

James v National Arts Club

2011 NY Slip Op 33938(U)

December 8, 2011

Sup Ct, NY County

Docket Number: 109945/2011

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 109945/2011
JAMES, O. ALDON
vs
NATIONAL ARTS CLUB
Sequence Number : 006
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 11/22/11
MOTION SEQ. NO. _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

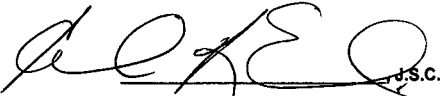
ORDERED that the branch of defendants' motion for leave to reargue that part of the Court's September 28, 2011 Memorandum Decision in which it found that "Aldon [James] is entitled to be restored as Governor of the Board" is granted, and upon reargument, the Court strikes that section of the Memorandum Decision which, as pertaining to the as the Board's August 4th meeting to suspend Aldon's position as Governor, stated "Aldon [James] is entitled to be restored as Governor of the Board." And it is further

ORDERED that the branch of defendants' motion for an order affirming the action of the Board of Governors of the National Arts Club in removing O. Aldon James rom the Board of Governors at a September 22, 2011 Board meeting is denied. And it is further

ORDERED that the defendants 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: 12/8/11


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

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

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

-----X

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

Plaintiffs,

Index No. 109945/2011
Sequence #006

-against-

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.

-----X

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

MEMORANDUM DECISION

In this action for injunctive relief, defendants the National Arts Club (the "NAC" or "Club"); the Board of Governors of the National Arts Club (the "Board"); Dianne Bernhard, as President of the National Arts Club ("Bernhard"), John Morisano ("Morisano"), as First Vice President of the Club; and Tara Cortes ("Cortes"), Stephen Hedberg ("Hedberg"), Milbry Polk ("Polk"), Alex Rosenberg ("Rosenberg") and Ross Znavor ("Znavor"), as Governors of the Club and as hearing officers (collectively, "defendants") move for leave to reargue that part of the Court's September 28, 2011 Memorandum Decision in which it found that "Aldon [James] is entitled to be restored as Governor of the Board"; and for an order affirming the action of the Board of Governors of the National Arts Club in removing O. Aldon James ("plaintiff") from the Board of Governors at a September 22, 2011 Board meeting.

Factual Background

On August 4, 2011, the Board held a special meeting, at which the Board authorized a Statement of Charges (the "August meeting"). The Statement of Charges sought to terminate plaintiffs' membership of the Club for, *inter alia*, mismanagement of the Club's funds. The Board also "suspended" plaintiff as Governor until final determination of the Statement of Charges (the "August suspension").¹

On August 29, 2011, upon an Order to Show Cause, the Court granted an "interim stay" enjoining defendants from pursuing a disciplinary hearing on the Statement of Charges. The Court also ordered that two issues be briefed for further oral argument at a later date: "(1) notice and (2) opportunity to be heard" at the disciplinary hearing.

Pending the Court's decision on the Order to Show cause, on September 22, 2011 the Board of Governors held another meeting, of which plaintiff was given notice (the "September meeting"). A quorum was present at this meeting. According to defendants, plaintiff was so disruptive, unruly, and intimidating toward other Board Members at the meeting, that after numerous warnings and failed attempts to get plaintiff to refrain from his obstreperous behavior, the majority of the Board voted to "remove" him from the Board of Governors (the "September removal").

By Memorandum Decision dated September 28, 2011 the Court granted preliminary injunctive relief enjoining the Club from holding the hearing to terminate plaintiffs' Club membership, finding that plaintiffs established a strong likelihood of success on their claim that

¹ Although the Board "suspended" plaintiff, it appears that plaintiff's position as a Governor of the Board remained in tact.

the Club violated the Bylaws. The Court also stated:

"Parenthetically, as to the Board's decision at the August 4th meeting to suspend Aldon's position as Governor, t[o] the degree that the Board's suspension constitutes a disciplinary action taken by the Board, the Court finds that defendants violated Bylaws' requirements of notice and opportunity to be heard. . . . Aldon [James] is entitled to be restored as Governor of the Board." (p. 17-18).

On October 12, 2011, plaintiffs then e-filed an Order to Show Cause (Motion Seq. 003) for an order finding that the Board acted appropriately, within its power, and did not violate any Order of the Court, when it removed plaintiff "during a Board meeting" on September 22, 2011. The Court, on the same date, after various email exchanges, stated to counsel

Based on the last order of the Court dated September 28, 2011, the purpose of the October 26, 2011 in-court conference is for the Court "to consider their [the parties and counsel] input on the parameters of the hearing" [to terminate their membership from the NAC and tenancies of NAC-owned apartments].

If there is a new order to show cause initiated, it will be returnable on that same date (10/26) and the issues raised in the order to show cause will be addressed on the return date.

If, however, there is no new order to show cause, and the Board rescinds the action to remove Mr. Aldon as a Governor, the Court, on October 26, would be willing to hear argument and clarify its ruling as to whether any new action to remove Mr. Aldon as a Governor is violative of the Court's existing orders.

If this is the course the parties wish to take, I would give parameters to a single submission from each side on the issue of whether removal of Mr. Aldon is (1) violative of an existing court order; and (2) permitted by statute and/or bylaws. (Email dated October 12, 2011 3:22 PM)

The Board then agreed to withdraw its Order to Show Cause and "restore Aldon James as a member of the Board of Governors" (see email dated October 13, 2011). The Board also stated that "In light of the foregoing, we believe that the only issues that need to be resolved at the October 26, 2011 hearing are those set forth in your September 28 Order; namely, the parameters of the hearing that the Club will hold in connection with the Statement of Charges

previously authorized by the Court." (Email October 13, 2011).

On October 26, 2011, the Court issued an order deeming the Order to Show Cause (Motion Seq. 003) withdrawn, and issued an order which set forth procedures for the upcoming hearing on the Statement of Charges.

On November 4, 2011, defendants filed the instant motion to reargue the Court's Memorandum Decision which directed to restore plaintiff to the Board, and for an order affirming the action of the Board in removing plaintiff from the Board at the September meeting.

Defendants now argue that this finding should be reargued and/or reconsidered. The briefing and argument on September 20, 2011 concerned primarily whether the Club had adhered to the provisions of its By-Laws in disciplining plaintiff as a member. There are different standards for expelling a member of a club and removing a member of a club's board. Expelling a member from the Club is a significant matter, because the member loses all the benefits of membership, and that is why the procedures described in Article I, Section 5 of the Club's By-Laws concerning membership and discipline are so extensive. On September 20, 2011 when the Court heard oral argument on the August 29, 2011 Order granting the interim stay, plaintiff's suspension as a Board member was not extensively briefed or argued, because it did not relate directly to the issues of "notice" and "opportunity to be heard" as they apply to member discipline. Plaintiff's suspension or removal as a Governor would not prevent him from enjoying a single benefit of Club membership and therefore he is not entitled to the same process in connection with his suspension or removal from the Board that he is entitled to receive before he is removed as a member of the Club.

Suspending or removing a Board member is not addressed in the Club's By-Laws or

Constitution, and thus, is controlled by NPL § 706. A Board can act to remove one of its members at any time pursuant to NPL § 706, and there is established precedent for removing a governor of the National Arts Club for conflict of interest or improper behavior at Board meetings. As evidenced in the Club's Board minutes dated January 19, 1989, Peter Davidson ("Davidson") and "Ms. Nix" were summarily removed as Governors of the Board upon the motion of the plaintiff. Plaintiff pointed out that the Constitution allowed for the removal of any Officer and Governor by the Board for conduct detrimental to the interests of the Club. Neither Davidson nor Ms. Nix received any due process in the form of a hearing or opportunity to be heard. Plaintiff also had former Governor Alex Quint ("Quint") removed from the Board without any notice or opportunity to be heard. If a summary expulsion of a governor for conflict of interest is valid, the summary suspension of a governor for that reason must be too.

First Department caselaw has upheld plaintiff's own summary removal of two Governors during a Board meeting, without reference to or use of the process described in Article I, Section 5 of the Club's By-Laws. A Statement of Charges has been issued against plaintiff and he has also sued the Club and Board repeatedly, and his interests are in conflict with those of the Board. Thus, plaintiff was properly suspended as a Board member by a majority vote of the Board at the August meeting and the Court should reconsider its order restoring him to the Board, so that the Board may continue to operate without including a member whose interests are so different than those of the Board itself.

Further, plaintiff's continuing conflict of interest and his behavior during the subsequent September meeting were proper reasons for the Board to vote to remove him from the Board at the September meeting. Defendants argue that the Court should affirm the Board's vote on

September 22, 2011 to remove plaintiff as a member of the Board. At the September meeting, Governor Dan Schiffman made a motion pursuant to Not for Profit Corporations Law ("NPL") §706 to remove plaintiff from the Board of Governors as a result of plaintiff's unruly and disruptive behavior during the Board meeting. That motion was duly seconded and passed by majority vote. Despite a majority of the Board having directed him to leave and then later voting to remove him, plaintiff continued to refuse to leave the meeting and continued to disrupt it. When a security officer was called, plaintiff stated that he would have to be "carried out" and that he would press charges for assault if anyone touched him. Thereafter, since the Board was unable to conduct any of its business, a motion to adjourn the meeting was made, seconded and passed, and the meeting was adjourned.

Defendants contend that at the present time, the Board is unable to conduct its regular business due to the interference that plaintiffs threatens to cause at any meeting. The Board seeks to have additional meetings to discuss the instant litigation, and litigation strategies, and is unable to do that with plaintiff present, because of his obvious conflict of interest and behavior. Indeed, the Court has previously endorsed the idea that the Board should be permitted to hold meetings without plaintiff in attendance, when it asked the Board to meet to consider a settlement proposal and indicated that plaintiff should not attend that meeting.

In opposition, plaintiffs deny that there are different standards for expelling a Club member and removing a Board member. While NPL § 706 addresses the right for a board to remove directors for cause, it does not thereby circumscribe the need for due process in removing board members.

As shown by the August 31, 2011 Hearing Transcript, September 20, 2011 Hearing

Transcript, and defendants' Memorandum of Law in Opposition to Plaintiffs' Order to Show Cause, With Temporary Restraining Order, dated September 9, 2011, the parties have repeatedly addressed the propriety of plaintiff's suspension.

Further, due process is applicable to all actions concerning discipline of directors *or* members of an organization and, thus, the much larger issue of whether the Board's disciplinary actions against plaintiff was proper has been thoroughly addressed.

Plaintiffs contend that to the extent that defendants include new information for consideration by the Court as a part of the present motion, the motion should be denied as violating CPLR 2221(d)(2), which prohibits the consideration of any factual matter that was not offered on the prior motion. To the extent that defendants seek to use allegations concerning the September 22 meeting as part of their submission in support their motion to reargue, or seek to submit any factual information not before the Court prior to oral argument on September 20, 2011, such tactic should be rejected.

Plaintiffs also argue that the motion for reargument regarding the September removal is moot. On October 12, 2011, defendants moved by Order to Show Cause for an order that the Board's removal of plaintiff on September 22, 2011 "was proper under the law and not in violation of any of the Court's prior orders." On October 13, 2011, defendants advised the Court that the Order to Show Cause was withdrawn and that the Executive Committee of the Board has agreed to restore plaintiff as a member of the Board of Governors.

Plaintiff's suspension in August was not "for cause" and no notice or opportunity to be heard was given to him. Pursuant to NPL § 706 the Board can only remove Governors "for cause." Separate and apart from the due process considerations and this Court's prior orders, the

Club's attempted suspension of plaintiff as Governor, purportedly pursuant to NPL § 706, is invalid. None of the grounds on which the Club seeks to justify its suspension of plaintiff from the Board constitutes "cause" under New York law. Mere discord with the Board does not rise to the level of "cause" required under NPL § 706, a standard which is heightened for the removal of directors. And, the Board has already conceded notice and opportunity to be heard is required for plaintiff's removal as a Governor and yet, now attempts to receive retroactive approval for the September 22 removal of plaintiff *without* notice or opportunity to be heard.

Plaintiff's suspension at the August meeting was allegedly proposed "because of his adverse interest to the Board, which would be likely to compromise the Board's ability to deliberate and proceed on the Statement of Charges." However, this "adverse interest" was not created by plaintiff himself, but was created because defendants instituted the Statement of Charges against him. The alleged conflict of interest was the grounds for suspension. Neither Cherry Provost, who signed the Statement of Charges, nor Daniel Schiffman, who is named as an injured party in the Statement of Charges, were suspended by the Board pending adjudication of the Statement of Charges, despite the fact that they also had interests adverse to the NAC based upon their allegations. Courts affirming such removal for "cause" have required a showing not of mere discord with other board members but of a full-blown breach of the director's fiduciary duty, which is not shown. In any case, plaintiff was entitled to notice and an opportunity to be heard prior to the imposition of any limitations upon his power to act.

Furthermore, defendants' request for judicial affirmation of the voluntarily rescinded September 22, 2011 board action constitutes an improper request for relief. Defendants' first attempt to validate the Board's September 22, 2011 action via a proposed Order to Show Cause

was withdrawn, with notification to the Court that it was not necessary to clarify the issue of plaintiff's removal. Where a course of action has been abandoned by the parties, any challenge to the propriety of taking the since-abandoned action is moot. Alternatively, because the Executive Committee has already restored plaintiff to the Board of Governors, defendants are essentially seeking an advisory opinion from the Court.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]).

Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979] ("A party cannot raise questions, advance new arguments, or assume a position inconsistent with that taken on the original motion"); *William P. Pahl Equipment Corp. v Kassis*, *supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

While the parties mentioned plaintiff's suspension from the Board (see the August 31, 2011 Hearing Transcript, pp. 5, 24; September 20, 2011 Hearing Transcript, pp. 4, 80; defendants' Memorandum of Law in Opposition to Plaintiffs' Order to Show Cause, With

Temporary Restraining Order, dated September 9, 2011 at pp. 8-10), that precise issue was not before the Court for determination, caselaw citing to board suspension was used to support the suspension of plaintiff as a *member* of the NAC, and the parties did not fully *brief* the issue. It is noted that the Court's statement concerning plaintiff's entitlement to remain a Board member was prefaced with the acknowledgment that the petitioner's order to show cause sought to temporarily enjoin the defendants from holding a hearing on the Statement of Charges and from selling certain items of personalty.

Upon review of NAC's Constitution and Bylaws, it is clear that there are no provisions concerning the suspension of a Governor from the Board. Section II of the Constitution, entitled "Board of Governors" and the remainder of the Sections of the Constitution, are silent as to suspending a Board member for any reason except for the situation in which a Board member has two consecutive, unexcused absences from meetings, in which case, the Board member would be deemed to have resigned.² Other than resigning from the Board, the Constitution does not proscribe the manner in which a Board member may be suspended. The Bylaws, which address "Membership," Committees, Dues and Fees, Visitors, and the promulgation of Rules, are likewise silent as to the removal of a Board member. The Bylaws, instead, discusses the removal of a member, as a form of "Member Discipline." (Bylaws, Article I, Section 5). And, unlike one's removal from the Board of Governors, the expulsion of a member results in denial of entry into the NAC, loss of all rights and privileges of membership, and removal from any committee

² Section 11.4 provides:

"The Board may fill any vacancy in its own body until the next annual election. Unexcused absence on the part of any Governor for two consecutive meetings shall be deemed equivalent to the resignation on the part of the Governor so absent.

or the Board of Governors (Bylaws, Article I, Section 5.H). Therefore, the suspension of a Board member is entirely different from the removal of a member, which was the principal issue to be decided by the Court in its October 28, 2011 Memorandum Decision.

Therefore, under the circumstances in this case, and a review of the Constitution and Bylaws, the Court grants the defendants' motion for leave to reargue. Thus, upon reargument, the Court strikes that section of the Memorandum Decision which, as pertaining to the as the Board's August 4th meeting to suspend Aldon's position as Governor, stated "Aldon [James] is entitled to be restored as Governor of the Board."

The Court, however, does not address the propriety and/or merits of the August suspension, since the Court, on reargument, is not to consider new arguments or facts (*Foley v Roche*, 68 AD2d 558, *supra*), and based on the record, the issue is moot for the reasons set forth below.

As to the branch of defendants' motion seeking an order affirming the action of the Board of Governors of the National Arts Club in removing plaintiff from the Board of Governors at a September 22, 2011 Board meeting, based on the record, this portion is moot. Instead of pursuing the Court's invitation to offer clarification at the October 26, 2011 in-court hearing, defendants restored plaintiff to the Board of Governors. Therefore, whether the September removal was proper under the law and not in violation of any of the Court's order is moot. A decision on this issue would be tantamount to an advisory opinion, which is not "the exercise of the judicial function" (*Matter of Joint Queensview Hous. Enter. v Grayson*, 179 AD2d 434, 577 NYS2d 856 [1st Dept 1992]) ("It is well settled law that "[t]he courts of New York do not issue advisory opinions for the fundamental reason that in this State '[t]he giving of such opinions is

not the exercise of the judicial function”); *see also Olszewski v Park Terrace Gardens, Inc.*, 27 AD3d 308, 812 NYS2d 473 [1st Dept 2006] (“The post-trial motion was properly dismissed because the case had been settled. . . ., [the] insurance carrier had paid the full amount of its policy toward that settlement, and [the] appeal sought an impermissible advisory opinion”).

Conclusion

Based on the foregoing, it is hereby

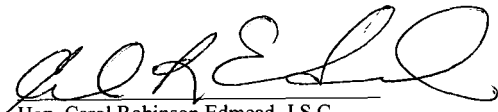
ORDERED that the branch of defendants’ motion for leave to reargue that part of the Court’s September 28, 2011 Memorandum Decision in which it found that “Aldon [James] is entitled to be restored as Governor of the Board” is granted, and upon reargument, the Court strikes that section of the Memorandum Decision which, as pertaining to the as the Board’s August 4th meeting to suspend Aldon’s position as Governor, stated “Aldon [James] is entitled to be restored as Governor of the Board.” And it is further

ORDERED that the branch of defendants’ motion for an order affirming the action of the Board of Governors of the National Arts Club in removing O. Aldon James from the Board of Governors at a September 22, 2011 Board meeting is denied. And it is further

ORDERED that the defendants 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: December 8, 2011



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

HON. CAROL EDMOAD