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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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RUSTIC ACRES ROD AND GUN CLUB INC.,

Plaintiff(s),

Index No. 15257/11

Motion Submitted: 12/9/11
Motion Sequence: 001, 002

-against-

HENRY CONWELL, JR. and NEIL CIAMPA,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....XX

Plaintiff Rustic Acres Rod and Gun Club, Inc. moves by order to show cause for a preliminary injunction, *inter alia*: (1) removing the defendants Henry Conwell, Jr., and Neil Ciampa from their positions as officers of the plaintiff; (2) directing defendant Henry Conwell, Jr., to account for monies he has collected on behalf of the corporation; and (3) and ordering the defendants to turn over books and stated records of the plaintiff corporation, as well as those relating to a certain limited liability company formed by the defendants, to persons whom the plaintiff contends are now its duly elected officers.

Defendants Henry Conwell, Jr., and Neil Ciampa *inter alia*, move by cross motion pursuant to CPLR § 3212 for summary judgment dismissing the complaint.

The defendants Neil Ciampa and Henry Conwell, Jr., assert that they are "charter" members and officers of the plaintiff, not-for profit corporation, Rustic Rod and Gun Club, Inc. ["the Club" or "the plaintiff"], a 10-member, hunting and fishing club which owns property in Delaware County, New York. For the past several years, however, two antagonistic member factions have engaged in an increasingly contentious dispute with respect to the operation and management of the ten-member Club. One member group is currently headed by the two defendants who have with others, effectively controlled the Club since their alleged election as officers in 1995. The other "objecting"group is comprised of newer members, described by the defendants as "regular" (non-voting/non-equity) members, who are dissatisfied with what they claim are the defendants' autocratic and unilateral leadership practices.

In September of 2011, after the defendants allegedly declined to satisfactorily account to the objecting Club members and/or to produce certain corporate books and records, the objecting faction scheduled a member meeting and conducted new elections. Among other business conducted, the objecting faction elected a new slate of officers drawn from their own ranks, including a president, a secretary and a treasurer.

Notably, and pursuant to the relevant provisions of the Club's By-Laws: (1) only charter members are permitted to vote for officers (By-Laws Art., VII [B]); and (2) officer terms are limited to a prescribed term of one year (By-Laws Art., VII [B]). With respect to the those By-Law provisions governing elective terms, the Club contends that the defendants have not established that they were duly elected at the 1995 election, nor that they were duly re-elected at any specific point after the 1995 elections.

In November of 2011, and at the direction of its new officers, the Club moved by order to show cause for, *inter alia*, pre-answer provisional relief, including a mandatory-type injunction removing the defendants Ciampa and Conwell from their respective offices of president and treasurer (*see*, ***N-PCL § 714[c]***).

The Club's order to show cause also demands relief directing the defendants to produce the Club's books and records; requiring defendant Conwell to account to the Club for monies he has allegedly collected and retained; and further relief directing the defendants to surrender the books of a certain limited liability company formed by the defendants in 2008 to exploit certain oil and gas mineral resources discovered on the Club's property.

Upon initially considering the Club's order to show cause, Justice Winslow ordered the defendants to produce the Club's books and records to the Court, but otherwise declined to award the plaintiff any additional relief. The defendants have since complied with the Court's directive.

Contemporaneously with the service of its order to show cause, the Club also commenced the within plenary action as against the defendants Ciampa and Conwell.

The Club's verified complaint contains two causes of action; the first alleges that the defendants have, *inter alia*, refused to turn over books and records and declined to provide an accounting of money collected by co-defendant Conwell on behalf of the Club; while the second cause of action alleges that the defendants breached their fiduciary duties to the Club by usurping a corporate opportunity arising out of the discovery of oil and gas deposits on the Club's property in 2008. There is no cause of action, however, predicated on the theory the defendants should be removed as Club officers – relief which was affirmatively sought in the Club's order to show cause (*see*, ***N-PCL § 714[c]***).

The remaining branches of the Club's motion for a preliminary injunction are now before the Court for review and resolution. The defendants have cross moved for summary judgment dismissing the complaint. The parties' respective applications should be denied.

"The purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties" (***Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.***, 65 A.D.3d 1051, 886 N.Y.S.2d 41 (2d Dept., 2009) *see*, ***Board of Managers of Wharfside Condominium v. Nehrich***, 73 A.D.3d 822, 900 N.Y.S.2d 747 (2d Dept., 2010); ***Masjid Usman, Inc. v. Beech 140, LLC***, 68 A.D.3d 942, 892 N.Y.S.2d 430 [2d Dept., 2009]). To establish entitlement to that relief, a movant must clearly demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor (***Aetna Ins. Co. v. Capasso***, 75 N.Y.2d 860, 552 N.E.2d 166, 552 N.Y.S.2d 918 (1990); ***Doe v. Axelrod***, 73 N.Y.2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 (1988); ***Perpignan v. Persaud***, ___A.D.3d___, 2012 WL 89602 (2d Dept., 2012); ***306 Rutledge, LLC v. City of New York***, 90 A.D.3d 1026, 2011 WL 6825921 (2d Dept., 2011); ***Dover Gourmet Corp. v. Nassau Health Care Corp.***, 89 A.D.3d 979, 933 N.Y.S.2d 574 [2d Dept., 2011]).

"A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts" (***Radiology Associates of Poughkeepsie, PLLC v. Drocea***, 87 A.D.3d 1121, 930 N.Y.S.2d 594 (2d Dept., 2011); ***Omakaze Sushi Rest., Inc. v. Ngan Kam Lee***, 57 A.D.3d 497, 868 N.Y.S.2d 726 [2d Dept., 2008]). Notably, a mandatory injunction, "which is used to compel the performance of an act . . . is an extraordinary and drastic remedy which is rarely granted and then only under unusual circumstances where such relief is essential to maintain the status quo pending trial of the action" (***Matos v. City of New York***, 21 A.D.3d 936, 937, 801 N.Y.S.2d 610 (2d Dept., 2005); ***Rosa Hair Stylists v. Jaber Food Corp.***, 218 A.D.2d 793, 794, (*see also*, ***St. Paul***

Fire & Mar. Ins. Co. v York Claims Serv., 308 A.D.2d 347, 348, 765 N.Y.S.2d 573 [1st Dept., 2003]).

"The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court" (***Rowland v. Dushin***, 82 A.D.3d 738, 739, 917 N.Y.S.2d 702 [2d Dept., 2011] *see*, ***Doe v. Axelrod, supra***, at 750).

With these principles in mind, and upon the conflicting allegations advanced at this early juncture of the proceeding, the Court agrees that the Club has not established a clear right to the relief sought (***Cooper v. Board of White Sands Condominium***, 89 A.D.3d 669, 670, [2d Dept., 2011]; ***Rowland v. Dushin, supra***).

Preliminarily, the Club's request, in effect, for a pre-discovery, mandatory injunction removing the defendants as corporate officers pursuant to N-PCL § 714[c], has been improperly demanded in its own name, rather than by the aggrieved shareholders as prescribed by N-PCL § 714[c]). In any event, in opposing the motion, the defendants have raised questions with respect to, *inter alia*, whether the member meetings noticed by the objecting shareholders were conducted in accord with the governing by-laws (*e.g.*, ***N-PCL § 711***) (By-Laws, Art. VI); whether one of the positions purportedly filled was even authorized by Club's applicable by-laws (By-Laws, Art. VIII [B]; Art XI); and whether the objecting members are, in fact, "charter" members entitled to schedule meetings and/or vote in the Club's elections (By-Laws, Arts., III [A], VII, VIII [B]; XVI [A], [B]).

Under these circumstances, the Club has failed to sustain its burden of demonstrating entitlement to the relief sought, branches of which, it should be noted, appear to represent portions of the ultimate relief requested in its complaint. (***Board of Managers of Wharfside Condominium v. Nehrich***, 73 A.D.3d 822, 823-824, 900 N.Y.S.2d 747 [2d Dept., 2010]; ***Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs., supra***; ***St. Paul Fire and Marine Ins. Co. v. York Claims Service, supra***; *see also*, ***Cooper v. Board of White Sands Condominium, supra***).

Defendants cross-motion for summary judgment is denied. The thicket of opposing allegations advanced by the parties with respect to, *inter alia*, the defendants' alleged failure to account and/or their handling of the Club's mineral rights assets, cannot be conclusively resolved as a matter of law on the documents and other materials submitted. It also bears noting that unresolved questions also exist with respect to: (1) the application and import, if any, of certain By-Law provisions limiting officer elective terms to only one year; (2) which members of the Club are charter members, in that, while apparently never formally elected as "charter" members, they were treated as such, since they paid the "charter" member fee

($3,000.00) and then received stock certificates from the Club in return; and (3) which officers, if any, are duly elected.

The Court has considered the parties' remaining contentions and concludes that they do not warrant the granting of relief sought by the movants in their respective applications.

Accordingly, it is,

ORDERED that Order to show cause by the plaintiff Rustic Acres Gun and Rod Club, Inc. for, *inter alia*, a preliminary injunction and related relief, is denied, and it is, further,

ORDERED that the cross motion pursuant to CPLR § 3212 by the defendants Henry Conwell, Jr., and Neil Ciampa for, *inter alia*, summary judgment dismissing the complaint, is denied.

A preliminary conference (22NYCRR 202.12) shall be held at the Preliminary Conference Desk, in the lower level of the Nassau County Supreme Court, on the 7th of March, 2012, at 9:30 a.m. This directive with respect to the date of the conference is subject to the right of the Clerk to fix an alternate date should scheduling require. Counsel for the movant shall serve a copy of this Order on all parties. A copy of the Order with affidavits of service shall be served on the DCM Clerk within seven (7) days after entry.

The foregoing constitutes the Order of this Court.

Dated: January31, 2012
Mineola, N.Y.

Karen V Murphy
J. S. C.