Civil Court of the City of New York
County of Kings; Commercial Part 52

Agudas Chasidei Chabad of the United States

Petitioner-Licensor,

-against-

Congregation Lubavitch, Inc., Zalman Lipskier, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, and in his representative capacity to President of Congregation Lubavitch of Agudas Chasidei Chabad, Avrohom Holtzberg, individually and in his capacity as Gabbai and in his capacity as Trustee of CLI, Menachem Gerlitzky, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, Yosef Losh, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, Sholom Ber Kievman, individual, as an employee of CLI and as an employee of Congregation Lubavitch, purportedly d/b/a Lubavitch World Headquarters, Congregation Lubavitch of Agudas Chasidei Chabad and Congregation Lubavitch, purportedly d/b/a Lubavitch World Headquarters,

Respondents-Licensees.

Index No: 106105/2011

Merkos L'Inyonei Chunuch

Petitioner-Licensor,

-against-

Index No: 106106-2011

Congregation Lubavitch, Inc., Zalman Lipskier, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, and in his representative capacity to President of Congregation Lubavitch of Agudas Chasidei Chabad, Avrohom Holtzberg, individually and in his capacity as Gabbai and in his capacity as Trustee of CLI, Menachem Gerlitzky, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, Yosef Losh, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, Sholom Ber Kievman, individual, as an employee of CLI and as an employee of Congregation Lubavitch,

purportedly d/b/a Lubavitch World Headquarters, Congregation Lubavitch of Agudas Chasidei Chabad and Congregation Lubavitch, purportedly d/b/a Lubavitch World Headquarters,

Respondent-Licensor.

Merkos L'Inyonei Chinuch Index No: 106107/2011

Petitioner-Licensor,

-against-

Congregation Lubavitch, Inc., Zalman Lipskier, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, and in his representative capacity to President of Congregation Lubavitch of Agudas Chasidei Chabad, Avrohom Holtzberg, individually and in his capacity as Gabbai and in his capacity as Trustee of CLI, Menachem Gerlitzky, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, Yosef Losh, individually and in his capacity as Gabbai, in his capacity as Trustee of CLI, Sholom Ber Kievman, individual, as an employee of CLI and as an employee of Congregation Lubavitch, purportedly d/b/a Lubavitch World Headquarters, Congregation Lubavitch of Agudas Chasidei Chabad and Congregation Lubavitch, purportedly d/b/a Lubavitch World Headquarters, 302-304 Kingston Avenue, Southest Room of the Second Floor, as more specifically delineated by the non-cross-hatched area on the diagram annexed hereto as Exhibit "1", Brooklyn, New York 11213 ("the premises").

Respondent-Licensor.

FACTUAL HISTORY

The real property laws in the State and City of New York are complex and often misconstrued by laypersons and lawyers alike. These summary proceedings to recover possession of real property would be a simple licensee holdover proceeding pursuant to RPAPL §713 (7), however, these particular properties have historical significance for all of the parties because the real properties here are owned and controlled by religious corporations organized under the laws of the State of New York. As in any action or proceeding involving religious institutions, the applicable rules of law and regulations, and their application to such institutions, excludes any consideration by the courts of the religious doctrinal differences and beliefs

between the parties. As such, a historical prospective of the most significant part of this nearly two decade old controversy between these parties and the procedural history of their litigation for this determination, albeit lengthy, is necessary. The litigation history determined specific material questions of fact and law including but not limited to the determinations made by the Supreme Court, Kings County (Harkavy, J., retired and deceased), and the Appellate Division, Second Department. Although the controversy is deeply rooted in a difference in doctrinal theology, the legal issue can be stated succinctly: do the Petitioners have the authority to recover possession of the demised premises herein under applicable law of this state.

About the parties and as will be shown from the record, Agudas Chasidei Chabad of the United States (hereinafter "Agudas") is a religious corporation that was incorporated in 1940 to, *inter alia,* establish, maintain, and conduct a place of worship in accordance with the Chasidic ritual and mode of worship of the Jewish Orthodox faith, and to acquire real property for that purpose. Following its incorporation, Agudas purchased 770 Eastern Parkway (hereinafter "770"), in Kings County, which became, among other things, the central Synagogue of the Lubavitch movement.

Merkos L'Inyonei Chinuch (hereinafter "Merkos"), a non-profit corporation, was incorporated in 1942, to operate as the educational arm of the Lubavitch movement. Following its incorporation, Merkos acquired the deed to 784-788 Eastern Parkway, (hereinafter "784-788"), the property adjacent to 770. The two properties are now adjoined, and the central Synagogue spans both buildings.

CLI was incorporated in 1996 as a non-profit corporation, for the purpose of succeeding and continuing the work of the unincorporated religious congregation known as Congregation Lubavitch, whose members regularly attended religious worship and studies at the Synagogue.

The Gabboim are the "managers" of the central Synogogue, as will be more fully discussed below.

On December 10, 2004, Merkos commenced a Supreme court action against Congregation Lubavitch, Inc., Mendel Sharf, Yaacov Thaler, and Bentizon Frishman for 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" or "Rebbe") and which referred to the Grand Rebbe in Hebrew terms transcribed in English "of blessed memory." The aforementioned defendants were arrested and prosecuted for the unauthorized removal of the plaque. In addition at that time, an ex-parte TRO was issued by the Hon. Yvonne Lewis which enjoined individual defendants 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, another altercation occurred and additional arrests were made. From the inception of this lengthy controversy, CLI and certain of its members opposed the installation of a worded plaque on the cornerstone of the buildings and further claimed an interest in the property pursuant to a constructive or 'community trust' and accordingly, had authority to determine the use and occupancy of the property.

Justice Harkavy, in a commendable and skillfully written decision, symbolic of so many of his decisions, wrote "[a] brief examination of the history of the Lubavitch movement and the life and legacy of the Grand Rebbe is helpful…in understanding this controversy. "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 importance 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. (*Footnote* 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.)"

"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])…..".

Based on this history and examination, Justice Harkavy determined that "… 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. Lastly, he stated "[a]s 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". (Merkos L'Inyonei Chinuch, Inc., et ano., v. Sharf, et al., 2006 WL 6353145 (2006). This ruling applied also to Agudas since subsequent to the action, Agudas and CLI were joined as necessary and indispensable parties. CLI claimed property rights to 784-788 Eastern Parkway and opposed the installation of this controversially worded plaque.

In the Supreme Court, there were two more decisions from Justice Harkavy: a) the decision and order dated March 27, 2007 (irrelevant to these proceedings) and b) the decision and order dated December 27, 2007, in which Harkavy, J. granted the Plaintiffs a final judgment of possession. It is noteworthy here that CLI argued that it could not be ejected because it is merely a management corporation formed by the managers of the Synagogue; it existed separately and apart from the religious corporation (CLI) and did not itself occupy or use the space at the Synagogue.

Justice Harkavy, after trial and through the admission of further documentary evidence, found that the evidence demonstrated that Congregation Lubavitch had been using the Synagogue space since the Synagogue was established in 1940, and that CLI replaced the unincorporated congregation on the date of its formation in 1996. After a review of a myriad of documentary evidence and finding some incredible testimony of the Defendants and their supporting affidavits, the Supreme Court further held that Congregation Lubavitch, Inc. and Congregation Lubavitch were one and the same. The evidence further showed that the Congregation, by the Gabboim, acted and continue to act through CLI. CLI was and remained in possession of the Synagogue space at 770 and 784-788 Eastern Parkway to the exclusion of Merkos and Agudas, and Merkos and Agudas established entitlement to possession of that space. The owners, Agudas and Merkos, were awarded a final judgment of possession of the Synagogue located at 770 and 784-788 Eastern Parkway, Brooklyn, New York, including but not limited to, the ground floor,

mezzanine, basement and sub-basement of the premises, all of which constitutes part of the Synagogue. As significant, he found that Congregation Lubavitch, Inc., the congregation that was occupying a portion of 770 and 784-788 Eastern Parkway, "purporting to be Congregation Lubavitch, whose trustees (gabboim) included, as of June 13, 1996, Zalmen Lipskier, Yehuda Blesofsky, Menachem Gerlitsky, and Yosef Losh", shall also deliver possession to Agudas and to Merkos.

In the first appeal, the Appellate Division upheld the Supreme Court's procedural discovery determinations and more notably held that Justice Harkavy properly denied that part of CLI's motion to dismiss the action as non-justiciable pursuant to CPLR 3211(a)(2), finding that "[c]ivil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis of their resolution" (*Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d 282, 286, 849 N.Y.S.2d 463, 879 N.E.2d 1282). "Here, the issue of title to the property and the right of possession incident thereto may be decided, as among Merkos, Agudas, and CLI, based upon the deeds to the properties, which vest title, and concomitant the right of possession (*see generally ; Novelty Crystal Corp. v. PSA Institutional Partners, L.P.,* 49 A.D.3d 113, 117, 850 N.Y.S.2d 497). CLI does not challenge the plaintiffs' ownership and has conceded that it is neither a tenant nor a licensee of the plaintiffs. As a result, these issues may be resolved without regard to any religious principles or doctrine and are, therefore, properly cognizable in this action (*see Congregation Yetev Lev D'Satmar, Inc. v. Kahana,* 9 N.Y.3d at 286, 849 N.Y.S.2d 463, 879 N.E.2d 1282; *Park Slope Jewish Ctr. v. Congregation B'nai Jacob,* 90 N.Y.2d 517, 664 N.Y.S.2d 236, 686 N.E.2d 1330; *First Presbyt. Church of Schnectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d 110, 116, 476 N.Y.S.2d 86, 464 N.E.2d 454; *Kelley v. Garuda,* 36 A.D.3d 593, 827 N.Y.S.2d 293; *Malankara Archdiocese of Syrian Orthodox Church in N. Am. v. Thomas,* 33 A.D.3d 887, 888, 824 N.Y.S.2d 101)". Further, contrary to CLI's arguments, the existence of a divisive doctrinal dispute within the Lubavitch community does not render the action non-justiciable, even if the facts underlying the action arise from that dispute and, as CLI suggested, the commencement of the

action was motivated by that dispute. Property disputes between rival religious factions may be resolved by courts, despite the underlying doctrinal controversy, when it is possible to do so on the basis of neutral principles of law (*see Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v. Congregation Yetev Lev D'Satmar, Inc.,* 9 N.Y.3d 297, 849 N.Y.S.2d 192, 879 N.E.2d 731; *Park Slope Jewish Ctr. v. Congregation B'nai Jacob,* 90 N.Y.2d 517, 664 N.Y.S.2d 236, 686 N.E.2d 1330; *First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454; *Kelley v. Garuda,* 36 A.D.3d 593, 827 N.Y.S.2d 293; *Malankara Archdiocese of Syrian Orthodox Church in N. Am. v. Thomas,* 33 A.D.3d at 888, 824 N.Y.S.2d 101; *Trustees of Diocese of Albany v. Trinity Episcopal Church of Gloversville,* 250 A.D.2d 282, 286, 684 N.Y.S.2d 76; *see generally Jones v. Wolf,* 443 U.S. 595, 602, 99 S.Ct. 3020, 61 L.Ed.2d 775). The Supreme Court, therefore, properly denied CLI's motion to dismiss the complaint as non-justiciable.

On the second appeal, the Appellate Division, Second Department affirmed the order dated November 14, 2007, for our purposes here, found, *inter alia*, that, "[i]n order to maintain a cause of action to recover possession of real property, [a] plaintiff must (1) be the owner of an estate in fee, for life, or for a term of years, in tangible real property, (2) with a present or immediate right to possession thereof, (3) from which, or of which, he has been unlawfully ousted or disseized by the defendant or his predecessors, and of which the defendant is in present possession" (*Jannace v Nelson, L.P.,* 256 AD2d 385, 385-386 [1998]). In this case, there was no dispute that Agudas and Merkos were the owners in fee of the real property at issue. "CLI has stipulated that it does not have any right to occupy the premises based upon a lease or a license and the evidence was sufficient to establish CLI's occupancy of the premises to the exclusion of the Plaintiffs, thereby satisfying the third element of their claim to recover possession of the property as against CLI. Accordingly, the Supreme Court correctly awarded judgment in favor of the Plaintiffs and against CLI". However, the judgment was "modified to delete reference to the congregation and the Gabboim, since neither were a party to this action". Merkos L'Inyonei Chinuch, Inc., et al., v. Sharf, 59 A.D.3d 408, 873

N.Y.S.2d 145, 2009 NY Slip Op 00660 (2009) (Merkos II).

Notwithstanding arguments to the contrary by Respondenst, the findings of facts and conclusions of law by Justice Harkavy, affirmed by the Appellate Division, Second Department, substantially narrow the issues of fact and law in these proceedings.

PROCEDURAL HISTORY OF THE SUMMARY PROCEEDINGS

The first summary proceeding commenced under L & T No: 106105/2011 involves the demised premises in controversy as 770 Eastern Parkway, Brooklyn, New York. In accordance with a Ten Day Notice to Quit, dated September 21, 2011, Rabbi Avraham Shemtov, as the Chairman of Agudas, the undisputed and uncontroverted title owner of the subject premises, had served said Ten Day Notice to Quit on the above entitled entities and individuals and provides that the license to occupy the subject premises is terminated effective October 4, 2011; should they fail to surrender possession by that date, a summary proceeding would be commenced to recover possession of the demised premises.

Additionally, a second summary proceeding was commended by Merkos against the above identical parties under L & T No: 106106/2014 for the premises known as 784–788 Eastern Parkway and against the above identical parties under L & T No: 106107/2011 for the premises known as 302 – 304 Kingston Ave., South East Room of the Second Floor, Brooklyn New York.

The above named Respondents did not surrender possession by October 4, 2011, and in conformity with said notice, the Petitioners had served a notice of petition and petition returnable on December 7, 2011 in Commercial Part 52. Since the original files in these proceedings appear to be lost, misplaced and/or damaged by the Court (there was a flood in the courtroom that contained the files and may have adversely affected these files), this Court relies on the electronic records of these proceedings (printed from the Civil Court, Kings County computer system).

On December 5, 2011, the Respondents moved by a pre-answer Motion to Dismiss returnable on December 7, 2011 and the Petitioners, on January 17, 2012, cross-moved for summary judgment. All the named Respondents joined in the motion to dismiss except for Respondent YOSEF LOSH, who as of the date of this decision, has failed to appear in any manner in the proceedings.

The Respondents moved to consolidate and to dismiss the respective proceedings pursuant to CPLR §3211 on the following grounds: (1) the Supreme Court has issued a judgment of possession against CLI in all proceedings; (2) dismissal against all Respondents under L & T No:106107/2011 (302-304 Kingston) on the grounds of *res judicata;* (3) the dispute between the parties "is an internal religious governance dispute and not justiciable in the secular courts"; and (4) for consolidation of all proceedings.

Petitioner opposed the motions except joined the Respondents in seeking consolidation of the proceedings.

In opposition, the Petitioner cross-moved for summary judgment asserting that the proceedings are a simple real property dispute and the Petitioners as title owners are entitled to possession against all named Respondents on the grounds that they are licensees and/or squatters. In addition, the Petitioner, by order to show cause, moved for leave to deem the Respondent's motion to dismiss as one for summary judgment.

In the motion practice, in reliance on the above decisions by the Supreme Court and the Appellate Division, Second Department, Judge Devin Cohen ruled that consolidation was not appropriate here since the Respondents raised different defenses with respect to certain premises and "while there are doubtless common questions of law and fact there also appears to be at least the potential for divergent issues". (p. 7) Accordingly, he declined to consolidate the proceedings under the same index number but found that "all motions are joined for the purpose of this decisions and the actions are joined for subsequent trial". (p. 7)

It also appears that by a second order to show cause, the Petitioner moved to deem the Respondent's motion to dismiss as one for summary judgment and this relief was likewise denied by Cohen, J., as well as the Respondent's cross-motion for sanctions.

Respondent's motion to dismiss argues that pursuant to the Supreme Court decision and order, the judgment of ejectment precludes these summary proceedings for possession; and since the Petitioner did not pursue these claims in the Supreme Court, these proceedings are precluded by the doctrine of *res judicata.* Since the prior action of ejectment involved 770 and 784-788, and not 302-304 Kingston Avenue, Judge Cohen found no basis to dismiss the petitions on such grounds.

The Respondents asserted that the Congregation and the Gabboin are not intruders, squatters or licensees; but the "congregational arm of Petitioner Agudas". As between the Petitioners and the religious congregation, "this is nothing more than a dispute over the internal governance of Agudas and the congregation, deeply rooted in a religious doctoral dispute between two factions of Chabad Lubavitch over the theological status of Grand Rabbi Menachem Mendel Schneerson".

The Respondents argue that this case should be dismissed against the remaining respondents exclusive of CLI on the grounds that the matter is non-justiciable and is not secular in nature. Although Respondents concede that the Appellate Division affirmed the Supreme Court ruling that the property dispute herein could be determined by this Court on neutral principles of law, this issue was not decided as between Merkos, Agudas, and the congregation and the Gabboim.

In opposition to summary judgment, the Respondents argued that "pursuant to the religious corporation law Article 5, the trustees of AGUDAS and MERKOS hold the properties in trust in accordance with the "discipline, rules and usages" of Lubavitch Hasidism. The discipline, rules and usage of the Lubavitch Hasidism "require the Synagogue to be maintained as a main house of worship for the Lubavitch Hasidism, as it has been since 1940, under the control and management of the Gabboim." Additionally, Respondents assert that each are "members" of the corporation Agudas. The Respondents further argued that MERKOS holds the properties pursuant to an "implied charitable trust" for Lubavitch Hasidism. Although this trust defense was rejected in the Supreme Court action, the Respondents argue that the Supreme Court did not determine the rights of the congregants and the Gabboim.

Cohen, J., concluded that the issues herein are justiciable, as did the Supreme Court, affirmed by the Appellate Division, Second Department; and there are questions of fact, some of which may require action in the Supreme Court.

As to the Petitioner's cross-motion for summary judgment, the Court determined that it was premature based on the above findings; specifically holding that issue was not joined and defenses, if any, were not yet proffered.

In summary, by the decision and order of Cohen, J., dated November 30, 2012, the Respondent's motion to dismiss and Petitioner's cross-motion were denied. For the purposes of the motion practice and for trial, the Respondent's motion to consolidate was granted.

Subsequently, it appears that the Supreme Court issued a stay of the proceedings pending the declaratory judgment action by the Respondents.

During the stay of the proceeding, the Respondents served and filed three answers for the respective proceedings. In a verified answer by Zalman Lipskier, united-in-interest with the other Respondents, dated February 28, 2013, (L & T Index number 106105/2011), claims as follows:

> 1. Respondent admits that Petitioner is the owner in fee of 770; 2. Respondents admit that the premises is used for non-residential purposes and denies that the removal of the Respondents is sought from the entire premises but is only for a portion of the premises used in conjunction with a portion of the premises known as 784–788 Eastern Parkway, Brooklyn, NY and occupied by Congregation Lubavitch of Agudas Chasidei Chabad as the "central" Lubavitch Synagogue; 3. Respondents admit that the Petitioner is entitled to possession of the premises but the Synagogue is subject to a statutory trust, or alternatively, an implied trust in favor of members of Congregation Lubavitch to use and occupy the Synagogue and concomitantly subject to the right of the Respondents, Lipskier, Holtzberg, Gerlitzky and Losh, to manage the religious and secular affairs of Congregation Lubavitch and the Synagogue in accordance with the bylaws and "core tenants" of

Lubavitch Hasidism; 4. Respondents admit the allegations in the petition but contend that CLI was ejected from the premises and thereafter vacated the premises in compliance with the Supreme Court judgment and any claim to possession is barred by the doctrine of *res judicata*; 5. In response to paragraphs 4(b) and 4(c), Respondents deny the allegations and state that Congregational Lubavitch is a religious congregation of the Petitioner and further claims that Lubavitch World Headquarters is located at 770 and 784–788 Eastern Parkway, Brooklyn, NY and not d/b/a Congregation Lubavitch; 6. Respondents deny paragraphs 4(d), 4(e), 4(f), and 4(g) but admit that each of the Gabboim is a Gabbi of Congregation Lubavitch and also a Trustee of CLI and acknowledge that Rabbi Lipskier is a senior Gabbai with many years of service and each Gabbia fulfills executive functions; 7. Respondents admit that Kievman is a volunteer shamas (caretaker) of the Synagogue; 8. Respondents deny use and occupy claims and avers that Petitioner's rights to possession is held pursuant to a statutory/express/implied trust in their favor; 9. Respondents acknowledged service of notices but deny their legal efficacy; 10. Respondents deny paragraph 11 of the petition; 11. Respondents admit the allegations in paragraph 12 and 13 of the petition; 12. Respondents deny claims that the Petitioners are entitled to use and occupancy in any amount; and, 13. Respondents admit that Congregation Lubavitch uses and occupies the Synagogue for religious services and study; and for educational and cultural events.

Additionally, each answer contained eleven affirmative defenses, as follows: 1. the dispute between the parties is plenary in nature and should not be resolved in a summary proceeding but in the Supreme Court where the Courts have equitable powers and power to any declaratory rights between parties; 2. "the dispute between the parties as to the use and occupancy of the Synagogue by Congregation Lubavitch, and the control of the Synagogue and Congregation Lubavitch by the Gabboim, is an internal governance dispute not justiciable in the secular court" (*citation omitted*); 3. "the dispute between the parties as to the use and occupancy of the Synagogue by Congregation Lubavitch, and the control of the Synagogue and

Congregation Lubavitch by the Gabboim, is an religious doctrinal dispute not justiciable in the secular court" (*citation omitted*); 4. CLI has already been ejected from the premises and thus the proceeding is moot as against CLI; 5. "Petitioner's claim for eviction of CLI from the premise **merged** into the Judgment of ejectment on behalf of Petitioner, against CLI and therefore barred by the doctrine of ***res judicata;*** 6. pursuant to section 5 of the New York religious Corporation law, title to the premises of which the Synagogue is a part is held in **statutory trust** in accordance with the "discipline, rules and usages" of Lubavitch Hasidism and may not be diverted from such use. Further, the discipline, rules and usages of the Lubavitch Hasidism require the Synagogue to be maintained as a main house of worship for the Lubavitch Hasids, as it has been since it was founded in 1940, under the control and management of the Gabbiom; 7. Petitioner's fee is encumbered by an 'implied charitable trust in favor of the Congregation and all other Lubavitch Hasids that require the Synagogue to be maintained as the main house of worship for Lubavitch since 1940 under the control and management of the Gabboim; 8. The Petitioner commenced these proceedings in bad faith for "the improper purpose of wrestling corporate control of Congregation Lubavitch away from the members of Congregation Lubavitch in derivation of the Religious Corporation Law"; 9. Petitioner acquiesced and consented in the use and occupancy of Congregation Lubavitch of the Synagogue since 1940. Respondents detrimentally relied on said use insomuch that large sums of money were invested over a period of many years including but not limited to the original construction, roof repairs, sidewalk repairs and air conditioning equipment; and therefore, the Petitioner should be estopped from denying the rights of Congregation Lubavitch to use and occupancy of the Synagogue and the management and control of it by the Gabboim; 10. The proceedings has been commenced more than ten years after the Petitioner was allegedly excluded from control of the Synagogue and is barred by the statute of limitations; and 11. The proceedings have been stayed by the Supreme Court (Phau, J.).

Under L & T Index number 106106/2011, the Respondents, by a verified answer by Zalman Lipskier, interposed the identical answer except that the subject premises in that proceeding is 784–788 Eastern Parkway, Brooklyn, NY.

Under L & T Index Number 106107/2011, the Respondent, by a verified answer by Zalmlan Lipskier, interposed the identical answer except that the subject premises in that proceeding is 302-304 Kingston Ave., Brooklyn, NY, 11213 and in the 8th affirmative defense, the Petitioner explicitly allowed Congregation Lubavitch to use and occupy the Synagogue including the office and Women's balcony.

It appears that all proceedings including discovery in this matter was stayed until in or about December 19, 2013, when the Petitioner submitted a notice of motion returnable on December 24, 2013 to restore the proceeding to the calendar. The motion to restore was granted and the proceedings were adjourned to February 4, 2014.

On February 4, 2014, the Petitioners and all non-defaulting Respondents appeared by counsel and entered into an agreement in which the parties agreed to a detailed discovery schedule. It limited discovery to specific defenses in the Respondent's answer; to be concluded by April 10, 2014; and to proceed to trial on May 5, 2014. Subsequently, on May 2, 2014, the attorneys agreed to extend depositions to May 30, 2014, and to a new trial date of June 11, 2014.

The case was adjourned to the following dates: June 30, 2014 and July 9, 2014.

During this time, by order to show cause, Edward Rudofsky, Esq., moved to be relieved as counsel for Respondent Rabbi Menachem Gerlitzky. By decision and order dated July 25, 2014, Cohen, J., found that Menachem Gerlitzky refused to communicate with his attorney and did not appear for a deposition. He also found that Menachem Gerlitzky created a conflict of interest for his counsel because the Rabbi was no longer 'united in interest' with the other named Respondents. Rabbi Menachem Gerlitzky did not oppose the motion and expressed that he no longer wanted to be involved in the case.

According to the second decision of Cohen, J., the case was adjourned to July 2, 2014 to permit Rabbi Gerlitzky an opportunity to consider a possible settlement offer presented by the Petitioners and to seek legal and non-legal advice. The decision also stayed the proceedings until August 18, 2014 and all of the proceedings, including the remaining motions, were adjourned to September 18, 2014.

It appears that the parties engaged in additional motion practice. The Respondents moved to dismiss the proceeding on the grounds that Petitioner did not comply with discovery and inspection; or alternatively, to compel the production of various documents; and the Petitioners cross-moved for entry of a default judgment against Respondent Losh and to prohibit Losh from supporting the claims and defenses with the testimony of Zalman Lipskier, and for a protective order.

Apparently, the parties continued to have disputes regarding discovery. Cohen, J., resolved some of the disputes by telephone conference. By decision and order dated April 7, 2015, Cohen, J., directed the turnover of redacted, un-redacted, and partially redacted versions of various documents and determined that the documents discovery was sufficient for the parties to proceed with their respective *cases-in-chief* and defenses. In all other respects, Cohen J., denied all of the other motions but preserved the Petitioner's right to an inquest against all defaulting Respondents. Lastly, he adjourned the case for trial to May 11, 2015 at 10:00 a.m. in Part 52.

Prior to the trial, the Respondents submitted a pre-trial brief. The Respondents claims, in sum and substance, mirror the above answer; the Petitioner cannot prove its *prima facie case*; the proceedings are time barred; the dispute is non-justiciable; and the demised premises are subject to an implied charitable trust. The Respondent provides copies of the decisions and orders of the Appellate Division in Merkos I, Merkos II and Merkos III as described above; the decision and order of Judge Cohen dated November 30, 2012; decision and order of Judge Sifton, United States District Court, E.D. New York; and Response to Notice to Admit executed by Rabbi Yehuda Krinsky affirmed on May 7, 2015 for such proceedings.

TRIAL TESTIMONY

The undersigned presided at a lengthy trial which commenced on May 11, 2015 and continued on the following dates: June 17, 2015, June 18, 2015, June 22, 2015, June 23, 2015, November 2, 2015, November 4, 2015, November 5, 2015, November 6, 2015, May 11, 2016, May 12, 2016, May 17, 2016, May 18, 2016, May 19, 2016, May 20, 2016, and May 24, 2016.

On May 11, 2015, the attorneys for the respective parties agreed that the caption would be amended to reflect that SHOLOM BER KIEVMAN is deleted as a party respondent and NOCHUM KAPLINSKY is substituted in his stead (he is substituted in his individual capacity since he is no longer a Gabbai).

Also, the attorneys for the respective parties agreed to admit into evidence a certified copy of the deed of ownership dated August 17, 1940, from Nassau Savings and Loan Association to Agudas Chasidei Chabad of the United States, the Petitioner herein, as evidence of ownership of 770 Eastern Parkway, Brooklyn, NY 11213 (Petitioner's Exhibit "1").

The parties agreed to admit into evidence a certified copy of the deed of ownership dated June 25, 1982, from Chassia Pullner to Merkos L'Intonei Chinuch, Inc. as evidence of ownership of 302-304 Kingston Ave., Brooklyn, NY (Petitioner's Exhibit "2").

The parties also agreed to admit into evidence a certified copy of the deed of ownership dated January 4, 1965 from Aaron Klein to Merkos L'Intonei Chinuch, Inc. of the premises known as 784-788 Eastern Parkway, Brooklyn, NY (Petitioner's Exhibit "3").

In opening statement, the attorney for the Petitioner argues that all of the properties are owned by Agudas and Merkos, and the Respondents are unlawfully attempting to assert possessory rights to the premises superior to those of the title owners of the property. Based upon this misconception, the Petitioner states that the Respondents believe and act like they are entitled to control the premises. The Respondents have engaged in unauthorized construction and alterations to the premises in contravention of the

Petitioners' ownership rights. For the Petitioners, this is a simple landlord and tenant matter and the Respondents should not be allowed to confuse and obfuscate the issue. The Petitioners claim that all of the pleadings have been properly served on the proper parties and the Court has subject matter jurisdiction. The Petitioners contend that the Appellate Division has already determined that the existence of a divisive doctrinal dispute within the Lubavitch community does not render the action non-justiciable even if the facts underlined the action arise from that dispute.

In opening for the Respondents, it is alleged CLI has been removed from possession pursuant to the above decision from the Supreme Court (Harkavy, J.). The gravamen of the Respondents contentions is that the Congregation and the Gabboim have rights that have not been litigated in the Courts. Further, counsel for the Respondents argue that this matter should be resolved in the Rabbinical Court--the Beth Din, and involves religious doctrine, and therefore, is in violation of the First Amendment.

Counselor, Mr. Noson Kopel, Esq., as attorney for Menachem Gerlitzky, asserts that the Synagogue's religious services have historically been in these buildings such as adult education, religious classes, Yeshiva schooling, and the residence of the Grand Rebbe himself. The Gabboim used to be appointed and were now elected and is the "vehicle for the financial transactions having to do with the congregation".

After the above opening statements, the Petitioner proceeded with its *case-in-chief* and called its first witness, Rabbi Mendel Sharfstein, who testified that he is the Director of Operations for Merkos since 2007 (although he claimed to have performed many of the job responsibilities since approximately 1994, prior to his official appointment) and affirmed that Merkos owns 784-788 Eastern Parkway and 302-304 Kingston Ave.

The Rabbi testified that he speaks on behalf of the Board of Trustees and communicates with the different divisions and departments of Merkos and other parties on behalf of Merkos. He oversees matters of development and legal matters. He also coordinates with other global matters for the organizations. For

example, he is involved in “physical securities” for the different Chabad centers globally since around 2008 or 2009. He also coordinates with local centers in assisting the community in relief efforts including Hurricane Katrina, Nepal, and Hurricane Sandy. The witness testified that Rabbi Yehuda Krinsky is the Chairman of Merkos and Rabbi Abraham SHEMTOV is the Chairman of Agudas. Merkos is the “central educational organization” for the Lubavitch movement; it oversees all of the educational and outreach work. There are currently over 4,000 Chabad educational centers around the world; all of these centers are part of the Merkos network. “Agudas is more the umbrella arm of the organization”. (T. Sharfstein, 5/11/2015, P. 44 L.4-12).

The witness described the layout of the buildings. He testified that the top floor of the building is used as a library for Agudas and owned by Agudas. The previous Rebbe was on that floor as well. He further testified that part of the space is still maintained as a residence as it was part of the library space. “The first floor has many different rooms; one is a study hall, a small study hall. The Rebbe’s primary room, his office is on that floor as well. Adjacent to his office across a small hallway is the office of the Rebbe’s Secretariat and there are several of the offices and rooms on that floor as well small little rooms which are used as office space”. The basement level is also used as a llibrary; “a small part of the basement section of that building which is use as a Synagogue space which is attached to the other properties 784 and 788 Eastern Parkway and it’s an open Synagogue space it’s the sub-basement level of the building, now that’s in regards to 770. (T. Sharfstein, 5/11/2015, P.45, L.19-25; P. 46, L.1-23). “As far as 784-788, these two building I believe were purchased around 1995 by Merkos. They were apartment buildings which were converted into, one the upper levels, office space. The top three floors of the building is used as office space and they are adjoined, so it’s the one continuous space. Each floor is attached, 784 and 788 has now become one property where they are adjoining together. And again, at the sub-basement level they had joined together, 784 and 788, together with that space, which is part of one big open space use as a Synagogue. (T. Sharfstein, 5/11/2015, P 46, L.10-23). More recently, about 20 years ago, there was additional construction

conducted to lower level of the 784-788 properties where there were other offices and rooms designated as also I believe bathrooms on that floor, so they dug down and created even more space at that level" (T. Sharfstein, 5/11/2015, P.46, L.24-25; P.47, L.1-5). As to 302-304 Kingston Avenue, he confirmed that the Petitioner seeks possession of "a small space with few offices, one of them is used by the Gabboim. And historically Gabboim of the Synagogue used that space as office space. The Respondents in this case, the Gabboim, are occupying that space. The property 302-304 is owed by Merkos." (T. Sharfstein, 5/11/2015, P.46, L.10-23). He also informed the Court that the Gabboim and CLI are one and the same; although operating by different names, they occupy the space jointly.

According to the Rabbi, "the Gabboim and CLI occupy 770, 774-788 and 302 around "1994 I believe. This was in close proximity to his passing, within a half year to a year where those individuals proclaim that they were going to be the Gabboim of the Synagogue based on an election that had taken place many years previous. And several years previous, probably seven years approximately prior to that point in time, they never asserted the control during the Rebbe's lifetime. But for a short period of time immediately after the election, but subsequent to that, they stepped away and they had nothing to do with the control of the premises. In approximately the end of '94 or the beginning of '95, they started to assert control over the premises and then from that point forward they started conducting themselves in a way where they were locking out and restricting the access from the owners to their buildings." (T. Sharfstein, 5/11/2015, P.50, L.17-25; P.51, L.1-9).

The witness further testified that the Gabboim interfered with the Petitioner's ability to operate their property. He said that the Gabboim or their agents changed the locks to the building without authorization and consent from the owner; perform construction work at the subject premises without the consent of the owner including extending part of the Women's Gallery toward the Union Street side of the building; no advance notice was given of the scope of work. In essence, the Gabboim expanded the buildings that that belonged to the organization, not just the Synagogue.

Rabbi Sharfstein explained that there was a great celebration in the Synagogue called the "book trial" in which the congregants celebrate the victory of Agudas in the Federal District in the controversy of the ownership of certain literary works that were part of the library at the World Headquarters. It appeared that the previous Rebbe's grandson challenged the right of Agudas to the literary works; he argued it was personal property that belonged to the previous Rebbe. At this celebration, hosted by the Gabboim, congregants or agents of the Gabboim stopped "the two gentlemen of the two corporations from entering the building at various times" at this special event. According to the witness, Agudas had hosted this event yearly, until a few years after the passing of the Rebbe, when the Gabboim decided they would no longer allow Agudas Chabad to host that event and took over hosting the event. There was an altercation with both sides, parties were trying to gain control of the physical space and to coordinate the event and ultimately the Gabboim prevailed and they hosted the event to the detriment of the owner. (T. Sharfstein, 5/11/2015, P. 54, L.1-12). In addition, he testified that from that point on, Agudas has not been able to host that event in its own building. (T. Sharfstein, 5/11/2015, P. 54, L.14-16). The witness further testified that on more than one occasion, the Chairmen of the organizations have been physically attacked when they've been in the building. He claimed that the Gabboim asserted the right to control that space and there were people that were doing this on their behalf. They took the position that they had the rights to control and manage that space, and therefore, nobody else can dictate to them how it should be used and who should get involved. The witness asserted that the Gabboim made it clear that they have a right to control and manage the property (T. Sharfstein, 5/11/2015, P.55, L.3-24). The witness described other altercations with the Gabboim, specifically one involving large propane tanks that were being stored in the basement level for alleged cooking in the facility and the second incident involving the construction of the air-conditioning unit on the rooftop of the building. In the former, the attorneys got involved and it was allegedly resolved, and the latter, according to the witness, the issues continue to this date. He said, without notice or authorization, he and others observed unauthorized individuals on the rooftop welding steel platforms to secure a large air

conditioning system. The unit obstructed the windows of various offices and it remains this way to this day. (T. Sharfstein, 5/11/2015, P.58, L.12-25). He also stated that proper authorization and consent was not obtained for the installation of the air-conditioning from the proper government authorities or the owners of the property. Further, the witness testified that the locks had been changed with the construction on the roof and of the Women's Synagogue, and no keys were ever provided by either CLI or the Gabboim to the owners.

Lastly, on direct examination of this witness, the Court admitted into evidence as Petitioner's Exhibit "4", an authorization from Rabbi Avraham Shemtov, in his capacity as Chairman of Agudas Chasidei Chabad a/k/a Agudas Chasidei Chabad of the United States, Inc., which states "Rabbi Mendel Sharfstein, as and is a duly appointed agent of Agudas Chasidei Chabad in all matters involving this and all related litigation, including but not limited to testifying at trial on behalf of Agudas Chasidei Chabad. The document is notarized on July 10, 2014 in the Commonwealth of Pennsylvania.

The Petitioner concluded direct examination and the case was adjourned for cross examination. The trial continued on June 17, 2015, in which, after substantial discussions between the attorneys, the parties consented to the admission into evidence of Petitioners Exhibit "5", a certified copy of a certificate of Merger of Merkos L'Inyonei Chinuch, Inc. (a New York Not-for-Profit corporation) and Merkos L'Inyonei Chinuch (a New York Religious Corporation) dated December 12, 2010. The merger was effective on the date of filing and was authorized by a properly held meeting for both corporations. Merkos L'Inyonei Chinuch is the surviving corporation.

Subsequently, Rabbi Mendel Sharfstein took the stand for cross examination by the Respondents, beginning with Mr. Rudofsky, Esq. After a repetition of his responsibilities, the testimony made it explicitly clear that the Petitioners are seeking to evict Congregation Lubavitch and the Gabboim.

Mr. Rudolfsky continued to question the witness about the new and the old Gabboim and how the change from appointment to election of Gabboim affected both Agudas and Merkos. He stated that the new

Gabboim took control since the old Gabboim, including Rabbi Katz that had worked closely with Agudas, was elderly; and if he did remain, it was in a limited role. As to Rabbi Pinson, his role was also limited since he had no authority to make any decisions since that was left to the new Gabboim that took over. In sum, the new Gabboim took over; were not members of Agudas, and not "sanctioned" by Agudas. (T. Sharfstein, 6/17/2015, P.56, L.20-24). The witness was clear that all of these events ensued after the election of the new Gabboim and were the result of them taking control of the premises.

The witness testified that the proceedings were authorized by the Board of Trustees for Merkos. He likewise testified that he spoke to Chairman Shemtov of Agudas and was informed by the Rabbi that the Board had also approved the commencement of the summary proceedings.

He further testified that he is the recording secretary of Merkos, was present at the meeting in which the Board of Trustees granted authorization to commence the summary proceedings and he believed that such meeting occurred in or about July to September 2011.

The witness further testified that the Gabboim had installed a security camera system without the authorization and consent of the Petitioners. According to the witness, this "real time" security system put the entire Head Quarters at risk.

Rabbi Sharfstein testified that there was a special subcommittee that was created in 2004 to handle the litigation with 770. There was a legal committee that consisted of Rabbi Krinsky, Rabbi Shmuel, Rabbi Kaplan, Rabbi Deren and himself. He said the committee was created by Merkos and made all decisions and oversaw the litigation process, particularly pertaining to all the legal matters to regain control of the premises on behalf of Merkos and Agudas. There was a two-tier process. The subcommittee made recommendations to the board and the board then determined if they would take the recommendation. In addition, the Respondent's attorney brings to the Court's attention that the Notice to Quit was signed by the Chairman, and not the President, of Merkos and Agudas. Further, he claims that the Grand Rebbe is still the President of both corporations and he has never been replaced. In the Rebbe's lifetime, Rabbi Hodokav was

the Chairman of Agudas; now, it is Rabbi Krinsky who is the Chairman of Merkos and Rabbi Shemtov is the Chairman of Agudas. In response to an inquiry by the Court, the witness gave a history of the three corporations: Agudas, Merkos, and Machne. The Rebbe became the president of all three corporations and no longer functioned as the chairman of the board and passed it on to Rabbi HODOKOV. This individual was the personal assistant, "right hand man", and the head of the Rebbe's Secretariat. He ran the Rebbe's office. He was the officer of Merkos and Machne (T. Sharfstein, 6/17/2015, P. 118, L.22-25; P.119, L.1-5). He contends that the Rebbe became the chairman in 1950 of Merkos and Machne. He did not believe that he became the chairman of Agudas. He passed away prior to the Rebbe's passing and when he did pass away, Krinsky became president of Merkos and Machne and Shemtov became the chair of Agudas. He further affirms that all of the above mentioned individuals remained in those positions through and including the date of trial (T. Sharfstein, 6/17/2015, P.119, L.1-20). The witness was firm that these two men were already on the board of these respective organizations and once there was death in the ranks, these gentlemen stepped up; were elected and became chairman of these two organizations.

The witness then testified that a merger of Merkos, a not-for-profit and a religious corporation required legislative action and according to him, a bill was passed to authorize this merger since the Rebbe did not want to create any new corporation; he merely wanted to keep the old corporations for continuity. The Petitioner was unable to conclude the merger of these corporations until after the conclusion of the Rebbe's illness. His illness was the reason that the final merger did not take place until 2011.

After further inquiry, the Petitioner rested on its *case in chief*. (T. Sharfstein, 6/17/2015, P.129, L.17).

After Petitioner rested, counsel for the Respondent, Mr. Rudofsky, requested that the Court assist in narrowing the legal issues at trial. The Court proceeded to review the answer submitted by the Respondent and determine its viability for trial.

The first affirmative defense alleging the summary proceedings are inappropriate was determined by the Supreme Court. The Supreme Court did not grant a stay of the trial in these cases and deferred to the Civil Court. Accordingly, the first defense was stricken.

The second affirmative defense that the dispute between the parties involves a religious doctrinal dispute and that is not justiciable in the secular courts was decided by the Supreme Court and affirmed by the Appellate Division.

The third affirmative defense claims that the dispute between the parties involved a religious doctrinal dispute, and not justiciable. This defense is not only redundant, it has been determined that it is justiciable through the application of neutral principles of law. Accordingly, the third affirmative defense was dismissed.

The fourth affirmative defense raises issues of fact and survived dismissal. The Petitioner asserts the Respondents are still in possession and the Respondent alleged that CLI has been ejected from the premises in accordance with the judgment of possession granted by the Supreme Court.

The fifth affirmative defense claims a merger of the judgment of ejectment and therefore, is barred by the statute of limitations. Since there are questions of fact as to possession, the fifth affirmative defense also survives dismissal.

As to the sixth affirmative defense, there remains a question of fact which is the primary defense to these proceedings, and that is whether the title to the premises of which the Synagogue is a part is held in a statutory trust for the benefit of the Lubavitch Hasids.

The seventh affirmative defense raises a question of fact as to whether the bylaws of the Petitioners and the teachings of the Lubavitch Rebbe show “beyond a reasonable doubt” that the Petitioners’ fee interest in the premises is encumbered by an “implied charitable trust” in favor of the Congregation and all other Lubavitch Hasids.

As to the eighth affirmative defense, the Court found that this defense, although not a defense to a license holdover proceeding, should survive since it could impact the rights to possession.

The ninth affirmative defense was stricken based on the fact that the principles of estoppel and detrimental reliance do not prohibit the institution of a summary proceeding under Article 7 of the RPAPL.

For the tenth affirmative defense, the Respondent asserts that the Petitioner brings this proceeding more than ten years after they were allegedly ousted from possession. Although there is a statute of limitations for wrongful ouster (RPAPL §853), it is inapplicable here since each proceeding was brought pursuant to RPAPL §713(7).

In sum, this Court dismissed the first, second, third, and ninth affirmative defenses, and the tenth affirmative defense was withdrawn as moot. The fourth, fifth, sixth, seventh and eighth affirmative defenses survive dismissal.

The trial continued on June 18, 2015 and the Respondent commenced its *case-in-chief*. The Respondent called as a first witness Yaakov Chazan. The Rabbi testified that he was ordained in 1982 and got his degree from the Yeshiva called *Tomchei Temimim* at 770. In addition to being a Rabbi, the witness stated that he was an editor for the past 20 years for a magazine named *Beis Mosiach*. This magazine is "published by philosophy, by history, activities of the Lubavitch of the movement and the teaching of the Rebbe, history of the Chabad. (T. Chazan, 6/18/2015, P.6, L.24-25; P.7, L. 1-3). He also testified that he edited many books of the Lubavitch teachings and had edited more than 30 books in the last four years and more than 100 pamphlets connected to the teaching and history of the Chabad movement. He has also edited the Rebbe's teachings and his letters as well as the previous Rebbe. He testified that he has also been involved in transcribing hand-written teachings of the Rebbe. He asserts that individuals that transcribe the Rebbe's teachings must have specified skills. In fact, he stated that you have to be an expert to know how to read the handwritten manuscript, which was a part of his job (T. Chazan, 6/18/2015, P.7, L.22-25).

The witness further testified that he has an affiliation with Agudas. He testified that he was a member of the Congregation Lubavitch of Agudas Chasidei Chabad; he is a paying member; he pays his dues; and prays and studied in the Synagogue at least three times a day. He testified that there are hundreds of thousands of people that are affiliated with Congregation Lubavitch of Agudas Chasidei Chabad.

He testified that many people pray their daily and especially on holidays. Congregants would purchase seats on the High Holidays. He testified that his understanding was that the Gabboim are in charge of running the activities in the Synagogue. Also, the Gabboim were elected by the votes of the members of the Congregation and he has participated in the elections.

Petitioner objects to Respondent's Exhibit "A-1" - a writing in Hebrew with the caption "Beth Din of Crown Heights" and its address is the only English on the document. There is no English translation; Respondent's Exhibit "A-2" - also a writing from the Beth Din of Crown Heights dated May 29, 1987, urging all qualified voters of the house of G-d-the Synagogue and house of study of the Rebbe through proper Gabboim to vote. It has no original Hebrew letter annexed; Respondent's Exhibit "A-3" - the identical writing in Hebrew, the English translation and affidavit of accuracy by a translator. Respondent's Exhibit "A-1" and "A-2" were not admitted into evidence; Respondents Exhibit "A-3" was admitted into evidence.

Respondent's Exhibit "B", a certificate of incorporation of Agudas Chasidei Chabad of United States, dated July 15, 1940, was admitted into evidence on consent.

Respondent's Exhibit "C-1", a Hebrew writing, and Respondent's Exhibit "C-2", an English translation of the writing were both admitted into evidence over objection.

Respondent's Exhibit "D-1", a Hebrew writing and Respondent's Exhibit "D-2", a translation of the writing, were not admitted into evidence on the grounds of relevancy.

In an effort to move the case forward, the Court insisted that the Respondent mark all the Exhibits and gave both sides the opportunity to object or consent to the evidence.

Subsequently, Respondent's Exhibit "E" was marked for identification purposes as the one page document entitled "To all members of the Lubavitcher Community of Crown Heights"; it specifically states that "Every Lubavitcher who davens at 770 is requested to recognize his right and duty to participate in the election, so that the new Gabboyim be elected by a majority of those who actually vote. The election will take place…on May 31, 1987 from 6:00 a.m. to 9:00 p.m. at the side entrance of 770 on Kingston Avenue…."

Respondents Exhibit "F" is a notice that states "1999 Election Literature"-meet the candidates up for election for Vaad Hakohol of Crown Heights and Board of Directors for CHJCC and for Gabboyim of 770.

Respondents Exhibit "G" is another announcement of the candidates up for election for Vaad Hakohol of Crown Heights, Board of Directors for CHJCC and for Gabboyim of 770; this announcement states the names of the individuals running for Vaad Hakohol and Gabboyim. The elections were scheduled for January 27, 2002.

The next document, Respondents Exhibit "H-1" and "H-2", are both writings dated June 12, 1987. Respondents Exhibit "H-1" is the original Hebrew writing and "H-2" is the Hebrew translation. It appears to be a writing from the Committee to the Rabbinical Court of Crown Heights by the "Committee of Agudas [Union of] Chasidei Chabad" stating, in relevant part, "We are hereby letting you know our opinion that any undermining that may be, even in a manner of appearance, against the ownership of Agudas [Union of] Chasidei Chaba"d in the affairs of 770 [the Synagogue address], may be bound [,] G-d forbid [,] it shall never pass[,] to influence the process of the matter on trial, and accordingly, we request that nothing should be done at all concerning the Synagogue manager [for example their independent election which undermines our authority]" signed Rabbi Krinisky, Shemtov, Mordechai Mentlik and David Raskin.

Respondents Exhibit "I-1" is a writing dated June 26, 1987 in Hebrew and Exhibit "I-2" is the English translation. It appears to be another writing from the Committee of Agudas [Union of] Chasidei Chabad to the Rabbinical Court of Crown Heights requesting that "…nothing should be done [no action

should be taken], that could effect [influence] etc, (and as we wrote in our above mentioned letter the honorable rabbis [you] requested) until the verdict [of the civil court about the ownership of the books] is issued for the benefit [of all]. And this is the reason why we abstain from demanding the rabbinical litigation which was discussed at our meeting on Sivan [June 10] and also you though so and said that that's the way it should be…".

Respondents Exhibit "J-1", is a writing in Hebrew; "J-2", a writing from the Rabbinical Court dated June 27, 1987, and "J-3" a replication of Exhibit "J-1", an English translation and the certificate of accuracy. "J-2" states, in pertinent part, "Behold, since the new gabbaim were already chosen and appointed by the majority of the neighborhood residents, the congregants of the Synagogue and Study Hall 770 the congregation and the gabbaim have the full right that they should serve as gabbaim as long as there will be no other ruling by a rabbinical tribunal…." The writing is dated June 27, 1987 from the Beth Din of Crown Heights to Vaad Hakahal [Community Council].

Respondent's Exhibit "K-1" is a Hebrew writing; "K-2" is the English translation of this writing dated November 16, 1995, which states, in pertinent part: "We are putting in writing what we told on the Eve of Friday of the [Sabbath] Portion Vayera of this year and that is that all those who were elected by the holy community (See the Book of Sichot)[conversations] 749 [1989] page 604) approximately nine years ago to serve as gabbaim [Synagogue manager]* in the 770 Synagogue, behold, they still have the right to serve as gabbaim for the duration of two years (after that look into the regulations of the elections and there is appears [states] that it is 3 years) that is, until new elections [take place], together with the above mentioned R'Yeshoshua [Pinson] and with R' Ze'ev Yechezkel, the Kohen, [Katz] that is, may they live, and not one of them should be deprived of this right, and anyone from among the elected who does not wish will announce it (since there is no compulsion)…".

Respondent's Exhibit "L-1", is a writing in Hebrew and "L-2" is the English version of the writing. This writing appears to be from the Executive Committee of World Agudas [Union] Chabad of their meeting and their agreement at those meetings.

After going through all of the exhibits on the record, the parties consented to the admittance of Respondent's Exhibit "A", "B", "C" and "D". The other documents were marked for identification only.

The trial continued on June 22, 2015. Again, to save judicial time and resources, the Court re-examined the answer of the Respondents to further narrow the issues of the Respondent's defenses. In furtherance of the Court's duties to narrow the issues of trial, all the parties agreed that "CLI has no rights".

After more legal arguments, by agreement, the Respondent called Rabbi Eli Cohen to the stand. The witness testified that he is an ordained rabbi; he studied at the Lubavitch Yeshiva at 770 Eastern Parkway in or about 1980. He came to the Shivah in 1973 and studied for about seven years; he continued after his ordination for about a year or so.

Rabbi Cohen claimed that he was appointed to certain campaigns for the organizations; he then ran the Chabad programs in San Francisco. From in or about 1985 to 2003, he also ran the movements' outreach activities and chaplaincy at NYU. Then, from 2003 to the present, Rabbi Cohen has been the Executive Director of the Crown Heights Jewish Community Council. He testified that he was familiar with the Synagogue located at 770, 784-788 and 302-304 Kingston Avenue. He described in detail the development and expansion of the Synagogue. (T. Rabbi Eli Cohen, 6/22/2015, P.44, L.17-25; P.45, L.1-25; P.46, L.2-25; P.47, L.1). The witness described that there were major fund raising campaigns throughout the community; brochures were made for that purpose and were coordinated by the Gabbai, Rabbi Katz. The witness testified that everyone was asked to contribute $770. He said he personally wrote checks ten times, $770.00 in the amount of $77.00 each as a contribution to the expansion of the Synagogue. For him, he claimed it wasn't easy to make this contribution since he had a very small income but understood from the

Rebbe's teaching and from his talks "it was a religious obligation to participate". (T. Rabbi Eli Cohen, 6/22/2015, P.48, L.5-14).

Continuing with the direct examination of Rabbi Cohen, he testified about how the Gabboim organized the services in the Synagogue; determined who should lead the services; and coordinated all other services including cleaning services. The group was also responsible for preparation of the worship services. The Gabboim also sold reservations for specific seats and areas in the Synagogue. The Gabboim also have non-religious functions including general order and maintenance in the various buildings and coordinated construction when construction was underway. He further affirmed that in 1973, the following persons were rabbis: Rabbi MOSHE, PINCHAS, KATZ, LESOFSKY, LIPSKIER and PINSON. From his knowledge, these individuals were the first Gabboim that he knew. There may have been Gabboim in 1970 but to the witness's personal knowledge, when he got there in 1973, from at least 1973 to 1987, over a decade, the same rabbis controlled the Gabboim except when one of them would pass away, like Rabbi Katz and Rabbi Lipskier. After Rabbi Katz passed away, for example, his son filled his position. He recalled that in 1987, there was an election for new Gabboim. The witness testified that this election was problematic. Those Gabbais were in office for no time and then stepped down. But later, these previously elected Gabboim, resumed office. He described that the elected Gabboim stepped down because there was opposition in the community to the 1987 elections and the faction that opposed the election stated that it was done with the authority of the Rebbe and therefore it began a discord of which the Rebbbe spoke about publicly. At that time, the Rebbe spoke as the President of Agudas and the President of Merkos.

The witness testified that as a result of the Rebbe's personal involvement in the dispute, the elected Gabboim stepped down to avoid any further dispute in the community. However, at another time, the identical group stepped back up; around 1995, "it was the son, Yehuda Blesofky, Zalman Lipskier, Joseph Losh, and Meir Harlig was also there, and Menachem Gerlitzy..." (T. Rabbi Eli Cohen, 6/22/2015, P. 86, L.4-10).

With this witness, Respondent sought to introduce into evidence Respondent's Exhibit "K-1" and "K-2". Both documents were excluded on the grounds of relevance.

The witness's recollection was firm that the Gabboim were elected in 1987, resumed office in 1995, and made no changes in their conduct of the services at 770. He further testified that he is a member of Agudas Chasidei Chabad, which makes [him] part of Congregation of Agudas Chabad. In addition, he is a member; he supports the congregation financially and he also prays at the congregation. (T. Rabbi Eli Cohen, 6/22/2015, P.98, L.1-16). In addition, the witness testified that there were elections in the 1990s, 1999, maybe 2002; there was also an election in 2009 and another in 2010 and there may have been one or two more. When asked if he had voted in the elections he said that he had. (T. Rabbi Eli Cohen, 6/22/2015, P.99, L.2-8).

He further testified about the different elections. As to Vaad Hakohol, the witness stated "it more like the religious aspects, the community aspects and to the social aspects". The Community (sic) Council, which I'm involved more than is the social aspect, social service, and those kind of things. Government. The Vaad Hakohol is more like community events, coordinates the Beth Din, things which are more related to the religious aspects of the community". (T. Rabbi Eli Cohen, 6/22/2015, P.102, L.4-12).

Although the witness examined Respondent's Exhibits "F and Exhibit "G", election notices distributed in the community elections on Sunday, April 25, 1999 and January 7, 2002, respectively, the documents did not go into evidence.

The trial continued on June 23, 2015. After a lengthy offer of proof, this Court, over objection, ruled that the Respondents shall be permitted to proceed with their trust defenses. The Court found no prejudice to the Petitioners, particularly since the Gabboim and Congregants did not have the opportunity to present evidence of a trust, whether statutory or equitable, and should be granted the opportunity to produce its proof of such trust in these proceedings.

During this testimony, one of the issues raised was what the congregants or the Gabboim did to raise funds for 770. He was compelled to give because he felt an obligation to give as a member of the congregation. He further stated that the Rebbe encouraged all members to give to the construction and other improvements within the Synagogue. Most significantly, he participated in gatherings which took place in the evening called SIYUM, which are done at the conclusion of study. There were also celebrations that took place at the conclusion of different portions of the study calendar. He said there are 83 gatherings during the year and they occur at the conclusion of each book of annual study. He further testified that the place of worship for the prior Rebbe and himself should be "maintained in perpetuity". The witness further stated that "it is part of the teaching that it—this place that the Rebbe prayed in -should be preserved and kept and maintained in that sense for--in perpetuity" as a Shul (T. Eli Cohen, 6/23/2015, P. 73, L. 12-17).

On cross-examination, he acknowledged that there was a legal committee that was in charge of the proceedings before the court. He stated that the following individuals were on the legal committee: Rabbi Cohen, Yakov Chazan, Mendel Schneerson, Baruch Bush and Pertetz Bronstein. He believed that this legal committee has been in existence since 2004 and specifically, this committee appears to have come about as a result of the legal action involving the cornerstone. Further, the witness testified that he is involved in every aspect of the legal committee including any interfacing with the attorneys for the Respondents. He said that "we all got together and the Gabboim was part of that discussion and a decision was made we needed to take. We made a legal committee, and that legal committee met with the attorney". (T. Eli Cohen, 6/23/2015, P.80, L.19-23). He testified that the legal committee was formed after Merkos bought the legal proceeding against the Shul and they held a meeting where certain people were chosen that would coordinate the legal response. (T. Eli Cohen, 6/23/2015, P. 77, L.11-14). The legal committee interviewed attorneys and sometimes reviewed legal documents.

On cross-examination, the Rabbi was clear that the legal committee formed in 2004 and continues until this day to assert the rights of the Congregation; he called it a "nightmare that continued". Rabbi

Cohen was adamant that they were trying to assert their rights as members in the prior action in the Supreme Court notwithstanding the ruling by Justice Harkavy and the Appellate Division. Although the rabbi is not an attorney, he was able to articulate what occurred in the Supreme Court and in the Appellate Division. He acknowledged that since the Congregation and Gabboim were excluded from the Supreme Court judgment of possession, and their rights were not affected, they did nothing in the court after that time to enforce their rights.

The trial continued on November 2, 2015, with the testimony of Rabbi Cohen. In a series of questions about membership, Rabbi Cohen was not able to clearly define what he meant when he said "he was a member of Agudas". He believed that the property of the organization belonged to its members. Respondent's Exhibit "M-1", the bylaws of Agudas, over objection, was admitted into evidence. (Evidence marked as "M" was not admitted into evidence). Rabbi Cohen was finally excused.

The next witness called by the Respondent was Rabbi Abraham Shemtov. He was the only individual that testified who lives outside of the state of New York, and affirms that he was a resident of Philadelphia, Pennsylvania. He is the Chairman of the Executive Committee of Merkos, he is a member of Merkos, and he is on the Board of Trustees.

The witness is 87 years old, and he stated that he had either never seen many of the documents before, did not know what they were and certainly he did not know their relevance here. Moreover, based on his testimony, he is also unfamiliar with various parts of the legal case. The only question that the Rabbi was able to answer with any degree of certainty was that he had been attacked when attempting to enter 770 and was not allowed to enter 770. He testified that this was an unprovoked attack. Although marked as Respondent's Exhibit "O" (notices of petition and petitions for all the index numbers), he did not recognize his own signature. At this stage, the Court took judicial notice of the entire contents of each of the court files. He also did not give clear answers to a series of questions.

He was asked to identify Respondent's Exhibit "P-1", a book, that the Rabbi stated was "unauthoritative" and he would not refer to the work at all. He was then asked to identify various individuals, presumptively from 770, including Shneur Zalnana Blesofsky, Moshe Pinchas Katz, and Joshua Pinson. Although the Rabbi knew of them, his answers were noncommittal; he may have known some of them in their individual capacity, but not in any official capacity and certainly, not as Gabbai. After further questioning by Respondent's attorney and a review of a prior deposition, the Rabbi said, "if Zev Katz is Gabbai he is displaced Gabbai". The sum and substance of his testimony is that he did not and does not recognize the Gabboim, would not acknowledge their existence and as to the deposition testimony, the witness claimed repeatedly that the attorney was taking his deposition testimony out of context.

Respondent's Exhibit "R-1" (Hebrew writing) and "R-2" (English translation of Hebrew writing) were not admitted in evidence after further questioning. The witness was then asked if he was prevented from speaking at 770 and he replied that he has been prevented from entering 770. The Rabbi was firm that the attack on him was unprovoked and he was without protection. (T. Rabbi Stemtov, 11/4/2015, P.71, L.1-15).

Rabbi Shemtov was then asked to review Respondent's Exhibit "S-1" (a Hebrew writing, an English translation dated June 12, 1987 and certificate of accuracy) and "S-2" (a Hebrew writing, an English translation dated June 26, 1987 and certificate of accuracy). After a review of both, the Rabbi questioned their authenticity but did acknowledge his name, but not his signature; and stated that he could have allowed his name to be signed by someone else with authority. (T., 11/4/2015, Rabbi Shemtov, P.73, L.2-24; P.74, L.1-18).

Over objection, Respondent's Exhibit "N", a writing on the letterhead of Agudas Chesidei Chabad-Lubavitch, which contained the signature of Rabbi Shemtov, dated January 11, 2005 to Mr. Jeffrey D. Buss, Esq. and Smith, Buss & Jacobs, LLP, was admitted into evidence.

Additionally, the Respondents questioned the witness about Respondent's Exhibit "T", a news article, written by Steven I. Weiss-the Jewish Chronicle dated March 23, 2006 @ 3:47 a.m. about a phone interview with Rabbi Shemtov. The Rabbi did not remember the interview, had never seen the writing and the document was not offered into evidence.

On his direct examination by Mr. Kopel, the witness did acknowledge that the Rambam authored some books and some of these books were in the Synagogue. He was reluctant to offer any testimony about "any teaching of the Grand Rebbe regarding Rambam at 770" (T., 11/4/2015, Rabbi Shemtov, P.87, L.1-25; P.88, L.1-11).

On cross-examination by Mr. Abramson, the witness stated that he was given authority to commence the proceeding by the members of the Board of Trustees at a meeting. They gave him permission to go forward with the lawsuit verbally and he signed the authorization. He also acknowledged that there were no minutes of the meeting that gave him authority to act. After these questions, there was limited re-direct and no re-cross, and he was thereafter excused.

The next witness called by the Respondent was Rabbi Yehuda Krinsky. He testified that he is the Chairman of the Board of Merkos and Secretary of the Board of Trustees of Agudas. The witness identified Respondent's Exhibit "S-1" and "S-2"; testifying that this was a letter to the Rabbis about not doing anything that would interfere with the pending decision in the Eastern District. He was unavailable for allotted time and subject to recall.

The trial continued on November 5, 2015, and the Respondents called Rabbi ZEV KATZ as their next witness. He testified that he has been a resident of Crown Heights all of his life. His earliest memories of Congregation Lubavitch were from his early childhood; 770, everybody knows is an "international address". "People from all over the world they come to that address. People still keep coming". (T. Zev Katz, 11//2015; P.4, L. 24-25; P.5, L.1-4). He further stated that his father was a Gabbai of Congregation Lubavitch and he was also a Gabbai in the past. His father was in charge of the spiritual partnership with the

Synagogue. His father primarily dealt with calling different people to the Torah. He said he became a Gabbai because his father was a Gabbai; he described this act as if the position of the Gabbai was passed down to him from his father as a legacy. The witness testified that at one point he acted as a Gabbai in the Minyin of the Rebbe's Shul; later, he became a Gabbai in the main Synagogue. He said that while the Rebbe was alive, there were no Minyin services in the Rebbe's room. Services were only held in the Rebbe's room after the Rebbe passed away. The Rebbe's room was a holy room and many tried to fit into that room when the Rebbe was alive. As a Gabbai, he and others were responsible for taking care of the Synagogue; lead worship and prayer services there; decided who should be called to the Torah for reading; and collected donations from the congregants there. The Court marked Respondent's Exhibit "V", which is a receipt printed in Hebrew.

On *Voir Dire*, the witness was asked about this type of receipt; whether it was limited to people that made donations in 770 or for everyone. He testified that Exhibit "V" is a receipt for a donation that would be given to anybody, whether or not that person was in 770 or not. Respondent's Exhibit "V" was admitted into evidence since "[t]his is a receipt [from] Rebbe for [a] donation which Rebbe gave to the Shul" (T. Zev Katz, 11/5/2015, P. 26, L.16-17).

The witness further testified that at one time, the Gabboim attempted to take control of the Synagogue but it did not happen because it was not with the Rebbe's approval. He stated that there were no Gabboim from 1987 to 1994 but after the Rebbe's death in 1994, the same group took over again. When the new Gabboim stepped back up, Rabbi Pinson was too elderly and did not get involved. As to Exhibit "W", a letter written in Hebrew dated November 16, 1995, from the Beth Din of Crown Heights to the Rabbis and a certificate of accuracy, the witness testified that he recognized the document, it was addressed to him and that he received it. He was clear from his testimony that he was not part of the Gabboim that took over the Synagogue and had nothing to do with them. Exhibit "W", stated in pertinent part, that "[w]e are putting in writing what we told on the eve of Friday of the Sabbath Portion Vayera of this year and that those who

were elected by the holy community…approximately nine years ago to serve as Gabbaim [Synagogue managers] in the 770 Synagogue, behold, they still have the right to serve as Gabbaim for the duration of two years… that is, until new election [take place]…" He believed "[t]his came as a result of them [Gabboim]—this is outcome of them becoming Gabboim and taking over to run the Synagogue" (T. Zev Katz, 11/5/2015, P.48, L.19-21). He testified that "for nine years they [elected Gabboim] did not get into office and did not after the nine years I mentioned after Rebbe pass away that's when they jump on it again. It is totally improper. The Shul is Agudas. I know very clearly, I['ve] seen it in writing from the Rebbe many occasions. I did not, I was not part of it. (T. Zev Katz, 11/5/2015, P.49, L.1-8). Respondent's Exhibit "W" did not go into evidence due to an improper foundation and the lack of authenticity of the document from the Beth Din.

In addition, the Respondent marked for identification, Respondent's Exhibit "X", a certificate of accuracy dated November, 2015; Respondent's Exhibit "Y", a Hebrew writing and an English translation dated July 7, 1988 from Rabbi Leibel Groner; and Respondent's Exhibit "Z", a Hebrew writing and an English translation undated and entitled "A brief report of the meeting of Agudath Chaba"d from Monday of this week". The witness's recollection about the documents was far from clear; he could not remember if he had seen the documents or even what they were, namely Exhibits "X" and "Z". However, he knew of the contents of Exhibit "Y", that is, the Rebbe giving the "green light" for the expansion of 770 that could only happen if their was approval by Agudas. The Rabbi claimed that it was the Rebbe's instruction that there would not be expansion of the Synagogue without the approval of Agudas. Respondent's Exhibit "Y" was admitted into evidence with no objection.

The Respondent's Exhibit "AA", a writing on the letterhead of Agudas, states in pertinent part, "In response to your letter of 21 Tammuz 5748, in which you request permission to make renovations and so on to the building that currently houses the Synagogue/study hall. Here if these [renovations] are guaranteed to be beneficial to the above- mentioned primary objective-namely, to maintain the Rebbe's Synagogue/study

hall and his holy gatherings-then (so long as it's all implemented properly and in a legal manner) we have no objection to your permission. May G-d grant you success". This letter was to the esteemed gabbaim of the Lubavitch within Lubavitch Synagogue from CH. A Chadakov, Chairman.

In addition, the Respondent's Exhibit "BB", a four-page writing that describes the significance of the expansion of the Shul, its historical significance to the Lubavitch movement, a description of the renovation, the cost of the renovations ($13 million dollars), and the solicitation from "supporters and admirers of Lubavitch, the main source of funding, as always, is from within. From Anash." The witness did not recall ever seeing the writing but acknowledged his involvement in the subject matter. Respondent's Exhibit "BB" was admitted into evidence with no objection.

As to Respondent's Exhibit "CC", labeled "official receipt", was admitted into evidence with no objection. It is a receipt issued to Zalman Lipskier thanking him for the contribution of $770.00 to the rebuilding of Beis Rabeinu Shebebovel. His contribution enabled his family to be inscribed on the historic Chomas Anash. It was sent from Joseph T. Gutnick, the Building Fund Chairman. He further testified that the Synagogue solicited the sum of $770.00 from anyone who was Lubavitch. The receipt had 770 as the Lubavitch World Headquarters and under the Gabboim it listed Rabbi Zev Katz and Rabbi Yehoshua Pinson. He acknowledged that he was a Gabbai and it was issued as a result of donation to the building fund. Respondent's Exhibit "CC" was admitted into evidence.

As to Respondent's Exhibit "DD", a copy of a plaque in Hebrew for any individuals that contributed $770.00 for the expansion of the Shul. (The plaques are presently not installed at 770). He further stated that there were no particular individuals that were solicited for donations to the Synagogue but that donations were taken from anyone who would give and was solicited from anyone that was Lubavitch. Respondent's Exhibit " DD" went into evidence.

As to Exhibit "R-1 and "R-2", this Court excluded both exhibits because its contents involve religious teaching.

The witness was not very clear about the manner in which Agudas and/or Merkos gave authorization to bring the eviction proceedings. The witness could not remember if it was by vote; whether Agudas and Merkos met together or separately or whether or not anything was put in writing, but he did state that there was definitely approval for the commencement of the eviction proceedings. He was adamant that it was Agudas that approved the eviction of the individual Gabbais listed in the legal papers.

During the latter part of this testimony on November 5, 2015, he was repeatedly asked who and why those individuals and entities were being evicted. The witness was very vague and never actually answered the question. However, he did testify that "the entities in the Shul are not running the Shul in accordance to Chabad Shul. It is not being run the way the understanding [of] Agudas Chabad. That's why it was then. Now things have to be straighten out" (T. Zev Katz, 11/5/2015, P. 92, L. 10-15.)

He further testified that that Congregation Lubavitch Inc. was not approved by the Rebbe; he implied that it is not a legitimate organization. He stated in essence that because the Rebbe did not approve it, the "whole thing has no right to exist". (T. Zev Katz, 11/5/2015, P.93, L.4-12.).

On this line of testimony, he concluded by saying that "I'm not familiar with legal terminology. I do want to say is that Agudas will evict, want to evict anyone, any individual, any groups that's interfering with the running of the Shul. That's why Agudas came to such conclusion[,] this was voted at Agudas meeting, anyone interfering with operation of the Synagogue should be evicted. He is interfering with the running of the Shul". The witness stated that all of the named Gabboim were interfering with the running of the Shul and therefore, there was authorization to evict them all. He stated generally that it would not matter whether it is CLI or the congregation or anyone else that was not approved by the Rebbe, did not belong in 770. (T. Zev Katz, 11/5/2015, P.97, L.15-23).

The Rabbi would not state with any certainty whether the Petitioner sought to evict Congregation Lubavitch of Agudas; however, he implied that there was a discussion that they may be forced into the situation of having to close the Shul. (T. Zev Katz, 11/5/2015, P.107, L.12-13).

The testimony went back to Respondent's Exhibit "U" (writing in Hebrew), and "U-1", the same letter in Hebrew, a translation in English of the letter, dated July 29, 1973, a souvenir from the wedding celebration of Shalom HaCohen and Chaya Mushkia, may they live Katz 14 Shavat 5771 [Wed, 19, 2011], stating that the letter contained a copy of the contract with the contractor for the expansion of the study hall of "Lubavitch within Lubavitch"; also that the insurance and the permits that were obtained the prior week and the contractors were performing their jobs; lastly, seeking the Rebbe's blessing that the work proceed uninterrupted and well. Respondent's Exhibit "U" and "U-1" were admitted into evidence without objection.

The case continued for trial on November 6, 2015, with direct examination of Rabbi Zev Katz. Respondent's Exhibit "P, a leather bound volume in Hebrew; Exhibit "P-1", a Hebrew writing, the English translation and certificate of accuracy; and Exhibit "P-2", another leather bound volume in Hebrew were all marked. The witness testified that the books contained copies of the Rebbe's letters on all kinds of topics including scholarly explanations and explanations on the matter of Halach [Jewish law].

The witness made it clear that the Rebbe did in fact dedicate the property for pious or religious use. He also was clear that 770 contained the Lubavitch World Headquarters. As far as he was concerned, everything happens there; it serves as a headquarters for all kinds of things. (Respondent's Exhibit "R-1" and "R-2" did not got into evidence). In addition, the witness was shown Respondent's Exhibit "EE", which is a writing in Hebrew, the English translation and the certificate of accuracy. The witness identified the letter as one that he wrote to Agudas, giving them an update of what went on in the Synagogue at 770 and the elected Gabboim, as he referred to them. He testified that "[b]asically, I'm writing the letter to a Agudas Chabad that the financial situation in the Synagogue is very deep into debt and very deep into problems, and I did not see myself wanting to continue with them serving together, and I'm basically giving an update to Agudas of the financials of the Synagogue. (T. Zev Katz, 11/6/2015, P.20, L.1-6). (Respondent's Exhibit "EE" was admitted into evidence).

Respondent's Exhibit "FF", the witness testified, appears to be a note that had apparently been cut and paste together and notwithstanding this fact, it appeared to report to the Rebbe issues that were going on at that time in the Synagogue. He said that Exhibit "FF" was a piecemeal of a letter that the Rebbe had spoken to them about the criticism of how they handled the issues in the Shul.

For the next hour or so, counsels questioned the witness about issues that were irrelevant to issues in the case. In regard to the photographic evidence, it depicts the Rebbe's chair and the place where he worshipped or his pulpit, still in place in a part of the Shul.

On cross-examination, in the opinion of this Court, the entire line of questioning did not elicit any evidence that was relevant to the defenses. However, Respondent's Exhibit "BB" did show that all of those in the Lubavitch community were solicited to pay for a $13 million cost of rebuilding 770. The advertisement made clear that the individual that was making a contribution was not just making a contribution, but making an investment in everything that is truly important to the Lubavitch. The record will also show that the $13 million was never raised.

Similar questions were asked by co-counsel, Mr. Kopel, and this Court found those lines of inquiry also irrelevant to the defenses. What was clear to the Court was that the Rabbi was quite adamant about his view that 770 is not just a Synagogue. He said, "…770 is not, like I said, is not a Synagogue. We go outside, we drive by, we see beautiful Synagogues. 770 is not a Synagogue. It is the World Lubavitch Center. That's why, when they went to raise out money, funds to be able to expand the building, renovate the building and so forth, that why we are referring to 770 as the place not only where the Rebbe davens, and it's for the wellbeing of the Chasidim. It's not a Synagogue. There are many Synagogues that have wonderful fundraising apparatus going on. This is not our case". "A simple example, in this fundraiser here, people giving $770.00 to be on the wall, or who gave different amounts of monies, came from all over the world. I was in Paris for a week's time raising money together with the—a Chabad Rabbi there, Rabbi Azimov, may he rest in peace". (T. Zev Katz, 11/5/2015, P.62, L.19-25; P.63, L.1-11).

While referring to Respondent's Exhibit "BB", the witness explained the religious significance of 770 in the plan for redemption for the coming of the Messiah; he read what the document states, which was that "770 is the very source of all the activity that is preparing the ultimate Redemption and arrival of Mashiach". He further explained that shortly after the fundraising campaign began, the Rebbe passed away and 770 never got the $13 million dollars. He did not know how much they raised either; he referred the attorney to his accountant. The witness explained that Anash means people that are members of the Chabad community. (T. Zev Katz, 11/5/2015, P.69, L.8-9). Inquiry was made about those that gave funds to the campaign, if they daven at 770, and he claimed that it varied, some came to 770 and some have never been.

After cross-examination, there was no re-direct and no re-cross.

The case continued for trial on May 11, 2016. A witness by the name of Mr. Pesach Laufer, subpoenaed by the Respondent, was supposed to testify and due to a change in the trial date, he did not appear, so the Respondent called Simon Jacobson. He testified that he has been a resident of Crown Heights for nearly fifty-nine years. He went to the Chabad school system; the United Lubavitch Yeshiva from kindergarten to high school. He then attended the Rabbinical college of America in Morristown, New Jersey, and subsequently, called to Graduate School of 770, which is the highest level of education in the Yeshiva system. The rabbi is currently a publisher of the *ALGEMEINER* journal. He is the director of the VAAD HANOCHOS HATIMIMIM. He is also the author of a book, "Toward a Meaningful Life". He was also involved in the compilation of the Grand Rebbe's teachings.

The witness also testified that he was one of the editors of a Hassidic encyclopedia which he worked on with others from 1978-1983. His testimony established that Menachem Mendel Schneerson is the Third Chabad Rebbe. Chabad is the name of the movement and Rebbe is like a leader referred to as "Tzemech". Further, the witness established that he was responsible for reconstructing, annotating and publishing the Vaad Hanochos Hatimim, which is the students transcripts or documentation of the Rebbe's talks (T. Simon Jacobson, 5/11/2016, P.12, L.16-21).

The Respondent sought leave to qualify the witness as an expert in the Lubavitch movement and the Court declined to deem him an expert. However, he was permitted to provide a background of the Lubavitcher movement. He went through the history of the movement; there being seven generations of Rebbes or teachers or leaders with Rebbe Menachem Mendel Schneerson, the seventh in a line of leaders of this dynasty. These seven teachers or masters, produced a corpus of teachings and writings and philosophy and directed the Chabad movement. (T. Simon Jacobson, 5/11/2016, p. 20, L. 18-25; p. 21, L. 1-10).

Rabbi Jacobson testified to the sacredness of the 770 Shul and the special relationship that the Rebbe had to the Shul where he prayed, studied and received audiences and people from all over the world. Respondent's Exhibits "R-1" and "R-2" were not admitted into evidence but Respondent's Exhibit "R-3" was admitted in evidence.

Questions were again raised about the fundraising to expand the Synagogue, and the Rabbi testified that the Rebbe encouraged everyone, the Congregation in the community, anyone that would listen, to participate in the fundraising for the 770 expansion. In addition, Respondent's Exhibit "D-2" was admitted into evidence, which is a published translation of transcription of Silco's (phonetic) Cornerstone decoration of the lying of the cornerstone.

The witness was then called on to define farbrengen, a Yiddish word for gathering. These gatherings are where the Rebbe would speak to the community or to anyone that attended their multitude of services and activities. The Rebbe talked about all types of matters-religious matters, practical matters and current events.

Respondent's Exhibit "FF" did not go into evidence.

Respondent's Exhibit "GG", is a writing purportedly distributed during the campaigns- it's suggested that on the holiday of Rosh Hashana, that "everyone should be admitted without any restriction at all, both on the first day of Rosh Hashana and the second day of Rosh Hashana". The document was admitted into evidence for that limited purpose.

The Respondents had marked Respondent's Exhibit "HH", a writing, dated February 1987 which was a transcription of the Rebbe's talk that was not recorded because it was on Shabbat. The witness describeed the process that takes place when the Rebbe was able to record and when the Rebbe is not able to record. On Shabbat and other holidays, those of the Jewish faith are prohibited from using any electrical devices. Few people are appointed and given the right and authority to review and transcribe those talks; the individuals that had this privilege were appointed by the Rebbe himself who he trusted that were known to be affective memorizers who would listen closely to the Rebbe's teachings and after Shabbat, came together and wrote it down, compared notes and then began the process of re—creating the teachings. The word *Chozrim* was given to these oral scribes that got together and documented the words spoken by the Rebbe on Shabbat and later published them. Based on said testimony, Respondent's Exhibit "HH", over objections, was admitted into evidence. The writing states, in pertinent par, that "behold, it is understood and also simple that in the case where there arises a question in matter of the community, in a matter that is relevant to the Synagogue and the like, they should turn to the rabbis of the community and act according to their instruction. And as stated upon them is placed the responsibility for the entire community, and consequently it is not my concern to mix in to matters that are relevant to rabbis". The witness testified that the document shows the importance of having Rabbis have authority in the community; no one should get involved in trying to sway that decision and that the Rabbis teaching should be obeyed. The Rebbe also said that anything that comes up in the community should be addressed by the Rabbis and no one has the right to speak in the Rebbe's name. These three Rabbis are elected by the community and are commonly known as the Beth Din, which means Court of Law; Court of Law of the community.

At the prompting of this Court, after conference, the parties agreed to the introduction into evidence of Respondent's Exhibit "II 1-6". The photographs are of the Rebbe in various parts of the Shul and 770. The photographs appear to range from the late '70s into the early '80s and even some in the "90s.

The witness was questioned about the Rambam. He testified that the Rambam is an acronym for Rabbi Moshe Ben Maimon. The Rambam was also known as Maimonides, a 10th century scholar sage doctor codifier of Jewish Law. (T. Simon Jacobson, 5/11/2016, P.101, L.4-8). He stated that the Rambam's "magnum opus' is called Mishne Torah, that is his main contribution. It's a code of Jewish Law, gathering all laws, like a constitution. (T. Simon Jacobson, 5/11/2016, P.101, L.14-18). The Rambam is six volumes, and according to the witness, is a voluminous work that can be completed in one to three years, depending on the availability of the person.

The attorney argues that under the orders of the Rebbe, the members had to complete the Rambam by attending daily lectures in 770. The witness confirmed this testimony by stating that at one point Menachem Gerlitzky was assigned to "run the studies of the Rambam and cycles." (T. Simon Jacobson, 5/11/2016, P.106, L.22-25). In addition to acknowledging that Gerlitzky was a Gabbai, he further described that after the completion of a chapter or section of the Rambam in 770, there was a celebration by having a little cake and vodka. (T. Simon Jacobson, 5/11/2016, P.105, L.1-5). The witness could not tell the court who gave him this role to teach and did not confirm that it was the Rebbe.

On cross-examination, the witness testified that he has attended services at 770 for 59 or maybe 56 years, and he was unaware that this was an eviction proceeding. He was also unaware that his uncle, his mother's brother, Rabbi Zalman Lipskier, was also a named party in the proceeding and subject to eviction. The balance of the examination of the witness was not relevant.

On redirect, he repeated prior testimony.

There was no re-cross and the Rabbi was excused.

The trial continued on May 12, 2016, and the Respondents called as their next witness YEHUDAH BLESOFKY. He testified that he has worshiped at the 770 Synagogue from the time he moved to Crown Heights in or around 1961 to the present. He repeated the history of the expansion of the Synagogue and his testimony was consistent with the other witnesses. Additionally, Respondent's Exhibit "JJ" was admitted

into evidence with no objection for "illustrative purposes only"; it signifies the witness's testimony about the expansion of 770. He stated that he did make a contribution in the sum of $770.00 to the expansion. He said he made the contribution because there was a brochure that was circulated which explained why everyone should contribute and "the Rebbe spoke about it and that it's something that everyone should do". He further stated that "the expansion of the shul for the sake of all the members that come and for the guests that come to pray at the Synagogue all year round." (T. 5/12/2016, Yehudah Blesofsky, P.16, L.22-25; P.17, L.1; P.17, L.7-10).

The witness also testified to the same "Wall of Anash", meaning "all of the members of the Hasidic community" that contributed to the expansion of the Synagogue. The Respondent produced and had marked Respondent's Exhibit "DD-1", which is the actual plaque that he was given for his contribution of $770.00. Apparently, the Wall of Anash was falling apart and at one point it was removed from the wall, discarded and returned to him.

In further testimony, the witness testified that he was elected as a Gabbai in 1987 and was elected by the Congregation, the members of the community. (T. 5/12/2016, Yehudah Blesofsky, P.23, L.23-24). He stated that there was opposition to the election. He stated that the Rebbe did not oppose the election and the Beth Din approved it. The witness also testified that at various times there were letters that went out from Agudas that opposed the election. Respondent's Exhibit "S-1" and "S-2" were letters that were sent from Agudas that contain the signatures of the committee of Agudas to the Beth Din. Additionally, Respondent's Exhibit "A-1" and "A-2" were letters from the Beth Din to "all the residents of our neighborhood" about their rights to vote in the elections; Respondent's Exhibit "S-1" and "S-2", also from the committee of Agudas, was about the Beth Din not taking any action that would undermine the Synagogue (the independent election which undermines their authority) or the trial in the Courts and any action by them would risk the verdict in the civil court case about ownership of the books.

Then, Respondent's Exhibit "KK", another letter from the Beth Din to the Vaad Hakahal (community council) of the neighborhood: on the question of whether the community has a right to vote for Gabbaim of the Synagogue of 770, "you have that right". His testimony was that all members of the community were asked to come out and vote and these writings went out to the entire community. After the rabbinical court gave their opinions to have the elections, pamphlets and letters were distributed throughout the community. He testified that after the election of 1987, he served as a Gabbai for about two weeks or so. He stated that for the sake of the community, they decided to step down. They stepped down until 1995 or 1996 and then went back to act as the Gabboim. After further testimony, and over objection, Respondent's Exhibit "S-1" and "S-2", "A-1", "A-2" and "KK" were admitted into evidence. Subsequently, the Respondent's Exhibit "E", a letter from the Vaal Hakahal to all members of the Lubavitch community of Crown Heights, was also admitted into evidence. The Court also reserved decision on the admissibility of "J-1", "J-2", and "J-3" after argument.

By the time these men resumed their position as Gabboim, there were two Gabbais, Rabbi Zev Katz and Rabbi Yehoshua Pinson. He said that after a while it became apparent that these two men could not run the Shul. An unspecified group went to the Beth Din for an opinion. They were told that if these men needed help, then should take those that were already elected in 1987 rather than start the whole process again. The witness clearly believed that it was the Rabbinical Court that issued the directive for the previously elected Gabboim to step back up again to run the Shul. When the older Gabboim resumed their office again, according to the testimony of the witness, there was no change in the Synagogue other than the identity of the Gabboim. He also contended that there were no changes in membership and no changes in the Congregation.

Over objection, the Court admitted into evidence, Respondent's Exhibit "J-3" and "W".

Rabbi Blesofsky also testified that Congregation Lubavitch, Inc. no longer legally existed. Based on the refusal of the prior Gabboim to provide them with a tax exemption number and tax information, they

were unable to deposit money in the Shul account. They got an attorney to get them a new tax ID so that they could put the money into the new account for the use of the Shul. The new corporation is Congregation Lubavitch and their physical office is at 302-304 Kingston Avenue, Brooklyn. He also testified that at one point their offices were destroyed and they were in the process of restoring the office. Then, they received the letter, Respondent's Exhibit "LL", admitted into evidence with no objection, which was a notice from Merkos to inform them to cease and desist any renovations at the property. He said that notwithstanding the fact that they completed their offices at that time, Merkos agent's still came with permits from the city to permit them to demolish that part of the building. He said that the police were called to the property and the police determined that Merkos could not just come in and throw them out in that manner and that they had to go through the Courts to remove them. So, the police stopped Merkos from going forward with the demolition. Respondent's Exhibit "MM" was not admitted into evidence.

In addition, "770 is different than a regular Synagogue. 770 is for the --anybody and everybody who wants to come, they could come and pray. They don't have to pay membership dues". When the court sought clarification of the requirements of membership for 770, the witness testified that there is no particular requirement for you to come to 770. (T. 5/12/2016, Yehudah Blesofsky, P.35, L.19-21).

The witness testified extensively about Respondent's Exhibit "NN". The witness testified that this letter from him was mailed to every Hasidic Jew in Crown Heights and elsewhere. The master mailing list comes from a mailing list called the TZACH and it is retained by the Lubavitch Youth Organization. You can request the specific zip codes in areas of Crown Heights such as 11213, 11225, 11203. He also stated that he had personal knowledge about the mailing because he participated in stuffing the envelopes and had other people assist him in this mass mailing. Over objection, Respondent's Exhibit "NN" was admitted into evidence.

Furthermore, Rabbi Blesofsky testified about the same event in 1995 in which Agudas requested that they be allowed to have the celebration of Hey Tevet; the 5th day of the month after Tevet which is a day

that is celebrated in the Lubavitch community as the date of the victory in Court over the books. The witness acknowledged at the time of the decision regarding the celebration, he was a Gabbai and they put two restrictions on Agudas (a/k/a Vaaad Aguch); two people could not speak publicly: Rabbi Krinsky and Rabbi Shemtov. It appears that they were restricted from public speaking for their alleged willful disobedience of a directive from the Beth Din. They spoke anyway and were told that because they did not follow the directive that they were told the prior year, they could not have the function in the Shul.

In addition, the witness testified that there was another election of the Gabboim in 1999 and marked Respondent's Exhibit "F", a brochure of meet the candidates for Vadd Hakohol of Crown Heights and for the Board of Directors for the CHJCC and the Gabboim of 770. He also testified that there was another election around 2002. In addition, the witness was shown Respondent's Exhibit "G", a slate of the candidates for the Board of CHJCC, the Vaad Hakohol of Crown Heights and the Gabboyim of 770. This document, likewise, over objection, was admitted into evidence. The Court also admitted into evidence Respondent's Exhibit "E" and Exhibit "F", over objections.

After additional questioning, the witness testified that the duties of the Gabboim are primarily administrative; their jobs are not religious in nature.

Mr. Kopel again asked the witness about the Rambam. The witness informed the court that Rabbi Gerlitzky organized the lesson on the Rambam in 770 from the start. He described the same testimony as the others that at the completion of certain parts of the Rambam, there is a celebration named the Siyum (completion of that portion) where there was food and drink.

On cross-examination, the Petitioner's attorney reminded the Court that the Court had stricken the Respondent's defense in the answer regarding statute of limitations. Since that defense has been stricken, the Petitioner waived cross-examination, and therefore, there was no re-direct or re-cross.

The Court had some clarification questions. When asked were there any qualifications other than being Hasidic to be able to come and worship in the Synagogue, the witness said that there are no other

requirements. He further stated that there were no monetary requirements to be a member of Congregation Lubavitch. He explicitly said that "[w]ell, the Congregation Lubavitch, Inc. is only there for the purpose of—of the monies that came in to deposit in the bank. As far as the member, as far as the people that came to Shul, they were not part of Congregation Lubavitch, Inc. (T. Blesofsky, 5/12/2016, P. 55, L.14-22). The witness was very clear that the purpose of the new incorporation of Congregation Lubavitch was because Rabbi Katz and Rabbi Pinson refused to give them the tax ID number so they had to get their own tax ID number to deposit offerings and any other monetary contributions from the Synagogue. After those questions, the witness was excused.

On May 12, 2016, in the afternoon court session, the Respondent called as their next witness, Zalman Lipskier. He testified that he has lived in Crown Heights since 1954 and was familiar with the Synagogue at 770 and 784-788 Eastern Parkway. He and his family pray in the Shul and he has been there since he was five years old. He testified that after the last Rebbe passed away, his father was elected as Gabbai; he believed it was in '71 or '72 and he remembered it was a public election. He also confirmed that his father and Blesofsky's father were elected to the Gabboim in the same election year. He was elected himself in a public election in 1987 and has been a Gabbai ever since that time. He confirmed that he was part of the group that had stepped down because of the public controversy and then resumed his position.

He further testified that he was familiar with the expansion of the Synagogue and acknowledged that he was appointed the head of construction in '72 and considered himself the construction manager. He repeated the history of the expansion of the Synagogue. He expressed the fact that they needed more room; the crowds kept getting bigger and bigger and at one point the Lubavitch Rebbe, Menachem Mendel Schneerson, encouraged development of 770. He reiterated the testimony about the Rebbe's teaching that each individual give $770.00 to expand the Synagogue. The witness recognized Respondent's Exhibit "CC", a copy of one of his receipts that shows that he paid $770.00 toward the campaign. The witness testified that, "the Rebbie referred to the Synagogue of 770 as the temple. There was no temple in Jerusalem so the

temple is 770." (T. 5/12/2016, Zalman Lipskier, P.62, L.17-19). Additionally, the witness stated "[e]very Jew was obligated in the time of the temple to participate either with funds or bodily, to participate in the temple, the Holy Temple of Jerusalem. And so now this is the place for every Jew to come and pray, pray and contribute and whatever, etcetera. This is the holiest place in today's times according to the Rebbe" (T. 5/12/2016, Zalman Lipskier, P.63, L.13-18). Jews from all over the world came there and they keep coming.

On the next court date of May 17, 2016, prior to any testimony, the attorney for the Respondent submitted a new case from the United States District Court of Rhode Island in which the Respondents claim is analogous to the cases at bar. The District Court imposed a constructive trust against the property of the original owners, a religious institution. After argument, this Court was provided a copy of the decision as well as the attorney for the Petitioner, and this Court "agreed to read and consider the decision in this determination".

The Respondents called Rabbi Yaakov Chazan. This witness had offered limited testimony but due to scheduling conflicts, his testimony could not be conclude and the Respondents reserved the right to conclude his testimony.

The witness testified that he has been involved in publications for Chabad teachings for 40 years; from at least 1976 through the date of his testimony. Respondent's Exhibit "OO," a list of the publications from 1976-2016 by Rabbi Chazan, was marked by the Court. The Respondents sought to qualify the witness again as an expert, and based on the Respondent's failure to include the witness on CPLR§3101(d) notice coupled with the failure to notify the Petitioner's attorney that he sought his testimony as an expert, he was precluded from any testimony about his area of expertise and Respondent's Exhibit "OO" was not admitted into evidence.

The witness was then shown Respondent's Exhibit "B", the certificate of incorporation of Agudas. The witness testified that Rabbi Menachem Mendel Schneerson, is the last and current Rebbe; there is no successor. The witness was shown Respondent's Exhibit "PP", a writing in Hebrew, an English translation

and a certificate of accuracy. A letter from Mr. Lieberman on the letter head of Secretaria of Rabbi Lubawitz containing contributions of $1,175.00 for the building fund that were donated by specified persons. Additionally, the witness was shown Respondent's Exhibit "PP", a receipt from the previous Rebbe's secretary, Chaim Lieberman. "He was the secretary of the previous Rebbe and produced this receipt to the people. He gave it to Rabbi Kazarofsky". "Rabbi Kazarofsky was from the committee to purchase the building of 770 and this was money that was given to him, that was specifically for the building fund and the previous Rebbe secretary delivered him this money for those ten people that gave special for the building fund, [to] purchase the building 770". (T. 5/17/2016, Rabbi Yaakov Chazan, P.32, L.8-19). After substantial argument, Respondent's Exhibit "PP" was not admitted into evidence.

The witness was also shown Respondent's Exhibit "QQ", a writing from the building committee to purchase the building at 770. Then, the Respondent's witness was shown Respondent's Exhibit "RR", a writing in Hebrew, and an English translation. Additionally, the witness testified about the history of 770. He stated that the previous Rebbe arrived in the United States in 1940. He was living in a hotel in Manhattan. The Chabad community started to look for a suitable place to establish the Chabad headquarters in the United States. In the late 1940s, they found a house at 770 Eastern Parkway; it was a doctor's house and a private clinic and suitable due its large size. It would be proper for a Synagogue and also an apartment for the previous Rebbe and office for Chabad headquarters. (T. 5/17/2016, Rabbi Yaakov Chazan, P.49, L.7-23). The new Rebbe, when he came to the building, instead of going to his apartment, he went to the Synagogue and gave a blessing. This day became a special day of observance. In the beginning, the building had a mortgage and even when the previous Rebbe passed away, there was still a mortgage. He explained that this is a "public house". It's a congregation for the whole Jewish community." T. 5/17/2016, Rabbi Yaakov Chazan, P.51, L.1-6). He testified that the previous Rebbe said that the property would be used for two purposes: for his home and to establish the Chabad headquarters and Synagogue. Even when the Rebbe got sick and he could no longer leave his apartment on the second floor, the majority of the congregants

continued to pray on the first floor. In the beginning, there were, 20, 30, 40 people but little by little, it started to grow. Today it is thousands. (T. 5/17/2016, Rabbi Yaakov Chazan, P.52, L.16-19). As the congregation grew, there became a need to expand. He confirmed that the purpose of the expansion was the Synagogue. He also seemed to imply that the original name of the congregation was Agudas Chasidei, Congregation Lubavitch. Both were used. He said, later, the Rebbe added more names.

The source of funds for the expansion was "public fundraising, Chabad Community and Jewish people in general. I have a letter from 1950 that the building committee is sending urgent letter to the Chabad community that there is not enough money to finish the building, everyone should give money." (T. 5/17/2016, Rabbi Yaakov Chazan, P.52, L.18-22). He further said that the fundraising was not just for the Chabad community but all Jewish people had an opportunity participate.

Subsequently, there were several Respondent's Exhibits--Exhibit "SS", a writing, in Hebrew, in the hand writing of the previous Rebbe to his mother undated; Respondent's Exhibits "SS-1", a writing, in Hebrew, in the hand writing of the previous Rebbe to his mother dated November 20, 1940 and certificate of accuracy; Respondent's Exhibit "TT", a writing entitled New Residence of the Lubavitcher Rebbe in Brooklyn-770 Eastern Parkway, undated alleged magazine from Agudas called Hakriya V'Hadedusha; Respondent's Exhibit "UU", a writing dated August 26, 1960 entitled Notice and Warning; Repondent's Exhibit "VV", a written receipt and an English translation dated September 3, 1961, all marked by the Respondent.

The witness explained that Exhibits "UU" and "VV" relate to the building fund from 1960 or 1961. The latter, according to the witness, is "a receipt to the Rebbe's mother that she gave $200.00 for the building fund of the Congregation Lubavitch and from 1960 is a public letter from the building of Congregation Lubavitch, asking everyone from the Chabad members, the Agudas, to participate in the fund, to be able to finish the building, should be able to pray there on high holidays." (T. 5/17/2016, Rabbi Yaakov Chazan, P.68, L. 20-25; P.9, L.1-6).

When the Respondent sought to move the documents into evidence, the Petitioner objected on a number of different grounds. After substantial arguments, "SS" is not admitted into evidence, however, the Court admitted the other documents, Exhibits "TT", "UU", and "VV", stating that this Court "admitted the documents in the evidence, subject to connection" of other proof of the Respondent's defense in this proceedings (T. 5/17/2016, Thompson, J., P.73, L.11-19).

On cross-examination, he acknowledged that he was a witness in another case against Merkos. He also acknowledged that he used to work for Merkos and got paid by Merkos. He would not acknowledge that he was fired by Rabbi Krinsky but only that Merkos stopped paying him. Afterwards, he got paid from other companies for his work. He was never given any explanation of why he was terminated. The remaining testimony was not relevant to the defenses in the proceedings. There was no re-direct and therefore, no re-cross. This witness was excused. Notwithstanding the above, Mr. Kopel requested time to question the witness and after questions that once again were not relevant to the defenses in the cases, the witness was excused.

The trial continued on May 18, 2016 and the Respondents called Rabbi Krinsky for a continuance of his testimony. In 1988, the day of the passing of the Rebbe's wife, he observed that the Rebbe was a very broken person; he had no children, no brothers or sisters, and his wife, his closest confidant was now gone. He further testified that the Rebbe was the most outstanding leader in the past century or two, and a world leader of Jewish life. He testified that at the Rebbe's home on President Street, the Rebbe called him to his office. The Rebbe told him he wanted to do three things: write a will; create a charitable fund in his wife's honor and memory to serve the needs of woman and their matters; and to create new corporations of the three corporations under his control with new bylaws, new boards and fill vacancies. He further testified that he never changed the names of the three corporate entities that his father-in-law constructed in the 1940's but their corporate restructures were completed by 1990.

After a court conference, the parties consented to the introduction into evidence of Petitioner's Exhibit "6", a certified copy, dated October 30, 2015, of a certificate of amendment of the certificate of incorporation of Agudas Chasidei Chabad of the United States of America. He also testified that he was a member of the executive committee of Agudas from 1970 until 1990. The original corporation was organized under Section 803 of the not-for-profit corporation law. He acknowledged that the number of trustees of the corporation was increased from 20 to 24, but he stated that they are not all active trustees. He further testified that on May 9, 1994, there was a meeting and the amendment was unanimously authorized and approved at the Board of Trustee meeting at which a quorum is present. The witness could not state with certainty whether or not there were written minutes of the meeting, but he was present at the meeting. According to his testimony, notwithstanding the passing away of the Grand Rebbe, some people believe that he is still the President of Agudas and of Merkos. Additionally, the parties admitted into evidence Respondent's Exhibit "WW", an affirmation signed by Rabbi Yehuda Krinsky in opposition to the cross motion which states in pertinent part, that Merkos is the fee owner of the premises; Merkos' intent is that the Synagogue will remain open as a house of worship to all, including members of Congregation Lubavitch, Inc., for the purpose of worship. Merkos is merely asserting its right to control its own space. Congregation Lubavitch Inc. asserted the right to determine what plaque, if any, can go on the exterior wall of the premises and asserts in court documents the right to exercise dominion and control of the area used as a Synagogue. Moreover, the parties agreed to introduce into evidence as Respondent's Exhibit "XX", a copy of the amended summons and complaint in the matter of Merkos and Agudas v. Mendel Sharf, et al under index no: 40288/2004, Respondent's attorney making specific reference to paragraph 81, which states, in part, as follows: "As between Merkos and Agudas, they agree that the Shul is initially created as part of Agudas when it began operating in 1940 and that Agudas has all the rights to operate, maintain and administer the Shul, as well as the right to the ownership of the assets of the Shul". (Note 'XX-1" is also made a part of the record which is a redacted copy of the summons and complaint). Respondent next had

marked Respondent's Exhibit "YY", a copy of the Plaintiff's brief dated December 2, 1985 in the United States District Court in the case of Agudas v. Gourary, Index No: CV-85-2909. Respondent claimed that the Petitioner is estopped from asserting that the property could not contain a trust since the Petitioner made that same argument on their own behalf in this case. Over objection, the document was admitted into evidence.

Next, the Respondents had marked Respondent's Exhibit "ZZ", a letter written by Moshe Pincus, Zev Katz, and Hakohen to the Rebbe requesting payment for the contractors to prepare the shul for the high holidays. The Rebbe responded and gave instructions to his office to give them $10,000 on one date and $10,000 on the day before the Sabbath. The witness testified that this is significant because Merkos paid in full for the construction of the Synagogue over three phases, which took several years. Merkos wrote the checks based on the directions of the Rebbe, the president of Merkos. Respondent's Exhibit "ZZ" was admitted into evidence on consent.

The parties agreed to the admission of Respondent's Exhibit "AAA", a writing that lists month, day and year and amounts in U.S. currency for a total of $125,000.00. This document reflects the payments made from the corporate checkbook of Merkos to contractors for the payment of construction of the Shul. The witness recognized the handwriting of Rabbi HODAKOV, a close assistant of the Rebbe's. These were payments that the Rebbe authorized to different contractors. *He made it clear more than once that Merkos bought the building and Merkos paid for the entire cost of construction of the Shul.*

The case continued in the afternoon with Rabbi Krinsky on the witness stand. He testified that Respondent's Exhibit "S-1" is a letter to the Beth Din of Crown Heights; it requested that the Beth Din not get involved in the controversy in the Shul and the Gabboim. Respondent's Exhibit "S-1" was admitted into evidence over objection. Additionally, the Court having already marked Respondent's Exhibit "S-2", a similar letter to Exhibit "S-1", over objection again, was admitted into evidence. The Rabbi further testified that all the individuals that signed Respondent's Exhibit "S-1" and "S-2" were all members on the Board of Agudas.

Respondent's Exhibit "BBB", is a memoranda dated 1973, by Rabbi Krinsky to the Rebbe that dealt with construction of the Synagogue in the upper three floors. The document was admitted into evidence with no objection. Additionally, the witness testified that the part of the memorandum that was underlined was done by the Rebbe and it was his understanding that the emphasis was on the urgency of completing the Synagogue before the high holidays.

The Respondent sought to admit Respondent's Exhibit "Q", but after testimony and argument, the Court declined to admit the exhibit because it was not relevant and incomplete. Likewise, the Court declined to admit into evidence Respondent's Exhibits "CCC-1", "CCC-2" and "CCC-3". After further testimony, the Court excluded their admission into evidence because of relevancy; there was no question of fact in dispute about the expansion of the Shul. Additionally, Respondent's Exhibit "DDD" was denied admission on grounds of relevance.

As in the past, Mr. Kopel made inquiries about the Rambam from the witness. The witness duplicated the same testimony as the other witnesses; the Rambam is the Hebrew Acrostic for the Hebrew name of Maimonides who lived 880 years ago; he was the Jewish codifier of Jewish Law. When asked by the Court whether or not he had authored any particular work, the witness testified that he authored a work by the name of *Yad Hachazaka*. "If you learn three chapters a day, in about 11 ½ months, you can complete the text; if you learn one chapter a day, you'll finish every three years. (T. 5/18/2016, Yehuda Krinsky, P.105, L.5-8). When asked about the meaning of *Farbregen*, the Rabbi reluctantly described the various kinds of events that may be referred to as Farbregen. For example, the celebration of the birth of a son; when the Rebbe spoke to thousands of people sometimes by a satellite transmission around the globe, it's called a Farbregen.

When asked if he was familiar with any community lessons in 770 regarding the learning of the Rambam, Rabbi Krinsky stated vehemently that he could not walk into the building; he exclaimed that he built the Synagogue nearly 25 years ago and he cannot walk into it.

On cross-examination, the witness stated that he and a few others could not walk into the building of 770 because it was hostile territory. He said that he became a member of the Rebbe's Secretariat in 1957. He further stated that he realized after coming into the Rebbe's office as an international leader that the headquarters were too small. Although he was not into real estate, he worked with Mr. Klein, a neighbor that was devoted to the Rebbe and Judaism, and he helped acquire more properties for the organization. He was able to successfully acquire the building in 1965. "It is now the home of a world-class precious collection farbregen and Judaic". He states its one of the finest collections in the world. They worked together and ultimately, purchased 784, 785 and 788, which were next to 770 up to and including Kingston Avenue. He further testified that it took two years for the tenants to move out because they did not evict anybody. Each tenant was given more than an ample opportunity to relocate. He also testified at that time that they were able to reconstruct certain wings of the building to create executive offices. They started doing work on the upper three floors and then there came a time when the people on the first and the second floors moved out. They were able to knock down the walls and the basement ceilings so they were able to get the proper height. He further stated that the development of the properties was done in two stages. "The first, 784 we extended the Synagogue that existed in 770 to the next building and then about two years later we were able to extend it to Kingston Avenue. And every step of the way I was involved with Mr. Klein, with the architect, with the engineers, with the contractors, paying the bills and make sure, oversight, et cetera, et cetera. And all the money was, as I mentioned before, in testimony by Rebbe's organization, namely, Merkos." (T. 5/18/2016, Yehuda Krinsky, P.113, L.13-22). The construction of the Synagogue up to Kingston Avenue was completed to accommodate the congregation when the Rebbe spoke there. He also informed this Court that once the extension was completed the organization was able to conduct live transmissions of the Rebbe's speeches throughout the world.

He went back to the testimony about the time near the death of the Rebbe's wife. He said that the Rebbe called him and told him there were three things that he needed to do for him: he wanted a will; create

a Foundation in honor of his wife and to fill the vacancies of the three corporations. He claimed that there were only two other people who know about these directives: the two secretaries in the Rebbe's office who were witnesses to the will.

As significant, he claimed that there came a time when he became the most hated man in the organization; that was when he was chosen as the Executor of the Rebbe's will. The will was publicly announced in the Shul and read before thousands of people live, by television and telephone transmission. He believed that people did not like him or were jealous of him. "He could've picked the Russian or Israeli, he picked an American boy born in New England, studies in public school, Latin school…And there was jealousy. They picked an American young man to be his trustee executor". He stated that one day he went down to pray, and a stranger told him to leave the Shul or else they were going to beat him up; that boy was one of the boys who beat him up. (T. 5/18/2016, Yehuda Krinsky, P.115, L.1-25). At another time, he was in the Shul honoring his uncle on a special day, and while he was silently praying with his feet together, someone tried to throw a big pot of filthy dishwater on him but they missed. About five minutes later, he was again attacked by someone that threw a bench at him but missed, and instead hit a famous Jewish singer named Abraham Fried, who lived in Crown Heights, and he was injured. He said that he left that day and never went back to the Shul. (T. 5/18/2016, Yehuda Krinsky, P.117, L. 10-22).

The trial continued on May 19, 2016 for cross-examination of Yehuda Krinsky. The witness stated that he was part of the Rebbe's Secretariat. He was born in Massachusetts to parents who were Lubavitch followers from "way back". He attended Boston Public High School and Harvard prep. His parents removed him from the school and sent him to New York. He was registered in the Lubavitch Yeshiva educational system and went through the classes to high school. He went to rabbinical college; ordained in 1956 at 23 years old.

Prior to his marriage, the Rebbe invited him to become part of the Secretariat, specifically, for public relations. He knew that the Rebbe was the chief executive officer for both Merkos and Agudas. One of the

Rebbe's concerns was to fill the vacancies of all of the three organizations. He also confirmed that the Rebbe wanted to amend the corporations of Agudas, Merkos and Mechne Israel. For the record, Agudas was established in 1940; Mechne Israel was established in 1943; and Merkos in 1943. Nathan Lewin, a prominent attorney in Washington D.C., was contacted after the Rebbe's wife's funeral for the will and he recommended Nathan Gordon for the legal work requested by the Rebbe for the corporations. He testified that the Rebbe approved of both men. According to the witness, Mr. Nathan Gordon personally interviewed the Rebbe and the Rebbe gave him instructions about the will and who should be the executor. Additionally, he spoke to him about the corporations and agreed to have them brought up to date. In the interim, he was busy filling the vacancies and discussing with other people, not with the Rebbe, about who the vacancies should be filled by. Later the Rebbe was given a list of people to approve. (T. 5/19/2016, Yehuda Krinsky, P.13, L.4-10).

At a later time, there was a meeting of the Trustees of Agudas and they unanimously voted to reinstate the bylaws; consented to the restating of the bylaws and elected the officers of the corporation, to wit: Rebbe Schneerson as President, Rabbi Hodakov as Chairman of the Board, Vice President and Treasurer, Dr. Nisssan Mindel as Vice Chairman of the Board and Rabbi Ydhuda Krinsky as Secretary. The Petitioner produced Petitioner's Exhibit "7-A", dated March 1990 (the actual date was left blank), the unanimous consent of Trustee of Agudas and after argument, the document was admitted over objection. It should be noted that the Rebbe's signature was first on the document but the witness testified that he did not sign it until after all of the other trustees signed their signatures.

In addition, the Petitioner produced Petitioner's Exhibit "7-B", the unanimous consent of members to the restatement of the bylaws of the corporation and the election of twenty trustees of the corporation, dated March 1990 (the actual date was left blank), increasing the members of the Board of Trustees. Over objection, Petitioner's Exhibit "7-B" was also admitted into evidence. It should also be noted that the witness testified that Agudas, the prior corporation, was the same as the corporation that was amended

primarily because the Rebbe would not change anything that the prior Rebbe, his father-in-law, had developed.

In his opinion, the Rebbe kept the corporations the same, but amended the corporation to include new people. The Petitioner moved to admit Petitioner's Exhibit "7-C", and over objection, this Court admitted it into evidence which is a restated bylaws of Agudas that counsel for the Respondent acknowledged would not be filed at any government agency. In addition, the fact that the above named exhibits were copies and not originals did not warrant the denial of their admissibility. They are the business records of the corporation (CPLR§4518) and the Respondent could not state any prejudice for exclusion (*Citations omitted;* CPLR §2001).

The witness stated that he did not remember any fundraising activities for the initial purchase of 770 but that he did not know any not-for-profit that existed without raising money. When inquiry was made about the source of the funds to purchase, Rabbi Krinsky stated that the congregation did not pay mandatory tithing, there was no penalty for not contributing, and funds were solicited from all over the world and were not just exclusively from those associated with Chabad. He also stated that there were no promises made in return for contributions.

In regards to the purpose for the expansion of the Synagogue, the witness stated that the expansion involved more than just the expansion of the prayer services. He said that the organization had exceptional growth and needed office space. The need for both kinds of spaces was the reason that they invested in the acquisition of 784 and 788 Eastern Parkway, two apartment buildings with four floors each. In regards to the prayer service space, he testified that the Rebbe spoke nearly every Sabbath and there were large gatherings in 770 and insufficient space to accommodate the number of people that wanted to come. In the beginning, the congregation had to go to Flatbush to rent a hall in the auditorium because of insufficient space in the Synagogue.

In addition, Rabbi Krinsky testified that Respondent's Exhibit "II-3" is a poor photograph of the Rebbe sitting before the whole assembly in the Synagogue. He described how the Synagogue had many gatherings, with and without the Rebbe, including school events, women's events, community events, and the High Holy days of Passover, Rosh Hashanah and Yom Kippur. Lastly, at different times, the Synagogue would be set up like a restaurant with wood tables, similar to a banquet and the Rebbe would appear after the meal.

He also described that Agudas purchased 770 in 1940 (he was 7 years old); the first expansion occurred in 1960; he was involved in the expansion and the 1965 purchase and he was also involved in the 1973 construction. Rabbi Krinsky further stated that he was involved in the construction; was aware of different phases of the construction; he was required to perform oversight of the actual construction as well as signed contracts and made certain that the contractors were paid. He believed that the ownership interest of the buildings that were obtained for these expansions was about 15% owned by Agudas and 85% owned by Merkos. In addition, the witness testified that as they continue to grow, they wanted to expand and were interested in purchasing the buildings that were behind the Synagogue over to Union Street. He knew the owner of the buildings and offered to give him a fair price for the buildings. He testified that Mr. Winter gifted them the buildings after several months of negotiations, and placed no conditions on those gifts. These buildings are currently occupied by the Gabboim and he seeks to recover possession of that occupied space in these proceedings.

On redirect, the witness was asked for whose benefit the Shul would be expanded and he replied, for everyone's benefit. He further stated that anybody could walk into the Synagogue, to pray or to study; he even said the entire world could pray or study at the Synagogue.

The attorney, on redirect, was unable to get the witness to define the "members" of the corporation. His testimony concludes that there is no requirement for membership in the Shul.

He dispelled the vision that the Rebbe's way was "the law", and said the Rebbe was flexible. His determination and approach was not a cookie-cutter approach. He was very personal and he made changes, and would not bind himself to an instruction that would live forever. He would say yes or no or direct one to go to the Vaad Hamesader. (T. 5/19/2016, Yehuda Krinsky, P.58, L.19-25; P.59, L.1-6). He also made a point about the Rebbe, that as a leader, he let all of the other members/trustees sign documents first and then he signed. This was established protocol in the organizations.

The witness once again testified that he could not go to the Synagogue because he was beat up in 1988 and also on another occasion; he did not specify a time or place.

The parties were unable to agree on the record whether the alleged interview with Rabbi Krinsky would be admitted into evidence because of the difference between the transcript and the translation.

Mr. Kopel conducted his own cross-examination. His questions were general and not about the defense of the formation of a trust. He asked about the incident with the dirty dishwater. He also delved into the character of the Rebbe. As to the corporations, it was understood that the Rebbe was the president of the corporations but that he was an amenable leader and everything was subject to change, and not dictatorial. When questioned by the Court for clarification purposes, the witness stated that the reason why the by-laws of the corporation were amended is because things changed between 1940 to 1990; specifically, after the Rebbe's wife passed away, it was his intent to pull together some loose ends by updating the corporate documents.

Although he's a humble man, after the appointment by the Rebbe of him as his executor, he became a known personality and he got a lot of media coverage. In fact, he stated that he had been the most popular Rabbi in America the first three or four years. He said he was a known personality and was very humbled (T. 5/19/2016, Rabbi Krinsky, P.86, L.1-5). The witness hinted that the Gabboim were protecting the individuals that were trying to hurt him and hurt others.

The trail continued on May 20, 2016 with the testimony of Menachem Gerlitzky. The witness said he was born in Montreal, Canada and lived there for about 18 years. He was brought up in the Lubavitch educational system; he went to the Lubavitch Yeshiva in Montreal. While in school, he visited the Lubavitch Rebbe. He described how he first met the Rebbe as a young child at about seven years old in 1963. He said they came to the Shul about 10 times in the 18 years that he was a citizen of Canada. He moved from Canada to Brooklyn in 1973 to study at the Lubavitch Yeshiva. He testified that he has lived in Brooklyn continuously except for two weeks; one week when he studied abroad in the Yeshiva in Paris and in Los Angeles.

A large part of the testimony of Rabbi Gerlitzky was about the ceremonies that were performed by the Rebbe. This witness also confirmed that the Rebbe initiated a campaign that all Jewish people should know all 613 commandments. "That came out [of] this campaign in April 1984. It was about the time we finished learning in kollel. And I started a class in 770 to learn three chapters a day of this Rambam, which completes the whole Rambam in less than a year. And we started this class, which thank G-d is continuing already until today over 32 years where we learned three chapters of the Rambam". (T. 5/20/2016, Menachem Gerlizky, P.23, L.4-25; P.24, L.1-5). As stated before, on the completion of the reading of the Rambam, there were celebrations in the Shul.

On cross-examination, he testified that in addition to learning the Rambam and the Siyum following the completion of each section, he also functioned as a Gabbai of the Shul. The Rabbi testified that he was a member of the Gabboim from 1995 or 1996 until today. He adds that he remains a Gabbai today because he has never lost an election.

He confirmed that the use of the Shul has not changed and will not change. The witness said that "[a] Gabbai gets up on the bimah stand and he gives out the aliyos. The aliyos is "[w]hen the eight people called up to the Torah sabbos morning and he chooses who he put the chazzan, which is the cantor to the pulpit, what is the Gabbai's role like in every shul". He further stated that "[a] the Gabbai in every shul gives the

aliyos and does the chazzan. (T., 5/10/2016, Rabbi Gerlitzky, P.36, L.12-22). In addition to these responsibilities, the Gabbai was also responsible for paying the bills of the Synagogue and other financial matters. (T., 5/10/2016, Rabbi Gerlitzky, P.37, L.9-14; p.40, L.11-13). He further stated that the Gabboim worked together collectively and each used their individual talents to take care of the Shul.

He further testified that the Rebbe "gave me the mission, the responsibility to do these complete farbrengens in 770 on every halacha, which is approximately 100 times a year. It's printed in the shlichas." He also stated that the Rebbe did not appoint a successor if he no longer is able to perform this particular ceremony (T., 5/20/2016, Rabbi Gerlitzky, P.60, L.13-16). He also stated that in all these years, he did not Farbrengen at any place other than 770. He could make 10 parties in 10 shuls today but the mission of the Rebbe was to do it at 770. (T., 5/20/2016, Rabbi Gerlitzky, P.62, L.7-9). Although the celebrations of the Rambam took place all over the world, including Israel, Tel Aviv, Jerusalem, Paris, Bangkok and Singapore; the celebration of the Rambam in 770 takes place hundreds of times a year. The witness was excused.

The Respondents next witness was Yaakov Winter a/k/a Jack Winter. He testified that he is a resident of Crown Heights and has lived there for over 50 years. He used to worship in the main Shul at 770. He has a real estate office on Kingston Avenue. He owned two buildings, 302-304 Kingston Avenue and in 1982, he gifted the buildings to the Lubavitch Rebbe as a birthday gift. He did not ask for any money and the Rebbe did not give him any money for the buildings. It was his understanding that the side of the building that was near Kingston Avenue was to extend the women's section of the Synagogue.

He testified that he originally purchased the buildings from someone else. He had been talking with Rabbi Krinsky, his friend, about the organizations purchasing them but they were not able to purchase at that point. So, he renovated the properties and rented out the properties. He ran the buildings for a number of years. He said that someone from the community was pressuring him; he was rich and powerful. He said this man was from the Shul but he did not believe he was from the Shul. He did all that he did with the

property because he wanted to help the Lubavitch. He further testified that he gave the buildings to the Rebbe with no conditions; the Rebbe could do as he pleased with them. He understood later that the Rebbe transferred the buildings to Merkos L'Inyonei.

On re-cross examination, it was revealed in Petitioner's Exhibit "2", in evidence, the deed of ownership was in his wife's name and, she transferred it to the Petitioner in its corporate name and not in the name of the Rebbe. The witness was then excused.

The trial continued on May 24, 2016, and Petitioner informed the Court that the Petitioner seeks judgment against Losh, a non-appearing party.

In addition, the Respondents sought to introduce evidence that was not admitted before, as follows: Respondent's Exhibit "SS", "SS-1", and Exhibit "KK". The Petitioners objected on the grounds of relevancy and after substantial argument in support, and in opposition, the documents were admitted in evidence and the Petitioner was granted an exception as in all of the other evidence that the Petitioner objected to that the Court admitted into evidence. Respondent's Exhibit "T", the purported transcript of an interview with Rabbi Krinsky after the Supreme Court decision, was not admitted into evidence because there was a dispute regarding the original live interview and the parties had not exchanged the document and recording. The parties agreed that the voice interview of Rabbi Krinsky is marked as Respondent's Exhibit "EEE".

Respondent's Exhibit "PP-1" is in evidence over objection. The Petitioner states that it helps the Petitioner's case and this Court found no prejudice to the Petitioner for its admission, thus, "PP-1" is in evidence.

In the afternoon, the parties agreed that there would be some deposition testimony read into the record and because this particular witness was available, agreed to take this witness out of turn. This witness, Nahum Gordon, Esq., is a rebuttal witness and notwithstanding the fact that the Respondent did not rest on its *case-in-chief*, the parties agreed to take him out of turn. The Petitioner called Nahum Gordon Esq.

to the stand as their first rebuttal witness. Mr. Gordon testified that he has a business address in Kenwood Mira, New York and it is in his private home. He stated that he is a Harvard law school graduate of 1960 and practiced law for nearly fifty years until he retired. The nature of his practice was corporate law. He knew the Lubavitcher Rebbe and was retained by the Rebbe to prepare the amendments to restructure the three Lubavitch corporations. He said the Rebbe wanted to make certain that the current members of the board, already approved by the Board of Trustees, continue to serve and to maintain control over the organizations. He did not want a stranger to be able to come in and take over the board. In fact, the witness authenticated Petitioner's Exhibit "7-A", "7-B" and "7-C", the amendments to the certificates of incorporation for the three corporations. The witness testified that the Rebbe did not want people who are not—who were not approved by the board to become members of the board. (T., 5/24/2016, Nuhum Gordon, Esq., P.38, L.18-20).

On cross examination, the witness acknowledged Respondent's Exhibit "EEE", a letter dated June 12, 1990, from him on his letterhead at the law firm of Sherman, Gordon & Gordon, P.C. to Rabbi Krinsky. Respondents Exhibit "EEE" did not go into evidence because it was an incomplete copy and the Respondents reserved their rights to submit a complete transcription of the Rebbe's writing.

After only part of this testimony, Mr. Gordon, who had suffered a stroke, was unable to conclude his testimony due to his lapse of memory and inability to participate in cross examination; the Respondent moved to strike his testimony and the court, in balancing the equities between the parties, granted the motion to strike. By agreement, the parties and the Court agreed to admit copies of the documents in the possession of Mr. Gordon that restructured the above named corporations.

Subsequently, the parties read various parts of the deposition of the respective parties in the prior proceedings into the record in this proceeding.

The Respondent read from the deposition of Rabbi Shemtov dated May 5, 2014 as follows:

P. 10, L. 5-11
P. 14, L. 25, 13-25

P. 30, L. 4-8
P. 41, L. 24-42
P. 43, L. 2-12
P. 84, L. 18-25
P. 90, L. 4
P. 87, L. 17-25
P. 90, L. 12-20
P. 91, L.22-25
P. 92, L. 5
p. 95, l. 2-10

Deposition of Rabbi Krinsky dated March 24, 2014 is read as follows:
P. 10, L. 22
P. 11, L. 11
P. 20, L. 21
P. 30, L. 21
P. 21, L. 12
P. 34, L. 7
P. 35, L. 7
P. 39, L. 17
P. 57, L. 5
P. 62, l. 4-15
P. 63, L. 10-14
P. 66, L. 7
P. 67, L. 6
P. 77, L. 9
P. 141, L. 12

Deposition of Avrohom Holtzberg dated May 17, 2014 is read as follows:

P. 17, L. 11
P. 43, L. 20
P. 47, L. 7

The deposition of Rabbi Shemtov described the Lubavitch movement. The deposition testimony described the role of the Gabboim, once called the Vaad Beis Haknesses. Various candidates were appointed on committees and their duties involved matters of the Synagogue. Rabbi Pinson and Rabbi Katz were on the committee. When asked who are the members of the committee the answer at the deposition was Rabbi Pinson, Rabbi Katz, but Losh did not join the committee. This committee was supposed to care for and promote the expansion of the Shul. He further stated that Zev Katz was a displaced Gabbai and is not functioning as a Gabbai.

In the deposition of Rabbi Krinsky, he acknowledged that the purpose of the incorporation of Agudas was a religious corporation and one of the reasons for the religious corporation is to have a place of prayer. The witness testified that every shul had a Gabboim; the Gabboim is needed to take care of the operation, the prayers, the aliyahs and minyanim.

The witness further testified that if you take away the name Congregation Lubavitch, the Shul at 770 is apart of Agudas. The witness further testified that the corporate papers from 1940 state that the mission for Agudas is to have a house of worship-a place where people could daven. The testimony also showed that nearly anyone can worship at 770 but only certain members were empowered to vote.

Also, the deposition elicited evidence, specifically, Exhibit "UU", which was evidence that the building for the Shul had stopped because of a lack of funds and the exhibit explicitly stated that everybody had a duty to participate in the fundraiser. Everyone meant the Anash and Temimim.

The witness testified at the deposition that Mr. KLEIN was involved in the purchase of the building to expand the Shul. The witness was very clear that the purchase of 784 and 788 was for the expansion of the Synagogue. Further, the witness testified that his understanding was that the Gabboim was intended to run the Synagogue to the extent that they were to manage the minyanim, to select those who had to have or want to have an Aliyah. He said in summary, the role of the Gabboim was whatever Agudas told them to do.

The witness further stated that the document marked as Respondent's Exhibit "ZZ", is a letter dated September 1973 from Rabbi Katz as a Gabbai to the Rebbe asking for money in the sum of $10,000, and an additional sum of $10,000 for the expansion of the Shul. The witness went on to say that the division of responsibility was as follows: as far as the Shul is concerned, to Agudas Chasidei Chabad, then to the Gabboim, and then of course to the people who come to daven. They have the responsibility to make sure everything is the "b'seder", meaning "in good order".

The Petitioner then read the testimony of Avrohom Holtzberg, a named party that did not testify. The parties had admitted into evidence Respondent's Exhibit "9", a copy of an envelope written to Holtzberg at

770 Eastern Parkway, Congregation Lubavitch. The witness was asked where CLI-Congregation Lubavitch is and he confirmed it is located in 770.

At the conclusion of this testimony read into the record, the Respondents rested on its *case-in-chief*, and when the Court asked whether the Petitioner had concluded its *case-in-chief*, the Petitioner stated that they had just been informed of an interview conducted by Mr. Gordon in 2007 to 2008 and if they were able to obtain the interview, the Petitioner wanted to submit it to the Court and it was agreed that the interview would be submitted. (T., 5/24/16, Proceedings, P.97, L.6-25; P.98, L.1-25; P.99, L.1-25; P.100, L.1-14). Subject to the exchange of this interview, in whatever form, the Petitioner rested on their *case-in-chief*.

The parties agreed to submit a trial brief at least 30 days after a full transcript and amendments, if any, were obtained from each other.

As agreed above, the attorney submitted an interview dated March 27, 2012 and transcribed on November 26, 2012, of Mr. Nachum Gordon (eighteen pages) and does not contain a transcription, is not signed by Mr. Gordon, and is numbered one through six-hundred seventy-three. The content of this interview contains the sum and substance of Mr. Gordon's conversations with the Rebbe and the actions he took on behalf of the Rebbe with regard to the Petitioner's corporations, the Rebbe's intention with the members, directors and trustees of each corporation, and the manner in which they were to operate.

The parties submitted two copies of this interview to the Court: 1) one unaltered copy of the interview; 2) a marked up copy with highlighter/color coded to show what portions of the transcript that each deemed relevant. The blue highlighter portions reflects that all parties find those provisions of the interview relevant; yellow represented those parts of the interview that the Petitioners claim are relevant; and green represents those parts of the interview that the Respondent asserts are relevant.

Court Inspection: October 30, 2017

For the record, as the presiding judge over these long proceedings, as the jurist that would make the findings of facts and conclusions of law in this continued controversy, found it was difficult to visualize these buildings and the expansion of the Synagogue and expressed the need to inspect the propertys. All parties consented to a Court inspection, called the "View" by the Respondents, of the demised premises. Attorneys for both sides, certain parties, a court officer and the undersigned judge went to the demised properties. Photographs were taken by the undersigned to memorialize the "view" and for purposes of this decision. Since the above testimony sufficiently describes the various buildings, their construction, expansions and mergers, the View simplified the visual facts about the properties.

The properties are extensive in size and probably represent approximately ¼ acre. The entrance door to the library was a massive wooden carved door and contained a plaque that had a Hebrew writing first and then in English stated "Library of Agudas Chassdei Chabad" and underneath these words are "OHEL YOSEF YITCHAK-LUBAVITCH". The library that was viewed was also extensive and probably the size of the entire floor of the building that it occupies. It contains wooden furniture, glass display tables and enclosed bookshelves that contain historical books, artifacts and sacred documents of the Jewish people from around the world. There were work spaces for the Librarian and others that use the library. It also displayed a portrait of the Grand Rebbe Menachem Mendel Schneerson.

The view also revealed the Rebbe's study and conference room with wood ceilings and original furniture of the Rebbe's. Plastic covered the conference table and it appeared not to be in use.

The Synagogue is extensive; it was clear from the large steel support pillars throughout the buildings that walls were removed between the respective buildings to expand the original buildings for the main Synagogue. There were individuals and groups studying, praying, and a large meeting was taking place there. There are single wooden seats, and rows of tables and seats throughout the Synagogue. They were not

long rows of "pews" as in other houses of worship. Several individuals were drinking coffee and other beverages. There were also long rows of books from one part of the Synagogue and where they are located, there are three steps that show the extension of the original building to the back of the property to further extend the Synagogue. In addition to books, there was a massive wood enclosed bookcase that occupied a large wall that showed a room above. The ceilings were approximately 20-25 feet in some areas. It was apparent from outside the building that it has been a three-story building and the conversion to expand the Synagogue was extensive.

The view also included a look at the second level of the property that contained a massive telephone network where when the Rebbe spoke, he could be heard from all over the world. This level also included original wood walls, bookcases and other historical relics. There was a miniature model of the Temple of Jerusalem also located on that level.

The view also included going to the Kingston Avenue side of the property to the Lady's Balcony. This part of the property was immediate repair. While on location, the undersigned almost lost her shoe in a gap in a deteriorated wood floor plank in this area. The space was small, barely moveable and contained long white painted wooden benches. This area contained a Plexiglas barrier that enclosed the entire length of this area to separate it from the main floor of the Synagogue below.

The executive offices were modern offices. The view revealed a significant computer system; a state of the art computer network and security systems that occupied their own rooms.

The court was unable to get access to one of the areas as described in this record below.

The inspection was about 50 minutes and encompassed the entire property.

PARTIES PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

By stipulation, dated December 16, 2016 and so ordered by the court on October 17, 2017, the parties agreed to the corrections to the trial transcripts and settled the transcripts. As stated in the trial

record, the attorneys submitted their proposed findings of fact and conclusions of law. Therefore, the burden of proof, on the Petitioner, this Court shall review and summarize the Respondents proposed findings of fact and conclusions of law.

On December 18, 2017, the Respondents submitted the proposed findings of facts and conclusions of law. The Respondents argue that predicate notices are jurisdictionally defective. There are three Vice Presidents of Merkos; the 1990 bylaws state that the Vice Presidents serve as the President in the absence of the President; the power of the President or Vice President cannot be delegated to the Chairman of the Board of either corporation; and there was insufficient evidence to support that the Board of Trustees or Directors authorized the commencement of the instant summary proceedings.

Respondent then tracks the prior litigation specified above in the Federal District Court action in which the Petitioners prevailed in their claim that the Rebbe's Library was held in "an implied charitable trust for the benefit of the Chabad Lubavitch religious community". Respondents relies on the law of oral charitable trust and doctrine of dedication.

Respondents also repeat and reiterate the questions of law presented to Cohen, J., their answer and each affirmative defense. Respondents most notably assert that "this court struck virtually all of respondent's affirmative defenses. As a result of these rulings, numerous lines of inquiry relating to these defenses were not permitted to be followed by Respondent's counsel. Respondents respectfully except from such rulings and request post-trial reconsideration thereof, and reopening of the trial to allow testimony and document on the stricken defenses."

Respondent then describes all of the parties to these proceedings, their legal capacity, the evolution of this historical site, and the witnesses on both sides-eleven witnesses. As to the testimony of Nahum Gordon, Esq., as described above, his testimony, having been stricken by the Court, and instead, the parties agreed to the submission of the aforementioned interview of Mr. Nahum Gordon.

As to the documentary evidence, the Respondent acknowledged the certificate of incorporation of Agudas provides the establishment of a place of worship in accordance with Orthodox Judaism at the demised premises of 770 Eastern Parkway; and mode of worship and all religious activities are under the jurisdiction of Rabbi Joseph Isaac Schneerson, Chief Rabbi, of the Hierarchy of Agudas Chasidei Chabad and his successors. Shortly after its incorporation on July 25, 1940, Agudas purchased 770 Eastern Parkway for $30,000.00 which "$5,000.00 was paid with the contract and $3,000.00 at closing". Contemporaneously, there was a letter to "all the people of Chabad" to "the special individual amongst the congregation of Chasidim", (Exhibit QQ), from the "Building Committee for the Lubavitcher Rabbi" for the purchase of 700 for a home for the Rebbe and for a beautiful and spacious Synagogue. Numerous individuals contributed a total of $1,175.00 to the building fund in July 1940 (Respondent's Exhibit PP). In a letter from the previous Rebbe to his mother, he explained that of the $7,000.00 required for the down payment and renovation of the new premises, $5,000.00 had been raised among his followers (Chasidim). Respondent argued that when the new Rebbe came from Europe to Brooklyn, he went directly to the room designated as the Synagogue and that prayers offered in that place should be accepted. This act was interpreted by Respondents "as being a statement that the building was a public place and not just a private home for the Rebbe". (T. Rabbi Chazan, 5/17/16, P.50). It is further argued that the Synagogue services should be operated by a "Synagogue Committee", which is referred to herein as the Gabbais or Gabbai (singular). Respondent states that the Gabboim operated under the general supervision of the Rebbe, the president of Agudas and Merkos, and gave them "maximum discretion" in their operation of the Synagogue.

As to Merkos, Respondents state that Merkos was created as the "educational arm of Agudas". Respondent describes in detail the expansion of the Synagogue. Most significant is the Respondent's claim that "the Rebbe instructed that the funds for the construction of the Synagogue be allocated from the charity funds directed by him to the Congregation Lubavitch Building Fund. At least $125,000.00 in 13 checks

were paid by Merkos to the Building Fund between August 1973 and January 1974 (Exhibits "ZZ" and "AAA").

Respondent further contends on the next expansion, which was the acquisition of 302-304 Kingston Avenue, Rabbi Krinsky agreed to purchase the property after notice of the sale by Mr. Winter, a real estate broker. Merkos did not have the funds to close, so Mr. Winter purchased the properties himself, and subsequently, "gifted it" to the Rebbe as a birthday present, who in turn transferred the property to Merkos. This property was used for the expansion of the women's balcony, for air conditioning for the "main Synagogue", and as an office for the Gabboim.

Later, there was another campaign to expand the Synagogue. There was a dedication ceremony in which the Rebbe laid a cornerstone at this property. The Respondents argue that the Rebbe published a work during the period of expansion of the building based on his talks about the Synagogue called the "The Booklet about the House of Our Teacher in the Dispora", interpreted as "The Holey Temple in Transit". Respondent claims that the Rebbe taught that 770 was a special place in the teaching of the Lubavitch faith; every individual had an obligation to contribute funds to the expansion; "that this Synagogue would be eternal and would eventually be incorporated in the structure of the Third Holy Temple to be built in Jerusalem." Respondent requests that the Court reconsider its rulings on Respondent's Exhibit "R" and "R-1", arguing that this evidence should be admitted to show the unique status of 770 and that the Rebbe represented, as a condition to the obligation to give contributions, that the structure would be preserved for all time. Respondent then discussed the fund raising brochure; the request from the Rebbe that the members of Petitioner and others give $770.00 or more for the building fund; the wall of Anash; the personal sacrifice that some made for the financial contributions; some contributed beyond their level of financial comfort; and the laying of the cornerstone was an "act of dedication" to the building for religious purposes. Based on these facts, the Respondent argues that the premises is held by Merkos as a charitable trust for the members of Agudas and the Chasidim of the Lubavitch movement.

Respondent also argues that the facts and arguments proffered by the Petitioner in the Federal District case of Agudas v. v. Gourary, 650 F. Supp. 1463 (E.D.N.Y. 1987) is analogous to the instant matter. By arguing the doctrine of dedication in that case, the underlying property herein, the Synagogue, should be treated in like fashion, the same principles should apply; the property is held in trust for the benefit of the congregation.

The Respondent argues that the teachings of the Rebbe comprised of hundreds of volumes, which clearly establish that the Synagogue at 770 has a special place in the teachings of the Lubavitch movement and represents the embodiment of the Holy Temple in Exile. His teachings are that the Synagogue should never be closed; after the Rebbe's death his place of prayer has been maintained as a "shrine of sorts"; he taught and instructed that the weekly "Siyum" gatherings based on the conclusion of certain portions of study and particularly for the conclusion of each section of the daily study of the Rambam. Respondent further alleges that according to Rabbi Gerlitzky, "it is his personal mission from the Rebbe, with the direct instruction to him repeated publicly by the Rebbe over 150 times, to continue the gatherings specifically at this location. Respondents argue that it cannot be changed like one could change the Wailing Wall. In essence, the duty of the Trustees of the religious movement is to preserve the "disciple, rules and usages" of the religion.

Respondent then discusses the role of the Gabboim again. They assert that from the inception of the Synagogue, it has been managed by the Gabboim and all disputes come under the jurisdiction of the Rabbis of the community. Due to opposition from the Board of Agudas (it should be noted that the Rebbe was still alive at this time), this Gabboim elected in 1987 stepped down and then in 1996, this group was reappointed at the behest of the community Rabbis because the Rebbe had designated all the authority in all matters related to the Shul, in the Gabboim (Exhibit "HH"). The Respondents argue that "this Court must not decide the issue in this case since "the current dispute has given rise to the instant litigation, while disguised as a

dispute over real property, is in fact a continuation of that internal governance battle from the 1980s and 1990s…."

Respondent acknowledges the ownership rights of both Agudas and Merkos but claims that "the only issue has been and continues to be: who will manage the Shul".

Respondent also uses the directive of the Beth Din of Crown Heights as grounds to bolster their argument that this is an internal religious dispute that precludes secular intervention by the Courts. The Respondents also assert that there have been several elections of the Gabboim of the Shul after the above elections.

Respondent claims that the Gabboim created a not-for-profit corporation called Congregation Lubavitch, Incorporated ("CLI") and this group held and distributed the funds collected from the Shul; it also enabled them to receive NYS sales tax exemption for purchases for the Shul. Respondent states that despite its name, it was not a religious corporation. Respondent further asserts that CLI is not present in the premises due to the decision and order of Harkavy, J., and no evidence has been presented that the Petitioners were excluded from the premises. In fact, the Respondent claims that the reason why Rabbi Shemtov and Rabbi Krinsky are not permitted to speak at public events is due to noncompliance with an order issued by the Beth Din of Crown Heights. Respondent claims that the attacks against both men had nothing to do with the Gabbaim or anyone associated with the Gabbaim. He claims that "Agudas is the current occupant of the disputed areas, for the use of Agudas members for prayer and other religious matters under the control of the elected Gabbaim" (Paragraph 152).

Respondent then describes the use of the Synagogue, what special services occur there; the symbolic unveiling of the Rebbe's chair and wooden stand on the raised platform at the front of the Shul that is preserved as it was during the Rebbe's lifetime. Moreover, the Siyum HaRambam, the first codification of Jewish law, consists of 84 sections in 17 volumes that, in 1984, the Rebbe instructed that 3 chapters be studied each day. In 1989, the Rebbe further instructed that upon the conclusion of the study of each of the

84 sections, a "siyum" (celebratory meal) should be held. The Rebbe specifically instructed Gabbai Gerlitzky to be responsible for the siyum celebrations be held at 770 and he has adhered to the Rebbe' instruction for the past 28 years.

The key issue between the parties, as Respondents argue, is that there is a wide membership of Agudas far in excess of merely the members of its Board of Trustees; whereas the Petitioner contends that the current membership of Agudas is limited to its Trustees. Respondents claim that the Rebbe would not have limited the membership of Agudas to a small number of individuals. Respondents further argue that there is no evidence to suggest that "the Rebbe intended a wholesale, radical change in the structure of Chabad Lubavitch, such as the Anash (people of Lubavitch) would be deprived of their beneficial interest in the property of the corporations or their right to control Congregation Lubavitch and the Synagogue through elected Gabbaim". (Paragraph 170).

Respondent further contends that the alleged renovations and ouster allegedly by Merkos occurred over 15 years ago and is time barred.

Respondents' proposed conclusions of law is a repetition and reiteration of their defenses in their answers. The only new claim is that the Notice to Quit is defective. The Respondent relies on the case of *Siegel v. Kentucky Fried Chicken*, 67 NY2d 792 (1986) for the proposition that the President and Vice President are the proper authority to execute the notice. In the absence of the President, the Vice President is required to sign the notices. Here, the predicate notices were signed by Rabbi Shemtov and Rabbi Krinsky as Chairman of their respective corporations. The notices do not contain any proof of their authority to act on behalf of the Vice President or President and no minutes were produced authorizing either Chairman to assume the role of the President or Vice President. Accordingly, the petition should be dismissed.

Procedurally, Respondents claim that the Respondents were wrongfully precluded from cross examining their own witness since these witnesses were subpoenaed witnesses and could not lead or impeach them. Respondents claim that the Court error in making these evidentiary rulings.

In its proposed findings of facts and conclusions of law, dated March 5, 2018, the Petitioner, on the contrary, asserts that this is a simple real estate dispute in which the Petitioner has the absolute right to evict the Congregation and the Gabboim. The Petitioner claims that the Appellate Division, Second Department, has already determined the lion share of the Respondent's claims and defenses.

Lastly, as to the defenses of trust, the Respondent did not assert the defense of constructive trust "since it would be dead on arrival". As to the statutory trust, there arguments are refuted by dispositive facts, applicable provisions of the Religious Corporation Law and controlling precedent from the Court of Appeals. As to an implied charitable trust, the Petitioner contends that the Respondent relies on case authority that undermines their claims in the proceedings.

In its final argument, the Petitioner, not required by the law upon which this proceeding is based, specifically, RPAPL §713(7), to assert that the Congregation and the Gabboim have interfered with the Petitioner's right to use and occupancy of its own property by: denial of access by changing the locks to the building; denying physical access to the property to Rabbi Shemtov and Rabbi Krinsky, Chairmen of the Board of both corporations owners; there were physical attacks against both Rabbis while the Respondents exercised dominion and control over the Synagogue; and prevented the Petitioner's from holding gatherings in the Synagogue.

The Petitioners presented evidence of ownership of both properties; distinguished between the entities Agudas Chasidei Chabad of the United States, the Petitioners herein, and Agudas Chasidei Chabad of the United States and Canada, an unincorporated association. Petitioner also defines both corporations. As to the Respondents, Petitioner states that Congregation Lubavitch of Agudas Chasidei Chabad is the congregation holding services in the Synagogue and also operates by other names: Lubavitch World Headquarters and by Congregation Lubavitch. Petitioner further describes the various individuals in this lawsuit.

In sum, the Petitioner claims that the Respondents did not comply with the notice to quit to vacate those spaces and the Petitioner proceeded with these cases. Moreover, the Respondents engaged in unauthorized alterations of the property without the consent of the Petitioner; the installation of the above air conditioning without consent; the storage of illegal propane tanks in the sub-basement level; illegal and unauthorized creation of a kitchen in 784-788 Eastern Parkway and Petitioner was notified of this factual finding from NYC Department of Environmental Protection; the installation of cameras that live stream all the actions of everyone in the Synagogue, which Petitioner claims creates a severe security risk to the Petitioner and others in the premises. In addition to the above, the Petitioner reminded this Court that at the inspection of the premises on October 30, 2017, while at the site the Court could not get access to 302-304 Kingston Avenue. It was claimed by Rabbi Liptskier that there was no access to the that part of the building which required multiple keys since that area had large sums of cash inside.

The Petitioner asserts that since 1996, when the Gabbaim seized control, they prevented gatherings of historical significance to the Petitioners and the Congregants. Petitioner describes a myriad of events, not in evidence, which allegedly occurred in the demised premises.

Subsequently, the Petitioner describes the corporate reorganization of Agudas and its significance to the limited number of members including the Rebbe to the exclusion of others.

The Petitioner also sets forth the history of the buildings and the Chabad Lubavitch movement from Europe to the United States. The growth of the movement and its congregants-the purpose of the expansion and acquisitions of the properties herein. First, it was for the Rebbe and his family; an apartment for his daughter and her family; offices for the movement and a Synagogue.

Petitioner acknowledges that there were fundraising campaigns for the purchase of said properties but states that through testimonial and documentary evidence, contributions or donations came in from all over the world from Jewish people and other persons not of the Jewish faith.

Petitioners assert that they have sustained their *prima facie* case; and the Court's dismissal of nearly all of the Respondent's defenses except the trust.

The Petitioner relies on the Harkavy decision and its finding that both Petitioners are the owners of the respective buildings; declaring that CLI had no rights, title, or interest in any of the properties. Most significant, the Petitioner relies on such determination that as owners in fee of the properties, both Petitioners have a right to possession and the right to use the property for any purpose which may be lawful; thus, the fee owner may exclude others from its property and to do to the buildings or structures on the property whatever it sees fit subject to relevant laws, ordinances and regulations.

As equally significant, the Supreme Court decision and the Second Department decisions rejected all of the defenses which are asserted by the Respondents in these proceedings. Petitioners state that the Respondents rely on the identical defenses that were rejected and affirmed. One of the more significant factual findings in the prior case involves a finding that "the evidence in this case demonstrates that CLI and Congregation Lubavitch are one and the same…and the Congregation, by the Gabboim, acted and continue to act through CLI". In addition, these identical defenses were raised in the *Scharf* litigation.

As to the defenses that the notices were defective, the Petitioners assert that this claim is time barred and has been waived by the Respondents. The Petitioners argue that this alleged defect was not raised in motion practice, in discovery, or at trial, which has occurred over a period of six years ago, and are therefore waived. Moreover, the Petitioner asserts that the *Siegal v. Kentucky Fried Chicken* case is not applicable to this case insomuch that there is no lease to be interpreted here.

The Petitioner further argues that Rabbi Krinsky and Rabbi Shemtov were authorized to sign the notices. First, it is argued that since there is no lease agreement, the Petitioner is not constrained by who can sign the notice. Additionally, RPAPL §713 may be signed by any of the stated entities that can commence a summary proceeding. Since the corporation acts through its officers and directors, the officers or directors may sign or anyone on behalf of the corporation with authorization and consent. Petitioner also produced

case law which supports their positions that the Respondents knew the signatory on the notices as they all had prior dealings with those individuals. Petitioner states that Respondent's Exhibit "N", a letter dated January 1, 2005, signed by Rabbi Shemtov; Respondent's Exhibit "LL", a letter dated November 4, 1996, signed by Rabbi Shemtov and Respondent's Exhibit "WW", a copy of the affirmation of Rabbi Krinsky dated December 21, 2004, all involve the Petitioner's claim of unauthorized use of the demised premises.

Petitioner contends that there is no President or Vice President of either corporation. The Petitioner states that the bylaws of both corporations designate their Chairmen as officers of such corporations. In these cases, both Rabbi Shemtov and Rabbi Krinsky have authority, express or implied, to sign the notices. In addition, both Rabbis testified that each was given authorization. The Board of Directors of Agudas authorized him to commence the proceedings. As to Merkos, he had authority because he was the Chairman and Secretary and he was granted authorization to commence the proceedings.

Petitioners state that the Respondent has not presented any evidence to establish a trust. Petitioner contends that the Respondent has merely rehashed the identical arguments made in Supreme Court. The Petitioner contends that the Respondent's reliance on RCL §5 is misplaced. The Petitioner states that all rights of the religious corporation, to real and personal property, belong to the trustees and members. The statute does not provide for any rights or beneficial interest in the corporation or its property, including real property, to the congregation and in this case, the Gabboim. The Petition further contends that the statute does not explicitly state that a religious corporation holds its real property in trust for the members of its congregation. Even assuming that RCL §5 creates a statutory trust in real property owned by the corporation, it would be limited solely to using such property for religious, charitable, benevolent or educational purposes. In addition, "it also cannot be disputed that 'members', as used by RCL§5, refers to those running the corporation, and not members of the congregation." In this case, the Restated By-Laws of Agudas vests its operation and control to its trustees and members (who are the same persons) (Petitioner's Exhibit "7-C"). In the case of Merkos, its operation and control was originally vested in its Board of

Directors (elected by its members), and later in its Board of Trustees when it was merged into the religious corporation, Merkos L'Inyonei Chinuch, in 2011. Petitioner contends that the Rebbe wanted a specific number of designated persons, chosen by him, to be the members and trustees of Agudas. Conversely, the members of the Respondents and Congregation would have no rights. The Rebbe directed the restricting of Merkos in a similar manner. After its merger from a not-for-profit corporation to a religious corporation in 1994, Merkos had the same individuals as members and its Board of Trustees were the previous Board of Directors.

Lastly, the Restated bylaws of Petitioner Agudas provides that the "Board of Trustee shall have general power to control and manage the affairs and property of the Corporation in accordance with the purposes and limitations stated in the certificate of incorporation. The Petitioner adds that the bylaws of Merkos state the same. The Petitioner relies on *Blaudziunas v. Egan*, 18 NY3d 275, 938 NYS2d496 (2011), which holds that parishioners were members of the ecclesiastical body-not members of the religious corporation and that "such status does not confer upon them the rights and duties as members of the corporation". The Court explicitly found that the RCL §5 vests the control of a religious corporation's real property in the board of trustees. Accordingly, the parishioners are not members of the religious corporation, they lack standing to challenge decisions concerning the transfer of the corporation's property made by the five member board of trustees.

As to the claims of a charitable trust, the Petitioner asserts that the Respondents have not presented any evidence to prove the elements of a charitable trust, to wit: a designated beneficiary; a designated trustee; a clearly identifiable *res;* and the delivery of the *res* by the settlor to the trustee. Not one element has been proven by the Respondents.

In addition to other claims, there is no evidence or showing of "an intent to create….implied trust as a necessary inference from unequivocal evidence". There are no express declarations from the Rebbe that Agudas was to hold the Synagogue or other parts of the building in trust for the benefit of the congregation

nor the Chabad Chasidic community in Crown Heights. The Petitioner further asserts that the Respondents' claims that donors had a religious obligation to contribute, that the Rebbe taught that it was a religious duty of each member of the Chabad Lubavitch to contribute to the expansion of the Synagogue, and that certain gifts were made beyond the comfort level of the donor were the grounds to create an implied trust was similarly rejected by the Supreme Court and the Appellate Division, Second Department.

Petitioners assert that Respondent's claims of bad faith are without merit. The Petitioners state that the Petitioners merely seek to exercise their legal rights as fee owners of the demised premises. In a letter from Rabbi Shemtov, he informed CLI that the Petitioners will maintain the house of prayer including the members of CLI for the purpose of worship. Merkos needed to assert control of the premises based on the fact that conduct, unbecoming of any house of worship, had occurred within the Synagogue including the Gabboim under their control. Such action shows good faith and not bad faith by the Petitioner.

Lastly, the claim against CLI is not moot. Petitioner Agudas, although not conceded by the Petitioner, may be barred by the prior litigation but Merkos, not a party to the *Sharf* litigation, still has rights to bring the holdover proceeding. Accordingly, the Petitioner is entitled to a final judgment of possession.

TRIAL COURT EVIDENTARY FINDINGS AND DISCRETION

One of the true safeguards of our due process of law is our multi-tier judicial system. In this multi-tier judicial system, great deference has been granted to the trial courts as the trier of facts. It has been firmly established that "[t]he credibility of the witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which should be rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of fact. The memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed on with greater safety by a trial judge who sees and hears the witness than by appellate judges

who simply read the "printed record" (Barnet v. Cannizzaro, 3 A.D.2d 745, 747, 160 N.Y.S.2d 329 [citation omitted]; see LeBron v. Brentwood Union Free School District, 212 A.D.2d 5112, 5113, 623 N.Y.S.2d 117; Segal v. MacDaniel Ford, 201 A.D.2d 717, 608 N.Y.S.2d 324).

The Court, after a careful and through review of all of the documentary and testimonial evidence, finds that the principals of the Petitioners and the Respondents corporations were credible. The Court further finds that the testimony of Rabbi Shemtov, although credible, unclear and ambiguous; the Court believes his unsteady and evasive answers were based on his lack of memory and age, he was 87 on the date of trial, not on the lack of truth or veracity of his testimony. As to the Respondents' witnesses, the Gabbaim and CLI members, the Court likewise found their testimony credible, but not supported by the testimonial and documentary evidence as will be shown below. Of equal significance, the Court did not find their testimony completely unworthy of belief; however, the Court will disregard that part of their testimony that the Court found unreliable and unsupported by the documentary evidence and accept that part of their testimony that was reliable.

As to their respective witnesses, it was apparent that of each witness is either a party of Petitioner's corporation or Respondent's corporation or has had a close relationship with the respective parties. Although purportedly disinterested witnesses, their working relationship with both principles of the Petitioner corporations, their testimony is biased and not totally objective as also discussed below. But their testimony, likewise, was credible and in some instances only, as discussed below, in conformity with the objective documentary evidence.

RULES OF LAW

In the post-trial proposed findings of facts and conclusions of law, the Respondents assert two procedural claims that require disposition. Respondent alleges: 1) the notice to quit is defective and warrants the dismissal of these proceedings. The Respondents claims were more fully described in the post-trial statements; and 2) Respondents claim that the Respondents were wrongfully precluded from cross-

examining their own witness by the Court in contravention of case authority. Respondents contend that the Respondent should have been permitted to lead their witnesses and to impeach them.

CPLR§ 3211(e) provides, in relevant part, that "at any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in subdivision (a)…Any objection or defense based on a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based on a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading….".

The objections contained in paragraphs 2 (lack of subject matter jurisdiction), 7 (the failure to state a cause of action), and 10 (the court should not proceed without a necessary party), according to the practice commentaries, are the least likely to be waived by careless pretrial procedure. Any or all of the three objections can be preserved by either a CPLR §3211 motion or by way of defense in the responsive pleading. In addition, these defenses can be divided; one or more may be used in a CPLR §3211 motion and the others may be saved for use in the pleading if the motion fails. If the defenses are not asserted in a CPLR §3211 motion or by way of defense in the responsive pleading, they are still not necessarily waived. Paragraphs 2, 7 and 10 can be raised at any time and can be made the subject of a summary judgment motion or invoked at trial. *See* Commentary C3211:49; C32.

Based on the above statute, the Petitioner is incorrect to claim that the Respondent cannot raise this defense at this stage. The problem is that the Respondent raised it in the proposed findings of facts and conclusions of law and not at the close of trial or motion for a directed verdict after trial.

On the other hand, the Petitioner is accurate that the Respondents did not raise the issue of the lack of a signature of the President or Vice President in their motion to dismiss. Subsequently, after said motion was denied as premature, the Respondents likewise did not raise this issue in the verified answer and affirmative defenses. Notwithstanding the lengthy record in this case, the Respondents also did not move to

dismiss after trial on this ground or in the form of a directed verdict. It was not until post trial in the proposed findings of facts and conclusion of law that this issue has been presented for a determination.

Although the Court has broad powers to amend pleadings to allow the assertion of new claims, the Respondents have not moved for this relief for more than two years after trial and thus, the Court cannot afford any relief to the Respondents to add a cause of action after trial. Moreover, since the Respondent rested on its *case-in-chief* without leave to amend to assert such defense, it would be highly prejudicial to the Petitioners to allow the Respondent to assert this defense at this procedural stage of the proceedings notwithstanding the fact that the Petitioners have addressed this claim in their proposed findings of facts and conclusions of law.

Turning to the substantive part of the claim, the Petitioner's claim that the Respondents have misapplied the ruling in *Siegal, supra,* is totally correct. *Siegal* is not applicable to the facts in this case and that ruling should not be compared to the case at bar.

Of greater significance, as supported by testimonial and documentary evidence by the Petitioners, the chairmen of both corporations, Rabbi Shemtov and Rabbi Krinsky, are also officers of the corporation. It is irrefutable that the Rebbe remains the President of Agudas and Merkos; it is also undisputed that there has not been any Vice Presidents of the respective Boards of Directors and Trustees of either corporation. The Court concurs with the Petitioner that both Rabbis are officers of the respective corporations and were granted authorization to proceed with the litigation by their internal governing committees at proper board meetings. The Court also finds credible the testimony of Rabbi Shemtov that his board customarily operated on verbal authorization following a vote of the board. At least his memory did not fail him to that extent. The fact that the Petitioner did not provide minutes of the meetings as requested in discovery and inspection by the Respondents is of no consequence. The Respondent has not presented any evidence or case authority that the failure of the Petitioner to provide written evidence of the meetings invalidates board action. In addition, Rabbi Krinsky testified that he was not only the chairman of the board, but also the secretary and

was at the meeting. Rabbi Scharfstein also credibly testified that he is the recording secretary at Merkos and was present on the day that authorization was granted by the board, heard the discussions and was subsequently authorized to commence the legal proceedings and to sign the notices. The notices, contrary to the Respondent's contentions, were generated by members and by officers of both corporations that own the property, were known both personally and professionally by each Respondent (these identical members of the board have been in place since at least March 1990), and are sufficient to support a valid cause of action under RPAPL§ 713 (7). This claim is therefore without merit.

Respondents contend that they should have been permitted to lead their witnesses and to impeach them. As the record shows, the Respondents were afforded every opportunity to prove their case; some evidence, in improper form and even some irrelevant, were allowed by this Court subject to connection and over objections by the Petitioner. On review of some of that evidence in detail, as opposed to the cursory view during trial, it will show that the Respondents evidence was voluminous and had been admitted in the prior litigation in the *Sharf* case and in the *Gourary* case. Now, the Respondents even attempt to reopen the trial contending prejudice and error. A brief review of the law here is in order.

It is a long standing rule of evidence, particularly crucial at trial, that when an adverse party is called as a witness in their own *case-in-chief*, such adverse party is deemed a hostile witness, and, in the discretion of the Court, direct examination may assume the nature of cross-examination by the use of leading questions. ***However*****,** a party may not impeach the credibility of such witness whom he calls *(see,* Becker v. Koch, 104 N.Y. 394, 10 N.E. 701; ***unless*** the witness made a contradictory statement either under oath or in writing (*see, Jordan v. Parrinello,* 144 A.D.2d 540, 541, 534 N.Y.S.2d 686; Prince, Richardson on Evidence, § 6–228, at 374 [Farrell 11th ed]); CPLR §4514). Whether to permit such questions over objection is a matter which rests in the discretion of the trial court. *See also* Marzuillo v. Isom, 277 AD2d 362, 716 NYS2d 98, 2000 N.Y. Slip Op. 10222 (2000) where a patient did not have the right in a medical malpractice action to impeach the defendant doctors, whom the patient had called as his own witness and, in

doing so, rendered them hostile witnesses who could be crossed examined; however, the plaintiffs had no right to impeach their own witnesses (*see* People v. Guy, 223 AD2d 723, 637 NYS2d 445; Jordan v. Parrinello, *supra,* and the plaintiff's claim that the court improperly limited cross examination was deemed unfounded; Ostrander v. Ostrander, 280AD2d 793, 720 NYS2d 635, 2001 NY Slip Op. 01023 finding, similar to the case at bar, that the record disclosed that the respondent was neither reluctant nor evasive in answering questions posed during direct examination, including several questions regarding the children and guns in a child custody case. "When the objection to the leading questions were sustained, Petitioner's counsel made no effort to elicit the information through questions which were not leading and petitioner does not claim that such questions were not feasible or that their use would be have been frustrated by respondent's hostility as an adverse party"; Fox v. Tedesco, 15 AD3d 538 789 NYS2d 742, 2005 NY Slip Op. 01317 (2005) holding that the general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior inconsistent statements made under oath or in writing (CPLR §4514; Commarota v. Drake, 285 AD2d 919 [2001]; Jordan v. Parrinello, *supra*. Accordingly, the Supreme Court should not have limited the Plaintiff's attempts to cross-examine the defendant driver, and impeach her with alleged inconsistencies in her MV-104 accident report and deposition testimony; Ferri v. Ferri, 60 AD3d 625, 878 NYS2d68, 2009 NY Slip Op. 01610, that sustained the Supreme Court by finding that "[t]he Supreme Court did not improvidently exercise its discretion in allowing the plaintiff's counsel to question the defendant, who was an adverse party, in the nature of cross-examination, and to impeach him with alleged inconsistencies in his prior statements". It is the court's view that every case in which this rule is applicable must be determined on its own unique facts (Becker v. Koch, *supra*).

In these consolidated cases, the record will also show that a lion share of the questions posed by the Respondent were leading, notwithstanding the Court's position that the witness was not "hostile" and should not be lead in the style of cross examination at the inception of the testimony. As compelling, the answers

by the witnesses were not adverse to the Respondent's case or defenses, but in some instances, were in conformity with the Respondents claims. Many questions of the first four witnesses (Respondent subpoenaed four members of the board of the Petitioner corporations) were of little significance to the primary defense of trust alleged by the Respondents, and inconsequential to the underlying defenses of this case. It should also be noted that even had the above Respondents produced such inconsistent statements, and the attempts in the record by Respondents to prove those inconsistent statements were not at all significant to the defenses stated herein (See above deposition transcripts which were reviewed by the court), are mandated by the case law to focus on claims supported by the evidence, not speculation or conjecture. Further, the Court did not find this rule assisted in the expeditious treatment of the witness but only further delayed an already extensive trial with no benefit to either party. In each instance where the Respondents were ruled against, there was substantial colloquy by both counsels of their respected positions which further delayed the trial.

This Court went to great lengths to not exhibit any bias in favor of either party, and felt the need to occasionally question a witness only to clarify and/or expedite testimony. As has frequently been held, "[a] Trial Judge may 'assume an active role in the examination of witnesses where proper or necessary ... to facilitate or expedite the orderly progress of the trial' " (Accardi v. City of New York, 121 AD2d 489, 491, quoting from People v. Ellis, 62 AD2d 469, 470).

The record will likewise support a finding that the adverse witnesses were not evasive of the Respondent's questions, were not "hostile" to the Respondents claims and primarily answered the questions posed by the Respondents. The adverse witnesses were neither reluctant nor evasive in answering questions posed during direct examination, including several questions about the Rebbe, his role in the restructure of the organizations, the fundraising campaigns and the use of these funds for the expansion of the Synagogue. When the objections to the leading questions were sustained, Respondents made no effort to elicit the information through questions which were not leading; and even when the Respondents did so, they never

asserted that such questions were not feasible or demonstrated that their inability to lead would have been frustrated by the "hostility of such adverse party". Ostrander v. Ostrander, *supra*.

The record will support the fact that since the Respondent did not like the answers given by some of the witnesses, the Respondents instead insisted that he could ask leading questions to illicit the responses so desired. The answers to the questions should be based on truth, not the facts created by the leading questions of Respondent's counsel. The Court found such tactics unnecessary and unwarranted here. Although the presumption allows an adverse party to be deemed hostile, the facts, as shown in the record, did not warrant the imposition of such presumption. Under these circumstances, and considering the lack of evidence to support Respondent's contentions, the Court, in its discretion, did not permit leading questions here; and is of the opinion that there was no prejudice to the Respondents, finds that the claims are unfounded and the ruling stands.

RELIGIOUS CORPORATION LAW

These proceedings involve the rights of a religious corporation to recover possession of real property. Since it is undisputed that the Petitioners are religious corporations organized and created under the Religious Corporation Law, there should be a discussion of the application of the Religious Corporation Law and the respective provisions applicable in these cases.

According to the legislative intention on the enactment of the Religious Corporation Law and the courts role in its interpretation, the primary purpose of the law is to provide for the orderly method for the administration of property and temporalities dedicated to use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the corporate trust. Congregation Yetev Lev D'Satmar, Inc. v. Kahana (2 Dept. 2006) 31 A.D.3d 541, 820 N.Y.S.2d 62 , appeal dismissed 7 N.Y.3d 898, 826 N.Y.S.2d 606, 860 N.E.2d 68 , affirmed 9 N.Y.3d 282, 849 N.Y.S.2d 463,

879 N.E.2d 1282 Religious Societies 3 ; Religious Societies 15.1 ; Russian Church of Our Lady of Kazan v. Dunkel, 1971, 67 Misc.2d 1032, 326 N.Y.S.2d 727 , affirmed in part, modified in part on other grounds 41 A.D.2d 746, 341 N.Y.S.2d 148 , motion denied 33 N.Y.2d 641, 347 N.Y.S.2d 588, 301 N.E.2d 555 , affirmed 33 N.Y.2d 456, 354 N.Y.S.2d 631, 310 N.E.2d 307 . Religious Societies 3.

The religious corporation law is a massive statute and regulatory body of law which encompasses many areas: administration of temporal affairs, custody and control of property, both real and personal, sale or encumbrances, custody and control of property, ecclesiastical governing bodies, finances, removal and demolition of property, and for the purposes of this decision, there is only one provision that is pertinent, namely, Section 5 of the Religious Corporation Law, which provides as follows:

"The ***trustees*** of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto, for the support and maintenance of the corporation, or, providing the members of the corporation at a meeting thereof shall so authorize, of some religious, charitable, benevolent or educational object conducted by said corporation or in connection with it, or with the denomination, if any, with which it is connected; and they shall not use such property or revenues for any other purpose or divert the same from such uses".

"They may transfer all or any part of the real or personal estate of such corporation to such bank, trust company, savings bank or savings and loan association organized or existing under the laws of the state of New York, or to a national banking association, federal savings bank or federal savings and loan association having a principal, branch or trust office located in the state of New York as may be designated by them or to a holding company, organized under the laws of the state of New York, of the same religious denomination, such property to be held in trust or in safekeeping or custody, to collect the income thereof and pay over the same to the trustees of such religious corporation at such times and in such manner as shall be agreed upon, and they may also, in their discretion, delegate and grant to the trustee or custodian designated by them all or any portion of the powers, responsibilities and discretionary authority possessed by them with respect to the retention and the investment and reinvestment of such property or any part thereof, and may from time to time modify such powers delegated by them or designate successor or different trustees or custodians within the limits and subject to the regulations and restrictions contained in this section. The trustees of an incorporated Roman Catholic Church, or of a Ruthenian Greek Catholic Church, shall not transfer any property as herein provided without the consent of the archbishop or bishop of the diocese to which such church belongs or in case of their absence or inability to act, without the consent of the vicar general or administrator of such diocese. By-laws may be adopted or amended, by a two-thirds vote of the qualified voters present and voting at the meeting for incorporation or at any subsequent meeting, after written notice, embodying such by-laws or amendment, has been openly given at a previous meeting, and also in the notices of the meeting at which such proposed by-laws or amendment is to be acted upon. By-laws thus adopted or amended shall control the action of the trustees. But this section does not give to the trustees of an incorporated church, any control over the calling, settlement, dismissal or removal

of its minister, or the fixing of his salary; or any power to fix or change the times, nature or order of the public or social worship of such church".

So many of the cases in this area are clear about the authority of the owner of the church property, although fiduciary, in fact, of the church property, have firmly established that the trustees of the corporation have unequivocal statutory authority to determine all issues with the personal and real property owned by the religious corporation.

Justice Scheinkman, as well as this Court, after a careful review and analysis of the cases that are involved in the above statutory scheme, fall into distinct categories: "(a) disputes between conflicting factions over ownership, control or possession of property (see, e.g., Episcopal Diocese of Rochester v. Harnish, 11 NY3d 340 [2008]; First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S., 62 N.Y.2d 110 [1984], cert denied 469 U.S. 1037 [1984]); (b) disputes between conflicting factions over membership or over eligibility to vote in meetings of the governing bodies (see, e.g., Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 9 NY3d 282 [2007]; Park Slope Jewish Ctr. v. Stern, 128 A.D.2d 847 [2d Dept 1987], lv dismissed 72 N.Y.2d 873 [1988]); (c) congregational disputes which arise under documents which explicitly call for the application of religious law (see Esformes v. Brinn, 52 AD3d 459 [2d Dept 2008]); (d) claims by congregants regarding misconduct by clergy (see Wende C v. United Methodist Church, 4 NY3d 293 [2005], cert denied 546 U.S. 818 [2005]); and (e) disputes between religious organizations and their clergy over ownership or control of property (see, e.g., Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F3d 94 [2d Cir2002]) which involved ownership of a copyright of a prayer book". In some of these cases, the courts have defined the issue as whether the involvement of civil courts in religious matters would violate the First Amendment or whether the courts have subject matter jurisdiction over the particular dispute.

From a historical perspective, "the United States Supreme Court has ruled that the First Amendment forbids civil courts from interfering in or determining religious disputes because there is substantial danger

that the states could become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs (*see* Serbian Eastern Orthodox Diocese for U.S. of America and Canada v. Milivojevich, 426 U.S. 696 [1976]). In Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyt. Church (393 U.S. 440 [1969]), the Court was called to resolve a dispute, which arose when two local churches withdrew from the hierarchical general church organization. The Court held that it violated the First Amendment for the state to make the determination over whether the local or national church controlled church property since the resolution depended upon whether the general church had abandoned or departed from the tenants of the faith and practice it held at the time the local churches joined it.

Subsequently, the Supreme Court in Jones v. Wolf (443 U.S. 595 [1979]), observed that the state 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 conclusively determined. The Court ruled that, while the civil courts cannot resolve church disputes on the basis of religious doctrine and practice and must defer to the resolution of religious disputes or policy by the highest court of a hierarchical church organization, the states are not required to follow any particular method of resolving church property disputes, so long as the method chosen does not involve consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of the faith.

In Jones v. Wolf , so infamously used in many of these cases, specifically stated that where a church property dispute can be resolved by neutral principles of law, there is no constitutional barrier to entertaining the dispute. The Supreme Court in *Jones* specifically referred to its prior decision in Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc. (396 U.S. 367 [1970]), where the property dispute was resolved on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property. The general

principles articulated in Jones v. Wolf, *supra* have been far reaching and continue to be a guiding post for interpretation of such disputes.

The law of the State of New York prescribing that the temporalities of a religious corporation shall be administered in accordance with denominational usage, contemplates the co-existence of a church in the spiritual sense and a church in the legal sense working together toward the same beneficent ends, but when the superior governing body having authority over ecclesiastical organization decrees its dissolution, the church as a legal corporate entity remains, and the church in a spiritual sense is dissolved and gone; under such circumstances, the trustees continue to administer the property for denominational purposes. Westminster Presbyterian Church of West Twenty-Third St. v. Trustees of Presbytery of New York, 1914, 211 N.Y. 214, 105 N.E. 199 *, reargument denied* 212 N.Y. 552, 106 N.E. 1044] .

Even more recently, in New York, the Court of Appeals has continued to follow the "neutral principles of law" approach, which requires the court to apply objective, well established principles of secular law to the issues. In doing so, courts may rely upon internal documents, such as a congregation's bylaws, but only if those documents do not require interpretation of ecclesiastical doctrine (Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 9 NY3d 282 [2007]). In the latter case, however, the Court concluded that the dispute was non-justiciable because it turned on whether a person had been expelled from membership in the congregation by the Rabbi, with the congregation's bylaws conditioning membership on whether the congregant "follows the ways of the Torah." In contrast, in Avitzur v. Avitzur (58 N.Y.2d 108 [1983], *cert denied* 464 U.S. 817 [1983]), the Court held that it could specifically enforce the terms of a *Ketubah,* signed by bride and groom as part of a religious marriage ceremony; providing for obligations of spouses under religious law and tradition, to the extent that in the *Ketubah*, the parties agreed to recognize a religious tribunal as having authority to summon them, render a decision, and impose compensation for noncompliance. The Court held that while the obligations undertaken by the parties in the *Ketubah* were grounded in religious belief and practice, that did not preclude enforcement of its secular terms, and at least

that portion of the *Ketubah* in which the parties agreed to refer their disputes to a nonjudicial body was enforceable. This was, in essence, no more than an agreement to alternative dispute resolution, and such agreements are enforced by neutral provisions of contract law (*see also* Malankara Archdiocese of Syrian Orthodox Church in N.A. v. Thomas, 33 AD3d 887 [2d Dept 2006], *lv dismissed in part, denied in part* 8 NY3d 876 [2007], where the Appellate Division, Second Department enforced the provisions of constitution of St Mary's Malankara Syrian Orthodox Church of Rockland which precluded the church from affiliating with a different church or religious group without the consent of the Patriarch of the Syrian Orthodox Church]).

Based on these neutral principles of law, Justice Scheinkman concluded that under the principles articulated by the United States Supreme Court and our Court of Appeals, in particular its rulings in Congregation Yetev Lev D'Satmar, Inc. v. Kahana, *supra,* and Avitzur v. Avitzur*, supra*, the claim brought by Plaintiffs in his matter, was justiciable and the admission into evidence of Chapter 13 of the Rule and Constitution of the Congregation of the Passion of Jesus Christ and the two documents signed by Father Gorman, in which he agreed to follow the principles of the Constitution set forth in Chapter 13, does not offend the First Amendment and would not divest the Court of subject matter jurisdiction. "While it is true, as in *Avitzur,* the documents signed by Father Gorman were grounded in religious belief and practice, that did not defeat the enforcement of its secular terms, *to wit:* a promise by Father Gorman to renounce ownership of property and to turn over any voluntary contributions or earned compensation to the benefit of the entire Congregation". To paraphrase from Martinelli v. Bridgeport R.C. Diocesan Corp. (196 F3d 409, 431 [2d Cir1999]), plaintiffs' claims are brought under New York law, not church law; church law is not the Court's to assess or enforce. Plaintiffs' claims neither relies on or seeks to enforce any duties arising from religious beliefs nor does it require or involve the resolution of whether Father Gorman's conduct was consistent with religious belief. (Passionist Communication, Inc. v. Arnold, 23 Misc.3d1130(A), 889 nYS2d 883, 2009 NY Slip Op. 51014(U)(2009)).

In Congregation Yetev Lev D'Satmar, Inc. v. Kahan, 9 NY3d 282, 879 NE2d 1282, 849 NYS2d 463, 2007 NY Slip Op. 09068 (2007) mentioned above, the High Court determined that "[i]t is well settled that membership issues such as those that are at the core of this case are an ecclesiastical matter (Park Slope Jewish Ctr. v. Stern, 128 A.D.2d 847, 513 N.Y.S.2d 767 [2d Dept.1987], appeal dismissed 70 N.Y.2d 746, 519 N.Y.S.2d 1032, 514 N.E.2d 390 [1987]; Matter of Kissel v. Russian Orthodox Greek Catholic Holy Trinity Church of Yonkers, 103 A.D.2d 830, 478 N.Y.S.2d 68 [2d Dept.1984]). A decision as to whether or not a member is in good standing is binding on the courts when examining the standards of membership requires intrusion into constitutionally protected ecclesiastical matters. Although courts generally have jurisdiction to determine whether a congregation has adhered to its own bylaws in making determinations as to the membership status of individual congregants, here, the Congregation's bylaws condition membership on religious criteria, including whether a congregant follows the "ways of the Torah." Whether Berl Friedman was expelled from membership of the Congregation inevitably calls into question religious issues beyond any membership criteria found in the Congregation's bylaws (Park Slope Jewish Ctr., 128 A.D.2d 847, 513 N.Y.S.2d 767 [1987]; Kissel, 103 A.D.2d 830, 478 N.Y.S.2d 68 [1984])".

"Contrary to petitioners' position, Berl Friedman's religious standing within the Congregation is essential to resolution of this election dispute. Petitioners ask this Court not only to determine the validity of the respondents' election but also to recognize that petitioners, including Berl Friedman, are elected officers and the authorized governing body of the Congregation. With such membership issues at the center of this election dispute, 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".

It is clear to this Court that in some religious institutions there are expressed canons, bylaws or resolutions that determine the rights to real and personal property of the institution and in others, there are no expressed rules to determine the dispute to personal and real property. For example, in Episcopal Diocese of Rochester v. Harnish, 11 NY3d 340, 899 NE2d 920, 870 NYS2d 814, 2008 NY Slip Op. 07991 (2008),

the Court of Appeals held that church canons clearly established an express trust in real and personal property in favor of the Diocese and church governing body. In that case, the Diocese approved a resolution declaring the parish ecclesiastically "extinct". In addition, it was resolved that All Saints' real property and tangible and intangible assets were to be "transferred to the trustees of the [Rochester Diocese]." All Saints, on the other hand, maintained that it held legal title to the real and personal property, and as it held the property free and clear under NY property law, neither the Rochester Diocese nor the National Church had claim to the property.

The Diocese moved for a declaratory judgment action seeking, among other relief, (1) a judgment that the real and personal property of All Saints was impressed with a trust in favor of the Rochester Diocese and National Church, (2) an injunction barring All Saints from interfering with the Rochester Diocese's ownership and use of the property and (3) an accounting. Defendants counterclaimed, seeking to (1) quiet title to the property, (2) declare certain provisions of the Religious Corporations Law null and void under the Establishment Clause of First Amendment of the United States Constitution and (3) enjoin the Rochester Diocese from trespassing and interfering in All Saints. Further, All Saints brought an Article 78 proceeding against the Rochester Diocese, seeking to annul the determination declaring the parish extinct. All Saints argued that the Rochester Diocese abused its discretion and failed to follow its own rules and New York law when it declared All Saints extinct.

The Supreme Court, in relying on Trustees of Diocese of Albany v. Trinity Episcopal Church of Gloversville, 250 A.D.2d 282, 684 N.Y.S.2d 76 [3d Dept.1999], granted summary judgment to plaintiffs, declaring that All Saints held all the real and personal property of the local parish for the benefit of the Rochester Diocese and National Church and dismissed All Saints' counterclaims. The Appellate Division affirmed "for reasons stated in the decision at Supreme Court" and also affirmed Supreme Court's dismissal of All Saints Article 78 petition since the Rochester Diocese's decision to dissolve the parish was a purely ecclesiastical determination and not reviewable by the Court (43 A.D.3d 1406, 841 N.Y.S.2d 816 [2007]).

The Court granted leave to appeal and ultimately, affirmed the Supreme court ruling (9 N.Y.3d 1027, 852 N.Y.S.2d 10, 881 N.E.2d 1196 [2008]).

Plaintiffs argue that there are both, *an express and implied trust* in favor of the Rochester Diocese and the National Church. Specifically, plaintiffs contend that All Saints expressly agreed to abide by the constitution and canons of the Rochester Diocese and is, therefore, subject to the trust doctrine of National Canons I.7.4 and I.7.5 (the Dennis Canons). Under the Dennis Canons, a parish holds its property in trust for the Diocese and the National Church. Plaintiffs also contend that Rochester Canon 8 reaffirms this doctrine, and that the Religious Corporations Law (*see* art. 3, § 42–a; art. 2, § 5) further supports their contention that a religious corporation, incorporated pursuant to article 3 of the Religious Corporations Law, holds its property in trust for the Diocese and the National Church. Finally, Plaintiffs argue that All Saints had remained an Episcopal parish for more than 20 years after adoption of the Dennis Canons without challenging their substance or applicability.

Among other arguments, All Saints argued that they cannot be bound by the Dennis Canons because they were adopted in 1979, nearly 30 years after All Saints was accepted as a parish. Also, All Saints raised a question of whether the Dennis Canons or Rochester Canon 8 create an express trust, effectively divesting All Saints of its property, without violating the due process provisions of the United States and New York State Constitutions. Moreover, All Saints argued that there is nothing in any deed or will or in the All Saints certificate of incorporation that establishes a trust over the All Saints property for the benefit of the Rochester Diocese or the National Church.

In Trustees of Diocese of Albany v. Trinity Episcopal Church of Gloversville, a case similar to All Saints, the Third Department noted that in many ways Dennis Canon I.7.4 was adopted in response to Jones v. Wolf*, supra,* which "held that the constitution of a hierarchical church can be crafted to recite an *express trust* in its favor concerning the ownership and control of local church property" (Trinity, 250 A.D.2d at 285, 684 N.Y.S.2d 76, citing Jones, 443 U.S. at 606, 99 S. Ct. 3020). The Third Department affirmed the

judgment granted in favor of the Diocese, concluding—despite the existence of deeds indicating that the local parish held unrestricted title to three parcels of land surrounding the church—that the property was held in trust for the benefit of the diocese and hierarchical church.

In applying "the neutral principles of law approach to All Saints, the Court found that "there is nothing in the deeds that establishes an express trust in favor of the Rochester Diocese or National Church. All Saints' certificate of incorporation, further, does not indicate that the church property is to be held in trust for the benefit of either the Rochester Diocese or the National Church. Nor does any provision of the Religious Corporations Law conclusively establish a trust in favor of the Rochester Diocese or National Church. **However,** the Court reasoned that the remaining factors for consideration under neutral principles, required a look at "the constitution of the general church concerning the ownership and control of church property" (62 N.Y.2d at 122, 476 N.Y.S.2d 86, 464 N.E.2d 454). It is this factor that the High Court found dispositive and accordingly, concluded that the Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church (*see Jones,* 443 U.S. at 606, 99 S.Ct. 3020), and that All Saints agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with the Rochester Diocese in 1947.

The High court, in relying on First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am., 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454 [1984], had adopted the neutral principles of law approach to church property disputes set forth by the United States Supreme Court in *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 [1979]. The Court said "[u]nder the neutral-principles approach, the outcome of a church property dispute is not foreordained. *At any time before the dispute erupts,* the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. Alternatively, *the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. *And*

the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form" (*Jones,* 443 U.S. at 606, 99 S.Ct. 3020, 61 L.Ed.2d 775 [emphasis added]).

"The enactment of the Dennis Canons was apparently an attempt by the Episcopal Church to do exactly what this language suggested—to "ensure ... that the faction loyal to the hierarchical church [would] retain the church property."

The Court explicitly excluded consideration of the existence of an implied trust. In agreeing to abide by all "canonical and legal enactments," "it is unlikely that the parties intended that the local parish could reserve a veto over every future change in the canons. We find it significant, moreover, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision (*cf. First Presbyt. Church,* 62 N.Y.2d at 125, 476 N.Y.S.2d 86, 464 N.E.2d 454)".

In conclusion, the Diocese established that they are entitled to the real and personal property at issue and defendants did not raise any triable issue of fact to preclude this determination.

Lastly, All Saints Article 78 petition, deeming the parish "extinct" was a nonreviewable ecclesiastical determination (*see* Matter of Congregation Yetev Lev D'Satmar, Inc. v. Kahana, 9 N.Y.3d 282, 849 N.Y.S.2d 463, 879 N.E.2d 1282 [2007]).

In another significant decision, the Court of Appeals in Blaudziunas v. Egan, 18 N.Y.3d 275, 938 N.Y.S.2d 496, 961 N.E.2d 1107 (2011) which dealt with the provision of the religious corporation that permits "members of the corporation" to authorize certain uses of a religious corporation's real property that did not give former parishioners of church incorporated as a religious corporation authority to challenge the board of trustees' decision to demolish the church. In essence, it was determined that the *parishioners were members of the ecclesiastical body, not members of the corporation, and the corporation's by-laws granted the trustees the power to control and administer the property of the church corporation.* After discussion of the history of the religious corporation, the facts showed that in 1909, Our Lady of Vilna Church—a

Roman Catholic church established to serve a Lithuanian community in New York City—was incorporated by the then board of trustees, comprised of the archbishop of the Roman Catholic Diocese of New York, the vicar general of the diocese, the rector of Our Lady of Vilna and two laymen trustees selected and appointed by the ex-officio members, pursuant to the Religious Corporations Law. The land on which the church building and former rectory are located was deeded to the church corporation in 1910 and 1912. At a special meeting of the board of trustees in 1980, the church adopted bylaws, consistent with the Religious Corporations Law and Canon Law of the Roman Catholic Church, regarding the governance of the church corporation and the rights and duties of the trustees. In relevant part, it defined "Church" as the "ecclesiastical entity (parish) that was incorporated under civil law as this Corporation" and "Members of the Church" to "mean the parishioners of the aforesaid ecclesiastical entity (parish)." The bylaws also explained the powers of the board of trustees and the limitations on said body. It stated: "The Trustees of the Corporation shall constitute its governing body . . . No act or proceeding of the Trustees shall be valid without the sanction of the Archbishop." The bylaws also conferred on the trustees "custody and control of all the temporalities and property belonging to the Corporation . . . in accordance with the discipline, rules and usages of the Roman Catholic Church and of the Archdiocese for the support and maintenance of the Church."

In 2006, the archbishop of the Diocese of New York, Edward Cardinal Egan, issued a decree of 'suppression', an ecclesiastical decision to close the church building and extinguish the parish, due to "a serious decline in its parish population, the need to provide for enhanced stewardship of Archdiocesan resources, and optimum use of Archdiocesan clergy and lay personnel to better serve the People of God." As stated in the decree, the archbishop proceeded pursuant to "Canon [Law] 515.2, after having first heard the Presbyteral Council of the Archdiocese of New York and consulted with the Regional Vicar, the administrator, and neighboring pastors."

In 2007, after the Archdiocese issued a press release regarding its decision to close the church, two

former lay trustees of the church commenced an action to challenge the suppression decree. Subsequently, that action was discontinued by stipulation.

Later, in October 2007, the board of trustees of the religious corporation convened a special meeting. A quorum was present—the three ex-officio members and a lay trustee. At the meeting, the lay trustee was reappointed, and another was appointed. According to the meeting's minutes, the archbishop reported on his "ecclesiastical suppression of the parish and closure of the church building due to the longstanding decline in parish population, lack of attendance and paucity of requests for baptisms, weddings and funerals, rarely held Lithuanian language Masses and the need to enhance and preserve resources to better serve the faithful." Additionally, a report concerning the condition of the building detailed an "historical overview of the problems with the building . . . the building's condition . . . [and a] conclu[sion] that there was a significant issue with respect to structural condition." After noting that there were "no plans to reopen the church for worship," the board of trustees unanimously adopted a resolution to demolish the building.

In February 2008, plaintiffs, former parishioners of the church, commenced an action and moved for a preliminary injunction seeking to enjoin defendants, the board of trustees, from demolishing the church building. The Supreme Court denied plaintiffs' motion and granted defendants' motion to dismiss the complaint. The Appellate Division affirmed. The court concluded, *inter alia*, that the Religious Corporations Law "does not require that the demolition of the church be authorized by the parishioners," but "vest[s] approval authority for all actions taken by the trustees of an incorporated Roman Catholic church in the archbishop or bishop of the diocese to which that church belongs" (74 AD3d 697, 698 [2010]). Although there was one dissent, the Appellate Division granted plaintiffs' motion for leave to appeal to the Court of Appeals and it was granted.

The High Court started by stating that "[R]eligious bodies are to be left free to decide church matters for themselves, uninhibited by State interference," save for matters that can be resolved through the application of "neutral principles of law" (First Presbyt. Church of Schenectady v United Presbyt. Church in

U.S. of Am., 62 NY2d 110, 116-117, 120 [1984]). The court engaged in the same analysis in its prior rationale, more specifically, finding that the "[a]pplication of the neutral principles doctrine requires the court to focus on the language of the deeds, the terms of the local church charter, the State statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of the church property" (Episcopal Diocese of Rochester v Harnish, *supra,* [internal quotation marks and citation omitted]).

Notwithstanding the bylaws of this church corporation, which grants the board of trustees custody and control of the church property, plaintiffs rely upon Religious Corporations Law § 5 to challenge the board of trustees' decision to demolish the church building. Plaintiffs contend that the decision to demolish the church building must be authorized by the parishioners, who they claim are members of the church corporation. The court found this argument unavailing. In reliance on the statute, the Court determined that Section 5 of the Religious Corporations Law, in relevant part, vests the custody and control of a religious corporation's real property in the board of trustees, and directs the administration of such property "in accordance with the discipline, rules and usages of the corporation . . . to which the corporation is subject, and with the provisions of law relating thereto, for the support and maintenance of the corporation, or, providing the members of the corporation at a meeting thereof shall so authorize, of some religious, charitable, benevolent or educational object conducted by said corporation or in connection with it, or with the denomination, if any, with which it is connected." It further states "[t]he trustees of an incorporated Roman Catholic Church . . . shall not transfer any property as herein provided without the consent of the archbishop or bishop of the diocese to which such church belongs or in case of their absence or inability to act, without the consent of the vicar general or administrator of such diocese" (Religious Corporations Law § 5). The Court, in reliance on Religious Corporations Law §§ 91 and 92, explained that the governance of an incorporated Roman Catholic church and the division and disposition of parish property, respectively. Section 91 requires "[t]he archbishop or bishop and the vicar-general of the diocese to which any

incorporated Roman Catholic church belongs, the rector of such church, and their successors in office . . . by virtue of their offices, [to] be trustees of such church . . . [as well as t]wo laymen, members of such incorporated church." It further states: "No act or proceeding of the trustees of any such incorporated church shall be valid without the sanction of the archbishop or bishop of the diocese to which such church belongs, or in case of their absence or inability to act, without the sanction of the vicar-general or of the administrator of such diocese." Section 92 recognizes the jurisdiction of a Roman Catholic bishop over an individual parish and his authority to act independently or with the consent of the trustees of the original Roman Catholic church corporation to transfer property to a new or second Roman Catholic church corporation.

After its analysis of the respective statutes, the Court decided that Section 5 of the Religious Corporations Law is consistent with sections 91 and 92 and the bylaws of the church corporation. They uniformly recognize the authority of the board of trustees and the archbishop to control church property. However, plaintiffs characterize themselves and other former parishioners as "members of the corporation," pursuant to section 5 of the Religious Corporations Law, and allege that they have the collective right to veto the demolition decision by refusing to give the requisite authorization relating to the use of church resources when they are used for some "religious, charitable, benevolent or educational object."

In applying the neutral principles of law doctrine, no such right or authority has been reserved for the benefit of the parishioners. Pursuant to the bylaws, *parishioners are members of the ecclesiastical body—not members of a corporation*. Such status does not confer on them the rights and duties as members of the religious corporation. *Nor have plaintiffs pointed to any statute, corporate governance document, church canon or other provision that identifies current or former parishioners as members of the corporation*. Given the deed to the property at issue is in the name of the religious corporation and the corporation's bylaws and the Religious Corporations Law unequivocally grants the trustees, as well as the archbishop specifically, the power to control and administer the property of the church corporation, the authority to demolish the church building was within their purview. Thus, plaintiffs have no basis to challenge the

actions properly voted on by the board of trustees and sanctioned by the archbishop. Accordingly, the order of the Appellate Division was affirmed.

In addition, there are other cases that deal with the above categories of disputes between the religious corporations and the congregants. For example, Citizens for St. Patrick's v. Saint Patrick's Church of West Troy, 117 A.D.3d 1213, 985 N.Y.S.2d 743 (3 Dept. 2014) where former parishioners of Roman Catholic church, as members of the congregation or "ecclesiastical body" of the church, were not members of the religious corporation with standing to challenge sale of church building following church's consolidation with other parishes. The Court held that the Supreme Court properly dismissed the complaint because plaintiffs lack standing to challenge the sale of the property. Plaintiffs may have been members of the congregation or "ecclesiastical body" of St. Patrick's, but that did not make them members of the religious corporation (Blaudziunas v Egan, 18 NY3d 275, 282 [2011]). "Member" is defined for religious corporation purposes as "one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws" (N-PCL 102 [a] [9]; *see* Religious Corporations Law § 2-b [1]). Pursuant to the incorporation documents and bylaws of St. Patrick's and the relevant statutes, St. Patrick's is managed by a five-member board of trustees consisting of the diocesan bishop, the vicar general of the diocese, the rector of the church and two laypersons selected by the other trustees (*see* Religious Corporations Law §§ 90, 91). Religious Corporations Law § 5 "vests the custody and control of a religious corporation's real property in the board of trustees" (Blaudziunas v Egan, 18 NY3d at 281). Based on the grounds that the Plaintiffs are not members of the religious corporation, they lack standing to challenge decisions concerning the transfer of the corporation's property (*see id.* at 282).

It is significant to take notice that while the definition of corporate membership is limited to the trustees for religious corporations that are Roman Catholic churches (*see* Religious Corporations Law §§ 90, 91), membership is broader for religious corporations that are associated with certain other denominations (e.g. Religious Corporations Law §66 [Presbyterian Church (U.S.A.)], §134 [Baptist churches], §164

[churches of the United Church of Christ, Congregational Christian churches and Independent churches], §195 [other denominations]). Membership qualifications and organizational structure—whether hierarchical or congregational—of a church that operates as a religious corporation are generally determined by the governing body of the affiliated religious denomination; due to the constitutional principle of separation of church and state, courts and the Legislature will not intrude on those ecclesiastical matters (*see* Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church of North America, 344 US 94, 107-110 [1952]; *see also* Episcopal Diocese of Rochester v Harnish, 11 NY3d 340, 350-352 [2008]).

See also Kroth v. Congregation Chebra Ukadisha Bnai Israel Mikalwarie, 1980, 105 Misc.2d 904, 430 N.Y.S.2d 786 where the sale of Synagogue was not in conformance with §195 where no valid congregational meeting was called or conducted to vest purported trustees with authority to sell Synagogue notwithstanding that they were cloaked with apparent authority by way of an exparte order which they themselves obtained; In re Beth Israel of Brownsville, 1921, 114 Misc. 582, 187 N.Y.S. 36 where the trustees of a religious corporation having a congregational form of government have no power to initiate proceedings to sell or mortgage the real property of the corporation without the consent of the members which consent must be given by a majority vote at a meeting, or in some manner in accordance with legally adopted by-laws.

Now, after a review of the above case law, the Court turns to the cases at hand. As shown from the above authority, the documentary evidence admitted into evidence and the bylaws in this corporation, the Respondents are members of the congregation or "ecclesiastical body" of Congregation Lubavitch; formerly, CLI. Their status does not make them "members of the religious corporation" (Blaudziunas v Egan, 18 NY3d 275, 282 [2011]). In this case, as in some of the above cases, the legal arm of the religious corporation is in the hands of the trustees/directors. Trustees of every religious corporation have the custody and control of "all the temporalities and property belonging to the corporation" and authority to administer the same for the support and maintenance of the corporation, or for some religious, charitable, benevolent or

educational objectives conducted by it, or in connection with it, or with such denomination. The congregational officers of a religious corporation, denominated trustees, are fiduciaries who must manage and preserve the property for the benefit of its religious purpose. Kroth v. Congregation Chebra Ukadisha Bnai Israel Mikalwarie, 105 Misc.2d 904, 430 N.Y.S.2d 786 (1980).

In this summary proceeding, like any other civil case, the Petitioners have the burden of proving their cases by a preponderance of the evidence (*Kennealy v. Westchester Elec. Ry. Co.,* 86 A.D. 293, 83 N.Y.S. 823). The burden of proof in this case is on the Petitioners, and the Court finds that the Petitioners have sustained their *prima facie* case to the extent that the Petitioners have admitted proof in admissible form to substantiate compliance with RPAPL § 741 and have proved the elements of the petition. The key issue here is if there are any defenses established by the Respondents that would preclude the entry of a final judgment of possession against them.

The contents of the petition must satisfy the requirements of RPAPL § 741, which requires the petition to: state the interest of the petitioner in the premises from which removal is sought (failure to plead petitioner's corporate status, for example, can result in dismissal of the petition). However, proof of ownership is not a prerequisite for maintaining a summary proceeding for nonpayment of rent; proof of landlord or lessor status is sufficient. Halle Realty Co. v. Abduljaami, 42 Misc. 3d 148(A), 986 N.Y.S.2d 865 (Sup 2014).

After many days of trial, it is irrefutable that the Petitioners are the owners of the premises herein. The Petitioners established proof of ownership of the subject premises by admission into evidence of a certified copy of the deed of ownership dated August 16, 1940 between Nassau Saving and Loan Association, as grantor to Agudas Chasidei Chabad of the United States, as grantee; and simultaneously thereto, executed a purchase money mortgage in the sum of $25,000.00 for the purchase of the premises known as 770 Eastern Parkway, Brooklyn, NY (Petitioner's Exhibit "1").

The Petitioners established proof of ownership of the subject premises, known as 302-304 Kingston

Avenue, Brooklyn, NY, by admission into evidence a certified copy of the deed of ownership dated June 25, 1982 from Chassia Fuller as grantor to Merkos L'Intonei Chinuch, Inc. (Petitioner's Exhibit "2").

The Petitioner proved ownership of the premises known as 784-788 Eastern Parkway, Brooklyn, NY by the admission into evidence of a certified copy of the deed of ownership dated January 4, 1965 from Aaron Klein as grantor to Merkos L'Intonei Chinuch, Inc. as grantee; and simultaneously thereto, a purchase money mortgage from Chase Manhattan Bank in the sum of $80,000.00 and to Machne Israel, Inc. in the sum of $60,000.00. (Petitioner's Exhibit "3").

Based on the admission into evidence of Petitioner's Exhibits "1", "2" and "3", it is irrefutable that the Petitioners have all rights, title and interest in the aforesaid properties and are the deed owners of the respective properties. It should also be noted that ownership of the demised premises were also established by the Supreme Court, Kings County and affirmed by the Appellate Division, Second Department.

Second, the statute requires the Petitioners to "state the Respondents interest in the premises and the Respondents' relationship to the Petitioner with regard thereto. Congregation Lubavitch, Inc., ("CLI") is a New York not-for-profit corporation founded in 1996 for the purpose of succeeding and continuing the work of the prior unincorporated religious congregation known as Congregation Lubavitch. The Gabboim, the group of managers that are responsible for the operation of the Synagogue and its membership have regularly attended religious services at the Synagogue since 1940. All of the above individuals, Zalman Lipskier, Avrohom Holtzberg, Menachem Gerlitzky (despite his disputed status), and Yosef Losh are Gabbai of Congregation Lubavitch and are Directors of CLI. Nachem Kaplinsky, is the Shammas (caretaker) of the Lubavitcher Synagogue. Kaplinsky was substituted as a party Respondent instead of Sholom Ber Kievman, on consent.

The parties dispute the actual entities that are in possession. Petitioner states that all of the parties above are in possession, and the Respondents argue that a part of the Petitioner Corporation, Congregation Lubavitch of Agudas Chasidei Chabad, is in possession and contends that the Petitioner is precluded from

the removal of its own congregation.

The Respondents' claim that after the Harkavy decision, CLI vacated the subject premises and assert that such vacatur is evidenced by the discontinuance of their business mail delivery at the premises and a change in the address of CLI on its letterhead. The Respondents suggest that the petition against CLI is moot since CLI has purportedly been ejected from the property; or, alternatively, the claims against CLI merged into the judgment of ejectment and are barred by *res judicata*. Respondent presents no evidence to support this claim.

Both parties and this Court acknowledged that the basis for the partial reversal of the judgment of ejectment against CLI in the Supreme Court action was that the Congregation and the Gabboim were not named and served as parties in that underlying action. The Respondents, in argument and during testimonial evidence, has not conceded that CLI surrendered possession of the subject premises by delivery of the keys to the Petitioner or by a written surrender to the Petitioners or take any other action to evidence a surrender of possession except as stated above. Those acts claimed by the Respondents do not constitute a surrender of possession. Notwithstanding the judgment of ejectment, CLI and the above Rabbis and their agents continue in possession of the demised premises since no evidence was presented that CLI ever relinquished dominion and control over the properties. Actual possession, said the Appellate Division, "means 'a subjection to the will and dominion of the claimant.' It 'exists when a thing is in one's immediate occupancy,' and it is evidenced by circumstances which vary according to the locality and character of the property. … 'Generally any overt acts indicating dominion and a purpose to occupy and not to abandon the premises will satisfy the requirements as to possession.' … It intends that the land is 'in the immediate control or power of the party.' Unlike the matter of 448 Arcade, LLC v. 90 North Pearl Inc., 2010 WL 3719300 (N.Y. City Ct.) where the court found that prior to the commencement of the proceeding, a Respondent had relinquished possession of the premises to the Petitioners and no longer asserted any control over the property and accordingly, the court had no jurisdiction over the claim. The facts in these cases support the

opposite conclusion. The Respondents and its agents continued to assert legal and actual possession of the demised premises. Respondents continue to conduct services in the Synagogue and to maintain and provide services for the operation of the Synagogue. Such actions are indicative of the exercise of dominion and control over the property. Witnesses from both sides attest to the continued operation of the Synagogue by the "elected Gabboim" from the "community" and those individuals, named in these proceedings, have continued to use and occupy the properties for nearly 28 years, as claimed by the Respondents.

Of greater significance, legal and actual possession was not delivered to the Petitioner by a Sheriff or NYC Marshall. The issuance of a judgment of possession only as opposed to one with a money judgment, without delivery of possession, is meaningless. For these reasons, the Respondent's claim that this case is barred by *res judicata* or is moot is without merit in fact or in law and this Court finds that the parties in possession of the demised premises are Congregation Lubavitch, Inc. a/k/a Congregation Lubavitch; Congregation Lubavitch of Agudas Chasidei Chabad; Congregation Lubavitch d/b/a Lubavitch World Headquarters separately and collectively, refer to the Congregation in possession and the above named individuals are also in possession.

In addition, the statute requires that the petition adequately describe the premises sought to be recovered, including a physical description of the premises; and state with sufficient specificity the premises. Papacostopulos v. Morrelli, 122 Misc. 2d 938, 472 N.Y.S.2d 284 (N.Y. City Civ. Ct. 1984); Village of Woodridge v. Proyect, 18 Misc. 2d 623, 189 N.Y.S.2d 258 (County Ct. 1959); Elul Realty Corp. v. Java New York Ltd., 12 Misc. 3d 336, 816 N.Y.S.2d 885 (N.Y. City Civ. Ct. 2006) (description of the premises must be accurate enough to allow a marshal to locate the premises without additional information); 180 Prospect Park West v. Quilles, 80245/10, NYLJ 1202496245843, at 1 (Civ., KI, decided May 25, 2011) (description of the premises is legally insufficient where apartment number is not properly stated). But *see* Najjar v. Cooper, 35 Misc. 3d 129(A), 950 N.Y.S.2d 724 (App. Term 2012) (trial court properly denied dismissal and granted landlord's cross motion to amend petition to identify on which floor tenant's

apartment was located); M.C.E. Corp. v. Xavier, 37 Misc. 3d 1221(A), 961 N.Y.S.2d 359 (Dist. Ct. 2012) (court grants petitioner's motion to amend the petition to read "four (4) family multiple dwelling" rather than commercial residence, and holds this mis-description does not render the petition jurisdictionally defective). This law is also applicable to commercial premises. In this case, there is no dispute that the petition adequately describes the premises.

Next, RPAPL §741 requires the petition to state the facts upon which the special proceeding is based. The service of the predicate notice, namely, the notice to quit, establishes the grounds for the commencement of these proceedings. The only restriction is that the notice cannot be based on alternative inconsistent legal theories. A petition cannot, for example, be initiated as both a "nonpayment and holdover," because a nonpayment proceeding is premised on the existence of a tenancy and a holdover proceeding is premised on the expiration of a tenancy. Unlike our general tolerance in civil proceedings for inconsistent pleadings, summary proceedings differ. RPAPL § 741(4) requirement that the petition "state the facts upon which the proceeding is based" has been interpreted by the courts as mandating that the petition contain certain information that is germane to the existence of the petitioner's claim and her/his entitlement to relief. In general, the petition must be adequate to give notice to the respondent of the transactions and occurrences that the petitioner intends to prove, so that the respondent has adequate information upon which to base defenses. CPLR 3013; Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). Vague, general, and conclusory allegations are not sufficient; pleadings must be sufficiently detailed and particular. 117 East 24th Street Associates v. Karr, 95 A.D.2d 735, 464 N.Y.S.2d 473 (1st Dep't 1983); Chelsea 19 Associates v. Coyle, 22 Misc. 3d 140(A), 881 N.Y.S.2d 362 (App. Term 2009).

The Notices to Quit which are incorporated by reference in the petition, states alternative relief. The notice to quit alleges that the Respondents' squatted or intruded in certain parts of the premises and in other parts had authorization of the Petitioners to use and occupy. The evidence at trial, such as the written correspondence from Shemtov to the Respondents and through testimony of Rabbi Scharfstein, show that

the Respondents excluded the Petitioner from possession of certain parts of the property, to wit: the basement, a room in the southwest corner of the property and entered onto the roof to install air conditioning equipment, and these allegations were not rebutted by the Respondent.

The notice to quit and the petition also assert that the Petitioners granted the Respondents a license to enter onto the land for the purpose of operating and managing the Synagogue and that license was terminated in the notices to quit and the Respondents have held over at the end of the term, which was effective October 4, 2011. Based on the defenses alleged by the Respondents, it is irrefutable that the Respondent has held over after said termination and the Petitioner has established that the Respondent remains in possession in contravention of the notices to quit.

The Respondents concede possession by the fact that the Respondents assert defenses to the petition and both parties agreed that the Respondents, as of the date of the last submission herein, were and continue to remain in possession of the Synagogue and the other named parts of the building. In addition, the Petitioner proffered a written authorization, admitted into evidence as Petitioner's Exhibit "4", which provides in relevant part that "Rabbi Mendel Sharfstein was and is a duly appointed agent of Agudas Chasidei Chabad in all matters involving this and all related litigation, including but not limited to testifying at trial on behalf of Agudas Chasidei Chabad", executed by Rabbi Avraham Shemtov as chairman of Agudas Chasidei Chabad, dated June 10, 2014.

The Petition is also required to state the relief sought, and in theses summary holdover proceedings the relief may include a judgment of possession and the issuance of the warrant of eviction forthwith or with a stay of issuance and/or execution of the warrant. In this case, Petitioners request an order of the Court to issue a warrant of eviction forthwith to remove Respondents from possession of the premises and for use and occupancy for each month of occupancy to the date of judgment individually and collectively against all individuals and all legal entities named in these proceedings (paragraph 14 in addition to the wherefore relief clause in the pleadings).

The request for a judgment of possession was only made by the Petitioners at the conclusion of trial and in post-trial briefs. Petitioners have made the request for relief in proper papers and the Respondents have not raised any objection to the requested relief except as to their claimed defenses. For such reasons, the Court finds that the Petitioner has proven the elements mandated by RPAPL §741.

It is also well settled that another pleading requirement is that the petition state whether the premises is subject to some form of rent regulation (*citations omitted*). But see Promenade Global LLC v. Abraham, 44 Misc. 3d 1205(A), 997 N.Y.S.2d 100 (N.Y. City Civ. Ct. 2014) (petition dismissed where petition incorrectly asserted premises were not governed by rent stabilization and that erroneous allegation was not amended.). Under some circumstances, an erroneous allegation may be amendable. *See, e.g.,* 631 Edgecombe LP v. Fajardo, 39 Misc. 3d 143(A), 2013 WL 2349722 (N.Y. App. Term 2013) (failure to properly plead rent regulatory status was amendable and was not intentional, but rather was due to uncertainty at the time as to retroactive application of the Court of Appeals' *Roberts* holding).

In further compliance with the requirement, this Court observes that the petition states that the premises is not subject to the Rent Control Law, Rent Stabilization Law or Emergency Tenant Protection Act of 1974 because the subject premises are occupied for nonresidential use (paragraph 12) and also avers that the premises is not located in a multiple dwelling (paragraph 13).

Based on the above findings, the Petitioners have sustained their *prima facie* burden under statute and case authority, and the burden shifts to the Respondents to produce evidence in admissible form to defeat the Petitioners' the rights to possession.

CPLR §3018(b) provided that "a party must plead as an affirmative defense 'all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading.'" Whether or not a claim is an affirmative defense is of obvious importance in the pleadings. It has been long established that the adverse party in an action or proceeding who wants affirmative relief of any character--anything more than a dismissal of the main claim in the ordinary case—

must include a counterclaim in the answer, and it must be labeled as a counterclaim. Denials and affirmative defenses seek to defeat the main claim only, not affirmative relief of a claim on behalf of the adverse party. "The effect of a successful affirmative defense is the dismissal of a plaintiff's complaint or cause of action. It does not give the defendant any affirmative relief against a plaintiff, such as monetary damages." P.J.P. Mech. Corp. v. Commerce and Indus. Ins. Co., 65 A.D.3d 195, 200, 882 N.Y.S.2d 34, 37 (1st Dep't 2009).

Now, in these cases, the answers by the Respondents do not contain counterclaims and accordingly, this Court should be barred from granting any affirmative relief. However, it has been successfully argued and affirmed that if the Plaintiff has the requisite notice of the adversary's position, and all of the underlying issues of fact have been appropriately raised in the case, thus, no surprise or prejudice, the Court may of course permit an amendment to add the "counterclaim" and the request for the affirmative relief. The court can grant any type of relief within its jurisdiction "appropriate to the proof, whether or not demanded," imposing such terms as may be just (CPLR §3017(a), as long as no party can claim prejudice. CPLR §3026.) Therefore, despite the neglect of the Respondents' to interpose a counterclaim, this Court, in the interest of fairness, justice and to avoid the loss of the tremendous amount of time for all the parties, witnesses and counsel, including the resources of this Court, and to avoid the loss of tremendous financial resources expended in the prosecution and defense of these proceedings, and to conform the pleadings to the proof, the Court finds that the answer and other documentary and testimonial evidence adduced at trial, is tantamount to a "counterclaim for the imposition of statutory trust and implied trust" although not explicitly denoted by the Respondents in its pleadings.

Now, the Court will summarize the disposition of the various defenses and narrow in on the issues of the statutory trust or implied trust.

The first (non-justiciable controversy), second (internal governance), and third (religious doctrinal dispute) affirmative defenses were dismissed on the record by this Court at pretrial conference on the grounds that the existence of a divisive doctrinal dispute within the Lubavitch community does not render

the action nonjusticiable, even if the facts underlying the action arise from that dispute and, as CLI suggested, the commencement of the action was motivated by that dispute. This Court relied on the determinations at the Appellate Division and incorporates the cases from its own research and analysis above. All of the cases above support the finding of this Court that property disputes between rival religious factions may be resolved by courts, despite the underlying doctrinal controversy, when it is possible to do so on the basis of neutral principles of law (*Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc. v. Congregation Yetev Lev D'Satmar, Inc.,* 9 N.Y.3d 297, 849 N.Y.S.2d 192, 879 N.E.2d 731; *Park Slope Jewish Ctr. v. Congregation B'nai Jacob,* 90 N.Y.2d 517, 664 N.Y.S.2d 236, 686 N.E.2d 1330; *First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Am.,* 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454; *Kelley v. Garuda,* 36 A.D.3d 593, 827 N.Y.S.2d 293; *Malankara Archdiocese of Syrian Orthodox Church in N. Am. v. Thomas,* 33 A.D.3d at 888, 824 N.Y.S.2d 101; *Trustees of Diocese of Albany v. Trinity Episcopal Church of Gloversville,* 250 A.D.2d 282, 286, 684 N.Y.S.2d 76; *see generally Jones v. Wolf,* 443 U.S. 595, 602, 99 S.Ct. 3020, 61 L.Ed.2d 775). Based on these well-founded principles, the Appellate Division, Second Department, therefore, held that Supreme Court properly denied CLI's motion to dismiss the complaint as nonjusticiable. All three defenses are therefore dismissed with prejudice.

As to the fourth and fifth affirmative defenses, this Court has determined that the Respondents failed to surrender possession of the demised premises as required by case authority, did not present evidence of such surrender and therefore, all of the Respondents described above and named herein remain in actual and legal possession of the demised premises, and the Civil Court had subject matter jurisdiction from the inception of these proceedings. The third and fourth affirmative defenses are dismissed with prejudice.

The eighth affirmative defense claiming that these proceedings were commenced in **bad faith** for the **improper** purpose of "wrestling corporate control of Congregation Lubavitch away from members of Congregation Lubavitch and the management of the Synagogue from the Gabboim", in derogation of the Religious Corporation Law, although it survived dismissal, was not proven by the Respondents. There was

no testimonial or documentary evidence to support any bad faith action by the Petitioners against the Respondents. In fact, the evidence presented by the Petitioners demonstrates that the Respondents were informed in writing by the chairman of the board that their conduct in regards to the property was unacceptable. Their complaints were legitimate issues of safety and in the best interest and safety of all of the occupants such as propane tanks in the alleged illegal kitchen in the basement. Additionally, the installation of air conditioning on the roof of any property requires permits and authorization from the Department of Buildings for a myriad of obvious reasons including health and safety. The Respondents did not present any evidence whatsoever to rebut these contentions by the Petitioner. On the other hand, the Respondents presented no evidence to prove this affirmative defense and thus, the eighth affirmative defense is dismissed with prejudice for the lack of evidentiary proof.

The ninth affirmative defense alleged that the Respondents incurred extraordinary expenses in the construction, maintenance and improvement of the Synagogue and therefore, the Petitioner should be estopped for denying the rights of the Respondents to use and occupancy of the demised premises. To sustain a defense of *equitable estoppel*, the Respondents must plead and prove 1) the conduct which amounts to a false representation or concealment of a material fact(s), 2) intention that such conduct was acted on by the other party, 3) knowledge of the true or real facts, 4) lack of knowledge of the true or real facts in question by the other party, 5) reliance on the conduct of the party estopped; and 6) a prejudicial change in position. New York State Guernsey Breeder's Co-op. Inc. v. Noyes, 260 AD 240, 22 NYS2d 132 (3rd Dept., 1940); First Union National Bank v. Tecklenburg, 2 AD3d 575, 577, 769 NYS2d 573, 574-575 (2nd Dept., 2003). Like most equitable defenses, there is some claim of detrimental reliance by the injured party. During oral arguments on the record, the Respondents did not present any arguments to support this claim, did not present any evidence in motion practice before the Court to support this claim, and certainly did not proffer any evidence to prove this claim. Therefore, the ninth affirmative defense is dismissed with prejudice.

The tenth affirmative defense alleges that the Petitioner is barred from the commencement of these proceedings based on the fact that the statute of limitations expired. There is no statute of limitation for the commencement of a summary proceeding based on RPAPL §713(7). The claims of exclusion from the property by the Petitioner is not a material issue of fact in this kind of proceeding. The parties may have asserted these claims as a grounds for the commencement of the proceedings, but the claims of exclusion from the property are irrelevant. Both parties, in their post trial briefs, made numerous claims about the unauthorized construction and improper conduct by the Respondents. Although these proceedings may have been motivated by these alleged bad acts by the Respondents, RPAPL §713(7) does not require any factual grounds, good, bad or indifferent, to commence a licensee holdover proceeding. It is one of the only grounds under the aforementioned provision to recover possession that does not require a factual basis to terminate possession. There has been no evidence proffered by either party that the Respondents were occupants pursuant to a written lease or other contract, and consequently, the Petitioners were not mandated to proffer any grounds for termination of the license for removal of the Respondents from possession. For these reasons, the tenth affirmative defense is dismissed with prejudice.

As to the eleventh affirmative defense, both parties agreed that this defense is moot and thus, is dismissed with prejudice.

Turning to the most relevant defenses in this case as set forth in the sixth and seventh affirmative defenses, namely, the imposition of a statutory trust and an implied charitable trust.

It is now time to look at the evidence proffered at trial and admitted into evidence. The Court finds it necessary at this stage to note one important observation about the evidence admitted by the Respondents in these proceedings as opposed to the Petitioners. First, nearly all of the evidence has been marked with exhibit tabs that show that these documents were already admitted into evidence in the prior trial before Justice Harkavay, the *Gourary* litigation and/or the parties depositions in either case or in other litigation between the parties. Most of the evidence, for our purposes, has been examined by the Supreme Court, the

Appellate Division, Second Department, the Federal District Court and now, the Civil Court.

Second, the quantum or quantity of the evidence should never attempt to overshadow the quality of the evidence. As the Court stated on the record, a notable part of the record in the proceedings contain extensive arguments between counsel about the admissibility of the evidence then the actual testimony of the witnesses and the admitted evidence. As can be easily discerned from the record, the Respondent's evidence was often repetitive, unrelated and irrelevant to the material issues of fact in the proceedings. Additionally, the evidence was admitted, with no additional evidence, testimonial or documentary, to demonstrate its relevance to the issues at hand. Evidence was often admitted and not connected to any other evidence. Evidence was not presented to show the imposition of a trust and at different times, was not tied together by the Respondents too any issue of fact. The material question of fact remains whether or not the Respondents have produced sufficient evidence to support the imposition of a trust, either expressed, implied, or statutory, against the real properties in question.

Although Respondent introduced nearly fifty-one exhibits, (actually more since some exhibits were in excess of three pages), deposition testimony, several interviews and other documentary evidence, so much of the evidence was not in dispute. It can be concluded that the admissibility of the evidence, that is, its quantity, appears to have taken precedent over the issue at hand. The quantum of evidence was more the focus than the legal documents that contain the expressed purposes of the Petitioners corporations. The question again is whether that evidence produced by the Respondents as opposed to the evidence produced by the Petitioner allows this Court to impose a trust against the real estate interest here.

The Petitioners affirmed, without written evidence, that the entity named Agudas Chasidei Chabad of the United States and Canada was an unincorporated association that was created by the former Rebbe Joseph Isaac Schneerson in 1924. It functioned from 1924 to 1940. No evidence was submitted by the Respondent to rebut this claim and so it is established here.

Subsequently, on July 25, 1940, Rebbe Joseph Isaac Schneerson and others executed the certificate

of incorporation for a new corporation, Agudas Chasidei Chabad of the United States, one of the Petitioners here, organized under the Religious Corporation Law (Respondent's Exhibit "B"). Respondent's Exhibit "B" establishes that this corporation was organized "in full appreciation of and adherence to the spirit of Americanism and Democracy" (¶2) and formed for enumerated purposes including to foster the spirit of orthodox Judaism among its members and their families; more significant to this determination, to establish, maintain and conduct a place of worship in accordance with Chasidic ritual and mode of worship of the Jewish Orthodox faith, customs and traditions, for its members, their families and friends (¶d). The certificate also provides for the establishment of a school for the study of the Holy Law and to maintain classes for the teaching of the customs and traditions of the Jewish Orthodox faith (¶f).

The document also provides that the principle office of the corporation is 770 Eastern Parkway (¶4); shall be conducted without pecuniary profit to any individual, group, individuals or to the corporation (¶3); and its governing body shall consisted of 20 trustees including Rebbe Joseph Isaac Schneerson and the elections of the Board of Trustees would take place on the 1st of September each year (¶7). The twenty trustees list in the document would be the trustees until the first meeting of the trustees. (¶6)

It is undisputed that this corporation was maintained by the former Petitioner corporation from 1924 to 1940. Respondents claim that these organizations are the same and their names are used interchangeably. There is no evidence presented by the Respondents to prove this claim; to the contrary, there is evidence, Petitioner's Exhibit's "7-A", "7-B" and "7-C" to substantiate that the change in the corporation was by merger. The corporation documents will be examined below. It is the opinion of this Court that there was a dispute in the Orthodox Hasidic community about the 770 synagogue and there is sufficient evidence to support this fact. It is also clear to this Court that the Grant Rebbe was a brilliant man, full of wisdom, discernment and prophetic. The evidence supports the conclusion of this Court that the corporate structure of both corporations was the legal mechanism that the Rebbe, with the assistance of competent counsel, conceived to maintain control and possession of the properties including the control of the Synagogue. The

Rebbe had foresight beyond his years.

As described above in the decision of Justice Harkavy and as shown from the *Gourary* litigation, there have been several conflicts in this community of Orthodox Hasidics. Each of the cases involved either personal property disputes and here, a conflict involving the real estate owned by these religious institutions.

In this conflict, as presented by the Respondents, the Orthodox Lubavitch community is in disagreement about the election of the Gabboim in the Synagogue. Respondents produced a writing from the Gabboim, the Vaad Hakahal, in a letter dated May 1987, which encouraged members of the community to come out to vote. Their letter seems to refer to the letter dated May 29, 1987 (Respondent Exhibit "A-2" and "A-3"), in which this controversy of the elections was taken to the Beth Din of Crown Heights. The Beth Din of Crown Heights, in response, encouraged all residents to participate in the election. It further appears that on June 12, 1987, the Rabbis of Agudas, wrote a letter to the Beth Din warning them to not interfere with the "ownership of Agudas" by acting in any way to affect the outcome of the trial (the *Gourary* litigation) and "nothing should be done at all concerning the Synagogue manager [for example their independent election which undermines their authority]. The Respondents introduced this letter into evidence as Respondent's Exhibit "H-1" (original Hebrew) and "H-2" (English translation). Apparently, there was a prior meeting with the Beth Din to stay any decision on the election of the Gabboim pending the outcome of the *Gourary* litigation (Respondent's "I-1"--original Hebrew and "I-2"-- the English translation). Subsequently, in a letter dated June 27, 1987, the Beth Din writes to Vaad Hakahal in response to a question to the Beth Din on June 25, 1987, which asked whether the Gabboim who were elected by the neighborhood residents, the congregants of the Synagogue and the Study Hall have the right to take office and serve in that capacity unless overruled by the Beth Din. (Respondent's "J-1"-original Hebrew-"J-2").

It appears that the elections took place, the Gabboim were elected and maintained office for a short while. The evidence shows that notwithstanding this election, the Gabboim did not take office from 1987 to

1995, and did not resume office until *after* the Rebbe passed away.

Based on the credible testimony of Rabbi Sharfstein, the Rebbe was not pleased with this election; however, the reasons were only slightly disclosed by the Respondent's witnesses. Rabbi Katz and Rabbi Cohen credibly testified that the Synagogue was not operating according to the tenants of the faith and it appeared that it was the responsibility of this elected Gabboim or at least perpetuated by their agents. As stated above, only unsubstantiated claims were made by the Petitioners in their trial brief but no evidence was presented of the conduct that the Rebbe allegedly did not approve. However, the election of the Gabboim or this dispute about the elections is not the material issue of conflict here as proffered by the Respondents. Although the underlying dispute may be religious, the rule of law that governs this case is based on the Religious Corporation Law, the bylaws of the corporations and the certificates of incorporation-neutral principals of law. The real dispute here is between conflicting factions over control or possession of real property (see, above, e.g., Episcopal Diocese of Rochester v. Harnish, 11 NY3d 340 [2008]; First Presbyt. Church of Schenectady v. United Presbyt. Church in U.S., 62 N.Y.2d 110 [1984], cert denied 469 U.S. 1037 [1984]). Do the Petitioners have the authority to remove the Respondents from possession for cause or without cause, and do the Respondents have any defenses to their removal from possession?

The testimony of Rabbi Krinsky and his intimate relationship with the Rebbe offered great insight into the motive and intention of the Rebbe about these properties. As compelling, the interview with Nachum Gordon, Esq. was also insightful and presented the most unbiased version of the intentions of the Rebbe in the restructure of the organizations.

As stated above, both counsel provided two copies of the Nachum Gordon, Esq. interview. Their highlighted portions demonstrate the differences in legal strategy and review of the relevant evidence. The interview of Mr. Gordon, Esq., revealed his tremendous level of respect and reverence for the Rebbe. Mr. Gordon, Esq., a Harvard graduate and corporate attorney was grateful that the Rebbe's organization reached

out to him on the Rebbe's behalf for legal work. Notwithstanding the Respondent's highlights that suggest that some of the conversations between Mr. Gordon was with Rabbi Krinsky and not the Rebbe himself or through Rabbi Krinsky is not persuasive. Also, the attempt by the Respondent to discredit the memory of the attorney is also without merit. The Court does not find these few claims an obstacle and certainly do not render Mr. Gordon any less credible. It would not be reasonable of this Court to expect the attorney to remember each and every detail of the legal work that he performed for the Rebbe in 1990, in an interview on March 27, 2012, nearly 12 years later. The Court gives greater weight to the unbiased and neutral testimony of the Rebbe's attorney than some of the other witnesses, although credible, because they are interested parties in this litigation and the attorney is not.

Rabbi Krinsky, as part of the Rebbe's Secretariat, and Mr. Gordon, Esq., worked closely and intimately together with the Rebbe. The Court finds both credible. Their truth and veracity are bolstered by the corporate documents that prove the intentions of the Rebbe with respect to the corporations. The attorney merely implemented the goals and objectives of his client; that client happened to be the Grand Rebbe, but a client nonetheless and it was unsolicited legal work; the Rebbe sought him out and not the other way around.

The attorney recalled that the Rebbe's wife had just died the day before and the Rebbe, based on a recommendation from Nathan Lewin, also a Harvard graduate, asked about "estate law" for the Rebbe. It was Rabbi Krinsky that called him on behalf of the Rebbe and he credibly testified to these facts. Mr. Gordon met with the Rebbe at his private home and discussed the Rebbe's needs and wishes. Since the Rebbe's wife had died childless and without a will, he wanted his intentions known that all of his property was to be left to the corporation, Agudas, and not to any other person or organization. The Rebbe designated Rabbi Krinsky as the executor of his will; the attorney could not recall the alternate that he selected, and the third alternative executor would be Rabbi Shemtov. The Rebbe wanted the will done immediately and the attorney stated that he prepared the will in a day or so, returned it to the Rebbe for signature, and it was

done. The will was an attorney-drafted will; the Rebbe produced the witnesses and the attorney-drafter acted as the notary. Rabbi Sharfstein also credibility testified to each of the above facts.

In addition, the Rebbe, through Rabbi Krinsky, sought his legal help to "revitalize" the corporations. He further stated that he was given the names of all three corporations, a list of the names of the people who were to serve as officers, what offices each would hold and the names of the directors or trustees of each. He concluded all of the paper work to obtain their certificates of incorporation. He said, "incidentally, the Rebbe listed himself as a director, one of the directors or one of the trustees….and he was also listed as the president of each and told me in each case that he would be the last to sign the corporation documents (Interview of Nachum Gordon, Esq., P.3, L.89-91).

What is more significant for our case is the expressed intention of the Rebbe was reflected in the fact that he gave the attorney a list of the names of the people who were to serve as officers, what offices each would hold and the names of the directors or trustees of each corporation. The attorney stated that when he asked the Rebbe about membership in the corporation, the Rebbe said "the same people who served as directors or trustees should serve as members, they and nobody else". (Interview of Nachum Gordon, Esq., P.5, L.158-159). When asked what were the ramifications of the Rebbe's decision about membership in the corporation, he said "annually when you have new elections of directors, the outside Chassidic or the outside Lubavitch world will not participate in those elections, only the Rebbe's hand-chosen people and the successors that they themselves choose would participate in the process of electing future representatives. Not the most democratic strategy in the world but *Moshe* was chosen by *HaKadosh Baruch Hu* and he in turn chose *Yehoshua* and so on. It was not until the state of Isreal where we had votes and you see the results. I'm not, I'm a *Zionist* and I'm not criticizing Israel, *Chas V'Shalom* but a divine choice or choice by a great *Tzaddik* will result in a better future than choice by the *Hamon Am* and that's clearly what the Rebbe wanted". (Interview of Nachum Gordon, Esq., P.5, L.163-173).

The attorney stated that the Rebbe was direct and forthright. The Rebbe knew exactly what he

wanted for the organizations. “Anything that was proposed was adopted by each board. It wasn’t simply the Rebbe saying let’s do it this way. He was the initiator but the board in each of the three situations approved everything”. (Interview of Nachum Gordon, Esq., P.7, L.234-237). The attorney thought it was a stoke of brilliant thinking by the Rebbe “because he managed to perpetuate his organizations in the easiest way possible. He compared the interfamily fights that broke out when other passed away”. “In the Rebbe’s case, not only did everything go simply and smoothly in the way he wanted it to go but it continued to grow with greater speed and his followers were able to take his initiative and increase it by a thousand-fold.” (Interview of Nachum Gordon, Esq., P.7, L.251-254).

The legal documents further assist the Court in the analysis of the internal structure of the Petitioners corporations. The Petitioners had admitted into evidence Petitioner’s Exhibits “7-A”, “7-B” and “7-C”. All of the ***trustees*** of Agudas Chasidei Chabad, the not-for-profit corporation consented and ratified the Restated bylaws of the corporation; consented to the elected officers of the corporation until their successors could be duly elected and qualified: Rabbi Menachem M. Schneerson-President; Rabbi Morduch A. Hodoko Chairman, Vice President and Treasurer; Dr. Nissan Mindel, Vice Chairman of the Board; and and Rabbi Yehuda Krinsky as Secretary. All trustees of the board signed the consent including the Rebbe (Petitioner Exhibit “7-A).

Further, the identical ***members*** consented and ratified the Reinstated bylaws and elected 20 trustees to the Board of Trustees (Petitioner’s Exhibit “7-B”).

The Court finds that by March 31, 1990, Agudas had no other members or trustees other than the individuals listed on Petitioner’s Exhibit “7-A” and “7-B”. Another provision of the bylaws that clearly delineates the Rebbe’s intentions with the corporation is Section 5 that provides that “membership in the corporation is not transferable”.

The decisive document that describes the legal structure of the organizations is the Restated bylaws of Agudas Chasidei Chabad of United States admitted as Petitioner’s Exhibit “7-C”. The bylaws, by their

terms, and as credibly testified to by Rabbi Krinsky, provide for an increase in membership of the corporation and the Board of Trustees in the corporation from 20 to 24 members only and those members were selected by the Rebbe. A list of those members were required to be listed in the corporation's minute book (article 2, section 1). The bylaws provide for the annual meeting of the members to be called by the Board of Trustees to elect trustees and to conduct business.

"**The Board of Trustee shall have the general power to control and manage the affairs and property of the Corporation in accordance with the purposes and limitations set forth in the Certificate of Incorporation**". The number of trustees on the Board of Trustee is 24 (Article 4, Section 1). Further, any action taken by the Board of Trustee shall be by a majority vote and each Trustee has one vote. (Article 4, section 9; Article 2, section 2, respectively). Informal board action constitutes any action by the board or any committee thereof may be taken without a meeting if all the members of the board or committee in writing adopt a resolution authorizing the action (Article 4, section 10). The bylaws also provided for committees of the Board of three or more trustees to act as provided in any resolution with the same authority as the Board. The bylaws explicitly restrict such committee's authority as specified therein (Article 5, section 1 (a-e)).

The officers of the corporation are president, secretary, treasurer and such other officers, including a chairman of the board, vice chairman, one or more vice presidents, within the discretion of the board. Trustees can hold more than one office but not the President and Secretary, those must be different.

In addition, vacancies in any office may be filled by the Board of Trustees. The President is the chief executive officer, shall preside at all meetings of the members and shall in the absence of the chairman of the board, preside at all the meetings of the Board of Trustees (Article 6, section 5).

As important here, the Chairman of the Board shall preside at all meetings of the board, is a ex-officio member of all standing committees and ***shall have such powers and perform such other duties as the Board of Trustees may from time to time prescribe.***

Similarly, Merkos had a restructuring at the behest of the Rebbe, as credibly testified to by Rabbi Krinsky. Petitioner admitted into evidence as Petitioner's Exhibit "5", a certificate of merger of Merkos L'Inyonei Chinuch, Inc. (a not-for-profit corporation "NFP") into Merkos L'Inyonei Chinuch (a religious corporation). Mr. Gordon, Esq., as well as Rabbi Krinsky credibly testified that the Rebbe also wanted the same corporate structure for Merkos as Agudas. Merkos NFP was filed with the Secretary of State on July 3, 1942 and Merkos, the religious corporation was filed on October 21, 1994. The boards of both corporations agreed to the merger at a proper board meeting. Merkos NFP merged into Merkos, the religious corporation, and Merkos, the religious corporation, remained the surviving corporation. As with Agudas, the Merkos NFP had nine members including the Rebbe and had a Board of Directors. When the organization merged, Merkos, the religious corporation, survived but now also has a Board of Trustees. The Court similarly concludes that the identical persons that were on the Board of Directors in the Merkos NFP are the same individuals that are now on the Board of Trustees in Merkos, the surviving corporation. In sum and substance, the Rebbe created two corporations in which he acted as the President and he personally selected the board members and trustees; those members of the organization that were loyal and favored his corporations.

In light of the above, both corporations, by the authority granted by the state of New York through the Religious Corporation Law, have the power and authority to operate in perpetuity. Although the Court does not totally find Rabbi Krinsky's claim that the Rebbe was not dictatorial unworthy of belief, the corporations' restructure show that the process of selection of the members of the Board of Trustees for both corporation was not 'democratic' but legal under the laws of this state. It appears that males only, especially, the Rabbis, and others, are vested with the authority to select their successors and their successor's successor. As the Rebbe's counsel stated, the Rebbe possessed the knowledge of the benefits and burdens of leadership and the structures of the corporations were intentionally "not so democratic". Mr. Gordon's story about his meetings with the Rebbe, the credible testimony of both Rabbi Scharfstein and Rabbi Krinsky,

coupled with a thorough review of the legal documents of both corporations by this Court, revealed that the Rebbe intended to maintain all power and decision-making authority of both properties in the hands of the Board of Trustees and not the congregation or the Gabboim or the Respondent corporations. The Rebbe's decision-making power is supported by the case law above and is not a deviation from the statutory framework established by the Religious Corporation law. As most of the cases above will substantiate, the hierarchical churches and other religious institutions reserve their rights to property ownership and management in their governing authorities such as the archbishop, the bishops, and the like. Parishioners except by expressed written agreements have no rights or decision-making authority with regard to real and personal property of the religious corporation. In this case, the Rebbe availed himself of the identical rights afforded by the NY law that authorizes its members to maintain dominion and control over the real and personal property owned by the two religious corporations by and through their Board of Trustees and no other legal entities.

Lastly, a review of the Petitioner's Exhibit "6" further supports the finding by the Court that all of the required minutes and board actions were proper notwithstanding claims by the Respondents to the contrary. Petitioner's Exhibit "6", in evidence on consent, includes the list of members; certificate of incorporation for Agudas; IRS letter to Agudas of the corporation's §501 (c) (3) tax exemption status; Reinstated bylaws; unanimous consent of the Members to the Reinstated bylaws and new trustees; notices of member meetings, minutes of members meetings and annual minutes of members meetings; annual meetings of trustees; certificate of amendment of certificate of incorporation of Agudas; and proxy for the members and trustees of the respective meetings are all indicia of proper board action and the Court is persuaded that the presence of the corporation's lawyer, Mr. Gordon, assisted in assuring compliance with the state and local law to the benefit of the corporations. The Court further finds the legal documents authentic and did not observe any irregularities in the documents that would call into question their truth and veracity.

Furthermore, the Court takes notice of the fact that legislative action was required to accomplish the Rebbe's goals. Congressional legislation was ultimately passed allowing the two Merkos corporations to merge to create one religious corporation authorized to control and determine all aspects of real and personal property owned by that corporation. Such action further demonstrates governmental approval for the corporate structure and purposes of the religious institutions.

In addition, the Grand Rebbe's profound knowledge of Jewish Law and tireless devotion to the Lubavitch movement not only earned him great 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." as shown by the credible testimony of Rabbi Krinsky.

As some of the minutes will show there was discord in the "community" (minutes of Agudas dated May 11, 1994) and emergency meetings of the Board of Trustees which granted authorization to commence legal action in the Supreme Court against various individuals to protect the members and the corporations' property from harm. It was also clear from these minutes that the Rebbe was ill at that time for psalms were recited in the meetings for his speedy recovery.

It is irrefutable that the history of the buildings, as argued by the Respondent, shows that 770 Eastern Parkway was purchased for the previous Rebbe, his family, for offices for the corporation and for the Synagogue. Further, it is not in controversy that the Synagogue was expanded five times due to the growth of the Lubavitch movement over fifty years from 1940 to date. It is also not in dispute that multiple individuals contributed to the funds to purchase the property; the purchase of the property was discussed in the Lubavitch newsletter; various fund raising campaigns were made for funds from the Lubavitch from Crown Heights, others from the Jewish communities and from other Jewish people from all over the world including those that were not of the Jewish faith; even the Rebbe's mother made a contribution to the building fund; the Rebbe directed funds from the charity funds he controlled to the Congregation Lubavitch Building Fund and Merkos paid $125,000.00 to the Lubavitch Building Fund between 1973 and 1974; even

the Petitioner had a fund raising brochure and its building committee represented that "770 occupies a unique and central place" and it is a "miniature-sanctuary" and the Rebbe asked members of Petitioner corporation, congregants and others to give $770.00 or more for the building campaign and those individuals would have their names inscribed on the "Wall of Anash" (Respondent's Exhibit "BB", "CC", "PP", "QQ", ,"SS", "TT", "UU", "VV", "ZZ", and "AAA"; see also the testimony of Rabbis Krinsky, Katz, Jacobson, Blesofsky, and Lipskier as described in the Respondent's post trial findings of facts.

It is also undisputed that from 1940 to date, the Synagogue has been in 770; the bylaws of Agudas require that there should be a Synagogue Committee that would be responsible for the operation of the Synagogue; the Synagogue services were run by the Gabboim; the Rebbe granted discretion to the Gabboim in the operation of the Synagogue; and the Shul at 770 has a special place in the teaching of the Lubavitch movement. It represents the embodiment of the "Holy Temple in Exile" (Respondent's Exhibit "GG" and "M-1", "R-1", "R-2" and "R-3"). (The Court admits into evidence Respondent's Exhibits "R-1", "R-2" based on Respondent's claims that those exhibits were erroneously excluded on the grounds that the Court finds no prejudice to the Petitioner as more fully discussed below).

It is also incontrovertible that there is special significance of the Synagogue in the theology of Agudas; it should never be closed; the Synagogue contains the "shrine of sort" where the Rebbe's place of prayer is; the Rebbe's teachings that there shall be a "Siyum" at the conclusion of certain portions of study; and it is the personal life mission of Rabbi Gerlitzky as instructed by the Rebbe to continue gatherings in this location to celebrate the finishing of the teaching of the Rambam.

In consideration of the above, the Court now turns to the legal and factual issues that remain: did the Respondents plead and prove the 6th and 7th affirmatives defenses of statutory trust and implied charitable trust, respectively.

Justice Harkavy found in relevant part that "[i]t 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 pertains 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".

Those findings were affirmed by the Appellate Division, Second Department, in the cases on appeal more fully described above. As repeatedly stated here, the rights of the congregation and the Gabboim were preserved for the failure of the parties to name and serve them in the litigation. Nonetheless, Justice

Harkavy determined that there was no "community trust" or constructive trust. After this court read and analyzed each of the Merkos cases and the record by Justice Harkavy, it was clear that the rights of the congregation and the Gabboim, in the interest of fairness, was required to be adjudicated in these cases. The Respondents, during the pendency of these cases, sought leave from the Supreme Court to stay these proceedings which this Court can reasonably presume that the Supreme Court, also concluded from the Order to Show Cause and opposition, that this matter was properly before the Civil Court, and, thus, denied leave for a stay.

During the pendency of this trial, the record will support the fact that as the presiding judge, great latitude was extended to the Respondents to present evidence in admissible form and testimonial evidence to support their claims. In addition, although the gravamen of trust claims in the Supreme Court action have been re-asserted here again in these proceedings, the Respondent now asserts the trust claims as a "statutory trust" (6th affirmative defense) and/or "implied charitable trust" (7th affirmative defense). The theory of recovery appears to have changed from the Supreme Court to the Civil Court.

It is clear to this Court from the above law that in some religious institutions there are expressed canons, bylaws or resolutions that determine the rights to real and personal property of the institution and in others, there is no expressed rules to determine the dispute to personal and real property. Episcopal Diocese of Rochester v. Harnish, *supra*, held that church canons clearly established an express trust in real and personal property in favor of the Diocese and church governing body.

In this case, the Court finds that there are no express provisions in the any of the deeds, bylaws, certificates of incorporations, amended certificates of incorporation, merger documents or any of the corporate documents including the member minutes, resolutions and board action that grant any expressed trust in favor of the Respondents. In addition, all of the evidence, excluding the religious doctrinal documents, including the evidence of the Respondents, namely, Respondents Exhibit "A-Z", "AA-ZZ" and "AAA-EEE", excluding the documents that were not admitted or were marked for identification only, did

not contain one word of any express trust granted by either corporation in favor of the Respondents.

Having determined that, the next query is whether the provision of the law relied on by the Respondents supports a finding of a statutory trust in favor of the Respondents. This Court, likewise, finds that RCL §5, specifically, does not create a statutory trust in favor of the Respondents. A summary of the statute should suffice. Section 5 of the Religious Corporation Law, provides, in relevant part, that: "The ***trustees*** of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation and of the revenues therefrom, and shall administer the same in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto, for the support and maintenance of the corporation, or, providing the members of the corporation at a meeting thereof shall so authorize, of some religious, charitable, benevolent or educational object conducted by said corporation or in connection with it, or with the denomination, if any, with which it is connected; and they shall not use such property or revenues for any other purpose or divert the same from such uses".

As this Court has thoroughly examined the corporate documents of both corporations, the Rebbe intended for the power and the control over the real property and personal property of these religious corporations to rest in the hand of the Boards of Trustees of the corporations (Petitioner's exhibits "5", "6", "7-A","7-B", "7-C", and "8"). The Rebbe narrowed the definition of members to include the members of the Board of Trustees only and each individual was approved by the Rebbe himself. His insistence on restructuring the corporations from not-for-profit corporations to religious corporations, requiring congressional approval, supports this conclusion. His plan was intentional and deliberate, and the Court is confident that his belief was that the religious corporations should determine all matters that involved the buildings owned by the corporations including the Synagogue and no others. The Rebbe acknowledged the authority of the Gabboim to manage the Synagogue. However, contrary to the contentions by the Respondents, his restructuring of the corporations did not demonstrate that he intended the congregation, the

Gabboim or the Synagogue to have any control, whatsoever, of the real and personal property owned by the corporations.

His intentions were implemented by the Board of Trustees, as shown in the minutes of their meetings, committees meetings and meetings of the trustees. Those corporate minutes and records support a similar finding by this Court as the Court of Appeals found in Episcopal Diocese of Rochester v. Harnish, *supra,* "the enactment of the Dennis Canons was apparently an attempt by the Episcopal Church to do exactly what this language suggested—to "ensure ... that the faction loyal to the hierarchical church [would] retain the church property." Likewise, the Rebbe's legal and structural changes to both corporations show that the faction, close to and loyal to the Rebbe and the corporations, and selected by the Rebbe himself, remain loyal to his trustees that would assure that the property acquired by the Lubavitch movement be controlled by the religious corporations. No such power or authority was every delegated to the congregation or the Gabboim; nor was any decision-making power ever granted to the Gabboim or the congregation over the property owned by the Petitioners corporations.

It is the opinion of this Court that the facts in this case are analogous to those in the Court of Appeals case of Blaudziunas v. Egan, 18 N.Y.3d 275, 938 N.Y.S.2d 496, 961 N.E.2d 1107 (2011) that rejected a similar argument as proffered here by the Respondents. In essence, in *Egan*, as in the case at bar, the ***parishioners were members of the ecclesiastical body, not members of the corporation, and the corporation's by-laws granted the trustees the power to control and administer the property of the church corporation.***

Furthermore, as also provided above, Citizens for St. Patrick's v. Saint Patrick's Church of West Troy, 117 A.D.3d 1213, 985 N.Y.S.2d 743 (3 Dept. 2014), is also directly on point with this case. There, former parishioners of the Roman Catholic church, as members of the congregation or "ecclesiastical body" of the church, were deemed *not members of the religious corporation with standing to challenge sale of*

church building following the church's consolidation with other parishes. As stated above, the High Court held that the Supreme Court properly dismissed the complaint because plaintiffs lack standing to challenge the sale of the property. Plaintiffs may have been members of the congregation or "ecclesiastical body" of St. Patrick's, but that did not make them members of the religious corporation (Blaudziunas v Egan, 18 NY3d 275, 282 [2011]). "Member" is defined for religious corporation purposes as "one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws" (*see* Religious Corporations Law § 2-b [1]). Religious Corporations Law § 5 "vests the custody and control of a religious corporation's real property in the board of trustees" (*Blaudziunas v Egan*, 18 NY3d at 281). Based on the grounds that the Plaintiffs are not members of the religious corporation, they lack standing to challenge decisions concerning the transfer of the corporation's property (*see id.* at 282).

Like the bylaws and certificate of incorporation here, the Religious Corporations Law § 5 also "vests the custody and control of a religious corporation's real property in the board of trustees", not the Respondents including the Gabboim or the congregants of the Synagogue. The legal documents are abundantly clear as to the rights of the religious corporation and the rights of the congregation and the Gabboim.

The Court does not believe that the Gabboim or the congregants of the Synagogue would in any manner totally disregard or ignore the clear intentions of the Grand Rebbe. Although the Rebbe remains the President of both corporations, and remains the spiritual leader of the Lubavitch movement, the Rebbe did not intend for the congregants or the Gabboim to have any control whatsoever over the property owned by the corporations. All of the parties should be reminded that the property, 734-788 Eastern Parkway, was a gift to the Rebbe for his great leadership as the Lubavitcher Rebbe and he, in turn, deeded the property to Merkos to expand the Shul; it was not supposed to be owned by any individual or entity other than the property owners, the religious corporation, Merkos. The Rebbe also made it clear in his will that his acquired property would belong to the corporation and no one else.

It should also be noted here that the Petitioners have never stated in any manner that the property would not be used as a Synagogue or in any manner suggested that the Synagogue would not be protected as provided in the certificate of incorporation and the Religious Corporation law. It is the right of the property owners, as the Rebbe so clearly directed, to use and occupy the property as they deem fit as long as it is in conformity with the certificate of incorporation and laws.

As to the imposition of a charitable trust, the Court finds that there are no facts or legal grounds to support this claim either. The Respondents argue that the findings of the Second Circuit Court, in the *Gourary* case, are analogous to these proceedings. The elements of a charitable trust, as described in the Petitioner's post trial brief, are just not applicable here. The issues in the *Gourary* case involved personal property not real property. Many of the books in controversy were historically significant to the Holocaust in Eastern Europe, explicitly Poland; those relics were for the benefit of all Jewish people, not just for the benefit of the *Gourary* family. Moreover, the previous Rebbe, the owner of the books, had given the books to Agudas and they were supposed to be housed in the Library described above in the Court's "view" of the property.

In this case, the Respondents have not presented any scintilla of evidence to prove any of the elements shown to constitute a charitable trust. The Rebbe's plan for the corporations show the exact opposite of the claims made by the Respondents. All of the aforementioned evidence admitted by the Petitioners show that the Rebbe did not intend to allow the Gabboim or congregants of the Synagogue any rights whatsoever over the property owned by Agudas or Merkos. Thus, the Court finds that there is no implied trust against 770 Eastern Parkway owned by Agudas and no implied trust against 302-304 Kingston Avenue and 784-788 Eastern Parkway owned by Merkos based on the lack of evidence.

As this Court stated on the record, this case has other significance, separate and apart from the dispute in the Lubavitch community. It could have other far-reaching consequences for the religious

community. No member of a congregation should not be able to assert ownership rights to the religious corporation's property, particularly based on claims that the congregation made financial contributions to the purchase, expansion and development of that Church or Synagogue, for that matter in addition to the claims of its special use by the Rebbe for religious and educational uses. The significance of a historical religious site like 770 for the Lubavitch community, like any other place of worship, such as St. Paul's Cathedral, just to name only one, carry heavy emotional and spiritual beliefs of its worshippers. However, those financial and religious contributions, small, medium or large, should not create equal, greater rights or superior rights in the giver than the deed owners of the property; and certainly, worshippers should not be allowed to encumber the religious corporations' property unless expressed in writing in legal documents as discussed above.

The Respondents argue that the Rebbe taught its congregants that it was their obligation to give $770.00 to the expansion of the Synagogue, and they detrimentally relied on his teachings. This argument also is without merit and it is the opinion of this Court should not adopted or accepted by the Court. Their gifts remain in the form of the stone and mortar that now constitute the expanded Synagogue and headquarters of the Lubavitich Hasids. As all of the witnesses stated, there was no particular tithe or offering required at 770 and the $770.00 gift that was given, although, relatively significant, should not create property rights in the congregants or Gabbooim.

There are a string of institutions as shown above that reserve rights and powers to the congregants and those that reserve rights and power to the hierarchy of the religious organization- ie., the Diocese and Archdiocese over personal and real property of the religious institution. As shown from the testimony of Petitioners and Respondents witnesses, the Synagogue did not require tithes and offering as a condition to prayer, study or worship in the main Shul; there was no written or oral mandates presented by either party from the Rebbe or the Gabboim that required financial contributions from any of the congregants. The Rebbe did make a special request of the Lubavitcher Synagogue and Jewish people from all over the world

and others to make a contribution of $770.00 to the expansion of the Synagogue. The Rebbe, through Merkos, likewise made significant contributions to the Synagogue as acknowledged by the Petitioners and Respondents alike. The titles and offerings in any places of worship are based on many factors, but most significant, each congregants commitment to the perpetuation of their faith, beliefs and morals has no boundary for some. Some feel the absolute moral and ethical obligation to support the movement or ministry, while others simply do not possess this pious approach to worship or to giving.

As this Court attempted to articulate during trial, to impose a trust on these religious corporations under the facts and circumstances in these cases could severely impede the ability of Petitioner's corporations to exercise dominion and control over its own properties. Such a ruling would be tantamount to the Respondents having complete dominion and control over property owned by such religious corporations. Such precedent could literally open the floodgates for each and every congregant of every denomination in this state excluding those that have expressed, in writings, to the contrary, to assert the identical claims. This Court will not set such a dangerous precedent and believe it would violate public policy.

For these reasons, the Court finds that the Respondents have not established any facts or grounds for the imposition of an implied charitable trust or statutory trust.

As Justice Harkavy so aptly stated "[a]s 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]). *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)", including the eviction of the Respondents, whether the Respondents are congregants of the Petitioners or congregants of the Respondents. Respondents have not presented any authority whatsoever that the Petitioner cannot remove its own congregants or the Respondents congregants from possession. The above statutes grant authority to the Board of Trustees, not the congregants, to all decisions regarding the use and occupation of their properties and the trustee granted

authorization at a properly held meeting of the Board of Trustees to remove Respondents from possession. Contrary to the arguments by the Respondents, the Court is precluded from looking into the religious dispute between the Messianists and the Petitioners over their theological differences over the Rebbe. The Court believes that the nature of the religious dispute required review here but have shown that this determination has been based on the application of neutral principles of law including both documentary and testimonial evidence presented by both parties.

Rebbe Menchem Mendel Schneerson determined the power and authority granted to the owners of these properties, not this Court. His intentions and only his intentions were made clear by granting full authority to the owners, through Boards of Trustees, not the congregants or the Gabboim, over the religious corporation's real property and personal property. This Court has the legal obligation to enforce the bylaws, religious corporation law and subsequent amendments to their contents. Just as the congregants had no legal rights to challenge the decision of the Board of Trustees to demolish a church, the congregation and the Gabboim have no legal rights to continue in possession after the Board of Trustees granted authorization to commence these legal proceedings to recover possession of the subject premises by proper board action.

Lastly, the decision of Congregation Jeshuat Israel v. Congregation Shearith Israel, presented by the Respondents, is not applicable to this case. The Religious Corporation Law and the bylaws of the Petitioner Corporation preclude the imposition of an implied trust or charitable trust, and thus, its claims of application are without merit.

CONCLUSION

For all the reasons set forth above, the Petitioners are entitled to entry of a judgment of possession against the Respondents stated in the pleadings, including Rabbi Losh, without inquest for the reasons stated above, with the warrant of eviction to issue forthwith and the execution stayed six months.

The Petitioner shall, upon entry of the decision and order by the Clerk of the Court, serve a copy of the decision and order and final judgment of possession on the Respondents with notice of entry within 30 days thereof and file proof of service with the Clerk of the Court.

A courtesy copy of this decision and order shall be mailed by the Court to both parties including by email notice, with acknowledgement request, due to the COVID-19 global pandemic.

The parties may retrieve their respective evidence from the Clerk of the Court on proper presentation of identification and shall sign an acknowledgment that such evidence was returned.

This constitutes the Decision and Order of this court.

Dated: April 25, 2020

Hon. Harriet L. Thompson
Pursuant to Order No: