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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 93,832

RABBI ROBERT A. GOODMAN,

Plaintiff/Petitioner,

vs.

TEMPLE SHIR AMI, INC.,
a Florida non-profit
corporation, and
RICHARD ASHENOFF,

Defendants/Respondents.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Contrary to Respondents' contentions in the introduction to their Brief, this Court is not being asked to decide a single religious issue. This Court is simply being asked to ensure that one of the citizens of this State receives redress for the wrongs committed against him.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE AND FACTS

As they have done throughout this case, once again the Respondents raise arguments on the merits even though it was the Respondents themselves who successfully persuaded the trial court to limit discovery and the hearing on their Renewed Motion to Dismiss to jurisdictional issues only. Notwithstanding that limitation, the Respondents' Brief is replete with arguments on the merits based on "facts" they include in their Brief. Rabbi Goodman takes issue not only with a number of the facts themselves, but also with the source provided for those "facts." The majority of the record citations set out in the Answer Brief are from the depositions of the Respondents taken prior to the hearing on the Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction. During their depositions, Temple Shir Ami and Richard Ashenoff refused to answer most of the questions relating to the Temple's repudiation of Rabbi Goodman's Second Contract. In fact, they

would only say that the reason the Temple repudiated Rabbi Goodman's contract (the "Second Contract") was he was guilty of "inappropriate Rabbinical behavior".

Substantially all of the "facts" set forth in the Respondents' Brief which set forth the basis for their arguments follow two patterns -- either the event never took place or if it did it had little effect on the outcome. The Temple's characterization of Ashenoff's defamatory statement concerning Rabbi Goodman is a good example. The Temple tells us that Ashenoff did not make the statement in the Executive Committee Meeting and that although he did make it at the board meeting, it had little or no effect on the Board's decision to repudiate the Second Contract.

There are two obvious problems with this. First, since the proceedings below were limited to jurisdiction these "facts" which go to the merits are irrelevant. Second, and more importantly, the Respondents themselves persuaded the trial court to preclude Rabbi Goodman from being able to obtain the tape recording of the meeting of the Executive Committee Meeting or to undertake any discovery on these issues. How can we now be expected to rely on the Respondents' interpretation of what the actual evidence might show or what effect it had on those acting on behalf of the Temple.

Because discovery and the hearing were limited to jurisdiction and because this appeal arises out of a dismissed Complaint, the Court is required to treat all of the allegations in Rabbi Goodman's Complaint which go to the merits of the case as true.

Accordingly, it must be assumed for purposes of this appeal that Temple Shir Ami renewed Rabbi Goodman's Contract with Temple Shir Ami, as set forth in its minutes, and that Temple Shir Ami later repudiated the Second Contract based on false statements made by Ashenoff. All of the self-serving statements made by the Respondents in their depositions and testimony to the effect that Rabbi Goodman was guilty of unrabbinical behavior, that no final agreement was arrived at or that the false statements made by Ashenoff had little or no effect on the Temple's decision should be disregarded.

In their Answer Brief, the Respondents claim that Rabbi Goodman's case was properly dismissed because he failed to exhaust his remedies. Their statement of the facts fails to point out that the Bylaws of Temple Shir Ami provide no mechanism for the Rabbi to convene a meeting of the entire congregation to reconsider a decision of the Board of Directors or for any other reason.

Finally, notwithstanding Rabbi Goodman's repeated assurances throughout this case that he does not seek reinstatement but merely damages, once again, the Respondents refuse to accept them and claim that the case is really about who will lead Temple Shir Ami. This time in fact, the Respondents have chosen to characterize Rabbi Goodman's intentions as sinister.

In these passages, Rabbi Goodman shows his cards. At the heart of Rabbi Goodman's claim is the question of who should be the spiritual leader of the Temple.

Respondents' Brief, at 26. While it is obvious that it serves their purposes and strengthens their argument to mischaracterize Rabbi Goodman's position, it is beyond belief that they could still be telling the Court this after Rabbi Goodman has clarified his position at least five times in pleadings and briefs and in his testimony at his deposition and the hearing. Lest it still be unclear: Rabbi Goodman does not seek reinstatement, only damages.

ARGUMENT

a. Florida Civil Courts can and must decide this case.

Throughout this case, the Respondents' only real argument has been that simply because Temple Shir Ami is a religious entity and Rabbi Goodman is a Rabbi, none of their actions can be questioned by the courts. This, according to them, is true even though Rabbi Goodman has no other avenue for relief. They must recognize the unfairness of their position because at no time have they ever even attempted to defend it as fair or just. According to them Rabbi Goodman simply has no rights. In fact, after conceding twice during oral argument before the Third District Court that they wrongfully withheld payments from Rabbi Goodman for work done under the First Contract, they now file a Cross Petition claiming that the Court lacks jurisdiction to even compel them to pay for work already performed.

Contrary to the Respondents' contention that their position is near-universal, a number of courts have moved away from the knee jerk position espoused by the Respondents that civil courts can offer no relief to clergy mistreated by their churches and temples. See Farias v. International Church of the Foursquare Gospel, No. 95-4784 (11th Cir. Apr. 24, 1996); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990); Drevlow v. Lutheran Church Missouri Synod, 991 F.2d 468 (8th Cir. 1993).

There are a number of facts which make this case different from most of the cases relied upon by the Respondents. First, the relationship between Rabbi Goodman and Temple Shir Ami was created pursuant to a written contract which was signed by both the Temple and Rabbi Goodman (the "First Contract"). Paragraph 12 of the First Contract stated:

12. TERMINATION FOR CAUSE

The Temple may discharge the Rabbi at any time for cause. Cause is intended to mean intentional or willful misconduct, incompetence, willful breach or neglect of duty or obligation of this agreement, intoxication, drug addiction, and any other conduct of a like nature and effect.

The Respondents have refused to give any explanation for Rabbi Goodman's "termination." Instead they claimed that Rabbi Goodman was guilty of "inappropriate Rabbinical behavior".¹ This appears

¹ The only other claim was that Rabbi Goodman had breached the confidence of a congregant. However, on cross examination,

to have been based on a difference in religious opinion between Rabbi Goodman and Temple Shir Ami. None of the issues raised would amount to "cause" under the parties' agreement which clearly requires a minimum of willful or intentional misconduct. While Temple Shir Ami is clearly entitled to decide that it could not continue to retain Rabbi Goodman because it had religious differences with him, the contract it entered into with him does not entitle it to terminate him with impunity for that reason. Accordingly, he is entitled to recover damages for the injury suffered as a result of Temple Shir Ami's failure to abide by its agreement. None of the foregoing requires the Court to consider or decide a single religious issue in order to decide this case.

None of the cases cited by the Respondents deals with a case where a church or temple has voluntarily entered into a contract with its leader itemizing the basis upon which he may be terminated. The closest case in all the cases cited by any of the parties is Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990), cited in Rabbi Goodman's Initial Brief. In Minker, the court upheld a priest's contract claim where the court found that a contract existed and the priest sought only monetary damages. The court stated: "A

Brian Mirson, the only person who testified to such a breach, admitted that no one had ever told him that Rabbi Goodman had breached a confidence of theirs and the only basis he had for making such claim was the hearsay statements of others. [T.A. 87].

church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court." Id. at 1359.

The principle set out in Minker applies here. Temple Shir Ami voluntarily entered into a written employment contract with Rabbi Goodman. The language of the First Contract clearly indicates that the parties anticipated that it would be enforceable in civil courts. For example, the First Contract contains a noncompete provision which prohibits Rabbi Goodman from becoming employed by another temple within 25 miles of the Temple Shir Ami after leaving Temple Shir Ami. The fact that the parties anticipated court review is obvious when one considers that Temple Shir Ami is congregational; it has no court or tribunal for considering disputes and is not associated with any organization which could do so.

The only possible entity which could decide any dispute arising out of the First Contract or the Second Contract is the Court and the parties anticipated that at the time they entered into the First Contract. Respondents cite Dobota v. Free Serbian Orthodox Church, 1998 Ariz. App. Lexis 15 (Ariz. Ct. App. Div. 1, Dep't D) for the proposition that "one who enters the clergy forfeits the protection of the civil authorities in terms of job rights." The facts in this case show that quite the opposite is true here. By entering into a written employment agreement which could only be enforced in the civil courts, Temple Shir Ami

voluntary forfeited its right to avoid having it enforced by the civil authorities. There is no other reasonable explanation for why the parties entered into the Employment Agreements. No one forced Temple Shir Ami to enter into the First Contract. It should not now be permitted to avoid its enforcement, especially where its enforcement will in no way interfere with the religious rights of the Respondents.

b. The Third District Erred in upholding the dismissal in favor of Richard Ashenoff.

Rabbi Goodman has properly alleged that Respondent Richard Ashenoff knowingly and maliciously defamed him and thereby cost him his job and his reputation. Respondents take the position that Ashenoff is protected because he committed the tort during a meeting of a religious organization. They claim that the Court cannot even inquire into it because to do so would violate Ashenoff's First Amendment rights because it would require the Court to inquire into whether Ashenoff had a "doctrinal duty to report any information to the Temple, regardless of its reliability".

The freedom to believe is absolute; the freedom to act is not. Cantwell v. Connecticut, 310 U.S. 296 (1940). Where there is a conflict between the two, the Courts have balanced the interest of the State against the religious interest of the individual. See e.g., Alberts v. Devine, 395 Mass. 59, 479 NE 2d 113, 123, cert. Denied., 474 U.S. 1013 (1985). Ashenoff has no protected interest

in undertaking malicious conduct while the State has a great interest in protecting its citizens and providing a remedy for wrongs committed against them.

The Respondents completely ignore the line of cases cited by Rabbi Goodman in his Initial Brief, finding church officials liable for their defamation even where the statements are made in the context of a religious organization's choice of its religious leader such as Farias v. International Church of the Foursquare Gospel, No. 95-4784 (11th Cir. Apr. 24, 1996); Marshall v. Munro, 845 P.2d 424 (Alaska 1993), Alberts v. Devine, 395 Mass. 59, 479 N.E.2d 113, 123, cert. denied, 474 U.S. 1013 (1985); McNair v. Worldwide Church of God, 197 Cal. App. 3d 363, 242 Cal. Rptr. 823, 830 (Cal. Ct. App. 1988) and Schreidell v. Shoter, 500 So. 2d 228 (Fla. 3d DCA 1986), rev. denied, 511 So. 2d 299 (Fla. 1987). In the face of well-reasoned precedent to the contrary, Richard Ashenoff has provided absolutely no valid reason why he should not be held accountable for his malicious conduct which caused Rabbi Goodman harm.

c. The congregational/hierarchical structure is relevant.

In Serbian Eastern Orthodox Diocese for U.S. of America & Canada v. Milivojevich, 426 U.S. 696, 724-25, 96 S.Ct. 2372, 2387-88, 49 L.Ed.2d 151, 171-72 (1976) (emphasis added), the United States Supreme Court stated:

In short, the First and Fourteenth Amendments permit 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. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

From that statement alone, it stands to reason that civil courts are required to decide cases involving disputes where religious organizations have chosen not to establish ecclesiastical tribunals. The cases cited by the Respondents to the effect that courts cannot intervene even where it is alleged that a church or temple has misapplied its own By-Laws all involve religious organizations which have established tribunals to resolve their own disputes. The lesson of Serbian is that a court cannot second guess the decisions made by a religious organizations' tribunal. This rule does not apply where the organization has chosen to not establish an institution for resolving such disputes. Furthermore, contrary to the Respondents' contention, the congregational/hierarchical distinction has been recognized in the context of disputes involving employment decisions regarding religious leaders. See Kupperman v. Congregation Nusach Sfard, 39 Misc. 2d 107, 240 N.Y.S. 2d 315 (N.Y. Sup. Ct. 1963) (action taken by board of directors to terminate Rabbi at meetings held pursuant to improper notice held a nullity).

d. Rabbi Goodman did not fail to exhaust his remedies.

In an attempt to divert attention away from the unfairness of their position and to make it seem like Rabbi Goodman is somehow himself to blame for the position he is in, the Respondents have formulated the contrived argument that Rabbi Goodman is not entitled to relief because he failed to exhaust his remedies. According to the Respondents, Rabbi Goodman was required to convene a meeting of the entire congregation of Temple Shir Ami and ask them to override the decision of the Board. Having failed to do so, according to the Respondents, he is forever barred from seeking recovery from them. This argument is absurd.

Even accepting for the moment the idea that before an employee may sue under an employment contract he or she must pursue all remedies available under the organizations' By-Laws, this argument is fallacious here because Temple Shir Ami's By-Laws provide no remedy which Rabbi Goodman failed to exhaust. There is absolutely no procedure under the By-Laws whereby the Rabbi of Temple Shir Ami is granted the right to request that the congregation revisit a decision made by the Board. It is inconceivable that a person could be denied access to our courts because he failed to seek relief for which no procedure exists. This is like saying that a corporate employee with a contract cannot seek relief in the civil

courts for the breach thereof until he or she asks the shareholders for his or her job back even if there are no procedures set up for doing so.

- e. The Respondents' arguments on the merits should be rejected.

While vehemently arguing that this case must be dismissed without regard to its merit and that Rabbi Goodman cannot conduct discovery into the merits of the case, the Respondents' Brief is replete with arguments on the merits based mostly on self-serving statements they made during their depositions. These are the same depositions where they refused to answer Rabbi Goodman's questions claiming that even entertaining such questions would unconstitutionally entangle the state in the affairs of the Temple. The trial court agreed with the Respondents, although it seemed to change its position at the hearing. While Rabbi Goodman recognizes that this Court should not consider the arguments on the merits made by the Respondents, the Appellant feels compelled to respond to some of these issues to point out their errors.

In addition to making their constitutional arguments, the Respondents argue or imply that this Court should uphold the lower courts' rulings because:

- (1) there was no second contract signed by both the Temple and Rabbi Goodman;

- (2) the Temple did not violate it's own By-Laws by holding a meeting without proper notice because it did so to spare Rabbi Goodman's feelings and to comply with a requirement in the Agreement which required the parties to agree on renewal at least ninety days before the end of the original Agreement term; and
- (3) Rabbi Goodman is not entitled to recover his unpaid wages for work performed under the First Contract because the Temple made him an offer to settle that claim and he did not accept it.

It is obvious that each of these arguments goes directly to the merits and has nothing to do with jurisdiction.

These arguments are not only inappropriate; they are incorrect. The minutes of the Board Meeting which reflect that the board renewed Rabbi Goodman's Contract constitutes a writing signed by the party against whom enforcement is sought and is therefore sufficient to satisfy the requirements of the statute of frauds and the language of the First Contract. See Londono v. City of Gainesville, 768 F.2d 1223 (11th Cir. 1985).

The Executive Committee made its decision to recommend repudiation of the Second Contract on Thursday, March 24, 1994. Except in extraordinary situations, the By-Laws require three days notice for Board Meetings. The Temple waited until four days later, the evening of Monday, March 28, 1994, to call a meeting for the very next night, Tuesday March 29, 1994². The Temple now claims that it did not violate the By-Laws because the First

² This was clearly done to ensure that few, if any, congregants who supported Rabbi Goodman would attend the meeting.

Contract required that contract negotiations be finalized ninety days before the end of the term of the First Contract and they failed to act more quickly because they did not want to embarrass him by "terminating" him just before a weekend when they were having a ceremony to honor him.

The First Contract expired on June 30, 1994. Ninety days before June 30, 1994, was Saturday, April 2, 1994. Temple Shir Ami could have held the meeting on Thursday, March 31 and complied with the By-Laws and the language of the First Contract. In any event, since the Board had already entered into the Second Contract and the Board was in fact repudiating the Second Contract, the ninety day deadline did not apply.

Temple Shir Ami has raised the fact that it has attempted to settle Rabbi Goodman's claim based upon Temple Shir Ami's refusal to pay him for work performed as a reason why this Court should uphold the trial court's decision that it lacks jurisdiction. Not only is it inappropriate to raise settlement discussions here, but the mere fact that the Temple made a settlement offer cannot form the basis for refusing jurisdiction to decide a case for work performed under a written contract and not paid for.

Each of these arguments go directly to the merits and should therefore be disregarded here. Rabbi Goodman is entitled to his day in court.

CONCLUSION

In light of the foregoing, Petitioner Rabbi Robert A. Goodman respectfully requests that the Court reverse the opinion of the Third District Court of Appeal and remand this action for trial on the merits, or alternatively, remand this case for further discovery and a full and fair hearing on the issue of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner typed in 12 point Courier New font was served by mail this 22nd day of March 1999, upon the following:

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