

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA PART 31  
Justice

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ANIL AGARWAL, et al.		Number <u>2318</u>	2008
- against -		Motion	
		Date <u>May 15,</u>	2008
REGO PARK GARDENS INC., et al.		Motion	
	x	Cal. Number <u>1</u>	
		Motion Seq. No. <u>1</u>	

The following papers numbered 1 to 19 read on the motion by plaintiffs Anil Agarwal, Anita Tripathi, Syed Asif Shah and Manuel Real for an order (1) granting a preliminary injunction enjoining defendants from creating or committing any new debts or new lines of credit pertaining to Rego Park Gardens Inc., or any of its assets pending the determination of this action; (2) declaring the election held on November 7, 2007 to be null and void; (3) scheduling a new election, with independent supervision; (4) declaring the offices of the newly elected directors vacated; (5) directing defendants to allow the plaintiffs to examine and inspect complete shareholder records consisting of the shareholder's Record Book as of November 7, 2007, the proprietary leases for all units as of November 7, 2007, the minutes of meetings, and the proxies used and counted at the November 7, 2007 election; and (6) awarding costs. Defendants Rego Park Gardens Inc., Bellmarc Property Management, Subrata Chowdhury, Stella Chan, Jiwei Yuan and Fatima Sherzad cross-move for an order dismissing the complaint, pursuant to CPLR 3211(a)(1) and (7), and BCL § 619, on the grounds that the complaint fails to state a cause of action, documentary evidence and plaintiffs failure to pursue their exclusive remedy under BCL § 619.

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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiffs Anil Agarwal, Anita Tripathi, Syed Asif Shah and Manuel Real are residential shareholders in Rego Park Gardens Owners, Inc. (Rego Park Gardens), sued herein as Rego Park Gardens Inc., a cooperative apartment complex. Defendant Bellmarc Property Management (Bellmarc) is the managing agent of Rego Park Gardens, and oversees the cooperative's annual meeting. Plaintiffs and defendants Subrata Chowdhury, Stella Chan, Jiwei Yuan and Fatima Sherzad were all candidates for the November 7, 2007 election to the Board of Directors of Rego Park Gardens. None of the plaintiffs were elected, while all of the individual defendants were elected.

Plaintiffs argue that they are entitled to a preliminary injunction, because the notice of election, ballots, proxies stated that the number of directors to be elected was four, despite the provision in the Bylaws setting the number of directors at five and because the defendant management company failed to comply with plaintiffs' written demand to examine the proxies and other corporate records. Plaintiffs further argue that they are entitled to declaratory relief, and to inspect and examine the corporate records pertaining to the election. Defendants cross-move in opposition and argue that the complaint should be dismissed because it does not comply with section 619 of the Business Corporation Law, that the documentary evidence establishes that the number of directors, election notice, proxies, ballot and election all complied with the corporation's bylaws, that the complaint fails to state a cause of action and that plaintiffs fail to satisfy the standard for a preliminary injunction.

#### **Business Corporation Law § 619**

BCL § 619 provides that, "[u]pon the petition of any shareholder aggrieved by an election ..., the supreme court ... 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."

Plaintiffs commenced this action by an order to show cause dated February 5, 2008, and a summons and complaint dated

January 16, 2008, and seeks to declare null and void the election of the Board of Directors of Rego Park Gardens Inc. by its shareholders at the election meeting conducted on November 7, 2007, and for an order directing the defendants to permit the plaintiff shareholders to inspect and examine certain corporate records relevant to said election. Defendants' in their notice of cross motion, state that as plaintiffs failed to pursue their exclusive remedy under BCL § 619, the complaint should be dismissed. It is noted that defendants do not raise this argument in their supporting affidavit, but include it in their memorandum of law. Although the plaintiffs, improperly denominated this claim as an action, the proper remedy is to simply to convert it to a special proceeding, under BCL § 619, rather dismissal (see CPLR § 103[c]; Rodriguez v New York City Tr. Auth., 269 AD2d 600, 601 [2000]; see also Boryszewski v Brydges, 37 NY2d 361, 365 [1975]; Haddad v Haddad, 272 AD2d 371 [2000]; Town of Fishkill v Royal Dutchess Props., 231 AD2d 511 [1996]). Therefore, defendants' request to dismiss the complaint on the grounds that the plaintiffs failed to pursue their remedies under BCL § 619, is denied.

**Plaintiffs' request for declaratory relief:**

Plaintiffs in their order to show cause improperly seek the ultimate relief sought in their complaint. In view of the fact that issue has yet to be joined, this request is denied in its entirety, as it is premature.

**Plaintiffs' request for an order allowing the inspection of corporate records:**

Election records constitute corporate records, and as such are subject to the right of inspection by a shareholder in accordance with the provisions of BCL § 624(b) and (d) (see Schapira v Grunberg, 30 AD3d 345 [2006], affirming 11 Misc 3d 1063[A] [2005]; see also Cuva v United States Tennis Assn. E., Inc., 831 NYS2d 347 [2006]). Defendants' counsel states in a reply affidavit, that after the service of the order to show cause plaintiffs inspected the proxy ballots and the respective proprietary leases. Plaintiffs do not contest this assertion. Plaintiffs were also provided with the minutes of the meetings of October 15, 2002, October 28, 2003, November 25, 2003, and November 7, 2007 meeting, which were attached as exhibits to the defendants' opposing affidavit and cross motion. Therefore, to the extent that the plaintiffs' complaint seeks an order directing defendants to permit them to inspect and examine the proxy ballots and proprietary leases, that branch of defendants' cross motion which seeks to dismiss this cause of action is granted, as the relief sought by plaintiffs is now moot.

As regards plaintiff's demand for the shareholders' Record Book as of November 7, 2007 and the minutes of meetings of its shareholders, the documentary evidence submitted herein does not establish that all such records were made available to the plaintiffs. Therefore, defendants are directed to make said records available to the plaintiffs for inspection and copying within 20 days after the service of a copy of this order together with notice of entry, provided that plaintiffs furnish the defendants with an affidavit pursuant to BCL § 624(c)).

**Plaintiffs' request for a preliminary injunction:**

The court may grant a preliminary injunction only where a plaintiff shows: (1) probability of success on the merits; (2) danger of irreparable injury in the absence of an injunction; and (3) balance of the equities in its favor (Nobu Next Door v Fine Arts Hous., 4 NY3d 839, 840 [2005]; Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 [1990]).

**Defendants' request to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7):**

Where a defendant moves pursuant to CPLR 3211(a)(1) to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Trade Source v Westchester Wood Works, 290 AD2d 437 [2002]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]; Berger v Temple Beth-El of Great Neck, 303 AD2d 346, 347 [2003]; Allstate Ins. Co. v Raguzin, 12 AD3d 468 [2004]; Tougher Indus. v Northern Westchester Joint Water Works, 304 AD2d 822 [2003]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (Berger v Temple Beth-El of Great Neck, supra; see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20).

It is well settled that "[i]n considering a motion to dismiss for failure to state a cause of action (see CPLR 3211[a][7]), the pleadings must be liberally construed (see CPLR 3026). The sole criterion is whether [from the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2003]; see also Bovino v Village of Wappingers Falls, 215 AD2d 619 [1995]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as

factual claims flatly contradicted by the record are not entitled to any such consideration (see Morone v Morone, 50 NY2d 481 [1980]; Gertler v Goodgold, 107 AD2d 481 [1985], affd 66 NY2d 946 [1985]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' (Guggenheimer v Ginzburg, supra at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (see Guggenheimer v Ginzburg, supra at 275; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (Gershon v Goldberg, 30 AD3d 372 [2006]; Hispanic Aids Forum v Estate of Bruno, 16 AD3d 294, 295 [2005]; Sesti v N. Bellmore Union Free Sch. Dist., 304 AD2d 551, 551-552 [2003]; Mohan v Hollander, 303 AD2d 473, 474 [2003]; Doria v Masucci, 230 AD2d 764, 765 [1996]; Rattenni v Cerreta, 285 AD2d 636, 637 [2001]; Kantrowitz & Goldhamer v Geller, 265 AD2d 529 [1999]; Mayer v Sanders, 264 AD2d 827, 828 [1999]; Sotomayor v Kaufman, Malchman, Kirby & Squire, 252 AD2d 554 [1998]).

#### **The Documentary Evidence of the Election:**

Bellmarc, in a notice dated September 27, 2007, informed all shareholders that anyone interested in running for a seat on the Board of Directors should submit their name and qualifications by October 10, 2007. All of the plaintiffs received this notice and timely submitted their names and qualifications. John Janangelo, the president of Bellmarc issued a notice dated October 11, 2007, entitled "NOTICE OF ANNUAL MEETING OF SHAREHOLDERS REGO PARK GARDENS OWNERS INC., WEDNESDAY, NOVEMBER 7, 2007" which set forth the time and location of the meeting and stated that it was for the purposes of:

- "1. To Elect (4) directors to the Board of Directors of the Corporation. The four directors shall serve until the next annual meeting of shareholders and thereafter until their respective successors are elected and qualify.
2. To Transact such other business as may properly come before the Meeting."

The notice also encouraged shareholders to attend in person so that there would be a quorum. Shareholders were provided with proxy ballots and were directed to vote for up to four individuals listed as candidates either on the ballot they would receive in person at the meeting, or by proxy.

Following the November 7, 2007 election, Bellmarc issued a memo dated November 9, 2007 addressed to all shareholders, which stated

that "the first (\*) four candidates were elected to serve a one year term on the Board of Directors:

*Subrata Chowdhury	115,438	voted shares
*Stella Chan	115,471	voted shares
*Jiwei Yuan	116,350	voted shares
*Fatima Sherzad	114,762	voted shares
Syed Shah	72,646	voted shares
A. Tripathi	71,649	voted shares
Manuel Real	71,949	voted shares
Anil Agarwal	71,907	voted shares

Please note that the sponsor did not participate in the election."

**Rego Park Gardens' Offering Plan and By Laws:**

The Offering Plan provides, in pertinent part, that as long as the sponsor owns unsold shares, it has the right to designate a specified number of directors prior to the election of the Board of Directors.

Article III, Section 1 provides, in pertinent, part that: "[t]he number of directors of the corporation is hereby fixed at three until the first annual meeting of shareholders at which time the number of directors of the corporation shall automatically shall be fixed at five."

Article III, Section 2 provides that after the first Board of Directors was elected, the directors would be elected at each annual meeting of shareholders, in the manner set forth in the bylaws, or at a special meeting, by a plurality of votes, or in the manner set forth in the bylaws.

**The Parties' Motion and Cross Motion and the Number of Directors to Be Elected:**

Plaintiffs' assert that pursuant to the Bylaws, the number of directors is five, while the notice of election, proxies and ballots issued to the shareholders stated that only four directors were to be elected. The relevant portion of the cooperative's Bylaws and the pertinent provisions of the Offering Plan, when read together, establishes that Rego Park Gardens' Board of Directors is composed of five directors, and that so long as the sponsor holds less than 25% of the unsold shares, the sponsor is entitled to designate one director and that the remaining four directors are to be elected by the shareholders.

It is undisputed that Arbern Rego Apartments LLC (Arbern) is the

holder of 25,363 unsold shares which are allocated to 49 apartments in the complex. The Fifty-Fourth and Fifty-Fifth amendments to the Offering Plan state that Arbern does not control the Board of Directors and that it designated one person to the Board. The sponsor now holds less than 25% of the total outstanding shares and, thus, is entitled to designate one director. The sponsor is also entitled to vote its unsold shares, irrespective of its right to designate directors (see Rego Park Gardens Associates v Rego Park Gardens Owners, Inc., 174 Ad2d 337 [1991]).

Although the minutes of January 3, 2007 list six individuals as members of the then current Board, there is no documentary evidence which established that the Bylaws were amended in order to increase the number of directors, whether elected or designated by the sponsor. It is noted that the so-called sixth Board member is identified as the president of the "Condo." It is undisputed the complex's commercial units are organized as a separate condominium. The fact that the condominium's president may be permitted to sit on the cooperative's Board of Directors, cannot be interpreted as an amendment to the Bylaws, or an increase in the number of directors elected by the cooperative's shareholders.

The documentary evidence thus establishes that the maximum number of directors the cooperative's shareholders were entitled to elect as of November 7, 2007, was four, and that the notice of election, proxies and ballots properly informed the shareholders of the number of directors to be elected. Therefore, that branch of defendants' cross motion which seek to dismiss plaintiffs' claim to set aside the election based upon the number of directors elected, is granted, and plaintiffs' request for a preliminary injunction based upon the same claim is denied.

#### **The Parties' Motion and Cross Motion and the Election Procedures:**

The documentary evidence submitted establishes that Bellmarc recorded the names of each shareholder, the number of shares voted by each shareholder and the number of shares or votes received by each candidate. A total of 32 ballots and 391 proxies were cast at the November 7, 2007 meeting, and the vote tally was as follows:

<u>Candidate</u>	<u>Shares Voted For</u>
Subrata Chowdhury	115,438
Stella Chan	115,471
Jiwei Yuan	116,350
Fatima Sherzad	114,762
Syed Shah	72,646
A. Tripathi	71,649
Manuel Real	71,949
Anil Agarwal	71,907

It is undisputed that all of the plaintiffs were present at the November 7, 2007 meeting and election. Plaintiffs allege that the election was illegal and unfair, due to the procedures used to tally the votes. It is undisputed that the parties were required to leave the public school where the election was held at approximately 10:15 P.M. Plaintiffs allege that when they moved to the cooperative's conference room, one of defendant management company's employees revealed that the election data had been erased, that the defendants failed to provide any explanation for this mishap, and that during the vote counting procedures issues arose over certain proxy ballots. Plaintiffs allege that despite their requests they have not been permitted to examine all of the proxy ballots; that on November 15, 2007, plaintiffs Agarwal and Tripathi were permitted to examine 18 proxies and determined that 12 proxies contained irregularities as to the signatures; that on November 15, 2007 Bellmarc provided plaintiffs with a computerized summary of the votes, which plaintiffs could not verify; and that on December 6, 2007 they made a written request for these records, pursuant to BCL § 624 and have not received a response.

It is undisputed that Bellmarc supervised the election, and that at the close of voting its employees began entering data pertaining to each shareholder and their corresponding ballot or proxy vote into a laptop computer. It is also undisputed that at the time the parties were required to leave the election site, the data that had been entered was not properly saved in the laptop computer. However, as all of the paper ballots and proxies remained in Bellmarc's possession, all of the vote data was re-entered into the laptop computer once the parties resumed the vote count at the corporation's offices. There is nothing in the Bylaws which requires that the vote count be completed the same day, and Bellmarc's determination to stop the vote count at 11:00 P.M. and to resume the vote count the next day does not state a claim for setting aside the election. In addition, plaintiffs' bare allegations of bias, unfair and fraudulent actions pertaining to the vote count are insufficient to warrant the granting of a preliminary injunction, as these allegations are insufficient to state a claim to set aside the election.

Bellmarc states that after the commencement of this proceeding it conducted a recount, at which time it rejected 68 proxies which contained names that did not match the shareholder for the apartment in question, and also rejected 41 questionable proxies whose signatures did not match the signatures on the proprietary lease. Bellmarc also determined that its original count included some multiple proxies from the same shareholders who had voted for different candidates. Finally, Bellmarc states that the votes of the holder of unsold shares were improperly counted in favor of the losing candidates, due to the fact that three tenants in sponsor owned apartments improperly voted by proxy, causing Bellmarc's computer program to cast the sponsor's other shares in favor of the same candidates. However, as the sponsor did not vote in person or by proxy, none of the sponsor's votes should have been counted. Plaintiffs point to all of these irregularities and assert that the defendants' actions are tainted with unfairness and bias. These irregularities, however, do not state a claim for fraud, and plaintiffs do not assert that a proper vote count would have changed the outcome of the election. Therefore, since none of these irregularities would change the outcome of the election, these irregularities fail to state a claim to set aside the election (see Schmidt v Magnetic Head Corporation, 97 AD2d 244 [1983]; citing Matter of Goldfield Corp. v General Host Corp., 29 NY2d 264 [1971]; see also Matter of Laufer, 221 AD2d 342 [1995]; Burke v Wiswall, 193 Misc 14 [1948]). Plaintiff's request for a preliminary injunction therefore is denied, and defendants' request to dismiss the claim to set aside the election, based upon procedures related to the vote count, is granted.

#### **Conclusion:**

This action is hereby converted to a special proceeding, as regards the claim to set aside the results of the November 7, 2007 election and for injunctive relief. Defendants' request to dismiss the complaint on the grounds that plaintiffs did not commence a proceeding pursuant to BCL § 619, is denied.

That branch of defendants' cross motion which seeks to dismiss plaintiffs' claims to set aside the November 7, 2007 election, is granted.

Plaintiffs' motion for a preliminary injunction and for declaratory relief is denied in its entirety.

Plaintiffs' request for an order directing defendants to permit them to inspect and copy corporate records, pursuant to BCL § 624, is granted to the extent that defendants are directed to make the shareholders' Record Book as of November 7, 2007 and the minutes of

the proceedings of its shareholders available to the plaintiffs for inspection and copying within 20 days after the service of a copy of this order together with notice of entry, provided that plaintiffs furnish the defendants with an affidavit pursuant to BCL § 624(c)).

Dated: June 16, 2008

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J.S.C.