

[*1]

Frankel v Congregation Yetev Lev D'Satmar
2008 NY Slip Op 51779(U) [20 Misc 3d 1137(A)]
Decided on August 22, 2008
Supreme Court, Kings County
Ambrosio, J.
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 22, 2008

Supreme Court, Kings County

**Sholem Eliezer Frankel, Abraham Klein, Moshe Green and
Usher Green, Plaintiffs,**

against

Congregation Yetev Lev D'Satmar, Defendant.

**Congregation Yetev Lev D'Satmar, Inc., Moshe Scher, David
Ekstein, & Elias A. Horowitz, Plaintiffs, - against -**

against

**Congregation Yetev Lev D'Satmar, Inc., Sol Perlstein & United
Talmudical Academy Torah V'Yirah, Inc., Defendants. Action
No. 2 Decision and Order**

**Congregation Yetev Lev D'Satmar, Inc., Jenoe Kahan, Sol
Perlstein and Jacob Schoenfeld, Plaintiffs, - against -**

against

Friedman, Berl, Isack Rosenberg, Sandor Oberlander, David Eckstein, David Markowitz, Elias A. Horowitz, Ben Werczberger, David Hauer and Central Congregation Yetev Lev D'Satmar, Inc., Defendants.

22110-2002

Michael A. Ambrosio, J.

The three actions pending before this court are related to the on-going dispute within the Chasidic Satmar community as to who is the successor to the late Grand Rebbe Moses Teitelbaum, Rabbi Zalman or Rabbi Aaron, the Grand Rebbe's two sons. For more than six years the two factions led by Jenoe Kahan (hereinafter "Kahan") on behalf of Rabbi Zalman and by Berl Friedman (hereinafter "Friedman") on behalf of Rabbi Aaron have been litigating in the courts as to who should be in control of the Board of Congregation Yetev Lev D'Satmar, Inc., (hereinafter "Congregation"). The Congregation operates multiple synagogues, butcher shops, a matzah bakery and several charitable organization in the Satmar community.

In a seminal decision issued by now-retired Justice Melvin Barasch in a related case over the disputed elections of two competing boards for control of the Congregation, he ultimately determined that a judicial resolution of the validity of either side's board elections was non-justiciable since it would require the Court to impermissibly entangle itself in religious doctrine in violation of the First Amendment of the itution (*Congregation Yetev Lev D'Satmar, Inc, v [*2]Kahana, et al, 5 Misc 3d 1023*) ; (hereinafter "the Election case"). Justice Barasch's decision was subsequently affirmed by the Appellate Division, Second Department (31 AD3d 541 [2nd Dept; 2006]). In its decision, the Appellate Division held that:

"the dispute over the rightful board of the Congregation . . . and whether the respondent's election violated the religious corporation law cannot be decided by application of neutral principals of law (citations omitted) . Rather, resolution of the parties' dispute would necessarily involve impermissible inquires into religious doctrine and the

Congregation's membership requirements" *Id.*

The Court of Appeals affirmed the decisions of the Supreme Court and the Appellate Division (*Congregation Yetev Lev D'Satmar, Inc, v Kahana, et al*, 9NY3d 282; (2007)). The central issue in the Election case was whether Friedman the Congregation president had been expelled from the Congregation by the Grand Rebbe. The court wrote:

" . . . Friedman's religious standing within the Congregation is essential to resolution of this election dispute. Petitioners ask that this court not only determine the validity of the respondent's election but also to recognize the petitioners, including . . . Friedman, are elected officers and the ***authorized governing body of the Congregation***. With such membership issues at the center of these election disputes, matters of an ecclesiastical nature are clearly at issue. These particular issues must be resolved by the members of the Congregation, and cannot be determined by this Court" *Id.* (emphasis added) .

The Court of Appeals has now made it perfectly clear that the civil courts cannot determine which faction is in legitimate control of the Board of the Congregation and thus which faction is "authorized" to manage its affairs.

In the wake of the decision by the Court of Appeals in the Election case this court afforded all of the parties in the three pending actions the opportunity to establish if any of the claims asserted in those cases could be determined by neutral principals of law. Voluminous briefs were received by the court. Interestingly, in their briefs, the Kahan faction which took the position in the Election case that the issues in that case were non-justiciable now argues that the three cases before this court are justiciable and the Friedman faction now claims all of the cases are non-justiciable. Each faction has done a 180-degree turn on the issue of non-justiciability. Upon careful review of the parties' submissions and the various claims and counterclaims asserted in their pleadings, this court concludes that the three pending cases cannot be resolved by applying neutral principals of law and accordingly must be dismissed since they are non-justiciable.

At bottom, all three cases mask a continued effort on the part of the split Congregation to have the court make a determination as to who should be in control of the Congregation. This is what Justice Barasch, the Appellate Division and the Court of Appeals have said a civil court cannot do.

The first action, *Sholem Eliezer Frankel, et al v Congregation Yetev Lev D'Satmar*, (Index No. 22110-2002) (hereinafter "Frankel action") was commenced by the filing of a summons and complaint in Supreme Court, Kings County on June 4, 2002. This class action was started against the Congregation by Friedman adherents who claim to have purchased seats for a new synagogue to be built at 540 Bedford Avenue, Brooklyn, New York. The Frankel action has two causes of action: (1) a class action contract claim for specific performance against the Congregation based on monies paid to purchase seats in the new synagogue under construction and (2) a class action [*3]contract claim for money damages in the event specific performance is not granted on the first claim. At first blush, one might assume you could simply apply neutral contract principals to resolve this dispute. However, the defendant is the Congregation and the plaintiffs (Friedman followers) sued Friedman in his purported capacity as the Congregation president. They sued Friedman rather than Kahan in a not-so-veiled attempt to get judicial recognition that Friedman is the one authorized to act on behalf of the Congregation. Not surprisingly, although not served, Kahan submitted an answer on behalf of the Congregation. The conduct of both factions in this litigation clearly illustrates the very heart of the problem which is who has leadership and control of the Congregation? The Court of Appeals has spoken loud and clear on this issue. The secular courts cannot make that determination.

Even assuming, *arguendo*, the issues in the Frankel action are justiciable, this action was discontinued as of right by the plaintiffs pursuant to CPLR § 3217 (a) (2) . Frankel and Friedman executed a notarized stipulation of discontinuance on June 20, 2002 which was subsequently filed with the Court on July 17, 2006. No action has occurred on this case since the answer was filed in June, 2002. There was no discovery, motion practice or notice and demands. Nor did anybody purporting to act on behalf of the defendant, Congregation demand to resume prosecution pursuant to CPLR § 3216. The answer filed by Kahan contains no counterclaims. The class was also never certified. The Kahan faction challenges the validity of the June 20, 2002 stipulation of discontinuance, however, this Court will not look behind the stipulation. All parties who were specifically sued and served with the complaint have agreed to a discontinuance of this action. This in no way should suggest that this Court accepts Friedman as the board president authorized to act on behalf of the Congregation. That is an issue for the Satmar community to resolve.

The second action, *Congregation Yetev Lev D'Satmar, Inc., Moshe Scher, et al v*

Congregation Yetev Lev D'Satmar, Inc., Sol Perlstein et al, (Index #

19144-2006; Orange County Index #

4333-2006) (hereinafter "Scher action") is a class action commenced in Orange County in June, 2006 by Friedman followers who claim breach of contract regarding the purchase of seats in the new synagogue under construction at 540 Bedford Avenue, Brooklyn, New York. The plaintiffs also sued United Talmudical Academy Torah V'Yirah, Inc ("UTA") asserting that defendant, Sol Perlstein, " vice-president of the Congregation" entered into an invalid lease agreement with UTA which effectively turned over the construction of the new synagogue to UTA. UTA is a religious corporation organized under New York Religious Corporation Law and operates the private school system in the Satmar community. The plaintiffs challenged Perlstein's authority to have entered into the lease agreement with UTA and UTA has counter-claimed for a declaration that the lease agreement is valid. UTA has also moved to file an amended verified answer with supplemental counterclaims based on a disputed election which occurred in March, 2007 for control of the board of UTA. The plaintiffs have cross-moved to discontinue this action. The claims raised in the Scher action, like the Frankel action, are non-justiciable. The problem becomes self-evident when the Congregation is named both as a plaintiff and a defendant. Who controls the Congregation is central to resolution of the claims and counterclaims which cannot be resolved by neutral principals of law.

In any event, the Scher action was ordered discontinued by Justice Owens in Orange County. This action was transferred to this court and consolidated with the Frankel action by order of Justice Arthur M. Schack, dated August 4, 2006. However, prior to that, on July 18, 2006 the plaintiffs filed [*4]with the Orange County clerk a notice of voluntary discontinuance. Based upon that notice the clerk's office marked the case "disposed." Justice Owens ordered the case dismissed on August 10, 2006, "nunc pro tunc to July 19, 2006" based upon the notice of discontinuance. The Kahan faction who oppose the plaintiffs' cross-motion to dismiss this case argue that Justice Owens had no authority to dismiss this action since Justice Schack's transfer order pre-dated his dismissal order thus divesting Justice Owens of jurisdiction to act on this case.

Justice Owens' decision to dismiss this case in Orange County constitutes the law of the

case which is binding upon this court as a court of coordinate jurisdiction (*Vanguard Tours Inc v Town of Yorktown*, 102 AD2d 868 (2nd Dept; 1984) ; *People v Johnson*, 148 AD2d 304 (1st Dept; 1989)) . Justice Schack's transfer and consolidation order is now rendered moot since both the Frankel action and this action are now deemed discontinued and are non-justiciable.

The third action, *Congregation Yetev Lev D'Satmar, Inc., Jenoe Kahan, et al v Berl Friedman, et al*, (Index #

25586-2006) (hereinafter "Injunction action") was commenced by the Kahan faction shortly after the decision by the Appellate Division in the Election case. In this case the plaintiffs seek the following relief: (1) declaratory judgment; (2) injunctive relief; (3) declaratory judgment under Real Property Law § 329; (4) trademark infringement and unfair competition; (5) unlawful use of non-profit religious corporation name under General Business Law § 397; (6) unlawful use of a corporate trade name pursuant to General Business Law § 133; (7) accounting; and (8) conversion.

At the heart of this case is a claim by Kahan that Justice Barasch's final decision left the Kahan faction in total control of the Congregation's property, assets and day-to-day operations without any interference from the Friedman faction as a result of the following language in his decision:

"As the Grand Rebbe has not given any indication of the wishes to the contrary, the court leaves intact the status quo in terms of the day-to day operation of the Congregation and its institutions until and unless the Grand Rebbe or any appropriately invested ecclesiastic tribunal rules otherwise."

The Kahan group argues that when that language is read in conjunction with eleven orders ^[FN1] [*5] issued by Justice Barasch and the Appellate Division in the Election case and a related case then pending before Justice Rosenwasser in Orange County (see, *Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., et al v Congregation Yetev Lev D'Satmar*, 11 Misc 2d 1055; rev 31 AD3d 480 69, aff. 9 NY3d 297 (2007)) it is unquestionable that by court orders, the Kahan faction was left in full control of the Congregation. The plaintiffs claim the causes of action in the complaint are justiciable since they are merely seeking to enforce prior court orders which left them in charge and barred

the Friedman faction from acting on behalf of the Congregation.

The plaintiffs further claim they have been in full control of the day-to-day operation of the Congregation since at least 2001 and therefore the "status quo" in Justice Barasch's decision can only mean that their faction is the sole authorized body empowered to run the Congregation. Kahan's factual claim that his faction has been in sole control of the Congregation's assets and property is hotly contested by the Friedman group.

The plaintiffs have moved for a preliminary injunction in this case seeking to enjoin the Friedman group from asserting any control whatsoever over the assets and property of the Congregation and from holding themselves out as the duly elected board of the Congregation. The defendants have cross-moved to dismiss the Injunction action pursuant to CPLR § 3211 on the grounds, *inter alia*, that the relief demanded is non-justiciable and is barred by res judicata and collateral estoppel. Not surprisingly, the Friedman faction has a different interpretation of the meaning of "status quo" in Justice Barasch's decision. They argue that "status quo" means that a dispute existed and that such a dispute will continue to exist unless and until the Grand Rebbe, or another rabbinical authority declares otherwise. The defendants also point to the fact that the Kahan faction made almost identical applications for injunctive and declaratory relief in the Election case before Justice Barasch who denied those motions in his final decision. Friedman also claims applications for similar relief were denied on at least seven occasions by the Appellate Division, a fact which was not disclosed by the Kahan group in their motion for a preliminary injunction in this case.

The Injunction action is nothing more than another disingenuous attempt by one of the factions to obtain relief which is beyond the reach of the court. To grant the Kahan faction such broad sweeping declaratory and injunctive relief would run afoul of the language and clear import of the decisions by the Appellate Division and the Court of Appeals that the secular courts cannot declare which board is the authorized governing body of the Congregation empowered to act on its behalf. It bears repeating the language by the Appellate Division: "the dispute over the rightful board of the Congregation . . . cannot be decided by application of neutral principal of law" (*supra* , 31 AD3d at 542) . Most importantly, the Court of Appeals has determined that a resolution of the dispute between the two factions would require "impermissible inquiries" into religious doctrine [*6](*supra* , 9 NY3d at 286) .

The Kahan faction has also misinterpreted Justice Barasch's decision. He dismissed the election case as non-justiciable. Having done so there can be no outstanding orders. Justice Barasch never issued permanent stays against one faction or the other. He merely acknowledged that at the time he issued his decision, the Grand Rebbe was still alive and pursuant to the tenets of the Satmar sect, it was up to him to determine who would be on the Board and who would be his successor. Having dismissed the Election case, Justice Barasch had no intention to choose one group or the other as the properly elected board of the Congregation empowered to manage its affairs. Most notably, Justice Barasch had a pending motion by the Kahan faction seeking almost identical injunctive and declaratory relief at the time he issued his final decision. It is beyond cavil given the eloquence of his decision that he manifestly understood the issues in that case and wrote what he meant. He could have chosen one faction over the other, the fact is he did not.

Significantly, the Appellate Division also denied the Kahan faction similar injunctive relief on several occasions finding that they had failed to demonstrate a likelihood of success on the merits. The most significant event which has occurred since the denial of those various applications is the unequivocal pronouncement by the Court of Appeals that the civil courts cannot determine who leads the Congregation.

Finally, to the extent plaintiffs rely on numerous interim orders (see, footnote 1) issued by Justice Barasch and the Appellate Division which granted authority to specific members of the Kahan group to control discreet aspects of the Congregation's affairs during the pendency of the Election case and the Orange County case, those orders were subsumed by the final decisions issued by Justice Barasch, the Appellate Division and most importantly the Court of Appeals (see, *Strnad v Brudnick*, 200 AD2d 735 (2nd Dept; 1994) .

Based upon the foregoing the plaintiffs' motion for a preliminary injunction is denied in its entirety since they have failed to establish a likelihood of success on the merits. The claims raised in the Injunction action are non-justiciable. For the same reason the defendants' motion to dismiss the Injunction action pursuant to CPLR § 3211 (a) (2) and (5) is granted.

In all other respects, all outstanding motions and cross-motions in all three actions are denied in their entirety.

This constitutes the Decision and Order of the Court.

Dated: **August 22, 2008**

Michael A. Ambrosio

Footnotes

Footnote 1: 8 /10 /01 Appellate Division granted Kahan's motion to modify TRO by eliminating the provisions of the TRO that would have installed a joint committee.

4 /30 /01 Order directing Friedman group to return money collected for dues, seats, etc.

9 /7 /01 J. Barasch enjoined and prohibited Friedman from advertising or selling seats in the congregation's main synagogue, or from collecting membership dues.

9 /14 /01 Order authorized Kahan group to notify NYPD of any disturbances.

11 /16 /04 Appellate Division denied Friedman group's request for a stay pending appeal and for re-imposition of the 8 /10 /01 TRO; Order prohibited the Friedman group from changing the status quo pending the hearing and determination on appeal.

3 /3 /06 Appellate Division granted the Kahan group's motion for a stay pending appeal of J. Rosenwasser's decision, which effectively said the Friedman group was in control.

4 /24 /06 Friedman got an ex parte TRO from J. Rosenwasser in the Orange County action that directed the police to help Friedman in carrying out his duties as the president of the congregation. The TRO enjoined the Kahan group from taking possession of the Grand Rebbe's residence, allowed Friedman to take action to allow anyone to attend any memorial service for the Grand Rebbe anywhere.

4 /25 /06 Appellate Division vacated J. Rosenwasser's order.

6 /2 /06 J. Owen granted an ex parte TRO that prohibited Kahan group from continuing the construction on the congregation's 540 Bedford Avenue property; prohibited Kahan from changing the status quo.

6 /9 /06 Appellate Division vacated J. Owen's TRO.

7 /11 /06 Appellate Division affirms J. Barasch decision stating that the Friedman election challenge is non-justiciable; court also vacated the deed signed by Friedman purporting to

transfer a ½ interest in the cemetery property to Kiryas Joel Congregation.

[Return to Decision List](#)