MEMORANDUM

SUPREME COURT : KINGS COUNTY (IAS Term, Part 42)

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MERKOS L'INYONEI CHINUCH, INC., et ano,

Plaintiff(s),

- against -

MENDEL SHARF, et al.,

Defendant(s).

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By Harkavy, J.

Dated: March 13, 2006

Index No. 40288/04

Defendant Congregation Lubavitch, Inc. (the "Congregation") moves for an order, pursuant to CPLR 603, 3211(a)(1) and (2), 5015 (a)(3) and 6314, (i) severing the claims against defendants Mendel Sharf, Yaacov Thaler, and Bentizon Frishman from the claims against the Congregation, (ii) dismissing the amended complaint as against the Congregation, (iii) vacating the ex-parte temporary restraining order ("TRO") issued herein, (iv) directing plaintiffs Merkos L'Inyonei Chinuch, Inc. ("Merkos") and Agudas Chassidei Chabad ("Agudas") to remove the plaque which they affixed to the premises at 784-788 Eastern Parkway in Brooklyn ("784-788"), and (v) ordering plaintiffs to reimburse the Congregation for the costs and expenses incurred in opposing plaintiffs' application for injunctive relief as well as the costs and expenses of the New York City Police Department incurred in enforcing the temporary restraining order issued in this action. Plaintiffs cross-move for an order, pursuant to CPLR 2215, 3212 and 3001, granting summary judgment declaring that plaintiffs Agudas and Merkos have all right, title and interest in and to 770 Eastern Parkway

("770") and 784-788, respectively, and that the Congregation has no rights in these properties, and granting a permanent injunction enjoining defendants from any further acts of vandalism, theft, harassment, trespass and/or nuisance with respect to the premises in general and the new plaque in particular, together with a mandatory injunction directing the Congregation to cease and desist from interfering in any manner with plaintiffs' effort to maintain a commemorative plaque or otherwise interfering with plaintiffs' interest in and enjoyment of the premises.

On December 10, 2004, Merkos commenced this action seeking, inter alia, injunctive relief with respect to the defacing, destruction and/or removal of a controversially worded plaque that plaintiffs sought to affix to 784-788, which commemorated the laying of a cornerstone by Grand Rebbe Menachem Mendel Shneerson, the grand rabbi and spiritual leader of the Lubavitch movement from 1951 until his death in 1994 (hereinafter referred to as the "Grand Rebbe") and which referred to the Grand Rebbe in Hebrew terms equivalent to the English phrase "of blessed memory." The lawsuit was initially instituted against individual defendants Sharf, Thaler and Frishman, who had been arrested and prosecuted in conjunction with the unauthorized removal of a previous plaque containing the controversial "of blessed memory" reference and the attempted replacement with a different plaque without the "of blessed memory" reference. Upon the commencement of this action, an ex-parte TRO was issued by the Hon. Yvonne Lewis on December 10, 2004 which enjoined individual defendants Sharf, Thaler and Frishman and anyone else with notice of the order

from interfering with Merkos' right to install a new plaque with the "of blessed memory" reference or from removing or damaging said plaque. The TRO further directed that the New York City Police Department "take all steps as are reasonably necessary" to enforce the terms of the TRO. Despite the TRO, on December 15, 2004, while workers were installing the new plaque, a melee ensued outside the premises involving opponents of the plaque and police officers assigned to the premises pursuant to the TRO, resulting in several arrests. Over the following months, individuals have attempted to destroy or deface the new plaque, and the new plaque was subsequently pulled off the side of the building on or about June 28, 2005, leaving a gaping hole in the facade. In the mean time, Agudas, the owner of 770, and the Congregation, a religious corporation formed in 1996 which opposes the "of blessed memory" plaque and which appears to claim an interest in 784-788 pursuant to a constructive or community trust and the authority to decide how it should be used, have been joined in this matter.

A brief examination of the history of the Lubavitch movement and the life and legacy of the Grand Rebbe is helpful in explaining why the seemingly reverential "of blessed memory" phrase is causing such acerbic discord and even violence among the Lubavitch community. The Lubavitch movement descended from the greater Chasidic movement within the Orthodox Jewish faith in eighteenth-century Eastern Europe when the Chasidic movement branched out into separate groups under the leadership of its own "Rebbe." Among these Rebbes was Schneur Zalman, the founder of a movement known either as

Lubavitch, named after the Russian city where the movement was centered or Chabad, an acronym of the Hebrew words "chochma" (wisdom), "binah" (comprehension) and "da'at" (knowledge). Following the death of Rebbe Schneur Zalman, the Lubavitch community continued to be led by a single spiritual leader known as the Grand Rebbe.

At the outbreak of the Second World War, Rebbe Joseph Isaac Shneerson (the "previous Rebbe"), the sixth in the line of Lubavitch Grand Rebbes, emigrated from Europe to the United States and eventually settled in the Crown Heights neighborhood of Brooklyn. The previous Rebbe thereafter established and became president of Agudas pursuant to the Religious Corporation Law on July 25, 1940. Agudas' certificate of incorporation provided that the corporation was created to establish, maintain and conduct a place of worship in accordance with the Chasidic ritual for its members, their families and friends and to acquire real property for this objective. Following its incorporation, Agudas purchased 770, which became the official residence of the previous Rebbe, the location of the central synagogue of the Lubavitch movement, and Agudas' worldwide headquarters. This building has since taken on such a spiritual import that replicas thereof have been constructed for use as synagogues in Israel, Australia, Italy, Brazil and Argentina. Agudas has held the deed and thus has been title owner of 770 from 1940 to this day.

The previous Rebbe, who died in 1950 without sons, was succeeded as leader of the Lubavitch movement by the Grand Rebbe, the previous Rebbe's son in law. Thereafter, the Grand Rebbe oversaw a significant expansion of the Lubavitch movement, sending

emissaries around the globe to further Jewish observance. The Lubavitch movement also saw significant growth in Crown Heights, creating the need for additional property. To address this need, Merkos, a non-profit corporation formed in 1942 and operating as the education arm of the Lubavitch movement, acquired the deed to 784-788, the property adjacent to 770, from Rabbi Aaron Klein. 770 and 784-788 are now adjoined and the central synagogue spans both buildings.

The Grand Rebbe's profound knowledge of Jewish Law and tireless devotion to the Lubavitch mission not only earned him the prodigious reverence of his followers but inspired the United States Congress to pass a resolution proclaiming the Grand Rebbe's birthday as "Education Day, U.S.A." Over the years, the Grand Rebbe's influence over his followers reached a level such that significant numbers in the Lubavitch community came to believe that he was "Moshiach," or the Messiah. This belief was reinforced not only by elements of religious dogma but by pronouncements by the Grand Rebbe himself in the few years before his death that the time of Messianic redemption was at hand.

Upon the Grand Rebbe's death in June 1994, the Lubavitch community was divided between those who considered him Moshiach (messianists) and those who did not. The true extent of the schism was realized when a plaque previously installed at 784-788 shortly after the Grand Rebbe's death which contained the "of blessed memory" phrase was defaced to the point that the controversial phrase was obliterated. To messianists, who insist that the Grand Rebbe never really died or would soon return and be revealed as the Messiah, the "of

blessed memory" reference and its implication that the Grand Rebbe is deceased is tantamount to blasphemy. Moreover, the messianists' anger over such wording was exacerbated by the fact that the plaque was affixed to the building adjoining the sacred 770 and which was visible to all those entering the central synagogue for prayer. The defaced plaque remained affixed to the building until November 2004 when it was ripped from the building as previously described, leading to the commencement of this action for injunctive relief to protect a new plaque containing the "of blessed memory" reference from further vandalism, destruction or removal. In the mean time, the messianist movement within the Lubavitch community has been pronounced. "Halachic" or religious rulings were issued by various Lubavitch rabbis which proclaimed that the Grand Rebbe is the Messiah and that the "of blessed memory" phrase shall not be used when referring to the Grand Rebbe. In 1999, several individuals attempted to take physical possession and control of a portion of 784-788, resulting in the commencement of an ejectment action by Merkos and a court order directing the police to remove the individuals.

This court is cognizant of the highly emotional nature of this controversy and its deep rooted religious underpinnings and reiterates its pronouncement made at conference with the parties that it will not rule on any questions dealing with religion but will make determinations based only on the laws of New York State. As such, the determination of this court shall in no way be construed as favoring one side or the other in the Messianic debate.

The Congregation's motion to dismiss is based primarily on the ground that this controversy is an internal religious dispute which cannot be decided without this court's entanglement in religious issues, and therefore this court is precluded by the Federal and State Constitutions from entertaining this action. Indeed, consistent with First Amendment principles, civil courts are precluded from interfering in religious disputes and thus, courts are prohibited from "resolving church property disputes on the basis of religious doctrine and practice" (*Trustees of Diocese of Albany v Trinity Episcopal Church*, 250 AD2d 282, 285 [1999] quoting *Jones v Wolf*, 443 US 595, 602 [1979]). Nevertheless, a "[s]tate has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively" (*Jones*, 443 US at 602) and although church property disputes come under the scrutiny of the First Amendment, secular courts can resolve such conflicts "so long as the underlying controversy does not involve determining religious doctrines or ecclesiastical issues" (*Trustees of the Diocese of Albany*, 250 AD2d at 285; *see also Park Slope Jewish Center v Congregation B'nai Jacob*, 90 NY2d 517, 522 [1997]; *Avitzur v Avitzur*, 58 NY2d 108, 115 [1983], cert denied 464 US 817 [1983]). As discussed below, this court is able to make a determination herein without resorting to an examination of Lubavitch laws and doctrines and, as a result, that part of the Congregation's motion to dismiss the complaint on the ground that this controversy is of a purely religious nature is denied.

It is not in dispute that Merkos and Agudas hold title to 784-788 and 770, respectively. Nonetheless the Congregation argues that while plaintiffs hold the deeds to the premises, they do so pursuant to a "community trust" or constructive trust and that the Congregation and its trustees, the "Gabboyim," have the authority to make decisions with respect to the maintenance and operation of 770 and 784-788, including the installation of a commemorative plaque. However, the Congregation has not proffered sufficient evidence to establish that it has any rights in the properties above and beyond plaintiffs. To the extent the Congregation is claiming a constructive trust, there are four factors which generally must be extant: (1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer in reliance on that promise; and (4) unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *Byrd v Brown*, 208 AD2d 582, 582-583 [1994]). The Congregation has not alleged any facts demonstrating these factors. There is no language in the deed from Rabbi Klein to Merkos which implies the creation of a trust nor is there any language in the certificate of incorporation of Merkos which establishes that the properties it acquires were to be held in trust for the Lubavitch community (*see First Presbyt. Church v United Presbyt. Church*, 62 NY2d 110 [1984]). The only facts set forth by the Congregation which may possibly suggest 784-788 was held in trust for the Lubavitch community and the Gabboyim it elects pertain to the building's purchase by Rabbi Klein, who thereafter transferred the deed to Merkos. However, the Congregation's submission of an interview with the wife of Rabbi Klein printed in the N'Shei Chabad Newsletter in which Mrs. Klein states

"WHATEVER WE GAVE REMAINS A HERITAGE" is clearly insufficient to establish that Rabbi Klein intended 784-788 to be held in trust for the Lubavitch community. Moreover, such contention is belied by a notarized document signed by Rabbi Klein which states that he was voluntarily taking title to the property in his name "solely as the nominee" of Merkos, that he never paid or advanced any moneys or other thing of value towards the purchase, and that all payments toward the purchase were made by Merkos.*

As owners in fee simple, Merkos and Agudas have "the right of possession, and the right to use [the properties] for any purpose which may be lawful" (*Matter of Brookfield*, 176 NY 138, 146 [1903]). Thus the fee owner may exclude others from its property and do to the buildings or structures on the property whatever it sees fit (subject to relevant laws, ordinances or regulations), such as renovating, painting, resurfacing or installing a plaque to the exterior. There is no argument raised in this matter that Merkos is prohibited by any law, ordinance or regulation of the City or State of New York from affixing *a plaque* of its choosing to the exterior of 784-788. The fact that the plaque may contain a controversial statement with respect to particular religious dogma is not relevant to such issues of property usage and enjoyment. The Congregation's argument, stripped to its essence, is not that Merkos does not have a right to affix *a plaque* to the exterior of 784-788, but is disallowed, according to a 1995 Halachic ruling, from referring to the Grand Rebbe with the phrase "of blessed memory." However, this is precisely the religious question which this court may not

*According to Merkos, Mr. Klein took title to the property as nominee so as to prevent any price gouging on the part of the seller.

consider. If this court were to make a determination that Merkos' legal right to affix the plaque of its choosing to its premises was limited by what words appeared on the plaque, or hold that Merkos is entitled to affix a plaque with the "of blessed memory" reference on the ground that its position in the Messianic debate was correct, then this court would have improperly entangled itself in the Messianic debate which the Congregation agrees may not occur.

As there are no issues with respect to the ownership of 770 and 784-788 or whether the properties are held as part of a trust, that part of plaintiffs' motion for summary judgment on its third through seventh causes of action (declaratory judgment claims) is granted.** Since it is established that Merkos has title in fee simple to 784-788 and the Congregation has failed to demonstrate any interest in or authority with respect to the use of the property, this court finds that Merkos is entitled to install a plaque of its choosing to the exterior of the building, and the Congregation has no legal right to interfere in the installation of the plaque or legal right to install its own plaque.

The repeated acts of vandalism and attempts to remove the controversial plaques are now well publicized. Moreover, a portion of the synagogue was, in effect, taken under physical control by messianists who attempted to damage or remove the controversial plaque by drilling through the interior walls behind the area where the plaque was located. A

**Contrary to argument of the Congregation that plaintiffs have not stated a cause of action for a declaratory judgment since plaintiffs' title ownership of the properties is not disputed, this court finds that a judicable controversy exists with respect to the parties' rights in determining how the properties are used, i.e. what may be affixed to the buildings' exteriors.

permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction (*Icy Splash Food & Beverage v Henckel*, 14 AD3d 595 [2005]). "Irreparable injury in this context means any injury for which money damages are insufficient" (*Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [1992]). The threat of the destruction of the plaintiff's property constitutes irreparable harm (*see Trimboli v Irwin*, 18 AD3d 866 [2005]). As stated by the Court of Appeals, "[w]here the end or the means are unlawful and the damage has already been done the remedy is given by a criminal prosecution or by a recovery of damages at law. Equity is to be invoked only to give protection for the future. To prevent repeated violations, threatened or probable, of the complainant's property rights, an injunction may be granted" (*Exchange Bakery & Restaurant v Rifkin*, 245 NY 260, 264-265 [1927]). It is clear from the history of this matter that any plaque inscribed with the "of blessed memory phrase" which is installed by Merkos to 784-788 would be in perpetual danger of being destroyed, removed or defaced. While the issuance of the TRO herein has not completely abated the problem, as evidenced by the incident of June 28, 2005, where the plaque was extracted from the wall, it is beyond doubt that in the absence of a permanent injunction plaintiffs' ability to protect its property will be greatly compromised. As a result, that part of plaintiffs' motion seeking a permanent injunction is granted and those branches of the Congregation's motion to dismiss the TRO, remove any plaques, and reimburse the Congregation and police

department are denied. The injunction shall be effective against all named defendants and any other person or entity with notice of the injunction.

This action is hereby severed with respect to plaintiffs' property damage claims against individual defendants Sharf, Thaler and Frishman and shall continue.

This court has considered all other arguments of the Congregation and finds them to be without merit.

The TRO shall continue in full force and effect pending the signing of an order by the court.

Settle order on notice.

ENTER,

J. S. C.

IRA B. HARKAVY
Justice of the Supreme Court