SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NATALIE KRODEL,

Petitioner,

-against-

AMALGAMATED DWELLINGS, INC., ABRAHAM BRAGIN, LYN KEST and ZENA COHEN,

Respondents.

DECISION AND ORDER

Index No.: 152176/2014

MELISSA A. CRANE, J.

Petitioner Natalie Krodel commenced this special proceeding in 2014 to challenge the election of Respondents Abraham Bragin, Lyn Kest, and Zena Cohen (collectively "Individual Respondents") to the board of Respondent Amalgamated Dwellings, Inc. ("Amalgamated" or "Corporate Respondent"). Petitioner's only remaining claim seeks an order nullifying Amalgamated's December 19, 2013 election (the "December 2013 Election") and appointing a trustee to oversee the conduct of a prompt election of all expired seats on the Board ("Election Cause of Action").

The following five motions are currently before this Court: (1) Petitioner's motion seeking an order scheduling a trial on the Election Cause of Action, (2) Respondents' cross-motion seeking summary judgement dismissing the Election Cause of Action (collectively docketed as NYSCEF Motion #020), (3) Respondents' order to show cause seeking dismissal of the Election Cause of Action due to the subsequent election of the Board of Directors that occurred on March 8, 2017 ("March 2017 Election"), (4) Petitioner's cross-motion seeking an order granting leave to amend the Verified Amended Petition to include allegations regarding the March 2017 Election (collectively

docketed as NYSCEF Motion #021), and (5) Petitioner's order to show cause directing Respondents to produce for inspection a true and correct copy of the certified results of the March 2017 Election (docketed as NYSCEF Motion #022). The court consolidates all these motions for decision.

The Petitioner brought the Election Cause of Action pursuant to New York Business Corporation Law § 619 ("BCL § 619"). This section states that the Court:

> upon the petition of any shareholder aggrieved by an election, and upon notice to the persons declared elected thereat, the corporation and such other persons as the court may direct, the supreme court at a special term held within the judicial district where the office of the corporation is located shall forthwith hear the proofs and allegations of the parties, and confirm the election, order a new election, or take such other action as justice may require.

In her Verified Amended Petition, some of the violations that Petitioner alleges occurred during the December 2013 Election include: the Board of Directors did not appoint an Election Committee (without the participation of anyone running for election or reelection) as required by the By-Laws; Respondent Abraham Bragin ("Bragin"), the Amalgamated's President, made all communications concerning the election on behalf of the Corporate Respondent; Bragin directed Honest Ballot Association not to include an opportunity for the Corporation's shareholders to write-in additional candidates; the Annual Meeting on December 19, 2013 was held without a quorum of the shareholders; and other violations.

After the start of this proceeding, while some of these motions were pending, the Board of Directors held an election on March 8, 2017 ("March 2017 Election"). This election marked the end of the three-year terms of the Individual Respondents, who were previously elected at the December 2013 Election. Based on a copy of the minutes of the March 2017 Election, affidavit from Issac Katz, a property manager employed by the

Management Company of the Corporate Respondent, and an affidavit from Christopher Backert, the CEO of a third-party election management company, the Individual Respondents Abraham Bragin, Lyn Kest, and Zena Cohen, who were the only candidates at that election, ran and were re-elected without opposition as Board Members on March 8, 2017. Mr. Backert testified that he certified the results of this election (Backert affidavit sworn on April 21, 2017, ¶¶ 2).

Here, Petitioner seeks to overturn the December 2013 Election, where the Individual Respondents were elected as Board directors for a 3-year term pursuant to Article II, Section 1 of the Amalgamated By-Laws. These same three Individual Respondents were re-elected without contest or opposition at the March 2017 Election.

Mootness occurs when the controversy or issues between the parties cease to exist (*Gilbert by Gilbert v. Board of Educ. of Bath Cent. School Bd.*, 127 AD2d 966 [4th Dep't 1987]). When a shareholder commences litigation to set aside a previously held corporate election for board of directors, the action will be moot if the subject corporation subsequently holds an election for directors (*Matter of Sahid* v. *1065 Park Ave.*, 140 A.D.3d 521 [1st Dept 2016] (where a shareholder sought to set aside two previously held elections, the Court held, "[a]fter the order on appeal was rendered and before the determination of this appeal, the next regularly-scheduled election for the cooperative's board of directors was held, rendering this appeal moot…"). Thus, Petitioner's Election Cause of Action is moot because the results of the new election superseded the results of the December 2013 election during the pendency of this litigation (*Khatibi v. Weill*, 8 A.D.3d 485 [2d Dep't 2004]).

In its cross-motion, the Petitioner does not refute Respondents' argument that, as a matter of law, the Election Cause of Action is moot by virtue of the March 2017

Election. Instead she seeks an order granting leave to amend the Verified Amended Petition to assert challenges now to the 2017 election.

A court may not grant leave to amend without appropriate substantiation (*Brennan v City of New York*, 99 AD2d 445, 446 [1st Dept 1984]). In her proposed Verified Second Amended Petition, Petitioner simply repeats the exact same violations that she claimed existed during the December 2013 election, without sufficient allegations that they did, in fact, occur again during the March 2017 Election.

Moreover, when a party inordinately delays in making an application to amend its pleadings, waiting until the "eve of trial" to do so, the court should deny amendment (*L.B. Foster Co. v. Terry Constructing, Inc.*, 25 AD2d 721 [1st Dept 1966]). Here, after the December 2013 Election, Petitioner did not challenge Amalgamated Dwellings, Inc.'s subsequently held election in 2015 at which different board directors' terms had expired (potentially subject to similar alleged violations), but instead waited until after the March 2017 Election to seek to amend her petition. "There is a marked distinction between what a court will do before and after a corporate election. .... if the election is held without prior application it becomes an unwarranted interference with internal corporate affairs to upset the election absent a showing that the relief sought would, if granted, change the result" (*Goldfiled Corp. v. General Host Corp.*, 36 AD2d 125 [1st Dept 1971]). The March 2017 Election occurred on March 8, 2017. Petitioner does not allege that she failed to receive timely notice from Respondent Amalgamated before that election's occurrence. Thus, even though she had the opportunity, the Petitioner did not seek prior relief, such as a temporary restraining order, on the grounds that the March 2017 Election was about to be conducted improperly or that the election would prejudice her rights as a shareholder. The Petitioner also does not allege that, if her motion to

amend is granted, and, if a decision is reached in her favor, the results of the March 2017 Election would change. Moreover, there is no legal precedent requiring the Corporate Respondent to meet the high burden of proof that the subsequently held corporate election was free of any irregularities to render a challenge to a previously held corporation election moot.

Finally, BCL § 619 states that "upon the petition of any shareholder aggrieved by ***an*** election, …, and confirm ***the*** election, order ***a*** new election, …" (emphasis added). Thus, the Legislature drafted BCL § 619 to allow a shareholder to seek judicial review of only a single election per court proceeding.

Because the March 2017 Election is not the subject of this case and the Respondents have provided competent evidence, by way of an affirmation and two affidavits, including one from the CEO of the third-party election management company affirming the results of the election, that the March 2017 Election took place, any further discovery related to the March 2017 Election is outside the scope of this proceeding. This proceeding concerns only the December 2013 Election. Discovery demands that seek information outside the scope of the summary proceeding should be denied (*Matter of L&M Bus Corp. v. New York City Dept. of Educ.*, 71 AD3d 127 [1st Dept 2009), aff'd in part, modified, 17 NY3d 149 [2011]). When a cause of action is rendered moot, the Court no longer maintains subject matter jurisdiction to adjudicate the matter. Thus, this Court need not decide the Petitioner's motion seeking to set this proceeding down for trial. Nor is it necessary to decide Respondents' cross-motion.

Accordingly,

IT IS ORDERED THAT Petitioner's motion seeking a trial on the only remaining claim, the Election Cause of Action (#20) is denied as moot; and it is further

ORDERED THAT Respondents' cross-motion seeking summary dismissal of the Election Cause of Action is granted; and it is further

ORDERED THAT Respondents' motion for summary judgment seeking dismissal of the only remaining claim, the Election Cause of Action, pursuant to BCL § 619 (#21) is granted; and it is further

ORDERED THAT Petitioner's cross-motion seeking an order granting leave to amend the Verified Amended Petition is denied; and it is further

ORDERED THAT Petitioner's motion (# 22), via order to show cause, directing Respondents to produce for discovery and inspection a true and correct copy of the certified results of the March 2017 Election is denied.

The Clerk directed to enter judgement in favor of Respondents dismissing the reminder of this action.

Dated: October 10, 2017
New York, New York

ENTER:

Melissa A. Crane, J.S.C.