

Matter of Kuts (Communicar, Inc.)
2013 NY Slip Op 32524(U)
August 16, 2013
Supreme Court, Queens County
Docket Number: 5892/13
Judge: Augustus C. Agate
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SHORT FORM ORDER AND JUDGMENT

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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In the matter of the application of
SAM KUTS, ET AL,

Index No: 5892/13

Petitioners,

Motion

Dated: April 26, 2013

For an Order pursuant to Business Corporation Law §619 adjudicating the completing claims regarding the election of the officers and directors of COMMUNICAR, INCCORPORATED held on March 17, 2013 and restraining: VADIM PTICHKIN, ETC. and others from acting on behalf of COMMUNICAR, INCORPORATED, as officers and directors until such time as said election is confirmed or a new election is held.

M# 1 & 2

Respondents.

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The following papers numbered 1 to 13 read on this Order to Show Cause by petitioners for an order declaring that the results of the election held on March 17, 2013 are null and void pursuant to BCL § 619; and cross motion by respondents for an order (i) confirming the election and (ii) dismissing the petition (Sequence No. 1); and separate Order to Show Cause by petitioners to modify the Temporary Restraining Order in this court's Order to Show Cause dated April 17, 2013.

PAPERS
NUMBERED

Order to Show Cause - Affidavits - Exhibits.....	1 - 3
Notice of Cross Motion - Affidavits - Exhibits..	4 - 7
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Upon the foregoing papers it is ordered and adjudged that these two Orders to Show Cause by petitioners and cross motion by respondents are decided as follows:

This is a proceeding pursuant to BCL § 619 to set aside a corporate election of Communicar, Inc. ("Communicar"), which was held on March 17, 2013. Communicar is a car transportation company which is engaged in the business of providing ground transportation services on a credit voucher basis. There are approximately 360 shareholders of Communicar, and the corporation is governed by a Board of Directors consisting of seven members, elected by the shareholders. The day-to-day operations of Communicar are managed by seven officers, who are also elected by the shareholders. The officers and directors hold office for a term of two years.

An election for directors and officers was held on March 17, 2013. Proxies were cast in the election, as permitted in the by-laws of Communicar. There were two slates of candidates, one with petitioner Sam Kuts, who was the incumbent President, and one with respondent Vadim Pitchkin. All the petitioners, except Ranjit Parhar, were candidates in the election, as were all the respondents, except Rodrick Sullivan. Respondent Sullivan was appointed as Inspector of the election by the Board of Directors pursuant to Article II(I) of the by-laws. This section gave the Inspector the power to hear and determine all challenges and questions arising in connection with the right to vote, and also gave him the power to count and tabulate all votes, ballots or consents and determine the result. Although preliminary election results were published on March 18, 2013, a final tally sheet and election results were not published until March 22, 2013. None of the petitioners were elected.

On March 27, 2013, petitioners moved by Order to Show Cause to declare the results of the election null and void pursuant to BCL § 619. The Honorable Leslie J. Purificacion, as Emergency Justice, signed the Order to Show Cause and ordered that pending the hearing of the application, respondents were restrained from taking any actions other than those in the ordinary course of business and day to day operations of the corporation. Thereafter, on April 4, 2013, petitioners brought another Order to Show Cause which sought to modify the Temporary Restraining Order signed by Justice Purificacion. This court signed the Order to Show Cause and modified the Temporary Restraining Order by adding that pending the hearing of the application, the respondents were restrained from changing Communicar's existing policy whereby shareholders providing a driver receive leasing fees.

In support of the Order to Show Cause, petitioners allege that the election was marred by various improprieties and

fraudulent conduct. Specifically, petitioners assert that some of the proxies were counted in an inconsistent and improper manner. Petitioners also contend, *inter alia*, that some of the proxies which were counted for respondents' slate of candidates were forged. Petitioners contend that these alleged improprieties affected the outcome of the election since petitioners would have received the higher number of votes for each office had these improprieties not occurred. Thus, petitioners seek to have the results of the March 17, 2013 election declared null and void and to have a new election ordered.

Respondents oppose the petition and also cross move to dismiss the petition. Respondent Sullivan contends that all of the petitioners' challenges to the election were investigated, and some of these challenges were upheld while other challenges were denied. Mr. Sullivan annexes to his affidavit an appendix which consists of an analysis and resolution of the challenged votes. In support of the cross motion, respondents argue that petitioners have failed to name as respondents certain persons who were declared elected at the subject election in violation of BCL § 619. Respondents further argue that the relief sought by the petitioners is barred by the business judgment rule. Respondents also contend that the application is procedurally defective because the proper vehicle to obtain the relief petitioners seek is an Article 78 proceeding.

The court will first address the cross motion by respondents to dismiss the petition.

The branch of the cross motion to dismiss the petition on the ground that petitioners should have sought relief through an Article 78 proceeding is denied. Upon a petition of any shareholder aggrieved by an election, Business Corporation Law § 619 gives the Supreme Court the authority to confirm an election, order a new election, or "take such other action as justice may require." (*Lago v 87-10 51st Ave. Owners Corp.*, 301 AD2d 527, 528 [2d Dept 2003]; *Matter of Tower Assocs. v Boulevard Towers Condominium*, 295 AD2d 525, 526 [2d Dept 2002].) Indeed, the purpose of BCL § 619 is to provide a summary review of a contested election. (*Matter of Faehndrich*, 2 NY2d 468, 474 [1957].) Thus, the relief requested herein is specifically authorized by BCL § 619, and petitioners were not required to commence an Article 78 proceeding.

The branch of the cross motion to dismiss the petition on the ground that petitioners have failed to name certain necessary

parties is denied. Respondents argue that petitioners have not joined in the proceeding four specific persons who were declared elected following the March 17, 2013 election. As a result of this failure to join all the elected officers and directors, respondents assert that the petition must be dismissed. BCL § 619 provides that any petition brought under this section must be on "notice to the persons declared elected thereat..." The court is afforded broad latitude in determining whether parties are to be added to a proceeding pursuant to CPLR 1001 and 1003, which provisions should be liberally construed. (see *Gross v BFH Co.*, 151 AD2d 452, 452 [2d Dept 1989].) A dismissal for failure to join a necessary party, however, should only be granted as a last resort. (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 821 [2003], cert denied 540 US 1017 [2003].)

In their reply affirmation, petitioners submit the affidavits of the four individuals that respondents maintain should have been joined in this proceeding. Each person avers in the affidavit that they have notice of the instant proceeding and consent to not submitting any objection to the relief requested by the petitioners to invalidate the subject election. Thus, in view of the affidavits submitted, the court finds that there is no prejudice if this proceeding continues in the absence of these four individuals.

The branch of the cross motion to dismiss the petition on the ground that the proceeding is barred by the business judgment rule is denied. The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]; *Deblinger v Sani-Pine Prods., Co.*, 107 AD3d 659, 660 [2d Dept 2013].) However, a corporation's elections must be in compliance with the corporate by-laws and applicable law of this state. (*Matter of White v Kings Vil. Corp.*, 26 Misc 3d 1222(A) [Sup Ct Kings County 2010].) As noted above, BCL § 619 authorizes the Supreme Court to take any action that justice may require with respect to a disputed corporate election. Therefore, notwithstanding the business judgment rule, the Supreme Court has the power to decided the issues presented in this application. Indeed, any other result would render BCL § 619 meaningless.

The court will now address the Order to Show Cause by petitioners to declare the results of the March 17, 2013 election

null and void. Petitioners argue, *inter alia*, that several of the votes cast by proxies were improper. Petitioners take issue with 19 votes represented by different stock certificates. Petitioners assert that these votes were improperly counted for respondents' slate of candidates rather than petitioners or were not counted at all, but should have been counted for petitioners. Petitioners maintain that had the votes been counted for them, it would have changed the outcome of the election.

Where it appears that there has been an arbitrary rejection of a slate of nominees, or where there are reasonable grounds to indicate that an election was not conducted in a regular, fair manner, the election should be set aside, and the court should order a new election. (see *Wolpert v First Natl. Bank of East Islip*, 381 F Supp 625, 628 [EDNY 1974]; *Matter of Kaminsky*, 251 App Div 132, 139-140 [4th Dept 1937], *affd* 277 NY 524 [1938].) Indeed, when "right and justice" require, a new election should be ordered. (*Matter of Bogart*, 215 App Div 45, 46 [4th Dept 1925].) Moreover, elections have been set aside under BCL § 619 for a variety of reasons, including erroneous rejection of votes or proxies. (see *Matter of Mount Vernon Dye Casting Corp.*, 127 Misc 169 [Sup Ct NY County 1926].)

In the case at bar, a review of the documentary evidence and affidavits establish that there were serious irregularities regarding the manner in which some of the proxies were counted. Such irregularities materially affected the outcome of the election. In one instance, respondents did not count nine proxies that were voted for petitioners on behalf of shareholder Solomon Katsman. In the appendix to his affidavit, respondent Sullivan avers that there was a "quid pro quo" in which Mr. Katsman received preferential treatment from the petitioners in exchange for his shares. Petitioner Sam Kuts, in his affidavit, avers that he had Mr. Katsman's proxy and voted for petitioners' slate of candidates. He avers that Mr. Katsman did not receive any preferential treatment from anyone for his proxies. Mr. Kuts further avers that he previously voted Mr. Katsman's proxy in three prior elections and also avers that the proxies for these nine votes were accepted on February 10, 2013 when the nominations for the candidates were held and voted. The court finds that respondents have failed to submit any proof whatsoever of a quid pro quo to justify not counting these nine votes, particularly in light of the fact that Mr. Kuts had voted Mr. Katsman's proxies in the past. (see *Matter of Mount Vernon Dye Casting Corp.*, 127 Misc 169 [Sup Ct NY County 1926].)

In another instance, Mr. Sullivan improperly invalidated three votes for petitioners and counted them for respondents. The proxies at issue were given by shareholder Donald Barfield. Mr. Sullivan's own analysis, set forth in his appendix, states that for the nominations, Mr. Barfield gave his proxies to the petitioners, but gave the proxies to respondents for the election. Mr. Sullivan then states that "thereafter, he (Mr. Barfield) gave a proxy to Petitioners' political camp for the election." Mr. Sullivan also states that Mr. Barfield admitted that he never revoked the proxy he gave to respondents. However, the proxy form clearly states on the top, in bold letters, that "[t]he undersigned, **revoking any proxy heretofore given**, hereby appoints and assigns..." (emphasis added.) Thus, if, as Mr. Sullivan states, Mr. Barfield gave a proxy to petitioners after he gave one to respondents, then the one given to respondents was automatically revoked.

In the above cases cited, respondents have been unable to articulate a legitimate basis for not awarding petitioners' slate of candidates these votes. Had these votes been counted for petitioners, some of the results of the election would have changed. Thus, the court finds that there are at least reasonable grounds to indicate that the March 17, 2013 election was not conducted in a proper, regular or fair manner. (see *Wolpert v First Natl. Bank of East Islip*, 381 F Supp at 632.) As a result, the court is left with no alternative but to set aside the election and order a new one.

Accordingly, this Order to Show Cause by petitioners is granted, and the election of the Directors and Officers of Communicar, Inc., held on March 17, 2013 is hereby declared to be null and void. (Sequence No. 1).

A special shareholders meeting shall be held within 60 days after service of a copy of this order and judgment with notice of entry, for the purpose of electing new officers and directors. The election shall be conducted in accordance with the current by-laws and certificate of incorporation, including all notice provisions.

Pending the new election, respondents are restrained from taking any actions other than those in the ordinary course of business and day to day operations of respondent Communicar, Inc.

Pending the new election, respondents are further restrained from changing Communicar, Inc.'s existing policy whereby shareholders providing a driver receive leasing fees.

The cross motion by respondents is denied.

The Order to Show Cause by petitioners to modify the Temporary Restraining Order is moot inasmuch as the Temporary Restraining Order has expired. (Sequence No. 2).

Date: August 16, 2013

AUGUSTUS C. AGATE, J.S.C.