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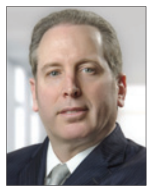
Expert Analysis

Congregations Transferring Real Estate: When Is Court Approval Needed?




By **Barry Black**

And **Jonathan Robert Nelson**

Several years ago, a congregation in Jackson Heights, Queens, filed a lawsuit seeking to quiet title to certain property. The congregation asserted that its prior conveyance of the property to the defendants was invalid because it had been made without leave of court, in violation of the requirements of N.Y. Religious Corporations Law (RCL) §12.

The Supreme Court, Kings County, granted summary judgment in favor of the congregation on its cause of action to quiet title, and the defendants appealed.

The Appellate Division, Second Department, recently affirmed the Supreme Court. In its brief opinion in *Congregation Nachlas Jacob Anshe Sfard of Jackson Heights v. Schwarz*, 152 A.D.3d 647 (2d Dept. 2017), the appellate court explained that RCL §12(1) provides that, to sell any of its real property, a religious corporation must apply for, and must obtain, leave of court pursuant to Not-For-Profit Corporation Law (N-PCL) §511. The purpose of this requirement, the appellate court observed, 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."

In this case, the Second Department found, the congregation—which was a religious corporation subject to RCL §12(1)—had established that no court had approved its transfer of the property at issue to the defendants. Therefore, the conveyance was invalid, the appellate court concluded.

New York Law

In one iteration or another, RCL §12, titled "Sale, mortgage and lease of real property of religious corporations," has been the law in New York for over a century. Yet even today there are many religious leaders and congregants—and many attorneys, accountants, and real estate professionals—who are not familiar with its requirements. As the defendants discovered in *Congregation Nachlas Jacob*, that can lead to the sale of real property, or to any other transaction subject to this law, being challenged and ultimately struck down even if it otherwise had been carefully and extensively negotiated and documented.

In one iteration or another, RCL §12 has been the law in New York for over a century. Yet even today there are many religious leaders and congregants—and many attorneys, accountants, and real estate professionals—who are not familiar with its requirements.

Generally speaking, RCL §12 provides that a religious corporation may not sell or mortgage any of its real property, or lease any of its real property for a term greater than five years, without applying for and obtaining approval of a court or the attorney general.

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There are some exceptions to this general rule. For example, RCL §12(1) provides that a religious corporation may execute a purchase money mortgage or a purchase money security agreement creating a security interest in personal property purchased by it without obtaining a court's permission.

In addition, RCL §12(7) provides that a religious corporation may sell lots, plots, or burial permits in its cemetery without a court's permission. Similarly, a religious corporation may transfer all or part of its cemetery to a cemetery corporation without court permission. (A religious corporation, however, may not mortgage its cemetery while it is used for cemetery purposes.) Moreover, other provisions of New York law, such as RCL §171, may modify RCL §12's approval requirements for certain intra-denominational conveyances.

Importantly, RCL §12 provides for "retroactive" approval of a covered transaction. In particular, RCL §12(9) provides that if a sale, mortgage, or lease was made without the required court approval, and a conveyance executed and delivered, a court may subsequently confirm the transaction.

The Standard

As provided in N-PCL §511(d), a court will approve a transaction subject to RCL §12 if it is satisfied that the consideration and the terms of the transaction are fair and reasonable to the religious corporation and that the purposes of the religious corporation or the interests of its members will be promoted.

This standard was at the heart of the decision issued a decade ago by the New York Court of Appeals in *Congregation Yetev Lev D'Satmar of Kiryas Joel v. Congregation Yetev Lev D'Satmar*, 9 N.Y.3d 297 (2007), where the court resolved a dispute over the ownership of a cemetery in the upstate New York town of Monroe.

The cemetery, which contains the grave of the Grand Rabbi Joel Teitelbaum, founder of the Hassidic sect of Orthodox Judaism known as Satmar, originally was acquired by Congregation Yetev Lev D'Satmar of Kiryas Joel (the Monroe Congregation) in 1981. The cemetery was conveyed to Congregation Yetev Lev D'Satmar (the Brooklyn Congregation) in 1988, and subsequently jointly operated by the two congregations.

> The court in 'Greek Orthodox Archdiocese' made it clear that RCL §12 applied not just to property used for religious purposes, but to "any" real property owned by a religious organization. The court declared that the Legislature "did not intend to limit applicability of the statute to property used as a place of worship."

The Brooklyn Congregation split into two rival factions over matters concerning leadership of the Satmar community. The feud resulted in each faction conducting separate elections of the board of directors and officers for the Brooklyn Congregation. On Jan. 14, 2001, Berl Friedman, purporting to act as president of the Brooklyn Congregation, convened a board meeting at which he authorized the transfer of an undivided one-half interest in the cemetery property to the Monroe Congregation. A deed, executed by Berl Friedman on Jan. 19, 2001 and conveying the one-half interest in the cemetery property for nominal consideration, was later recorded in the Orange County Clerk's Office.

At approximately the same time, members of the rival faction held a meeting at which they designated themselves the true officers of the Brooklyn Congregation. They sought to restrict the use of the cemetery property by filing a so-called "declaration" with the Orange County Clerk providing that only those designated officers could mortgage, sell, or otherwise encumber the property.

In 2005, the Monroe Congregation filed a lawsuit seeking, among other things, a declaration that the transfer of the one-half interest in the property was lawful or, in the alternative, to obtain *nunc pro tunc* approval of that transfer pursuant to RCL §12. Defendants responded that Berl Friedman had not been authorized to execute the 2001 deed because he had been expelled from the Brooklyn Congregation.

The Supreme Court, Orange County, awarded summary judgment to the Monroe Congregation, upholding the validity of the transfer. The Appellate Division, Second Department, voided the conveyance, finding that the Monroe

Congregation had not established that the transfer had promoted the interests of the Brooklyn Congregation by furthering a religious or charitable object generally. As a result, it ruled, the Monroe Congregation was not entitled to retroactive judicial approval of the transfer.

The dispute reached the Court of Appeals, which affirmed. It concluded that there was ample support for the Appellate Division's finding that the transfer was not in the best interests of the Brooklyn Congregation. The court ruled that where the transfer was at least in part "plainly designed to advance one side of the factional dispute," the Appellate Division had justifiably determined that no "best interests" showing had been made.

Application of §12

Despite the relative clarity of the statute, applying §12 can be nuanced and fact-dependent.

Consider, for example, *Greek Orthodox Archdiocese of North and South America v. Abrams*, 162 Misc.2d 850 (Sup. Ct. N.Y. Co. 1994). The case arose in 1986 when the Greek Orthodox Archdiocese decided to sell certain real estate it owned in Purchase in Westchester County. The executive committee of the Archdiocesan Council approved the sale to a developer. The sale contract required court approval, which the Archdiocese obtained from the Supreme Court, Westchester County, in April 1987.

After obtaining court approval of the sale, the Archdiocese agreed to two modifications of the sale contract—one to restructure the contingent interest formula, and one to accept a one-time cash payment of $1.3 million from the developer in return for releasing it from any further obligations. The Archdiocese did not obtain court approval for either of these modifications.

A member of the Archdiocese later challenged the modifications. In response, the Archdiocese argued that RCL §12 required court approval only for a conveyance of real property and not for modifications of a promissory note that did not affect title to the real property.

The Supreme Court, New York County, rejected the Archdiocese's contentions. It ruled that even though §12 did not expressly apply to contract modifications, a modification of a contract resulted in the establishment of a new agreement between the parties that supplanted the affected provisions of the original agreement. Accordingly, it concluded, by entering into agreements to modify the price to be paid on the original contract, the Archdiocese and the developer had "entered into a new contract of sale" that had to be approved by the court pursuant to RCL §12.

Other Challenges

Over the years, there have been many other challenges to RCL §12. In fact, the court in the *Greek Orthodox Archdiocese* case rejected two other challenges brought by the Archdiocese. First, the court made it clear that RCL §12 applied not just to property used for religious purposes, but to "any" real property owned by a religious organization. The court declared that the Legislature "did not intend to limit applicability of the statute to property used as a place of worship."

Then, the court ruled that RCL §12 was constitutional, reasoning that the law had no effect on, and therefore placed no burden on, the ability of the members of the Archdiocese to practice their religion, either by pressuring them to commit some act forbidden by their religion or by preventing them from engaging in conduct mandated by their faith. The inquiry mandated by RCL §12 involved "only the terms of a real estate transaction" and was not an inquiry into religious beliefs or the regulation or prohibition of conduct undertaken for religious reasons.

Conclusion

Legal and business advisers to religious organizations must keep in mind the requirements of RCL §12 when they are considering the sale, mortgage, or other disposition of real property, or amending agreements relating to the sale, mortgage, or other disposition of real property. Failure to do so can upset a transaction, even well after it has seemingly been completed.