James v National Arts Club
2012 NY Slip Op 33420(U)
March 22, 2012
Sup Ct, New York County
Docket Number: 109945/2011
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

JAMES Jr, O. Alden, et al
-v-
THE NATIONAL ARTS CLUB, et al

INDEX NO. 109945/11
MOTION DATE 2-14-12
MOTION SEQ. NO. 004

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion pursuant to CPLR 2221(e) to renew Motion Sequence Number 004, which sought an order (a) disqualifying the Board of Governors (the "Board") of the National Arts Club (the "Club") from acting as the triers of fact on a Statement of Charges against plaintiffs, and (b) designating a neutral third person or group of persons to hear and determine the Statement of Charges is granted, and upon renewal, Motion Sequence 004 is granted; and it is further

ORDERED that in light of the determination herein that the Board is disqualified from acting as the triers of fact on the Statement of Charges against the plaintiffs, the hearing conducted on the Statement of Charges on January 23, 2012 and decision rendered as a consequence thereof, are invalid, and a new hearing shall be conducted by a neutral arbiter pursuant to the Club's Bylaws and Constitution and/or the CPLR; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3-22-2012

J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 35

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O. ALDON JAMES, JR., JOHN JAMES and
STEVEN U. LEITNER,

Plaintiffs,

-against-

Index No. 109945/2011
Motion Seq. No. 009

THE NATIONAL ARTS CLUB; THE BOARD OF GOVERNORS OF THE NATIONAL ARTS CLUB; DIANNE BERNHARD, as President of the National Arts Club; JOHN MORISANO, as First Vice President of the National Arts Club; and TARA CORTES, STEPHEN HEDBERG, MILBRY POLK, ALEX ROSENBERG and ROSS ZNAVOR, as Governors of the National Arts Club and as hearing officers,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs O. Aldon James, Jr. ("Aldon"), John James and Steven U. Leitner ("plaintiffs") move pursuant to CPLR 2221(e) to renew Motion Sequence Number 004, which sought an order (a) disqualifying the Board of Governors (the "Board") of the National Arts Club (the "Club") from acting as the triers of fact on a Statement of Charges against plaintiffs, and (b) designating a neutral third person or group of persons to hear and determine the Statement of Charges (the "Disqualification Motion").

Factual Background

This preliminary injunction action arises from the Board's issuance of a Statement of Charges, which sought to revoke plaintiffs' membership in the Club and terminate their tenancies at the Club premises based on alleged improprieties committed by plaintiffs.

Upon plaintiffs' order to show cause for temporary restraining order to stay the Board's

hearing on the Statement of Charges, the Court granted a stay of the hearing "until further order of the Court" (Order dated September 28, 2011).

Approximately one month thereafter, plaintiffs moved to disqualify the Board from acting as the triers of fact at the hearing, and requested that the Court designate a neutral third person or group of persons to hear and determine the Statement of Charges. Plaintiffs argued, *inter alia*, that the Board had become tainted by media reports of the events, had prejudged the plaintiffs, and reached a pre-determined outcome on the Statement of Charges prior to the hearing. Thus, it was argued, the Board could not be deemed a fair, impartial and neutral trier of fact of the hearing.[1]

By Memorandum Decision and Order dated November 19, 2011, this Court denied plaintiffs' motion, finding that plaintiffs "failed to sufficiently establish bias on behalf of the *entire* Board of Governors." (Order, p. 10). The Court explained that (1) 15 Board members "avowed that during deliberations, they will not consider any media coverage or correspondence received from Ms. [Diane] Bernhard ["Bernhard"] in deciding the disciplinary charges, and that they will consider only the evidence and testimony presented at the hearing" (p. 10); (2) the Bylaws entitled the Board to rely upon "counsel's [investigatory] memorandum attached to the Statement of Charges"; and (3) the information the Board members allegedly received from outside sources and desire to "act swiftly" failed to establish any bias on their part (pp. 11-12). The Court also found that there was no "conflict of interest as to the entire Board of Governors

[1] Thereafter, the Court held an in-court conference, and set forth various procedures to afford the parties a "'reasonable' opportunity to be heard at the impending hearing" (Order dated October 26, 2011).

due to the derivative action filed by plaintiffs for corporate waste." (P. 15).[2]

Almost a month thereafter, on December 14, 2011, the Board, along with the other defendants, then sought leave to amend their answer and to assert counterclaims in this action (the "Verified Counterclaims"), which this Court granted (Order dated January 11, 2012).

After the filing of defendants' motion for leave to amend the answer and to assert counterclaims, the plaintiffs presented an oral application to the Court on December 22, 2011 for the Court to reconsider its November 19, 2011 order declining to disqualify the entire Board, based on "new facts" (Transcript, p. 3). The "new" facts purportedly consisted of the affidavit used to support defendants' motion to amend to assert counterclaims and in the Verified Counterclaims themselves (*id.*). Plaintiffs' counsel insisted that Board could not render a fair adjudication of the Statement of Charges. The Court rejected plaintiffs' oral application.

Now in support of their formal motion to renew, plaintiffs argue that the Verified Counterclaims filed after the Memorandum Decision was issued, which precisely track the Statement of Charges, constitute new facts, and that had they been known at the time, would have led to a different result.

Plaintiffs argue that the Verified Counterclaims, verified on behalf of the Board and necessarily certified to be true under 22 NYCRR § 130-1.1, contain allegations identical to those

[2] The Court however, held that "the media reports submitted indicate[] a possibility that Ms. Bernhard has reached a determination on the charges and manner of discipline plaintiffs are to receive prior to the scheduled hearing" and disqualified Bernhard as a trier of fact. (Order, p. 14). The Court also granted defendants' cross-motion to disqualify certain Governors who had not attested to their ability to remain unbiased, to the extent of disqualifying Governors Pat Hackett and Stacey Engman as triers of fact of the Statement of Charges.

the Board is to "adjudicate" at the hearing on the Statement of Charges.[3] These Verified Counterclaims now establish, what the Court previously found lacking, *i.e.*, that the Board arrived at a conclusion on the Statement of Charges prior to the hearing.

Plaintiffs point out that the Statement of Charges alleges that Aldon wrote unauthorized checks on the Club's account for his personal benefit. Yet, the entire Board has now asserted the exact same charge in Verified Counterclaims and the Sixth through Eighth Counterclaims. Similarly, the Statement of Charges alleges that plaintiffs occupied multiple apartments at below market rents, without leases, and without the Board's knowledge. Yet, those same allegations are now included, virtually verbatim, in the Board's Verified Counterclaims. The Statement of Charges also alleges that plaintiffs used the apartments to hoard possessions and allowed the apartments to fall into disrepair. However, the Board, again, repeats the same charges in the proposed Verified Counterclaims. Thus, these issues, have been decided by the Board of Governors. Moreover, this overlap between the allegations in the Statement of Charges and the allegations in the Verified Counterclaims, is admitted by the Board's counsel, Roland Riopelle ("Riopelle"). Riopelle notes that "The counterclaims assert, in detail, many of the claims already asserted in the Club's internal Statement of Charges." Plaintiffs argue that under these circumstances, and especially in light of 22 NYCRR 130-1.1, the entire Board has "arrived at a conclusion [on the Statement of Charges] prior to the hearing" and the law demands the Board be disqualified from hearing and determining the Statement of Charges.

Furthermore, argues plaintiffs, the Verified Counterclaims now establish a basis for the

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[3] During the pendency of this motion, the hearing was held on January 23, 2012, and since then, the Board voted to expel plaintiffs as Governors of the Board. The parties do not consider the issue of bias and impartiality moot, as a finding of bias and/or impartiality would void the Board's vote at the hearing.

Court to agree with plaintiffs that Aldon's derivative action created an insoluble conflict between the Board's defense of the derivative action and their obligation to serve as neutral "jurors" on the Statement of Charges. The Verified Counterclaims now firmly place the entire Board on record as litigants adverse to plaintiffs on the very matters at issue in the Statement of Charges. The Verified Counterclaims definitively demonstrate the Board's lack of fairness and impartiality and its apparent bias by executing a verified pleading claiming as facts the very issues to be decided at a hearing before it. The conflict of interest warrants disqualification.

In opposition, defendants argue that plaintiffs misunderstand the law governing verification, and, in turn, misinterpret the verification sworn to by Bernhard. Section 3020(d) of the CPLR provides that the "verification of a pleading shall be made by the affidavit of the party, or, if two or more parties united in interest are pleading together, by at least one of them who is acquainted with the facts...." The CPLR provides that a party "united in interest" with other parties may verify the filing on behalf of all. Thus, Bernhard, who is fully acquainted with the facts and united in interest with the Club and its Board, appropriately verified the counterclaims on behalf of the other defendants. The plaintiffs cannot read into Bernhard's verification what is not there, *i.e.*, that the entire Board reviewed and verified the counterclaims.

As explained to the Court on December 22, 2011, the Board was told generally what kind of counterclaims could be brought during a monthly Board meeting, and, at that meeting, the Board voted in favor of filing counterclaims of the kind that had been generally described to them. As also explained to the Court on December 22, in approving the filing of counterclaims at a Board meeting, "the board did not intend that each board member was swearing to the statements [in the counterclaims] as true." (Transcript, p. 34). A simple review of the

Verification itself shows that Bernhard is the only individual who [read the annexed Amended Answer] and thus, "verified" (swore to the truth of) the allegations contained in the Counterclaims.

At the December 22 hearing, the Court first observed "I don't have something where each board member said, I swear to the statement." (Transcript p. 17). In response, the plaintiffs' attorney stated that the Court was incorrect, and that there was in fact such a document. (Id). When the Court asked to be shown such a document, plaintiffs' counsel read from the above quoted Verification (pp. 17-18). Plaintiffs' attorney contended that the counterclaims had been "verified by a person united in interest with all board members." In response, the Court noted: "Not with, 'for.' 'For.' Not 'with.' 'For.' 'On behalf of.'" (id). As the Court reasoned, there is one Verification, sworn to by one individual. Consistent with CPLR 3020(d), the counterclaims were verified "solely" by Bernhard who is united in interest with the other defendants. Thus, Bernhard's verification on behalf of the other defendants simply does not function as a statement by her co-defendants in the manner argued for by the plaintiffs.

Section 130-1.1 provides that "[b]y signing a paper ... a party certifies to the best of that person's knowledge, information and belief ... the presentation of the paper or the contentions therein are not frivolous." This section does not say that the sole individual signing the pleading is signing on behalf of all defendants; nor does this section say that one individual is making representations on behalf of others who have adopted it. So the plaintiffs' citation of Section 130-1.1 adds nothing to their argument.

Finally, plaintiffs' arguments appear to include, *sotto voce*, a suggestion that the outcome of the hearing will somehow act as *res judicata* on or influence the Court's determination of the

Counterclaims in this action, and that is why the Board's decision on the evidence presented at the hearing is a foregone conclusion - because the Board will seek to gain advantage here by its decision on the internal proceedings at the Club. This argument is also a misconstruction of the law. The Board is not a Court, and its decision cannot possibly be binding on the Court here. Moreover, the Court or the jury deciding this case could not possibly be influenced by the Board's decision, since the trier of fact in this case will be required to consider only the evidence presented to it here. Therefore, the plaintiffs' suggestion that the Board's decision is a foregone conclusion because the Board will try to gain some advantage in this lawsuit through that decision should be rejected.

Thus, the Board's decision to authorize the filing of Counterclaims, and Bernhard's verification of those counterclaims, do not support plaintiffs' argument that the Board as a whole should be disqualified from deciding the Statement of Charges against the plaintiffs.

In reply, plaintiffs argue that the CPLR specifically provides that one party may verify a filing on behalf of other parties. This type of verification is permitted only where the several parties on behalf of whom one verification is submitted are "united in interest." And, once such a verification is used, it has the legal force and effect of acting as a binding verification as if each and every defendant had individually verified.

Defendants misapprehend the key language at issue of what it means to be "united in interest." Where, as here, parties to a litigation share uniquely intertwined interests, those parties assume a special relationship under the law. Where the parties are so similarly situated, actions taken by or upon one party constitute an action taken by or upon all parties. Bernhard is united in interest with all of the members of the Board. Each Governor shares common claims against the

plaintiffs and they will ultimately rise or fall together in this litigation. Under these circumstances, courts have held that the actions taken by or upon one party impact the legal rights and claims of the parties "united in interest" therewith as if they were but one single party. Persons who are "united in interest" stand in such a similar position in a litigation that "they will stand or fall together" necessarily. Thus, legal action taken by or upon one of those parties constitutes an action taken by all parties.

Plaintiffs contend that since defendants voluntarily, and as a unit, voted in favor of asserting counterclaims against plaintiffs, Bernhard's verification of the counterclaims on behalf of the Board, signals that they may be treated as a single legal entity. Defendants should not be permitted to proclaim their independence and distance themselves from the verification while simultaneously reaping the benefits of efficiency and economy bestowed only upon parties who are united in interest.

Moreover, defendants should not be permitted to bring claims against plaintiffs as a group for litigation purposes, and then distance themselves from those claims for purposes of alleging their neutrality in determining the very charges upon which they are seeking considerable sums of money from plaintiffs in court. The Verified Counterclaims create an unquestionable "appearance of bias" that should be avoided when possible. These were not compulsory counterclaims. Defendants asserted counterclaims that had no relationship to the allegations made by plaintiffs in the Complaint, which had as its primary focus the improper procedures being implemented for the hearing on the Statement of Charges issued by the Club. The Verified Counterclaims pertain not to the procedures of the hearing, but rather allege wrongdoing tracking the very content of the Statement of Charges itself.

In addition, defendants had the option of waiting until the hearing on the Statement of Charges was completed, and filed a separate action. Instead, defendants asserted their claims before fulfilling their objective as an allegedly neutral panel.

Finally, a recent interchange between Ms. Pat Hackett and Riopelle with respect to determining the Statement of Charges reveals that Ms. Hackett has now signed an affidavit, and presented it to the Court, affirming her ability to determine the Statement of Charges fairly and neutrally. Riopelle, in his Opposition to Pat Hackett's Request to Serve as A "Voter" on the Statement of Charges, dated February 3, 2012 (e-filing Doc. No. 145-1), without any input from the Club, has rejected her affidavit, proclaiming that she is aligned with Aldon, and therefore is incapable of fairly determining the charges. It is ironic that when the Board, through a verified pleading, affirms the truth of the underlying factual allegations within the Statement of Charges, defendants proclaim that they are neutral and unbiased; conversely, when Ms. Hackett, through a verified pleading, affirms her neutrality, she is deemed by the Club's counsel to be too biased to be believed.

Discussion

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, lv. dismissed 71 NY2d 994, 529

NYS2d 277). Plaintiffs' motion is based on the Verified Counterclaims that arose after the Court's Memorandum Decision was issued on November 19, 2011. And arguably, the Verified Counterclaims would have led to a different result. Therefore, renewal is granted.

The decisive issue before the Court on renewal is whether the Board should be disqualified from acting as triers of fact on the Statement of Charges based on the statements made in the Verified Counterclaims as verified by Bernhard.

Effects of the Verification

CPLR § 3020, entitled "Verification" provides:

> (a) Generally. A verification is a statement under oath that the pleading is true *to the knowledge of the deponent*, except as to matters alleged on information and belief, and that as to those matters he believes it to be true. . . .
>
> * * * * *
>
> (d) By whom verification made. The verification of a pleading shall be made by the affidavit of the party, *or, if two or more parties united in interest are pleading together*, by at least one of them who is acquainted with the facts, *except:*
>
> *1. if the party is a domestic corporation, the verification shall be made by an officer thereof and shall be deemed a verification by the party*; . . . .
> (emphasis added)

The defendants in this action are (1) the Club, (2) the Board, (3) Bernhard as President of the Club, (4) John Morisano, as First Vice President of the Club (5) Governor Tara Cortes (6) Governor Stephen Hedberg, (7) Governor/hearing officer Milbry Polk, (8) Governor/hearing officer Alex Rosenberg and (9) Governor/hearing officer Ross Znavor.

Here, the Counterclaims are asserted by "Defendants and counterclaim plaintiffs" and the verification reads:

> DIANNE B. BERNHARD, being duly sworn, deposes and says that she is one of the individual Defendants in the above-entitled action; she is a member of the Board of Governors the defendant National Arts Club, and she is the President

> of the defendant National Arts Club, and is therefore capable of verifying the annexed Amended Answer *for all defendants*: that she has read the annexed Amended Answer and knows the contents of it; and that the statements of fact contained in the Amended Answer are true to the best of her knowledge, information and belief.
> (Emphasis added).

In this instance, the Club, being a nonprofit corporation, must verify the counterclaims by its officer (Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., CPLR 3020, C3020:7 ("An officer is the one who makes a verification in favor of a corporate party.")), and Bernhard clearly has the authority to verify the Counterclaims on behalf of the Club.

As to the effect of Bernhard's verification "for all" of the remaining defendants, *i.e.*, the Board and individual defendants, it is noted that "If the parties on one side are united in interest and plead together, one who is 'acquainted with the facts' may verify for all CPLR 3020(d)" (*id.*). "In this context, the courts have construed the phrase 'united in interest' to refer 'to the identity of legal rights and interests of the [parties]'" (*id.*, *citing Betzler v Carey*, 109 Misc 2d 881, 441 NYS2d 206 [Sup. Ct., Chemung County 1981], *aff'd* 91 A.D.2d 1116, 458 NYS2d 338 [3d Dept 1983]). Thus, while such remaining defendants can verify the Counterclaims individually, they may verify the Counterclaim pleading by another defendant, *i.e.*, Bernhard, provided they are united in interest with Bernhard and to the extent they are "pleading together." In regard to the latter, it bears repeating that the Counterclaims are asserted by "Defendants and counterclaim plaintiffs." Thus, the defendants are pleading together.

As to whether Bernhard is united in interest with such remaining defendants, the "phrase 'united in interest' refers to the identity of legal rights and interests of the parties *(Dinowitz v Rivera*, 22 Misc 3d 1108(A), 880 NYS2d 223 [Supreme Court, Bronx County 2008] *citing*

Maniscalco v Power, 4 AD2d 479 [1st Dept 1957], *aff'd* 3 NY2d 918 [1957]). Here, the remaining individual defendants (and the Board) are individuals, who, in their capacity *as Board members (Governors)*, each has the same legal interest as that of the Club, in that each of the remaining defendants seeks: an accounting regarding the Club's real estate assets, a money judgment in favor of the Club, to set aside self dealing transactions regarding the Club's assets, money damages from plaintiffs for diverting the Club's corporate opportunities to benefit financially from the Club's real estate assets and decorative art, the return of Club property to the Club, an accounting for Aldon's unauthorized expenditures of the Club's funds and return to the Club of such expenditures, damages to the Club in connection with their waste of Club funds, the return to the Club money damages resulting from their self-dealing payments, and costs for attorneys fees. These forms of relief are based on allegations, which are also contained *in the Statement of Charges,* that (1) "Aldon hand wrote numerous checks against the NAC's checking account without any prior authorization by the Board"; (2) plaintiffs used the Club's "property for their personal benefit without the knowledge and authorization of the Board" "without making appropriate payments to the NAC, at fair market value, for the use and occupancy of those apartments"; and (3) Aldon "stored items in the transient rooms" thereby depriving the Club "of revenue that it would have received by renting the rooms." However, the Statement of Charges does not seek the damages sought herein, but to remove plaintiffs as Governors and members of the Club.

However, Bernhard's verification does not show that the Board, in its entirety, or that the remaining individual defendants, arrived at a conclusion on the Statement of Charges prior to the hearing, or that the entire Board reviewed and verified the truthfulness of the assertions in the

Counterclaims. Bernhard was the sole individual who read the contents of the Counterclaims, and the sole individual to attest to the truthfulness of the allegations therein. There is no indication that the individual members of the Board read, or were made aware of the allegations in the Counterclaims, or swore to the truth of its contents. Therefore, while the verification is sufficient for purposes of the pleading requirement, such verification is insufficient to impute to the remaining defendants an agreement with the facts in the Counterclaims so as to find that they each reached a conclusion on those facts prior to the hearing.

The Commentaries to CPLR 3020 on *Thomas v Good Samaritan Hosp.* (237 AD2d 429, 655 NYS2d 89 [2d Dept 1997]) provide some guidance on the conclusions that can reached by virtue of an officer's verification. In *Thomas*,

> "Officer X verified the corporate defendant's answer, which reasonably led the plaintiff to believe that X knew something about the allegations in the case. That prompted the plaintiff to seek to depose X in behalf of the corporation. But X then pleaded lack of personal knowledge of the facts. The court accepted this and held that the corporation under these circumstances could itself make the choice of who is to depose in its behalf. See CPLR 3106(d).

The Commentaries continue:

While Officer X "was a proper person to verify the corporate pleading under CPLR 3020(d), the Thomas decision" illustrates that "one without personal knowledge of the facts is permitted to verify under CPLR 3120(d), doing so based on secondhand information that renders the verifier "acquainted" with the facts. CPLR 3020(d)." Therefore, although the verification by the Officer X was sufficient for pleading purposes, it did not necessarily establish that the officer had personal knowledge of the facts.

Likewise, the verification by Bernhard, does not necessarily establish that the remaining

defendants attested to the truth of the statements in the Counterclaim. As explained to the Court on December 22, in approving the filing of counterclaims at a Board meeting, "the board did not intend that each board member was swearing to the statements [in the counterclaims] as true." (Transcript, p. 34). A review of the Verification shows that Bernhard is the only individual who read the annexed Amended Answer and thus, "verified" (swore to the truth of) the allegations contained in the Counterclaims. Thus, the Court finds that the new information, *to wit*: Bernhard's *verification* of the Counterclaims, fails to establish that the Board (except as to Bernhard) assented to the Counterclaim allegations so as to render it unfair or partial.

Effects of the Counterclaims

However, there is a distinction between the effect of the *verification* and the effect of the Board members voting to assert the Counterclaims. As explained to the Court on December 22, 2011, the Board was told during a monthly Board meeting the types of counterclaims that could be brought, and, at that meeting, the Board voted in favor of filing counterclaims of the kind that had been described to them. Thus, the record indicates that the Board was advised as to the types of Counterclaims that could be asserted against plaintiffs, and indeed, voted in favor of pursuing the Counterclaims against plaintiffs. The Counterclaims seek, *inter alia*, damages as a result of plaintiffs' diversion of the Club's corporate opportunities to benefit financially from the Club's real estate assets and decorative art. This claim is the principle basis upon which the Board seeks to remove plaintiffs as Governors of the Club pursuant to the Statement of Charges. As stated by this Court in its September 28, 2011 Decision and Order, "it is fundamental that a trial held before a voluntary association tribunal be fair and impartial" (*Bloch v Veteran Corps of Artillery*, 61 AD2d 772, 402 NYS2d 200 [1st Dept 1978]). Further, "[a]ny tribunal permitted by law to try

controversies 'not only must be unbiased but also must avoid the appearance of bias" (*Matter of Berg*, 85 Misc 2d 37,41, 378 NYS2d 875, 878 [Sup. Ct. N.Y. County 1975]; *Morris v New York Football Giants, Inc.*, 150 Misc 2d 271, 276, 575 NYS2d 1013, 1016-17 [Sup. Ct., New York Co. [1991] (football commissioner held disqualified from hearing NFL arbitration where, in previous litigation, he had taken adverse position on the very issue to be arbitrated)).

In light of the above, the Court finds that the Board's "Counterclaim" position in this action (as voted on by its members), together with the various Board members' roles as hearing officers to judge the merits of the Statement of Charges, deprive the Board, and its members "of the necessary neutrality to arbitrate the[] claims" in the Statement of Charges (*Morris v New York Football Giants, Inc.*, *supra*). To find in favor of the plaintiffs herein at the hearing, the Board, or its members sitting and deliberating at the hearing, "would have to reverse certain positions" they advocate herein in this action *(Morris v New York Football Giants, Inc.*, *supra*). This circumstance warrants a finding that the Board, and/or its members, cannot be neutral of the Statement of Charges.

Given this Court's inherent authority to select a neutral arbiter "when the potential bias of a designated arbitrator would make arbitration proceedings simply a prelude to later judicial proceedings challenging the arbitration award" (*Morris v New York Football Giants, Inc.*, 150 Misc 2d 271, *supra citing*, *Masthead Mac Drilling Corp. v Fleck*, 549 F Supp 854, 856 [SDNY 1982]), an appointment of a neutral and impartial arbitrator is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion pursuant to CPLR 2221(e) to renew Motion Sequence Number 004, which sought an order (a) disqualifying the Board of Governors (the "Board") of the National Arts Club (the "Club") from acting as the triers of fact on a Statement of Charges against plaintiffs, and (b) designating a neutral third person or group of persons to hear and determine the Statement of Charges is granted, and upon renewal, Motion Sequence 004 is granted; and it is further

ORDERED that in light of the determination herein that the Board is disqualified from acting as the triers of fact on the Statement of Charges against the plaintiffs, the hearing conducted on the Statement of Charges on January 23, 2012 and decision rendered as a consequence thereof, are invalid, and a new hearing shall be conducted by a neutral arbiter pursuant to the Club's Bylaws and Constitution and/or the CPLR; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 22, 2012

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD