

Matter of Singleton v Morton

2020 NY Slip Op 33612(U)

November 2, 2020

Supreme Court, New York County

Docket Number: 156354/2020

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER

PART 6

Justice

**In the Matter of the Petition to Set Aside the
Election of Directors and the Election of Officers
Of 303 West 122 Street H.D.F.C.
Held on July 16, 2020**

INDEX NO. 156354/2020
MOTION DATE
MOTION SEQ. NO. **1, 2**
MOTION CAL. NO.

**ANTONIO SINGLETON, MARTHA FREEMAN,
AND MARY COLLINS,**

DECISION AND ORDER

Petitioners,

- against -

**BARBARA MORTON, EITAN AGAI,
BRIANNE MUSCENTE, ANDREW ROMAN
And PAULINA MONTERS,**

Respondents.

The following papers, numbered 1 to ____ were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits _____

Replying Affidavits

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits _____	2
Replying Affidavits	

Cross-Motion: Yes X No

Petitioners Antonio Singleton (“Mr. Singleton”), Martha Freeman (“Ms. Freeman”), and Mary Collins (“Ms. Collins”) (collectively, “Petitioners”) commenced this special proceeding, seeking an Order:

1. Declaring that the purported special meeting and election held on July 16, 2020 and of July 17, 2020 of members of the Board of Directors of 303 W. 122nd Street H.D.F.C. is null and void; and
2. Directing Respondents to produce records of the July 16, 2020 and July 17, 2020 shareholders meeting; and
3. Pending the hearing and determination of the within Petition, so as to avoid further damages and self-dealing, Petitioners respectfully demand that each of

the Respondents, purportedly elected as members of the Board of Directors of the Co-op, be enjoined, restrained and prohibited from acting or holding themselves out as or from exercising any of the duties or functions of directors or officers of the Co-op.

Petitioners also seek a Judgment against Respondents Barbara Morton (“Ms. Morton”), Eitan Agai (“Mr. Agai”), Brianne Muscete (“Ms. Muscete”), Andrew Roman (“Mr. Roman”), and Paulina Monters (“Ms. Monters”) in amount to be determined by the Court based upon the Respondents’ violation of the terms and of the conditions of the Offering Plan and Amendments, self-dealing and breach of their fiduciary duty, plus costs and disbursements.

Respondents bring an Order to Show Cause (Motion Sequence 2) seeking an Order:

1. Directing the Petitioners to turn over to the Respondents all books, records, ledgers, bank statements, blank stock certificates, copy of all stock certificates, corporate seal, blank proprietary leases, copies of executed leases, corporate documents; leases; files, vendor information, building insurance, all keys, security codes, and copies of all documents; and
2. Prohibiting Petitioners from having access to banking accounts, withdrawing any monies from said account, collecting rent and have any control of the HDFC; and
3. Directing Petitioners to sign all necessary forms for Respondents to have access to all funds in the Citibank account number 9933112442; and
4. Staying Petitioners from managing the HDFC, having access to HDFC office, HDFC files, tenants and shareholders files, collecting rent/maintenance and/or having any management control over the Subject Premises; and
5. Awarding costs, attorney fees and disbursements of this proceeding should be paid by Petitioners.

The Court heard oral argument on September 15, 2020, October 20, 2020, and October 27, 2020.

On September 16, 2020, the Court issued an Order granting Motion Sequence 2 to the extent that:

It is hereby ORDERED that Petitioners are stayed from acting as officers and members of the Board of Directors of 303 W. 122nd Street HDFC, which includes managing, collecting rent/maintenance, sending letters to tenants, shareholders, licensees, invitees, vendors, using HDFC funds of any kind, selling apartments, entering into contract of sale on behalf of 3030 W. 122nd Street HDFC, using HDFC office and files; it is further

ORDERED that the Petitioners are directed to turn over to the Respondents all books, records, ledgers, bank statements, bank stock certificates, copy of all stock certificates, corporate seal, bank proprietary leases, copies of executed leases, corporate documents, leases, files, vendor information, building insurance, all keys, security codes, and copies of all documents by September 16, 2020 at 5:00pm; and it is further

ORDERED that Petitioners are to sign any and all documentation for the transfer of access of funds in the Citibank account 9933112442 and any other account that the Petitioner may maintain by and on behalf of the HDFC; and it is further

ORDERED that Respondents shall not make any expenditure in excess of \$5,000.00, without court order...

On October 27, 2020, the proceeding was marked fully submitted and all responsive documents were submitted.

Background/Factual Allegations

According to the Verified Petition:

303 W. 122nd Street H.D.F.C. ("Co-op) is a domestic cooperative corporation formed pursuant to the Laws of the State of New York and formed under Section 402 of the BCL and Article XI of the Private Housing Finance.

Mr. singleton, is a shareholder of the Co-op and resides at 303 West 122nd Street, New York, New York, 10027, Apt. #1.

Ms. Freeman, is a shareholder of the Co-op and resides at 303 West 122nd Street, New York, New York, 10027, Apt. #22.

Ms. Collins, is a shareholder of the Co-op and resides at 303 West 122nd Street, New York, New York, 10027, Apt. #21.

Ms. Morton, is a shareholder of the Co-op and resides at 303 W. 122nd Street, New York, New York, 10027, Apt, #53.

Mr. Agai, is a shareholder of the Co-op and resides at 303 W. 122nd Street, New York, New York, 10027, Apt. #52.

Ms. Muscente, is a shareholder of the Co-op and resides at 303 W. 122nd Street, New York, New York, 10027, Apt. #67.

Mr. Romar, is a shareholder of the Co-op and resides at 303 W. 122nd Street, New York, New York, 10027, Apt. #31.

Ms. Monters, is a shareholder of the Co-op and resides at 303 W. 122nd Street, New York, New York, 10027, Apt, #37.

Respondents contend that there are 42 apartments in the Co-op out of which there are 24 shareholder owned, 9 apartments where shareholder passed away and waiting estate designation, 7 vacancies, and 2 renters.

On July 16, 2020, the Co-op held a shareholders meeting. Respondents contend that 17 shareholders appeared at the meeting. On July 17, 2020, the Board elected the following officers: Ms. Morton, President; Mr. Agai, Vice President; Ms. Muscente, Secretary; Mr. Romar, Treasurer; and Ms. Montero, Board Member.

Petitioners' Contentions

Petitioners asserts that the Notice of a Special Meeting of the Shareholders of the Co-op to elect a new Board of Directors, was not issued pursuant to the By-Laws, which requires that a Notice of Special Meeting of Shareholders must be issued by the Co-op President, directors, or shareholders, and if it is to be issued by the shareholders, it must be issued by shareholders holding at least 10% of the issued and outstanding shares of the corporation. Petitioners argue that since the Notice was not valid, the meeting held on July 16, 2020 was not effective to elect members of the Board of Directors of the Co-op. Petitioners argue that Respondents were one vote short of a duly elected quorum, since 13 shareholders in good standing must appear, and the Respondents admit to only 12 shareholders.

Petitioners further argue that the Notice was not given personally or by first class mail to the shareholder entitled to vote at such meeting, not less than 10, or more than 50 days before the date of the meeting. Petitioners assert that pursuant to the By-laws, a quorum of shareholders was not present at the meeting. Petitioners contend that pursuant to Sec. 8, Art. III of the By-laws, only shareholders in good standing, 10 days before the date of any meeting, are entitled to notice of the meeting and are eligible to vote or to be elected to the Board, who owe two months or less in maintenance. Petitioners assert out of the 25 shareholders, five of the shareholders were not eligible to vote, therefore there was not a quorum present. Petitioners argue that the election of members of the Board of Directors held on July 16, 2017 is null and void because of the failure of the said Respondents to comply with the Rules and By-Laws of the Co-op.

Petitioners argue that an independent observer, Justin George from NHS, had been retained by Respondents to monitor the meeting. Petitioners assert that Mr. George has refused to issue any confirmation that the meeting was lawful. Petitioners assert that only one proxy was acknowledged, as the other two are either not acknowledged at all, or the notary stamp is missing. Petitioners argue that the proxy form, as used by the H.D.F.C., confirms that the H.D.F.C.'s requirement of a signed and acknowledged proxy was not adhered to, on July 16, 2020. Petitioners further argue that Respondents have not provided proof of mailing of the July 2, 2020 Notice, or that all of the shareholders received notice in person. Petitioners assert that the Affidavit of Service is not valid because it is from a self-interested party. Petitioners argue that Respondents' own sign-in sheet shows that only 8-9 people who could vote, appeared, since apartment #4 is an Estate, with no fiduciary,

and the shareholder is dead, as is apartment #7, with \$30,000.00 in arrears, and apartment #32, whose arrears total an excess of two months, Apartment #8 owes more than two months; apartment #54 allegedly appeared “remote”, with no explanation for same, nor resolution which permits this. Apartment #55 owes arrears in excess of two months as well.

Respondents’ Contentions

In opposition, Respondents argue that on July 2, 2020, Notice was served by personal service on the shareholders at their apartment entrance doors pursuant to the By-laws. Respondents assert that the affidavit of Service of Ms. Morton acknowledges service of the Notice, and attendance of a quorum (17 out of 24 shareholders) at the July 16, 2020 Special Election, which demonstrates that there was a duly called meeting. Respondents argue that pursuant to Article VI Section 8 of the By-laws, a quorum was established. Respondents assert that 17 shareholders appeared at the meeting fulfilling the requirements of Section 8 entitled Quorum for a majority of the shareholders to have a meeting, and Ms. Collins in Apartment 21 was present, refused to sign the sign-in sheet and abstained. Respondents argue that Ms. Collins was removed as a Board Member on October 7, 2019 for being more than two months in arrears.

Respondents argue that “As noted by the affidavits, nomination, ballots, sign-in sheet, proxies, rent roll, Bylaws, the minutes of the election, a quorum was established and confirmed on video by Petitioner Antonio Singleton.” Respondents assert that there was a quorum because 17 out of the 24 shareholders appeared, 13 in person and 4 by proxy, 10 shareholders present were eligible to vote, 2 shareholders present were ineligible to vote, 3 proxies present were eligible to vote, and 2 proxies present were ineligible to vote.

Legal Standard

“To warrant any interference by the court in the internal affairs of the corporation, a petitioner must make a clear showing of impropriety or action outside the scope of authority. *Mishaan v. 1035 Fifth Ave. Corp.*, 47 Misc 3d 930, 937 [Sup Ct, NY County 2015]. “A corporation’s scope of authority is defined by the Business Corporation Law and the corporate by-laws.” *Id.* “Where a co-op’s by-laws are clear, they must be followed. *Id.*”

“Under section 619 Business Corporation Law, judicial review of corporate elections is broadened to authorize the court to “take such other action as justice may require.” *Crass v. Budd Publications, Inc.*, 28 AD2d 1100, 1100 [1st Dept 1967]. (internal citation omitted). “In regard to corporate elections, Business Corporation Law § 619 authorizes the court, upon a petition of any shareholder aggrieved by an election, to confirm an election, order a new election, or take such other action as justice may require.” *Mishaan*, 47 Misc 3d at 937 (internal citation omitted). “In considering whether to confirm or set aside an election, the court must determine whether improprieties produced a different result from what it otherwise would have been or whether an inequitable result has been thereby produced.” *Id.* (internal citation omitted). “However, the election may be set aside only where it is so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require it.” *Id.* (internal citation omitted). “The failure to give proper notice in accordance with applicable statutes and the corporate by-laws would render an election invalid ... while a meeting scheduled in compliance with the statutes and by-laws would not.” *Id.* at 938 (internal citation omitted).

Article VI Section 1 of the By-laws entitled Annual Meeting states:

A meeting of shareholders shall be held annually for the election of directors and the transaction of other business on the first day of March (month) of each year, if it is not a legal holiday and, if it is a legal holiday, then on the next succeeding day not a legal holiday.

Article VI Section 4 of the By-laws entitled Special Meeting states:

Special meetings of the shareholders of the Corporation may be called at any time by the President or by order of the Board given at a meeting of the Board or by shareholders holding ten (10%) percent of the issued and outstanding shares of the Corporation. The notice or waiver of notice of special meeting shall state the time and place of such meetings and the purpose of the meeting. No business shall be transacted at a special meeting except as stated in the notice.

Article VI Section 6 of the By-laws entitled Notice of Meetings states:

Written notice of any meeting will state the place, date and hour and given personally or by first class mail to each shareholder entitled to vote at such meeting not less than ten nor more than fifty days before the date of the meeting. Written notice of a special meeting will indicate that it is being issued by or at the direction of the person or persons calling the meeting and state the purpose or purposes for which the meeting is called.

Article VI Section 8 of the By-laws entitled Quorum states:

At all meetings of the shareholders of the Corporation, the presence, in person or by proxy, of shareholders who own a majority of all shares which are issued and outstanding shall be necessary to constitute a quorum for transaction of business. If there is no quorum at any meeting, the holders of a majority of shares which are present may adjourn the meeting to some future time and place. At the reconvened meeting, the same quorum will be required.

Article VI Section 9 of the By-laws entitled Eligibility to Vote states:

All shareholders in good standing in the Corporation ten (10) days before the date of any meeting are entitled to notice of the meeting and are eligible to vote at the meeting. No shareholder shall be eligible to vote or to be elected to the Board who is shown on the books or management accounts of the Corporation to be behind in two or more monthly payments due the Corporation under the Proprietary Lease.

Pursuant to Article VI Section 10 of the By-laws entitled Number and Manner states:

At every meeting of the shareholders, each shareholder present, either in person or by proxy, shall have the right to cast one vote per share on each question. In the event the shares allocated to one apartment are held by more than (sic) one person, such persons shall jointly or separately cast their allotted votes, with each person entitled to cast

the fraction of the votes which represents his or her interest. Voting by shareholders shall be by voice vote unless any shareholder present at the meeting, in person, demands a vote by written ballot.

Pursuant to Article VI Section 11 of the By-laws entitled Majority Rule states:

a) Meeting Votes. The votes of shareholders, voting in person or by proxy, which are present at a duly conducted shareholders meeting (“Meeting Votes”), shall decide by majority vote any question brought before the meeting, unless the question is one for which any express provision of law, these By-Laws, the Proprietary Lease or the Certificate of Incorporation requires a different vote, in which case such express provision shall govern and control.

b) Total Votes. Votes on amendments of these By-Laws and other matters which require a vote of all the issued and outstanding shares of the Corporation (“Total Votes”), shall be decided by a majority of the Total Votes unless the question requires a different percentage of the Total Votes, in which case such express provision will govern and control.

Discussion

Here, Respondents have properly served pursuant to Article VI Section 6 of the By-laws entitled Notice of Meetings. Ms. Morton submits an Affidavit of Service as Exhibit T to Motion Sequence 2. Ms. Morton states that:

On July 2, 2020, I personally served at each apartment entrance door at 303 West 122nd Street, New York, New York “A Special Meetings of Shareholders: A Letter from the President (See attached)” upon:

Apt. No. Shareholder	Apt. No. Shareholder
1 Antonio Singleton	37 Paulina Montero
2 Lily Chase	43 Dewitt King
3 June Howard	45 Julia Townson

4 Merle Benard	47 Adam Rosenwach
5 Desiree Joyner	52 Eitan Agai
6 Gila Carlin	53 B & J Morton
21 Mary Collins	54 Denise Fortune
22 Martha Freeman	55 Romona Laroche
23 Estate of P. Grant	56 B. Webster & Ann Still
24 M. Reyes Dawson	62 Patroce Lashue
25 Michelle James	63 Gisella Clarke
26 Horace Neal	64 Alice Walker
27 Terrence Moore	65 Mary Pedrosa
31 Andrew Romar	66 Stephen Carbo
32 Joseph & Barabra Fobbs	67 Brianne Muscente
33 Timothy Kennedy	
36 Lissie Carrasquillo	

Ms. Morton personally served each shareholder entitled to vote 14 days before the date of the meeting indicating the purpose of the special meeting.

Having determined that there was proper service, the Court turns to whether there was a quorum at the July 16, 2020 meeting. It is unclear which shareholders out of the 24 shareholders and four proxies that appeared were eligible to vote pursuant to Article VI Section 9 of the By-laws, especially since it was Petitioners who held the books and records and accounting of the Co-op. Therefore, there will be hearing to determine which shareholders listed on the attendance sheet were eligible to vote pursuant to Article VI Section 9 of the By-laws.

Wherefore it is hereby

ORDERED that the parties shall appear for a hearing to determine which shareholders listed on the attendance sheet (Exhibit C, Answer) were eligible to vote as of July 6, 2020, pursuant to Article VI Section 9 of the By-laws. The hearing shall be held on November 18, 2020 at 10:00am via Microsoft Teams.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: November 2, 2020

ENTER: 
_____ J.S.C.

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**