

Cong. Machon Chana v Labkowski
2022 NY Slip Op 32568(U)
July 26, 2022
Supreme Court, Kings County
Docket Number: Index No. 503045/15
Judge: Lawrence Knipel
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At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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CONG. MACHON CHANA, a Religious Corporation,

Plaintiff,

-against-

Index No.: 503045/15

Mot. Seq. No. 14

SARA LABKOWSKI, ZALMAN LABKOWSKI,
RIVA TELESHEVSKY and BAILA BRONSTEIN
a/k/a BAILA GRINKER,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>473-502</u>
Opposing Affidavits (Affirmations)	<u>503-504</u>
Affidavits/ Affirmations in Reply	<u>506-513</u>
Defendants' Memorandum of Law	<u>505</u>

Upon the foregoing papers, in this declaratory judgment action by plaintiff, purporting to represent Cong. Machon Chana (plaintiff), a religious corporation, plaintiff moves, under motion sequence number 14, for an order, pursuant to CPLR 3101 and 3126, directing: (1) that the answer of defendants Zalman Labkowski, Riva Teleshevsky (Teleshevsky), and Baila Bronstein a/k/a Baila Grinker (Bronstein), dated April 3, 2019, be stricken in its entirety; or in the alternative (2) that the issue of whether Zalman

Labkowski, Teleshevsky, and Bronstein are members of the board of trustees of Cong. Machon Chana be deemed resolved in plaintiff's favor; or in the alternative (3) that Zalman Labkowski, Teleshevsky, and Bronstein be prohibited from opposing plaintiff's claim that they are not members of Cong. Machon Chana's board of trustees and/or precluding them from introducing any evidence at trial to support their contention that they are members of Cong. Machon Chana's board of trustees; or in the alternative (4) granting such other and further relief as the court may deem just and proper.

Facts and Procedural Background

This action arises out of a dispute as to who is authorized to act on behalf of Cong. Machon Chana, and, in turn, control the use of real property located at 1367 President Street in Brooklyn (the premises) and held in the name of the Cong. Machon Chana. The premises have been used since the 1970s as a dormitory for female students engaged in Torah study, in accordance with Cong. Machon Chana's mission to hold and conduct classes in religious subjects.

Plaintiff claims that Cong. Machon Chana's board of trustees has changed over the years, that elections for board members are held on an annual basis, and that over the years many different persons have served as members of the board of trustees. Defendants dispute this and claim that since 1973, the board of trustees of Cong. Machon Chana has consisted of only four persons, namely, Zalman Labkowski, Teleshevsky, Bronstein, and Rabbi Nathan Gurary, who is deceased. Defendants also claim that since 1973, Sara Labkowski has been the sole person to occupy the position of president of Cong. Machon Chana.

By a petition dated December 23, 2014, Sara Labkowski, purporting to act on behalf of Cong. Machon Chana, as its president, commenced a holdover proceeding in the Civil Court, Queens County, to evict the students residing at the premises. On March 17, 2015, Cong. Machon Chana commenced this action against Sara Labkowski and Machon Chana Women's Institute, Inc. (the Women's Institute), seeking a judicial declaration that Sara Labkowski is not authorized to act on behalf of Cong. Machon Chana.

By a decision and order dated September 25, 2015, the court granted that branch of a motion by plaintiff which sought a preliminary injunction restraining Sara Labkowski and the Women's Institute from continuing with the prosecution of the holdover proceeding and for a stay of that proceeding. That decision and order was affirmed by the Appellate Division, Second Department (*Cong. Machon Chana v Machon Chana Women's Inst., Inc.*, 162 AD3d 635, 637 [2d Dept 2018]).

While the originally named defendants in this action were Sara Labkowski and the Women's Institute, following the initial exchange of documents between the parties, the Women's Institute moved to dismiss plaintiff's complaint as against it, and plaintiff cross-moved to amend its complaint to add Zalman Labkowski, Teleshevsky, and Bronstein, who claim to be the sole members of the board of trustees of Cong. Machon Chana, as defendants. This claim by Zalman Labkowski, Teleshevsky, and Bronstein is vehemently disputed by plaintiff, which asserts that they have no power or authority to act on behalf of Cong. Machon Chana.

By an order dated May 25, 2017, the court, in light of counsel for the Women's Institute's assertion in open court that the Women's Institute does not claim ownership or

the right to use or occupy the premises, granted the Women's Institute's motion to dismiss plaintiff's complaint as against it. The court further granted plaintiff's cross motion to add Zalman Labkowski, Teleshevsky, and Bronstein as defendants. Thus, the present defendants in this action consist of Sara Labkowski, who claims to be the president of Cong. Machon Chana, Zalman Labkowski, Teleshevsky, and Bronstein. Plaintiff's redrafted amended summons and complaint was filed with the court on June 7, 2017, and was served on Teleshevsky on June 23, 2017, Sara Labkowski and Zalman Labkowski on August 3, 2017, and Bronstein on October 4, 2017.

On May 17, 2017, the Women's Institute filed an action against Yosef Spalter (Spalter), Meir Horowitz (Horowitz), Rabbi Shloma Majeski, and Machon L'Yahadus, under index number 509876/2017 (the 2017 Women's Institute action),¹ seeking monetary damages for an alleged conversion of its funds, and a declaration that Spalter and Horowitz are not its board members. The 2017 Women's Institute action concerns a claim that a competing women's yeshiva stole employees and resources from the Women's Institute to start the competing school, known as Machon L'Yahadus. By an order dated July 3, 2019, the court denied a motion to stay the 2017 Women's Institute action or consolidate it with this action (NYSCEF Doc No. 500).

¹ There are a total of four other actions, which are related to the instant action, namely: *Machon Chana Women's Institute Inc et al. v Shea Hecht et. al.* (Sup Ct, Kings County, index No. 513701/2015); *Machon Chana Women's Institute Inc. v National Committee for Furtherance of Jewish Education et. al.* (Sup Ct, Kings County, index No. 513767/2015); *Machon Chana Women's Institute, Inc. v Sara Labkowski et. al.* (Sup Ct, Kings County, index No. 506164/2017) and *Machon Chana Women's Institute Inc. v Yossi Spalter et. al.* (Sup Ct, Kings County, index No. 509876/2017).

On April 9, 2019, Zalman Labkowski, Teleshevsky, and Bronstein served and filed their joint answer to plaintiff's amended complaint, which consists of a one sentence statement that they joined in full in the answer of Sara Labkowski dated October 29, 2015 as if fully set forth therein (NYSCEF Doc No. 438).

On April 19, 2019, plaintiff served its first notice for discovery and inspection and first set of interrogatories on Zalman Labkowski, Teleshevsky, and Bronstein (NYSCEF Doc Nos. 482, 483, 484). By a consent to change attorneys filed on September 19, 2019 (NYSCEF Doc No. 439), defendants retained new counsel, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP. On December 30, 2019, plaintiff filed a motion to compel responses to its discovery requests, under motion sequence number 13 (NYSCEF Doc No. 442). On January 17, 2020, defendants' attorney, Amy B. Marion, Esq., a partner with the law firm of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, opposed this motion on the ground that it was moot because on that day, January 17, 2020, her law firm transmitted Zalman Labkowski, Teleshevsky, and Bronstein's discovery responses to plaintiff's counsel (NYSCEF Doc No. 466).

Zalman Labkowski, Teleshevsky, and Bronstein served their discovery responses, which are dated January 17, 2020, on plaintiff's counsel (NYSCEF Doc Nos. 488, 489, 490). On March 10, 2020, plaintiff's attorney, Mark S. Frey, Esq., served a deficiency letter upon defendants' counsel regarding these discovery responses, and requested that they set up a time to discuss each referenced document request and response (NYSCEF

Doc No. 479). On March 12, 2020, plaintiff withdrew motion sequence number 13, on consent and without prejudice (NYSCEF Doc No. 471).

On March 11, 2020, plaintiff served a notice to take the deposition of Teleshevsky (NYSCEF Doc No. 499). By an email dated April 30, 2021, plaintiff's counsel informed defendants' attorneys that it had been over three months since they promised to respond to his deficiency letter in this matter dated March 10, 2020, and that they also had refused to schedule the deposition of Teleshevsky, which had been noticed for April 16, 2020 (NYSCEF Doc No. 480). Defendants' attorneys have taken the position that defendants will not proceed with Teleshevsky's deposition, nor any deposition in this case, unless Jonathon Bachrach, Esq., who represents Spalter and Horowitz in the 2017 Women's Institute action, attends the deposition.

On February 7, 2022, plaintiff filed its instant motion (NYSCEF Doc No. 473). Defendants oppose plaintiff's motion.

The Parties' Contentions

In support of its motion, plaintiff argues that discovery sanctions should be imposed on Zalman Labkowski, Teleshevsky, and Bronstein, pursuant to CPLR 3126, based on their failure to provide proper responses to their discovery requests and Teleshevsky's refusal to appear for deposition. Plaintiff contends that Zalman Labkowski, Teleshevsky, and Bronstein's responses to their notice for discovery and inspection show that they do not have any documents which support their claims that they are the sole and exclusive members of the board of trustees of Cong. Machon Chana.

Plaintiff asserts that Zalman Labkowski, Teleshevsky, and Bronstein, rather than admit that there are no documents supporting their claims, have attempted to dodge the issue and avoid directly stating that there are no documents. Plaintiff states that Zalman Labkowski, Teleshevsky, and Bronstein's responses are vague and evasive and fail to designate documents which are responsive to its requests. Plaintiff contends that with regard to the most basic documents that go to the heart of Zalman Labkowski, Teleshevsky, and Bronstein's claim that they constitute the "true" board of trustees of Cong. Machon Shana, neither Zalman Labkowski, Teleshevsky, nor Bronstein can produce, identify, or point to a single document to support their claim.

Plaintiff argues that Zalman Labkowski, Teleshevsky, and Bronstein have engaged in bad faith gamesmanship because their responses, rather than identifying specific documents, merely state that the documents are already in plaintiff's possession, refer to 1,682 pages of documents which were previously produced by prior counsel without specifying the responsive pages, and refer to "documents produced in the litigation of all actions thus far." Plaintiff argues that Zalman Labkowski, Teleshevsky, and Bronstein do not have the requested documents, and that their responses are designed to avoid having to state this, and/or to avoid having to submit to the court detailed affidavits of due diligence specifying what efforts were made to comply with their discovery obligations.

Plaintiff points out that while the crux of defendants' contentions in this action is that Zalman Labkowski, Teleshevsky and Bronstein are the sole members of the board of trustees of Cong. Machon Chana, and that there have never been any other trustees other than Rabbi Nathan Gurary, when Zalman Labkowski, Teleshevsky, and Bronstein were

requested to produce or identify specific documents to substantiate their claims, they could only state that it has the documents in its possession, or that the documents have already been produced, while being unable to specifically identify the documents to which they are referring. Plaintiff argues that the court should conditionally strike Zalman Labkowski, Teleshevsky, and Bronstein's answer and/or direct each of them to submit a detailed statement stating under oath that the documents do not exist, the reasons the documents do not exist, and the attempts that were made to find the requested documents, including the dates and places where a search to obtain the documents was made, the persons spoken to in conducting their search, and the results of such search.

Plaintiff further contends that Zalman Labkowski, Teleshevsky, and Bronstein's interrogatory responses are facially inadequate and are willfully designed to avoid their obligation to respond in a good faith and straightforward manner to interrogatories which are neither overbroad nor oppressive. Plaintiff additionally asserts that Teleshevsky is improperly refusing to appear for deposition due to defendants' counsel's insistence that Jonathon Bachrach, Esq., who does not represent any party in this action, must be present.

In opposition to plaintiff's motion, defendants' attorney, Amy B. Marion, Esq., asserts that in January 2021, defendants uploaded their prior attorney's production of 1,682 documents to plaintiff. She further asserts that in an email dated June 27, 2019, defendants' prior counsel told plaintiff's attorney that "there are no more documents from the new defendants or people with knowledge that you don't know about" (NYSCEF Doc. No. 485).

Zalman Labkowski, Teleshevsky, and Bronstein, by their attorney, Ms. Marion, Esq., contend that they responded to plaintiff's first notice for discovery and inspection (NYSCEF Doc Nos. 488, 489, 490) and first set of interrogatories (NYSCEF Doc Nos. 496, 497, 498). They argue that their responses complied with their discovery obligations and are sufficient to avoid the striking of their answer. Zalman Labkowski, Teleshevsky, and Bronstein assert that they have informed plaintiff that they are willing to proceed with Teleshevsky's deposition so long as Mr. Bachrach, Esq. attends this deposition. Zalman Labkowski, Teleshevsky, and Bronstein also contend that plaintiff's attorney, Mark S. Frey, Esq., failed to comply with Kings County Supreme Court Uniform Civil Term Rules, Part J, Commercial Division Rules, Rule 18, and on this basis, the court should not consider or address plaintiff's motion.

Discussion

Initially, the court notes that Zalman Labkowski, Teleshevsky, and Bronstein's opposition to plaintiff's motion is largely based on their contention that the court is precluded from considering it based upon plaintiff's failure to comply with Kings County Supreme Court Uniform Civil Term Rules, Part J, Commercial Division Rules, Rule 18, which provides as follows:

"Disclosure Disputes. Parties must comply with the Uniform Rules, § 202.70 (g), Rule 14, regarding consultation among counsel prior to contacting the Court. If counsel are unable to resolve a dispute, the party seeking Court intervention shall send a letter to the Court, of no more than two (2) pages, upon notice to all parties, describing the problem and the relief requested. Such letter may be answered within eight (8) days by letter of no more than two (2) pages, also on notice to all parties. The party requesting relief shall then contact Chambers to arrange a conference (preferably by telephone) to resolve such dispute. If no effort is made by counsel to schedule such

conference, the Court will infer that the matter has been resolved and will take no action. The Court may order that a motion be made but no discovery motion will be entertained without prior compliance with this rule.”

Defendants assert that plaintiff’s attorney, Mr. Frey, Esq., did not comply with this rule prior to filing the instant motion, and that “no discovery motion will be entertained without prior compliance with this rule.” Defendants do not deny that plaintiff’s attorney sent a letter to the court, of no more than two pages, describing the issues and the relief requested in compliance with this rule. Defendants’ attorney, Ms. Marion, Esq., does not claim to have answered this letter (*see* 22 NYCRR 202.70 [g], rule 14 [providing that “any affected opposing party or non-party shall submit a responsive letter”]). She states, however, that plaintiff’s attorney did not comply with the Rule’s requirement of arranging for a court conference to resolve the dispute, and that no such conference was ever held.

Mr. Frey, Esq., in response, explains that he did, in fact, contact Chambers after several weeks had passed and defendants’ counsel had not responded to his letter to the court setting forth the nature of the discovery dispute in this action. He states that he inquired if his letter had been received and if Chambers had received a response from defendants’ counsel. He sets forth that he was advised that his letter had been received, that no response had been received from defendants’ counsel, that the court was aware of his request for a pre-motion conference, and that if he did not hear from Chambers within two weeks, he should take that as permission to file a motion. After not hearing from Chambers for two weeks, Mr. Frey filed plaintiff’s motion. Thus, plaintiff has demonstrated sufficient compliance with Commercial Division Rule 18. The court shall, therefore, address plaintiff’s motion on the merits,

Under CPLR 3101 (a), “full disclosure” is required for “all matter material and necessary in the prosecution or defense of an action.” CPLR 3126 provides that if a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed,” the court may, among other things, render “an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party” seeking disclosure; “an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, . . . or from using certain witnesses”; or “an order striking out pleadings or parts thereof.”

The court has ““broad discretion to oversee the discovery process”” (*Henry v Datson*, 140 AD3d 1120, 1121 [2d Dept 2016], quoting *Maiorino v City of New York*, 39 AD3d 601, 601 [2d Dept 2007], quoting *Castillo v Henry Schein, Inc.*, 259 AD2d 651, 652 [2d Dept 1999]). “The nature and degree of a penalty to be imposed under CPLR 3126 for discovery violations is addressed to the court’s discretion” (*Crupi v Rashid*, 157 AD3d 858, 859 [2d Dept 2018]; see also *Desiderio v Geico Gen. Ins. Co.*, 153 AD3d 1322, 1322 [2d Dept 2017]; *Pesce v Fernandez*, 144 AD3d 653, 654 [2d Dept 2016]; *Krause v Lobacz*, 131 AD3d 1128, 1128-1129 [2d Dept 2015]; *Kanic Realty Assoc., Inc. v Suffolk County Water Auth.*, 130 AD3d 876, 877 [2d Dept 2015], *lv dismissed* 27 NY3d 974 [2016]; *Crystal Clear Dev., LLC v Devon Architects of N.Y., P.C.*, 127 AD3d 911, 913 [2d Dept 2015]; *Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 800 [2d Dept 2010]).

“Before a court invokes the drastic remedy of striking a pleading, or even of precluding all evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” (*Cripi*, 157 AD3d at 859; *see also Henry*, 140 AD3d at 1122; *Singer v Riskin*, 137 AD3d 999, 1001 [2d Dept 2016]; *Krause*, 131 AD3d at 1129; *Stone v Zinoukhova*, 119 AD3d 928, 929 [2d Dept 2014]; *Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d at 800). “Willful and contumacious conduct may be inferred from a party’s repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply . . . or a failure to comply with court-ordered discovery over an extended period of time” (*Stone*, 119 AD3d at 929, quoting *Rock City Sound, Inc. v Bashian & Farber, LLP*, 83 AD3d at 686-687 [2d Dept 2011]; *see also Pesce*, 144 AD3d at 654; *Friedman, Harfenist, Langer & Kraut*, 79 AD3d at 800).

Significantly, there were no prior discovery orders which Zalman Labkowski, Teleshevsky, and Bronstein disobeyed. Rather, plaintiff’s motion is based upon Zalman Labkowski, Teleshevsky, and Bronstein’s failure to fully respond to plaintiff’s first notice for discovery and inspection and first set of interrogatories, and Teleshevsky’s failure to appear in response to plaintiff’s notice of deposition. There was also no repeated failure to comply or pattern of noncompliance and delay which could give rise to an inference of willfulness. Zalman Labkowski, Teleshevsky, and Bronstein did not refuse to respond to plaintiff’s first notice for discovery and inspection and first set of interrogatories, but gave inadequate responses. Thus, the court does not find that the extreme and drastic sanction of striking Zalman Labkowski, Teleshevsky, and Bronstein’s answer is warranted here.

Rather, the appropriate remedy is to direct Zalman Labkowski, Teleshevsky, and Bronstein to provide supplemental responses to plaintiff's first notice for discovery and inspection and first set of interrogatories and to direct Teleshevsky to appear for deposition, as set forth in detail below (*see* CPLR 3124).

With respect to Zalman Labkowski, Teleshevsky, and Bronstein's responses to plaintiff's first notice for discovery and inspection propounded to Zalman Labkowski (NYSCEF Doc No. 482), document request number 1, requested the minutes of meetings of Cong. Machon Chana, including, without limitation, the minutes concerning the election of trustees, the election of officers, the premises, the eviction proceeding, and the initiation of any legal actions by or on behalf of or against Cong. Machon Chana. Document request number 2 requested documents concerning the meetings of the board of trustees of Cong. Machon Chana, including, without limitation, the notices of meetings, the scheduling of meetings, and the minutes of meetings. Document request number 3 requested all notes, memos, or memorandum of any meetings of the board of trustees of Cong. Machon Chana attended by Zalman Labkowski as a claimed trustee of Cong. Machon Chana.

Zalman Labkowski's response (NYSCEF Doc No. 488) for all three of these document requests each stated as follows:

"This request seeks documents in [p]laintiff's own possession. Without waiving [any] General Objections ... responsive, non-privileged documents that are in [d]efendant's possession have been provided as part of prior's counsel's May 23, 2017 production in the instant 2015 case, volumes I-II, DEF_000001-000631 and DEF_000632-001682. Additionally without waiving any objections hereto, see Bates # AFDEF000001-000011."

This response is patently inadequate. It fails to specifically designate the documents in plaintiff's own possession responsive to this request or distinguish between the documents that are responsive to document request numbers 1, 2, and 3. Furthermore, it fails to specifically identify which documents that were previously produced by prior counsel are responsive to each document request. Zalman Labkowski, Teleshevsky, and Bronstein have broadly stated that these documents are to be found somewhere within DEF Bates # 000001-000631 and DEF Bates # 000632-001682, which consist of 1,682 pages, without specifying which pages are responsive to which request. It is also noted that plaintiff asserts that these pages were previously produced as Sara Labkowski's production of documents (prior to Zalman Labkowski being named as a defendant in this action) and that none of them are responsive to its request. Plaintiff states that the documents Bates stamped AFDEF 000001-000011, referred to by Zalman Labkowski, are documents that it had previously produced in this action, which do not support Zalman Labkowski, Teleshevsky, and Bronstein's claims.

Teleshevsky's response to plaintiff's first notice for discovery and inspection (NYSCEF Doc No. 489) and Bronstein's response to plaintiff's first notice for discovery and inspection (NYSCEF Doc No. 490), in response to document request number 1, both state: "See Zalman Labkowski's response to Document Request [number] 1." Teleshevsky and Bronstein's responses to document request number 2 similarly state: "See Zalman Labkowski's response to Document Request [number] 2."

Teleshevsky and Bronstein's responses to document request number 3 both state as follows:

“Without waiving any objections, responsive, non-privileged documents that are in [d]efendant’s possession, have been provided as part of prior counsel’s May 23, 2017 production in the instant 2015 case, volumes I-II, DEF_000001-000631 and DEF_000632-DEF_001682. Additionally, see documents produced herein and documents produced in the litigation of all actions thus far, and thus is equally available to [p]laintiff, no new documents are in [d]efendant’s possession.”

These responses are inadequate. These responses merely refer to Zalman Labkowski’s vague responses referring generally to 1,682 pages of documents, which were produced by defendants’ prior counsel before Teleshevsky and Bronstein were named as defendants in this action. They broadly reference numerous pages of documents without any specificity as to what pages refer to which documents. Furthermore, the responses to document request number 3 direct plaintiff to not only all of the documents produced to date in this action, but also to all of the “documents produced in the litigation of all actions thus far.” Since Teleshevsky and Bronstein claim that they have already produced these documents, they must specifically provide the Bates stamped numbers of the pages responsive to each of these separate document demands.

Zalman Labkowski, Teleshevsky, and Bronstein cannot refer generally to numerous pages, but are required to specifically indicate where previously produced responsive documents may be found (*see Tarkan v Safdieh*, 67 Misc 3d 1209[A], 2020 NY Slip Op 50480[U], *1 [Sup Ct, NY County 2020]; *Boltin v Board of Managers of the 447-453 W. 18th St. Condominium*, 2020 NY Slip Op 30434[U], *4 [Sup Ct, NY County 2020]; *DC Cruises LLC v L&L Tours, Inc.*, 2014 WL 2930757, *3 [Sup Ct, NY County 2014]). Zalman Labkowski, Teleshevsky, and Bronstein also cannot evade their disclosure obligations by suggesting that the documents are equally accessible to plaintiff without

identifying the documents (*see Sanon v Sanon*, 51 Misc 3d 1214[A], 2016 NY Slip Op 50657[U], *3 [Sup Ct, Monroe County 2016]).

Plaintiff claims that Zalman Labkowski, Teleshevsky, and Bronstein are attempting to avoid stating that they have no documents responsive to these requests, and that no documents to support their claims in this action exist. If such documents are not in Zalman Labkowski, Teleshevsky, and Bronstein's possession or do not exist, Zalman Labkowski, Teleshevsky, and Bronstein are directed to provide to plaintiff, within 30 days of the date of this decision and order, with notice of entry thereof, affidavits by them, describing the search made by them for these documents and explaining why such documents are not in their possession, do not exist, and/or why they were not found (*see Castillo v. Henry Schein, Inc.*, 259 AD2d 651, 652 [2d Dept 1999]; *Morse v LoveLive TV US, Inc.*, 69 Misc 3d 1224[A], 2020 NY Slip Op 51481[U], *10-11 [Sup Ct, NY County 2020]; *DC Cruises LLC.*, 2014 WL 2930757, *3). The court also notes that Zalman Labkowski, Teleshevsky, and Bronstein's failure to provide information in their possession would preclude them from later offering proof regarding that information at trial (*see Bivona v Trump Mar. Casino Hotel Resort*, 11 AD3d 574, 575 [2d Dept 2004]; *Corriel v Volkswagen of Am.*, 127 AD2d 729, 731 [2d Dept 1987]).

Document request number 4 requests Zalman Labkowski, Teleshevsky, and Bronstein to provide documents concerning the statements made in affirmations dated May 5, 2015 by each of them submitted in this case that: (a) "at all times since the formation of the Congregation in 1973, to date . . . Sara Labkowski has acted as the president of the Congregation," and (b) "[w]ith authorization from the board of trustees Sara Labkowski,

as president, has handled and supervised all the operations of the Congregation, uninterrupted, for over 40 years and continues to act in that capacity.” Zalman Labkowski, Teleshevsky, and Bronstein each responded that:

“This request is nearly identical to Spalter and Horowitz’s Document Request No. 3 in the 2017 case bearing index number 509876/2017. Without waiving the General Objections set forth above, responsive, non-privileged documents that are in [d]efendant’s possession, have been provided with Sara Labkowski’s Response to Spalter and Horowitz’s Interrogatories and Document Requests in the 2017 case with the Index No. 509876/2017, Bates # AF000261-AF000427.”

In this response, Zalman Labkowski, Teleshevsky, and Bronstein are referring to Spalter and Horowitz’s document requests in the 2017 Women’s Institute action. Spalter and Horowitz are not parties to the instant action. Furthermore, the 2017 Women’s Institute action concerns, in part, the identity of the board of trustees of the Women’s Institute, which is a wholly separate and distinct entity from Cong. Machon Chana. There are no claims in the 2017 Women’s Institute action concerning Cong. Machon Chana, and there are no longer any claims in this action concerning the Women’s Institute.

Moreover, the document referred to in response to document request number 4 as Bates # AF000261 (NYSCEF Doc No. 492) is identified at the top as: “Machon Chana Women’s Institute Mail – Re: Machon Chana board.” This document concerns the board of trustees of the Women’s Institute, rather than the board of trustees of Cong. Machon Chana.

The document at Bates # AF000282-AF000283, referenced in this response, which was produced in the 2017 Women’s Institute action, consists of the minutes of the 2016 annual meeting of the board of directors for the Women’s Institute (NYSCEF Doc No.

493). This document lists the members of the board of directors of the Women's Institute as Riva Teleshevsky, Sara Katzman, Sara Labkowski, Rabbi Zalman Labkowski, Kalman Weinfeld, and Pam Newman. Plaintiff points out that in the instant action, defendants have consistently asserted for years that the only persons who have ever served as trustees of Cong. Machon Chana are Zalman Labkowski, Riva Teleshevsky, Baila Bronstein, and Rabbi Nathan Gurary. As contended by plaintiff, the documents referred to in Zalman Labkowski, Teleshevsky, and Bronstein's response, which have been submitted to the court, are not evidence of Sara Labkowski's authority to act on behalf of the Cong. Machon Chana, but are only related to the Women's Institute. The remaining pages referred to in response to document request number 4 have not been submitted to the court.

Zalman Labkowski, Teleshevsky, and Bronstein must supplement their response to document request number 4 to specifically state which particular Bates numbered pages respond to this document request. If they do not possess such responsive documents, they must each so state under oath.

As to many of the other responses to plaintiff's document requests (in particular, document request numbers 5-12), Zalman Labkowski's responses either state that plaintiff already has all the requested documents, directs plaintiff to see all of the documents previously produced herein by prior counsel, or directs plaintiff to see "documents produced in the litigation of all actions thus far," one of which is the 2017 Women's Institute action. The responses of Teleshevsky and Bronstein follow a similar pattern, or rely upon Zalman Labkowski's responses to similar requests. All of Teleshevsky and Bronstein's responses which rely on Zalman Labkowski's responses fail to identify any

specific documents. To the extent that all of these responses point to previously produced documents, they fail to specifically identify which of the previously produced documents upon which they are relying. Zalman Labkowski, Teleshevsky, and Bronstein are directed to supplement their responses. To the extent that Zalman Labkowski, Teleshevsky, and Bronstein fail to supplement their responses to plaintiff's document requests, they shall be precluded from relying on any other documents at trial or in opposition to a motion for summary judgment by plaintiff (*see Dvortsov v Levy*, 74 Misc 3d 1229[A], 2022 NY Slip Op. 50253[U], *4[Sup Ct, NY County 2022]).

As to plaintiff's interrogatories, interrogatory number 1 requested Zalman Labkowski, Teleshevsky, and Bronstein to identify all witnesses known to him or her "with knowledge of information material and necessary to the subject matter of this action." Zalman Labkowski, Teleshevsky, and Bronstein each responded that: "[a]ll witnesses have been identified throughout the extensive litigation in this case. Additionally, [p]laintiff is well aware of all individuals with knowledge of material information as they have all been employed by and associated with Congregation Machon Chana for years."

This response is inadequate and deficient. Zalman Labkowski, Teleshevsky, and Bronstein are required to properly answer this interrogatory by specifying which witnesses they assert have knowledge to substantiate the claim that they have each been a member of the board of trustees of Cong. Machon Chana for the period of time asserted by them. They must supplement their answer to this interrogatory to provide the names of these witnesses and all responsive information in their possession (*see Tarkan*, 2020 NY Slip Op 50480[U],

*1-2; *Site Safety, LLC v Gunnala*, 68 Misc 3d 1213[A], 2020 NY Slip Op 50928[U], *2 [Sup Ct, NY County 2020]).

Interrogatory number 2 requested that Zalman Labkowski, Teleshevsky, and Bronstein “state whether to [his or her] personal knowledge documents exist which contain information material and necessary to the subject matter of this action, including without limitation documents concerning [p]laintiff, the [p]remises and/or the [e]viction [p]roceeding, and if [his or her] answer to this interrogatory is in the affirmative,” to provide, information sufficient to identify the custodian(s) and location of such documents and a general description of such documents. Zalman Labkowski, Teleshevsky, and Bronstein each responded that “responsive, non-privileged documents that are in [his or her] possession, have been provided with prior counsel’s May 23, 2017 production in the instant 2015 case, volumes I-II, DEF_000001-000631 and DEF_000632-DEF_001682.”

Plaintiff points out that Zalman Labkowski, Teleshevsky, and Bronstein each refers to all of the documents previously produced by Sara Labkowski, without identifying any documents in particular. Plaintiff asserts that the documents previously produced by Sara Labkowski do not speak to the issues. Zalman Labkowski, Teleshevsky, and Bronstein may supplement their answers to this interrogatory by providing all responsive information in their possession (*see Site Safety, LLC*, 2020 NY Slip Op 50928[U], *9). If Zalman Labkowski, Teleshevsky, and Bronstein intend to solely rely on these documents and/or if no documents exist which are responsive to this interrogatory, they should each provide a sworn statement to that effect (*see Dijkstra v Millar El. Indus.*, 228 AD2d 469, 470 [2d Dept 1996]; *Morse*, 2020 NY Slip Op 51481[U], *10-11).

With respect to Teleshevsky's deposition, despite the fact that the motion to consolidate this action with the Women's Institute action was denied, defendants' current counsel is insisting on treating these matters as if they have been consolidated for discovery. Defendants repeatedly indicate that are willing to proceed with depositions, but only on the condition that all counsel for the related actions participate, claiming that the court directed that these actions be resolved together. Defendants specifically assert that they will not proceed with Teleshevsky's without Jonathon Bachrach, Esq.'s attendance at the deposition. As previously noted, Mr. Bachrach, Esq. represents two of the defendants in the 2017 Women's Institute action, but does not represent any of the parties in this action.

Plaintiff's attorney, Mark Frey, Esq., affirms that he spoke with Mr. Bachrach, Esq., who advised him that he would not be attending any depositions in this action since he does not represent any parties in this action. Mr. Frey, Esq. states that Mr. Bachrach, Esq. does not understand why his presence is necessary in an action in which he does not represent any of the parties, and in which his clients, Spalter and Horowitz in the 2017 Women's Institute action, have no interest in the outcome. Plaintiff argues that defendants' insistence that Mr. Bachrach, Esq. must be present in order to hold Teleshevsky's deposition is a delaying tactic by them.

Defendants' refusal to have Teleshevsky submit to a deposition without Jonathon Bachrach, Esq. being present is unfounded. Mr. Bachrach, Esq. need not be present since he is not an attorney involved in this action. The court had denied consolidation of this action with the Women's Institute action in its July 3, 2019 order (NYSCEF Doc No. 500) and never directed that Mr. Bachrach, Esq. must be present for Teleshevsky's deposition

to proceed in this action. Nevertheless, it appears that defendants may have misconstrued the court's July 9, 2019 order (NYSCEF Doc No. 504), as opposed to acting willfully or contumaciously in failing to schedule Teleshevsky's deposition. In this regard, the court considers that there has been no court order directing Teleshevsky's deposition, with which she has failed to comply. The court, therefore, declines to strike Teleshevsky's answer, and finds that the appropriate remedy is to compel Teleshevsky to appear for a deposition and direct a conditional order of preclusion (*see Brodsky v Amber Ct. Assisted Living, LLC*, 147 AD3d 810, 810 [2d Dept 2017]; *Patel v DeLeon*, 43 AD3d 432, 432-433 [2d Dept 2007]; *Williams v Ryder TRS, Inc.*, 29 AD3d 784, 785 [2d Dept 2006]; *Viteritti v Gelfand*, 289 AD2d 566, 567 [2d Dept 2001]).

The court notes that a repeated failure to appear for a deposition, coupled with the failure to proffer a reasonable excuse for that failure, supports an inference that such failure is willful and contumacious (*see Bouri v Jackson*, 177 AD3d 947, 949 [2d Dept 2019]; *Apladenaki v Greenpoint Mortg. Funding, Inc.*, 117 AD3d 976, 977 [2d Dept 2014]; *Castrignano v Flynn*, 255 AD2d 352, 353 [2d Dept 1998]). Thus, the court directs that in the event that Teleshevsky fails to appear for her deposition within 30 days of service of a copy of this decision and order with notice of entry thereof, she shall be precluded from testifying at the trial of this action in support of defendants' claims and defendants shall be precluded from introducing any evidence that Teleshevsky is a member of the board of trustees of Cong. Machon Chana.

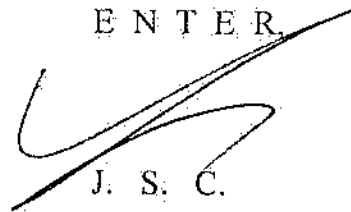
Conclusion

Accordingly, plaintiff's motion is granted to the extent that: (1) Zalman Labkowski, Teleshevsky, and Bronstein shall provide supplemental responses to document request numbers 1, 2, 3, 4, and to the extent necessary document request numbers 5-12, which specifically identify which of the previously produced documents upon which they are relying, and specify which Bates stamped numbered pages are responsive to which request within 30 days of service upon them of a copy of this decision and order with notice of entry thereof; (2) if documents responsive to plaintiff's document requests are not in Zalman Labkowski, Teleshevsky, and Bronstein's possession or do not exist, they are directed to provide to plaintiff, within 30 days of service upon them of a copy of this decision and order with notice of entry thereof, affidavits by them, describing the search for these documents and explaining why such documents are not in their possession, do not exist, and/or why they were not found; (3) Zalman Labkowski, Teleshevsky, and Bronstein are directed to supplement interrogatory number one by identifying all witnesses known to him or her with knowledge of information material and necessary to the subject matter of this action within 30 days of service upon them of a copy of this decision and order with notice of entry thereof; (4) Zalman Labkowski, Teleshevsky, and Bronstein are directed to supplement interrogatory number two by providing all responsive information in their possession within 30 days of service upon them of a copy of this decision and order with notice of entry thereof; if Zalman Labkowski, Teleshevsky, and Bronstein intend to solely rely on the documents previously produced by Sara Labkowski and/or if no documents exist which are responsive to this interrogatory, they are directed to provide a sworn

statement to that effect within such time period; and (5) Teleshevsky is directed to appear for a deposition at a time and place mutually agreed to by the parties, but in no event less than within 30 days of service upon them of a copy of this decision and order with notice of entry thereof, unless otherwise agreed to in writing by the parties. Jonathon Bachrach, Esq. need not be present at this deposition. In the event that Teleshevsky fails to appear for her scheduled deposition, without any reasonable excuse for an adjournment of her deposition, she shall be precluded from testifying at the trial of this action in support of defendants' claims and defendants shall be precluded from introducing evidence that Teleshevsky is a member of the board of trustees of Cong. Machon Chana.

This constitutes the decision and order of the court.

E N T E R.



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**