STATE OF NEW YORK
SUPREME COURT, COUNTY OF WESTCHESTER

In the Matter of the Application of

CONCORDIA COLLEGE,

Petitioner,

For Leave to Sell Real Property, pursuant to
Sections 510 and 511 of the Not-for-Profit Corporation Law

Index No.: 64228/2021

Hon. Lawrence H. Ecker

MEMORANDUM OF LAW IN SUPPORT OF CONCORDIA FACULTY AND STAFF OBJECTIONS TO PETITIONER'S MOTION BY ORDER TO SHOW CAUSE FOR APPROVAL OF THE SALE OF ITS COLLEGE CAMPUS

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Former full-time Concordia College faculty members William D. Salva, Joan Adams, Kathleen Fitzgerald, Nathalie Virgintino, Barry McNamara, Laurie DuBos, Seongshin Kim, Eunyoung Jung, Molinda Kearns, Deborah Carter, Jennifer Pinto, Joanna Maulbeck, Jerry Carrino, Rebecca Berry, Whendi Cook-Broderick, Robin Das, Peter Hillman, Christopher Millet, Michael Lisbin, Gregory Torsiello, Johanna Perry, Allyn Kulk, and Alison Matika, and former full-time Concordia College staff members Jason Francis, George Groth, Janet Wechsler and Nancy Block (the "Objecting Faculty and Staff"), submit this memorandum of law in support of their objections to Petitioner's motion by order to show cause for approval of the sale of its college campus to Iona College pursuant to the N.Y. Not-for-Profit Corp. Law § 510 and 511 (McKinney).

Preliminary Statement

Most (but not all) of the aforementioned faculty and staff members identified herein received notice of the Order to Show Cause because Petitioner listed them on Exhibit 2 to the Proposed Order to Show Cause to the Petition as former full-time employees who have "not signed separation agreements" and are therefore presumed to be owed money they will receive from the sales proceeds, thereby making them creditors. Because each faculty and staff member identified herein is owed money which could be paid from the proceeds of the sale, each is an "interested person" within the meaning of Section 511(b) of the NPCL for purposes of objecting to a sale which, if the consideration is inadequate, which they claim, and/or the proceeds are not being used to promote the corporation's purpose, which they also claim, could conceivably extinguish their right to recover at all.

ARGUMENT

Petitioner Concordia College, a not-for-profit corporation incorporated under §501(c) of the Not-for-Profit Corporation Law ("NPCL"), seeks an order, pursuant to NPCL N.Y. Not-for-Profit Corp. Law § 510, to approve the $30 million sale of its campus to Iona College. Once the sale is approved, Petitioner, which ceased offering instruction as of August 26, 2021, plans to dissolve. Because not-for-profit corporations by their nature, lack the usual oversight otherwise provided by shareholders, and because of the charitable corporate purpose that must be served when not-for-profit status is conferred, the legislature enacted NPCL N.Y. Not-for-Profit Corp. Law § 511(d) (McKinney), empowering the courts to pass on the propriety of a sale of a not-for-profit corporation's assets. *See Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 186 Misc. 2d 126, 151, 715 N.Y.S.2d 575 (Sup. Ct. 1999) (disapproving sale).

Pursuant to NPCL N.Y. Not-for-Profit Corp. Law § 511(b), copies of the petition and supporting papers were served on the New York State Attorney General, a statutory party, which the Petition states has no objection to the sale. The Attorney General, however, was notified that Concordia's faculty and staff, who were terminated when Petitioner decided to cease operating, were not being paid the severance they were owed and had planned to object to the sale. In accordance with NPCL § 511(b), the Attorney General then directed Petitioner to serve notice of the sale to the faculty and staff. NPCL § 511(b) permits interested persons to appear at the hearing and "show cause why the application should not be granted."

I. The Relevant Legal Standard

The Not-for-Profit Law sets forth two issues to be considered by the court: (1) The fairness and reasonableness of the terms of the transaction and (2) whether the sale would promote the purposes for which the corporation was formed. *Manhattan Eye, Ear & Throat*

Hosp., 186 Misc. 2d 126 *see also* *Application of Church of St. Francis De Sales of New York City*, 110 Misc. 2d 511, 512, 442 N.Y.S.2d 741 (Sup. Ct. 1981), citing NCPL § 511 (d), which provides in pertinent part that the court must be satisfied that "the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation . . . will be promoted." The burden is on Petitioner to satisfy both prongs of the test. As shown below, Petitioner cannot on the present record sustain that burden.

II. Petitioner Has Not Proven That The Consideration for the Sale is Fair and Reasonable to the Corporation

The first prong of N.Y. Not-for-Profit Corp. Law § 511 requires that "the consideration and terms of the transaction are fair and reasonable to the corporation." Here, because the transaction involves the sale of Petitioner's 28.61 acre campus, the Court must first determine the "fair market value" of the real estate being sold and then determine whether the proposed $30 million contract price is within a reasonable range of that value. *See, e.g., In the Matter of Congregation B'Nai Abraham of East Flatbush, Inc. v. Rosoff*, 73 A.D.2d 646 (2d Dep't 1979) (once factual issue raised by conflicting appraisals is resolved, court must then determine "whether the proposed sale price" is "adequate"); *Application of Church of St. Francis De Sales of New York City*, 110 Misc.2d 511, 515 (Sup. Ct. N.Y. Cty. 1981) (upon finding the "fair market value of the premises," court determined that that contract price was "within the range of fair market value").

A. Petitioner's Three Appraisals Conflict with Each Other in Multiple Material Ways

Here, the property at issue was never exposed to prospective buyers for any length of time to market the property. Therefore, the only evidence of "fair market value" Petitioner offers comes from appraisers. Specifically, Petitioner claims the $30,041,710 purchase price in its contract dated May 6, 2021 represents "fair market value" based on the following three appraisals for the property (see Petition ¶¶ 32-42): (1) an appraisal from Valbridge Property Advisors ("Valbridge") dated as of September 30, 2020 in the amount of $39,100,000; (2) an appraisal from Cushman & Wakefield ("C&W") dated as of November 4, 2020, that Iona obtained, in the amount of $30,000,000, and (3) an appraisal from Goodman-Marks Associates, Inc. ("Goodman"), dated as of August 11, 2021, obtained by Petitioner at the suggestion of the New York Attorney General, in the amount of $30,000,000.

However, as explained in greater detail below, because these three appraisals conflict with each other in a multiple of material ways, a determination of fair market value cannot be made on this record without an evidentiary hearing. *See Congregation B'Nai Abraham of East Flatbush v. Rosoff,* 73 A.D.2d 646 (2d Dep't 1979). In *Congregation B'Nai Abraham of East Flatbush Inc.,*, 73 A.D.2d 646, there were two appraisals of the property being sold and neither were considered to properly deal with the question of valuation and current market value. As the Second Department explained, "a factual issue has been created by the conflicting appraisals as to the current market value of the synagogue property" and [s]ince neither appraisal deals properly with the valuation question and both are in conflict as to the actual worth of the property, an evidentiary hearing is required to resolve the issue." *Id.*

Here there is a wide difference in value between $39 million on one hand, and $30 million on the other, but the differences go beyond that. The three appraisals each estimated value based on the gross building area ("GBA") of the 27 buildings on the campus multiplied by a price per square foot that each obtained based on what it regarded as comparable sales. However, each appraisal used substantially different square footages. Valbridge used 348,721 square feet (Petition ¶ 39); C&W used 279,929 square feet (Petition ¶ 39); and Goodman used

261,615 square feet. *See* Petition Ex. 18, page 2 ("[T]he subject property is currently improved with a college campus which contains 261,615 ± square feet of gross building area (GBA)"). These figures, which obviously differ wildly, cannot be reconciled without an evidentiary hearing.

Petitioner concedes the square footage amounts reported by Valbridge and C&W are substantially different from each other, but does not even mention the even lower amount that Goodman used. Nor does Petitioner attempt to explain these differences away, except to say that the square footage that C&W used was "provided by Petitioner" while seemingly giving short shrift to what Valbridge did, saying it was "based on its own methodology." Petition ¶ 39. In fact, depending on the evidence at the hearing, it may turn out that Valbridge's square footage is the most reliable of the three. Thus Valbridge states that "[t]he appraisers performed measurements of the improvements and compared them to the improvement square footages reported by PropertyShark.com and GeoData.com, as well as the Westchester County GIS mapping software [and] [t]he square footages reported by the Westchester County GIS website were closest in line with our measurements and this source was relied upon for the square footage of the buildings and the finished basement spaces which included classrooms and offices. Petition Ex. 16, p. 2. And while the Petition nowhere discusses the even lower square footage for the improvements that Goodman used, Goodman's report came with the following disclaimer: "We were provided with a building inventory list including the GBA for each improvement from property management at the time of inspection, which we have relied upon as being accurate. Any information to the contrary may affect our valuation herein." Petition Ex. 18, p. 2, n. 1.

These disclaimers are, of course, no substitute for actual testimony at an evidentiary hearing where those objecting to the proposed transaction can cross examine Petitioner and the appraisers to determine which square footage is the one that should be used for measuring the property's fair market value.

Determining which square footage to use is important in measuring the property's fair market value because each appraiser came up with a different price per square foot on a different set of comparable sales. Thus, Valbridge came up with $120 per square foot; C&W with $100 per square foot and Goodman with $115 per square foot. But if the square footage that Valbridge says it actually measured and confirmed, *i.e.*, 348,721, is the one that the Court determines should be used, and the Court concludes that the price per square foot that Goodman came up with of $115 is based on the best set of comparable sales, which Petitioner suggests is the case, see Petition ¶ 41 ("One notable aspect of the Goodman Report is that it took into consideration seven other regional education campus sales occurring between 2016 and 2021"), then the "fair market value" would be <u>$40,102,914</u> (348,721SF x $115 = $40,102,914.

There is also an internal conflict in Valbridge's own numbers. Valbridge had a price per square foot of $120 and came up a value of only $39,010,000 based on its having used not 348,721 square feet, *but 329,894 square feet*. In fact, Valbridge used both square footages in its report (compare Petition Ex. 16, at pp. ii and 15, which breaks down building by building how the 348,721 figure was arrived at, with p. 29, where the 329,894 figure is used) and neither Petitioner nor Valbridge offer any explanation for the discrepancy, which again underscores the need for an evidentiary hearing on fair market value in order to determine which are the correct numbers to use for purposes of making that calculation.

B. None of the Appraisals Examined Land Sales in Bronxville

However, these conflicts in square footage and price per square foot are not the only problems with using these appraisals as representative of fair market value. Of even greater potential significance is that none of these three appraisals take into account the value of land in the Village of Bronxville, where the campus is located. As C&W points out, the Village of Bronxville was ranked "as the 13th richest place in the US by Bloomberg." See Petition Ex. 17 at 29. Valbridge look at land sales in Northford Connecticut, Ridgefield Connecticut, Cheshire Connecticut, Peconic, New York, and South Salem, New York, and estimated the value of the Petitioner's Bronxville 28-acre campus at $ 3 per square foot which, at 43,560 square foot to an acre, comes to $130,680 per acre (Petition Ex. 16 at pp. 62-78), or about $3,500,000 in total.

For its part, having reporting that Bronxville was the 13th richest place in the entire country, C&W looked at land sales in various parts of Westchester County, *but not Bronxville*, and concluded that the value of Petitioner's Bronxville campus was $400,210 per acre, for a total value of only $11,450,000. *See* Petition Exhibit 17 at p.64. And Goodman did not look at the value of the land at all.

However, the value of land in Bronxville – the 13th richest place in the nation – is not insignificant and, we submit, in accordance with Section 511 of the NPCL must be taken into account in determining the fair market value of Petitioner's 28-acre Bronxville campus before any determination can be made as to whether Petitioner's proposed purchase price of $30 million is adequate or within a reasonable range of fair market value. Based on publicly available land sales records from Bronxville, it appears that the value of land per acre in Bronxville today may be closer to $3 million per acre. In 2015, a .39 acre vacant parcel at 38 White Plains Road, which is 0.9 miles from Petitioner's 13.83 acre parcel at 187 White Plains Road, and a similar distance from Petitioner's 9.08 acre parcel at 182 White Plains Road, sold for $1.15 million, which today would put a 1-acre parcel closer to $3 million. A copy of that sales record is attached as Exhibit 34 to the accompanying affirmation of Robert B. Bernstein, dated October 20, 2021 (the "Bernstein Affirmation"). That value is similar to the reported sale in 2009 – *eleven years ago* – of a 1-acre vacant parcel at 18 Elm Rock Road, which is 0.8 miles from Petitioner's 13.83 acre parcel at 187 White Plains Road, which sold for $2.4 million. A copy of that sales record is attached as Exhibit 35 to the Bernstein Affirmation.

And more recently, in December 2020, a 50-year-old "tear-down" home on 0.78 acres at 14 Village Lane, a little more than mile away, sold for $2.375 million, which would put one acre at just over $3.045 million. A copy of that sales report is attached as Exhibit 36 to the Bernstein Affirmation. At the evidentiary hearing, we would seek to establish that fair market value cannot be determined without taking the actual price of land in Bronxville into account. At $3 million an acre, the value of Petitioner's 28-acre Bronxville campus would be $84 million.

That $84 million estimate is nearly three times Petitioner's proposed $30 million contract price. But as high as that number may be, it is not necessarily an anomaly. The fair market value reported on the tax assessment rolls in the Town of Eastchester and the Village of Bronxville for Petitioner's campus is much higher even than that, which is further evidence that the appraisals Petitioner submitted do not, in fact, represent fair market value. Specifically, the 13.85 acre parcel having a Tax Identification Number of 6.1/1/1 and an address at 187 White Plains Road is assigned a fair market value by Eastchester of $180,180,555 and $144,150,000 by Bronxville; the 9.08 acre parcel having a Tax Identification Number of 7.J/1/1 having an address at 182 White Plains Road is assigned a fair market value by Eastchester of $41,787,037 and $29,076,000 by Bronxville, and the 1.37 acre parcel having a Tax Identification Number of

6.1/1.A and an address at 193 White Plains Road is assigned a fair market value by Eastchester of $5,805,555, and by Bronxville of $6,795,000 which, all together, compromises 24.3 acres of the 28-acre parcel, and is valued on Eastchester's tax rolls at a total of $227,773,147, and on Bronxville's tax rolls at a total of $180,021,000. These estimates of fair market value by the assessors of the Town of Eastchester and the Village of Bronxville, respectively, are of course, no substitute for a proper appraisal, but they do suggest that the three appraisals that Petitioner is relying upon may have grossly understated the actual fair market value of the Bronxville campus which, again, can only be determined at an evidentiary hearing.

In sum, for the foregoing reasons, we respectfully submit that Petitioner has not satisfied the first prong of Section 511 of the NPCL which requires as a threshold matter a determination of the property's fair market value, which we contend cannot be determined based on the evidence submitted without an evidentiary hearing, and only then can be compared with the contract price to determine whether it is adequate or within a reasonable range of fair market value.

III. The Sale Will Not Promote the Purposes of the Corporation

Under the second prong of Section 511, which requires that "the purposes of the corporation . . . will be promoted," Concordia's petition fares no better. *See* *Agudist Council of Greater New York, v. Imperial Sales Co.*, 158 A.D.2d 683 (2d Dep't 1990) (disapproving sale where conveyance of the property and resulting closure of senior citizen center would be "highly detrimental" to petitioner's corporate purpose to provide services to senior citizens); *Manhattan Eye, Ear & Throat Hosp.*, 186 Misc. 2d 126 (disapproving sale where conveyance of real estate from nonprofit hospital to a for-profit hospital and a real estate developer would be contrary to not-for-profit corporation's long-established mission to serve as an acute care specialty, teaching and research hospital). As the court explained in MEETH, "the issue under section 511 is not the buyer's planned use of the real estate, however worthy that use may be, but whether seller's use of the sale proceeds will promote its own corporate purposes." 186 Misc. 2d at 149. In applying the second prong, the Court "should be guided primarily by whether those ends would be realized in light of conditions prevailing at the time the issue is presented to the court." *See* *Manhattan Theatre Club, Inc. v. Bohemian Benev. & Literary Ass'n of City of New York*, 120 Misc. 2d 1094, 467 N.Y.S.2d 143 (Sup. Ct. 1983), *aff'd,* 102 A.D.2d 788, 478 N.Y.S.2d 274 (1984), *aff'd,* 64 N.Y.2d 1069, 479 N.E.2d 222 (1985) (rejecting proposed sale of not-for-profit fraternal organization's headquarters where, at the time the matter was before the court, most member of the organization were opposed to the sale and the organization had no plan to reopen at another location).

Here, Petitioner's corporate purpose in its charter is "to operate postsecondary degree programs registered by the State Education Department and to confer degrees approved and authorized by the Board of Regents of the University of the State of New York in connection with such programs, including the degrees of Associate of Arts (A.A.), Associates in Science (A.S.), Associate in Occupational Science (A.O.S.), Associate in Applied Science (A.A.S.), Bachelor of Arts (B.A.), Bachelor of Science (B.S.), Bachelor of Professional Studies (B.P.S), Bachelor of Music (Mus. B.), Master of Science of Education (M.S.E.D.) and Master of Science (M.S.)." Petition, Ex. 2, paragraph 2. In addition, Concordia's mission, as set forth in its promotional literature, is primarily to serve first-generation college students from poor and lower middle-class working families from the New York metropolitan area who are most in need of financial assistance to attend college. Concordia's enrolled student population at the time of its closing was majority non-white with 24.4% Hispanic or Latino and 18.4% Black or African American. https://www.collegedata.com/college-search/concordia-college-new-york

Thus, in its 2020-2021 promotional brochure to prospective students, Petitioner states under the heading, "About Concordia College," that "[o]ver 93% of Concordia students receive financial aid and about a third are first-generation college students" and "[t]he 2020 US News Best Colleges rankings named Concordia a Top Performer on Social Mobility for its success in graduating economically disadvantaged students." A copy of that statement from Petitioner is attached to the Bernstein Affirmation as Exhibit 33.

As explained below, the proposed transaction will not serve Petitioner's corporate purpose at this time because, as structured, 85% of the proceeds of sale are being used to repay the lending arm of Petitioner's owner, while none is being used to help the several hundred Concordia students who until Petitioner ceased offering instruction were working toward their two- and four-year degrees but who have thus far not enrolled anywhere and are at risk of dropping out and defaulting on their student loans; and none is being used to pay the faculty and staff what they are owed based on the unexpired terms of each faculty member's respective contracts and the respective lengths of service of both faculty and staff. This failure to pay what's owed to those who were responsible for teaching the students who were seeking two- and four-year degrees is a perversion of Petitioner's corporate purpose.

Petitioner argues that because of rising costs, declining enrollments and the global COVID-19 pandemic, its corporate purpose was best promoted by ceasing to offer instruction, firing faculty and staff, getting federal and state regulators to approve its having entered into teach-out arrangement with neighboring schools so that its students can enroll elsewhere, and now, having already done all of that, by selling its campus to Iona College in order to pay off remaining debts, filing a Cy Pres petition with respect to the disposition of Petitioner's restricted endowment funds which as of September 8, 2021, totaled $14,747,944, and then dissolving. *See* Petition ¶¶ 72-75 (arguing that proposed sale of the campus "promotes the educational purposes of Petitioner by allowing current students to complete their education without enduring significant hardships"). Having already decided to do each of those things, Petitioner is now asking the court with this application to rubber stamp what is effectively a *fait accompli*. But satisfying the second prong of Section 511(b) of the NPCL is not that simple. See MEETH, 186 Misc.2d at 141 (rejecting "plan to effectuate closure, receive regulatory approval for its plan, enter into a contract for sale, and then to seek court approval under section 511 [which] would have had the effect of presenting the court with what could have been essentially a *fait accompli*").

First, we believe there is ample evidence on this record to show that the transaction will not "promote" the corporation's purpose because Petitioner did not have to close at all and decided instead to close the school and sell the campus primarily to use its corporate assets for a different purpose. While Petitioner argues that it was suffering from rising costs and declining enrollments, its auditor showed that Petitioner was able to rising costs, declining enrollments and balance its budget with a $7.5 million loan in November 2019 from the lending arm of the Lutheran Church-Missouri Synod, which owns and operates the college, and as far as future deficits were concerned, the auditor included in its report for the fiscal year ending June 30, 2019 a representation that, as of December 10, 2019, Concordia had "$7.43 million in available and unused approved credit," that its lender LCEF had "stated its intention, consistent with its mission, to continue to support the College should the need arise," that LCEF has "$1.89 billion in total assets and $236 million in net assets as of June 30, 2019," and "[i]ts mission is to support

[LCMS] by ensuring that financial resources and related services are available now and in the future") (see FY 2019 Audited Financial Statement at 14, a copy of which is attached to the Bernstein Affirmation as Exhibit 31. Nor does COVID-19 appear to have financially devastating as Petitioner suggests. Petitioner's auditor reports that Petitioner received $2,767,000 on April 24, 2020 under the Paycheck Protection Program (see Petition Exhibit 19 n. 10). In addition, on March 1, 2021, Petitioner received an additional line of credit of $2,950,000, and on March 23, 2021, Petitioner received an additional award of $2,487,041 from the Higher Education Emergency Relief Fund under the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act") (these amounts are all summarized in note 2 to Petitioner's Audited Financial Statement for the Fiscal Year ending June 30, 2020, attached as Petition Ex. 19). And if these millions of dollars in additional cash liquidity during the past two years was not enough to keep Petitioner from balancing its budget, it is worth noting that, unlike other small colleges that may be struggling financially in the current market, Petitioner's 28-acre campus in Bronxville was worth tens of millions of dollars, and with only a $25 million mortgage, was clearly underleveraged. Thus, if Petitioner was running a deficit, because it was sitting on arguably the most expensive property in the 13th richest place in the United States, Petitioner could have bridged any gap needed to keep the school open by either borrowing against one or more of its real estate parcels, or selling off one or more parcels that are not part of the main campus, which is what Petitioner is actually doing right now. Perhaps most telling then, in terms of why Petitioner made the decision to close, is the absence from Petitioner's financial statement for the fiscal year ending June 30, 2020 of the representations from the prior year's financial statement that LCMS and its lending arm had the financial resources and willingness to continue funding the school.

In short, the foregoing evidence suggests that the reason Petitioner ceased offering instruction and chose to sell its campus to Iona was not declining enrollments or COVID-19, but rather the decision of LCMS to end financial support. Viewed from that perspective, the sale of the campus for $30,041,710 merely facilitates the repayment of a $25,426,759 loan to LCEF, representing about 85% of the proceeds of sale, so that instead of investing more money in Concordia and its mission of supporting first-generation and economically disadvantaged majority non-white students, LCMS and its lending arm can use for another purpose the money that for decades was supporting Petitioner and its mission. Selling real estate for that purpose does not necessarily promote the corporate purpose under Section 511 of the NPCL. See MEETH, 186 Misc.2d at 155-156 ("while it may be appropriate, in certain cases to solve financial difficulties by eliminating the organization's mission by selling its assets and then undertaking a new mission," that approach should be the "carefully chosen option of last resort" because otherwise a not-for-profit corporation would reprioritize its mission rather than take "all reasonable efforts to preserve" it).

Here, it is not clear on this record that Petitioner's decision to cease instruction and sell its campus to Iona was necessary to promote Petitioner's corporate purpose. To the contrary, there is substantial evidence to show these actions were intended not to promote Petitioner's corporate purpose, but to destroy it. Accordingly, that issue too needs to be addressed in an evidentiary hearing.[1]

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[1] This is the third time in three years that LCMS has decided to close one of its Concordia colleges because it no longer supported the school's corporate purpose. In 2018, LCMS closed Concordia College in Selma, Alabama, a small historically Black college or HBCU, and the only such school sponsored by the Lutheran Church, citing declining enrollment and an insufficient number of its students joining the Lutheran ministry. https://www.insidehighered.com/news/2018/02/23/concordia-alabama-historically-black-college-announces-it-will-shut-down-operations . This was followed by the closing in 2020 of Concordia University Portland ("CUP"), citing declining enrollment and rising costs, but only after LCMS and its lending arm withdrew financial support in response to the school's having allowed a gay rights group to meet on campus. *See* https://www.insidehighered.com/news/2020/02/14/warning-signs-concordia-university-portlands-closure-which-

Next, even if the school's closing was required, and we respectfully submit that it was not, the sale of the campus, as proposed, and most importantly, the use of the proceeds from that sale, are not being used to promote Petitioner's corporate purpose. Petitioner argues that the sale promotes its corporate purpose because it allows for its students to have a smooth transition from Concordia to Iona College. *See* Petition, ¶ 46 ("the convenience and ease of continuity for Petitioner's students provided by Iona's close proximity (almost walking distance) and similar degree and program offerings cannot be over-stated"). However, it is Petitioner's *argument* which is overstated.

According to the Petition, even though "Petitioner and Iona issued joint communications, held town halls, and provided information to students and parents regarding admissions, tuition and information for students to transfer throughout the 2021 spring semester," only 92 of Concordia's 433 students have registered for classes at Iona this fall, 63 have enrolled elsewhere and the overwhelming majority of them – possibly as many as 278 – have thus far enrolled nowhere and are at risk of dropping out, for which Petitioner was required by the United States Department of Education on August 18, 2021 to post a letter of credit in the amount of $616,263 as security to protect against "potential, future student loan discharge liabilities." *See* Petition, ¶¶ 15, 24, 55.[2] It bears repeating that these students Petitioner is leaving behind are majority non-

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now-stretches-across ("report raised questions about whether the university's conservative parent organization tied financial help to changing a campus resource center for gay, lesbian, trans, queer and nonbinary students"), and https://www.oregonlive.com/education/2020/02/did-concordia-get-shut-down-because-it-was-too-progressive-on-gay-rights.html. The displaced students at CUP then filed a class-action lawsuit against CUP in an Oregon state court demanding reimbursement of tuition and expenses, alleging that the school "misled hundreds of students about its financial condition and collected tuition in 2020 that students would not have paid had the students known the truth about Concordia University's looming closure." See *Spaulding, et al v. Concordia University*, First Amended Complaint, Case No. 20CV07190 (Circuit Court for the State of Oregon for Multinomah County), filed January 13, 2021, paragraph 1. That case is scheduled for trial in March 2022. A copy of that complaint is attached as Exhibit 39 to the Bernstein Affirmation.

[2] While the vast majority of Concordia's students have not enrolled in Iona, there appears to be a discrepancy as to the number who actually have. In paragraph 24 of the Petition, Concordia states that while 163 of its 433 students applied to Iona, "as of the date hereof," i.e., October 4, 2021, only "92 of them registered for class there in Fall of

white and economically disadvantaged from the poorest neighborhoods in the New York metropolitan area. This sale does not promote their interests at all and it should, because, as part of its mission to serve that population, Petitioner without a doubt took advantage of every federal and state educational grant and loan program there is to get them to enroll. See Petition Ex. 19 n. 2 ("During 2020 and 2019, the College disbursed to students $2,880,182 and $2,601,928 under the Federal Pell Grant Program and $1,379,679 and $1,296,691 under New York State's Tuition Assistance Program"); see also Ex. 19 n. 1 ("The majority of the College's students rely on funds received from various federal financial aid programs under Title IV of the Higher Education Act of 1965, as amended, to pay for a substantial portion of their tuition").

Indeed, the most that Petitioner can say is that, by reason of its decision to cease instruction and sell its campus to Iona, these former students are now all "eligible" to enroll somewhere else and "[i]t is believed that most of the remaining students have or will enroll at another institution and Petitioner continues to work toward accomplishing that goal." Id. In other words, far from promoting Petitioner's corporate purpose to award to award two-and four-year college degrees to students, many of whom faced economically disadvantage and were first in their family to attend college, the most Petitioner can now offer as a result of the transaction is wishful thinking that nearly 300 of these former students who are no longer earning credits toward those degrees will eventually be able to get them elsewhere. In short, because of Petitioner's actions, not only are these students at risk of not getting the college degrees they had been working toward and promised they would receive from Concordia if they enrolled there,

2021." But in an affidavit filed in support of the sale by Iona's president, James Carey, sworn to on October 15, 2021, only eleven days later, he states that "[i]n Fall 2021, Iona enrolled over 150 former Concordia students to enable them to complete their degrees." *See* Affidavit of James Carey, ¶ 9. Whether the number is 92, as Petitioner states, or "more than 150" as Iona states, matters greatly in determining whether Petitioner's corporate purpose is being promoted by the transaction and is appropriately resolved in an evidentiary hearing.

but the millions of dollars that Petitioner received in taxpayer-financed financial aid for these students is at risk of being wasted. Against that background, Petitioner who by virtue of its being a not-for-profit corporate entity pays no taxes on the 28 acres it owns in one of the richest places in America, is now asking for expedited approval of a sale of its campus to Iona, where not one dime of the millions of dollars Petitioner will receive in proceeds from that sale will be used to help these students – none of whom will be continuing their education at Iona. When viewed from that perspective, the proposed sale most assuredly does <u>not</u> promote Petitioner's corporate purpose. Indeed, Petitioner's request is shameful, embarrassing and appalling.

The faculty fare badly too. Because Petitioner decided to cease instruction, terminate the faculty and sell the campus, faculty members are owed nearly $5 million based on the salary and benefits that Petitioner must pay on the unexpired portions of their contracts, plus the amounts they are entitled to as severance based on their respective lengths of service. However, Petitioner refuses to acknowledge these obligations. *See* Petition ¶ 62 ("based upon a careful analysis from counsel of the pertinent facts and circumstances, [Petitioner] has concluded and strongly believes that it has no contractual obligation to offer severance to any employees, and has developed and presented in that analysis compelling evidence in support of this position"). The faculty takes issue with that assertion, has seen no such evidence, and believes it to be without merit. Indeed, one faculty member, William D. Salva, a 16-year tenured business professor who was a former dean and most recently served as "interim" provost, who was offered nothing when he was terminated, has already filed suit against Concordia seeking to recover at least $807,000. *See William D. Salva v. Concordia College,* Index No. 63932/2021. A copy of that complaint is attached as Exhibit 3 to the Bernstein Affirmation.

Moreover, the obligation to pay former faculty upon termination their full salary and benefits for the unexpired portions of their contracts was apparently recognized by Concordia University Portland, another LCMS-owned college, when it closed last year. Thus, prior to closing, it reportedly prepared a liquidation schedule which called for the payment to faculty of up to $17.4 million for the unexpired portions of their three-year contracts. See Bernstein Affirmation, ¶ 39.

In any event, Petitioner states it is willing to offer by way of "compromise" a fraction of what the faculty is owed in the form of "separation payments" based on length of service, but only if the faculty members release Petitioner for their claims based on the unexpired portions of their contracts. Petition ¶¶ 64-65; see also Petition ¶ 68 (Petitioner believes that the separation payments "can be fairly viewed under the law as a full-value compromise of any claims of entitlement to severance").

However, offering the faculty (and staff) only a fraction of what they are owed does not promote the corporation's purpose, particularly where, as here, Petitioner has not set up a reserve to cover these claims and does not appear to have sufficient cash on hand post-sale to cover them. See Bernstein Affirmation ¶ 3. This is because the faculty's claim represents compensation they are owed for having taught students for whom, consistent with Petitioner's corporate purpose, Petitioner was offering two- and four-year degrees. By representing that "none of the proceeds of the proposed sale of Petitioner's assets will be used to pay severance" (Petition ¶ 70) Petitioner is doubling down on its promise not to pay the faculty what it owes, which is diametrically opposed to promoting Petitioner's corporate purpose and reason itself for not approving the sale on these terms. *See In the Matter of Friends World College v. Nicklin,* 249 A.D.2d 393 (2d Dep't 1998) (approving sale of college's real estate where "the transaction promoted the interest of the College by enabling it to pay its debts"). Here, by admitting the transaction is purposely structured so that the college will be unable to pay the debt it owes to the faculty, Petitioner is underscoring that its corporate purpose is not being promoted.

Moreover, Petitioner at the same time proposes to use 85% of the proceeds of sale to repay the lending arm of its owner for investment elsewhere where there is no evidence in the record to show the sale was required because Petitioner had missed any payments of interest or principal or was in any way in default under that loan. This was therefore not a debt that was due and owing. Rather, Petitioner is repaying that loan as part of the transaction not to promote its corporate purpose by repaying a debt, but because, having chosen to sell to Iona the underlying property securing the loan's repayment, it presumably must do so to give Iona clean title. The alternative would be to sell the property subject to the loan at a true fair market price, so that, if Iona is still the purchaser, it would assume responsibility for payment of principal and interest, and the money originally invested would continue to be used for its original intended corporate purpose to provide post-secondary education in the New York metropolitan area. Moreover, the additional proceeds raised from a purchase price reflecting true fair market value could then be used to help those nearly 300 displaced economically-disadvantaged students, whom Petitioner had promised a two- or four-year college degree if they enrolled – for which Petitioner was richly compensated through federal and state aid, not to mention being exempt from property taxes.

There is also a substantial public interest consistent with Petitioner's corporate purpose in using the proceeds of sale to protect the rights of faculty and staff to collect on their claims, should they ultimately prevail. Thus, by letter addressed to the presidents of Concordia and Iona dated May 12, 2021, even Westchester County Executive George Latimer, weighed in, stating, "[w]hile Concordia College has planned to cease all academic instruction before the start of the Fall 2021 semester, we believe as a condition of any approval of such a sale, all Concordia liabilities, including those owed to its former staff members must be addressed and satisfied." A copy of that letter is attached to the Bernstein Affirmation as Exhibit 29.

Also inconsistent with promoting Petitioner's corporate purpose is the requirement in the transaction that Petitioner hold in escrow an undisclosed and apparently secret "separation payment" to be given to its president the Rev. Dr. John A. Nunes. However, this was not even a debt that was owed. To the contrary, when Nunes' five-year contract was allowed to expire, it was not renewed, and as far as we are aware, did not provide for any "separation payment." To use the proceeds of sale to give him a "separation payment" anyway, while faculty who are owed money are paid nothing, perverts the corporate purpose.

Just as inconsistent with Petitioner's corporate purpose is the provision of the Asset Purchase Agreement by which Iona is allowing Nunes to continue living rent-free for the next two years in a 4,621 square foot Bronxville mansion at 163 White Plains Road on the Concordia campus while he assists Iona in its "transition" to Bronxville. See Petition ¶ 71(Iona has agreed to allow Petitioner's president, Rev. Dr. John A. Nunes to "continue residing in his current campus residence under a new lease through June 2023 as necessary to oversee the winding up of the Petitioner's business and to assist Iona as a liaison with the transition into the Bronxville community"); see also APA Schedule 6.12 which specifies that the monthly rent is $0, there is no lease, and that his continued residency is tied to his "employment agreement" the details of which were not disclosed. Nunes, of course, is the only Concordia official to file an affidavit with the Court supporting Petitioner's application to approve the sale. It is difficult to imagine a provision of the transaction more inconsistent with Petitioner's corporate purpose to award two and four-year degrees to students than to reward Petitioner's president with free housing over the next two years as part of a deal in which at the present time it appears only a fraction of those students who were in the process of earning those degrees will end up getting them, no money from the proceeds of sale is being escrowed or otherwise spent to provide these students at a minimum with the scholarships and/or other forms of financial aid they had when enrolled at Concordia, and not a penny from the proceeds is being used to pay the faculty who taught these students what they are owed.

Finally, because instruction has been halted and the faculty and staff terminated, the Court almost certainly cannot undo the damage that has already been done, but under Section 511(d) of the NPCL, the Court can now direct how, consistent with Petitioner's corporate purpose, the proceeds from that sale should be spent. Here, at a minimum, the Court should require that Petitioner place in escrow that portion of the proceeds of sale that would (i) offer all former students with the scholarships and financial aid they had when they were Concordia students in order to facilitate their transfer to and enrollment in those schools with whom Concordia has entered teach-out arrangements to cover former Concordia students; and (ii) cover the claims of faculty and staff for compensation for the services they rendered to provide Concordia's students with two- and four-year degrees. The Court should also direct that no "separation payment" be paid at all to Nunes, who was not entitled to any severance and who is not therefore owed any money for providing Concordia students with two-and four-year degrees.

CONCLUSION

For the foregoing reasons, the Objecting Faculty and Staff of Concordia College respectfully request that Petitioner's motion by order to show cause for expedited relief be denied and that a determination of fair market value for Petitioner's campus be the subject of an evidentiary hearing so that a determination can be made as to whether the purchase price is adequate or within a reasonable range of the fair market value, and that the issue of whether the terms of the transaction and, in particular the proceeds of the sale from that transaction promotes the corporation's purpose, likewise be addressed at that same evidentiary hearing, so that the Court may issue the findings of fact required prior to the granting or denial of the relief requested by Petitioner under Section 511 of the Not-for-Profit Corporation Law.

Dated: October 20, 2021

Respectfully,

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158 A.D.2d 683
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of AGUDIST COUNCIL OF GREATER NEW YORK, Respondent, v. IMPERIAL SALES COMPANY, Appellant.

Feb. 26, 1990.

Synopsis

Appeal was taken from judgment of the Supreme Court, Kings County, Vaccaro, J., denying approval of contract of sale of religious corporation's real property. The Supreme Court, Appellate Division, held that corporation's proposed sale of senior citizen center was properly disapproved by Supreme Court pursuant to Religious Corporations Law and Not-For-Profit Corporations Law.

Affirmed.

Attorneys and Law Firms

****956** I. Edward Pogoda, Brooklyn, for appellant.

Graubard Mollen Horowitz Pomeranz & Shapiro, New York City (Scott E. Mollen, Gary S. Mayerson and John P. Sheridan, of counsel), for respondent.

Robert Abrams, Atty. Gen., New York City (Lawrence S. Kahn, Pamela A. Mann, David G. Samuels and Bernard Toomin, of counsel), Atty. Gen. of the State of N.Y. pro se.

Before LAWRENCE, J.P., and RUBIN, SULLIVAN and BALLETTA, JJ.

Opinion

MEMORANDUM BY THE COURT.

In a proceeding pursuant to Religious Corporations Law § 12 and Not–For–Profit Corporation Law § 511, Imperial Sales Company appeals from a judgment of the Supreme Court, Kings County (Vaccaro, J.), dated January 30, 1989, which denied approval of a contract of sale of certain real property by the petitioner to the appellant, vetoed the contract, and rendered it inoperative.

ORDERED that the judgment is affirmed, with costs.

In light of the petitioner's valid certificate of incorporation which indicates that its purposes are to provide religious services and services to senior citizens, the Supreme Court properly determined that the petitioner is a religious corporation and properly disregarded the appellant's claims to the contrary (*see, Harosym v. St. John's Greek Catholic Church of Syracuse,* 239 App.Div. 563, 564, 267 N.Y.S. 906).

Contrary to the appellant's claim, the prior arbitration proceeding before a rabbinical panel and the subsequent proceedings seeking to confirm the arbitration award did not address the issue of whether the proposed sale of the petitioner's real property met the requirements of the Religious Corporations Law or the Not–For–Profit Corporation Law (*see, Kilstein v. Agudath Council of Greater N.Y.,* 133 A.D.2d 809, 520 N.Y.S.2d 189). Moreover, those provisions expressly make authorization by the Supreme Court or the County Court a condition precedent to the sale of real property. The appellant could not obtain such authorization from the rabbinical panel (*see,* Religious Corporations Law § 12; Not–For–Profit–Corporation Law §§ 510, 511; *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn,* 76 A.D.2d 712, 717, 431 N.Y.S.2d 834, *affd.* 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480; *see also,* ****957** *Levovitz v. Yeshiva Beth Henoch,* 120 A.D.2d 289, 296–297, 508 N.Y.S.2d 196). As a result, the appellant failed to satisfy its burden of demonstrating an identity of issues in the present and prior proceedings warranting application of the doctrine of res judicata (*see, Kaufman v. Eli Lilly & Co.,* 65 N.Y.2d 449, 456, 492 N.Y.S.2d 584, 482 N.E.2d 63; *Ryan v. New York Tel. Co.,* 62 N.Y.2d 494, 499–502, 478 N.Y.S.2d 823, 467 N.E.2d 487).

It is clear from the record that a conveyance of the property housing the petitioner's senior citizen center would be highly detrimental to the petitioner's corporate purpose (*see, Church* ***684** *of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn, supra,* 76 A.D.2d at 717, 431 N.Y.S.2d 834). The petitioner's certificate of incorporation expressly states that one of its corporate purposes is to conduct activities for senior citizens. The petitioner clearly demonstrated that despite initial assurances by a third party that relocation of the senior citizen's center was possible, and despite concerted investigations of alternative sites, no suitable alternative site could be found to house the center, and dissolution would result if the contract between the parties was specifically enforced. Thus, the Supreme Court properly determined that the sale of the property would not benefit the corporation and disapproved the sale (Not–For–Profit Corporation Law § 511; *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn, supra,* at 717, 431 N.Y.S.2d 834).

We have considered the parties' remaining contentions and find them to be without merit.

All Citations

158 A.D.2d 683, 551 N.Y.S.2d 955

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110 Misc.2d 511
Supreme Court, New York County, New York,
Special Term, Part II.

In the Matter of Application of The CHURCH OF ST. FRANCIS DE SALES OF NEW YORK CITY For Leave to Sell Real Property.

Aug. 20, 1981.

Synopsis
Church submitted an application for approval of a contract to sell a building. The Supreme Court at Special Term, New York County, Beverly S. Cohen, J., held that the evidence was sufficient to establish that the fair market value of the premises on date the contract was made was in the area of $2 million, and thus the contract price of $2,200,000 was within the range of fair market value, and the evidence was also sufficient to establish that the transaction was entered into in good faith by both parties after proper exposure of the property to prospective buyers, and thus the petition met the standards of the applicable law.

Petition approved.

Attorneys and Law Firms

****742** Joseph E. Moukad of ***511** Cusack, Stiles & Hale, New York City, for The Church of St. Francis De Sales of New York City.

Stuart A. Summit and Mark L. Furman of Burns, Jackson, Summit, Rovins & Spitzer, New York City, for Barry Trupin.

Ernest H. Hammer, New York City, for Mark Hertzan.

OPINION OF THE COURT

BEVERLY S. COHEN, Justice:

The Religious Corporations Law provides that a religious corporation may not sell any real property without leave of the court, such leave to be sought pursuant to section 511 of the Not-for-Profit Corporation Law. RCL § 12.

Pursuant to these statutes, petitioner submitted to this Court an application for approval of a contract to sell a building located at 15 East 96th Street, to one Barry Trupin, for $2,000,000. Subsequently, the petition was amended to reflect the commitment of Mr. Trupin to pay an additional sum of $200,000 if the transfer of title takes place on or before September 1, 1981. In connection with this contract a brokerage commission of $120,000 is payable by the seller on closing of title.

The Not-for-Profit Corporation Law requires the court to determine whether the "consideration and the terms of ***512** the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted (by the sale) ...". (§ 511 subd. [d]).

In an effort to make the court aware of all pertinent information concerning the property, the Church included in its petition a list of other offers for the property received by it this year, as well as an appraisal report it had procured. Shortly after submission of this petition, Trupin commenced an action for specific performance of the subject contract. In connection with that action a different appraisal was submitted. In view of the conflicting appraisals and the possibility of higher offers, this Court conducted a hearing. *Congregation B'Nai Abraham of East Flatbush v. Rosoff*, 73 A.D.2d 646, 422 N.Y.S.2d 1016 (2d Dept. 1979). At the hearing, evidence was offered by the Church, by Barry Trupin and by Mark Hertzan, a potential buyer interested in opposing the petition. N–PCL § 511(b).

The Not-for-Profit Corporation Law sets forth two issues to be considered by the court: (1) The fairness and reasonableness of the terms of the transaction and (2) whether the sale would benefit the petitioner or promote the interests of its members. N–PCL § 511(d). In making its determination the Court is to determine the first issue, as of the time of the making of the contract, and the second, as of the time of the consideration of the approval of the contract. *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist*, 76 A.D.2d 712, 718, 431 N.Y.S.2d 834, aff'd 54 N.Y.2d 742, 442 N.Y.S. 986, 426 N.E.2d 480 (1981).

It is urged by Hertzan that the purchase price of the contract be evaluated in light of conditions prevailing at the time of consideration of the petition rather than as of the making of the contract. For practical business reasons such a standard should not be applied. To do so would introduce so serious an element of uncertainty into real estate transactions entered into by churches, as to destroy their negotiating power. Furthermore, to disapprove a contract on the basis of conditions prevailing at the time the petition is before the court would result in turning the church out of court to face the uncertainties of the market. ****743 *513** Bereft of the contract it had, without the certainty of a contract hoped-to-be-better, the church would be subject to a decline in the market which would result in the evaporation of all "better" offers. That in any particular period there was a rising market, can only be said in retrospect.

For these reasons the court looks to the market value on the contract date to determine whether the terms of the contract are fair and reasonable. If the contract meets the test of "fair and reasonable at the time it was made" then its confirmation will guarantee to church transactions security and reliability which will give the church the benefit of a firm contract.

At the hearing evidence of fair market value was offered by the Church, Trupin and Hertzan. This evidence consisted of appraisals by Mr. Kerler for the Church, by Mr. Van Anken for Trupin, offers to buy the property and the contract between Mr. Trupin and the Church.

The appraisal report by Mr. Kerler consisted of his description of the property which he inspected on March 18, 1981, newspaper reports of real estate conditions, a list from the Church of offers received for the property.

In his report Mr. Kerler rejected the use of comparable sales to determine fair market value, reasoning that there were no buildings comparable to the subject premises, he rejected capitalization of income as a basis for appraisal because the property was intended for use as a one-family dwelling. He unabashedly stated: "Therefore this appraisal is based upon the best offer thus far received." The hazards of using this method will appear when "the best offer thus far received" and others are analyzed below. Mr. Kerler set the value of the property as of April 6, 1981 at $2,341,250, based on an offer by one Frederick Mueller.

Based on his testimony, it appears that Mr. Kerler's report was tailored to the Church's requirements, as he perceived them, rather than being an independent appraisal. Mr. Kerler's report does not shed any light on the question of fair market value.

The second appraiser, Mr. Van Anken, testified that he considered the market data approach most appropriate for appraising single family homes. Based on comparison of ***514** data on sales in the area of the east side of Manhattan in the corridor of Madison to Fifth Avenues; computation of square footage prices; adjustments for limitation of use and obligation to return to the seller a share of any profits on a resale within three years; adjustment for outstanding features of the building, Mr. Van Anken evaluated the premises at $1,800,000 in January 1981 and as of June 11, 1981, the date of the report, at $2,100,000. Mr. Van Anken's testimony, report and his opinion are evidence of the market value of the premises.

Testimony of Mr. Mueller's attorney as to the offer purportedly made by Mr. Mueller for the purchase of the property was offered. This testimony was excluded. We are enjoined by *Hine v. Manhattan Railway Company*, 132 N.Y. 477, 30 N.E. 985 (1892) to exclude hearsay testimony regarding offers made by another. "The evidence adduced in this case is objectionable because it places before the Court or jury an absent person's declaration or opinion as to value, while depriving the adverse party of the benefit of cross-examination." *Hine v. Manhattan Railway*, 132 N.Y. at 480, 30 N.E. 985.

Hine further cautions with respect to testimony as to offers even when there is testimony by the offeror. Mark Hertzan testified as to his offers to purchase the property. His offers were $1,000,000 in November 1980, $2,200,000 on February 3, 1981 and $2,300,000 on July 23, 1981. Both Hertzan and Ronald Stone testified about their joint plans to convert the building to a multiple dwelling. It is significant that Mr. Stone testified that he was unaware of the clause in the Trupin contract, one which petitioner's attorney testified was part of every contract for sale of real property by the Church. This clause provided that any profit on resale of the premises within 3–5 years must be shared equally with the Church.

****744** Such ignorance casts a doubt as to the seriousness of the offer or the extent of the negotiations resulting in the offer. The Hertzan group was most interested in maximizing profits. It is questionable whether the offer would remain at the same high level, subject to the recapture-of-profits clause, as it had attained absent knowledge of that clause.

Further question as to the nature of this offer arises when it is noted that the ratification of the contract by the ***515** Archbishop took place on May 13, 1981, well after presentation of Mr. Hertzan's increased offer of February 3. The Hertzan offer is not evidence of the market value of the property.

It does not appear, even by hearsay testimony, that there was an offer anywhere near Trupin's $2,000,000 offer until that offer was made on November 8, 1980. The only offer noted before that time was Mr. Hertzan's offer of $1,000,000. This suggests that it was Trupin's bid, well over the previous bid, which set the market price. (see, *In re Young Israel of Bedford Park*, N.Y.L.J., July 14, 1953, p. 18, col. 2.

The contract of February 22, 1981 between Trupin and the

Church of St. Francis De Sales was entered into evidence and is itself some evidence of market value on the contract date. *Plaza Hotel Associates v. Wellington Associates, Inc.*, 37 N.Y.2d 273, 277, 372 N.Y.S.2d 35, 333 N.E.2d 346.

Fixing a market value for real property is a different matter from determining the market value of standardized items sold regularly and in large numbers. As Chief Justice Holmes of the Massachusetts Supreme Judicial Court pointed out with reference to evaluation of old furniture: "In a case like this market value is a criterion which oscillates within limits, because, in the absence of a balance wheel like the stock exchange, it cannot be assumed with regard to a single object and a single sale that the element of accident is eliminated, and that the most favorable purchaser will be encountered." *Bradley v. Hooker*, 175 Mass. 142, 143, 55 N.E. 848, 848 (1900).

Based on all the evidence the court finds that the fair market value of the premises on February 22, 1981, was in the area of $2,000,000. The amended contract price of $2,200,000 would net to the church $2,080,000 after payment of the brokerage fee, if the closing is held on or before September 1, 1981. Thus, the Trupin price is within the range of fair market value.

In determining whether a transaction is fair and reasonable to the petitioner, the court must concern itself with other facts in addition to the fair market value of the property. (See *Matter of St. Luke's Hospital*, 33 Misc.2d 888, 228 N.Y.S.2d 25 (1962).

***516** Bearing in mind that the purpose of the statute is to protect the church and its members, the court looks to all the circumstances of the sale which may affect petitioner. *Church of God*, supra. It appears to the satisfaction of this Court that the transaction was entered into in good faith by both parties after proper exposure of the property to prospective buyers. *Matter of Congregation of B'Nai Abraham of East Flatbush, Inc*., N.Y.L.J., March 13, 1980. The Church had decided to sell the property some time well before January, 1981 because it was underutilized, and testimony established that many brokers were aware of the offering and, indeed, the property was shown to many prospective purchasers. Furthermore, the Court is mindful that a *lis pendens* has been filed against the property in connection with Trupin's action for specific performance. This action, based as it is in part, on a claim that Section 12 of the Religious Corporations Law is unconstitutional, would survive a determination, it made, that the terms of the transaction were not fair and reasonable to the Church. Thus, conveyance of the property by the Church would be hampered.

If this sale were not approved the Church would perforce lose the benefit of receiving the proceeds of the sale immediately. The Court recognizes the current high level of interest rates which make delay in receipt of money costly in itself.

The attorneys for Trupin and the Church have agreed that after transfer of title on ****745** September 1, 1981, possession by Trupin will be delayed to September 30 to allow time for relocating the present occupants.

The petition as amended to include the increased offer of Barry Trupin meets the standards of the applicable law. The objections of Mark Hertzan and the members of the Parish Council of the Church of St. Francis De Sales to the petition are without merit.

Accordingly, the petition, as amended, is approved. Petitioner is directed to arrange for transfer of title on or before ***517** September 1, 1981. The proceeds of the sale shall be used in the manner proposed by petitioner.

All Citations

110 Misc.2d 511, 442 N.Y.S.2d 741

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249 A.D.2d 393
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of FRIENDS WORLD COLLEGE, Respondent, v. George NICKLIN, etc., et al., Appellants.

April 13, 1998.

Synopsis
College which was organized under Not-For-Profit Corporation Law brought special proceeding seeking leave to dispose of real property. The Supreme Court, Suffolk County, Floyd, J., granted petition. Defendants appealed, and the Supreme Court, Appellate Division, held that: (1) defendants, who were not officers, directors, or trustees of college, lacked standing to challenge sale, and (2) college made sufficient showing that it received adequate consideration and that sale promoted college's interests, so that sale was properly approved.

Affirmed in part, and appeal dismissed in part.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****489** Peter D. Oram, New York City, for appellants.

Hunton & Williams, New York City (Myron D. Cohen and Jeffrey W. Gutchess, of counsel), for respondent.

Before O'BRIEN, J.P., and PIZZUTO, SANTUCCI and JOY, JJ.

Opinion

****490** MEMORANDUM BY THE COURT.

***393** In a proceeding pursuant to Not–For–Profit Corporation Law § 511 for leave to sell certain real property, the appeal is from (1) an order of the Supreme Court, Suffolk County (Floyd, J.), dated November 25, 1996, which, *inter alia*, granted the petition, (2) an order of the same court, dated January 28, 1997, which ***394** denied the appellants' motion for reargument, and (3) a judgment of the same court, entered February 4, 1997, which, *inter alia*, granted leave to sell the subject property.

ORDERED that the appeal from the order dated November 25, 1996, is dismissed; and it is further,

ORDERED that the appeal from the order dated January 28, 1997, is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the judgment is affirmed; and it is further,

ORDERED that the petitioner is awarded one bill of costs.

The appeal from the intermediate order dated November 25, 1996, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the proceeding (*see*, *Matter of Aho*, 39 N.Y.2d 241, 248, 383 N.Y.S.2d 285, 347 N.E.2d 647). The issues raised on appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see*, CPLR 5501[a][1]).

In this special proceeding pursuant to Not–For–Profit Corporation Law § 511, Friends World College (hereinafter the College) sought leave to dispose of 29.1 acres of waterfront property in Lloyd Harbor, Long Island, which was formerly part of the College campus. The Supreme Court properly granted the College's motion to strike the appellants' answer on the ground that they did not have standing to challenge the proposed sale because they were not trustees, officers, or directors of the College. Contrary to the appellants' contention, the court properly determined the issue of standing without a hearing. In a special proceeding, where no triable issues of fact are raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it (*see*, CPLR 409[b]; *Matter of Bahar v. Schwartzreich*, 204 A.D.2d 441, 443, 611 N.Y.S.2d 619).

In addition, the College satisfied the two-prong test set forth in Not–For–Profit Corporation Law § 511(d) by showing that (1) the consideration and terms of the transaction were fair and reasonable and (2) the transaction promoted the interest of the College by enabling it to pay its debts. Accordingly, we conclude that the petition was properly granted. Lastly, notwithstanding the appellants' attempt to recharacterize their motion for reargument as one for renewal, the motion merely reiterated arguments previously rejected by the court in connection with the earlier motion. Inasmuch as no appeal lies from an order denying reargument, the appeal from the order dated January 28, 1997, must be dismissed (*see*, *Marine* ***395** *Midland Bank v. Freedom Rd. Realty Assocs.*, 203 A.D.2d 538, 539, 611 N.Y.S.2d 34).

All Citations

249 A.D.2d 393, 671 N.Y.S.2d 489, 125 Ed. Law Rep. 782,

1998 N.Y. Slip Op. 03410

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73 A.D.2d 646
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of CONGREGATION B'NAI ABRAHAM OF EAST FLATBUSH INC., Respondent, v. Murray ROSOFF et al., Appellants.

Dec. 17, 1979.

Attorneys and Law Firms

****1016** Julius Zizmor, New York City, for appellants.

Fenichel & Lauer, New York City (Elias Lauer and Seymour Fenichel, New York City, of counsel), for respondent.

Gilbert Klaperman, Lawrence, for Rabbinical Council of America, *amicus curiae*.

Opinion

***646** In a proceeding, *inter alia*, to obtain leave to sell real property pursuant to section 511 of the Not-For-Profit Corporation Law, the appeal ****1017** is from an order of the Supreme Court, Queens County (KUNZEMAN, J.), dated July 9, 1979, which, *inter alia*, granted the petition. Order reversed, without costs or disbursements, and proceeding remitted to Special Term for a prompt hearing and determination as to whether the proposed sale price of the synagogue is adequate. Although on this record appellants' other allegations are meritless, a factual issue has been created by the conflicting appraisals as to the current market value of the synagogue property. Since neither appraisal deals properly with the valuation question and both are in conflict as to the actual worth of the property, an evidentiary hearing is required to resolve the issue. In view of the circumstances, the hearing should be held promptly.

DAMIANI, J. P., and O'CONNOR, LAZER and RABIN, JJ., concur.

All Citations

73 A.D.2d 646, 422 N.Y.S.2d 1016 (Mem)

186 Misc.2d 126
Supreme Court, New York County, New York.

In the Matter of the MANHATTAN EYE, EAR & THROAT HOSPITAL, Petitioner, and Memorial Sloan Kettering Cancer Center et al., Intervenors, v. Eliot SPITZER, as Attorney General of the State of New York, Respondent, and Board of Surgeon Directors of the Manhattan Eye, Ear & Throat Hospital et al., Intervenors.

Dec. 3, 1999.

Synopsis
Charitable corporation filed petition seeking court authorization of transaction that would result in the sale of its real estate assets and closure of nonprofit hospital. The Supreme Court, New York County, Bernard J. Fried, J., held that: (1) proposed sale was not fair and reasonable to the corporation, as required for court approval, and (2) proposed sale did not promote purposes of the corporation, as required for court approval.

Petition denied.

Attorneys and Law Firms

****576 *126** LeBoeuf, Lamb, Greene & MacRae, L.L.P. (Peter K. Vigeland, John M. Aerni, New York City, and Patricia A. Taylor, Staton Island, of counsel), ***127** for petitioner.

Eliot Spitzer, pro se, and William Josephson, J. Robert Pigott and Sandra Giorno–Tocco, New York City, of counsel, for Eliot Spitzer, respondent.

Paul, Weiss, Rifkind, Wharton & Garrison (Michael P. Gutnick and Steven B. Rosenfeld, New York City, of counsel), for Memorial Sloan Kettering Cancer Center, intervenor.

Wachtel & Masyr, L.L.P. (John W. McConnell, New York City, of counsel), for Downtown Development Group/Colony Capital, intervenor.

Stillman & Friedman, P.C. (Charles A. Stillman, Scott M. Himes and Peter E. Dolotta, New York City, of counsel), for Board of Surgeon Directors of Manhattan Eye, Ear & Throat Hospital and another, intervenors.

McDermott, Will & Emory, New York City (Andrew B. Roth, Garden City, of counsel), for Lenox Hill Hospital, intervenor.

Swidler, Berlin, Shereff, Friedman, L.L.P. (Kevin O'Brien and Heather Gottry, New York City, of counsel), for Continuum Health Partners, Inc., intervenor.

Levy, Ratner & Behroozi, P.C. (Elizabeth A. Baker, New York City, of counsel), for 1199 National Health & Human Service Employees Union, intervenor.

Opinion

BERNARD J. FRIED, J.

The Manhattan Eye, Ear & Throat Hospital ("MEETH" or "the hospital") has petitioned for authorization to sell substantially all of its assets, pursuant to Not–For–Profit Corporation Law § 511, which requires that the court be satisfied that the "consideration and the terms of the transaction are fair and reasonable" and that the "purposes of the corporation * * * will be furthered." (Not–For–Profit Corporation Law § 511[d].) What is sought to be sold is MEETH's hospital facility located at 64th Street in Manhattan, to Memorial Sloan Kettering Cancer Center ("MSKCC") and Downtown Group/Colony Capital ("Downtown"), ****577** a real estate developer. The Hon. Eliot Spitzer, in his capacity as Attorney General of the State of New York ("AG"), a statutorily necessary party, has opposed this petition. A thirteen day evidentiary hearing was held which, with the agreement of all parties, merged the preliminary injunction application with the hearing on the merits of the section 511 petition.

FINDINGS OF FACT

A. Manhattan Eye, Ear and Throat Hospital

Established in 1869, originally located on East 34th Street, and then on East 41st Street, MEETH relocated to its present East 64th Street location in 1906, where it ultimately erected three buildings: the Old Hospital Building, the New Hospital ***128** Building and the Annex. At this location, it presently operates a highly sophisticated research and teaching (until it terminated its residency program on June 30, 1999), world-renowned, acute care specialty hospital, providing out-patient and in-patient medical services in three specialized areas: ophthalmology, otolaryngology, and plastic surgery. In February 1995, MEETH opened an Outpatient Extension Center in Harlem (the " Harlem Center"), which, unlike the 64th Street facilities, does not provide in-patient care. Instead, it currently functions similarly to the out-patient clinic at 64th Street, and refers patients to 64th Street, for sub-specialty clinics and surgery.

According to its Certificate of Incorporation, MEETH's corporate purposes are:

> to establish, provide, conduct, operate and maintain a hospital in the City, County and State of New York for the general treatment of persons suffering from acute short-term illnesses; performing general plastic surgery; treating persons suffering from diseases of the eye, ear, nose or throat; and maintaining a school for post graduate instruction in the treatment of such illnesses, performing such surgery, and the treatment of such diseases, and conducting associated and basic research.

By all accounts, MEETH has outstandingly realized these corporate purposes. In order to fulfill its teaching purposes, it developed premier residency programs in the fields of ophthalmology and otolaryngology ("ENT"), as well as a premier fellowship program in aesthetic or plastic surgery. It has consistently been ranked among the top specialty hospitals in the United States. Its physicians have achieved world acclaim for their advancements in medical care and for their provision of acute care in these specialty areas. As to this there is no dispute.

In recent years there have been significant advances in medical technology, and an upheaval in the dynamics and economics of healthcare. The impact of these changes has not escaped specialty hospitals, such as MEETH. Inpatient censuses have been drastically decreasing, a trend which is expected to continue, if not accelerate, with the ongoing shifts to ambulatory surgery. Concomitant with the reduction of inpatient activity, which phenomenon itself has resulted in the reduction of hospital revenues, there have been fundamental changes in hospital economics. This, too, has impacted MEETH, which derives its revenues from several sources, including self-paying patients, reimbursements from Medicare, Medicaid and private health care insurers, and charitable contributions. The Balanced ***129** Budget Act of 1997, Pub.L. No. 105–33, 111 U.S.Stat. 251, has resulted in a reduction of Medicare revenues. There have also been similar reductions in reimbursements from State Medicaid and private health care insurers. This containment of medical expenses, spawned in no small part by the advent of managed care, which has decreased inpatient admission in favor of ambulatory surgery, and other cost cutting measures, is not expected to abate.

MEETH sought to cope with this changed landscape. In 1993, the hospital obtained approval to decertify beds and to ****578** establish six additional operating rooms for ambulatory surgery. In 1995, it opened its Harlem Center as a community outreach program, which also served to funnel patients to 64th Street. Dr. George A. Sarkar, Ph.D., J.D., MEETH's Executive Director, sent to the Board members a "proposed strategic plan," dated November 4, 1998, in which he discussed the "Sale or Lease of the Annex Building" and establishment of the proposed Brooklyn Extension Center ("Brooklyn Center"). Thereafter, in December 1998, MEETH applied to the State Department of Health ("DOH") for authorization to open the Brooklyn Center. In its application, MEETH explained that it "is a specialty hospital located ... at east 64th Street." Although approved, the Brooklyn Center has not been opened.

Then in 1999 MEETH's Board of Directors abruptly decided to sell the 64th Street facility to MSKCC and Downtown; to terminate its residency programs; to close the Hospital; to transform the Harlem Center and the planned Brooklyn Center from extension centers to free standing Diagnostic and Treatment ("D&T") Centers; and to eventually add further D&T centers in the South Bronx. Following these decisions, MEETH entered into a nonbinding "Memorandum of Understanding" for a sponsorship agreement with New York–Presbyterian Hospital ("NYPH"), under which NYPH would become MEETH's sole corporate member. Implementation of these plans necessitated the sale of the 64th Street facility, i.e., substantially all of the assets of MEETH, and led to this ligation.

B. "Friends of MEETH" Letter

On October 22, 1998, the Board of Directors received a confidential memorandum, "Re: Crisis at MEETH," from "a group of physicians practicing at Manhattan Eye, [Ear] and Throat Hospital comprising substantially all of the members of the medical staff ... an informal group known as the 'Friends of MEETH.' " This memorandum stated that there was a "crisis at MEETH," discussed a host of problems and ***130** recommended "that the Board of Directors, in keeping with its fiduciary responsibility to the Hospital, appoint an independent hospital consulting firm to examine the operations of MEETH in their entirety." Upon receipt of this memorandum, Mr. Lindsay C.

Herkness, III, the Board President, contacted Dr. Sherrell Aston, Chairman of the Plastic Surgery Department, and requested that they meet "immediately." Mr. Herkness stated that "[the Friends of MEETH letter] is a bad document, a dangerous document, that could be harmful to both the physicians and the hospital" and asked Dr. Aston "to use [his] influence on the medical staff to withdraw it." When Dr. Aston refused, Mr. Herkness replied if "you guys give me a hard time and don't do that, I'm going to sell the hospital." Mr. Herkness did not deny that he made the remark. Rather, he testified that he did not "recall anything about selling the hospital. It was not on my mind."

Thereafter, Mr. Herkness appointed a Special Committee, consisting of himself, Charles S. Whitman, III, Esq., and Mr. Norman Straus, to "look into the matters raised in the memorandum and to report to the full Board." Mr. Herkness testified that there "was a great deal of concern about the allegations and the need to get to the bottom of it." Deloitte & Touche L.L.P. ("Deloitte"), the Hospital's auditors, were retained to review the financial concerns expressed in the Friends of MEETH letter. In addition, the Special Committee directed the hospital staff to respond, point-by-point, and the Committee had informal meetings with members of the medical staff.

On December 16, 1998, there was a Board meeting, where members of the medical staff were invited to express their views. As Secretary of the Board, Mr. Whitman prepared one page of minutes from the staff notes, which merely mentioned that the physicians in attendance ****579** were allowed to state their concerns, but it did not indicate the nature of the statements. Mr. Whitman explained that "[a]s a corporate lawyer you manage to keep your Board of Directors minutes sanitized." It was after this testimony, and as a result of a court order to produce the staff notes, that twenty-six single-spaced pages of notes were produced. These notes show that twenty physicians spoke out. Mr. Herkness not only described the meeting as "historic" and said that the Special Committee and the "Friends of MEETH" would meet soon, but he sent a memorandum to the Members of the Board of Surgeon Directors confirming that "[o]nce the staff has made their report to the Special Committee, we can meet with the Medical Staff Leadership." No such meeting ever occurred. ***131** There was no further Board response to the concerns expressed over the mismanagement of MEETH and the Special Committee never issued a report. Rather, in January 1999, the Special Committee metamorphosed into a Strategic Committee, with an additional Board member added, Richard W. Pendleton, Jr., Esq., and Mr. Herkness changed its mandate.

C. Decision to Monetize MEETH's Assets and to Sell the Hospital

1. Retention of a Strategic Advisor

What occurred was that, as Mr. Whitman put it, there was "[a] bid from [MSKCC] to buy the entire hospital which came out of the blue in the middle of January of 1999." Mr. Whitman had learned of "the approach" from Mr. Herkness, and advised Mr. Herkness that "we have to consider it [the offer] and we would need a committee to do that," which caused Mr. Herkness to reconstitute the Special Committee into a Strategic Committee. Mr. Whitman also advised Mr. Herkness that a "financial advisor was necessary ... because the board would need to have the offer analyzed from a financial point of view." This led to the retention of Shattuck Hammond Partners, a Division of PricewaterhouseCoopers Securities, L.L.C. ("Shattuck Hammond"), an investment banking firm that provides services exclusively to the healthcare industry. According to Mr. Herkness, the offer from MSKCC was not what caused retention of Shattuck Hammond. Rather, he testified that the strategic advisors were retained after he received a draft of "Proposed 1999 Operating and Capital Budgets," dated January 15, 1999, which he described as "horrific." It is clear, however, that Shattuck Hammond was retained because of the MSKCC proposal.

On February 5, 1999, Mr. Herkness, with the approval of the Strategic Committee, entered into a written retention agreement with Shattuck Hammond to assist MEETH in evaluating its strategic options. The retainer agreement also authorized Shattuck Hammond to seek out parties "interested in entering into a Transaction with the Hospital," a task which seems irreconcilable with the determination of an appropriate strategic recommendation, a determination which should have come first.[1] The "transaction" referred to was defined in the retention agreement as "any merger, consolidation, reorganization, ***132** recapitalization, sale, business combination or other transaction pursuant to which the Hospital and/or any assets of the Hospital are involved in acquiring, being acquired by or combining with a third party."

MEETH agreed to pay Shattuck Hammond a retainer fee of $100,000, and agreed that "[u]pon the closing of a Transaction," it would pay a "Transaction Fee" of one percent (1%) of the "Aggregate Transaction Value." According to Mr. Herkness, he had been informed that this fee arrangement was "standard in the industry." The evidence confirms that there was an understanding that a sale was not **580 only contemplated at the time Shattuck Hammond was retained, but was the actual expectation of the parties. Thus, Shattuck Hammond had a direct financial interest in an outcome which would require sale of the real estate. Significantly, while the fee arrangement was discussed by the members of the Strategic Committee, it does not appear to be the subject of any discussion by the Board. Indeed, neither Rozlyn Anderson, Esq., nor Mr. Underhill, both Board members, and not members of the Strategic Committee, was aware that if there was no transfer or acquisition of assets, Shattuck Hammond would not be entitled to the 1% transaction fee, although Ms. Anderson testified that had she known it would have been irrelevant.

2. MEETH is Put Up For Sale

On February 22, 1999, Mr. Herkness reported that he had appointed a Strategic Committee to assist in the review of "(1) whether MEETH can survive in today's medical and economic environment as an independent specialty care hospital; (2) what are the strategic options available; and (3) how should MEETH respond to the possible offers from Memorial Sloan Kettering Cancer Center ... and Mt. Sinai–NYU Medical Center Health System [Mt. Sinai]." The Mt. Sinai possibility, as noted by various Board members, "would not involve the closure of the Hospital."

Shattuck Hammond's written report, which Mr. Herkness had described as a "fairness opinion," was presented. However, at trial he acknowledged that it is was not a "fairness opinion," which of course, as a financial advisor at a major brokerage firm, Mr. Herkness would have known is a term of art in the securities field.[2] Shattuck Hammond described the "Hospital's ongoing mission.... 'to improve the quality of life for its *133 patients'," and asked:

> Can the Board, Management and Medical Staff counteract market forces acting against the Hospital and does the Hospital have sufficient financial resources to sustainably support all aspects of the Hospital's current mission, role and business and charitable purposes?
>
> Having posed this question, Mr. James S. Scibetta, a Shattuck Hammond director, concluded that the "business had no value, but the underlying real estate has considerable value" and "that probably one of the best things for the board to consider was to look at the real estate as a very valuable asset ... and see if it could use that as a way to capture additional resources for the board to sort of refocus its mission and do what the board had been discussing." Mr. Scibetta thought it "ridiculous" to contend that MEETH could remain independent. And he testified that "nobody would pay one dollar in order to just take over the business as is." It was this mindset, that the real estate was the only asset of MEETH with value, which determined the future course of events. As Mr. Scibetta put it, the Board wanted to "monetize the assets," rather than seek to preserve MEETH as its main priority.

Neither Shattuck Hammond nor the Board considered MEETH, itself, as having any ongoing economic value. Nor was there recognition or any discussion of the value of MEETH's name, which was considered by Mr. Morton P. Hyman, Chairman of Continuum Health Partners, Inc. (Continuum), to have "great value," and by Mr. Terrence M. O'Brien, Executive Vice President and Chief Operating Officer of Lenox Hill Hospital, to have "marquis value" as "one of the top hospitals in the country." Even Mr. Herkness conceded at trial that the name had "franchise value."

Under the heading "Outlook for MEETH as a Going Concern," Shattuck Hammond concluded that "market forces **581 have been and are expected to be increasingly unfavorable for the provision of services in a hospital setting," that many of the services provided by MEETH "are being provided in doctors' offices, free standing ambulatory surgery centers, and a number of neighboring hospitals that are competitive for such services with MEETH," and that as a specialty hospital MEETH "has an inherently riskier business model than non-specialty hospitals with considerable financial resources and *harmony* *134 among physicians, management and the Board." (Emphasis added.) The latter, of course, is a recognition by Shattuck Hammond that there was a "[l]ack of confidence and support for the current Management." The strategic plan neither addressed this lack of "harmony," nor discussed whether solving this lack of harmony could or would have changed or altered its evaluation and ultimate conclusions. Instead, Shattuck Hammond determined that "MEETH's recent financial performance is not sustainable and necessitates proactive, dramatic remedial action," pointed out that "MEETH has significant value tied up in unused or underutilized real estate assets" and purported to evaluate various strategic options, including the MSKCC "transaction opportunity," i.e., the sale of all of the real estate, concluding that this would result in the highest "[p]robability of successful implementation vs. financial reward of success," or in other words, it was the best strategic option. However, not all strategic options were evaluated. Shattuck Hammond failed to report Continuum's expression of interest in a non-sale transaction with MEETH as a possible strategic option.

The report continued, "[i]f the [MSKCC] offer were accepted following the implementation and finalization of the plan of closure," Public Health Law, Article 28, would require surrender of the hospital operating certificate; MEETH would be required to obtain certification "to conduct diagnostic and treatment activities in clinic settings"; and "[i]t is unlikely that, given the applicable statutory and regulatory framework, the corporation will be permitted to retain the name 'Manhattan Eye, Ear and Throat Hospital.' " While the latter may or may not be accurate, its inclusion in the Report indicates that Shattuck Hammond recognized, and communicated to the Board, its understanding that the sale of the real estate would definitively alter MEETH's mission. Moreover, although there had been discussion at previous Board meetings about expanding the extension centers, such discussion was always in the context of the continued existence of an acute care hospital on 64th Street. The free standing D&T center proposal appears to be mentioned for the first time as an option identified in the Shattuck Hammond report, as it sought to "reprioritize" MEETH's mission.

At the February 22nd meeting, Cushman & Wakefield submitted a "Restricted Appraisal Report," concluding that value of the 64th Street real estate "was in the range of $46 to $55 million, it being understood that an approximate 12–month marketing period would be required to attempt to realize such ***135** value in the real estate market." It was pointed out that the net proceeds would be reduced by "real estate brokerage commissions in the range of 2.3%." The fee arrangement with Shattuck Hammond was not discussed. The February 22nd meeting concluded with the nine board members present (two members had been excused) unanimously voting to sell the real estate to MSKCC or Mt. Sinai, or to "any other not-for-profit health care provider for a price as near as possible to $45 million," which was less than the Cushman & Wakefield appraisal. The Board also authorized filing of the requisite applications for regulatory and judicial approval.

Mr. Herkness testified that this decision to sell was impelled by the "doomsday scenarios" set forth in a January 15, 1999 memorandum from Mr. Leonard Weil, MEETH's Chief Financial Officer, containing three proposed operating budgets for ****582** 1999. Mr. Herkness did not know if any of these budgets, which forecast "bottom line losses" ranging from $6,369,000 to $3,417,000, which he described as "warning shots ... was actually adopted." It was this memorandum that "heightened" his concerns about MEETH's financial situation, and which led to the decision, taken within five weeks, to sell the real estate and to close MEETH as an acute care specialty hospital[3]. The Board accepted Shattuck Hammond's negative conclusion ***136** concerning " the continued viability of MEETH's remaining an independent specialty care hospital," and its recommendation that "the Hospital's current mission would be de-prioritized," a reference to elimination of the Hospital in Manhattan, terminating the performance of plastic and reconstructive surgery, and ending the "school for post-graduate education." The minutes do not record any discussion as to what MEETH planned to do with the net proceeds, although Mr. Herkness and Dr. Sarkar each testified that the sale proceeds were intended to be applied to transform MEETH from its historical role as a teaching specialty hospital into free standing D&T centers in underserved areas of New York City.

3. Expressions of Interest in Keeping MEETH (Prior to February 22, 1999)

Prior to the February 22nd decision to sell, there had been expressions of interest in keeping MEETH as an acute care specialty hospital which were neither mentioned at the Board meeting, nor in the Shattuck Hammond report. One such expression came from the New York Eye & Ear Infirmary ("NYEEI"), which in February was well into joining Continuum. Discussions with NYEEI had, in fact, been ****583** ongoing for years. Continuum had also shown interest in MEETH: the previous year, in March 1998, Dr. Robert G. Newman, Continuum's President and CEO, met with Dr. Sarkar. Nothing came of that meeting. Thereafter, on December 18, 1998, Mr. Hyman met with Mr. Herkness, and other MEETH officials, in connection with MEETH's desire to sell the Annex. At this meeting, Mr. Hyman referred to Continuum's discussions with NYEEI and suggested that they explore "possibly merging the two institutions [MEETH and NYEEI]." Mr. Herkness replied that ***137** MEETH "was very strong financially, certainly stronger than New York Eye and Ear and that he wouldn't see any reason really to combine unless basically New York Eye and Ear gave Manhattan Eye and Ear the keys, but he would consider that and possibly get back to me [Mr. Hyman]." Mr. Herkness testified that Mr. Hyman "was rather enthusiastic" about MEETH fitting into the NYEEI affiliation, although Mr. Herkness testified that he had no interest, because "at that point we still thought we had a viable enterprise." Thus, contrary to Mr. Scibetta's view that "nobody would pay one dollar in order to just take over the business as is," there was interest from other medical institutions in seeking to preserve MEETH as a world-class teaching and research hospital, which were ignored by the Board in adopting the recommendations of Shattuck Hammond, its strategic advisor.

4. March 22, 1999 Board Meeting: Mt. Sinai Offer Discussed

On March 11, 1999, Mt. Sinai and MEETH entered into a thirty day, binding agreement, which contained a no-shop clause[4], to sell the real estate for $46,000,000. Under this agreement, Mt. Sinai would continue to maintain MEETH's mission as an acute care specialty teaching hospital. This proposal was discussed at the March 22, 1999 meeting of the Executive Committee of the Board of Directors. It was explained by the Strategic Committee that "such a transaction would bring a large critical mass and expertise to MEETH's existing operation, keep the Hospital's present services as well as add to them, ensure the continuance of the Residency Programs, and maintain all Hospital employees in their present or similar positions. This would allow MEETH to continue to run extension centers in underserved areas and fund research." This agreement between MEETH and Mt. Sinai lapsed before the next Board meeting.

5. Board's Decision to Open the Bidding Up

At its April 15, 1999 meeting, the Board was told by Mr. Scibetta that both MSKCC and Mt. Sinai had "backed away from their initial proposals and have indicated an interest only at a price substantially below the $46 million minimum amount ... in the appraisal." Mr. Scibetta recommended that MEETH should "open up the process and inject some competitive forces into the negotiations." Because the Board "wanted to be able to offer [the properties] to real estate developers as ***138** well as to make sure that all of the potential bidders on the upper east side real estate [sic] would be approached," it voted to retain Cushman & Wakefield as its broker. Shattuck Hammond was to contact "likely not-for-profit hospital entities" and Cushman & Wakefield would seek to qualify "five or six of the most prominent and likely real estate buyers."

Previously, however, in late February or early March, Mr. Hyman, from Continuum, had spoken with Mr. MacRae, MEETH's attorney who, as required by the no-shop clause, said "that the negotiations between MEETH and another hospital ****584** were so far along that they did not feel they could discuss any other corporate possibilities with [Continuum] or anyone else, and that they felt ethically and morally bound not to enter into such discussions." The Board was not informed of this conversation. From the evidence it is clear that by the time the Mt. Sinai offer had lapsed and Cushman & Wakefield had been retained, the Board's goal, as Mr. Scibetta testified, was "to obtain fair value for the assets, and for the bids to be in by basically, I think we had established early May." No reason has been provided for this haste to sell the real estate, a haste which seems particularly unnecessary in light of the Cushman & Wakefield Restricted Appraisal Report, which had stated that the required marketing period would be approximately one year. Nor was there any reason as to why Continuum's interest in preserving MEETH by entering into a non-sale transaction was not included in Shattuck Hammond's report as a possible strategic option.

On April 25, 1999, the *New York Times* reported that MEETH was for sale.

Thereafter, a scheduled annual Board meeting was held on April 29, 1999, at which time Mr. Scibetta said bids were expected to be received, beginning on April 30th, and he reiterated that Shattuck Hammond had determined "that the Hospital's business had no value." He also advised the Board that "[a]lthough Shattuck Hammond Partners tried to interest Mt. Sinai in taking over MEETH, Mt. Sinai was disinterested in keeping the business and only interested in the real estate aspect of the transaction, at a figure much lower than the appraisal." At this meeting, the Board voted to sell the hospital, at a price in excess of $40,000,000. There was no explanation for this decision to sell the real estate for *less* than its appraised value of $46 to $55 million. At this meeting, authorization to seek regulatory approvals was again provided. Moreover, the Board now realized that its sale and closure plan, ***139** leading to free standing D&T centers, would require an amendment to the Hospital's Certificate of Incorporation, and a proposed amendment was authorized, although never submitted.

Now, two months after the Board initially had voted to sell its real estate, the minutes for the first time identify, in the context of discussion of the *New York Times* article, that the Board had decided that "the Hospital was going back to its original mission of serving the poor in underserved areas, and redirecting its charitable assets to accomplish this goal." Other than the Shattuck Hammond report, which discusses the Hospital's "original" mission, there is no written record concerning this momentous decision. There had been no study concerning this so-called return to the "original mission" and no proposal or recommendation on the subject was provided to the Board for its review and deliberation. Notably, there was no management plan or recommendation discussing the need to return to this "original" mission, nor do prior Board minutes report any discussion held on the subject.

6. Board Accepts Downtown and MSKCC Offer

By the May 5, 1999 Board meeting, four separate proposals had been received, including a $41,000,000 bid from Downtown and MSKCC (and two proposals from real estate developers). According to this offer, MSKCC would open a breast cancer facility in the New Hospital Building, and the remaining real estate, to be purchased by Downtown, would be used as a building site for an apartment building. Mt. Sinai submitted two alternative proposals: (1) a $27,500,000 offer for the real estate, with the hospital closed; and (2) an offer to acquire the Hospital and its operations for "a very substantially reduced price." Because the second Mt. Sinai offer was "vague," the Board took a "short break" in its meeting during which Mr. Scibetta, at the Board's request, placed a telephone call to Mr. Barry Friedman, Mt. Sinai's ****585** President and Chief Financial Officer, who stated that Mt. Sinai would seek a "very reduced price," in the range of five to eleven million dollars, and would only commit to running MEETH for up to two or three years. This spur-of-the-moment telephone conversation persuaded the five Board members who were present that the MSKCC offer should be accepted "promptly." Somehow, this telephone call to Mr. Friedman had confirmed Shattuck Hammond's view that MEETH had no value, beyond the real estate it was "sitting" on, warranting acceptance of the MSKCC offer.

The Board took no further steps to seek a bidder which would save MEETH's long-established mission. Instead it decided ***140** that "the most preferable offer" would be a combination of "fair and reasonable consideration" together with the involvement of a major tax exempt hospital. This sale would "provide the necessary funding for the Board's envisioned diagnostic and treatment centers and other hospital-type activities to be relocated to medically underserved areas in New York City." The Board then approved a sale to Downtown and MSKCC. That same day, Mr. Herkness executed a non-binding letter of intent, without a no-shop clause, to sell the real estate to Downtown and MSKCC. (On June 25, 1999, the parties entered into a "Real Property Contract for Sale" ["Contract"].)

The May 5th minutes record that after the decision to sell was approved, "[t]he Board *then* discussed the issue of closing the Hospital. The Board noted that *no* actual decision had been made to close the Hospital." (Emphasis added.) Previously, on April 29, 1999, the Board had terminated the residency program and authorized the President to prepare for possible hospital closure. However, even as of May 5th, as the minutes show, the Board did not seem to believe that it was actually closing the Hospital. One has to wonder exactly what the Board thought it was doing. Then, without a record of further discussion or Board authorization following this May 5th meeting, MEETH submitted a closure plan to the DOH on June 14, 1999, as an attachment to a letter from Dr. Sarkar, in which he also "requested issuance of a diagnostic and treatment center operating certificate for the existing Harlem facility." It was after this that Mr. Herkness sought (and obtained) "a resolution reaffirming the Hospital's intent to close the East 64th Street facility." This occurred at the July 26, 1999 Board meeting.

As of July 26th, the Board had neither received nor commissioned any study with regard to the Board's planned use of the sales proceeds to establish D&T centers, the necessity for such centers, or the viability of such centers. It was an idea in progress. It may be that written documentation, at this point, was not needed, if there had been any other type of evaluation; however, there was none. There had been no consultation with the medical staff or other medical experts or health care experts or anyone else concerning its feasibility or viability. Rather, Mr. Herkness testified that the "best feasibility study is five years of experience." It bears noting, however, that MEETH had no experience with free standing D&T centers. At best, this plan evolved from the Harlem Center, which was an extension center, and not a free standing center. Nonetheless, without such seemingly basic information, the decision to sell and close was made.

***141** From these events, the conclusion is inescapable, based upon all the credible evidence, that the Board, recognizing MEETH's financial problems, certainly after the March 11, 1999 Mt. Sinai letter of intent lapsed, chose not to seek a solution that would preserve the Hospital, either itself, or in some sort of affiliation with a major medical institution that would be willing to try and preserve MEETH's historic purposes. Rather, the Board decided on a course of action which would lead to the sale and closure of the hospital, and then provide the Board with a substantial ****586** sum of money to allow it to take MEETH down the path to new, unstudied and unevaluated charitable purposes.

MEETH began to act, i.e., it terminated the residency program, upon the assumption that it would receive DOH approvals for closure and establishment of the D&T centers. It executed a letter evidencing its intent to sell to MSKCC, and chose to take steps to effectuate closure and receive regulatory approval for its plan, to enter into a contract for sale, and then to seek court approval under section 511. This would have had the effect of presenting the court with what would have been essentially a fait accompli. To put it another way, if everything went as hoped for, MEETH would have been able to present the section 511 petition pertaining to an *already* closed hospital, with DOH approval for the D&T centers, and it would have asked the court to find "that the purposes of the corporation ... will be promoted." This would have effectively neutralized, or substantially compromised, any meaningful judicial role in the section 511 process. Indeed, under the scenario envisaged by MEETH, denial of the petition would have been a pyrrhic victory for its opponents: the hospital would already be closed; under such circumstances, a court order could hardly have restored MEETH.

D. Events Following the Decision to Sell and Close MEETH

1. MEETH Doctors Seek to Enjoin the Proposed Sale

On May 10, 1999, a CPLR article 78 petition was filed to enjoin the proposed sale to Downtown and MSKCC. The Attorney General did not participate in this proceeding. Rather, in a letter from William Josephson, Esq., Assistant Attorney General, Charities Bureau, the court was advised that "[s]ince the proposed transaction is in a preliminary stage, it would be premature for us to take a formal position on it." On May 28, 1999, the petition was dismissed. What the Article 78 proceeding demonstrated, however, is that the medical staff played no role in the decision to sell and close the hospital: it was not ***142** consulted and the Board did not respond to written entreaties on behalf of the doctors. While they were not necessary parties, in a legal sense, Mr. Herkness and the Board recognized that it was the medical staff that distinguished MEETH. Nevertheless, the Board members believed that the doctors were acting in their own self-interest in opposing the sale and did not involve them in its fundamental decisions affecting the future of MEETH.

2. MEETH Commissions Business Plan Re: D&T Centers

Following the June 14, 1999 submission of the closure plan to DOH, Mr. Wayne M. Osten, Director, Office of Health Systems Management, DOH, wrote to Dr. Sarkar on July 22, 1999, and requested "a business plan or financial feasibility analysis on the proposed MEETH Diagnostic and Treatment Centers." This request caused MEETH, which had made the decision to transform MEETH's mission without detailed analyses, and had no studies, reports or other documents concerning the D&T plan, to retain outside consultants, Dr. Frank Cicero, of Cicero Shapiro Velazquez & Cicero, and Mr. Charles Kachmarick, President, Sterling Health Capital Management. These consultants were retained "to develop a business plan in support of the proposed MEETH Diagnostic and Treatment Center." Significantly, they were charged with supporting the already decided-upon plan. The Cicero/Sterling study, entitled "Manhattan Eye, Ear & Throat Hospital Business Plan For Fulfillment of Mission Statement" ("Business Plan"), not unsurprisingly supported closure of the Hospital, and the transformation of MEETH from a world-class teaching hospital to operating two D&T "sites in under-served areas in Harlem and Brooklyn." The Board had decided upon the Mission statement; the retained consultants then wrote the "Operational Plan," and provided a ****587** "Need Assessment" and "Financial Projections." Neither Dr. Cicero nor Mr. Kachmarick looked at or evaluated, or were asked to look at or evaluate, any of the proposed alternatives to closing MEETH. Indeed, Dr. Cicero, who testified that he was aware of Continuum's interest, and "possibly Mt. Sinai," stated that it would have been "inappropriate" for him to talk with interested potential bidders for MEETH.

At its September 21, 1999 meeting, the Business Plan was accepted by the Board. It was also at this meeting that the Board authorized the filing of a petition seeking court approval of the sale of the hospital's real estate. Under the terms of the June 25, 1999 contract, this petition should have been filed ***143** within sixty days. While there has been no explanation for the failure to file in accordance with the contract, there is no doubt that MEETH was putting off instituting the judicial petition while awaiting the hoped-for DOH approvals for the closure and D&T plans. By September 21st, it decided it could not put off the filing any longer.

3. Attorney General Becomes Involved

Since as a Type B, i.e., charitable, corporation, MEETH does not have shareholders, the Attorney General, acting as *parens patriae,* is statutorily involved whenever such a charity seeks to dispose of all, or substantially all, of its assets, as MEETH resolved to do (N–PCL § 511). Upon learning from the *NY Times* article of the decision to sell, Paula Gellman, Esq., Assistant Attorney General, Division of Public Advocacy, wrote to Dr. Sarkar on April 27, 1999, and explained that it was "common practice" for the AG to become involved "before a formal submission is made to the Supreme Court so that we may review the papers and raise any questions or concerns we have in advance." This led to a meeting at the AG's office, which was followed by a June 3rd letter from Mr. Josephson to Thomas Ruggiero, Esq., one of MEETH's counsel, stating that since it decided to sell the Hospital, the Board is required "to entertain all responsible proposals, not to favor any bidder over another in the process, and to treat all bidders and potential bidders identically and fairly." This letter was submitted because the AG had received complaints alleging that other interested buyers were not able to obtain pertinent information. In response, the AG was advised that "a successful bidder has been selected and pursuant to a letter of intent, good faith negotiations regarding the definitive contract are continuing." The AG was not told that the letter of intent was not binding, and that it did not contain a no-shop clause. Nor were other interested parties advised that it was non-binding. Mr. Scibetta testified that MEETH could not "be seen actively soliciting proposals, but we are more than willing to review any proposals, and the board would have a fiduciary responsibility to do so." This statement was incorrect; there was nothing in the non-binding letter which would have prohibited MEETH from actually seeking to preserve its mission.

On June 23, 1999, Dietrich L. Snell, Esq., Deputy Attorney General, Division of Public Advocacy, wrote to MEETH's counsel, complaining that there were other "*bona fide* offerors" and that "[w]e are not aware of ... one single shred of evidence that MEETH is actively exploring in good faith all or ***144** even any of these expressions of interest [which would preserve MEETH]." This statement proved to be accurate.

Thereafter, the AG's representatives were ultimately invited to attend the July 26, 1999 Board meeting, both the full meeting attended by several doctors from the medical staff, and the Executive Session. At both of these meetings, Mr. Scibetta evaluated various offers, and reiterated that it was the opinion of Shattuck Hammond that the Hospital's "business had negative value." At the end of the Executive Session, Mr. Herkness said that ****588** "[i]t was the sense of the Board of Directors to monetize the real estate...." The decision to go forward with the sale to MSKCC and Downtown was unchanged.

Representatives of the AG continued to meet with MEETH, DOH officials, and others, over the additional concern that MEETH was engaging in a *de facto* closure of the Hospital, since its closure plan had not received DOH approval. The AG also continued to insist that MEETH must negotiate in good faith with other potential bidders. When MEETH filed this petition, the AG opposed it on the ground that other offers had been submitted, which would have preserved MEETH, and that there had been no genuine effort to negotiate with these bidders in good faith.

E. Alternative Proposals Designed to Preserve MEETH

1. Continuum Proposal

Mr. Hyman, Chairman of Continuum, having been told in late February or early March that MEETH was in negotiations which were "far along" with an unnamed hospital, and that it could not discuss other proposals, did nothing further until he read the *New York Times* article. He then met with MEETH's physicians and he agreed to try to accommodate at Continuum the medical staff, who would be dislocated upon the sale of the Hospital, and the residents, whose program was being discontinued on June 30, 1999. This led to Mr. Hyman writing a letter on June 29, 1999 to Mr. Herkness in which he proposed a solution which would allow MEETH to continue its mission. Mr. Hyman testified that Continuum proposed "to take the facility over. We were confident that with different management ... as well as our financial strength ... we could continue MEETH in furtherance of its mission." Continuum's offer was that MEETH "join" its healthcare network and combine with NYEEI, which had just joined Continuum. It was not an offer to purchase the assets. Continuum would have maintained the Harlem Center; however, no commitments were made with regard to the proposed D&T centers since the specific proposal ***145** was not shown to Continuum. Mr. Hyman explained that they would have to perform "due diligence" to determine if the proposal was "sound." Continuum was prepared to "guarantee" MEETH against all losses for five years and to invest "$10 million, as needed" (a figure which was later raised to $15 million). Finally, since the proposal was for MEETH to merge with NYEEI, this proposal additionally provided MEETH with the security of the assets of NYEEI, and its unencumbered real estate. Recognizing that "in the future, it might be appropriate for MEETH to sell a portion of its real estate[,]" Continuum guaranteed that "[e]very dollar raised from the sale of any asset of MEETH must stay with MEETH and be used solely for the advancement and enhancement of MEETH."

A condition of Continuum's proposal was that "the existing members of the Board of Directors of MEETH are to resign upon the consummation of this transaction." As Mr. Hyman put it, Continuum's proposal left no money for the use of MEETH's Board in its plan to establish the two D&T centers, or to expand into other geographical areas. He pointedly testified that the Board did not "have an interest separate and apart from the institution itself," and questioned "why a board insists upon receiving money to go off and do their own thing." He explained that if "the standard of comparing a hospital's value as an ongoing concern [is] by looking at the operating income and the operating expenses versus the asset value, then ... almost every hospital in Manhattan would have to sell its real estate and go out of business." To preserve MEETH, Continuum was prepared to keep, as minority members, those current Board members who are prepared "to support" the "one hundred and thirty year old" mission of MEETH.

On July 1, 1999, Mr. Hyman proposed an "immediate" merger between MEETH ****589** and NYEEI, and agreed to "guarantee all obligations now existing at MEETH." He received no response from Mr. Herkness to either of his letters. However, on July 10, 1999 Mr. Hyman received a letter from Mr. Scibetta, asking him to meet with him. On July 13th, they spoke on the telephone, and Mr. Scibetta wanted to know "what Continuum was prepared to bid for the MEETH real estate." Told that Continuum did not want to buy the real estate, but rather to "continue MEETH exactly where it was," Mr. Scibetta replied "that's very nice, but our board has decided that we are going to sell the real estate." When asked the "purpose" of having a meeting, since Continuum was not a bidder for the real estate, Mr. Scibetta replied that "you know what this is all about and ***146** I think we should get together." A meeting was scheduled for July 15th but was never held.

What occurred is that after the telephone conversation, Mr. Hyman invited representatives of the AG to the meeting, "because so many misunderstandings seem to have cropped up already, that I didn't want to come out of a meeting and have more misunderstandings." The morning of the meeting, Mr. Scibetta learned that Mr. Hyman had invited representatives of the AG, and told Mr. Hyman that he would not attend the meeting. When asked why, Mr. Scibetta replied that "what he had to tell me he would not [say] in front of the Attorney General." Mr. Scibetta confirmed that he had refused to attend the meeting with representatives of the AG. He testified, as he had informed the Board, that it was inappropriate for these representatives of the AG to attend the meeting with Continuum, in light of the fact that other potential bidders had not made similar requests.

At the July 26, 1999 Board's Executive Session, Mr. Scibetta reported that on July 1st Continuum had submitted a proposal. He explained that MEETH would become a "subsidiary," the Board would be required to resign, and then he incorrectly characterized the proposal merely as an offer to "invest up to $10 million ... [which] was inferior in all respects to the Mt. Sinai proposal of May 5, which had already been rejected by the Board of Directors." Neither orally nor in the written report was the Board advised of the full scope and nature of Continuum's proposal, including that it would guarantee all of MEETH's losses for five years.

Thereafter, in mid-September, Mr. Hyman received an invitation to meet with Mr. Scibetta, and on September 17, 1999 he attended a meeting with Mr. Scibetta, Mr. Herkness, and two other Board members, Mr. Chips Chapman Page, and Mr. Richard W. Pendelton, Jr. Continuum's proposal, which included that it was prepared to take over and run MEETH within twenty-four hours, was described. Continuum was also prepared to invest beyond the $15 million, "if we had an opportunity to discuss the proposal with the MEETH board." Mr. Hyman further explained that if MEETH's real estate were to be sold in the future, the proceeds would remain "within the MEETH facility to support its mission." Mr. Herkness and Mr. Scibetta told Mr. Hyman that "the board has decided that we want to sell the real estate. [And asked:] Are you prepared to make a bid," to which Mr. Hyman replied "absolutely not." During the meeting, either Mr. Herkness or Mr. Scibetta inquired whether ***147** Continuum was willing to indemnify MEETH against MSKCC, if liability arose from "break[ing]" the Contract. Believing, correctly, as it turned out, that the Contract was conditioned upon regulatory and judicial approvals, Mr. Hyman asked to see the written Contract, in order "to know what it was that we were being asked to indemnify." This request was refused and the meeting ended. There were no further discussions with Continuum.

2. Lenox Hill Proposal

Mr. O'Brien, Executive Vice President and Chief Operating Officer, and Ms. ****590** Gladys George, President and Chief Executive Officer of Lenox Hill, on June 23, 1999, met with Mr. Scibetta, who told them that MEETH was about to sign an agreement to sell its property and inquired whether Lenox Hill "would like to buy their property." Mr. O'Brien replied it was not interested in purchasing "the property, [but] we would be very much interested in having a potential relationship with MEETH, either a merger or a sponsorship, where we could keep MEETH open and could continue to fulfill its mission." This led to a June 25th letter from Ms. George to Mr. Herkness, expressing her desire to meet with him and

MEETH's Board "to discuss this matter further."

On July 1, 1999, Lenox Hill sent Mr. Herkness a written proposal to sponsor MEETH, which would become a subsidiary of Lenox Hill, with Lenox Hill as the sole voting member. Under the terms of this proposal, which Ms. George wrote would "result in an approximately $50 million financial benefit," MEETH would continue in the New Hospital Building on East 64th Street, and Lenox Hill would guarantee "to invest not less than $3 million per year for not less than ten years to support the hospital and related services provided by MEETH." Title to the Old Hospital Building and Annex, which had been appraised as worth from $16.6 to $20.2 million, would be transferred to a newly created MEETH Foundation, whose trustees would be MEETH's existing Board. This Foundation could use the proceeds to further MEETH's corporate purposes, including patient care at the New Hospital. Lenox Hill was prepared to operate MEETH immediately. Ms. George was "anxious" to meet with MEETH to "refine the terms and conditions" of this proposal. On July 14, 1999, Lenox Hill officials again met with only Mr. Scibetta, even though they had "requested on a number of occasions" to meet with MEETH's board members. Mr. Scibetta made it clear that MEETH was "very focused on trying to complete the [MSKCC] transaction." ***148** This led to Lenox Hill formulating another proposal, which was contained in a July 15th letter sent to Mr. Herkness, the so-called Lenox Hill # 2 proposal which continued the sponsorship proposal, but recognized the MSKCC and Downtown contract.

The Lenox Hill proposals were discussed at the July 26, 1999 Board meeting, at which representatives of the AG and the DOH were present by invitation. Also invited were Mr. Michael P. Gutnick, Senior Vice President, Cushman & Wakefield, and James Lytle, Esq., attorney for MSKCC. Several members of the medical staff were also present. No invitation had been extended to Lenox Hill. Shattuck Hammond presented a written report in which, *inter alia,* it described the Lenox Hill proposals, and mischaracterized the proposals concerning the purpose of the MEETH Foundation. Moreover, Mr. Scibetta failed to inform the Board that Lenox Hill, as stated at the July 14th meeting, would be willing to establish "a separate LH–MEETH subsidiary" if that would be more desirable to the Board. On July 30, 1999, Ms. George wrote to Mr. Scibetta, complaining of these mistakes, and sent copies to the Board members. She also requested a meeting with Mr. Scibetta and the Board. There was no response. Thereafter, a meeting was held on September 16, 1999; representing Lenox Hill were Mr. James Marcus, Chairman of the Board, Ms. George, Mr. O'Brien, and representing MEETH were Mr. Scibetta, Dr. Sarkar, Mr. Herkness, Mr. Whitman (who had to leave early), and another Board member. At this meeting, Lenox Hill explained its proposals. Mr. Herkness then requested that MEETH be provided with additional documentation "outlining exactly what the MEETH Division would be." Ms. George responded that it would take "a week or so to put together the [requested] detailed information." Mr. Herkness replied "fine," they all shook hands, and the meeting ended. Lenox Hill started to assemble material requested by Mr. Herkness. ****591** However, it never completed the assembly and forwarding of the materials because on the following Tuesday, September 21, 1999, the Board authorized its counsel "to proceed as expeditiously as practicable to file the Section 511 petition" seeking judicial approval of the sale to MSKCC and Downtown. This petition was filed later that day. The Board was not informed of the meeting held with Lenox Hill, nor was it informed that Mr. Herkness had requested additional information and that he had been told by Ms. George it would be submitted in "a week or so."

***149 F. MEETH'S Plan**

MEETH's plan is to sell a part of its real estate to MSKCC, one of the world's outstanding cancer treatment and research centers. MSKCC plans to convert the New Hospital Building to expand its breast cancer center. Undeniably, this would be an extremely worthwhile use. However, the issue under section 511 is not the buyer's planned use of the real estate, however worthy that use may be, but whether seller's use of the sale proceeds will promote its own corporate purposes. (E.g., *Matter of St. Luke's Hospital,* 33 Misc.2d 888, 228 N.Y.S.2d 25 [Sup.Ct., N.Y. County 1962].) The remaining real estate will be sold to Downtown, a real estate developer, which intends to erect an apartment building on the site.

Upon completion of the transaction, and following the hoped-for DOH approval, MEETH will close its existing specialty hospital. If further DOH approvals are obtained, MEETH will then convert the existing Harlem Center, and the already approved though-not-yet built Brooklyn center to the proposed D&T centers. In addition, as part of the transaction MEETH also has proposed entering into a sponsorship agreement with New York–Presbyterian Hospital.

Although there is no mention of it in the minutes of the April 29th Board meeting, at which the sale of the real property and termination of the residency programs were authorized, the day before, on April 28th, Mr. Herkness had met with Dr. David B. Skinner, Vice Chairman and

Chief Executive Officer of NYPH, and proposed placing MEETH's soon-to-be displaced residents at NYPH. Also discussed was "developing a continuing working relationship with" NYPH. After a series of meetings between MEETH and NYPH officials, on July 26, 1999, the Board authorized an "affiliation agreement ... with [NYPH] relating to the Hospital's Harlem Center and its proposed Brooklyn Center." The Board authorized the NYPH arrangement, and thereafter NYPH and MEETH entered into a "non-binding" Memorandum of Understanding, dated September 30, 1999. Under this agreement, as Mr. Louis F. Reuter IV, Vice President of Administration for NYPH, testified, $10 million of the proceeds from the sale of the real estate would be placed into a restricted fund for MEETH's programs which would be housed at NYPH; the remaining $31 million would be available for MEETH's use, including the D&T Centers proposal. This NYPH sponsorship does not necessarily envisage a separate MEETH hospital facility; rather, "the ophthalmology and otolaryngology clinics at NYPH will have appropriate ***150** plaques and/or signage which will acknowledge the MEETH Division."

CONCLUSIONS OF LAW

At issue is whether, as required under section 511(d) of the Not–For–Profit Corporation Law,[5] MEETH has shown "to the satisfaction of the court," both that the "consideration and the terms of the transaction are fair and reasonable"[6] and that ****592** "the purposes of the corporation ... will be promoted"[7] by the sale of all or substantially all of the hospital's assets to Downtown and MSKCC. The few reported decisions dealing with this section have held that whether "the consideration and the terms of the transaction are fair and reasonable to the corporation" is to be evaluated at the time that the contract to sell is entered into. (*Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn,* 76 A.D.2d 712, 717–18, 431 N.Y.S.2d 834 [2d Dept.1980], affd. 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480; *Wolkoff v. Church of St. Rita,* 132 Misc.2d 464, 471, 505 N.Y.S.2d 327 [Rich. Sup.Ct.1986]; *Matter of the Church of St. Francis de Sales of New York,* 110 Misc.2d 511, 512, 442 N.Y.S.2d 741 [Sup.Ct., N.Y. County 1981]). On the other hand, the cases hold that whether "the purposes of the corporation ... will be promoted" is to be evaluated "in light of conditions prevailing at the time the issue is presented to the court." (*Manhattan Theatre Club, Inc. v. Bohemian Benevolent and Literary Assoc. of the City of New York,* 120 Misc.2d 1094, 1097, 467 N.Y.S.2d 143 [Sup.Ct., N.Y. County 1983], citing *Church of God,* 76 A.D.2d 712, 717, 431 N.Y.S.2d 834). Given my Findings of Fact, I conclude that MEETH has not satisfied either prong of section 511. Therefore I deny MEETH's petition to approve the proposed sale.

***151** Before turning to section 511, there are several areas that warrant brief discussion. Not-for-profit corporations operate under legal regimes designed for traditional for-profit corporations[8]. However, fundamental structural differences between not-for-profit corporations and for-profit corporations render this approach incapable of providing effective internal mechanisms to guard against directors' improvident use of charitable assets. For example, in the for-profit context, shareholder power ensures that Boards make provident decisions, while in the not-for-profit context, this internal check does not exist. To put it another way, a nonprofit corporation has no "owners" or private parties with a pecuniary stake to monitor and scrutinize actions by the directors. This distinction is even more significant in the case of charitable corporations, such as MEETH, where there are no members, because the board is essentially self-perpetuating. (Explanatory Memoranda No. 1, January 13, 1969, McKinney's Cons.Laws of NY, Book 37, Not–For–Profit Corp. L., p. XX [1970 ed.]).

The Not–for–Profit Corporation Law addresses this lack of accountability by requiring court approval of fundamental changes in the life of a Type B charitable corporation, such as a disposition of all or substantially all assets, since there are no shareholders whose approval can be sought. The Attorney General is made a statutory party to such petitions, and his "active participation" is presumed. (See V. Bjorkland, *op. cit.,* § 8–2 [a], p. 238). This is to ensure that the interests of the ultimate beneficiaries of the corporation, the public, are adequately represented and protected from improvident transactions. ****593** (*Rose Ocko Foundation, Inc. v. Lebovits,* 259 A.D.2d 685, 688, 686 N.Y.S.2d 861, 864 [2d Dept.1999], citing *Church of God,* 76 A.D.2d at 716, 431 N.Y.S.2d 834; *Wolkoff v. Church of St. Rita,* 132 Misc.2d 464, 467, 505 N.Y.S.2d 327). It is pursuant to this mandate that this court is called upon to review the sale of substantially all of MEETH's assets to MSKCC and Downtown.

A charitable Board is essentially a caretaker of the not-for-profit corporation and its assets. As caretaker, the Board "ha[s] the fiduciary obligation to act on behalf of the corporation ... and advance its interests" (*Pebble Cove Homeowners' Association, Inc. v. Shoratlantic Development Co. Inc.,* 191 A.D.2d 544, 545, 595 N.Y.S.2d 92 [2d Dept.], lv. to app. dsmd. 82 N.Y.2d 802, 604 N.Y.S.2d 559, 624 N.E.2d 697 [1993]) in "good faith and with that degree ***152** of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." (N–PCL 717[a]). This formulation of the Board's duty of care is an "expansion" of the comparable section of the Business Corporation Law which does not contain the words "care" and "skill" (Wyckoff, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 37, N–PCL 717, at 350–352), and firmly establishes the appropriate standard of care for directors of a not-for-profit corporation.

It is axiomatic that the Board of Directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. This duty has been referred to as the "duty of obedience." It requires the director of a not-for-profit corporation to "be faithful to the purposes and goals of the organization," since "[u]nlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the raison d'être of the organization." (Bjorkland, *op. cit.,* § 11–4 [a], at p. 414). Analysis of the duties of charitable directors more commonly arises in an action brought by the AG alleging breach of the duties owed to the corporation under N–PCL §§ 112 and 720, and does not appear to have been discussed in any reported decision under section 511. But the duty of obedience, perforce, must inform the question of whether a proposed transaction to sell all or substantially all of a charity's assets promotes the purposes of the charitable corporation when analyzed under section 511.

In recent years, across the United States, there have been a series of transactions that, although certainly different from this petition, nevertheless resemble, in certain basics, MEETH's proposal. I am referring to the nationwide spate of conversions of nonprofit hospitals into for-profit hospitals which has caused a substantial output of commentary. (E.g., Stampone, "Turning Patients Into Profit: Nonprofit Hospital Conversions Spur Legislation," 22 Seton Hall Legis. J. 627 [1998]; Hyman, "Hospital Conversions: Fact, Fantasy, and Regulatory Follies," 23 J. Corp. L. 741 [1998]; Brody, "The Limits of Charity Fiduciary Law," 57 Md. L.Rev. 1400, 1458–1476 [1998]; Hernandez, Note, "Conversions of Nonprofit Hospitals To For–Profit Status: The Tennessee Experience," 28 U. Mem. L.Rev. 1077 [1998]; Krause, " 'First, Do No Harm': An Analysis of The Nonprofit Hospital Sale Acts," 45 U.C.L.A. L.Rev. 503 [1997]; and Rubin, "Nonprofit Hospital Conversions in Kansas: The Kansas Attorney General Should Regulate All Nonprofit Hospital Sales," ***153** 47 U. Kan. L.Rev. 521 [1999]; see also, Gassel & Gerzog, "Conversions of Not–for–Profit Organizations Proliferate," N.Y.L.J., 8/29/96, p. 7, col. 1.) It has also resulted in some twenty states enacting or considering legislation regulating such conversions (see Hernandez, *op. cit.,* at 1102, note 125, collecting statutes and pending legislation). However, there has been no similar activity and little discussion in New York where such conversions are not permitted.

Nonetheless, the conversion analogy is analytically useful. This is because, absent the for-profit component, which of course is absent in a Section 511 petition, ****594** a conversion is conceptually similar to MEETH's petition, inasmuch as in both there is a charitable organization which alleges that it is incapable of continuing its primary mission of operating a hospital, seeks approval of the sale of all its assets, and plans to apply the sale proceeds towards a newly revised mission. As is relevant to the analysis, for example, legislation in one state requires that the attorney general examine the transaction to determine "(2) Whether the nonprofit hospital exercised due diligence in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the sale; (3) Whether the procedures used by the seller in making its decision, including whether appropriate expert assistance was used (were fair); (4) Whether conflict of interest was disclosed, including, but not limited to, conflicts of interest [of] board members ... and experts retained by the seller[;] [and] (5) Whether the seller will receive reasonably fair value for its assets." (Krause, *op. cit.,* at 551, summarizing criteria specified in the Nebraska statute). I believe this to be a clear and concise statement of factors which a court should be concerned with in evaluating a transaction under section 511 to sell all the assets. Indeed, they are in many respects mirrored in the AG's June 3, 1999 letter to MEETH, in essence agreed to by MEETH's counsel, in which the AG wrote "Elementary principles of corporate and fiduciary law require the Board, after it has decided to sell the hospital, to entertain all responsible proposals, not to favor any bidder over another in the process, and to treat all bidders and potential bidders identically and fairly."

I turn now to the first prong of section 511, which requires that "the consideration and terms of the transaction are fair ***154** and reasonable to the corporation." Because the sale of the real estate, as proposed, is inextricably interwoven with the closure of MEETH as it exists today, I believe that the transaction as a whole must be examined, not just the "fair market value" of the real estate. This transaction is unlike, for example *Matter of Church of St. Francis De Sales, supra,* a simple transaction which dealt only with the question of the value of a building being sold by the Church; there was no larger transaction involved. There do not appear to be reported decisions of more complex transactions, such as here, where implementing its decision to sell its real estate assets to MSKCC and Downtown would require the closing of MEETH and a fundamental change to its corporate purposes. The Board accepted Shattuck Hammond's conclusion that "the business [of MEETH] had no value," which I have found to be incorrect. Clearly MEETH, as a functioning acute care, specialty hospital, had value: major medical entities were willing to operate it and keep it open and guarantee the expenditure of substantial sums to do so. Thus, while it may be that the real estate was fairly valued, this is not enough. The transaction did not take into account MEETH's full value, and the NYPH proposal to establish a MEETH pavilion or building, with "plaques and/or signage," does not correct this since it does not necessarily contemplate preserving the business of MEETH, and therefore preserving the total assets of MEETH. Moreover, as I have also found, evidence at the hearing established that MEETH's name itself had significant value. Again under the terms of the proposed transaction, this value is not evaluated nor is it clear that it will be preserved. The Board disregarded these components of value when it decided to "monetize" its assets and sell the real estate. This is a fundamental flaw which leaves me unsatisfied that the terms and conditions of the proposed transaction are "fair and reasonable."

Under the second prong of section 511, which requires that "the purposes of the corporation ... will be promoted" (N–PCL 511[d]), MEETH's petition fares no better. Unfortunately, there is lacking judicial precedent concerning a proposal of ****595** this magnitude[9]. While MEETH has argued that the proposal to abandon the acute care, teaching and research hospital ***155** component of its mission and to pursue the D&T centers does not require an amendment, this argument is belied by the Board's own action on April 29th, authorizing submission of an Amendment to its Certificate of Incorporation (although never submitted) expressly providing for the D&T centers. This is behavioral evidence that the Board knew that it was proposing a fundamental change in the corporation's mission, which indeed it was doing For generations MEETH's mission, as stated in its Certificate of Incorporation, was understood to be the operation of an acute care, specialty teaching and research hospital dedicated to "plastic surgery" and to the treatment of "persons suffering from diseases of the eye, ear, nose or throat." While it is certainly correct that the definition of "hospital" contained in section 2801(1) of the Public Health Law includes a diagnostic and treatment center, as MEETH now argues, it is sophistry to contend that this means that MEETH is not seeking a new and fundamentally different purpose, in light of the overwhelming evidence which demonstrates this is exactly what it is doing. The conclusion is inescapable that the proposed use of the assets involves a new and fundamentally different corporate purpose.

Before I turn to analysis of MEETH's failure to establish that the proposed transaction will further its corporate purposes as required by section 511, a prescient passage from one text is instructive:

> [A] hospital or clinic providing specialized services, that is so deeply in debt that its provision of services is seriously jeopardized, may wish to transfer its assets to another clinic or hospital providing basically the same services in return for assumption of its debt. The only alternative may be the protection of federal bankruptcy laws or a receivership under state law for the protection of creditors. [Bjorklund, *op. cit.,* § 8–2[b][3], at p. 243.]

While it may be appropriate, in certain cases, to solve financial difficulties by eliminating the organization's mission by selling its assets and then undertaking a new mission, the passage properly focuses attention upon the duty of obedience, which mandates that a Board, in the first instance, seek to preserve its original mission. Embarkation upon a course of conduct which turns it away from the charity's central and well-understood mission should be a carefully chosen option of last resort. Otherwise, a Board facing difficult financial straits might find sale of its assets, and "reprioritization" of its mission, to be an attractive option, rather than taking ***156** all reasonable efforts to preserve the mission which has been the object of its stewardship.

As has been documented in the Findings of Fact, the record is clear that this case is not a situation where the Board first made a reasoned and studied determination that there was a lack of need for MEETH as a hospital, or that the financial difficulties made it impossible to ensure the survival of MEETH. Rather, the credible evidence is that MEETH's decision to sell was impelled by MSKCC's offer, which caused the Board to recognize the value of the underlying real estate; then its realization that it could "monetize" this asset drove subsequent events.

The MSKCC offer initially drove the decision to retain a strategic advisor, Shattuck Hammond, which had a direct and substantial interest in a sale of the real estate, i.e., the 1% transaction fee. This arrangement, regardless of whether it was traditional in investment banking, as Mr. ****596** Hammond testified, resulted in a situation where the Board put its reliance upon a strategic advisor which had an actual interest in the recommendations of its strategic study. It is not necessary for me to conclude that this conflict of interest compromised the result; the fee arrangement certainly gives the appearance that the integrity of the process was flawed and that the Board had not obtained the assistance of a truly independent expert.

Moreover, there does not appear to have been full disclosure to the Board of the potential for a conflict of interest in the expert. The evidence showed that two Board members were unaware of the percentage fee which was a part of Shattuck Hammond's retention. Additionally, there was no discussion or deliberation by the Board over the fact that its strategic advisor had a direct, and perhaps disabling, financial interest in the outcome of the strategic option it was recommending. Nor was there a decision by the Board to retain and rely upon Shattuck Hammond, notwithstanding this issue. The issue simply was never raised. As a result, it cannot be concluded with confidence that the Board received wholly disinterested advice. This becomes more troubling in view of the manner in which Shattuck Hammond dealt with bidders such as Continuum and Lenox Hill, which were not interested in purchasing the real estate, by providing misleading information concerning their offers, often omitting crucial details, and by asserting that the only realistic option was the sale of the real estate.

It is also clear that the MSKCC offer, which drove the decision to "monetize" the assets, drove the subsequent decisions ***157** to create a new or "reprioritized" mission, to prematurely terminate the residency programs, to seek approval to close the hospital, and virtually every other decision made by the Board, as I have detailed above.

This decision to "monetize" drove the need to change the corporate purposes, and these new or reprioritized purposes then became the basis for the argument that "purposes of the corporation ... will be promoted." A careful evaluation of whether there was a basis for changing the corporate purposes should have determined the need to sell, not vice versa. The total absence of any study beforehand, concerning the D&T centers, and the retention of healthcare experts, only after submission of the proposal to the DOH, and only to prepare a business plan "for fulfillment" or in "support" of the D&T proposal, not to independently evaluate the plan's feasibility, buttresses the conclusion that the sale drove the change in purpose. Indeed, the report submitted by Dr. Cicero and Mr. Kachmarick states that "[t]he following business plan describes how MEETH will achieve [its] goal, in keeping with its expanded mission statement." To argue that MEETH was returning to its original purposes without an iota of evidence that it made this fundamental determination prior to the decision to sell and close, cannot obscure the fact that this decision, of necessity, eliminated MEETH's historic mission, its historic raison d'être.

Moreover, the record also demonstrates that the Board failed to properly consider the various alternatives submitted which would have preserved MEETH's mission. The Board had concluded that these alternatives were the equivalent of "giving the keys away," and summarily rejected them[10]. However, the Board has no independent vitality. It appears that the Board confused preservation of the Hospital with preservation of the Board, when the appropriate calculus should be what is good for the Hospital is good for the Board. This is borne out by the testimony ****597** concerning Mr. Herkness' promise to consider the additional Lenox Hill materials, and his bringing the matter to vote without advising the Board of this commitment to ***158** Lenox Hill, which effectively foreclosed the Board from considering a proposal which would have preserved MEETH's mission. It is borne out by Mr. Scibetta's refusal to meet with Continuum in the presence of the AG, who is a statutory party to any section 511 petition, a decision acquiesced in by the Board. It also is borne out by the lack of interest in pursuing potential bidders who were willing to preserve MEETH. This conclusion is reinforced by the events on September 17, 1999 when Mr. Herkness inquired whether Continuum was willing to indemnify the Board and then refused to let Mr. Hyman examine the MSKCC contract.

In sum, it is evident that this petition fails to meet the two pronged test of section 511. The terms of the transaction are not fair and reasonable to the corporation, inasmuch as no consideration was given to the value of MEETH as a going concern; rather, this value was disregarded. Moreover, evaluating the transaction at the time of the petition, it is clear that there has not been a showing that the sale will promote the purposes of the corporation. To the contrary, MEETH decided to sell, and then evolved its new or "reprioritized mission." There has been no reasoned determination that MEETH cannot continue to operate an acute care, specialty research and teaching hospital, as other medical institutions are proposing to do, and are willing to invest substantial sums to accomplish. MEETH instead chose to sell its real estate, to seek DOH approval to close its hospital, and then apply for judicial imprimatur of this plan. I conclude that this sales transaction should be disapproved.

[Portions of opinion omitted for purposes of publication.]

All Citations

186 Misc.2d 126, 715 N.Y.S.2d 575, 2000 N.Y. Slip Op. 20511

Footnotes

1 Interestingly, at the time that this authorization was extended, the full Board had not even considered whether a sale of assets was necessary or strategically prudent.

2 Rule 13e–3(e)(1) (17 C.F.R. § 240.13e–[e][1]), promulgated pursuant to Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m, requires the disclosure of various items, listed in Schedule 13E–3, 17 C.F.R. § 240.13e–100, which is important in determining the fairness of a variety of corporate transactions. These statements are commonly referred to as a fairness opinion.

3 According to Mr. Herkness, these budget proposals also led to the significant February 2, 1999 decision to defease approximately $16.2 million of Dormitory Authority of the State of New York ("Dormitory Authority") bonds, which had been issued in a refinancing on August 1, 1997. The 1997 refinancing dropped the interest rate to below 5%, which Mr. Herkness testified had saved the Hospital "almost a million dollars annually."

The refinancing agreement provided that if the debt service ratio (essentially net income divided by interest payments) fell below 1.25 then the Dormitory Authority "may require the Hospital to employ a Hospital Consultant" and submit a report with regard to "actions to be taken by the Hospital to improve its management and financial position," and if the ratio fell below 1.10 "for any two consecutive fiscal years," then the Hospital "must immediately employ such a consultant, implement its recommendations," and file a report.

Mr. Herkness testified that, since the proposed operating budgets forecast a drastic drop in the debt service ratio, it was decided that the Bonds should be paid off in full. Thus, by "Unanimous Written Consent ... In Lieu of a [Board] Meeting," the Board resolved "to completely defease" the bonds. This required taking $9.4 million from cash reserves and using $6.8 million which had been withheld by the Dormitory Authority. Mr. Herkness was concerned that, if they fell below the ratio MEETH would be forced into "paying off the bonds." And Mr. Whitman thought "then presumably, you could be thrown into bankruptcy by the dormitory authority." Passing the fact that a charitable hospital cannot be put into involuntary bankruptcy (11 U.S.C. § 303), and that the Agreement provided graduated measures, it appears that there was no effort to determine what action the Dormitory Authority would have taken. Astonishingly, at a time when MEETH was supposed to be facing financial "doomsday," the bonds were paid off without determining how much investment income would be lost compared with the interest that would saved as a result of paying off the bonds, and without ascertaining the position of the Dormitory Authority.

The refinancing also gave "the Authority ... a first mortgage lien" on its real property to "secure all obligations and liabilities" under the Loan Agreement. This was a "condition precedent" to the issuance of the bonds. In its Written Consent, the Board stated that "the equity represented by such bond reserves can be more effectively utilized in connection with a prepayment of the mortgage ... to give the Hospital greater flexibility and options in dealing with its financial needs." This leads to the conclusion that the bonds were defeased as part of the plan to sell the real estate and is evidence that the emphasis was on sale, since if the Board was seeking means to preserve MEETH, defeasance may not have been desirable.

4 MEETH agreed "not to solicit, initiate or encourage the submission by a third party of any competing proposal."

5 The origins of section 511 date to 1876 (Code Civ. Pro. of 1876, §§ 3390–3393, added by L. 1890, c. 95); its lineage can be traced through the General Corporation Law § 52 to 1969, when it became a part of the new Not–For–Profit Corporation Law (L.1969, c. 1066).

6 This requirement was added in 1972 (L.1972, c. 961 § 6). Prior to this amendment, judicial decisions had required "fair market value" (e.g., *Matter of St. Luke's Hospital,* 33 Misc.2d 888, 891, 228 N.Y.S.2d 25 [Sup.Ct., N.Y. Cty., 1962]).

7 Before 1969, the court was required to be satisfied "that the interests of the corporation will be promoted" (Gen.Corp.L. § 52). The newly enacted Not–For–Profit Corporation Law changed the statutory language to "the purposes of the corporation ... will be promoted." While no legislative history has been found for this change, it is in consonance with Article 2 ("Corporate Purposes and Powers"), which for the first time defined a non-profit corporation in New York (Wyckoff, Practice Commentaries, McKinney's Cons.Laws of NY, Book 37, Not–For–Profit Corporation Law, § 201, at 43–44) and N–PCL § 402, which requires, as did former law, that the certificate of incorporation set forth, *inter alia,* "the purpose or purposes for which it is formed." (N–PCL § 402 [a] [2].)

8 The N–PCL was designed to reflect the Business Corporation Law as closely as the subject matter would permit. (See V. Bjorkland, J. Fishman, D. Kurtz, *New York Nonprofit Law and Practice: With Tax Analysis,* § 1–3(c), p. 15.)

9 There are reported decisions dealing with somewhat complicated sales. (E.g. *Agudist Council of Greater New York v. Imperial Sales Co.,* 158 A.D.2d 683, 551 N.Y.S.2d 955 [2d Dept., 1990] [sale disapproved where services provided to senior citizens will be

disrupted] and *Church of God,* 76 A.D.2d 712, 431 N.Y.S.2d 834). Such decisions generally deal with the impact of the sale of the assets on the existing mission, and do not involve a concomitant proposal to change or reprioritize the existing mission.

10 See Bjorklund, *op. cit.,* § 8–2[c], at p. 246, n. 58, discussing when a charitable "business" is being transferred, and in exchange the acquirer is assuming all liabilities and guaranteeing continuation of the seller services and noting that the "value (i.e., total assets transferred) may be much greater than the consideration (i.e., liabilities assumed)." Neither Continuum nor Lenox Hill was proposing this scenario, as was suggested by the "keys" metaphor.

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120 Misc.2d 1094
Supreme Court, New York County, New York,
Trial Term, Part 63. .

MANHATTAN THEATRE CLUB, INC., Plaintiff, v. BOHEMIAN BENEVOLENT AND LITERARY ASSOCIATION OF the CITY OF NEW YORK, Defendant.

Sept. 16, 1983.

Synopsis
Purported purchaser sought specific performance of contract for sale of not-for-profit corporation's real property. The Supreme Court, New York County, Trial Term, Seymour Schwartz, J., held that absent delivery of the executed contract by purported vendor to purported purchaser, the contract was not binding.

Judgment for defendant.

Attorneys and Law Firms

****144 *1094** Weil, Gotshal & Manges, New York City, for plaintiff; Kevin P. Hughes and Jeffrey S. Klein, New York City, of counsel.

Richard Pikna, New York City, for defendant.

Opinion

SEYMOUR SCHWARTZ, Justice:

Plaintiff seeks specific performance of a contract for the sale of real property. The proceeding was tried before this court without a jury.

Defendant, a non-profit organization of Czechoslovak fraternal lodges, is the owner of buildings located at 321 E. 73rd Street and 334 E. 74th Street. Plaintiff, a theatrical organization, is defendant's tenant, operating a theatre at the 73rd Street property.

In 1979, the parties entered into negotiations for the renewal of defendant's lease. Because of need for expansion, plaintiff was interested in leasing the large theatre and the adjoining 74th Street property. However, the negotiations soon moved in the direction of a purchase by plaintiff rather than a lease.

Defendant authorized its president, Henry Yochman (Yochman) to appoint a committee to conduct negotiations and to report back with recommendations. Plaintiff appointed ***1095** its own representatives, including its attorneys, to conduct negotiations on its behalf.

The parties quickly agreed to a sales price of 1.6 million dollars. However, other terms relevant to the proposed sale required further negotiations which continued for nearly two years. Chief among the areas of dispute was defendant's desire to use two rooms in the buildings in perpetuity for meetings of its organization.

The attorneys for both parties were primarily involved during the final year of negotiations (1980–1981). There were detailed drafts in an attempt to satisfy defendant that it would have the use of the two rooms even if the buildings were destroyed. Language was worked out guaranteeing defendant use of the two rooms "as long as the buildings located at the premises shall stand and if the buildings are restored following their destruction by fire or other casualty".

While the negotiations continued, a faction of defendant's organization opposed to the sale instituted a lawsuit in Supreme Court seeking an injunction. That action, (The Czech Free School Suit) instituted in April, 1981, is still pending. In recognition of the problems inherent in that suit, the parties provided in the proposed contract the following:

> "The parties hereto understand and agree that the consummation of the sale contemplated ****145** by this Agreement is conditioned upon there being a final determination in [The Czech Free School Suit] which does not prohibit conveyance of the premises in accordance with the terms of this Agreement."

On June 12, 1981, the contract was signed by an authorized representative of plaintiff and a check for $5,000 was delivered to defendant's attorney as a deposit together with the contract. While the parties dispute whether there was an understanding that Yochman was to sign the contract the following day, the Court finds that there was indeed such an understanding.

Yochman signed the contract the following day, June 13. Yochman, however, claims that he signed without reading it and then only on the understanding between him and his attorney that it would not be delivered without Yochman's permission. Yochman further claims that his authority to ***1096** sell the buildings was revoked at the June 13 meeting. The Court finds, however, that his authority was not revoked at the June 13 meeting and that his authority to sign was unimpaired at the time of the execution.

On June 25, 1981, defendant's attorney contacted plaintiff's attorney and informed her that the deal was off. After further attempts to negotiate failed, the deposit was returned to plaintiff.

Defendant never delivered the executed contract to plaintiff.

It has long been held that conveyances of interests in land require delivery. *219 Broadway Corp. v. Alexander's, Inc.,* 46 N.Y.2d 506, 414 N.Y.S.2d 889, 387 N.E.2d 1205. There, the parties reached agreement on the terms of a lease. The lessee signed the lease and forwarded it to the lessor who then executed it but never made delivery.

The court held the lease ineffective and noted the importance of delivery:

> "By requiring delivery, the law facilitates the true expectations of the parties by ensuring that the interest in the property is not conveyed until that moment when the parties so intend."

Id. at 512, 414 N.Y.S.2d 889, 387 N.E.2d 1205.

Plaintiff seeks to distinguish *219 Broadway* by noting that a lease is primarily a conveyance while the instrument here is a contract to convey with the conveyance occurring only when title passes. Its contention, finds support in *Balsam v. Axelrod,* 102 Misc.2d 1000, 424 N.Y.S.2d 814, where the Court refused to extend 219 Broadway's requirement of delivery to contracts to sell real property.

This Court declines to follow the distinction made in *Balsam.* The purpose of the delivery rule is to show "an unequivocal intent that the interest intended to be conveyed is, in fact being conveyed. The mere signing of the instrument by parties not in the presence of each other, without more, does not evince such intent." *219 Broadway Corp. v. Alexander's, Inc., supra* 46 N.Y.2d at 512, 414 N.Y.S.2d 889, 387 N.E.2d 1205. It is certainly as important to demonstrate intent when a fee simple is conveyed as when the conveyance is a leasehold interest. The rule argued by plaintiff and accepted in *Balsam* would result in the incongruity of a higher evidentiary standard to demonstrate intent for the transfer of a leasehold interest ***1097** rather than the transfer of a fee which is the transfer of the entire interest of the grantor without reversion.

A contract to sell real property is not binding absent delivery. *See, Farago v. Burke,* 262 N.Y. 229, 186 N.E. 683. There, the parties met at the seller's attorney's office where the contract for the sale of the Van Cortlandt estate was drawn up and signed by the seller. The purchaser approved the contract but failed to sign it, and asked instead if he could have a copy of the contract reviewed by his attorney. The buyer agreed to return the following week to exchange contracts. Before he did so, the seller changed his mind. Although the Court noted that the seller would have been obligated had the buyer signified his acceptance or consent prior to the seller's withdrawal of the offer, it held there was no contract. Similarly, there was no contract here, notwithstanding that plaintiff would ****146** have been obligated under the contract if defendant manifested its intent to be bound prior to plaintiff withdrawing its offer to purchase. The absence of delivery, even if not an absolute requirement, is conclusive evidence here that defendant did not intend to be bound.

Failure to deliver which conclusively evidenced a lack of intent to be bound aside, there was no contract because of the failure to satisfy an express condition precedent. The Czech Free School suit was still pending at the time of trial and the contract expressly conditioned sale upon the final determination of that action.

Not-For-Profit Corporation Law § 511 compels the Court to void the agreement even if there was a valid contract. That section requires Court approval where a Not-For-Profit corporation wishes to sell substantially all of its assets. *Id.* In determining whether to grant approval, the Court must apply a two prong test. First, it must determine that the terms and consideration are not unwise. Second, it must find that the sale will benefit the corporation or promote the best interest of its members. *Church of God v. Fourth Church of Christ,* 76 A.D.2d 712, 431 N.Y.S.2d 834, *aff'd* 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480. In applying the second prong, the Court, "should be guided primarily by whether those ends would be realized in light of conditions prevailing at the time the issue is presented to the court." *Id.* 76 A.D.2d at 717, 431 N.Y.S.2d 834.

***1098** Here, the Court determines that the proposed sale at the present time will not benefit the corporation or promote the best interests of its members. Most members now oppose the sale. There was no showing at trial of any relationship of purchase price to the then market value of the properties and no demonstration of an agreed plan to carry on defendant's fraternal and cultural activities at another location. There is no proof that the sale is in defendant's best interests at this time.

Judgment for defendant.

All Citations

120 Misc.2d 1094, 467 N.Y.S.2d 143

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102 A.D.2d 788
Supreme Court, Appellate Division, First Department, New York.

MANHATTAN THEATRE CLUB, INC., Plaintiff-Appellant,
v.
BOHEMIAN BENEVOLENT AND LITERARY ASSOCIATION OF the CITY OF NEW YORK, Defendant-Respondent.

June 28, 1984.

Synopsis
Purchaser brought action for specific performance of contract to convey real property. The Supreme Court, New York County, Seymour Schwartz, J., 120 Misc.2d 1094, 467 N.Y.S.2d 143, dismissed the complaint, and purchaser appealed. The Supreme Court, Appellate Division, held that purchaser was not entitled to specific performance of the contract to convey real property.

Affirmed.

Carro, J., filed dissenting opinion in which Alexander, J., joined.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

****274** K.P. Hughes, New York City, for plaintiff-appellant.

R. Pikna, New York City, for defendant-respondent.

***789** Before SANDLER, J.P., and CARRO, SILVERMAN, FEIN and ALEXANDER, JJ.

Opinion

****275** MEMORANDUM DECISION.

***788** Judgment, Supreme Court, New York County, 120 Misc.2d 1094, 467 N.Y.S.2d 143, after trial entered September 30, 1983, dismissing a complaint for specific performance of a contract to convey real property, is affirmed without costs.

The facts are as stated in the dissenting opinion. However, we reject the notion that the concept of delivery should be confined to a contract involving a leasehold interest. As the Court of Appeals noted in *219 Broadway Corporation v. Alexander's, Inc.,* 46 N.Y.2d 506, 511, 414 N.Y.S.2d 889, 387 N.E.2d 1205, the concept of delivery is not an archaic principle of property law, but rather is "fundamental to the conveyance of an interest in land". Analyzing the practicalities of the situation, in language as equally applicable to transactions in real estate as to leasehold interests, the court noted:

> "[D]elivery serves a very practical end. It is a common practice in the contemporary business world for parties to draft and sign instruments of conveyance prior to the time at which they intend their contemplated transaction to become irrevocable. By requiring delivery, the law facilitates the true expectations of the parties by insuring that the interest in the property is not conveyed until that moment when the parties so intend". (46 N.Y.2d at 511–512, 414 N.Y.S.2d 889, 387 N.E.2d 1205.)

The dissenters see the extended delay between signing and ultimate repudiation of the contract as an indication that rejection of the contract was "only ... an afterthought." The facts, as related in the dissent, clearly belie that conclusion. Plaintiff's attorney was made aware, contemporaneous with the notification that the contract had been signed, that there was "trouble" with the approval, clearly "bad news" for the prospects of consummation of the transaction. Plaintiff was thus put on notice of anything but a "clear intent" to convey the property interest at the time of signing. Plaintiff certainly did not have to wait two months to realize that approval of the sale by defendant's board of delegates was very much in jeopardy. Under such circumstances, armed with such knowledge, it would have been impossible for plaintiff, at any time during those two months, to have inferred or construed a delivery of the signed contract of sale. The passage of time merely made more obvious the hesitation of defendant, a state of mind clearly sought to be protected by the Court of Appeals in adhering to the requirement of delivery in *219 Broadway v. Alexander's* (supra). In viewing the delivery concept as a manifestation of "the intent of the parties that an interest in the land is, in fact, being conveyed", the Court of Appeals, while referring to a leasehold interest cited authorities which would apply the principle equally to the conveyance of a deed to real property.* Where the prospective purchaser is on notice that there are doubts as to the approval of conveyance, especially where those doubts evince hesitation as to whether the transaction will be in the best interests of the conveyor's membership (see *Church of God v. Fourth Church of Christ,* 76 A.D.2d 712, 718, 431 N.Y.S.2d 834, affd. 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480), the burden of proving delivery or nondelivery shifts to the prospective purchaser (15 N.Y.Jur., Deeds § 47). Manifestly, plaintiff has not borne that burden here.

All concur except CARRO and ALEXANDER, JJ., who dissent in a memorandum by CARRO, J., as follows:

We would reverse the order of Supreme Court, approve the sale under the terms of § 511 (subd. [d]) of the Not-for-Profit Corporation ****276** Law, and grant specific performance to plaintiff.

Both parties are not-for-profit corporations. Plaintiff has been a tenant in defendant's 73rd Street building since 1970. The rest of that five-story building goes largely unused for the simple reason that defendant has not been financially secure enough to keep the structure up to building and fire code specifications. Indeed, much of the maintenance responsibilities have been undertaken by plaintiff, beyond the requirements of its lease, as necessary for the operation of a public theatre and cabaret. Defendant's own use of the premises is limited to two rooms on the second floor—for a weekly Czech language course and a monthly delegates' meeting.

In the Fall of 1979, as it began the final year of its five year lease, plaintiff became interested in expanding in order to accomodate larger audiences and a growing staff. Because of plaintiff's success at that location, (over half of its audience is drawn from the Upper East Side), it originally sought to also lease defendant's adjoining facility on 74th Street, which contains a larger theatre. Some early, tentative negotiations along this line were had. But when defendant advised that it would not even renew the ***790** existing lease and had received an offer of $1.6 million to purchase both parcels (with half a million in cash), plaintiff matched the offer under its right of first refusal contained in the lease. Later, plaintiff bettered the deal by offering an all-cash deal via the City of New York's commitment to finance the purchase (and then lease the property back to MTC). In addition, and critical from defendant's point of view, plaintiff agreed to allow defendant the continuing use of the two rooms on the second floor, at no cost.

Defendant's independent appraisal of the property, presented to defendant's October 1979 membership meeting, disclosed a value of slightly under a million and a half. Attorneys for both parties began to negotiate, with a first draft being sent from plaintiff's attorney to defendant's counsel in December of 1979. At an April 1980 membership meeting a committee was appointed to consider plaintiff's offer. Even at that time, when the offer only provided for $500,000 cash, the committee recommended approval and, by a vote of 16–0, defendant authorized its officers to enter into negotiations and a contract of sale.

Plaintiff, for its part, had to obtain approval for the financing via public hearings before Community Board No. 8, the City Planning Commission and the Board of Estimate, with adoption of the approving resolution of this last body coming on March 12, 1981. Drafts of the contract were drawn by the attorneys in November, 1980, and February, 1981, the latter containing the specific guarantee for defendant's use of the two rooms as long as the building stood or if the building was restored after casualty. (The City approved this concession, as a provision within the deed of conveyance, on May first, and it was then incorporated into the June 1, 1981 draft).

At the May 2, 1981 delegates' meeting, the proposed contract was explained and the delegates approved the sale by a vote of 11 to 4. The sale was felt to be beneficial because defendant could not afford to keep and maintain the building; the cash purchase price would allow defendant to renovate a constituent's building in Astoria and relocate there; plaintiff was the only prospective buyer who did not wish to demolish the building and would allow continued use of the two (school and meeting) rooms; and the $1.6 million offer was an excellent price in light of the building's condition and the room-usage condition. In fact, the attorneys further modified the proposed contract of sale in the June 10th draft to specify the dimensions of the two rooms.

The contract signing was set for June 12, 1981 at the offices of plaintiff's attorneys. Plaintiff's principal, Mr. Grove, was there, as was defendant's lawyer, but not Mr. Yochman, defendant's principal. The June 10th draft was further modified in three minor areas, as authorized by Mr. Yochman over the phone. Mr. Grove signed the contract ****277** and tendered the $5000 down payment check to defendant's attorney. Counsel took the contract giving it to his office suite mate for delivery to Yochman the next day, when a membership meeting was to be held at the building.

Yochman did receive the contract the following day, and he signed it. Twenty minutes later Yochman presided over the delegates' meeting—a tumultuous affair in which a dissident faction voiced strenuous objections to the sale. (We know what occurred there because the dissident's attorney, now counsel for defendant, brought a stenographer along). The sale opponents argued their cultural and sentimental attachment to the building, stating that the Manhattan location was an irreplaceable asset, the purchase price was too low and the project relocation to Astoria was undesirable. Three new members or delegates were proposed, apparently in hopes of then re-balloting the approval for the sale. At this point the meeting was adjourned, and contrary to defendant's assertions, Yochman's authority as president was thus never mentioned, much less revoked.

However, the now-signed contract was never delivered back to plaintiff, although plaintiff's counsel learned, two days after the fact, that Yochman had indeed signed it. That attorney testified that she was not ***791** informed of any serious problem, but only of requests for some minor modifications.

Defendant's counsel testified that he informed plaintiff's lawyer that there was "good news and bad news." The good news was, of course, that Yochman had signed; the bad news was, "There was a lot of hostility and problems back and forth." Later that day, or the next, he discussed the contract terms with Yochman, who now wanted assurance that, no matter what became of the building, defendant would have the use of two rooms "in perpetuity." Although the attorneys held regular discussions on this point over the next two months, it was not until August 6, 1981 that defendant's counsel wrote to say that there was no binding agreement. On August 19, 1981 counsel returned the $5000 down payment.

We believe plaintiff is entitled to specific performance of the contract already signed by Yochman, in his capacity as president of defendant. Initially, we note that since this is not an action to compel performance of a long-term lease, defendant's reliance upon *219 Broadway Corp. v. Alexander's, Inc.,* 46 N.Y.2d 506, 414 N.Y.S.2d 889, 387 N.E.2d 1205, is misplaced. In that case the Court of Appeals (per Jasen, J.) expressly stated that they did not "reach or consider the broad question whether, and in what circumstances, signature alone will suffice to create an enforceable contract." (46 N.Y.2d at 513, 414 N.Y.S.2d 889, 387 N.E.2d 1205). The Court did point out, however, that

> "the concept of delivery is not given to precise definition or controlled by fixed formalities. It can be said, however, with as much certainty as this sometimes elusive concept permits, that a delivery of a lease so as to give it effect requires acts or words or both acts and words which clearly manifest that it is the intent of the parties that an interest in the land is, in fact, being conveyed to the lessee." (citations omitted).

(46 N.Y.2d at 512, 414 N.Y.S.2d 889, 387 N.E.2d 1205). From this we adduce that the key factor is "the intent of the parties," and thus, actual delivery is not essential, but may be implied. *See, e.g. Birch v. McNall,* 19 A.D.2d 850, 244 N.Y.S.2d 60 ("A binding contract, however, may be made without a physical delivery of the instrument evidencing the contract."); *Balsam v. Axelrod,* 102 Misc.2d 1000, 1001–2, 424 N.Y.S.2d 814.

It seems clear that at all relevant times over the almost two years of negotiations, defendant manifested the requisite intent to sell the property to plaintiff. In the case of *Brown Bros. Electrical Contractors v. Beam Construction Corp.,* 41 N.Y.2d 397, 393 N.Y.S.2d 350, 361 N.E.2d 999, where the issue was whether the "course of conduct and communications between [the parties] created a legally enforceable ****278** agreement" for electrical work, the Court (per Fuchsberg, J.) discussed the proper method of gauging intent:

> In accordance with long-established principles, the existence of a binding contract is not dependent on the subjective intent of either [party]. In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds. In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were trying to attain. (citations omitted)

(41 N.Y.2d at 399–400, 393 N.Y.S.2d 350, 361 N.E.2d 999). The several approvals of the sale by the membership and the active negotiations of defendant's attorney certainly meet this test. And despite his not being present at the contract signing on June 12, 1981, Yochman's telephonic endorsement of last minute changes shows his active participation in every detail. Even the two month hiatus between the signing and the eventual repudiation of the agreement confirms that the intent of defendant changed only as an afterthought. As noted by the Second Department, in *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn,* 76 A.D.2d 712, 431 N.Y.S.2d 834, *aff'd* 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480, while the formalities, such as signing and delivery, are usually necessary, the "rule yields, however, when the parties have agreed on all contractual terms and have only to commit themselves to writing. When this occurs, the contract is effective at the time the oral ***792** agreement is made, although the contract is never reduced to writing and signed." (76 A.D.2d at 715, 431 N.Y.S.2d 834). The present case is, of course, even more compelling since there is a signed written document to evidence the agreement. *Compare Church of God, supra* at 715, 431 N.Y.S.2d 834: "Neither the minutes of defendant's corporate meeting at which plaintiff's offer was accepted nor the transmittal letter expressly or impliedly reserved the effectiveness of the agreement until the formal contract was signed. Accordingly, we find that the parties duly contracted for the sale of defendant's church edifice to plaintiff."

Of course, defendant is correct in arguing that no sale of its property is possible prior to court approval of the terms of the sale, as required by the Not-For-Profit Corporation

Law, § 511 (subd. [d]). It is not necessary, however, to require that a separate petition be brought for this purpose. *Cf. Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn, supra,* 54 N.Y.2d 742, 744, 442 N.Y.S.2d 986, 426 N.E.2d 480 ["in an action for specific performance, a court of equity 'has ample power to inquire into the fairness of the contract and as to its advantage or disadvantage to the religious corporation, and to approve the proposed conveyance and direct it to be made where, upon all the facts, no valid reason appears for refusing such relief' (*Muck v. Hitchcock,* 149 App Div 323, 328–329 [134 N.Y.S. 271], *rev'd on other gnds* 212 N.Y. 283 [106 N.E. 75] ...)." (String citation omitted)]. *See also* 76 A.D.2d at 716, 431 N.Y.S.2d 834.

Under the statute we are directed to assess, and be satisfied, that "the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, ..." N–PCL § 511 (subd. [d]); *Matter of Church of St. Francis de Sales of NYC,* 110 Misc.2d 511, 512, 442 N.Y.S.2d 741. We believe both prongs of this test are well-satisfied. As noted above, this sale will enable defendant to refurbish the Astoria building and expand its activities while maintaining its Manhattan language school, as well as continue to hold its monthly delegates' meeting. The price, especially at the time it was negotiated (*cf. Matter of Church of St. Francis, id.*), appears to be both fair and reasonable in light of these concessions as to the two ****279** rooms. No other prospective purchaser would have allowed this as a condition of the sales contract, much less, include in the deed of conveyance an assurance that comparable space would continue to be made available should the building be voluntarily demolished and rebuilt.

Lastly, we find no merit to defendant's argument that the sale cannot be consummated because of the contract provision requiring that there first be "a final determination [of the dissidents' law suit] which does not prohibit conveyance of the premises." Under the auspices of the Czech Free School, the opponents of the sale had brought an injunctive action in April of 1981. Within a month Yochman had explained the sale terms to a delegates' meeting at which the dissidents were present, and the delegates again approved the sale, by a vote of 11 to 4. On June 15, 1981 (two days after Yochman signed), Special Term denied the motion for a preliminary injunction. But in mid-July Yochman capitulated to the dissidents and agreed to take the position that the deal with plaintiff was terminated, in return for discontinuance "with prejudice" of the Czech Free School action. That lawsuit was never formally discontinued, however, presumably to allow defendant to rely upon the non-performance of the above-mentioned condition in the contract. Unsurprisingly, the attorney for the dissidents in that action now represents defendant here. Thus, the obstacle is one which is solely in defendant's power to remove (and there has already been one judicial determination that that action was not likely to succeed). Yochman could have insisted upon a stipulation of discontinuance in July of 1981, and the issue is moot, now, anyway. The action has been abandoned. *Cf. Wagner v. Derecktor,* 306 N.Y. 386, 118 N.E.2d 570; *Mokar Properties Corp. v. Hall,* 6 A.D.2d 536, 179 N.Y.S.2d 814. And *compare Weinprop, Inc. v. Foreal Homes, Inc.,* 79 A.D.2d 987, 434 N.Y.S.2d 471 and *In re: Heyliger,* 39 A.D.2d 698, 332 N.Y.S.2d 253. We believe defendant has, effectively, waived this ***793** condition and must "accept performance of the contract as is." *Weinprop, Inc. v. Foreal Homes, Inc., supra* (citation omitted).

For all of the foregoing reasons the judgment entered September 30, 1983 in Supreme Court, New York County, should be reversed, the contract declared to be in accord with the requirements of N–PCL § 511, and specific performance decreed in plaintiff's favor.

All Citations

102 A.D.2d 788, 478 N.Y.S.2d 274

Footnotes

* "The legal requirements of delivery and acceptance imposed on deeds are also placed on leases as conveyances of interests in land." (3 Thompson, Real Property [1959 ed] § 1059; see 7 Thompson § 3229: "The 'execution' of a deed means the making thereof, which includes all acts such as signing, sealing and delivering."

64 N.Y.2d 1069
Court of Appeals of New York.

MANHATTAN THEATRE CLUB, INC., Appellant, v. BOHEMIAN BENEVOLENT AND LITERARY ASSOCIATION OF the CITY OF NEW YORK, Respondent.

April 23, 1985.

Synopsis

Prospective purchaser brought action for specific performance of contract for sale of real property. The Supreme Court, New York County, Seymour Schwartz, J., 120 Misc.2d 1094, 467 N.Y.S.2d 143, dismissed complaint. The Supreme Court, Appellate Division, 102 A.D.2d 788, 478 N.Y.S.2d 274, affirmed, and purchaser appealed. The Court of Appeals held that purchaser was not entitled to specific performance, since it failed to demonstrate requisite objective manifestation of intent of parties to enter into contract for sale.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1070 ***878 **223** Kevin P. Hughes and Jeffrey S. Klein, New York City, for appellant.

John T. Morin and Kevin J. Farrelly, New York City, for respondent.

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division, 102 A.D.2d 788, 478 N.Y.S.2d 274, should be affirmed, with costs.

Both parties are not-for-profit corporations.

In May 1979, plaintiff, a lessee of premises owned by defendant, evidenced a desire to renew its lease. Preliminary negotiations evolved into discussions for a proposed sale of the property to plaintiff, which were followed by more extensive negotiations between representatives of the respective parties and their attorneys in efforts to formulate the specific provisions for a contract of sale. Two years later, on June 13, 1981, a final draft of the proposed contract of sale was handed to defendant's president, Henry Yochman, just prior to his attendance at a special meeting of the membership where he was to preside. The contract had been signed by plaintiff's representative the previous day in Yochman's absence. Defendant's attorney asked Yochman to sign on behalf of defendant prior to entering the meeting, assuring him that the contract, though signed, would not be delivered until they had reviewed it further. Yochman then signed. Plaintiff's attorney was contemporaneously notified by his counterpart of the execution of the contract, but with the caveat that there was "trouble" with approval of the sale and "bad news" for the prospect of an ultimate consummation of the contract.

This contract was never returned to plaintiff's attorney after the meeting of the membership where strenuous objection to the sale was voiced by a number of those present. Attempts by the parties to reconcile persisting problems were of no avail. On August 6, 1981, defendant's counsel sent a letter stating that no binding agreement had been reached and thereafter returned the deposit which had accompanied the final draft.

Dismissal of the complaint in the ensuing action for specific performance was proper since the circumstances presented here ***1071** fail to demonstrate the requisite objective manifestation of intent of the parties to enter into a contract (*see, Brown Bros. Elec. Contrs. v. Beam Constr. Corp.,* 41 N.Y.2d 397, 399–400, 393 N.Y.S.2d 350, 361 N.E.2d 999; *Arnold v. Gramercy Co.,* 15 A.D.2d 762, 224 N.Y.S.2d 613, *affd.* 12 N.Y.2d 687, 233 N.Y.S.2d 475, 185 N.E.2d 911).

WACHTLER, C.J., and JASEN, MEYER, SIMONS, KAYE and KANE, JJ., concur.

ALEXANDER, J., taking no part.

Order affirmed, with costs, in a memorandum.

All Citations

64 N.Y.2d 1069, 479 N.E.2d 222, 489 N.Y.S.2d 877

End of Document

McKinney's Consolidated Laws of New York Annotated
Not-for-Profit Corporation Law (Refs & Annos)
Chapter 35. Of the Consolidated Laws (Refs & Annos)
Article 5. Corporate Finance (Refs & Annos)
McKinney's N-PCL § 511

§ 511. Petition for court approval

Effective: July 1, 2014

Currentness

<[Education Law § 216-a adjusts the language of this section as it applies to education corporations]>

(a) To obtain court approval to sell, lease, exchange or otherwise dispose of all or substantially all its assets, a corporation shall present a verified petition to the supreme court of the judicial district, or the county court of the county, wherein the corporation has its office or principal place of carrying out the purposes for which it was formed. The petition shall set forth:

1. The name of the corporation, the law under or by which it was incorporated.

2. The names of its directors and principal officers, and their places of residence.

3. The activities of the corporation.

4. A description, with reasonable certainty, of the assets to be sold, leased, exchanged, or otherwise disposed of, or a statement that it is proposed to sell, lease, exchange or otherwise dispose of all or substantially all the corporate assets more fully described in a schedule attached to the petition; and a statement of the fair value of such assets, and the amount of the corporation's debts and liabilities and how secured.

5. The consideration to be received by the corporation and the disposition proposed to be made thereof, together with a statement that the dissolution of the corporation is or is not contemplated thereafter.

6. That the consideration and the terms of the sale, lease, exchange or other disposition of the assets of the corporation are fair and reasonable to the corporation, and that the purposes of the corporation, or the interests of its members will be promoted thereby, and a concise statement of the reasons therefor.

7. That such sale, lease, exchange or disposition of corporate assets, has been recommended or authorized by vote of the

directors in accordance with law, at a meeting duly called and held, as shown in a schedule annexed to the petition setting forth a copy of the resolution granting such authority with a statement of the vote thereon.

8. Where the consent of members of the corporation is required by law, that such consent has been given, as shown in a schedule annexed to the petition setting forth a copy of such consent, if in writing, or of a resolution giving such consent, adopted at a meeting of members duly called and held, with a statement of the vote thereon.

9. A request for court approval to sell, lease, exchange or otherwise dispose of all or substantially all the assets of the corporation as set forth in the petition.

(b) Upon presentation of the petition, the court shall direct that a minimum of fifteen days notice be given by mail or in person to the attorney general, and in its discretion may direct that notice of the application be given, personally or by mail, to any person interested therein, as member, officer or creditor of the corporation. The court shall have authority to shorten the time for service on the attorney general upon a showing of good cause. The notice shall specify the time and place, fixed by the court, for a hearing upon the application. Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

(c) If the corporation be insolvent, or if its assets be insufficient to liquidate its debts and liabilities in full, the application shall not be granted unless all the creditors of the corporation shall have been served, personally or by mail, with a notice of the time and place of the hearing.

(d) If it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, as described in the petition, for such consideration and upon such terms as the court may prescribe. The order of the court shall direct the disposition of the consideration to be received thereunder by the corporation.

Credits

(L.1969, c. 1066, § 1. Amended L.1970, c. 847, § 23; L.1972, c. 961, § 6; L.1985, c. 102, § 1; L.2013, c. 549, § 55, eff. July 1, 2014.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Rose Mary Bailly and William Josephson

2021

As the Practice Commentaries to this section have noted previously, Religious Corporations Law § 12.1 prohibits a religious corporation from selling, mortgaging or leasing "any of its real property without first applying for and obtaining leave of the court or the attorney general therefor, pursuant to NPCL § 511." The failure on two occasions to obtain court approval for the transfer of real property to defendant by two trustees of plaintiff was at issue in *St. Lucy's Cathedral Old Roman Catholic Church v. Sacred Heart of Jesus English Rite Catholic Church, Inc*., 189 A.D.3d 909, 133 N.Y.S.3d 472 (Mem) (2nd Dept. 2020). The first purported transfer occurred during the pendency of previous litigation; the transfer was done without notice to the court or other parties to the litigation. The court learned of the transaction and ordered the property returned. The property was returned and the litigation ended. The second transfer of the same property between the same parties again without court approval occurred shortly thereafter. Plaintiff sued to quiet title and defendant moved to dismiss the complaint. The trial court granted plaintiff summary judgment and dismissed defendant's motion. Defendant appealed. The appellate court affirmed the trial court's decision, observing that the plaintiff had clearly demonstrated that the transfer had not met section 511's requirements. The court also held that defendant's allegation that plaintiff's trustees who carried out the transaction were acting ultra vires did not preclude summary judgment in plaintiff's favor.

2020

In 2016, petitioner Mount Olive Baptist Church of Manhasset sought court approval of its sale of certain real property that it owned to GG Acquisitions, LLC. The court declined to approve the sale at that time on the grounds that the terms of the sale were not fair to the church, particularly the purchase money mortgage that formed a substantial part of the purchase price. The provision for a purchase money mortgage was never deleted and ultimately was the undoing of the sale. The purchaser attempted to address the court's concerns by increasing the purchase price and making the terms of the purchase money mortgage more favorable to the church. The church was not persuaded that these terms addressed the court's original concerns so it returned to court to have the contract declared null and void. The court granted the church's motion. *Mount Olive Baptist Church of Manhasset v. GG Acquisitions*, LLC, 178 A.D.3d 1051, 112 N.Y.S.3d 591 (2nd Dept. 2019) (Action I).

While the church's application to have the contract declared null and void was pending at the trial level in Action I, the purchaser commenced an action for specific performance of the contract requiring the church to amend the contract and "use its best efforts" to obtain court approval of the sale. *GG Acquisitions, LLC v. Mount Olive Baptist Church of Manhasset*, 178 A.D.3d 1023 116 N.Y.S.3d 303 (2nd Dept. 2019) (Action II). The church moved to dismiss the specific performance complaint in Action II and the purchaser moved for a preliminary injunction. When the trial court in Action I granted the church's application to declare the contract null and void, the trial court in Action II denied both the church's motion to dismiss the action for specific performance and the purchaser's cross-motion for a preliminary injunction, declaring the proceedings academic. The purchaser appealed. The appellate court in Action I reversed the trial court decision, holding that the church's application to declare the contract null and void should not have been granted because the church did not specifically request declaratory relief. 178 A.D.3d 1051, 112 N.Y.S.3d 591 (2nd Dept. 2019). That decision in Action I led the appellate court in Action II to hold that the proceedings were no longer academic and affirmed the denial of the purchaser's motion for preliminary relief. It concluded that the relief purchaser sought was futile because accepting a purchase money mortgage was not a risk that the church should take.

Article 5A--New York Prudent Management of Institutional Funds Act

As noted in 2020 Practice Commentaries to Sections 102 and 112, the New York State Attorney General filed a complaint in Supreme Court, New York County, on August 6, 2020, seeking the dissolution of the National Rifle Association (NRA), a New York not-for-profit charitable membership organization, for engaging in persistent fraudulent and illegal activities in violation of the Not-for-Profit Corporations Law and the Estates, Powers & Trusts Law. The complaint also names NRA's leadership team: Wayne LaPierre, Joshua Powell, Wilson "Woody" Phillips, and John Frazer, as current or former officers, directors, and key persons of the corporation. It seeks restitution from them for violations of their fiduciary duties, the removal of LaPierre, Powell, and John Frazer from their current positions in the NRA, and an injunction prohibiting them from holding any future fiduciary positions in any not-for-profit or charitable organization incorporated or authorized to conduct business in New York, or which solicits charitable donations or holds charitable assets in New York. The complaint alleges that the NRA and the individual defendants were subject to the requirements of Article 5A, NYPMIFA, and that they failed to manage the NRA's institutional funds in good faith and with care an ordinarily prudent person in a like position would use. The complaint alleges that, among other things, the NRA 1) permitted a total reduction in unrestricted assets to exceed $63 million during a relevant three-year period; 2) failed to incur only appropriate and reasonable costs in relation to its assets and the purposes of the NRA; 3) failed to make reasonable efforts to verify facts relevant to management of its institutional funds; 4) failed to make reasonable efforts to keep its Board and relevant committees of the Board apprised of the financial status, risks, and commitments of institutional funds; 5) authorized and expended significant institutional funds (in excess of $54 million) for payments without consideration of the factors required to be considered by NYPMIFA; 6) imprudently pledged capital assets to obtain loans for current expenses, taking loans in excess of $5 million from the separately maintained funds in violation of its bylaws; 7) used these same funds for payment of travel expenses of its chief Executive officer outside the NRA expense reimbursement system; and 8) permitted its Audit Committee to fail to evaluate or report on the requirements of NYPMIFA, and the NRA's compliance with those requirements.

2019

John T. Walsh Enterprises, LLC v. Grace Christian Church involved a foreclosure action on a mortgage in the amount of $350,000 against church property. The church moved for summary judgment dismissing the action on the grounds that the mortgage was unenforceable because it had not been approved by the congregation as required under section 200 of the Religious Corporations Law, its board of directors, and the court or attorney general as required under NPCL 511. 62 Misc.3d 1224(A) (Sup. Ct. Kings Co. 2019). As the court notes in its opinion, the " 'purpose of this requirement is to protect the members of the religious corporation, the real parties in interest, from loss through unwise bargains and from perversion of the use of the property.' " *Id.* (citations omitted). Acting on the language of RCL § 12 (9), plaintiff mortgagee sought court approval during the pending foreclosure litigation. Analyzing the facts under the two-prong test for approving such a transaction, the court concluded that the transaction was unwise in light of prevailing conditions, and that the transaction would not inure to the benefit of the congregation. Indeed, the "nunc pro tunc approval of a $350,000 mortgage with a 16% rate of interest and default interest rate of 24%" would exceed $1 million and could realistically result in the congregation's loss of its property. It denied the mortgagee's application for approval of the mortgage but left open other avenues of relief such as suing on the bond without reference to the property.

2018

The issue before the appellate court in *Congregation Shaare Zedek v. Leventhal* was whether a potential creditor has standing under section 511(b) to challenge petitioner's proposal to change the premises on which the synagogue was located to a mixed use of synagogue and residential condominium. 162 A.D.3d 479, 74 N.Y.S.3d 855 (1st Dep't 2018) (Mem.). Subdivision (b) of section 511 provides that the court must direct that at least 15 days notice of the application for approval to sell, lease, exchange or otherwise dispose of all or substantially all of a nor-for-profit corporation's assets be given to interested parties including members, officers or creditors of the corporation. The court affirmed the motion court's decision that the appellant's status as a potential creditor, *i.e.*, plaintiff in the action against the synagogue, did not confer the status of judgment creditor. He thus lacked standing to challenge the synagogue's application.

Matter of Adirondack Tri-County Nursing and Rehabilitation Center, Inc. involved petitioner's application to transfer its nursing home (all of its assets) to a third party which petitioner alleged intended to continue the operation of a nursing home. 58 Misc.3d 1210(A), 2017 WL 6945536 (Sup. Ct. Warren County 2017) (Table). The Attorney General challenged the transfer, concerned that the third party intended to resell the property for commercial development. After examining the proposed transfer in light of the standard that the transfer must be "fair and reasonable" and promote the purposes of the corporation, the court concluded that transfer met the standard for such a transfer, and that the Attorney General's concerns were not supported by the record.

In *National Church of God of Brooklyn, Inc. v. Carrington,* the court rejected a founder, pastor and sole trustee's attempt to transfer assets over the congregation's objection. 56 Misc.3d 1215(A), 65 N.Y.S.3d 492 [Sup. Ct. Kings County 2017] (Table). After many complex corporate maneuvers by the defendants, the court granted plaintiff congregation's motion for a preliminary injunction. The fact that the petitioner was a religious corporation raises issues about the intersection of sections 510, 511 and 511-a of the NPCL, governing approval of transfer of all or substantially all corporate assets and section 12 of the Religious Corporations Law, which requires that certain religious corporations seek the court's approval of such a transfer on notice to the Attorney General. This case, and other recent cases, suggest that further guidance to religious corporations is needed.

Guidance on when religious corporations must notify the New York Attorney General and/or seek New York Supreme Court approval of certain real estate transactions is likely to become more important as more religious corporations encounter financial difficulties, and as landmarks and other air rights transfer authorizations become more common. Charles V. Bagli, *Floodgates Open For Air Rights In Midtown East*, N.Y. Times, Mar. 3, 2008, at A17. A recent *New York Law Journal* article offers some guidance on this subject, but the law is more complicated than the article indicates. Barry Black & Jonathan Robert Nelson, Religion Law *Congregations Transferring Real Estate: When Is Court Approval Needed*?, N.Y.L.J., Mar. 1, 2018, at 3, cols. 1, 2 & 3 [hereinafter "Black & Nelson"].

I. Statutory Structure

Two Consolidated Laws chapters are relevant, the Religious Corporations Law and the Not-for-Profit Corporation Law.[1]

Footnote 1. The Religious Corporations Law [hereinafter "RCL"] has an "es," and the Not-for-Profit Corporation Law [hereinafter "NPCL"] does not. When New York was revising its corporation laws in the 1960s and repealing its General Corporations, Stock Corporations and Membership Corporations Laws, it dropped the "es" from the Business Corporation Law and the NPCL. But New York abandoned efforts to revise the 1951 Cooperative Corporations and 1900 Religious Corporations Laws which retain the "es."

NPCL. Section 2-b of the RCL applies the NPCL to religious corporations with certain exceptions and changes and subject to the RCL's primacy. RCL section 2-b.1(a). Section 216-a of the Education Law is a similar "bridging a statute, making the NPCL applicable, with exceptions and changes, to corporations chartered by The Regents of The State University of New York under section 216 of the Education Law. Section 216-a contains more "adjusting provisions" than does RCL section 2-b. Among the NPCL sections made applicable to the RCL are sections 510 and 511 and new section 511-a, because RCL section 2-b does not make them inapplicable.

NPCL section 510(a)(1) and (2) provide for two-thirds approval of members, if any, and of directors of any sale, lease, exchange or other disposition of all or substantially all of a not-for-profit corporation's assets. In *Rose Ocko Foundation v. Lebovits*, 92 N.Y.2d 997, 696 N.Y.S.2d 107, 718 N.E.2d 412 (1999), the New York Court of Appeals held section 510 applicable to the Foundation's disposition of its largest, most significant, most valuable asset. Charities Bureau, New York State Office of the Attorney General, A Guide to Sales and Other Dispositions of Assets Pursuant to Not-for-Profit Corporation Law §§ 510-511 and Religious Corporations Law § 12.4 (Feb. 3, 2016) [hereinafter "AG Guidance"] echoes this standard, but correctly notes that it does not apply to religious corporations. Id. at 5. The AG Guidance is available on the Attorney General's website. Section 510(a)(3) provides, in the case of a charitable corporation as defined in NPCL section 102(a)(3-a) & (3-b), for court or Attorney General approval in accordance with sections 511 or 511-a, respectively. NPCL section 511-a was enacted in 2013 by section 56 of Chapter 549 effective July 1, 2014, the so-called Non-Profit Revitalization Act. It provides for Attorney General approval of transactions to which NPCL sections 510 and 511 apply as an alternative to section 511 court approval. Because, as we shall see, RCL section 12 requires court approval of all religious corporation property dispositions, one might conclude that section 511-a is irrelevant to religions corporations. But as we shall also see, the issue is more complicated. Section 511(a) sets forth the contents of a court approval petition. Section 511-a(b) tracks section 511(a) for an Attorney General approval petition.

A. RCL. RCL section 12.1 prohibits a religious corporation from selling, mortgaging or leasing "*any* of its real property without first applying for and obtaining leave of the court or the attorney general therefor, pursuant to section 511 of the not-for-profit corporation law as that section is modified by paragraph (d-1) of subdivision 1 of section 2-b of this chapter or section five hundred eleven-a of the not-for-profit corporation law." (emphasis added) Purchase money mortgages are excepted.

"Religious corporation" is defined in the RCL, section 2.A:

A "Religious Corporations Law corporation" is a corporation created for religious purposes to which this chapter applies under section two-a of this chapter. Unless the context otherwise requires, whenever "religious corporation" or "corporation" is used in this chapter, such term shall mean a "Religious Corporations Law corporation."

The RLC also defines in section 2 "incorporated church" and "unincorporated church." Religious organizations that are not corporations are apparently not subject to the RCL, for example, unincorporated associations that are not churches. RCL § 2.A. Foreign religious corporations also appear not to be subject to the RCL. If such wish to conduct activities in New York, presumably they would apply to the Secretary of State under NPCL Article 13.

Before discussing the NPCL borrowing statute, RCL section 2-a, a threshold issue should be noted. NPCL section 102(a)(3-b) includes "religious" among the purposes of a "charitable corporation" under NPCL section 102(a)(3-a). Can a "church" incorporate under the NPCL? What if any is the relationship of a religious Not-for-Profit Law corporation to the Religious Corporations Law? Would the Secretary of State incorporate under the NPCL a not-for-profit corporation that clearly was a church?

II. Procedural Requirements

The RCL contains many Articles specific to particular religions. See RCL Articles 3 to 24 except Article 10. New Articles are added to the RCL as needed to reflect the governance of particular religious corporations. This particularity is one reason why the effort to modernize the RCL was abandoned. Black & Nelson do not discuss this particularity.

RCL section 12 reflects this particularity. For the first of many examples, section 12.2 prohibits the trustees of an incorporated Protestant Episcopal Church from making "application to the court" for leave to sell mortgages or lease without the consent of its bishop and diocesan standing committee.

Section 12.3 requires the consent of a Roman Catholic archbishop or bishop in the case of a Roman Catholic church, and so on through sections 12.4 (Ruthenian Catholic Church), 12.5 (African Methodist Episcopal Zion Church), 12.5-a (General Assembly of the Presbyterian Church (U.S.A.)), 12.5-b (United Methodist Church), and 12.5-c (General Synod of the Reformed Church in America). Section 12.6 is specific about the contents of a section 12 court petition in the case of these churches. "Church" is undefined in the RCL, although, as we have seen, it does distinguish between "incorporated" and "unincorporated" churches. RCL § 2.A third paragraph. The latter definition appears to be an anomaly, because the RCL applies only to corporations. RCL §§ 2.A & 2-a.

Section 2-b.1(d-1) provides that no church referred to in subdivisions 2, 3, 4, 5, 5-a, 5 b, 5-c and six of RCL section 12 shall be required to give notice to the Attorney General under NPCL section 510. But in NPCL section 511(b) court approval proceedings the court shall direct that notice be given to the Attorney General. There is an issue as to which prevails, the RCL's primacy or the "shall" direction to the court in NPCL section 511(b).

Moreover, Chapter 555 of the 2015 Laws section 17 amended RCL section 12 to add an explicit reference to NPCL section 511-a which, as we have seen, authorizes a petition to the Attorney General to substitute for court approval under NPCL section 511. Was this intended to repeal by implication the RCL section 12 requirement of court approval in all cases to which section 12 applies? The New York State Senate Introducer's Memorandum In Support of Bill S.5865A makes no reference to any RCL amendment except in the Short Title. (on file with the authors) Most of the Legislature's consideration of this Bill happened between June 9 and June 18, 2015.

Furthermore, repeals by implication are not favored:

Repeals of earlier statutes by implication are not favored, and a statute is not deemed [repealed] by a later one unless the two are in such conflict that both cannot be given affect. N.Y. Statutes § 391 (McKinney 1971)

Given the primacy afforded to the RCL, the mandatory breadth of section 12, the public policy favoring the protection of religious corporation property and the exemption of hierarchical (as contrasted with congregational) churches from the Attorney General notice requirement, the better view would seem to be that NPCL section 511-a is inapplicable to the hierarchical religious corporations (and perhaps even to congregational ones). The amendment of RCL section 12 to add the reference to NPCL Section 511-a would seem to be another example of when the drafters of the Non-Profit Revitalization Act nodded. In any case the RCL should be amended to delete the amendment made by Chapter 555 or to clarify the issues it raises.

III. Recent Cases.

Black & Nelson properly cite and discuss the seminal New York Court of Appeals decision in *Congregation Yeter Lev D'Satmar of Kiryas Joel v. Congregation Yeter D'Satmar,* 9 N.Y.3d 297, 849 N.Y.S.2d 192, 879 N.E.2d 731 (2007). It involved ownership of a cemetery that contained the grave of a revered rabbi. The congregations were in disagreement. The Court declined to approve the Solomon-like transfer of a one half interest in the property to each, because the best interests standard of NPCL section 511(d) had not been satisfied. Presumably, the Court foresaw continued disputes.

The recent Second Department decision, *Congregation Nachlas Jacob Anshe Sfard of Jackson Heights v. Schwarz,* 152 A.D.3d 643, 59 N.Y.S.3d 84 (2d Dep't 2017), that triggered Black & Nelson's interest in this subject is but one of many of cases in all four Judicial Departments that hold that, in the absence of court approval, no religious corporation's transfer of real property is valid. *MG West 100 LLC v. St. Michael's Protestant Episcopal Church,* 127 A.D.3d 624, 8 N.Y.S.3d 299 (1st Dep't 2015); *Associate Presbyterian Congregation of Hebron v. Hanna,* 113 App.Div. 12 (3d Dep't 1906); *Muck v. Hitchcock*, 149 App.Div. 323, 134 N.Y.Supp. 271 (4th Dept), *rev'd on other grounds,* 212 N.Y. 283, 106 N.E. 275 (1912).

Three cases decided in the Fall of 2017 by Supreme Courts in three different counties have vastly different fact patterns but all reach the same result.

National Church of God of Brooklyn, Inc. v. Carrington, 56 Misc.3d 1215(A), 65 N.Y.S.3d 492 (Sup. Ct. Kings County Aug. 1, 2017) (table) (Index Number redacted by the Court), N.Y.L.J., Sept. 21, 2017, http://www.law.com/newyorklawjournal/alm1D/1202798407447, invalidated a self-described founder, pastor and sole trustee's attempt to transfer assets over the congregation's objection. After many complex corporate maneuvers by the defendants, the court granted plaintiff congregation's motion for a preliminary injunction. See discussion earlier at p. 87 of Practice Commentary.

Kelly v. Garuda, 57 Misc.3d 1212(A), 71 N.Y.S.3d 923 (Sup. Ct. Nassau County Oct. 2, 2017) (Index Number 7016/04) (table), N.Y.L.J., Oct. 31, 2017, http://www.law.com/newyorklawjournal/alm1D/1202601142434, also involved complex facts and a long history. The Court found that the International Society for Krishna Consciousness had a long history of top down governance, under "neutral principles" granted plaintiffs' immediate possession of a temple and assets, and ejected the defendants. What makes this case particularly interesting is the Court's discussion of the United States Constitution First Amendment issues first discussed by the United States Supreme Court in *Watson v. Jones*, 80 U.S. 679 (1871).

There are Constitutional restrictions that are binding on courts in the context of litigation involving religious institutions. Because of these restrictions, the role of civil courts is severely circumscribed. Jones v. Wolf, 443 U.S. 595, 602 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969). "Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the *highest of the church judicatories* to which the matter has been carried, the legal tribunals must accept such decisions as final and binding on them." Watson v. Jones, 80 U.S. 679, 681 (1871) [emphasis added]. The United States Supreme Court has held that the First Amendment "permits hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters." Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich, 426 U.S. 696, 724 (1976).

The third recent case is Matter of the *Home of The Sages of Israel, Inc.*, N.Y.L.J., Oct. 31, 2017 (Sup. Ct. N.Y. County Oct. 16, 2017) (Index No. 153111/2015) http://www.com/newyorklawjournal/alm1D/1202801142382. Petitioner sued for court approval of a sale of its property. Again, two groups of congregants were in dispute. The sale had been approved by the Attorney General, but an August 10, 2015 letter to the Court requested it to determine who were the members of petitioner and of its board of trustees. The Court determined that the agreement to sell the property was null and void and dismissed the petition. The religious corporation was congregational, not hierarchical, and thus RCL Article 10 applied. The Court applied the detailed governance provisions of Article 10 in an extensive discussion of the facts.

IV. 2018 Legislation

A.9983 was introduced in the New York State Assembly on March 6, 2018 and referred to The Corporations, Authorities and Commissions Committee from which it never emerged. This bill would have exempted hierarchical religious organizations from RCL court approval, if the value of the transaction was less than $200,000 and if a deed was accompanied by a certificate of approval of the relevant church and its hierarchy. Value would be established by one recent "professional" appraisal.

The Attorney General's Guidance states, "The appraisal should be done by a licensed appraiser who is completely independent of both buyer and seller. The appraisal cannot be done by a broker involved in the sale of the property", the implication being that even if the broker is a licensed appraiser, its appraisal will not be accepted. A.G. Guidance, at 5. If the proposed transaction is not arm's length, the Attorney General may require two appraisals. *Id.* The Bill would have made an exception to the appraisal requirement for a conveyance by a solvent religious corporation to another or to a membership, educational, municipal or not-for-profit corporation for a nominal consideration. The Bill does not make clear what it means by membership. The Bill contains similar provisions with respect to mortgages.

This not only not a "good" bill, in Albany parlance, it is a bad bill. The overriding purpose of RCL section 12 is to protect religious property by requiring judicial and Attorney General oversight. The cases discussed in this article illustrate the importance of continuing that oversight.

Further, the $200,000 test may be appropriate for New York City counties, but would likely exempt from oversight many up-State transactions.

Moreover, the Bill does not incorporate the Attorney General's Guidance with respect to appraisals. It only refers to one report by "a professional appraiser."

Finally, the Bill does not define "solvent." New York law describes two types of insolvency, inability to pay debts as they accrue, the so-called equity test, and a balance sheet test in which liabilities exceed assets, the so-called legal test. Compare *Werner v. Crippen,* 245 App.Div. 363, 282 N.Y.S. 723 (4th Dep't 1935), *aff'd*, 270 N.Y. 535, 200 N.E. 305 (1936) with *Matter of Auditore's Estate*, 136 Misc. 664, 240 N.Y.S. 502 (Surr. Ct. Kings County 1930). Which test did the introducers have in mind?

PRACTICE COMMENTARIES

by *Rose Mary Bailly, William Josephson and Peter J. Kiernan*

2017

The memorandum decision of the Second Department in *Congregation Nachlas Jacob Anshe Sfard of Jackson Heights v. Schwarz,* 152 A.D.3d 647, 55 N.Y.S.3d 913 (2nd Dept. 2017) affirmed the long established requirement under NPCL section 511 that a religious corporation must seek the approval of the Attorney General before selling its real property. *See also* N.Y. Relig. Corp. Law § 12(1) ("A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court or the Attorney General therefor pursuant to section five hundred eleven of the not-for-profit corporation law ...."). The Congregation sought to set aside certain complicated transactions alleging they violated section 511 and were fraudulent. The trial court granted summary judgment on the claim that transfer was made without the approval of the Attorney General but denied summary judgment as to the claims of fraud. The Appellate Division affirmed the grant of summary judgment regarding the transfer of the property and held the defendants' remaining arguments to be without merit. Related litigation is discussed in *State of New York ex rel. Simon Schwarz*, Kings County Index No. 5418/13; *Samuel Schwarz and Simon Schwarz v. Helene Schwarz et ano*., Kings County Index No. 10942/12).

The proposed sale of a church's real property for less than the appraised value was at issue in *Dong v. First Korean Church,* 151 A.D.3d 930, 54 N.Y.S.3d 451 (2nd Dept. 2017). The church had entered into a contract for the sale of real property in Queens for $18,700,000. After entering into the agreement, the church obtained an appraisal valuing the property at $19,500,000. The church submitted an application to the Attorney General for approval of the sale at the original price. The Attorney General stated that he would object to the sale so the church refused to go forward with the contract. The prospective purchaser sued the church for specific performance. The court granted the church's motion for summary judgment dismissing the complaint. The Appellate Division held that the church had met its burden of proof on its motion for summary judgment because the sale had not been approved by the board of trustees and the church members as required by NPCL section 511(a)(7) & (8).

PRACTICE COMMENTARIES

by *Rose Mary Bailly, William Josephson and Peter J. Kiernan*

Section 511 sets out the procedure for obtaining court approval for the sale, lease, exchange or other disposition of all or substantially all of the assets of a not-for-profit corporation.

Upon presentation of the petition, a minimum of fifteen days notice must be given by mail or in person to the Attorney General, unless good cause can be shown for shortening the time for service. Within the discretion of the court, notice must also be given to any interested person. The purchaser of property has been held not to be an interested party. *Wolkoff v. Church of St. Rita*, 132 Misc.2d 464, 472, 505 N.Y.S.2d 327, 333 (Sup. Ct. Richmond County 1986), *aff'd*, 133 A.D.2d 267, 518 N.Y.S.2d 1020 (2d Dep't 1987). Notice must be given in person or by mail and must specify the time and place for a hearing on the application. NPCL § 511(b). If the corporation is insolvent or its assets are insufficient to liquidate its debts and liabilities in full, the application will not be granted unless all creditors have been served, personally or by mail, with a notice of the time and place of the hearing. NPCL § 511(c).

The court applies a two-prong test before authorizing the transaction. *Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn*, 76 A.D.2d 712, 717, 431 N.Y.S.2d 834, 838 (2d Dep't 1980), *aff'd*, 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480 (1981). First, the consideration and the terms of the transaction must be fair and reasonable to the corporation, at the time of the making of the contract. PCL § 511(d). To do this, it is necessary to look at the fair market value at the time the contract was entered into. *See, e.g., Wolkoff v. Church of St.Rita*, 132 Misc.2d 464, 471, 505 N.Y.S.2d 327, 333 (Sup. Ct. Richmond County 1986), *aff'd,* 133 A.D.2d 267, 518 N.Y.S.2d 1020 (2d Dep't 1987) (the current market value, in the absence of special circumstances, is the most reliable index for calculating what constitutes fair consideration for the sale of real property, and the date for determining such value is the date of the contract); *Application of Church of St.Francis De Sales of New York City,* 110 Misc.2d 511, 512, 442 N.Y.S.2d 741, 743 (Sup. Ct. New York County 1981) (court must look at fair market value when contract was made, not at the date of petition).

Second, the sale should promote the best interests of the corporation and its members. NPCL § 511(d). In doing so, the court should evaluate the contract in light of the conditions prevailing at the time the issue is presented to the court. *See* Victoria Bjorklund, James J. Fishman, and Daniel L. Kurtz. New York nonprofit law and practice: with tax analysis § 80.2[2][c] (2d ed. 2013) (*citing Application of Church of St.Francis De Sales of New York City*, 110

Misc.2d 511, 512, 442 N.Y.S.2d 741, 743 (Sup. Ct. New York County 1981). This determination is generally made on a case by case basis. *See, e.g., Agudist Council of Greater New York v. Imperial Sales Co.*, 158 A.D.2d 683, 684, 551 N.Y.S.2d 955, 957 (2d Dept., 1990), *appeal denied* 76 N.Y.2d 707, 560 N.Y.S.2d 989, 561 N.E.2d 889 (1990) (disapproved where corporation's proposed sale of a senior citizen center would be detrimental to corporation's purpose).

LEGISLATIVE STUDIES AND REPORTS

1. Source: Gen.Corp.L. §§ 50, 51, 52 and 53.

2. Changes: Revised, reworded and combined; new provisions.

Comment: Paragraph (a) is adapted from Gen.Corp.L. § 50. The information required to be stated in the verified petition includes several new provisions, as well as revisions of the requirements of Gen.Corp.L. § 50, in line with the changes made from the provisions of the Membership Corporation Law. Paragraph (b) is derived from Gen.Corp.L. § 51, with the addition of a provision requiring notice to the Attorney General of the filing of an application under paragraph (a). Paragraph (c) incorporates, without change, the provisions of Gen.Corp.L. § 53. Paragraph (d) is based on Bus.Corp.L. § 52. If the court determines that either the purposes of the corporation or the interests of the members will be promoted, it may authorize the disposition of all or substantially all of the assets, as provided.

Notes of Decisions (53)

McKinney's N PCL § 511, NY NOT PROF CORP § 511
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Not-for-Profit Corporation Law (Refs & Annos)
Chapter 35. Of the Consolidated Laws (Refs & Annos)
Article 5. Corporate Finance (Refs & Annos)
McKinney's N-PCL § 501

§ 501. Stock and shares prohibited; membership certificates authorized

Currentness

<[Education Law § 216-a adjusts the language of this section as it applies to education corporations]>

A corporation shall not have stock or shares or certificates for stock or for shares, but may issue non-transferable membership certificates or cards to evidence membership, whether or not connected with any financial contribution to the corporation, as provided in section 601 (Members). The fact that the corporation is a not-for-profit corporation, and that the membership certificate or card is non-transferable shall be noted conspicuously on the face or back of each such certificate or card.

Credits

(L.1969, c. 1066, § 1. Amended L.1970, c. 847, § 16.)

Editors' Notes

PRACTICE COMMENTARIES

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The prohibition against a corporation issuing shares or certificates for shares ensures that the corporation is not a "proprietary" one and that profits are not being distributed to members. However, as provided in NPCL § 601, a corporation may issue non-transferable membership certificates or cards as evidence of membership, whether or not connected with any financial contribution to the corporation. The nature of those membership certificates is described in Article 6.

LEGISLATIVE STUDIES AND REPORTS

1. Source: Mem.Corp.L. § 40.

2. Changes: Reworded and revised; new provisions.

Comment: The section makes express the implied prohibition of Mem.Corp.L. § 40 against the issuance of shares or certificates for shares. It follows Mem.Corp.L. § 40 in authorizing the issuance of membership certificates or cards, and governs their terms. Membership may be evidenced otherwise than by certificates or cards as provided in § 601 (Members). A new provision specifies that membership certificates or cards shall be non-transferable.

Notes of Decisions (2)

McKinney's N PCL § 501, NY NOT PROF CORP § 501
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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McKinney's N-PCL § 510

§ 510. Disposition of all or substantially all assets

Effective: July 1, 2014

Currentness

(a) A sale, lease, exchange or other disposition of all, or substantially all, the assets of a corporation may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of cash or other property, real or personal, including shares, bonds or other securities of any other domestic or foreign corporation or corporations of any kind, as may be authorized in accordance with the following procedure:

(1) If there are members entitled to vote thereon, the board shall adopt a resolution recommending such sale, lease, exchange or other disposition. The resolution shall specify the terms and conditions of the proposed transaction, including the consideration to be received by the corporation and the eventual disposition to be made of such consideration, together with a statement that the dissolution of the corporation is or is not contemplated thereafter. The resolution shall be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or a special meeting. Notice of the meeting shall be given to each member and each holder of subvention certificates or bonds of the corporation, whether or not entitled to vote. At such meeting by two-thirds vote as provided in paragraph (c) of section 613 (Vote of members) the members may approve the proposed transaction according to the terms of the resolution of the board, or may approve such sale, lease, exchange or other disposition and may authorize the board to modify the terms and conditions thereof.

(2) If there are no members entitled to vote thereon, such sale, lease, exchange or other disposition shall be authorized by the vote of at least two-thirds of the entire board, provided that if there are twenty-one or more directors, the vote of a majority of the entire board shall be sufficient.

(3) If the corporation is, or would be if formed under this chapter, classified as a charitable corporation under section 201 (Purposes) such sale, lease, exchange or other disposition shall in addition require approval of the attorney general or the supreme court in the judicial district or of the county court of the county in which the corporation has its office or principal place of carrying out the purposes for which it was formed in accordance with section 511 (Petition for court approval) or section 511-a (Petition for attorney general approval) of this article.

(b) After such authorization the board in its discretion may abandon such sale, lease, exchange or other disposition of assets, subject to the rights of third parties under any contract relating thereto, without further action or approval.

Credits

(L.1969, c. 1066, § 1. Amended L.1970, c. 847, § 22; L.1972, c. 961, § 5; L.2013, c. 549, § 54, eff. July 1, 2014.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by *Rose Mary Bailly and William Josephson*

2018

In *Dowling v. Terrace City Lodge 1499 IBPOE*, the appellate court affirmed the denial of plaintiff's motion for summary judgment on its cause of action for specific performance of a contract for the sale of real property. 163 A.D.3d 767, 82 N.Y.S.3d 582 (2d Dep't 2018). The court held that the contract for all or substantially all of the defendant's assets was unenforceable because defendant not-for-profit corporation had failed to secure the approval of its board or members as required by section 510.

PRACTICE COMMENTARIES

by *Rose Mary Bailly, William Josephson and Peter J. Kiernan*

Section 510 is designed to protect the members of a not-for-profit corporation from unwise bargains and the wrongful use of the corporation's property, and to assure both the public's interest in the proper distribution of the corporations' asserts and the satisfaction of the officers' and directors' fiduciary obligation. Thus the sale, lease, exchange or other disposition of all, or substantially all, of a corporation's assets requires authorization by the terms of this section.

If there are members entitled to vote thereon, the board must present to such members for a vote at an annual or special meeting a resolution specifying:

(1) the terms and conditions of the proposed transaction, including the consideration to be received by the corporation; (2) the eventual disposition of the consideration; and (3) whether dissolution of the corporation is contemplated after the disposition.

Notice of the meeting must be given to each member and each holder of subvention certificates or bonds of the corporation, regardless of whether they are entitled to vote. At the meeting, the members must approve the proposed transaction according to the terms of the resolution by a two-thirds vote (as provided in NPCL § 613(c)), or approve the disposition, but authorize the board to modify the terms and conditions thereof. NPCL § 510(a)(1).

If there are no members entitled to vote, the disposition must be approved by at least two-thirds of the entire board. If there are twenty-one or more directors, a vote of the majority of the board is sufficient to approve the disposition. NPCL § 510(a)(2). *See* NPCL § 102(6-A) (definition of "entire board").

If the corporation is, or would be if formed under the NPCL, a charitable corporation, the disposition requires approval of the Attorney General or judicial approval, the procedures for which are provided in sections 511 and 511-a, respectively.

After authorization the board of directors may, in its discretion, abandon the proposed disposition of assets without further action or approval. This right is subject to the rights of third parties under any relevant contracts. NPCL § 510(b).

LEGISLATIVE STUDIES AND REPORTS

1. Source: Mem.Corp.L. § 21.

2. Changes: Reworded and revised; new provisions.

Comment: This section marks a departure from the Membership Corporation Law by distinguishing a sale, lease, exchange or other distribution of all, or substantially all, the assets of a corporation, from transactions involving less than all or substantially all the assets, governed by the preceding section. Paragraph (a) is derived from Bus.Corp.L. § 909(a). Authorization of the disposition of all or substantially all of the assets, and the terms, conditions and consideration therefor, shall be in accordance with subparagraph (1) if there are members entitled to vote; otherwise, in accordance with subparagraph (2). The requirement in Mem.Corp.L. § 21, second paragraph, of obtaining judicial approval for the sale, mortgage or lease of any of the corporation's real property has been modified and retained to the extent provided in subparagraph (3): judicial approval is required for the sale, lease, exchange or other disposition of all or substantially all the assets of a Type B or Type C corporation. Paragraph (b) is derived from Bus.Corp.L. § 909(c).

Notes of Decisions (12)

McKinney's N PCL § 510, NY NOT PROF CORP § 510
Current through L.2021, chapters 1 to 440. Some statute sections may be more current, see credits for details.

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