

Green v Cristancho
2018 NY Slip Op 31901(U)
August 2, 2018
Supreme Court, New York County
Docket Number: 153985/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

SIWANA GREEN et al.

INDEX NO. 153985/18

- v -

MOT. DATE

AL CRISTANCHO et al.

MOT. SEQ. NO. 001 and 002

The following papers were read on this motion to/for set aside election, preliminary injunction
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). 1-25
NYSCEF DOC No(s). 28-38, 40-52, 53-62

This proceeding is brought pursuant to BCL § 619 by the former members of the board of directors of the 67-69 St. Nicholas Avenue Housing Development Fund Corporation (the "HDFC" and sometimes the "Corporation") against new members of the board of directors for the HDFC. Petitioners seek to overturn both their removal from the board and respondents' election to the board because the meeting/election violated the HDFC's bylaws. Respondents have answered the petition.

There were two special meetings held at which the respondents were elected. The first was on March 13, 2018 and the second was on April 17, 2018. With respect to the first meeting, petitioners allege that the subject shareholders were not eligible to vote because they were more than two months in maintenance arrears or were otherwise not in good standing in the HDFC because, to wit, they did not occupy the apartments appurtenant to their shares as a primary residence.

Further, petitioners claim that the April 2018 meeting was not issued and/or held in conformance with the HDFC bylaws because the notice of special meeting was not issued by the President of the HDFC, by order of the Board or by ten percent of the shareholders eligible to vote. Petitioners allege that the April 2018 meeting was procedurally defective because "[n]one of the shareholders named in the April 2018 notice were in good standing in the HDFC ten days before the date of the meeting."

In the petition, movants have asserted four causes of action: [1] a declaration that the Mach 13, 2018 meeting void ab initio; [2] a declaration that respondents' election as directors on April 17, 2018 "was a nullity"; [3] a declaration that none of the Respondents have the power, right or authority to act as directors or officers of the HDFC and that all of Respondents prior actions as Directors or Officers of the HDFC be declared null and void; and [4] damages and costs.

Respondents deny the allegations contained in the petition and assert affirmative defenses of: [1] failure to state a claim; [2] improper service; [3] that respondents were duly elected as Directors of the HDFC; [4] petitioners fail to allege a BCL § 619 claim; [5] petitioners proper remedy is to attend the next

Dated: 8/2/18

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] 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

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shareholder election for directors; [6] petitioners are not entitled to a preliminary injunction; and [7] unclean hands.

Respondents further assert counterclaims against petitioners for breach of fiduciary duty and a declaration that the transfer of Unit 12 in the building to petitioner Veronica Clark was invalid and that petitioner Veronica Clark is not a legal shareholder of the corporation.

In addition to the petition, Petitioners have brought two orders to show cause for the same relief, to wit, an order enjoining respondents from collecting rent or maintenance, acting as directors and/or officers of the HDFC and ordering respondents to turn over any monies they received from tenants and shareholders of the HDFC. Petitioners further sought temporary restraints in each OSC. The first TRO was denied by this court. The second was denied by the Honorable Gerald Lebovits, who permitted petitioners to renew their application on the return date. This court again denied the TRO on the return date.

The court's decision on the petition and the two orders to show cause follows.

Discussion

By way of these motions, petitioners seek a preliminary injunction, which is a drastic remedy and should not be granted unless the movant can demonstrate "a clear right" to such relief. (*City of New York v. 330 Continental, LLC*, 60 AD3d 226 [1st Dept 2009]). On a motion for preliminary injunctive relief, petitioners must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in their favor (see *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; see also *1234 Broadway LLC v. West Side SRO Law Project*, 86 AD3d 18 [1st Dept 2011]).

Pursuant to BCL §619, "[u]pon 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" (see generally *Gearing v. Kelly*, 11 NY2d 201, [1962] rearg. den 11 NY2d 1016).

Even if the court finds improprieties with regards to the election, "the election may not be set aside unless the court concludes further that the result would have been different had no such improprieties existed" (see *Goldfield Corp. v. General Host Corp.*, 29 NY2d 264 [1971]; see also *Schapiro v. Grunberg*, 12 Misc3d 1195[A] [Sup Ct NY Co 2006]; *Mishaan v. 1035 Fifth Ave. Corp.*, 47 Misc3d 930 [Sup Ct NY Co 2015]). Further, the court should "consider the practical problems entailed" by setting aside or holding a new election (*Goldfield, supra* at 273).

There is no real dispute that petitioners' removal and respondents' election at the March 13, 2018 meeting was not in conformance with the HDFC's bylaws. Indeed, a second special meeting to remove and hold an election was ultimately held on April 17, 2018. Therefore, petitioners' claims with regards to the March 2018 meeting are moot and the first cause of action in the petition is severed and dismissed.

Turning to the April meeting, petitioners allege three defects. The first defect concerns notice of the meeting, and petitioners allege that it was not issued by shareholders who were eligible to vote. The second defect arises from petitioner's claim that shareholders not eligible to vote actually voted at the meeting. Finally, petitioners allege that respondents Cristancho and Grabanski were not eligible to serve as directors of the HDFC because Cristancho was in arrears for more than two months maintenance ten days prior to the election and Grabanski is not a lawful shareholder of the HDFC.

In their answer, respondents detail the procedure undertaken for the April 2018 meeting. Respondents allege that on April 6, 2018, a group of the HDFC's shareholders comprising ten percent or more of

shareholders eligible to vote called, by written notice, a special meeting of shareholders to be held on April 17, 2018, at 7:00 p.m. in the lobby of the Building (the "notice"). A copy of the notice has been provided to the court. The notice was sent to all shareholders, regardless of whether or not the shareholder was eligible to vote at the special meeting, by both first-class mail and certified mail. Respondents have provided proof of service. According to the notice, the purpose of the meeting was to remove petitioners as directors and officers of the HDFC and to elect successors to fill any vacancies created by the removal of directors.

Article VIII, § 5, of the HDFC's bylaws provides in pertinent part that: "[a]t any regular or special meeting of the shareholders duly called, any Director may be removed with or without cause by a majority of Total Votes and a successor may then be elected to fill the vacancy thus created." The HDFC's bylaws Article IX, § 3, provides that: "[a]ny officer of the Corporation may be removed, either with or without cause...by a vote of shareholders representing a majority of the Total Votes." Article VI § 9 provides that "[a]ll shareholders in good standing in the Corporation ten (10) days before the date of any meeting . . . are eligible to vote at the meeting."

On April 17, 2018, at 7:00 p.m., the special meeting of the shareholders of the HDFC was held in the lobby of the Building. Respondents claim that a quorum was established, and ten shareholders were present, in person or by proxy, at the April Meeting, to wit: Jeremy Fenn-Smith; Josephine Sibley; Grabanski; Clara Meregildo; Pearring; Cristancho; Tang Fan; Nurys Garcia; Sharon Prescod; and Hao Feng.

Charlisse Johnson, NHS Program Coordinator for Neighborhood Housing Services of New York City, also attended the April Meeting as a third-party monitor to conduct the election of directors of the HDFC. Respondents allege that Charlisse Johnson vetted shareholders' eligibility to vote and determined the validity and effect of proxies prior to the meeting. Due to a current rent roll being inaccessible or non-existent, Ms. Johnson vetted the Corporation's shareholders' eligibility to vote based upon at least one year's proof of maintenance payments from each shareholder.

Three shareholders attended the April Meeting by proxy, as follows: Jeremy Fen-Smith appointed Cristancho as his proxy; Josephine Sibley appointed Rakesh Nigam as her proxy; and Tang Fan appointed Lauren Santos as his proxy.

Nine of the ten shareholders that attended, in person or by proxy, were eligible to vote at the April Meeting. The nine shareholders present that were eligible to vote were: Jeremy Fenn-Smith; Josephine Sibley; Grabanski; Clara Meregildo; Pearring; Cristancho; Tang Fan; Nurys Garcia; and Hao Feng. Sharon Prescod, a unit owner and shareholder of the HDFC, was present in person at the April Meeting, but was not eligible to vote due to being more than one month in arrears in the payment of monthly maintenance charges.

Ultimately, at the April Meeting, petitioners were removed as directors and officers of the Corporation after voting upon duly-made motions as follows. Eight shareholders, constituting a total of 2,000 votes, voted in favor of the removal of petitioners Green, Clark, and Green as directors and officers of the HDFC; zero shareholders voted against; and one of the two shareholders of Apartment 1 in the building, constituting 125 votes, abstained from voting. Also at the April meeting, respondents were nominated for election as directors, and a vote was held. The voting results were identical to the vote removing petitioners. After they were voted in as directors, respondents met and elected Grabanski as President; Cristancho as Treasurer; and Pearring as Secretary of the Corporation.

Charlisse Johnson certified the aforesaid results of the election of Directors of the Corporation held at the April meeting, and respondents have provided a copy of her Election Certification dated April 20, 2018 (the "certification"). The certification states in pertinent part as follows:

To Whom it May Concern,

Neighborhood Housing Services provides training and technical assistance services for residents to effectively run limited-equity cooperatives. ...

Our staff was called in order to assist with election preparation and election monitoring. As per the by-laws, our agency bases quorum on the number of the Shareholders in the building. For example: ten (10) Shareholders in the building will lead to a quorum of six (6). All would have to be in good standing to vote. Based on the nature of the foreclosure on the building, our staff spoke with Mr. Mark Matthews Asset Manager, from HPD. He stated that quorum could be met amongst the number of shareholders that are in good standing. A current rent roll was not accessible. Therefore, Mr. Luis Salguero of Asset Management, instructed our staff to base the election on one year's worth of documents that can serve as proof of payment. For example: bank statements, receipt of payment, money orders and etc.

Neighborhood Housing Services staff conducted an Annual Election on Tuesday, April 17, 2018 at 7:00 PM for 67-69 St. Nicholas Avenue HDFC. All positions were cleared. Candidates were nominated to be on the ballot. Quorum was met amongst the number of eligible Shareholders. All eligible Shareholders had an opportunity to vote, the results were tallied and certified. 67-69 St. Nicholas Avenue HDFC Board of Shareholders members are listed below. The new Board will be in placed effective immediately.

On this record, the court finds that both motions and the petition must be denied without a hearing. Assuming *arguendo* that petitioners could establish that the April 2018 meeting was also not in conformance with the HDFC's bylaws, the petition would nonetheless be denied in the exercise of this court's discretion and the interests of justice. Here, it is clear, that a majority of the shareholders exercised their judgment and voted petitioners out and respondents on to the board. Their will should not be freely disregarded by this court. On this record, a hearing would not lead to a different result.

Moreover, respondents have demonstrated, through the certification and other proofs on this record, a diligent effort to ensure that the bylaws were followed in noticing the April meeting, the removal of petitioners and their election. To set aside the election at the April meeting would reward petitioners' efforts to thwart same. Indeed, petitioners have not demonstrated that they made any efforts to assist respondents and/or the HDFC at the April meeting to ensure that the procedures followed thereat complied with the HDFC's bylaws (i.e., providing a copy of the current rent roll). Otherwise, petitioners claims largely amount to form over substance, insofar as they seek to hide behind bylaws provisions in an effort to retain their positions at the HDFC in contravention to the will of the shareholders. The court notes that the petition is not supported by an affidavit from any of the shareholders of the HDFC aside from the named petitioners themselves.

Moreover, The HDFC is in dire financial straits. Respondents have provided a copy of an In Rem Tax Foreclosure Post-Judgment Notice from the NYC Department of Finance dated April 3, 2018, which reflects that the HDFC owes \$1,070,674.33 in unpaid real property taxes, charges, and interest. Further, there are claims of self-dealing and breach of fiduciary duty. While the court declines to address the merits of these claims, they nonetheless give the court pause. This litigation is already a waste of the HDFC's limited resources, and even if a hearing could possibly lead to a different result, the HDFC would incur bear the burden of further litigation costs.

At oral argument on these motions, the reality that the City may foreclose upon the parties was impressed upon the parties. The court cannot say that setting aside the election would be appropriate, given irrefutable evidence that petitioners, at best, mismanaged the HDFC, resulting in its current finan-

cial situation. Petitioners actions and/or inaction could cause all of the shareholders to lose their beneficial interest in the HDFC.

Accordingly, the petition and both orders to show cause are denied in their entirety.

As for respondents' counterclaims, they are severed and dismissed without prejudice to bring in a plenary action, as they are not appropriately asserted in this summary proceeding.

Conclusion

In accordance herewith, it is hereby

ORDERED that motion sequence numbers 001 and 002 are denied in their entirety; and it is further

ORDERED that the petition is denied; and it is further

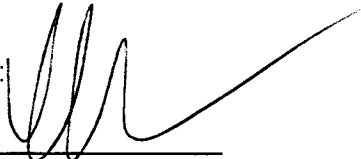
ORDERED that respondents' counterclaims are severed and dismissed without prejudice to bring in a plenary action; and it is further

ORDERED that this proceeding is dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 8/2/18
New York, New York

So Ordered: 

Hon. Lynn R. Kotler, J.S.C.