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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAWRENCE K. MARKS Justice

PART 41

Index Number : 653177/2011
GUBERMAN, JOSH
vs.
CONGREGATION AHAVATH CHESED
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

This motion is decided in accordance with the accompanying Decision and Order, dated May 28, 2014.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6-9-14

HON. LAWRENCE K. MARKS, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

----------X

JOSH GUBERMAN,

Index No. 653177/2011

Plaintiff,

- against -

CONGREGATION AHAVATH CHESED,

Defendant.

----------X

LAWRENCE K. MARKS, J.:

Plaintiff Josh Guberman ("Guberman") seeks to purchase certain real property owned by defendant Congregation Ahavath Chesed ("Congregation"), an entity subject to the Religious Corporations Law (RCL). In his verified complaint, Guberman seeks specific performance and money damages from the Congregation based on a fully executed contract of sale between the parties. In its verified amended answer, the Congregation has denied liability and interposed several affirmative defenses. The parties have completed discovery and filed a note of issue.

In motion sequence 002, the Congregation moves for summary judgment on the complaint. For the reasons set forth below, defendant's motion for summary judgment is granted.

BACKGROUND

For purposes of the Congregation's motion for summary judgment, the facts are construed in the light most favorable to Guberman as the non-movant. *Jacobsen v. New York City Health & Hosps. Corp.*, 2014 N.Y. Slip Op. 02098, at 6 (N.Y. Mar. 27, 2014). The Congregation is a religious corporation formed in 1942. Its articles of incorporation and by-laws provide for a six-member board of trustees. Y. David Scharf Aff, dated 3/22/13 ("Scharf Moving Aff"), Exh B ¶ 5; Scharf Moving Aff, Exh C art. II § 1. Pursuant to the by-laws, the trustees "shall have all the powers granted by the applicable provisions of the Religious Corporation laws" (Scharf Moving Aff, Exh C, art. II § 2), and the members of the Congregation "shall have all the powers provided under the applicable provisions of the Religious Corporation law of the State of New York." Scharf Moving Aff, Exh C art. I § 3.

Following the death of the Congregation's long-time rabbi in 2006, the membership of the Congregation dwindled, as did the donations required to maintain and operate the synagogue. Plaintiff's 19-a Statement, ¶¶ 6-7; Scharf Moving Aff, Exh X (David Redisch Aff, dated 2/14/12) ("Redisch Aff"), ¶ 4. The Congregation had, for at least 15 years, eschewed the formalities contemplated in its articles of incorporation and by-laws; the rabbi and his close relatives had run things themselves, without any duly authorized board of trustees or any documented congregational meetings. Perry L. Cohen

Aff, dated 4/17/13 ("Cohen Opp Aff"), Exh J at 12-13, 19-20, 60-63.[1] After the rabbi's death, his relatives continued this practice, apparently in consultation with long-time members of the Congregation. Cohen Opp Aff, Exh J at 25-27, 38-41, 52-54, 60-63, 65-69, *passim*; Redisch Aff, ¶¶ 5, 7.

At some point after the rabbi's death, members of the Congregation discussed the sale of its real property located at 309 West 89th Street in Manhattan, which was the Congregation's main asset and the location at which services were held. The former rabbi's son testified that the building is "old and dilapidated," and that, although his mother still lives there, "[i]t would take a substantial investment to make it habitable." Cohen Opp Aff, Exh J at 10, 54-55 (noting that she is "scared to be there" and "needs to move out"). In light of the dwindling membership and contributions, the consensus of the members of the Congregation was that they could not continue at that location, for financial reasons. Cohen Opp Aff, Exh J at 54.

No later than spring 2011, the property was listed with a real estate broker. Plaintiff's 19-a Statement, ¶ 1; Josh Guberman Aff, dated 4/17/13 ("Guberman Opp Aff"). The listing price of $4 million was based on the real estate broker's expertise. Cohen Opp Aff, Exh J at 49.[2]

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[1] For example, although the former rabbi's son testified that "[t]here may be copies of minutes from the early '80s," it appears that no such records were uncovered "despite a diligent search for them." Cohen Opp Aff, Exh J at 63.

[2] The parties have not provided any evidence of a contemporaneous formal valuation of the property, and the evidence submitted on this motion indicates that the Congregation, for its part, did not obtain one. Cohen Opp Aff, Exh J at 49.

Guberman and the Congregation eventually entered into a written contract of sale, dated July 8, 2011, by which the Congregation agreed to sell the premises to Guberman for $3.85 million. Plaintiff's 19-a Statement, ¶ 2. There was, at that time, "a consensus of the people [*i.e.*, the members of the Congregation], that they had agreed to the sale." Cohen Opp Aff, Exh J at 59. The members of the Congregation were also aware that "the senior member of the Shul," Solomon Scharf, would be signing the contract. *Id.;* Plaintiff's 19-a Statement, ¶¶ 9-11; Cohen Opp Aff, Exh J at 108. He had informal authority to sign the contract. Cohen Opp Aff, Exh J at 59.

Both parties were represented by counsel in the transaction. Paragraph 58 of the contract states:

> It shall be a condition of Seller's obligation to close that Seller is able to obtain all required approvals necessary for the transfer of the Premises to Purchaser pursuant to this agreement, (collectively, the "Approvals") including without limitation:
>
> (i) the written approval and/or consent by the Attorney General of the State of New York to the sale of the Property by the Seller to Purchaser; and
>
> (ii) a Court Order issued by the a [*sic*] Justice of the Supreme Court of the State of New York, County of New York, permitting the sale of the Property to Purchaser.
>
> Seller shall make applications to obtain the Approvals within thirty (30) days from and after the expiration of the Due Diligence Period (as hereinafter defined).

Compl, Exh A, Rider ¶ 58. The Due Diligence Period was to expire on July 18, 2011, Compl, Exh A, Second Rider ¶ A, and the contract stated that time was of the essence as to Guberman's obligations. Compl, Exh A, Rider ¶ 59.

Members of the Congregation met to discuss the contract on multiple occasions in the months after it was signed, but did not reach agreement to take any further action. Scharf Moving Aff, Exhs H-I; Redisch Aff ¶ 8; Cohen Opp Aff, Exh J at 51-54, 60-61, 95-97, 123, 152-53; *cf.* Scharf Moving Aff, Exh F at 74-75 ("Everyone knew the circumstances [of the proposed sale] prior to the [September 2012] meeting. ... Everyone was in the loop someway or another. I don't recall how everyone knew about it, but everyone knew about it."). The record is devoid of any formal documentation of these meetings or discussions through minutes, resolutions, or the like. *E.g.*, Cohen Opp Aff, Exh J at 63. Meanwhile, the parties subsequently amended the contract three times in August and September 11, at the request of the Congregation's counsel. Each amendment extended the time for the Congregation to "make applications to obtain the Approvals" in Paragraph 58. Compl, Exh B. The third amendment, dated September 23, 2011, extended this time to October 7, 2011. *Id.*

It appears that, as late as September or October 2011, Guberman, Benjamin Orenstein, and counsel for both parties believed that the transaction would go forward. Cohen Opp Aff, Exh J at 154; Guberman Opp Aff, ¶¶ 10-11. The Congregation's counsel prepared a draft petition for dissolution, bearing a date of September 22, 2011, by which the Congregation could seek the requisite court approval to consummate the transaction.

Cohen Opp Aff, Exh E; Cohen Opp Aff, Exh J at 140-152. The draft petition states that the sale was duly authorized by a resolution dated August 22, 2011, "adopted by unanimous vote of the Board of Trustees and Members of" the Congregation. Cohen Opp Aff, Exh E, ¶ 16. However, no such resolution appears anywhere in the record,[3] and neither this draft petition nor any other petition seeking court approval was ever signed, let alone submitted to a court. Cohen Opp Aff, Exh J at 63.[4]

The evidence submitted on this motion suggests that the Congregation was, long after signing the contract and even after the present litigation was filed, torn between trying to revitalize itself in its current location if it could obtain the necessary financial commitments from its members, or else selling the property and dissolving. Cohen Opp Aff, Exh J at 41-42, 54, 80, 84, 97, 103, 137-38, 152-53, 167-70, 179; Redish Aff ¶ 8.

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[3] The draft petition is incomplete on its face; for example, Paragraph 4, which purports to list the members of the board of trustees, is conspicuously blank. Cohen Opp Aff, Exh E, ¶ 4. Paragraphs 16 through 18 of the petition purport to attach copies of a formal resolution, a certified transcript of the minutes, and the notice of meeting, but no such exhibits are attached. Cohen Opp Aff, Exh E, ¶¶ 16-18. The former rabbi's son testified that the information contained in the draft petition "was provided by myself and maybe my brother-in-law. Might be my brother-in-law, maybe my sister." Cohen Opp Aff, Exh J at 144. He and his brother-in-law have stated under oath that the Congregation did not issue a resolution approving the sale. Cohen Opp Aff, Exh J at 60; Redisch Aff, ¶¶ 8-9.

[4] Although facts concerning the creation, purpose and existence of the draft petition are not hearsay, the statements contained in the draft petition are hearsay, and thus cannot be considered for the truth of the matters asserted unless an exception applies. Unfortunately, the parties have not meaningfully addressed this or any other legal issues concerning the admissibility and probative value of statements contained in the draft petition. The Court notes, however, that "hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition." *O'Halloran v. City of New York*, 78 A.D.3d 536, 37 (1st Dep't 2010).

Plaintiff's counsel sent a letter dated November 3, 2011 advising the Congregation that it was in default under the contract and "[u]nless such default is cured on or before 5:00 P.M. on November 11, 2011, ... Purchaser shall immediately commence an action for specific performance...." Scharf Moving Aff, Exh Y. Guberman then did so, on November 15, 2011.

Almost a year later, on September 3, 2012, the Congregation convened its first formally documented meeting in over a decade. Scharf Moving Aff, Exh Q; Cohen Opp Aff, Exh J at 60-63. At this meeting, the membership elected a board of trustees; voted to increase the number of trustees; voted to disapprove the sale; and voted to raise and borrow funds for certain purposes. Scharf Moving Aff, Exh Q. Ali Scharf, who chaired the meeting, testified that the Congregation "voted not to consent to the sale." Scharf Moving Aff, Exh F at 73. When asked why, he stated: "Because the outcome of the sale would have left us with no alternative to continue our congregation." *Id.*

Thereafter, defendant's counsel purported to terminate the contract, by letter dated November 7, 2012, advising plaintiff's counsel that "Seller has been unable to obtain the necessary approval for transfer of the Premises to Purchaser" under paragraph 58 of the contract. Scharf Moving Aff, Exh S. Thereafter, Guberman's deposit was returned to him, with interest, without prejudice to the rights of either party. Cohen Opp Aff, Exh I.

The Congregation's interim acting rabbi has stated under oath that "the internal conflict regarding the possible sale of the Shul has energized the congregation. The proposed sale of the Shul has led to an invigorated constituency, therefore, the

membership is against the support of the sale." Redisch Aff, ¶ 10. The son of the Congregation's former rabbi has testified that the synagogue continues to exist at the property, and plans to do so "[d]efinitely for like immediate future, like a few-year period." Cohen Opp Aff, Exh J at 184-85. He further testified that there has been "a new crowd which has frequented the shul, the Congregation, mostly on Saturdays" over the past two years, who are younger than the long-time members. Cohen Opp Aff, Exh J at 120-21. His mother still attends services at the synagogue, and he also attends "at least a couple of times a month." Cohen Opp Aff, Exh J at 14, 34-36.

The Present Litigation

In his verified complaint, Guberman asserts two causes of action. In his first cause of action, he seeks specific performance of the contract, *i.e.*, an order "requiring the Congregation to apply for the requisite approvals necessary to complete the Contract, and upon receiving the necessary approvals, requiring the Congregation to consummate the sale of the Premises." Compl, ¶ 19. In his second cause of action, he seeks $1 million in damages from the Congregation for breach of contract. Compl, ¶ 27. The Congregation filed a verified amended answer in November 2012, denying liability and asserting several affirmative defenses. Discovery has been completed, and a note of issue has been filed.

In support of its present motion for summary judgment, the Congregation has submitted numerous exhibits, and two memoranda of law. In opposition, Guberman has

submitted an affirmation on personal knowledge, multiple exhibits, and a memorandum of law. Each party submitted a Rule 19-a Statement, a response to the other's Rule 19-a Statement, and, at this Court's request following oral argument, a letter addressing the impact of *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn*, 76 A.D.2d 712 (2d Dep't 1980), *aff'd* 54 N.Y.2d 742 (1981), on the present matter.

DISCUSSION

The Congregation moves pursuant to CPLR 3212 for an order granting it summary judgment on the complaint. To obtain summary judgment, the movant "'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 (1st Dep't 2012) (citations omitted); CPLR 3212. Once this showing has been made, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Madeline D'Anthony*, 101 A.D.3d at 607.

While it is well-settled that the facts, and all reasonable inferences therefrom, must be construed in the light most favorable to the non-movant, it is equally clear that "mere speculation ... is insufficient to defeat a motion for summary judgment." *Espinal v. Trezechahn 1065 Ave. of the Ams., LLC*, 94 A.D.3d 611, 613 (1st Dep't 2012) ("where

testimony is 'physically impossible or contrary to experience,' it has no evidentiary value"); *IDX Capital, LLC v. Phoenix Partners Group LLC*, 83 A.D.3d 569, 570 (1st Dep't 2011) ("only the existence of a bona fide issue raised by evidentiary facts, not one based on conclusory or speculative allegations, will suffice to defeat a motion for summary judgment").

Cause of Action for Money Damages

In his second cause of action, Guberman seeks money damages for breach of contract "in an amount to be determined at trial, but in no event less than one million dollars." Compl, ¶ 27. Although the present record reveals no basis for a six-digit figure, plaintiff does claim to have incurred nearly $85,000 worth of expenses, including attorneys' fees, in connection with the proposed purchase. *See* Guberman Opp Aff, ¶ 12; Scharf Aff, Exh Z; *cf.* Compl, ¶ 24.

The Congregation argues that the second cause of action must be dismissed, because Guberman expressly contracted away the right to seek money damages for breach of contract. The argument is based on paragraph 55 of the contract, which states:

> In the event Seller shall default in the performance of Seller's obligations under this Contract and the Closing does not occur as a result of the above, Purchaser's sole and exclusive remedy shall be either (i) to instruct the Escrow Agent to pay to Purchaser the Deposit with interest earned thereon, if any, and Seller shall be released from any further liability to Purchaser hereunder, except that such provisions contained herein that otherwise expressly survive termination of this Contract shall survive; or (ii) to seek specific performance,

> Purchaser hereby specifically waiving any and all other rights and remedies in equity or at law, including without limitation, a suit for damages.

Compl, Exh A, Rider ¶ 55. In the alternative, the Congregation argues that, to the extent that plaintiff is seeking attorneys' fees, that portion of the claimed damages must be dismissed because there is no legal or contractual basis to award attorneys' fees in the present case.

The Congregation's motion for summary judgment on the second cause of action is entirely unopposed. Nowhere in his opposition papers does Guberman address defendant's arguments concerning the second cause of action. Guberman has not attempted to distinguish any of the cases cited by defendant, or to identify any claimed ambiguities in Paragraph 55, or to offer any alternative interpretations of Paragraph 55. Nor does Guberman suggest that Paragraph 55 is unenforceable or otherwise inapplicable to the second cause of action, or identify any other contractual provisions that might survive termination of the contract and provide a basis for him to sue for money damages.

Whether or not a writing is ambiguous is a question of law to be resolved by the court, and is thus suitable for resolution on a motion for summary judgment. *Richard Feiner & Co. Inc. v. Paramount Pictures Corp.*, 95 A.D.3d 232, 237 (1st Dep't 2012). Likewise, absent any ambiguity, the construction of a contract is a question of law for the court. *Koren Rogers Assoc. Inc. v. Standard Microsystems Corp.*, 79 A.D.3d 607, 608-09 (1st Dep't 2010). Of course, even claimed ambiguities in a writing do not necessarily defeat a motion for summary judgment, when resolution of the ambiguities does not

depend on extrinsic evidence. *Sutton v. East Riv. Sav. Bank*, 55 N.Y.2d 550, 554 (1982). In any event, the Court concludes that the parties' contract unambiguously limits Guberman's remedies in case of breach. Indeed, Guberman expressly "waiv[ed] any and all other rights and remedies in equity or at law, including without limitation, a suit for damages." Compl, Exh A, Rider ¶ 55.

It is well-settled that such limitation-of-remedy provisions are enforceable. *See, e.g., Metropolitan Life Ins. Co. v. Noble Lowndes Intl.*, 84 N.Y.2d 430, 436 (1994) ("A limitation on liability provision in a contract represents the parties' agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor."); *Keifer v. Sony Music Entertainment, Inc.*, 8 A.D.3d 107, 107 (1st Dep't 2004) (affirming grant of summary judgment, where "[p]laintiffs failed to demonstrate triable issues of fact concerning their recording contract, which provided termination as the exclusive remedy against defendant"). Indeed, the Court of Appeals has recognized that "if contracting parties agree to a limitation-of-liability provision, it will be enforced unless unconscionable, even if it leaves a non-breaching party without a remedy." *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 2014 N.Y. Slip Op. 02101, at 18 (N.Y. Mar. 27, 2014).

The Court concludes that there are no material disputed issues of fact with respect to the Congregation's unopposed motion for summary judgment on the enforceability of this provision. *See Diplomat Props., L.P. v. Komar Five Assoc., LLC*, 72 A.D.3d 596, 598 (1st Dep't 2010) (affirming grant of summary judgment, and noting that "[d]efendant

purchaser is bound by the exclusive remedy provisions set forth in the parties' contract, having failed to adduce any facts from which a trier of fact could find that plaintiff seller engaged in misconduct 'smack[ing] of intentional wrongdoing'").[5]

The limitation-of-remedies provision is therefore enforceable, and summary judgment is granted to the Congregation dismissing the second cause of action.[6]

Cause of Action for Specific Performance

Paragraph 58 of the contract makes it "a condition of Seller's obligation to close that Seller is able to obtain all required approvals necessary for the transfer of the Premises to Purchaser ... including without limitation" written approval and/or consent of the Attorney General and a court order permitting the sale. Compl, Exh A, Rider ¶ 58. Defendant argues, in essence, that the requested order of specific performance (*i.e.*, an order requiring defendant to seek the approvals necessary to go forward with the transaction) is futile because, due to the Congregation's now-unanimous opposition to the proposed dissolution and sale, the transaction is no longer capable of being approved.

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[5] Where the provisions of Not-for-Profit Corporation Law (N-PCL) § 511 apply to a proposed sale, the requirements apply to "any termination-payment clause or similar damages or reimbursement provision" even if the underlying sale is disapproved. *64th Assoc., L.L.C. v. Manhattan Eye, Ear & Throat Hosp.*, 2 N.Y.3d 585, 587, 591 (2004). Here, it is clear that the limitation on remedies contained in Paragraph 55 is favorable to the Congregation and thus meets the standard of "fairness, reasonableness and furtherance of corporate purpose." *Id.* at 591.

[6] In light of this disposition, there is no need to reach the Congregation's alternative argument, that Guberman has failed to identify any legal or contractual basis for seeking attorneys' fees in this action and therefore cannot recover that component of his claimed damages. *See Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989).

Defendant frames the issue both in terms of failure of a condition precedent, and in terms of futility. Plaintiff concedes that the statutory scheme requires approval of the transaction "by the Congregation's membership and board" before court approval can be granted. Pl's Mem Opp, at 2. However, he argues, in essence, that the requisite internal approvals have already been obtained, or alternatively that there are factual questions concerning whether the membership approved or authorized the transaction.

1. The Statutory Scheme

The Court notes that, even if the contract had omitted any reference to the need for court approval, that requirement is imposed by law and cannot be evaded by the parties to the contract. *See Associate Presbyt. Congregation of Hebron v. Hanna*, 113 App. Div. 12 (3d Dep't 1906) (noting that the statute would be nullified if the parties could circumvent it by consummating the sale as between themselves); *cf. Wyatt v. Benson*, 4 Abb. Pr. 182, 191 (N.Y. County Sup. Ct. 1857) (noting that the parties could not obtain approval for the sale from an arbitrator of their own choosing, as approval rests "solely in the discretion of this court, and cannot be lawfully delegated to anyone else"). Indeed, the purpose of requiring court approval "is to protect the members of a religious corporation, the real parties in interest, from loss through unwise bargains and perversion of the use of church property." *Morris v. Scribner*, 121 A.D.2d 912, 916 (1st Dep't 1986); *see also Muck v. Hitchcock*, 212 N.Y. 283, 287 (1914); *Soho Ctr. for Arts & Educ. v. Church of St. Anthony of Padua,* 146 A.D.2d 407, 411 (1st Dep't 1989).

Section 12 of the RCL provides that a religious corporation, such as the Congregation, "shall not sell ... any of its real property without applying for and obtaining leave of the court therefor pursuant to section five hundred eleven of the not-for-profit corporation law," subject to certain modifications and exceptions that are not relevant here. RCL § 12(1). The petition for court approval must, among other things, set forth:

> 6. That the consideration and the terms of the sale ... are fair and reasonable to the corporation, and that the purposes of the corporation, or the interests of its members will be promoted thereby, and a concise statement of the reasons therefor.
>
> 7. That such sale ... has been recommended or authorized by vote of the directors in accordance with law, at a meeting duly called and held, as shown in a schedule annexed to the petition setting forth a copy of the resolution granting such authority with a statement of the vote thereon.
>
> 8. Where the consent of members of the corporation is required by law, that such consent has been given, as shown in a schedule annexed to the petition setting forth a copy of the resolution granting such authority with a statement of the vote thereon.

N-PCL § 511(a). The Court of Appeals has recognized that the statute requires "both leave of the court and appropriate denominational authorization." *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn*, 54 N.Y.2d 742, 744 (1981).[7]

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[7] The First Department and other courts have recognized that the statute contemplates an essentially democratic process. *Morris v. Scribner*, 121 A.D.2d at 916 ("the law treats religious corporations as essentially democratic institutions"); *Wolkoff v. Church of St. Rita*, 132 Misc.2d 464, 469 (Richmond County Sup. Ct. 1986) ("the court has been able to protect the church's property by ... denying approval where a majority of the congregation was against it"); *In re Reformed Dutch Church in Saugerties*, 16 Barb. 237 (N.Y. County Sup. Ct. 1853) ("It is the right

Ultimately, the proposed sale cannot be approved unless the court is satisfied that (1) "the consideration and the terms of the transaction are fair and reasonable to the corporation" and (2) "the purposes of the corporation or the interests of the members will be promoted." N-PCL § 511(d).

2. Relevant Time Frame for Analysis of the Second Prong

Although both prongs of N-PCL § 511(d) must be satisfied in order to approve the proposed sale, the Congregation's motion for summary judgment dismissing the complaint focuses on the failure of the second prong. However, as previously noted, the parties have largely concentrated on different time frames in their respective analyses of this prong.

It appears that neither the Court of Appeals nor the First Department has directly addressed the issue of the relevant time-frame for a court to consider when determining the second prong of Section 511(d), *i.e.*, whether the proposed sale will promote the purposes of the religious corporation or the interests of the members of its congregation. However, the Court of Appeals has at least indirectly addressed the issue in *Church of God* (54 N.Y.2d 742) by affirming the Second Department's decision.

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of a majority to control, in all civil affairs, and not less in the management of the temporalities of a religious society than any other."); *Wyatt v. Benson*, 4 Abb. Pr. at 191 ("Even though the defendants be the legally elected trustees of the society, they have not, in my opinion, any right or power to institute or carry on proceedings to sell the real estate of the society without the consent of a majority of the corporators.").

In considering whether the proposed sale will promote the purposes of the religious corporation or the interests of the members of its congregation, the Second Department was "guided primarily by whether those ends would be realized in light of conditions prevailing at the time the issue is presented to the court." *Church of God*, 76 A.D.2d at 717.[8] The timing issue was critical to the decision, because the Second Department determined that, although the transaction was fair and reasonable to the religious corporation at the time of contracting, it was no longer in the corporation's best interests at the time the issue came before the court, due to a significant change in circumstances. The Court of Appeals affirmed, and specifically held that the Appellate Division's factual finding was "supported by the weight of the evidence." *Church of God*, 54 N.Y.2d at 744.

Courts outside the Second Department have followed the same analysis. *See Abounding Grace Ministries and Community Solutions, Inc. v. Ukranian Evangelical Assemblies of God Church, Inc.*, 2007 NY Slip Op 34197(U), at 39 (N.Y. County Sup. Ct. Dec. 20, 2007) (looking to the "time of the making of the contract" in gauging the fairness and reasonableness of the terms of the contract, and to "the time approval of the contract is considered" in gauging whether the sale is in the best interest of the

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[8] By contrast, the Second Department held that the first prong – "that the terms and consideration of the transaction were not unwise" – focuses on "the conditions prevailing at the time [the bargain] was struck." *Church of God*, 76 A.D.2d at 717.

congregation); *Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A.*, 2014 WL 1612988 (S.D.N.Y. Mar. 30, 2014) (collecting cases).

At oral argument on the present motion, this Court also asked the parties to provide their views on the applicability of *Church of God* to the present matter, and they did so. Neither party identified any authority (whether in the First Department or elsewhere) that would contradict or undermine the relevant aspects of the Second Department's analysis in *Church of God*. To the contrary, Guberman referred to the Second Department's approach to the two-prong test as "controlling." Letter of Craig M. Nisnewitz, dated 7/3/13 ("Plaintiff's 7/3/13 Letter"), at 5.[9]

Finally, on its own independent review of the statute and case law, the Court concludes that the Second Department's timing analysis is also consistent with the statutory language and purpose.

3. May a Religious Corporation Change Its Mind About Selling Its Property?

Although the Congregation has argued that the Congregation did not change its mind because it never formally approved the sale, the Court notes that, when construing all of the proffered submissions on this motion in the light most favorable to Guberman, it appears that the Congregation at least informally approved and authorized the sale to

[9] Although it appears that the First Department has not yet had occasion to address the timing issue, it has nonetheless cited the Second Department's decision on several occasions for other points of law. *See, e.g., Soho Ctr. for Arts and Educ.*, 146 A.D.2d at 411; *Morris v. Scribner*, 121 A.D.2d 912; *Manhattan Theatre Club, Inc. v. Bohemian Benevolent & Literary Assn. of the City of N.Y.*, 102 A.D.2d 788 (1st Dep't 1984).

Guberman in the summer of 2011. There is, therefore, on the present motion for summary judgment, a question of whether the RCL permits a religious corporation to change its mind about going forward on a contract to sell its real property.

A further detailed discussion of the *Church of God* decision is appropriate because that case also involves a religious corporation that changed its mind about a proposed sale of its real property. Although the Second Department found that the transaction was fair and reasonable to the religious corporation at the time it was made, it disapproved the transaction because "conveyance of defendant's church edifice would now be highly detrimental to the purpose of the corporation and the interests of its members," where the "[s]ale is now unanimously opposed by defendant's membership" due to a merger that revitalized the congregation and "[s]pecific performance of this contract would leave the combined congregation of two churches without a house of worship." *Church of God,* 76 A.D.2d at 717.

The Second Department noted that a religious corporation does not have an unfettered right to change its mind as to the sale of its real property after it has entered into a contract of sale but before the requisite court approval has been obtained. *Id.* at 718 (suggesting that it would be inappropriate if "the sale is only opposed ... because of a slightly better offer from some other party"). Therefore, the Second Department cautioned that the determination "must be made on a case-by-case basis." *Id.*

With respect to this aspect of the *Church of God* decision, the Congregation has argued that the present transaction also "fail[s] prong two, for similar reasons" as in

Church of God, namely: "The Congregation, like the Church, does not have an alternative place of worship, even as the synagogue is growing and visited, and the Congregation would be made homeless by a forced sale. Like the Church, the Congregation has explicitly considered a sale and indicated via the unanimous vote of its members that it does not wish to sell." Defendant's 7/3/13 Letter, at 3. By contrast, Guberman argued that "enforcing the contract of sale is in the Congregation's best interest, which was struggling to sustain its infrastructure, believed it could not maintain itself and thus decided to honor the deceased Rabbi and further the Congregation's religious purpose by making charitable gifts and contributions of the proceeds of any sale of the property." Plaintiff's 7/3/13 Letter, at 1. In its letter, just as in its moving papers, Guberman failed to address or even acknowledge the Second Department's discussion of the relevant time frame in which to consider the second prong. Instead, Guberman argued that, under the Second Department's analysis, "the fact that certain congregants may have at some later time changed their mind regarding the sale is not determinative." Def's 7/3/13 Letter, at 4-5.

4. Application to the Present Motion

The Congregation has shown, *prima facie*, that it does not currently believe that the purposes of the Congregation or the interests of its members will be promoted by the proposed sale, because – somewhat ironically – the conflict about selling the property "has energized the congregation" and "invigorated" the constituency. Redisch Aff, ¶ 10;

cf. id. ¶ 7 (noting that the Congregation now "anticipates receiving previously unanticipated contributions which will obviate the necessity of selling the Shul"). The Congregation has shown that the re-energized members wish to continue worshiping at their present location (Cohen Opp Aff, Exh J at 184-85; Cohen Opp Aff, Exh F at 73), a purpose that is clearly central to the Congregation's purpose as a religious corporation. *See Church of God*, 76 A.D.2d at 718. The Congregation has also shown, *prima facie*, that its members – and the directors they elected at their first formal meeting in decades in September 2012 – currently oppose the proposed sale, and have formally recorded their disapproval of the sale in the written minutes of the meeting. Scharf Moving Aff, Exh Q. Moreover, the procedures followed at this meeting appear to be consistent with the Congregation's bylaws and articles of incorporation. Scharf Moving Aff, Exhs B-C. Thus, the Congregation has made a *prima facie* showing that, if this Court were to grant the specific performance requested by Guberman and order the Congregation to submit a petition for court approval of the transaction, it would not currently be able to submit a petition that complies with the statutory requirements.

The burden therefore shifts to Guberman to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of material fact concerning the Congregation's current opposition to the sale, *i.e.*, its ability to submit a petition that complies with the requirements of N-PCL § 511 and RCL § 12.

Guberman first argues, using somewhat obscure logic, that evidence of the September 2012 meeting disapproving the transaction constitutes "parol evidence" that

must be disregarded because it seeks to explain, vary, or contradict the written terms of the contract. Pl's Mem Opp, at 10-11. Obviously, the contract signed in July 2011 and the amendments executed in August and September 2011 do not contain any representation about whether or not the Congregation would later determine that the transaction was no longer in its best interests and vote to disapprove the transaction a year later, in September 2012. Guberman's argument rests on a specious misreading of the contractual language; he argues that Paragraph 58 contains a factual assertion that the Congregation "is able" to obtain the required approvals. To the contrary, those words appear in Paragraph 58 as part of a condition; that is, the Congregation's obligation to close is conditioned on its ability to obtain the required approvals. Thus, Paragraph 58 expressly anticipates that the Congregation may, or may not, be able to obtain the requisite approvals for the sale.

Guberman next attempts to raise questions about "the content and import of the Congregational meetings that took place between July 26, 2011 and September 22, 2011." Pl's Mem Opp, at 12-13. This Court is assuming, for the purposes of the present motion, that the Congregation informally approved and authorized the transaction during that time frame, whether on August 22, 2011 (as referenced in the draft petition) or otherwise. If the Court were confronted with competing resolutions, an earlier one approving the sale, and a later one disapproving it, there might be a triable issue about whether the Congregation should be ordered to go forward with the sale on the resolution approving the sale. However, in response to the Congregation's showing of a formally documented

congregational vote unequivocally rejecting the transaction, Guberman has not come forward with proof in admissible form that the Congregation ever issued a resolution or other document approving the sale, which could be attached to the petition as required by N-PCL § 511(d)(7)-(8).

Plaintiff also argues that there are material issues of fact concerning the September 3, 2012 meeting at which the Congregation voted unanimously to disapprove the sale. *See* Pl's Mem Opp, at 13. In support of this argument, Guberman points to four items in the record. The first three are based on language contained in the contract of sale (dated July 2011), the parties' course of conduct in obtaining extensions of time (August-September 2011), and the preparation of a draft verified petition (dated September 22, 2011). All of these, however, occurred at least eleven months before the September 3, 2012 meeting, and the Court cannot discern how they in any way cast doubt on the Congregation's ultimate decision in September 2012 that the transaction was not in the Congregation's best interests, after all. The fourth item to which Guberman points is the deposition testimony of the former rabbi's son, testifying that it was the consensus of the long-term members of the congregation to sell the property. However, this testimony again relates to the summer 2011 time-frame, in which the property was offered for sale and the parties executed the contract. Once again, it does not raise any material questions about the validity of the much later September 2012 meeting. The Court therefore concludes that Guberman has not come forward with any evidence that raises triable

questions about the validity of the September 2012 meeting and the Congregation's formal vote to disapprove the sale.

Finally, to the extent that Guberman argues that there are triable factual issues regarding whether the Congregation ever intended to perform the contract (Pl's Mem Opp, at 1-2, 13-14), it is clear that, for breach of contract claims, the relevant intent is the parties' objectively manifested intent, rather than the undisclosed subjective intent of either party. *Matter of Ahern v. South Buffalo Ry. Co.*, 303 N.Y. 545, 560-61 (1952); *Kowalchuk*, 61 A.D.3d at 125; *cf. Biotronik A.G.*, 2014 N.Y. Slip Op. 02101, at 17.

Nor has Guberman managed to raise any triable questions of fact about whether the Congregation's present opposition to the sale is based on considerations other than the Congregation's determination that its interests will be best served by continuing to worship at its current location. There is, for example, no evidence that the Congregation has found another buyer who is willing to pay a higher price. *See Church of God*, 76 A.D.2d at 718; *see also* Cohen Opp Aff, Exh J at 164-65. Indeed, the Court notes that, if it were to ignore or override the Congregation's September 2012 vote and order the Congregation to submit a petition that complied with the provisions of RCL § 12, it would be improperly substituting its own views as to the viability of the Congregation for the members' views. *Cf. Matter of Metropolitan N.Y. Synod of the Evangelical Lutheran Church of Am. v. David*, 95 A.D.3d 419 (1st Dep't 2012) (noting that "petitioner's determination that the congregation had become so diminished and scattered that it could no longer function is a nonjusticiable religious determination").

Plaintiff has thus failed to raise any triable issue of material fact with respect to the Congregation's showing that, following the commencement of the present litigation, the Congregation determined that the proposed sale is no longer in its best interests and that the members and newly elected directors have issued a resolution opposing the sale. This Court concludes that, on the present motion, the Congregation has established *prima facie* that it cannot submit a petition meeting the requirements of N-PCL § 511, as it has determined that the sale is not currently in its best interest (N-PCL § 511[a][6]), and cannot attach the required resolutions approving the sale in light of the members' unanimous and unequivocal rejection of the sale (N-PCL § 511[a][7]-[8]). Moreover, it would be futile to require the Congregation to submit a petition for court approval, as the second prong of N-PCL § 511(d) cannot be satisfied at this time; the Congregation has shown, without meaningful contradiction, that the sale no longer promotes the purposes of the corporation or the interests of its members.

The Court has considered the parties' remaining contentions and concludes that they lack merit.

Accordingly, it is hereby

ORDERED that summary judgment is granted to defendant Congregation Ahavath Chesed and the complaint of plaintiff Josh Guberman is dismissed.

Dated: May 28 2014

ENTER:

J.S.C.