

**Rabbinical Bd. of E. Flatbush v Educational Inst.
Oholei Torah of Brooklyn, Inc.**

2018 NY Slip Op 32739(U)

October 24, 2018

Supreme Court, Kings County

Docket Number: 505815/18

Judge: Debra Silber

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At an IAS Term, Part 9 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 24th day of October, 2018.

P R E S E N T:

HON. DEBRA SILBER,
Justice.
-----X

RABBINICAL BOARD OF EAST FLATBUSH,
Plaintiff,

- against -

EDUCATIONAL INSTITUTE OHOLEI TORAH OF
BROOKLYN, INC.,
Defendant.
-----X

DECISION / ORDER

Index No. 505815/18
Action #1
Mot. Seq. # 1
Submitted: 7/12/18

RABBINICAL BOARD OF EAST FLATBUSH,
Plaintiff,

- against -

EDUCATIONAL INSTITUTE OHOLEI TORAH OF
BROOKLYN, INC.,
Defendant,

Index No. 511811/18
Action #2
Mot. Seq. # 1

THE ATTORNEY GENERAL OF THE STATE OF NEW
YORK,
Nominal Defendant.
-----X

The following papers numbered 1 through 11 read herein:

Papers Numbered

	<u>Action #1</u>	<u>Action #2</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2</u>	<u>5-7</u>
Opposing Affidavit (Affirmation) _____	<u>3-4</u>	<u>8-9</u>
Reply Affidavit (Affirmation) _____		<u>10-11</u>

These related actions were commenced by Rabbinical Board of East Flatbush (Rabbinical Board) against Educational Institute Oholei Torah of Brooklyn, Inc. (Oholei Torah) to quiet title to the religious bathhouse (Mikvah) at 340 East 52nd Street in Brooklyn (Property).

In Action #1, defendant Oholei Torah moves for an order: (1) dismissing the complaint based on res judicata, collateral estoppel and the statute of limitations, pursuant to CPLR 3211 (a) (5), and (2) vacating and discharging the notice of pendency that Rabbinical Board filed against the Property.

In Action #2, Rabbinical Board moves, by order to show cause, for an order: (1) staying Action #1, pursuant to CPLR 2201; (2) granting it an injunction, pursuant to CPLR Article 63, restraining and enjoining Oholei Torah from selling, transferring, conveying, disposing or otherwise encumbering the Property until the resolution of Action #2; and (3) consolidating Action #1 and Action #2, pursuant to CPLR 602.

The foregoing motions are hereby joined for a single disposition.

Background

Rabbinical Board's Action #1

On March 23, 2018, Rabbinical Board, a religious organization that formerly operated the Property as a religious bathhouse, commenced Action #1, a quiet title action, against Oholei Torah, another religious organization, by filing a summons and a complaint verified by Rabbi Shimon Hecht. In addition, Rabbinical Board filed a notice of pendency against the Property. The complaint in Action #1 alleges that Rabbinical Board “has been the owner” of the Property and “[u]ntil this past week, [Rabbinical Board] was under the impression that it was the Deed Holder to the [Property] having acquired title to same prior to 2005” (Action #1 complaint at ¶¶ 4 and 6). Rabbinical Board alleges that it “inspected the current Deed and learned that on or about August 17, 2005 the Deed was transferred out of

its name . . . to [Oholei Torah] for zero consideration and without authorization or permission from [its] agents, officers, Rabbis, or leaders . . .” (*id.* at ¶ 8). The deed reflects that Mendel Lerman, who is “not associated with [Rabbinical Board]” and appears to be employed by Oholei Torah,¹ improperly signed the deed on behalf of Rabbinical Board (*id.* at ¶¶ 9 and 10) as its President.

In Action #1, Rabbinical Board’s complaint seeks judicial declarations that: (1) title to the Property is vested in it; (2) the deed transferring the Property to Oholei Torah is a nullity; (3) Oholei Torah has “no estate, right, title, interest or right to possession in the Property or any portion thereof”; and (4) Oholei Torah is “forever enjoined from asserting any estate, right, title, interest, or right to possession in the Property” (*id.* at ¶¶ 17-18).

Oholei Torah’s Dismissal Motion

Oholei Torah, on May 11, 2018, filed a pre-answer motion seeking to dismiss the complaint in Action #1 on the grounds that the relief demanded therein is barred by the doctrines of *res judicata* and collateral estoppel and time-barred by the statute of limitations.

Oholei Torah relies upon a July 26, 2005 order (2005 Order) issued by the court (Jacobson, J.) in a 2005 *ex parte* proceeding (index No. 20961/05) purportedly commenced by Rabbinical Board for Leave to Transfer the Property to Oholei Torah (2005 Proceeding). The 2005 Order, a copy of which is annexed to Oholei Torah’s dismissal motion, authorized Rabbinical Board to transfer the Property to Oholei Torah “for no consideration” and ordered that the 2005 Order be forwarded to the Attorney General of the State of New York (NYAG) and that the NYAG “is to be notified, in writing, when the transaction has been completed . . .” No appeal was taken from the 2005 Order, as it was *an ex parte* application, and no notice was required to be served on anyone other than the Attorney General.

¹ Oholei Torah’s web site, a printout of which is attached as Exhibit 4 to plaintiff’s opposition papers, lists Mendel Lerman as “Director of Building Campaign” in The Development, Dinner and Alumni Office.

Oholei Torah's dismissal motion annexes a copy of the 2005 verified petition in the 2005 Proceeding, which was verified by Mendel Lerman. The 2005 petition alleged that Mendel Lerman was a member of Rabbinical Board's Board of Trustees and its President (see 2005 petition at ¶¶ 1 and 2). The 2005 petition further alleged that "[f]or the past number of years, [Oholei Torah] has undertaken to maintain the subject premises[,] paid all expenses, maintenance, heating, repairs, etc., as [Rabbinical Board] has been unable to pay for same" (*id.* at ¶ 7). The 2005 petition also alleged that "the transfer of the said premises by [Rabbinical Board] was authorized by a vote of at least two-thirds of the Trustees of [Rabbinical Board] at a Special Meeting held for that purpose, at which meeting, MENDEL LERMAN, presided" (*id.* at ¶ 8).

In support of its dismissal motion, Oholei Torah submits a memorandum of law in which it contends that Action #1 "is a brazen attempt by certain unidentified individuals posing under the guise of a now defunct organization to personally profit from the potential sale of [the Property]." Oholei Torah asserts that the Property "was legally transferred to [it] on August 24, 2005 with the consent of the [NYAG] and the approval of the . . . Court. . . ." Oholei Torah argues that the relief sought in Action #1 is precluded by the 2005 Order, and that the claims asserted in Action #1 are barred by the 10-year statute of limitations that governs actions filed pursuant to RPAPL article 15.

Rabbinical Board, in opposition, asserts that the 2005 Proceeding was "a deceptive action orchestrated by a Director of [Oholei Torah], Mendel Lerman . . ."; Rabbinical Board "never brought the [2005] Petition, nor intended to transfer the Subject Premises . . ." and that Rabbinical Board "has only been made aware of this fraudulent 2005 Petition upon its inclusion in Defendant's Motion to Dismiss." Essentially, Rabbinical Board argues that the 2005 Proceeding was "a fraud upon this Court and the Attorney General . . ." and that

“Mendel Lerman, on behalf of [Oholei Torah], transferred the Subject Premises to itself”

Rabbinical Board submits an affirmation from Rabbi Simon Hecht, an officer of Rabbinical Board, who affirms that “Mandel Lerman is not associated with Rabbinical Board, nor has he ever been associated with Rabbinical Board.” Rabbi Hecht explains that “[u]ntil in or about March of 2018, [Rabbinical Board] was under the impression that it remained the owner of the Subject Premises, since it gained title to same prior to 2005 and has continuously maintained and operated the Mikvah.” Rabbi Hecht further affirms that Rabbinical Board recently learned that it was no longer the deed holder of the Property “through ruminations throughout the East Flatbush community that [Oholei Torah] was intending to sell the Subject Premises” and through “numerous articles [that] were being written and published spanning from May 17, 2018 through June 2, 2018 referencing [Oholei Torah’s] intention to sell the Subject Premises.”

Rabbinical Board’s Action #2 and Order to Show Cause

Meanwhile, on June 8, 2018, in response to Oholei Torah’s dismissal motion in Action #1, Rabbinical Board commenced Action #2 against Oholei Torah and the NYAG, by order to show cause.² Rabbinical Board seeks an order: (1) staying Action #1, pursuant to CPLR 2201; (2) granting it an injunction restraining and enjoining Oholei Torah from selling, transferring, conveying, disposing or otherwise encumbering the Property, pursuant to CPLR Article 63; and (3) consolidating Action #1 and Action #2, pursuant to CPLR 602.

The first cause of action in Action #2 seeks a declaration that the August 17, 2005 deed transfer is a nullity because it was the product of fraud. The second cause of action in Action #2 seeks a declaration that the 2005 Order which authorized the transfer of the Property from Rabbinical Board to Oholei Torah is a nullity because “it was premised upon

² The court granted Rabbinical Board a temporary restraining order until July 12, 2018, the return date of the motion, providing that Oholei Torah, and anyone acting on its behalf, is restrained, enjoined and prevented from selling, transferring, conveying, disposing or otherwise encumbering the Property.

documents which intentionally misled the Court into rendering an improper decision . . .”

The complaint in Action #2 also asserts a third cause of action to quiet title to the Property and a fourth cause of action for the imposition of sanctions against Oholei Torah, pursuant to 22 NYCRR § 130-1.1 (Part 130).

Discussion

As a preliminary matter, that branch of Rabbinical Board’s order to show cause in Action #2 for an order, pursuant to CPLR 602, consolidating Action #1 and Action #2 is granted, since those actions involve common questions of law and fact. Indeed, the complaints in Action #1 and Action #2 are nearly identical, with the exception of the allegations regarding the allegedly fraudulent 2005 Proceeding, which were included in the Action #2 complaint after Rabbinical Board became aware of the 2005 Proceeding. A consolidation order is issued simultaneously herewith. Oholei Torah’s pre-answer dismissal motion, which was filed in Action #1, is denied for the reasons that follow.

On a motion to dismiss pursuant to CPLR 3211 (a) (5), the “court must take the allegations [in the complaint] as true and resolve all inferences which reasonably flow therefrom in favor of the pleader” (*AAA Viza, Inc. v. Business Payment Sys., LLC*, 38 AD3d 802, 803 [2007] [quoting *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998)]).

“A defendant who seeks dismissal of a complaint on the ground that it is barred by the statute of limitations bears the initial burden of demonstrating, prima facie, that the time in which to commence the action has expired” (*6D Farm Corp. v Carr*, 63 AD3d 903, 905-906 [2009]). “The statute of limitations for actual fraud is six years from the commission of the fraud or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later” (*Loeuis v Grushin*, 126 AD3d 761, 763-764 [2015]). Oholei Torah’s argument that Rabbinical Board’s claims are subject to dismissal because they are barred by the statute of limitations is rejected because Rabbi Hecht affirmed

that Rabbinical Board only recently discovered the allegedly fraudulent 2005 deed transfer through ruminations in the community and news articles regarding Oholei Torah's intention to sell the Property in May and June 2018. Here, Rabbinical Board's action to quiet title to the Property based on Oholei Torah's alleged 2005 fraud is not time-barred, since Action #1 was commenced soon after Rabbinical Board allegedly discovered the fraud in 2018.

Similarly baseless is Oholei Torah's contention that Rabbinical Board's claims are barred by res judicata and/or collateral estoppel because the transfer of the Property to Oholei Torah was previously ordered and resolved in the 2005 Proceeding. Clearly, the issues now raised by Rabbinical Board regarding Oholei Torah's alleged fraud were not previously litigated in the 2005 *ex parte* Proceeding. Rabbinical Board's claim that Oholei Torah obtained the 2005 Order in the 2005 Proceeding because Mendel Lerman, a Director of Oholei Torah, fraudulently held himself out to the court as a member of Rabbinical Board's Board of Trustees and its President was not an issue before the court in 2005. If Rabbinical Board's allegations of fraud are true, as they are presumed to be on a CPLR 3211 dismissal motion, Rabbinical Board had no opportunity to litigate Mendel Lerman's lack of authority to bind it in the 2005 Proceeding. Rabbinical Board's allegations of fraud were not litigated in the 2005 Proceeding, which resulted in the 2005 Order. Thus, there is an "absence of an identity of issues actually litigated and decided" between the 2005 Order and the instant consolidated action (*Gorelik v Gorelik*, 71 AD3d 730, 731 [2010]). Oholei Torah's dismissal motion, insofar as it seeks dismissal, pursuant to CPLR 3211 (a) (5), based on the doctrines of res judicata and collateral estoppel, must, therefore, be denied.

The court notes that the gravamen of the claim is that Mendel Lerman obtained the 2005 Order with fraudulent documents, as distinguished from a claim that a board member acted without board authority, as in *Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 219 AD2d 186 [2d Dept 1996].

Finally, Rabbinical Board has failed to demonstrate that it would be irreparably harmed absent a preliminary injunction enjoining Oholei Torah from selling, transferring, conveying, disposing or otherwise encumbering the Property pending the resolution of this consolidated action. Rabbinical Board filed a notice of pendency against the Property, which notifies any potential purchaser or encumbrancer of the instant dispute regarding the ownership of the Property and sufficiently protects the Rabbinical Board pending the resolution of this consolidated action. Accordingly, it is

ORDERED that Rabbinical Board's order to show cause in Action #2 is granted only to the extent that Action #1 and Action #2 are consolidated under index No. 505815/18, pursuant to CPLR 602, and is otherwise denied; and it is further

ORDERED that the consolidated caption shall hereinafter read:

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RABBINICAL BOARD OF EAST FLATBUSH,

Plaintiff,

- against -

EDUCATIONAL INSTITUTE OHOLEI TORAH OF
BROOKLYN, INC. AND THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Defendants.

-----X; and it is further

ORDERED that Oholei Torah's dismissal motion in Action #1 is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court