which was held on August 29, 2010, with a quorum of the board of trustees in attendance, and G Toe S. Washington, Anna Washington and Ernest Harmon were elected by a majority vote of the board members to fill the vacancies, and to become officers of the Church. Respondents make no claim that the resulting board had not less than five of the named trustees who were not ministers of the gospel or priests of any denomination (*see Religious Corporations Law § 180*). To the degree respondents claim such board has been dissolved by the congregation, the removal of trustees of a self-perpetuating board with or without cause may be accomplished only by the applicable vote of the members of the board of trustees (*see Not-For-Profit Corporation Law § 706[c][2]*), or pursuant to a judgment obtained by the Attorney General or ten percent of the members of the congregation, whether or not entitled to vote (*see Not-For-Profit Corporation Law § 706[d]*). Respondents have failed to demonstrate any vote by the board of trustees to dissolve the corporation, or any such judgment dissolving the Church.

To the extent respondents and other congregants elected a new board of trustees, the election is void because article 9 of the Religious Corporations Law makes no provision for any elections, other than by votes of the trustees themselves (*see Matter of Venigalla v Nori*, 11 NY3d at 62). Notably, the only "members" referred to in article 9 are the members of the board of trustees (*id.*).

To the extent petitioners assert respondents Carl L. Paris, Ernest Harmon and Willie Rhett resigned their positions as trustees, there is no evidence respondents tendered their resignations. In addition, their action in participating in the August 29, 2010 election does not itself constitute a resignation of their positions as trustees and officers, and petitioners have failed to offer any other evidence that respondents Carl L. Paris, Jr., Willie Rhett and Ernest Harmon have relinquished their positions as trustees, or that respondents Carl L. Paris, Jr. and Ernest Harmon have relinquished their positions as officers.

To the extent petitioners seek to declare Faye Rhoden is a trustee of the Church, she was not joined as a party respondent herein, and therefore, the court makes no determination as to whether Faye Rhoden remains a member of the board, or has resigned from the board.

As the petition fails to state a cause of action for a permanent injunction, the application in the order to show cause to enjoin respondents from acting as trustees or officers of the Church is denied.

Under these circumstances, it is ordered and adjudged that the petition is granted only to the extent of declaring the Church is a free church managed by a self-perpetuating board of trustees, that petitioners G Toe S. Washington, Jr., Louella King, Anna Washington, Willie Rhett, Carl L. Paris, Jr., and Ernest Harmon are members of the board of trustees of the Church, G Toe S. Washington, Jr., Carl L. Paris, Jr., and Ernest Harmon are the president, vice president and secretary/treasurer, respectively, of the Church and the election of respondents as trustees pursuant to the March 11, 2012 election is null and void.

Dated: December 3, 2012

J.S.C.