Kilian v 220/67 Owners Corp.
2023 NY Slip Op 33169(U)
September 13, 2023
Supreme Court, New York County
Docket Number: Index No. 153077/2023
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** ***Justice*** **PART** **14**

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ALYX KILIAN,

Petitioner,

- v -

220/67 OWNERS CORP., ANTHONY IADEVAIA, individually and in his capacity as President of 220/67 Owners Corp.'s Board of Directors, SCOTT LUBARSKY, in his capacity as Vice President of 220/67 Owners Corp.'s Board of Directors,

Respondents,

SETH HORWITZ, in his capacity as a member of 220/67 Owners Corp.'s Board of Directors, MAX HERZOG, in his capacity as a member of 220/67 Owners Corp.'s Board of Directors, JUE WONG, in her capacity as a member of 220/67 Owners Corp.'s Board of Directors, and BARRY SEGEN, in his capacity as a member of 220/67 Owners Corp.'s Board of Directors,

Nominal respondents entitled to notice of this special proceeding

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INDEX NO. 153077/2023

MOTION DATE 07/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5,6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33

were read on this motion to/for SPECIAL PROCEEDING.

The amended petition to vacate and set aside the results of a December 6, 2022 election, to remove certain respondents from their positions, to compel respondents to permit petitioner to review certain records is denied and respondents' cross-motion to dismiss is granted.

Background

Petitioner is a resident and shareholder at respondent 220/67 Owners Corp. (the "Cooperative"). She insists that this Court must set aside the results of a December 6, 2022

election for the directors of the Board of the Cooperative. Petitioner explains that each shareholder is entitled to cast up to 7 ballots which, when accounting for the allegedly 30,586 shares present during the election, meant that the highest possible vote total (assuming every shareholder voted and used all 7 ballots) would be 214,102. Petitioner questions how there could have been 238,574 votes cast and insists that no explanation has provided for the extra votes.

She insists that in prior elections, she would ask the Cooperative's attorney for details about the vote tallies but on this occasion, she was referred to the Cooperative's managing agent ("MKI"). Petitioner complains that none of the Cooperative's shareholders requested the appointment of an election inspector and suggests that respondent Iadevaia (who is allegedly not a shareholder) unilaterally picked MKI to be the election inspector. She claims that MKI refused to respond to her requests for more detailed information.

Petitioner also argues that respondents Iadevaia and Dubarsky, who were both elected to the Board in the December 2022 election, are not eligible to serve on the Board because they are not shareholders or members of the Cooperative. She brings three causes of action 1) to set aside the election results, 2) for declaratory relief that the two individual respondents are not eligible to serve in their roles on the Board and 3) that she be permitted to inspect the election records.

Respondents (both respondents and the "nominal" respondents) cross-move to dismiss. They insist that this entire case relies upon an unsubstantiated hearsay statement from an unidentified corporate agent about the number of votes cast in the last election. Respondents observe that petitioner was actually elected to the Board in the very election about which she complains.

They explain that petitioner was president of the Cooperative in 2016 when the Board hired MKI to act as the managing agent and that MKI tallied the results of every election since

then (except for the 2021 election, which was held virtually). Respondents observe that the Cooperative's attorney supervised the 2021 election.

They explain that ten candidates ran for election in December 2022 and that petitioner received the fifth highest number of votes. Respondents maintain that once the directors were elected Iadevaia (who was second in votes) was elected President and Lubarsky (who was fourth) was elected as Vice President by a unanimous vote. They insist that the Cooperative's by-laws provide that a director need not be a shareholder and that being a *spouse* of a shareholder is sufficient. Respondents observe that after this proceeding was commenced respondent Iadevaia resigned from both the Board and as president.

Respondents maintain that MKI sent petitioner the vote tallies but not the underlying spreadsheet (which shows how each shareholder's vote is cast). They argue that petitioner failed to disclose the identity of the person who told her the total number of shares present during the election and respondents decided not to compromise the anonymity of the shareholder votes by disclosing the spreadsheet.

They insist that the amended petition was not timely served, that petitioner did not properly plead futility (a requirement for a shareholder derivative claim) and that there is no basis to challenge the election. Respondents maintain that there is no basis for the suggestion that MKI counted additional votes after the election ended.

In reply, petitioner emphasizes that respondents' attorney agreed to accept service of the amended petition and, in exchange, petitioner agreed to extend respondents' time to reply to this amended pleading.

The Election- the First and Third Causes of Action[1]

In this Court's view, petitioner did not meet her burden to demonstrate any irregularities with the December 6, 2022 election result. Petitioner did not cite to any admissible evidence for her allegation that the number of votes cast is greater than the number of possible votes for such an election. In the amended petition, she claims that a representative for MKI (the managing agent) told her "that the shareholders who participated in the election, either [sic] or by proxy or in person, held 30,586 shares" (NYSCEF Doc. No. 6, ¶ 22).

A review of the record reveals that respondents included an email thread that detailed the total number of outstanding shares in connection with an election in 2021 (NYSCEF Doc. No. 24 at 13-17). Petitioner received the email with this information (*id.*). The Court added up the shares detailed in this email and it amounted to 40,845. This means, when accounting for the fact that shareholders could cast seven ballots, that the total number of outstanding votes would far exceed the total votes in the election in question here (238,574 were cast, far fewer than 285,915, which is 40,845 multiplied by seven). Accordingly, to the extent that the amended petition suggests that the total votes cast was impossible, that claim is wholly without merit.

That leaves petitioner with the sole contention that the total votes cast is improper because someone from MKI allegedly told her a lower number of shares were involved in the election. But petitioner does not identify who told her this information or whether some other member of the Board confirmed this amount as the total votes. Such a vague allegation is not sufficient to throw out an election given that petitioner's only issue is that someone orally gave her incorrect information.

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[1] In light of the parties' stipulation (NYSCEF Doc. No. 31) concerning the amended petition, the Court denies respondents' claims about improper service. This Court prefers to decide cases on their merits.

And in opposition, respondents included affidavits from MKI employees that contradict petitioner's vague and unsubstantiated account. Ms. Chan, who collected the ballots at the election meeting, contends that she did not recall petitioner asking her about the number of shares involved in the election (NYSCEF Doc. No. 26, ¶ 13). Mr. Catinella, another employee for MKI who as at the meeting, asserts that he and Ms. Chan were the only individuals at the meeting from MKI and that he did not speak with petitioner about the number of shares (NYSCEF Doc. No. 27, ¶ 6). And petitioner did not submit any affidavit in reply to refute these specific assertions.

Moreover, another MKI employee (Mr. Adams) observed that petitioner has been a member of the Board since at least 2016 (when MKI was hired) and that she was the president of the Board when the Cooperative entered into a management agreement with MKI (NYSCEF Doc. No. 18, ¶¶ 3, 4. He contends that MKI has counted the votes for every election since 2016, except for the 2021 election (*id.* ¶ 6). Mr. Adams contends that he sent the final vote tallies to petitioner for the December 2022 election, including the breakdown of how many votes each candidate received (*id.* ¶ 19).

The Court also finds that petitioner is not entitled to review the underlying spreadsheet, maintained by MKI, that details the specific way in which shareholders voted. Mr. Adams insists that at least since MKI was hired (in 2016) no Board member has ever asked for or received this spreadsheet (NYSCEF Doc. No. 18, ¶ 21). Under these circumstances, the Court finds that there is no reason to require the production of the spreadsheet. The specific candidate for whom each vote was cast is not an issue here; according to petitioner, it is the *total* number of votes cast that is allegedly suspicious. That is curious, however, because petitioner, as a shareholder and former president of the coop, certainly knew how many total shares the

Cooperative issued. The total number of votes possible is 285,915 (at least on this record) and there were only 238,574 votes cast; petitioner's assertion that too many votes were cast makes no sense. Her claim that votes were somehow added after the election meeting was over is unsupported and entirely too speculative.

Petitioner's additional assertion that MKI should not have been an election inspector is contradicted by the fact that the by-laws state that "Inspectors of election *shall not* be required to be appointed at any meeting of shareholders unless requested by a shareholder present" (NYSCEF Doc. No. 7, Article 11, § 6). Petitioner did not adequately express a sufficient objection to MKI's supervision of elections which, according to respondents, has routinely happened dating back to when *petitioner was serving as president of the Board*.

Second Cause of Action

The Court also denies the second cause of action which seeks declaratory relief that Lubarsky is not eligible to serve as Vice President (the President resigned since this proceeding was commenced).

Paragraph 4 of the amended petition incorrectly states that the Cooperative was organized and existing pursuant to the Cooperative Corporations Law—it was not. The certificate of incorporation (NYCEF Doc. 19) clearly states the Cooperative was formed under the Business Corporation Law. In any event, petitioner cites to the Cooperative Corporations Law § 64 for the proposition that only a member of the Cooperative can serve as president or vice president. But petitioner failed to cite any law or appellate decision that states that a residential cooperative incorporated under the Business Corporation Law (which this cooperative is) is nevertheless constrained by the Cooperative Corporations Law. Here, the by-laws provide that "It shall not

be necessary for a director of this Corporation to be a shareholder" (NYSCEF Doc. No. 7, Article III, § 2). And they also provide that the "president shall be a member of the Board of Directors, and shall be a shareholder or the spouse of a shareholder, but none of the other officers need be a member of the Board of Directors or a shareholder or the spouse of shareholder" (*id*. Article IV, § 1). That clearly refutes petitioner's request for declaratory relief.

The Court observes that petitioner points to a First Department case in which she claims that the Cooperative Corporations Law was applied to a resident cooperative organized under the Business Corporation Law (*Oliver 889 LLC v 889 Realty Inc.*, 212 AD3d 531, 183 NYS3d 352 [1st Dept 2023]). In that case, the First Department held that a voting agreement in a mixed-use cooperative violated the *Business Corporation Law* (*id*. at 531). While there were a few citations to the Cooperative Corporations Law in the opinion, petitioner did not adequately explain how the *Oliver 889 LLC* action stands for the principle that the Cooperative Corporations Law supersedes long standing by-laws of a residential cooperative organized under the BCL.

The remaining cases cited by petitioner also do not compel the Court to strike down the Cooperative's by-laws. In fact, petitioner claims at one point, without citation, that the "clear implication is that the CCL applie[s] to the cooperative corporation even though it was formed under the BCL" (NYSCEF Doc. No. 33 at 9). It is a significant leap from such an assertion to the conclusion that large portions of by-laws are now somehow prohibited by a statute under which the Cooperative was *not* formed.

Summary

In this special proceeding the Court must consider the burdens on each side. Petitioner had to raise a sufficient allegation that there was a basis to both set aside the December 2022

election and for the inspection of the underlying records (which would enable her to see which neighbors voted for her and who voted against her) . It may be that, as Ms. Chan speculates, that Ms. Chan *may* have provided petitioner with a number regarding the total shares present at the time the question was asked (although Ms. Chan did not specifically recall such a conversation). But, as she observes, the number of shareholders present increased as the meeting proceeded.

In other words, a possible offhand comment does not establish petitioner's burden to set aside an election under Business Corporation Law § 619 especially where petitioner did not bother to clarify any of her assertions in reply in light of the affidavits submitted by respondents. Moreover, petitioner, as a shareholder and former president of the Board for the Cooperative, certainly knew how many shares the Cooperative issued. Her allegation that too many votes were cast is wholly without merit on this record.

Accordingly, it is hereby

ORDERED respondents' cross-motion to dismiss is granted; and it is further

ADJUDGED that the application is denied and the amended petition is dismissed, with costs and disbursements to respondents; and it is further

ORDERED the Clerk is directed to award costs and disbursements in favor of respondents and against petitioner upon presentation of proper papers therefor.

9/13/2023				ARLENE P. BLUTH, J.S.C.
DATE				
CHECK ONE:	X CASE DISPOSED		NON-FINAL DISPOSITION	
APPLICATION:	GRANTED	X DENIED	GRANTED IN PART	OTHER
	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE