

<b>Desuzia v Board of Directors of Concourse Vil., Inc.</b>
2012 NY Slip Op 33648(U)
August 29, 2012
Sup Ct, Bronx County
Docket Number: 260392/2012
Judge: Howard H. Sherman
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9/5/12

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4/11

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

\_\_\_\_\_X  
*D. ...*  
 -against-  
*Set of Dir*  
 \_\_\_\_\_X

Index No. 260392-12  
 Hon. HOWARD H. SHERMAN  
 Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion,  
 Noticed on \_\_\_\_\_ and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of June 14, 2012

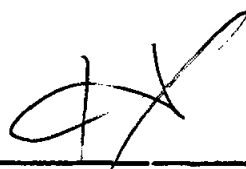
	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:  
 Justice: \_\_\_\_\_  
 Dated: \_\_\_\_\_

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING DECISION FILED HEREWITH

Dated: 8/29/12

Hon.   
 J.S.C.  
 HOWARD H. SHERMAN

NEW YORK SUPREME COURT - COUNTY OF BRONX

**PART 4**

-----x  
DOROTHY DESUZIA, DENA WILLIAMS, VIVIAN  
LYNETTE, MARIE MCCULLOUGH, and LEROY  
MEYERS, SR.,

Index No.: 260392/2012

Petitioners,

THE BOARD OF DIRECTORS OF CONCOURSE  
VILLAGE, INC., WARREN BOWLES, RISE BROWN,  
IVY D. FORDE, MARTHA HATCHER, RONALD  
WILKERSON, TARJI DAIS, SHERYL COMMODORE and  
STEPHANIE JUNIOR, individually and as members of the  
BOARD OF DIRECTORS OF CONCOURSE VILLAGE,  
INC.,

**DECISION/ORDER**

Present:

Hon. Howard H. Sherman  
Justice

Respondents.  
-----x

Petitioners move pursuant to Article 78 of the CPLR for an order preliminarily and permanently restraining and enjoining respondents Board of Directors of Concourse Village Inc. and eight individually named directors from meeting and taking any action as the Board unless a quorum of two-thirds of the board are present in addition to rescinding and annulling any and all actions taken by the board with less than a two-thirds quorum present.

Concourse Village ("C.V.") is a large housing complex founded in 1960 pursuant to Article 12 of the Public Housing Law ("PHL") and the Limited Profit Housing Law ("LPHL"). The certificate of incorporation was filed in June 1960. At that time the

certificate was silent as to what number of directors constituted a quorum. Article 15 of the certificate did provide that it was subject to the provisions of the General Corporation Law, the statute which preceded the Business Corporation Law.

In 1968, an amended certificate was filed which by its terms, was filed pursuant to the LPHL and the Business Corporation Law [Sec. 805] which had become effective after the corporation was formed. Again the certificate did not provide for what number was needed for a quorum.

The corporation by-laws were adopted in 1962 and subsequently amended three times, between 1981 and 1987. The original by-laws defined quorum as a majority of directors. The 1981 amendment to the by-laws provided under the heading "meeting" that the board must have two-thirds of its members present to act. There appears to have been nothing further concerning the by-laws until 1996 when another amendment, again under a different heading, provided that a vote required a two-thirds of the members present.

The last by-law amendment again provided for a two-thirds presence of directors to meet.

At some point in 2012 the board by the eight respondents herein sought a legal opinion from the Board's counsel (who now represents the board and the eight members in this proceeding) as to what constitutes a quorum. Counsel's opinion, that a quorum only requires a majority of the board is what led to this application.

While respondents do not dispute much, if any, of the history set forth by

petitioners, including some thirty years of by-law "two-thirds" requirements, they do dispute the applicability of the by-laws to this board for purposes of quorum requirements. This position of the "Board" and individual respondents, stemming from counsel's opinion letter has been fully supported by the agency charged with the developments' oversight. In two separate letters, counsel for DHCR has stated that pursuant to the Business Corporation Law, a majority of the board constitutes a quorum notwithstanding the by-laws.

Section 707 of the BCL provides:

Unless a greater proportion is required by the certificate of incorporation, a majority of the entire board shall constitute a quorum for the transaction of business or any specified item of business, except that the certificate of incorporation of the by-laws may fix the quorum at less than a majority of the entire board but not less than one-third thereof.

The CV by-laws provide for a greater number of directors to be present for a quorum. The statute makes clear that the by-laws only apply when they provide for less than a majority, not more. This leads to the crux of the argument and issue put forth by petitioners. Does the BCL even apply to this case? There is little, if any, law or guidance on this issue. However, a plain reading of the statutes involved clearly indicate that the BCL does apply and the Not-for-Profit Corp. Law (NPCL) does not apply, contrary to petitioners' understanding. Indeed as argued by petitioners if the NPCL applied, the by-laws would control.

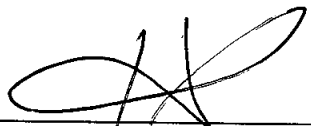
Petitioner relies on the language in NPCL Sec. 13(a)(1) which states that it applies

to corporations that were "heretofore or hereafter formed under this article and the not-for-profit corporation law..." N.Y. Pub. Fin. Hous. L. § 13-a(1)(emphasis added). Petitioner appears to be treating the word and as and/or when it is not. Moreover, the Private Housing Finance Law (PHFL) provides for what must be contained with the Certificate of Incorporation for the PHFL and NPLL to both apply. The Concourse Village certificate of incorporation does not so provide. While CV is clearly subject to the provisions of the PHFL, it is not subject to the NPLL. As such, the by-laws provision of the NPLL does not apply. The BCL does.

Based upon the above the application is denied in all respects.

This constitutes the decision and order of this court.

Dated: August 29, 2012  
Bronx, New York

  
\_\_\_\_\_  
Hon. Howard H. Sherman  
J.S.C.