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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION – FIRST JUDICIAL DEPARTMENT

BELLA DAVIS,

Petitioner-Respondent

-against-

MICHAEL MELNICKE,

Respondent-Appellant

BRIEF OF AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE[1]

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish organization with affiliated chapters and congregations throughout the country. Among its other activities, Agudath Israel serves as an advocate in various governmental arenas for the interests of and concerns of American Orthodox Jewry.

In the case at hand, respondent Ms. Davis and Appellant Mr. Melnicke had entered into an agreement with a mandatory arbitration provision. The arbitration provision required the parties to settle all disputes in accordance with Jewish law before a Beth Din consisting of three rabbinic arbitrators selected by a mechanism described in the agreement. If, as occurred here, the mechanism failed to determine which rabbi should serve as the third arbitrator, the agreement provided that a party may petition "a Court of Competent Jurisdiction" to select the third rabbi to complete the tribunal. Ms. Davis petitioned the court below to make that selection, whereupon the court (the Honorable Eileen Bransten, J.S.C.) "carefully considered" the lists of potential rabbinic arbitrators submitted by each of the parties and proceeded to appoint one of them – Rabbi Irving Breitowitz—to fill the religious position of rabbinic judge. By doing so, we believe the court overstepped its constitutional bounds.

We emphasize that our involvement in this case should not be construed as an expression of any reservations about Rabbi Breitowitz or his competency to serve as a rabbinic judge on a properly constituted Beth Din. Indeed, Rabbi Breitowitz has lectured at at least one Agudath Israel function in recent years, and enjoys a fine reputation in Agudath Israel circles.

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[1] We acknowledge and thank Marc Edelstein, a law student at Cardozo Law School, for his assistance with this brief. Pursuant to Rule 28(a)(2)(B), Amicus Curiae Agudath Israel of America is a nonprofit corporation that has not issued stock and has no parent corporation or subsidiaries.

We also emphasize that our involvement in this case should not be construed as advocacy on behalf of either party with respect to their underlying claims. Agudath Israel generally maintains a policy of non-involvement in litigation involving disputes among members of our constituency. We know nothing about the underlying dispute or its procedural history beyond the facts summarized in the decision below; we take no position whatsoever as to which side is in the right. Indeed, a Beth Din may well determine that Respondent's position should prevail.

In the interests of full disclosure, and as elaborated in the motion papers submitted herewith, respondent Mr. Melnicke and his attorney Mendel Zilberberg are both active officers of and contributors to Agudath Israel. In fact, Mr. Zilberberg is the individual who alerted us to this case. Our involvement, though, has absolutely nothing to do with our relationship with these individuals.

Stated simply, we feel compelled to offer our views in the case at bar due to our deep concern that the ruling below, if upheld, will have ramifications that extend far beyond the specific dispute at hand. The lower court's decision represents a serious threat to the religious autonomy of the Beth Din, a vital and central religious institution in our community. The ruling clearly crosses the constitutionally mandated separation between church and state and creates a dangerous precedent that could lead to unconstitutional interference by the civil courts in matters that are inherently religious.

ARGUMENT

I. THE LOWER COURT MADE A CONSTITUTIONALLY IMPERMISSIVE RELIGIOUS DETERMINATION WHEN IT DETERMINED WHICH RABBI WAS QUALIFIED TO SERVE ON A BETH DIN

1. The Lower Court's Appointment Of A Rabbinic Judge To Sit On A Rabbinic Tribunal Constituted An Unconstitutional Entanglement Between Church And State

The lower court "carefully considered both parties' lists of potential rabbinic arbitrators" and chose Rabbi Breitowitz to serve on the rabbinic panel. Record on Appeal ("R."), at 28. The court did not comment on the nine other names that had been submitted for consideration (other than to describe the list submitted by Rabbi Mendel Epstein, Mr. Melnicke's chosen arbitrator, as "five impressive rabbis," R., at 23). The court focused exclusively on Rabbi Breitowitz's qualifications, pointing to the fact that he "was ordained at Ner Israel Rabbinical College and earned a Doctor of Talmudic Law from that institution," "serves as Rabbi of the Woodside Synagogue Ahavas Torah," "obtained a J.D. from Harvard Law School, [and] is also a tenured Professor of Law at the University of Maryland School of Law." R., at 22. Furthermore, the court noted, "Mr. Melnicke did not call Rabbi Breitowitz's religious credentials or qualifications into question." R., at 28. On this basis, Justice Bransten made her appointment.

By "carefully considering" ten candidates for the position of rabbinic judge, and then choosing one of them to decide and apply Jewish religious law to resolve a dispute, the Supreme Court made an inherently religious determination: that Rabbi Breitowitz, presumably more so than any of the other "nominees", had the proper religious qualifications to serve in this role. Such a religious determination by a court is an excessive government entanglement with religion and is a violation of the Establishment Clause.

For over a century, the Supreme Court of the United States has expressly shielded religious tribunals from government intrusion. In the seminal case of Watson v. Jones, 80 U.S.

(13 Wall.) 679 (1871), the Supreme Court of the United States examined the nature of the relationship between church and state and explicitly upheld the autonomy of religious tribunals, stating that:

> The right [of religious associations] to . . . create tribunals . . . for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.

Watson, 80 U.S. at 728-29.

Since the Supreme Court's declaration in Watson, it has been axiomatic that civil courts may not intrude into matters that concern religious controversy, even those that incidentally affect secular rights. Religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of . . . faith and doctrine." Kedroff v. St. Nicholas Cathedral of Russian Orthodox Chruch in North America, 344 U.S. 94, 116 (1952); see also Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich, 426 U.S. 696, 713-14 (1976); Grunwald v. Bornfreund, 696 F. Supp. 838, 840 (E.D.N.Y. 1988).

When a court evaluates religious credentials and appoints a rabbi to sit on a Beth Din and expound on Jewish religious law, the court itself assumes a religious function. This oversteps the very same constitutional bounds that preclude states from appointing individuals to make substantive religious determinations about food being sold as kosher. See Commack Self-Service Kosher Meats, Inc. v. Weiss 294 F.3d 415, 429 (2nd Cir. 2002) (appointment of Orthodox rabbis to an advisory board "convince us that New York's delegation of authority to the Board was made on the basis of religion, and not on principles neutral to religion"); Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1343 (4th Cir. 1995) (The Establishment Clause

forbids the government form delegating authority "to a group chosen according to a religious criterion"); Ran-Dav's County Kosher v. State, 129 N.J. 141, 158-159 (1992) (appointment of specific rabbis to a governmental kosher oversight board is unconstitutional). Even assuming this is what the parties intended in empowering a "Court of Competent Jurisdiction" to select a rabbinical judge—an assumption we contest in Point II below—the court had no authority to carry out their wish at the expense of the First Amendment.

2. The Lower Court Erred In Applying Avitzur v. Avitzur To The Instant Case

The lower court erroneously based its premise herein, that a court can appoint a rabbinic arbitrator to a Beth Din without violating the Establishment Clause, on the New York Court of Appeals decision in Avitzur v. Avitzur, 58 N.Y.2d 108 (N.Y. 1983).

The issue in Avitzur was whether a court can enforce a *Ketubah* (a religious prenuptial agreement) in which the couple agreed that in the event of certain circumstances the couple would submit themselves to a specific Beth Din that was clearly delineated by the parties in the agreement. The Court of Appeals ruled that a court's mere enforcement of the secular terms of a religious contract does not constitute excessive entanglement between church and state. *Avitzur* reasoned that a court can determine whether such a contract is enforceable by applying solely neutral contract law. The Court of Appeals noted that while "judicial involvement in matters touching upon religious concerns has been constitutionally limited . . . , and courts should not resolve such controversies in a manner requiring consideration of religious doctrine," Avitzur, 58 N.Y.2d at 114, still, in order to enforce the contract "no doctrinal issue need be passed upon, no implementation of a religious duty is contemplated, and no interference with religious authority will result." Id. at 115.

Thus, the Avitzur court merely interpreted a contract and enforced it. Unlike the arbitration agreement in this case, the agreement in Avitzur specifically named the Beth Din that

should serve as the applicable religious tribunal. Id. at 111. The court enforced the provision agreed upon by the parties, and compelled arbitration before the specified tribunal. The court did not need to contemplate the religious authority or the competence of the Beth Din, since the parties had already sanctioned the forum.

By sharp contrast, in the case at bar, if the agreement is read as requiring a civil court to choose a rabbinic arbitrator to decide religious law, that provision must be unenforceable since it calls for a civil court to directly determine who is qualified to apply religious doctrine—which, as shown above, is a thoroughly impermissible entanglement between church and state.

The issue in this case is not a novel one. In Pal v. Pal, 45 A.D.2d 738 (N.Y. App. Div. 1974), the Appellate Division was confronted with the very same issue as the case at bar—whether a court may appoint a rabbi to serve on rabbinical tribunal and decide a civil dispute, in that case, a divorce. The court ruled that the court had no jurisdiction to appoint a rabbi, reasoning that "Special Term had no authority to, in effect, convene a rabbinical tribunal." *Id.* At 739, citing Margulies v. Margulies, 42 A D 2d 517).

Avitzur holds that a court can determine, using neutral contract law, what the parties intended. But Avitzur does not—and cannot—stand for a proposition that any agreement between parties is enforceable even where it contradicts established constitutional law. A court may apply neutral contract law to determine that the parties agreed to go before rabbinic arbitration, but a court may not determine who is a qualified rabbi to serve on such a rabbinic panel and decide religious law.

II. THE AMBIGUOUS PROVISION IN QUESTION, WHICH CALLS FOR A COURT TO DETERMINE THE QUALIFICATIONS OF A RABBINIC ARBITRATOR, SHOULD BE CONSTRUED TO REFER TO A BETH DIN IN ORDER TO RENDER IT CONSTITUTIONAL

The contractual clause at issue allows a party to petition a "Court of Competent Jurisdiction" to select a third rabbinical arbitrator. Petitioner-Respondent maintains, and the court below agreed, that the term "Court of Competent Jurisdiction" refers to secular court. As discussed in Point I, however, such construction would render the contractual clause unconstitutional. Respondent-Appellant, however—pointing to the general religious nature of the agreement and the specific contractual provision (surprisingly omitted in the court below's recitation of the arbitration agreement (R., at 20) that "[t]he procedures and conduct of the arbitration proceeding shall be in accordance with Jewish law" (R., at 100) maintains that the term "Court of Competent Jurisdiction" must mean a Beth Din—a rabbinic tribunal.

The court below cavalierly dismissed the possibility that the parties may have intended that a Beth Din choose the third rabbinic judge, finding that the phrase "Court of Competent Jurisdiction" was "complete, clear and unambiguous." R., at 26. Respectfully, we disagree. If the parties truly intended that "the procedures and conduct of the arbitration proceeding shall be in accordance with Jewish law," then it is inconceivable that they also intended that a secular court should have authority to choose any members of the rabbinic tribunal. Jewish law would never cede to a secular authority the power to appoint rabbinic judges. Yes, we agree that the parties could have found a more articulate way to express their desire to have a Beth Din appoint the third rabbinic judge, but we believe, given their professed desire to have Jewish law control all aspects of the arbitration, that that is what they most likely intended. At a minimum, the matter is far from "complete, clear and unambiguous."

When construction is required because of an ambiguity in a contract, the law favors a construction that renders the contract enforceable rather than one which renders it void. "If the agreement is capable of a construction which will make it valid and enforceable, that construction will be placed on it." M. O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 56 (1939); see also Eddy v Prudence Bonds Corp. 165 F2d 157, (2nd Cir. 1947) cert den 333 US 845; Friedman v State (1934) 242 AD 314, 275 NYS 64, affd 268 NY 530, 198 NE 389 (1935). The Court should therefore construe the term "Court of Competent Jurisdiction" to refer to a rabbinic tribunal—the only constitutional means of construction.

III. IN THE ALTERNATIVE, IF THIS COURT CONSTRUES THE TERM "COURT OF COMPETENT JURISDICTION" AS TO APPLY TO A CIVIL COURT, THEREBY RENDERING THE CLAUSE UNCONSTITUTIONAL, THE COURT SHOULD STRIKE THIS PROVISION WHILE MAINTAINING THE BROADER ARBITRATION AGREEMENT AS A WHOLE

The contractual clause at issue, which calls for a Court of Competent Jurisdiction to weigh the qualifications of various rabbis in order to appoint a rabbinic arbitrator, is but one provision within a larger arbitration agreement. Neither party contests the enforceability of the arbitration agreement as a whole. Indeed, both parties have individually initiated arbitration proceedings, albeit before different rabbinical panels. If this court agrees with the court below that the term "Court of Competent Jurisdiction" can only be construed as applying to a secular court, the clause must be stricken from the broader arbitration agreement, as this clause calls for the court to unconstitutionally entangle itself within a matter of strictly religious nature. The rest of the arbitration agreement, however, is both uncontested and wholly enforceable.

For over a century, the Court of Appeals has maintained that the fact that a specific provision is unenforceable because of illegality does not affect the validity and enforceability of other provisions in the agreement. See e.g. BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 394

(1999) (Appellate court erred in not severing an unenforceable provision in a contract not to compete).

Moreover, it makes no difference whether the contract contains two distinct promises, only one of which is unenforceable, or whether there is only one promise that is divisible—the court shall strike the illegal provision and preserve the remainder of the parties' agreement. See Saratoga State Waters Corp. v Pratt, 227 NY 429 (1920); Central New York Tel. & Tel. Co. v Averill, 199 NY 128 (1910); BDO Seidman, Id., at 394. The test is the degree to which the illegality infects and destroys the agreement, McCall v Frampton, 438 NYS2d 11 (2d Dept, 1981). Stated differently, the court shall sever the illegal clause so long as the "provision does not vitiate the entire agreement and the other provisions of the agreement may be valid and enforceable." Ferro v. Bologna, 31 N.Y.2d 30, 36 (1972).

The provision at issue here is clearly not the main objective of the contract; it can be severed without affecting the parties' express wish to have their dispute arbitrated by a Jewish tribunal applying Jewish law. Under this scenario, the parties and their designated arbitrators would simply have to find a way to agree on the composition of the Beth Din.

There would be nothing unusual about such an arrangement. Indeed, most arbitration agreements with which we are familiar contain no designated mechanism for breaking an impasse between two arbitrators who are unable to agree on the third arbitrator. What ordinarily happens is that the arbitrators keep working at it until eventually the impasse is resolved.

If "Court of Competent Jurisdiction" is construed to refer to a secular court and not a Beth Din, the provision must be stricken—but the rest of the arbitration agreement should stand, and the parties and their arbitrators should get down to the business of finally agreeing on the identity of the third rabbinic arbitrator.

CONCLUSION

For the reasons set forth herein, the decision of the Supreme Court should be overturned.

RESPECTFULLY SUBMITTED this 22nd day of December, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

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_____

Mordechai Biser

New York, New York

December 22, 2005

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd of December, I personally served a copy of the Motion Of Agudath Israel Of America For Leave to File Brief As Amicus Curiae in support of Respondent Appellant, and Brief of Agudath Israel as Amicus Curiae, upon the following counsel for the parties by first-class mail:

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Affirmed before me this 22nd day of December, 2005.

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Notary Public