Tiemann Place Realty, LLC v 55 Tiemann Owners Corp.
2014 NY Slip Op 33218(U)
December 8, 2014
Supreme Court, New York County
Docket Number: 159958/14
Judge: Donna M. Mills

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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TIEMANN PLACE REALTY, LLC and GEORGE JOHNSON,

Petitioners,

-against-

Index No. 159958/14

55 TIEMANN OWNERS CORP., IAN WATSON, and ROSA ALVARADO,

Respondents.

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55 Tiemann Owners Corp.

Counterclaim Petitioner,

-against-

TIEMANN PLACE REALTY, LLC and GEORGE JOHNSON,

Counterclaim Respondents,

and JOSEPH PISTILLI and ANTHONY PISTILLI

as Additional Counterclaim Respondents,

For an Order Pursuant to Article 78 of the Civil Practice Rules and Procedure and Business Corporation Law § 619 Setting Aside the Results of the Annual Meeting of Shareholders of 55 Owners Corp., conducted on June 17, 2014, and Related Relief.

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DONNA MILLS, J.

Petitioners Tiemann Place Realty, LLC (TPR) and George Johnson, the owners of a

majority of the shares of respondent 55 Tiemann Owners Corp. (Owners Corp or Corporation), a cooperative corporation that owns the building located at 55 Tiemann Place in Manhattan, move, pursuant to CPLR 6301 and 7803 (3), for a preliminary injunction to set aside the results of an election conducted at a special meeting of the Corporation on September 10, 2014. At that election, respondents Ian Watson and Rosa Alvarado were elected to replace petitioner Johnson and nonparty Anthony Pistilli as directors of Owners Corp.

Respondent/counterclaim petitioner Owners Corp moves to dismiss the petition and to set aside, nunc pro tunc, the results of the earlier election of directors, held at the June 17, 2014 annual meeting of Owners Corp shareholders, on the ground that, at that time, TPR and Johnson elected a majority of the board of directors, in violation of a provision in a stipulation (Stipulation) entered into in a foreclosure action entitled *Federal Home Loan Mortgage Corp. v 55 Tiemann Owner's Corp.* (92 Civ 6316 [KTD] [USDC, SD NY 1997]).

For the reasons that follow, I am denying both the petition and the counterclaim petition.

Petitioners contend that the removal of Johnson and Pistilli, as directors, violated both Business Corporation Law (BCL) § 602 and article II, sections 2 and 4 of the bylaws of Owners Corp. BCL § 602 (c) provides that:

> "Special meetings of the shareholders may be called by the board and by such person or persons as may be so authorized by the certificate of incorporation or the by-laws. At any such special meeting only such business may be transacted which is related to the purpose or purposes set forth in the notice required by section 605 (Notice of meetings of shareholders).

Similarly, article II, section 2 of the Corporation's bylaws states:

> "A notice of each special meeting, stating . . . the purpose thereof . . . shall be served . . . on each shareholder of record . . . . No business other than that stated in the notice shall be transacted at any special meeting unless the shareholders of

> record of all outstanding shares of the corporation are present thereat in person or by proxy."

It is undisputed that the June 17, 2014 special meeting was not attended by the shareholders of all outstanding shares of Owners Corp, either in person or by proxy. Citing *Matter of De La Force v Khiterer* (2013 NY Slip Op 31439[U] [Sup Ct, NY County 2013]), petitioners contend that, accordingly, the notice of the September 10, 2014 special meeting, which describes the purpose of the meeting as 'sole[l]y for the shareholders to elect a new board of directors," did not permit the removal of any then-existing director. *De La Force*, indeed, holds that, where the bylaws of a cooperative corporation provide that only such matters as are specified in the notice of a special meeting may be considered at such a meeting, a notice that there will be an election of "a new board of directors" does not permit the removal of an existing director. I respectfully disagree with that holding. *De La Force* cites no case in support of its holding, and it does not appear that *De La Force* has been cited by any court. Where, as in this case, and as in *De La Force*, the number of directors is set by the governing documents of a corporation, the election of a new board of directors necessarily entails the possibility that an existing director will be removed. In *Matter of Faehndrich, Inc.* (2 NY2d 468 [1957]), the Court held that a notice of a special meeting of stockholders, that recites that it is called for the purpose of "electing directors of the corporation for the ensuing year," gives fair notice that an existing director may be removed. (The underlying facts of that case, including the fact that the petitioner in that case was removed from his position as a director, appear in the decision of the trial court. *See Matter of William Faehndrich, Inc.* 3 Misc 2d 156, 159 [Sup Ct, NY County 1956].)

Petitioners also rely upon article II, sections 2 and 4 of the bylaws. The latter, which

provides that:

> "Any director may be removed from office at any time with or without cause by vote of the shareholders at a shareholders' meeting duly called for that purpose,"

does not support petitioners' position. Inasmuch as the September 10, 2014 special meeting was called for the purpose of electing a new board of directors, and inasmuch as there was no stated purpose of increasing the number of directors, the purpose that was stated necessarily included a vote that would determine whether any then-director would be removed from office.

The first paragraph of article II, section 2 of the bylaws provides that:

> "Directors, other than those constituting the first board, shall be elected at the annual meeting of shareholders, or at a special meeting called for that purpose as provided by law"

That paragraph is irrelevant here. The board, as it stood at the beginning of the September 10, 2014 meeting, had been elected, whether validly or not, at the June 17, 2014 annual meeting. As discussed above, the board elected at the September 10, 2014 meeting was elected "at a special meeting called for that purpose.'

The second paragraph of article II, section 2 provides that:

> "Directors elected at the first annual meeting of the shareholders and at meetings subsequent thereto shall serve until the date herein fixed for the next annual meeting of shareholders, and until the election and qualification of their respective successors."

The directors who were elected at the September 10, 2014 meeting were elected at a "meeting subsequent" to the first annual meeting of the shareholders, which was held on June 17, 2014. Thus, at most, this paragraph provides that those directors shall serve until the next annual meeting of the shareholders. The second paragraph of article II, section 2 does not provide, as petitioners appear to argue, that "directors elected at the first annual meeting of the shareholders

and at *annual* meetings subsequent thereto . . . ..' If the paragraph did so provide, it would directly contradict article II, section 4 of the bylaws, which provides that a director may be removed from office at any time.

The petition also sets forth the text of article III, section 1 of the bylaws, which pertains to officers, not directors. Other than setting forth that section, the petition does not refer to it.

The counterclaim petition appears to have been served solely because counterclaim petitioner mistakenly believes that the second paragraph of article II, section 2 of the bylaws supports the petition. Accordingly counterclaim petitioner is concerned to demonstrate that the directors who were elected at the first annual meeting of the shareholders were not validly elected and, accordingly, are not entitled to serve as directors until the next annual meeting. As shown above, such an argument misreads the second paragraph of article II, section 2 of the bylaws.

In any event, counterclaim petitioner has not shown that either the conduct or the results of the June 17, 2014 election of directors violated that provision of the Stipulation which bars TPR and its assigns and successors from electing more than one less than the majority of the board of directors. Notably, Owners Corp argues that TPR and Johnson, together, violated the Stipulation. Johnson, however, is not a signatory to the Stipulation, and he is not bound by its terms. Owners Corp's argument, that Johnson is bound by the Stipulation, as the assignee of TPR's interest in the unsold shares allocated to his apartment, would make the Stipulation binding upon all subsequent purchasers of the unsold shares currently held by TPR and create two classes of shareholders, leaving aside TPR, to wit those who purchased their shares prior to entry of the Settlement and those who, like Johnson, purchased their shares thereafter. Finally, to void the results of the June 17, 2014 election would call into question any contractual

commitment made by the board between June 17, 2014 and September 10, 2014. Owners Corp gives no reason for doing so.

Owner's Corp seeks a declaration that the September 10, 2014 election is valid and binding. While I am denying TPR's petition to set aside the results of that election, petitioners' failure to show that that election is invalid does not necessarily lead to the conclusion that it was, in all respects, valid. Accordingly, I decline to issue a declaratory order.

Accordingly, it is hereby

ADJUDGED that the petition is denied; and it is further

ADJUDGED that the counterclaim petition is denied, and it is further

ORDERED that the proceeding is dismissed.

Dated: 12/8/14

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.