

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 IN RE: . Chapter 11
4 KOLLEL MATEH EFRAIM, LLC, . Case No. 04-16410 (SMB)
5 Debtor. . New York, New York
6 . Thursday, October 25, 2007
7 . 10:31 a.m.

8 KOLLEL MATEH EFRAIM, LLC .
9 . Adv. Proc. 04-04545

10 vs. .

11 HELEN-MAY HOLDINGS, LLC .
12 .
13 KOLLEL MATEH EFRAIM, LLC .
14 . Adv. Proc 07-01937

15 vs. .

16 HELEN-MAY HOLDINGS, LLC .
17 .
18 .

19 TRANSCRIPT OF MOTIONS
20 BEFORE THE HONORABLE STUART M. BERNSTEIN
21 CHIEF UNITED STATES BANKRUPTCY JUDGE

22 APPEARANCES:

23 For the Debtor: Scott A. Krinsky, Esq.
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(Appearances Continued)

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1 APPEARANCES: (Continued)

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I N D E X

	<u>Page</u>
<u>MOTION FOR APPOINTMENT OF CHAPTER 11 TRUSTEE</u>	
<u>OR CONVERSION TO CHAPTER 7</u>	
By Mr. Krinsky	3
By Mr. Carlebach	16
<u>Court Decision</u>	19

1 (Proceedings commence at 10:31 a.m.)

2 THE COURT: Kollel. This is a hearing on a variety
3 of matters, including the Court's order to show cause or the
4 order directing the debtor or any other party in interest to
5 show cause why, in lieu of dismissal, the case shouldn't be
6 converted to Chapter 7 or the case should remain in Chapter 11
7 but a Chapter 11 trustee or examiner should be appointed.

8 So I guess I'll hear from you, Mr. Krinsky.

9 MR. KRINSKY: Your Honor, that's fine. I would just
10 point out that Helen-May is actually supporting the employment
11 of a trustee. We are opposing it.

12 A couple of things, Your Honor. Preliminarily, I
13 would point out regarding a Chapter 11 trustee that it's an
14 extraordinary standard. In Paragraph 20 of their papers they
15 concede that they have to demonstrate it or burden of proof is
16 by clear and convincing evidence, which is a high standard.

17 In addition to that, we would point out that the
18 applicable statute for Chapter 11 trustee, 1104, talks about a
19 motion on request of a party in interest --

20 THE COURT: And you don't think I can do it sua
21 sponte?

22 MR. KRINSKY: Your Honor, I cited a case, American --

23 THE COURT: Did you find any case in the Southern
24 District of New York which dealt with this issue?

25 MR. KRINSKY: Not with the specific issue of the

1 employment of the sua sponte trustee. I did not see any.

2 THE COURT: Really? How long did you research this?

3 MR. KRINSKY: Your Honor, I did not spend a lot of
4 time on it. I apologize for that. I did see the case in the
5 Eastern District. I did --

6 THE COURT: Maybe you ought to do a little more
7 research next time. Okay?

8 Under 105A I can do sua sponte whatever a party can
9 do, right?

10 MR. KRINSKY: I'm sorry, Your Honor?

11 THE COURT: Doesn't 105A say that the Court can
12 essentially do sua sponte anything a party can do? The Court
13 can make a motion sua sponte if a party can make a motion.

14 MR. KRINSKY: Your Honor, I've seen it in other
15 contexts. Again, I didn't specifically see it in this context
16 and I did see that one American case, which was an Eastern
17 District decision. I'll move on though.

18 The standard under 1004 is they have to go under A1
19 or A2. A1 they concede in Paragraph 44 of their papers that
20 it's a high standard of cause. It talks about fraud and
21 dishonesty. We don't think that they have made a showing by
22 clear and convincing evidence there's fraud and dishonesty
23 here. In fact, the Court did indicate at the last October
24 11th --

25 THE COURT: How about mis-management?

1 MR. KRINSKY: We don't believe they've made a clear
2 and convincing showing to that either.

3 THE COURT: Has the debtor operated either a
4 children's camp or a retreat for rabbinical students during
5 the last three years on the property?

6 MR. KRINSKY: No. What is going on in my
7 understanding, and I don't think it's ever been --

8 THE COURT: I thought you told me that's what is
9 occurring and I recall seeing an exhibit in one of the sets of
10 papers talking about opening up a camp for children I think it
11 was last summer. Did that occur?

12 MR. KRINSKY: My understanding is that there is an
13 entity there that operates the camp, but that is not the
14 debtor.

15 THE COURT: Did I authorize the debtor to turn the
16 operation of the property over to another entity?

17 MR. KRINSKY: No, Your Honor, you did not.

18 THE COURT: And does the debtor get any payments from
19 anybody in return for turning the property over?

20 MR. KRINSKY: Your Honor, my understanding is it does
21 not.

22 THE COURT: Has the debtor earned any income during
23 this case?

24 MR. KRINSKY: My understanding, Your Honor, is it
25 does not.

1 THE COURT: Doesn't that suggest that the debtor has
2 been mis-managing the property?

3 MR. KRINSKY: Well, again, I --

4 THE COURT: It's paying debt every month or it's
5 supposed to pay debt every month and it's not doing anything
6 with the property.

7 MR. KRINSKY: Well, again, Your Honor, I think they
8 would have to show what could be done with the property to
9 meet the clear and convincing evidence standard.

10 THE COURT: Well, isn't the person who is operating
11 it operating a camp?

12 MR. KRINSKY: They operate a camp two months a year.
13 My understanding is it's sort of -- you know, they do collect
14 a few dollars which go to run the camp. It's not something
15 that --

16 THE COURT: So the debtor, at minimum, could operate
17 a camp two months a year.

18 MR. KRINSKY: Could the --

19 THE COURT: At a minimum, the debtor could operate a
20 camp for two months a year, right?

21 MR. KRINSKY: Well, the debtor is not the one
22 operating the camp.

23 THE COURT: I understand that. The debtor has given
24 up the operation of the property to somebody else.

25 MR. KRINSKY: That's correct, Your Honor.

1 THE COURT: Without a court order. Go ahead.

2 MR. KRINSKY: Your Honor, we don't believe they met
3 the standard under mis-management, which, again, they concede
4 is a high standard.

5 THE COURT: So tell me why I shouldn't just convert
6 the case.

7 MR. KRINSKY: I was going to go to A2. You want me
8 to just --

9 THE COURT: Well, just tell me why I shouldn't
10 convert the case.

11 MR. KRINSKY: Okay. The last time we were here we
12 talked a little bit about the conversion issue. At that point
13 we raised the issue under 1112(c), which basically says that
14 the case can't be converted if the debtor is not for profit.

15 THE COURT: Are you saying that the debtor is a not-
16 for-profit corporation?

17 MR. KRINSKY: No, Your Honor, you know we are not.

18 THE COURT: So that's somebody else's argument,
19 right?

20 MR. KRINSKY: That's correct, Your Honor. That's
21 correct.

22 THE COURT: So you're making somebody else's
23 argument.

24 MR. KRINSKY: Your Honor, all we are saying is that
25 they have made that assertion that the debtor is the religious

1 corporation. Assuming they are correct, which we dispute,
2 then there would conceptually be a violation of the statute to
3 convert the case.

4 THE COURT: So couldn't that convert it back at that
5 point?

6 MR. KRINSKY: Well, Your Honor, I think -- two things
7 on that.

8 I think the first thing would be I'm not sure you can
9 be half pregnant. I'm not sure --

10 THE COURT: Pardon?

11 MR. KRINSKY: I think it would be sort of a half-
12 pregnant, genie-out-of-the-bottle argument.

13 THE COURT: Why?

14 MR. KRINSKY: Well, because if, in fact --

15 THE COURT: Just had an argument earlier today about
16 converting a case, reconverting a case from Chapter 7 to
17 Chapter 11. It happens.

18 MR. KRINSKY: Well, right, but I don't think the
19 context I heard earlier was in the context of a religious
20 corporation, not for profit, non-money corporation.

21 THE COURT: Suppose that the religious corporation is
22 not the debtor, but is an alter-ego with the debtor. Then
23 it's not the debtor, it's just liable for the debtor's debts.
24 That's one possibility, isn't it?

25 MR. KRINSKY: That's correct. Assuming that would be

1 the case, I think you still would use that -- I think the
2 Court could still use that factor as part of its analysis as
3 to whether the case should be converted or dismissed. I think
4 the Court should give pause if, in fact, it was found to be
5 the religious corporation. Again, it's a discretionary test.

6 The other factors that courts can look at in these
7 situations are, you know, who is opposing dismissal. The only
8 party opposing dismissal at this point, the only creditor
9 appears to be Helen-May.

10 THE COURT: Because all the other debt is insider
11 debt, right?

12 MR. KRINSKY: No, that's not correct, Your Honor.

13 THE COURT: Who is Maskil El Dal?

14 MR. KRINSKY: That is insider debt.

15 THE COURT: Okay. And how much are they owed?

16 MR. KRINSKY: Your Honor, I don't have that in front
17 of me, but they are owed --

18 THE COURT: \$1.2 million?

19 MR. KRINSKY: I believe it's a significant -- but
20 there are, I believe, other creditors as well.

21 THE COURT: Has the debtor ever operated from the
22 same premises as Maskil El Dal?

23 MR. KRINSKY: I don't know the answer to that, Your
24 Honor.

25 THE COURT: Okay.

1 MR. KRINSKY: I would also point out that one of the
2 factors the courts look at, discretionary factors, interest to
3 creditors, conversion versus dismissal, is what are we doing
4 in bankruptcy? What is there left to do in bankruptcy? I
5 mean we have --

6 THE COURT: Well, pursue claims.

7 MR. KRINSKY: Which the Court has pointed out, on a
8 few occasions, can also be pursued in the state court.
9 There's nothing unique about the bankruptcy court vis-a-vis
10 these claims.

11 THE COURT: But what about the claim that the
12 principals of the debtor breached their fiduciary duty by not
13 trying to develop the property or use it for something other
14 than turning it over to a third party?

15 MR. KRINSKY: This is the first time I've heard about
16 this potential claim. The case --

17 THE COURT: But I asked you a question. What is the
18 -- you know, you've said the debtor is not dishonest and
19 hasn't committed fraud, but there's also mis-management under
20 the statute, so it's fairly raised.

21 MR. KRINSKY: Well, again, I mean, we had spent a
22 significant of the Chapter 11 time, as the Court is aware, in
23 limbo because of the issue of settlement.

24 THE COURT: But that didn't stop any -- that didn't
25 stop you from turning the operation of the property over to a

1 third party. I mean, during the summer of 2005 was there some
2 sort of a camp operated there?

3 MR. KRINSKY: I believe there was, Your Honor.

4 THE COURT: During 2006 was there a camp operated
5 there?

6 MR. KRINSKY: I believe there was, Your Honor.

7 THE COURT: And during 2007 was there a camp
8 operated?

9 MR. KRINSKY: I believe there was.

10 THE COURT: So how did the limbo affect the operation
11 of the property, which you tell me can only be used two months
12 a year anyway.

13 MR. KRINSKY: That's my understanding, Your Honor.

14 THE COURT: All right. So it doesn't sound like
15 limbo affected the operation of the property, the legal limbo
16 of the case. And I understand what you're saying, but how did
17 it affect the property?

18 MR. KRINSKY: Well, again, I think you asked about --
19 I think you -- your question was more in the concept of mis-
20 management or breach of fiduciary duty. I mean, there has
21 never been a showing that the property could be used for
22 anything else. There has never been a motion or any kind of a
23 suggestion until today that you didn't maximize, you didn't do
24 this, you didn't do that.

25 THE COURT: But, you know, the debtors' principals

1 are the ones who know what's going on, and that's part of the
2 problem. Nobody knows what's going on with this case.

3 MR. KRINSKY: But I would also find out -- I'm not
4 sure that a claim for breach of fiduciary duty or waste could
5 not be raised in the state court. I mean, those are state
6 court claims. They do have a judgment. It's not uncommon, if
7 someone has a judgment against an entity, to go after that
8 entity on various different theories, including waste.

9 THE COURT: What if the breach involved the breach of
10 a duty imposed under the bankruptcy laws?

11 MR. KRINSKY: I think in that situation an argument
12 could be made that the inability to -- the duty under
13 bankruptcy law would be subsumed under a general breach of
14 fiduciary duty. I think the argument could also be made in
15 the state court. I don't think -- again, I don't think any of
16 this is unique to a bankruptcy court.

17 It's all basically state law claims. There are
18 already -- the stay has been lifted twice regarding the
19 property. There's an eviction proceeding pending in which the
20 debtor and the religious corporation are parties. There's
21 also a foreclosure action in which Helen-May is a party. We
22 were supposed to be made a party to that as well. There's the
23 removed action and they also have a judgment.

24 Anything that is happening here could easily be
25 happening in state court.

1 THE COURT: Is there any connection between the
2 debtor and the religious corporation?

3 MR. KRINSKY: Fine connection.

4 THE COURT: Financial, management, anything?

5 MR. KRINSKY: Our position is that they're two
6 separate legal entities.

7 THE COURT: I understand that. I can read the
8 certificates of incorporation also, but that wasn't my
9 question. Do they have common management?

10 MR. KRINSKY: Well, we've indicated that the rabbi is
11 a manager. I mean, it's no secret. We've indicated that the
12 rabbi is a manager of the debtor.

13 THE COURT: And what is his relationship to the
14 religious corporation?

15 MR. KRINSKY: And we've also disclosed that he is a
16 trustee of the religious corporation.

17 THE COURT: Okay.

18 MR. KRINSKY: And again, in terms of the expense, we
19 would point out that -- we don't know if -- to say that a
20 trustee will be able to come in and look at things quickly in
21 this case, we don't believe that. These pleadings are
22 voluminous. The trustee is going to want to come in,
23 trustee's counsel, trustee's this, trustee's that.

24 Again, we think, if you look at everything, we think
25 dismissal is a better option for everyone.

1 THE COURT: So you think that the more complex the
2 possible fraud, the less the case cries out for the
3 appointment of the trustee?

4 MR. KRINSKY: Well, Your Honor, I mean, that's sort
5 of the, you know, the hypothetical.

6 THE COURT: But that sounds like what you're saying,
7 the trustee will have to look at a lot of stuff, therefore,
8 don't appoint a trustee.

9 MR. KRINSKY: Well, but no. I didn't mean in terms
10 of fraud, I meant in terms of volume. There's a voluminous
11 amount of pleadings, there are different adversaries to look
12 at, there's different -- every set of papers by Helen-May is
13 forty-five pages.

14 THE COURT: So what's the harm if the trustee does
15 that?

16 MR. KRINSKY: That will basically create a tremendous
17 amount of fees and wipe away whatever could be.

18 THE COURT: So what could be? What does the debtor
19 have to pay creditors, other than the insiders?

20 MR. KRINSKY: The debtor has the two pieces of
21 property.

22 THE COURT: What steps has the debtor taken to
23 liquidate those two pieces of property?

24 MR. KRINSKY: Well, the debtor hasn't taken any steps
25 because the debtor is in --

1 THE COURT: Okay.

2 MR. CARLEBACH: Your Honor, I think that -- just that
3 very admission that the debtor has been operating a summer
4 camp at the premises for the past three years while in
5 bankruptcy --

6 THE COURT: Well, he said the debtor hasn't been
7 operating it, the debtor has ceded the property to somebody to
8 operate.

9 MR. CARLEBACH: Right. So and taken together with
10 the disclosure and the schedules that in the summer of 2004
11 they earned \$300,000 in income from the property and --

12 THE COURT: I thought that the debtor did not
13 disclose any income.

14 MR. CARLEBACH: Filed pre-petition.

15 THE COURT: Oh, pre-petition.

16 MR. CARLEBACH: Pre-petition. Pre-petition. Post-
17 petition, all the operating reports to the file there is no
18 income. So you can't have it both ways.

19 In other words, on the one hand, they're letting this
20 entity run this property. They're generating all this income.
21 They're not paying any expenses because we have no expenses.
22 They haven't asked, so presumably this entity, which is
23 unrelated to them, is getting all this money and the debtor is
24 using this court as a shield not to pay expenses, automatic
25 stay, not disclosing what their relationship is with this

1 entity, not disclosing no management relationship, you know, I
2 can't think of a greater manipulation of this Court where you
3 take the bankruptcy code and you use it as a shield to protect
4 you from everything, but the other side of the ledger, the
5 income side, the benefits that you get from it, that is
6 completely precluded from clutter, you don't pay one cent in
7 expenses.

8 I mean, aside from the minimal adequate protection
9 that they've paid in the past, they haven't lived up to their
10 contracts, haven't paid the operating expenses, and the real
11 point is that the real creditors of this debtor have seen
12 nothing from this case.

13 The pleadings in this case, in fact, have honed down
14 the issue, the issue of a trustee coming in. We have done the
15 work to hone the issue of a trustee. It's very simple to look
16 at the documents.

17 The issue of -- the debtor has made the alter-ego
18 case right here when they say that the non-profit is running
19 the case and we're letting them do it, we're not asking them
20 for any rent, you know, that would be Exhibit A, Judge.

21 I mean, there is no -- the debtor is an empty shell,
22 an LLC that has no assets and --

23 THE COURT: It has two parcels of real estate.

24 MR. CARLEBACH: It has the two parcels, which were
25 filed with the EIN of the religious corporation, just as the

1 petition is the EIN of the religious corporation. You don't
2 have to be a genius to figure on what's going on in here. And
3 to let this debtor exit this court after having, you know,
4 having burned its creditors, having gotten what it needed, and
5 then to throw us now to stay put and say let a state court
6 judge so we can hang out on the property -- and that's the
7 only reason they want to go to state court, Judge, so they can
8 take it to a state court judge and they've done it already.

9 They haven't disclosed what's going on in the
10 bankruptcy court, just say we're a contract entity, and play
11 both sides of the fence. If you're a contract entity, where's
12 our \$1,500 at the end of the contract? Oh, we're terminating
13 the contract so we don't owe you the \$1,500 a day; so leave
14 the property; no, we're hanging out here.

15 This is -- they're sitting on that fence for three
16 years here. It's not right. It's just not right that they
17 should be able to just exit and essentially have used this
18 Court for what I can only describe as nefarious purposes.

19 THE COURT: All right. Does the US Trustee have any
20 position on this?

21 MR. MASUMOTO: Not at this point, Your Honor.

22 THE COURT: All right. Yes, sir. Go ahead.

23 MR. KRINSKY: Your Honor, again, I just point out we
24 did pay expenses. We paid the money that was owed, pursuant
25 to the first two adequate protection orders and then --

1 THE COURT: But you didn't pay the ones that I
2 directed because you didn't like that one because it was too
3 high, right?

4 MR. KRINSKY: Well, no, but you -- Your Honor, you
5 know we thought we had a settlement and we certainly thought
6 we had good faith, believed the Court was going to uphold that
7 settlement. It was only when it all came due and the case
8 went bad in February --

9 THE COURT: Since February, have you paid it since
10 February?

11 MR. KRINSKY: We have not -- we paid a few payments
12 under the second order, not the big --

13 THE COURT: Okay.

14 MR. KRINSKY: All right? We don't have the money to
15 do that, Your Honor.

16 THE COURT: All right.

17 MR. KRINSKY: And again, I would point out that, you
18 know, they have a judgment. It's not just a question of
19 litigating again in state court, they have a judgment. They
20 had all the rights of a judgment creditor. A judgment
21 creditor can do many things in, you know, outside of
22 bankruptcy court, so I really don't see the prejudice.

23 THE COURT: The debtor moved to dismiss this case and
24 on the return date the Court directed the debtor to show
25 cause why the case should not be converted to Chapter 7, or,

1 in the alternative, why the Court should not appoint a Chapter
2 11 trustee or an examiner. The matter was adjourned for two
3 weeks to permit the debtor to serve notice of the Court's
4 order to show cause on all parties in interest, and to allow
5 all parties, including the debtor, to respond.

6 Having considered the parties' arguments, I conclude
7 that the conversion is in the best interest of the creditors
8 and the estate.

9 The background relating to this case is discussed in
10 In re: Kolllel, K-o-l-l-e-l, Mateh, M-a-t-e-h, Efraim, E-f-r-
11 a-i-m, LLC, 334 BR 554 (Bankr. S.D.N.Y. 2005).

12 I assume familiarity with that opinion and highlight
13 the facts relevant to this decision.

14 The debtor is a New York limited liability company.
15 According to the petition, Jack Lefkowitz is the debtor's
16 managing and sole member.

17 The debtor filed this Chapter 11 case on October 4,
18 2004 for the express purpose of protecting its rights under
19 the sale contract with Helen-May, which is discussed in the
20 Court's earlier opinion.

21 The petition did not include a federal taxpayer
22 identification number.

23 The debtor filed a second case entitled Mateh, M-a-t-
24 e-h, Efriam, LLC, Case No. 04-17525, on November 24, 2004.

25 That petition listed a taxpayer identification number

1 of 11-2831693. The second case was dismissed by order dated
2 November 27, 2006.

3 The debtor's filings indicated that it has
4 substantial property and substantial debt. Schedules show
5 that the debtor owns two parcels of real estate valued at
6 \$600,000 and may still have rights under the contract with
7 Helen-May.

8 Its schedules also list over \$2.8 million in
9 unsecured debt.

10 Although the debtor has occupied the Helen-May
11 property during the entire case and has supposedly operated
12 some sort of camp or has permitted somebody else to do so, the
13 debtor has never earned any income. I note in this regard
14 that the debtor failed to file any operating reports for two
15 years and only did so recently because the Court directed the
16 debtor to do so.

17 The operating reports indicate that the debtor has
18 subsisted on insider loans. The Court never authorized these
19 loans and if they were not made in the ordinary course of the
20 debtor's business, the loans would seem to run afoul of
21 Section 364.

22 The debtor moved to dismiss this case on August 6th,
23 2007. Lacking business income and cash, the debtor has
24 conceded that it cannot confirm a plan.

25 On the return date of the motion, I questioned

1 whether dismissal was the appropriate disposition, in light of
2 some of the facts I recount below, as well as others since
3 revealed.

4 As a result, I issued the aforementioned order to
5 show cause.

6 Pursuant to the version of Section 1112(b) in effect
7 at the time this case was filed, the Court may convert or
8 dismiss a Chapter 11 case for cause shown, whichever is in the
9 best interest of the creditors and the estate.

10 The statute lists several specific examples of cause,
11 but the list is not exclusive.

12 A motion under Section 1112(b) involves a two-step
13 analysis. The Court must first determine whether cause exists
14 to convert or dismiss. If cause exists, the Court must then
15 decide which option is in the best interest of the creditors
16 and the estate. In re: Superior Siding and Window, Inc., 14
17 F.3d 240, 242 (4th Cir. 1994).

18 Cause plainly exists in this case. The debtor has
19 continued to lose money and concedes that there is no
20 possibility of rehabilitation. It is unable to effectuate a
21 plan and failed to file a plan and disclosure statement within
22 the time fixed by the Court. In addition, the debtor failed
23 to file operating reports for two years until ordered to do

24 I also conclude that conversion is the better option.
25 The debtor owns unencumbered real property purchased in 2004

1 for \$600,000 which a trustee can administer. In addition, the
2 operating reports indicate that the debtor owns other assets
3 of unliquidated value.

4 Furthermore, the debtor's rights to Helen-May's
5 property remain unresolved.

6 On the other hand, the debtor owes substantial debt.
7 As noted, its schedules list over 2.8 million, while its
8 operating reports list pre-petition debt of approximately 1.6
9 million.

10 Its September 2007 operating report also lists post-
11 petition debt in excess of \$460,000, consisting of unpaid
12 adequate protection and insider loans.

13 If this case is dismissed, there may be a mad
14 scramble among the creditors to recover their debts, and the
15 debtor's insiders will have the inside track.

16 Beyond what has been said, there are unique facts
17 about this case that cry out for the appointment of and
18 investigation by an independent fiduciary.

19 According to Helen-May, the debtor is not the LLC but
20 instead is Kolllel, K-o-l-e-l (sic), Mateh, M-a-t-e-h, Efraim,
21 E-f-r-a-i-m, a New York religious corporation based in
22 Brooklyn. Helen-May further charges that even if the
23 religious corporation is no the debtor, it is the alter-ego of
24 the debtor and liable for its debts.

25 The evidence adduced thus far supports Helen-May's

1 allegations. The debtor used the religious corporation's
2 taxpayer identification number on its second petition. It
3 also used the religious corporation's taxpayer identification
4 number on two real estate transfer tax returns that it
5 prepared and presumably filed when it purchased the two
6 parcels adjacent to the Helen-May property.

7 The debtor has conceded that it does business in the
8 name assigned to the religious corporation. The assignment of
9 the real estate contract with Helen-May was made to "Kolel, K-
10 o-l-e-l (sic), Mateh, M-a-t-e-h, Efriam, E-f-r-a-i-m" and was
11 signed by Abraham Steinwurzel, S-t-e-i-n-w-u-r-z-e-l, on
12 behalf of the assignee.

13 Steinwurzel was one of the original trustees of the
14 religious corporation and in court today debtor's counsel said
15 he was still a trustee.

16 According to the affidavits he has submitted in this
17 case, he is also the debtor's rabbi, manager, and de facto
18 chief financial officer.

19 In addition, he signed all of the debtor's recent
20 operating reports. His close connection with both the
21 religious corporation and the debtor implies that both
22 corporations knew the debtor was using the religious
23 corporation's identity to conduct business.

24 The evidence also shows a close relationship with the
25 debtor's principal creditor, Maskil, M-a-s-k-i-l, El, E-l,

1 hyphen Dal, D-a-l, Incorporated.

2 According to the schedules, the debtor owes Maskil
3 \$1.2 million in pre-petition debt. The debtor did not list
4 Maskil in its petition as one of its twenty largest creditors,
5 implying that Maskil is an insider, which is also, I think,
6 conceded today.

7 Under the plan filed in June 2005, Maskil agreed to
8 waive any distribution and to fund the purchase of the Helen-
9 May property. The debtor used the same address that is
10 Maskil's address, 1526 52nd Street in Brooklyn, on the
11 aforementioned real estate transfer tax returns.

12 Lastly, the debtor's attorneys, Backenroth, Frankel &
13 Krinsky, LLP, belatedly filed a supplemental 2016(b) notice
14 dated October 16th, 2007 disclosing that Maskil has paid the
15 firm \$50,000 on account of the debtor's legal fees in this
16 case since October 2004.

17 There is at least one other aspect of this case that
18 gives me some pause. The debtor -- or the debtor says someone
19 else -- has conducted a children's camp at the property and
20 may have also used the camp as a retreat for rabbinical
21 students, yet the debtor has never reported any income and,
22 according to its schedules, it earned \$300,000 in income I
23 think the year before the filing.

24 The debtor is a for-profit corporation and cannot,
25 consistent with its fiduciary duties to its creditors and the

1 estate, permit its property to be used free of charge. A
2 trustee can investigate the circumstances surrounding the use
3 of the debtor's property and, if appropriate, recover
4 compensation or damages from those who used it or from the
5 debtor's fiduciaries for permitting that use.

6 The debtor maintains that the conversion motion lacks
7 creditor support, aside from Helen-May, and that Helen-May can
8 pursue its claims outside of bankruptcy.

9 Helen-May, however, is the principal non-inside
10 creditor and supports the Court's order to show cause.

11 Most of the other debt is owed to insiders and
12 affiliates.

13 The debtor also argues that a trustee will increase
14 the administrative expenses and will, therefore, prejudice the
15 creditors. It's hard to see how creditors would be
16 prejudiced, since the only assets reported by the debtor
17 consist of relatively illiquid real estate.

18 Finally, the debtor correctly notes that the Court
19 cannot convert a non-monied corporation's Chapter 11 case
20 without its consent. See 11 USC, Section 112(c), and if I
21 conclude that the religious corporation is the actual debtor,
22 the conversion order would violate this restriction.

23 The putative debtor does not, however, contend that
24 it is a religious or non-monied corporation and has been
25 admonished in the past about making arguments that belong to

1 the religious corporation.

2 Furthermore, it did not serve the notice of hearing
3 on the religious corporation, at least according to the
4 affidavit of service, so that it could intervene and make this
5 argument.

6 In any event, the argument is premature. The trustee
7 may decide not to pursue the claim. The religious corporation
8 may prevail in the litigation. The Court may determine that
9 the religious corporation is an alter-ego, allowing the
10 trustee to reach its assets without actually making the
11 debtor.

12 It is sufficient to say that if the Court decides
13 that the religious corporation is the debtor, the Court can
14 deal with that issue at that time.

15 In light of the foregoing, the case will be converted
16 to Chapter 7. This moots the alternatives of appointing a
17 Chapter 11 trustee or examiner.

18 I'll ask the US Trustee to send an order over today.

19 MR. MASUMOTO: Sure will, Your Honor.

20 THE COURT: Thank you very much.

21 With respect to the other items on the calendar, I'll
22 adjourn the motion to remand sine die. I want to hear what
23 the Chapter 7 trustee's views on that are.

24 I've indicated I think the motion for sanctions is
25 premature at this point.

1 MR. CARLEBACH: I would ask that that adjourn that as
2 well.

3 THE COURT: I'll adjourn it sine die and if I forget
4 about it and it becomes relevant, you can remind me and we'll
5 put it back on the calendar.

6 I'm going to adjourn the pretrial conference also
7 because I think that is a trustee's claim, an alter-ego claim.
8 In any event, the trustee -- even if it's your claim, the
9 trustee might want to intervene in that proceeding.

10 What I'll do is, since I don't want to lose track of
11 this case, I'm going to schedule another status conference to
12 hear from the trustee in let's say forty-five days.

13 Do you have a date in state court?

14 MR. CARLEBACH: I believe it's November 19th,
15 November 20th.

16 THE COURT: Well, the trustee is now substituted as a
17 party for the debtor, so you ought to advise the trustee about
18 that, whoever the trustee is.

19 I'll adjourn this to December 11th, ten o'clock, for
20 a status report from the trustee and we can talk about whether
21 it makes sense to schedule these other matters. As a matter
22 of fact, I'll adjourn all the other matters to December --
23 what did I say?

24 MR. CARLEBACH: December 11th.

25 THE COURT: 11th also.

1 Yes, sir.

2 MR. KRINSKY: Your Honor, could I just ask one or two
3 housekeeping matters?

4 THE COURT: Sure.

5 MR. KRINSKY: As you know, the -- Helen-May has filed
6 an adversary proceeding, what I have -- what we have referred
7 to as the alter-ego adversary proceeding.

8 THE COURT: Right.

9 MR. KRINSKY: My understanding is that answers are
10 due on Monday in that proceeding. Your Honor has indicated in
11 the past that that claim would arguably belong to the Chapter
12 7 trustee as opposed to the creditor.

13 THE COURT: Right.

14 MR. KRINSKY: That's one issue I'd like to raise.
15 And the second issue, more pressing than that --

16 THE COURT: So you're seeking to extend your time,
17 right?

18 MR. KRINSKY: Correct, Your Honor.

19 THE COURT: Okay. You didn't ask that, but I assumed
20 that's --

21 MR. KRINSKY: But that's really not my real issue. I
22 just wanted to give you some background. My real issue is
23 this:

24 In connection with that adversary proceeding, Helen-
25 May has also apparently recently issued subpoenas to various

1 parties. Those subpoenas are returnable I believe as early as
2 next week.

3 Again, we believe that that now claim would belong to
4 the trustee, one. Secondly, there has been no -- the issue
5 hasn't been joined, there has been non 26(f) conference and no
6 --

7 THE COURT: So maybe I should direct you to file an
8 answer immediately.

9 MR. KRINSKY: Well, what I was asking for I guess is
10 whether or not those subpoenas could be withdrawn, without
11 having to engage in what I would consider -- I mean, I don't
12 want to burden this Court with more work. That's not my
13 purpose and motion practice to quash subpoenas or things along
14 those lines.

15 THE COURT: Was the subpoena served on you?

16 MR. KRINSKY: No, it was --

17 THE COURT: So why would you make a motion to quash?

18 MR. KRINSKY: Well, there were subpoenas served upon
19 Mr. Lefkowitz --

20 THE COURT: You don't represent Mr. Lefkowitz.

21 MR. KRINSKY: Let me just give you the whole --

22 THE COURT: Okay.

23 MR. KRINSKY: -- before you -- there was a subpoena
24 served upon Mr. Lefkowitz, there was a subpoena served upon
25 the rabbi. More important than all that, there was also a

1 subpoena served upon the bank.

2 My history with banks, as Your Honor may know, unless
3 they have a court order, they're just going to give discovery.
4 You can't stop them once they're in motion. That's my real
5 concern.

6 If that subpoena as to the bank could be withdrawn or
7 adjourned because there's no way to stop a bank without a
8 court order and I don't want to have to engage in what I
9 believe is a claim that would, A, belong to the trustee and,
10 again, B, there has been on 26(f) conference.

11 THE COURT: But how can you make that argument? How
12 do you have standing to argue that he shouldn't be subpoenaing
13 the bank? I don't understand that. That's the trustee's
14 argument, isn't it?

15 MR. KRINSKY: That would be the trustee's argument as
16 of this -- well, technically, there hasn't been an order
17 appointing the trustee yet and this is in process right now.

18 THE COURT: Well, there will be by this afternoon.

19 MR. KRINSKY: That's correct, Your Honor.

20 THE COURT: Any subpoenas returnable before this
21 afternoon?

22 MR. KRINSKY: No, they're returnable next week.

23 THE COURT: All right.

24 MR. KRINSKY: Again, the trustee may not want to
25 pursue that claim. And again, there has been on 26(f)

1 conference. It would seem to me that these subpoenas are void
2 ab initio, but the problem again is that a bank will just go
3 ahead and comply unless there is some sort of court order
4 preventing them from complying.

5 MR. CARLEBACH: Your Honor, everything that Mr.
6 Krinsky said is by way of argument. If they have a motion to
7 make -- it sounds like Your Honor has opined about who has
8 this alter-ego claim.

9 THE COURT: Well, I know there's case law and I know
10 I've had a case. The alter-ego claim under New York law
11 belongs to the estate.

12 MR. CARLEBACH: But the alter-ego claim, as I
13 understand it, if, for example, a fraudulent conveyance claim
14 would certainly belong to the estate. The alter-ego claim is
15 really just a question of recovery of assets.

16 I mean, I haven't done any research on it but --

17 THE COURT: There is Second Circuit law.

18 MR. CARLEBACH: Well, I would say if they have any
19 argument to make, whether it's lack of standing or any other,
20 they need a protective order, let them make that motion. I am
21 not consenting to anything. We want to proceed with our
22 action. If the trustee -- we'll talk to a trustee and, you
23 know, any defenses or whatever they have to raise, they can
24 raise it in papers.

25 THE COURT: All right. The one thing I will do is

1 I'll adjourn the time to answer the complaint until the next
2 status conference.

3 MR. CARLEBACH: Is that on behalf of the religious
4 corporation as well?

5 THE COURT: Well, --

6 MR. CARLEBACH: They're not here, they're not
7 represented. It just --

8 THE COURT: They're not here because they didn't get
9 notice of the proceeding.

10 MR. CARLEBACH: I understand, but they were served.
11 They were served with --

12 THE COURT: You know what? Let someone make a motion
13 on notice to all parties if you're seeking an adjournment or
14 to stay the litigation. Mr. Carlebach is right, I don't have
15 all the parties in front of me.

16 MR. CARLEBACH: And they're looking for a protective
17 order. Let them make that motion under Rule 26.

18 THE COURT: Okay.

19 MR. KRINSKY: I'm sorry, Your Honor? What's your
20 ruling?

21 THE COURT: All I'm saying is I don't have all the --
22 I don't have any motions relating to the adversary proceeding
23 and I don't have all the parties who are parties to the
24 adversary proceeding, so I'm not going to stay the adversary
25 proceeding on your request.

1 I will say Mr. Carlebach --

2 MR. KRINSKY: Well, I wasn't asking you to stay --

3 THE COURT: I will say that you should talk to the
4 trustee because we don't want to do this twice and the trustee
5 may have his or her own ideas about what records the trustee
6 wants.

7 MR. CARLEBACH: We intend on cooperating very closely
8 with the trustee.

9 THE COURT: All right. All right. And if you think
10 that this action is being prosecuted by someone who is not the
11 real party in interest, the debtor can certainly make that
12 motion.

13 MR. KRINSKY: Okay. I'm just -- Your Honor, I
14 apologize. Let me just clarify.

15 THE COURT: I'm going nothing about the litigation.

16 MR. KRINSKY: Okay. So there's no -- as I understand
17 your ruling, there's no extensions then on the answer either?

18 THE COURT: Well, I can -- do you have any objection
19 to extending the debtor's time to answer?

20 MR. CARLEBACH: What are they looking for, a two-week
21 extension or --

22 THE COURT: What are you looking for?

23 MR. KRINSKY: Yeah, that --

24 THE COURT: Two weeks?

25 MR. KRINSKY: Sure, that's fine.

1 THE COURT: All right. I'll give you a two-week
2 extension. Thank you.

3 So your answer is due -- when was it due and when is
4 it due now?

5 MR. CARLEBACH: I believe it was the 29th it was due.
6 According to the bankruptcy court, you know, based on the date
7 the summons is issued, they automatically --

8 THE COURT: All right. Whenever it's due, fourteen
9 days thereafter. Okay?

10 MR. KRINSKY: Thank you, Your Honor. And that's just
11 for the debtor then?

12 THE COURT: Who else do you represent?

13 MR. KRINSKY: No. Okay. All right. So then in
14 terms of the subpoenas, since we've already raised this issue
15 before you today --

16 THE COURT: Right.

17 MR. KRINSKY: -- in terms of procedure --

18 THE COURT: But it's not your issue. It seems to me
19 that a subpoenaed party -- it's the subpoenaed party that
20 makes the motion to quash the subpoena. I'm not going to say
21 that they can't serve a subpoena because there's no Rule 26
22 conference. You guys haven't been talking to each other for
23 three years that I can see.

24 MR. KRINSKY: Yeah, but Your Honor, issue hasn't even
25 been joined.

1 THE COURT: Is there anything in the --

2 MR. KRINSKY: It's premature.

3 THE COURT: So why wouldn't the subpoenaed party come
4 in and make a motion to quash the subpoena on the grounds that
5 it's untimely or --

6 MR. KRINSKY: Well, Your Honor, I understand what
7 you're saying. I'm just trying to -- again, in the past we've
8 been sort of admonished about creating all this paper. I'm
9 trying to -- simple solution --

10 THE COURT: Well, you've also been admonished about
11 raising arguments that belong to third parties because it
12 seems to be, on your part, an inability to keep in mind who
13 you represent and who you don't represent. You filed that
14 state court proceeding and Fixler was your client in that
15 also, wasn't he? At the same time you're representing the
16 debtor-in-possession and you have a dispute with Fixler as to
17 who owns a fraud claim.

18 MR. KRINSKY: I believe that was only inadvertently
19 on the remand motion, it was not done by us. I understand
20 what you're saying, though, Your Honor.

21 THE COURT: You get two weeks to answer. That's all
22 I'm saying.

23 The other matters will be adjourned to 12/11.

24 Thanks.

25 (Proceedings concluded at 11:06 a.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



October 26, 2007

Lisa Luciano, AAERT Cert. No. 327
Certified Court Transcriptionist
Rand Reporting & Transcription, LLC