

Bais Yaakov of Brooklyn v Kenner
2020 NY Slip Op 33669(U)
October 30, 2020
Supreme Court, Kings County
Docket Number: 507107/20
Judge: Larry D. Martin
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At an IAS Term, Part Comm 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 30th day of October, 2020.

P R E S E N T:

HON. LARRY D. MARTIN,
Justice.

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BAIS YAAKOV OF BROOKLYN, a/k/a BAIS YAAKOV
OF MIDWOOD,

Plaintiff,

- against -

Index No. 507107/20

DAVID KENNER,

Defendant.

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The following e-filed papers read herein:

NYSCEF Docket No.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>2, 4-9, 22, 28-30, 49-51</u>
Opposing Affidavits (Affirmations) _____	<u>14-15, 65-68, 81</u>
Reply Affidavits (Affirmations) _____	<u>76-77</u>

Upon the foregoing papers, plaintiff Bais Yaakov of Brooklyn (Bais Yaakov) moves, by order to show cause (in motion sequence [mot. seq.] 1), for an order, pursuant to CPLR 6313, restraining defendant David Kenner (Kenner) from taking any further actions on behalf of, or in the name of Bais Yaakov, including, but not limited to, calling or appearing at board meetings, signing checks or entering into any contracts or

agreements. Defendant Kenner, appearing pro se, cross-moves (in mot. seq. 2) for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint. Plaintiff Bais Yaakov moves (in mot. seq. 3) for an order: (1) pursuant to CPLR 5251 and Judiciary Law §753 (a) (3), holding defendant Kenner in civil contempt for violating this court's April 24, 2020 temporary restraining order; (2) pursuant to CPLR 5251 and Judiciary Law §753 (a) (3), ordering defendant Kenner to purge his contempt.

Bais Yaakov's motion for a preliminary injunction (mot. seq. 1) is granted to the extent that defendant Kenner is enjoined from taking any further action on behalf of, or in the name of Bais Yaakov, including, but not limited to, calling or appearing at Board meetings, signing checks, or entering into any contracts or agreements, except in the ordinary course of the business of this not-for-profit religious corporation, and Bais Yaakov is directed to post an undertaking in the amount of \$5,000.00 within 15 days after service of this order with notice of entry thereof.

Bais Yaakov's motion to hold defendant Kenner in contempt (mot. seq. 3) is denied.

Kenner's cross-motion for summary judgment (mot. seq. 2) is granted only to the extent that an immediate trial is ordered on the issue of whether Bais Yaakov has the capacity to sue based on the authority of Yehoshua Balkany, acting as president.

The parties are directed to appear at a conference to be scheduled by the Court at which issue relating to the conduct of the immediate trial will be determined, including if the immediate trial may be conducted by referee.

As alleged in the complaint and Rabbi Yehoshua Balkany's affidavit in support of the motion for a temporary restraining order and preliminary injunction, defendant Kenner has fraudulently held himself out as a board member of Bais Yaakov as part of a scheme to use its assets for personal profit.

Bais Yaakov is a religious corporation that was founded in 1971 by Rabbi Yehoshua Balkany, a board member and its president from the time of its founding. For many years, Bais Yaakov operated a religious day school at a building that it owned in Brooklyn (the Property). While it still conducts adult Jewish education classes, Bais Yaakov no longer operates the day school, and it leases the Property to another school. In order to "restructure" its religious programming and pay back teacher salaries, Rabbi Balkany sought to obtain a mortgage loan. Rabbi Balkany, through another Bais Yaakov board member, Noah (Jehuda) Herskovits, was introduced to defendant Kenner and thereafter hired him to obtain the mortgage loan. Kenner, however, had Rabbi Balkany sign documents that Rabbi Balkany believed to be authorization forms for the mortgage loan, but in fact removed Rabbi Balkany from the board and added Kenner to the board. Kenner thereafter obtained a \$1,250,000.00 mortgage loan (Mortgage), from which he wired \$550,000.00 to Bais Yaakov. Bais Yaakov asserts that Kenner has refused to account for the remainder of the funds.

According to the complaint and Rabbi Balkany's affidavit, Rabbi Balkany called a March 8, 2020 meeting of the board to address Kenner's actions. At the March 8, 2020

meeting, the board voted to reinstate Rabbi Balkany as a board member and its president and to formally remove Kenner from the Board. Rabbi Balkany alleges that Kenner was provided notice of the meeting, but did not attend.

Based on these factual allegations, Bais Yaakov seeks a judgment declaring that Kenner is no longer a board member of Bais Yaakov and a permanent injunction barring Kenner from, among other things, identifying himself as a Bais Yaakov board member, from issuing or receiving checks, from entering into any loan agreements and from executing agreements or contracts relating to Bais Yaakov property.

In cross moving for summary judgment, Kenner submits an affidavit attesting that: (1) he was a board member, at least as of January 2019; (2) he was reelected to the board at a February 15, 2020 meeting; (3) the purported board meeting held on March 8, 2020 was improper because, among other reasons, he was not given notice of the meeting by any means, including by way of mail, telephone or email; (4) Rabbi Balkany resigned from the board in August 2019; and (5) since the March 8, 2020 meeting was not properly held, Kenner was not removed from the board, Rabbi Balkany was not reinstated to the board as president of Bais Yaakov, and, accordingly, he had no authority to commence this action on behalf of Bais Yaakov.

In support of these contentions, Kenner submits, among other documents, a January 18, 2020 affidavit that was part of a request for the issuance of a title insurance policy. The January 2020 affidavit is signed by Rabbi Balkany, Sara Balkany, Jehuda Herskovits,

and Kenner, and identifies the board of Bais Yaakov at that time as consisting of Rabbi Balkany, Sara Balkany, Kenner, Jehuda Herskovits, and Chaya Wagner. Kenner also provides what he identifies as minutes of a February 15, 2019 board meeting at which Rabbi Balkany, Sara Balkany, Kenner, Jehuda Herskovits, and Chaya Wagner were re-appointed to the board, Kenner was designated secretary and treasurer of the board and given authority to obtain a mortgage loan in the amount of \$1,250,000.00 and a new version of the by-laws for Bais Yaakov was adopted. Finally, Kenner has attached a copy of an August 1, 2019 letter from Rabbi Balkany to the Bais Yaakov's board, in which he states that he his resigning from any position he has with Bais Yaakov, and that he was no longer a member, board member, president, dean or employee of Bais Yaakov.

In opposing these contentions, Bais Yaakov has submitted an affidavit from Rabbi Balkany, who does not deny that he signed the affidavit to obtain title insurance that identified Kenner as a board member, or that he signed the resignation letter. Rather, in this affidavit, Rabbi Balkany contends that there was never a formal vote of the board appointing Kenner to the board, that the purported February 15, 2019 board meeting – at which Kenner was appointed to the board and revised by-laws were adopted – did not take place, that the minutes of this meeting are a fabrication, and that the signatures of the board members that appear on the last page of the minutes (and without any text) were, upon information and belief, taken from signature pages of documents Kenner asserted were necessary for the closing of the mortgage. Rabbi Balkany further contends that he only

took a temporary leave of absence in August 2019 due to a Rabbinical Court's threat to issue a "siruv" against him, and that "it was known to everyone, including Mr. Kenner, that my leave of absence would be temporary, pending a resolution with the Rabbinical Court" (Balkany Opp. Aff. ¶16). According to Rabbi Balkany, the temporary nature of his resignation is also shown by the fact that Kenner submitted a handwritten "bill" for his services in the amount of \$350,000.00 in February 2020.

Considering these factual averments in the context of summary judgment standards, the court finds that Kenner has demonstrated, prima facie, that he became a member of Bais Yaakov's board at some time in late 2018, and Bais Yaakov has failed to demonstrate an issue of fact in this respect.

The court, however, finds that Rabbi Balkany's affidavit, and those of the other Bais Yaakov board members submitted in opposition, are sufficient to demonstrate the existence of factual issues with respect to the whether the minutes of the February 15, 2019 board meeting submitted by Kenner are a forgery and whether the revised by-laws were adopted at that meeting. Of note, in this respect, the purported signature page of the minutes contains no text and there is no independent indication on the signature page that the signatures were obtained in relation to the purported board meeting. Rabbi Balkany has thus demonstrated factual issues as to whether there was ever a "formal vote" to add defendant Kenner to the board.

Rabbi Balkany, however, does not challenge the bona fides of the January 2019 “affidavit” signed by Rabbi Balkany, Sara Balkany, Jehuda Herskovits and Kenner, which identifies the board of Bais Yaakov, as of January 2019, as consisting of Rabbi Balkany, Sara Balkany, Kenner, Jehuda Herskovits, and Chaya Wagner (*see Bank of New York Mellon v Gordon*, 171 AD3d 197, 202 [2d Dept 2019]). As such, Rabbi Balkany and the other signers of the document are conclusively presumed to have read and agreed to the terms of this “affidavit” (*see Cannariato v Cannariato*, 136 AD3d 627, 628 [2d Dept 2016], *lv denied* 27 NY3d 903; *Shklovskly v Khan*, 273 AD2d 371, 372 [2d Dept 2000]; *see also Nerey v Greenpoint Mtg. Funding, Inc.*, 144 AD3d 646, 648 [2d Dept 2016]; *cf. Fuentes v Aluskewicz*, 25 AD3d 727, 728 [2d Dept 2006]).

Rabbi Balkany has also failed to submit evidentiary proof controverting Kenner’s assertions that all of the board member unanimously agreed to add Kenner to the board. Such an unanimous agreement of the board, even if reached without a formal vote, mandates a finding that Kenner was added as a member of Bais Yaakov’s board (*see St. Marks Assets, Inc. v Sohayegh*, 167 AD3d 458, 459 [1st Dept 2018]; *Leslie Semple & Garrison, Inc. v Gavit & Co.*, 81 AD2d 950, 951 [3d Dept 1981]; *Matter of Doelger*, 254 App Div 178, 186-187 [1st Dept 1938], *affd* 279 NY 646 [1938]; *Gerard v Empire Sq. Realty Co.*, 195 App Div 244, 249 [2d Dept 1921]; *Matter of Stylemaster Dept. Store*, 7 Misc 2d 207, 208-209 [Sup Ct, Westchester County 1956]; *see also Pierre v Psatha*, 293 AD2d 364, 364 [1st Dept 2002]). Indeed, if Kenner was never deemed a member of the

board, it is hard to understand why there was a need to vote Kenner off of the board at the March 8, 2020 meeting.

Kenner has also demonstrated, prima facie, that Rabbi Balkany resigned from the board and presidency of Bais Yaakov in August 2019. Rabbi Balkany does not dispute the authenticity of the August 1, 2019 resignation letter that Kenner submitted in support of his cross motion (*see Bank of New York Mellon v Gordon*, 171 AD3d at 202). In this letter, Rabbi Balkany expresses his intent to resign, and, whatever the actual reasons for his resignation, the letter contains no indication that Rabbi Balkany only intended to take a temporary leave of absence. While Rabbi Balkany's facially unconditional nature of the letter of resignation would generally be considered effective upon its tender to the board (*see Manhattan Co. v Kaldenberg*, 165 NY 1, 10 [1900]; *Rose v Green*, 145 AD2d 618, 621 [2d Dept 1988], *lv dismissed* 74 NY2d 836 [1989]), Rabbi Balkany's submissions, in this respect, raise a factual issue as to whether the board understood that he had simply taken a temporary leave of absence as part of a ruse to dodge the jurisdiction of the rabbinical arbitration tribunal. Indeed, Kenner's submission of a handwritten bill to Rabbi Balkany in February 2020 strongly suggests that Kenner understood that Rabbi Balkany was still acting as president of Bais Yaakov despite his purported resignation.

There are also factual issues with respect to the propriety of the March 8, 2020 board meeting that preclude determining whether or not Rabbi Balkany was reinstated to the board and presidency of Bais Yaakov and whether or not Kenner was properly removed

from the board. If the February 15, 2019 revised by-laws govern the calling and conduct of the March 8, 2020 board meeting, the meeting was improperly held because section 10 of the revised by-laws require that a special meeting be called by at least two directors and that notice of the meeting be provided by written notice mailed at least seven days before the meeting. In his affidavit, however, Rabbi Balkany only asserts that the meeting was called by him and that notice for the meeting was provided by a telephone call. Nevertheless, in view of the above noted factual issues as to whether the revised by-laws were ever properly adopted at the February 15, 2019 meeting, there are factual issues as to whether the revised by-laws govern the March 8, 2020 meeting.

In the absence of by-laws governing the issue, the meeting would be governed by the Not-For-Profit Corporation Law, which provides that a meeting may be called by the president of the board (Not-For-Profit Corporation Law § 710 [c]). Given the factual issue as to whether Rabbi Balkany truly resigned as president of Bais Yaakov, there is also a factual issue as to whether he could call for a special meeting. While Not-For-Profit Corporation Law § 711 (a) requires the board members be provided with notice of special meetings, it contains no requirements with respect to the means of providing such notice. As such, it would appear that notice by way of a telephone call could be deemed reasonable notice if it was provided within enough time to insure that board members could attend the meeting (*see Adlerstein v Wertheimer*, 2002 WL 205684, *8 [U] [Del Ct Chancery 2002]; *cf. Webber v Webber Oil Co.*, 495 A2d 1215, 1220 [Me 1985]; *see also Brechner v*

Incorporated Vil. of Lake Success, 25 Misc 2d 920, 923-924 [Sup Ct, Nassau County 1960]). Thus, while Kenner has made out his prima facie showing regarding lack of notice of the meeting , including by way of telephone (*cf. Rapaport v Schneider*, 29 NY2d 396, 401-402 [1972]; *Cirrinzione v Polizzi*, 14 AD2d 281, 283 [4th Dept 1961]), Rabbi Balkany's affidavit regarding telephone notice is sufficient to demonstrate the existence of a factual issue with respect to whether Kenner was provided with notice of the meeting. Thus, there are factual issues as to the propriety of the March 8, 2020 board meeting and whether Kenner was voted off of the board at that meeting.

These factual issues regarding whether Rabbi Balkany resigned as president likewise preclude finding that he did not have authority as president to authorize the commencement of this action. If Rabbi Balkany is not deemed have resigned, or was deemed reinstated at the March 8, 2020 board meeting, he would have presumptive authority as president to authorize the commencement of this action (*see West View Hills v Lizau Realty Corp.*, 6 NY2d 344, 346-348 [1959]; *Fernandez v Hencke*, 93 AD3d 440, 441 [1st Dept 2012]; *TJI Realty v Harris*, 250 AD2d 596, 597-598 [2d Dept 1998]). On the other hand, Rabbi Balkany is deemed to have resigned, and the March 8, 2020 meeting was improperly held, he no longer had authority to act as president or to commence this action in the name of the corporation (*see TJI Realty*, 250 AD2d at 598; *Concrete Constr. Sys. v Jenson*, 65 AD2d 918, 919 [4th Dept 1978]; *Board of Mgrs. of the Clermont Green Condominium v Vanderbilt Mansions, LLC*, 44 Misc 3d 1205 [A], 2014 NY Slip Op 51023,

*5 [U] [Sup Ct, Kings County 2014]; *Schillinger & Albert v Myral Hats*, 55 Misc 2d 178, 179 [Civ Ct, New York County 1967]).

Aside from these factual issues which preclude finding that Bais Yaakov has no capacity to bring this action and that Kenner was not voted off of Bais Yaakov's board, Kenner's affidavit and supporting proof fail to demonstrate, prima facie, that he did not divert funds from the loan obtained by him for his own personal use and was not pursuing other personal objectives with respect to property/assets belonging to Bais Yaakov. Kenner and Herskovits' conclusory averments in their affidavits, as well as the purported bank records submitted in support of the motion, fail to demonstrate the propriety of Kenner's actions in this respect, and fail to controvert the complaint's assertion that, out of a \$1,250,000.00 loan, Bais Yaakov only received funds in the amount of \$550,000. Accordingly, Kenner is not entitled to summary judgment dismissing the complaint regardless of the sufficiency of Bais Yaakov's opposition papers in this respect (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Nevertheless, the issues relating to Bais Yaakov's capacity to sue based on the authority of Rabbi Yaakov acting as president is an issue that could have been brought as part of a CPLR 3211 (a) (3) motion to dismiss (*see Concrete Constr. Sys.*, 65 AD2d at 919; *Board of Mgrs. of the Clermont Greene Condominium*, 2014 NY Slip Op 51023, *5; *Schillinger & Albert*, 55 Misc2d at 179; *see also Micro-Link LLC v Town of Amherst*, 109 AD3d 1130, 1131-1132 [4th Dept 2013]; *cf. Matter of Park Knoll Owners Inc. v Park Knoll*

Assoc., 175 AD3d 1410, 1411 [2d Dept 2019]). Given this, and given that the issue of such authority could be dispositive of the action, it is the kind of discrete issue that warrants directing an immediate trial pursuant to CPLR 3212 (c) (*see Deep v Boies*, 53 AD3d 948, 952 [3d Dept 2008]; *Starr v Johnson*, 143 AD2d 130, 132 [2d Dept 1988]; *Sosnowski v Kolovas*, 127 AD2d 756, 758 [2d Dept 1987]; *Purta v Cisz*, 42 AD2d 594, 594 [2d Dept 1973], *lv dismissed* 33 NY2d 655 [1973]; *cf. HSBC Bank USA, N.A. v Corazzini*, 148 AD3d 1314, 1315 [3d Dept 2014]). The court thus directs an immediate trial relating to Rabbi Balkany's authority to authorize the commencement of this action. The parties are thus directed to appear for a virtual conference to be scheduled by the Court to address issues relating to the immediate trial, including whether the issue may be tried by a referee.

The court grants Bais Yaakov's motion for a preliminary injunction in order to maintain the status quo during the pendency of this action, as it has demonstrated the likelihood of success on the merits, irreparable injury absent granting the injunction and balancing of the equities in its favor (*see 538 Morgan Ave. Props., LLC v 538 Morgan Realty, LLC*, 186 AD3d 657, 658 [2d Dept 2020]; *Ying Fung Moy v Hohl Umeki*, 10 AD3d 604, 604-605 [2d Dept 2004] [the existence of questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction]). This grant of a preliminary injunction is conditioned upon Bais Yaakov posting an undertaking in the amount of \$5,000.00 within 15 days after service of this order with notice of entry thereof (CPLR 6312 [b]).

Finally, the court denies Bais Yaakov's motion to hold Kenner in contempt of court for violating the temporary restraining order by removing funds from a bank account because the notice of motion for such relief was defective in that it failed to provide the warnings required by Judiciary Law § 756 (*see Matter of P&N Props. v Williams*, 302 AD2d 466, 466-467 [2d Dept 2003], *lv denied* 100 NY2d 512 [2003]). Moreover, the assertions contained in Rabbi Balkany's affidavit in support of this motion fail to demonstrate, *prima facie*, that funds were removed from the bank account at issue, let alone that it was Kenner who removed such funds. As such, Bais Yaakov has failed to demonstrate grounds warranting a hearing on whether Kenner violated the temporary restraining order (*see Palladino v Pallidino*, 89 AD3d 814, 815 [2d Dept 2011]; *Platten v New York State Div. of Parole*, 85 AD3d 1281, 1282 [3d Dept 2011]; *Bay Parkway Super Clean Car Wash v Accurate Auto Repair*, 220 AD2d 549, 550 [2d Dept 1995]).

This constitutes the decision and order of the court.

E N T E R,

LDM
J. S. C.