

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

THE REALTY ENTERPRISE, LLC	x	INDEX NO. 18425/05
- against -		BY: KITZES, J.
HYDE PARK OWNERS CORP., et al.		DATED: NOVEMBER 7, 2005

x

This is a hybrid Article 78 proceeding and action for declaratory and injunctive relief, inter alia, challenging resolutions of the Board of Directors of Hyde Park Owners Corp. which amended corporate by-laws to require candidates for board membership to be shareholders and residents of the cooperative.

Hyde Park Gardens is a 746-unit cooperative apartment complex located north of Jewel Avenue and west of 138th Street in Flushing, New York. Petitioner Realty Enterprise LLC is a limited liability company whose principals own and manage more than 3,000 apartments in the metropolitan area. Effective December 19, 2002, the petitioner took by assignment a loan on which the cooperative owed \$18,770,168 in principal and more than \$6,000,000 in accrued interest. On June 4, 2003, the petitioner acquired 54 units in the cooperative from an investor who occupied a seat on the Board of Directors through a designee. The petitioner allegedly reached an understanding with the Board that its designee would become a director. The petitioner never received its

allegedly promised seat. On June 2, 2003, the Board of Directors had allegedly passed a secret resolution that amended the cooperative by-laws to require that directors be residents of the cooperative.

The petitioner complains that the present Board of Directors has acted illegally with respect to the scheduling of stockholders' meetings for the election of directors and with respect to the imposition of qualifications for membership on the Board. Article II, § 1 of the corporate by-laws provides in relevant part: "The annual meeting of the stockholders of the Corporation, for the election of Directors and for such other business as may properly come before such meeting, shall be held in the Borough of Queens, City of New York, at such time and place before the 1st day of May each year as may be designated by the Board." In or about May 2000, the Board of Directors amended the by-laws to require that all directors be shareholders of the cooperative. On June 2, 2003, the Board imposed the requirement of residency on directors. According to the petitioner, the amended by-law concerning residency deprived shareholders who are non-residents of the cooperative from participating in its affairs. On the other hand, Ruth Farrago, the President of the Board of Directors, alleges that in 2003, in order to ensure that the cooperative was run by people committed to the long-term maintenance of the property, and not by investors looking for quick

profits, the Board amended the by-laws to require that directors be residents of the cooperative. She denies that the Board intended to discriminate against the petitioner through the passage of the amendment. Over the years, six directors who had moved out of their apartments were asked to resign and they did so.

The petitioner objects to a plan by the present Board to borrow \$8,000,000 for what the latter claims are short and long-term capital needs. According to Leon Goldberg, one of petitioner's managing members, "[a]t prevailing interest rates, the practical effect would be that the \$8 million loan would cost the Corporation [the respondent cooperative] \$16 million over its term, with a balloon payment of more than \$7.5 million looming at its maturity.***The Corporation's per unit debt would be \$29,600, more than double the \$14,131 figure of just four years ago." On the other hand, Farrago alleges that the additional financing is needed for maintenance projects such as roof repairs and sewer upgrades and that the financing would only result in a modest increase in maintenance costs. She contends that the petitioner, an investor in, but not a resident of, Hyde Park, is not concerned about the quality of life at the cooperative, but rather has as its concern low maintenance costs that facilitate the sale of units.

The court notes initially that the petitioner has brought a hybrid Article 78 proceeding and action for declaratory and injunctive relief. (See, e.g., Jansen Court Homeowners Ass'n v

City of New York, 17 AD3d 588.) While an Article 78 petition can be given summary treatment if there is no issue of fact (see, CPLR 409[b]; Eck v City of Kingston Zoning Bd. of Appeals, 302 AD2d 831; Barreca v DeSantis, 226 AD2d 1085), a party can ordinarily obtain summary relief in an action for a declaratory judgment and a permanent injunction by bringing an appropriate motion. (See, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3001:7, C3001:21.) However, in the case at bar, the parties have "charted their own procedural course" (see, Sidney B. Bowne & Son, LLP v Parr Development Corp., 13 AD3d 607; Estate of Menon v Menon, 303 AD2d 622; J & A Vending, Inc. v J.A.M. Vending, Inc., 303 AD2d 370), and the court will reach the merits of the causes of action, as the parties themselves have done.

The first cause of action seeks a judgment declaring invalid the amendments to the by-laws which require directors to be shareholders and cooperative residents. The first cause of action lacks merit. Business Corporation Law § 701 provides in relevant part: "***the business of a corporation shall be managed under the direction of its board of directors, each of whom shall be at least eighteen years of age. The certificate of incorporation or the by-laws may prescribe other qualifications for directors." (Emphasis added.) (See, TJI Realty, Inc. v Harris, 250 AD2d 596; Stone v Frederick, 245 AD2d 742.) In the case at bar, the

determination of the Board of Directors to require directors to be both shareholders and cooperative residents is not only supported by Business Corporation Law § 701, the determination is also shielded from judicial interference by the business judgment rule. "[T]he business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" (Levandusky v One Fifth Ave. Apartment Corp., 75 NY2d 530, 537, quoting Auerbach v Bennett, 47 NY2d 619, 629; see, DeSoignies v Cornasesk House Tenants' Corp., 21 AD3d 715.)

The second cause of action seeks a judgment declaring that the amendments to the bylaws which require directors to be shareholders and residents of the cooperative are invalid on the ground that the requirements violate Business Corporation Law § 501(c). The statute provides that with exceptions not relevant here, "each share shall be equal to every other share of the same class." (See, Zilberfein v Palmer Terrace Co-op., Inc., 18 AD3d 742; Mariaux v Turtle Bay Towers Corp., 301 AD2d 460.) However, in the case at bar, the Board of Directors could impose qualifications for directors without violating § 501(c), since stock ownership alone does not create a "vested right to become a director." (Matter of Smith, 154 AD2d 537.) Even if stock ownership alone created rights concerning corporate directorships,

the Board of Directors could limit such rights pursuant to Business Corporation Law § 701 without violating the principle that shares within a class are to be equal.

The third cause of action alleges that the Board of Directors has not held an annual meeting of shareholders for the election of directors since December 2003. The petitioner seeks an order directing the Board of Directors to schedule a shareholders' meeting for the election of directors. Business Corporation Law § 602(b) provides in relevant part: "A meeting of shareholders shall be held annually for the election of directors and the transaction of other business on a date fixed by or under the by-laws." (See, Raynor v Yardarm Club Hotel, Inc., 32 AD2d 788.) In the case at bar, while Article II, § 1 of the corporate by-laws require that the annual meeting be held before May 1, the petitioner alleges that the last shareholders' meeting occurred on December 15, 2003. The petitioner relies on Business Corporation Law § 603(a) which authorizes shareholders holding 10% of the votes entitled to elect directors to demand in writing the call of a special meeting for the election of directors. The petitioner has submitted such a demand purportedly signed by individuals holding more than the necessary amount of shares. However, the respondents allege without contradiction that the demand for a special meeting to be held on September 29, 2005 is invalid because the cooperative received it on August 25, 2005, only 35 days previously.

Business Corporation Law § 603 requires that the date specified for the special meeting be not less than 60 days from the date of the written demand. The third cause of action lacks merit because of the petitioner's failure to establish that it complied with the statutory mechanism for demanding a special meeting for the election of directors. In any event, the court notes that the respondents have stated that the Board has no objection to calling an annual meeting and has scheduled one for November 15, 2005.

The fourth cause of action seeks an order prohibiting the Board of Directors from entering into new "material transaction[s]" on behalf of the cooperative, such as the \$8,000,000 loan, until a shareholders' meeting is held for the election of Board members. "In order to state a cause of action, a complaint seeking a permanent injunction must show: (1) the violation of a right presently occurring, or threatened and imminent; (2) that the plaintiff has no adequate remedy at law; (3) that serious and irreparable injury will result if the injunction is not granted; and (4) that the equities are balanced in the plaintiff's favor." (67A NY Jur 2d, "Injunctions," § 153; see, Nicowski v Nicoski, 50 Misc 2d 167; Ohio Players, Inc. v Polygram Records, Inc., 2000 WL 1616999 [SDNY] [n.o.r.]; Quinn v Aetna Life & Cas. Co., 482 F Supp 22; 12A Carmody-Wait 2d § 78:194.) In the case at bar, the petitioner has adequately pleaded these elements and, moreover, has established these elements as a matter of law. The respondents

have failed to raise any genuine issues of fact which would preclude summary treatment of the fourth cause of action. (See, Alvarez v Prospect Hospital, 68 NY2d 320.) The petitioner has a right under statute and under corporate by-laws to elect corporate directors on an annual basis for the management of the cooperative and a right to have the cooperative governed by directors who hold office as provided by statute and corporate by-law. Permitting the present members of the Board of Directors to undertake major financing on behalf of the corporation before a new election would amount to a violation of the petitioner's rights as a shareholder and may result in serious injury to it. Moreover, the equities are balanced in the petitioner's favor since the respondents allege that an election for a new Board will be held just days away on November 15, 2005. Under these circumstances, the petitioner is entitled to a permanent injunction prohibiting the Board of Directors from undertaking new financing on behalf of the cooperative until a new election for Board Members is held.

In its fifth cause of action, the petitioner seeks an order directing the Board of Directors to provide photocopies of a list of shareholders, including addresses and telephone numbers, the minutes and notices of meetings of the Board in 2005, and documents pertaining to the proposed second mortgage. A CPLR article 78 proceeding in the nature of mandamus lies to compel the inspection of corporate books and records, although a

petitioner must demonstrate a clear legal right to the requested relief. (See, Liberman v Katlowitz, 269 AD2d 599; Berkowitz v Astro Moving and Storage, Co., Inc., 240 AD2d 450.) The petitioner has established a clear legal right to the inspection of the list of shareholders, including their addresses, though not their telephone numbers. (See, Business Corporation Law § 624.) The petitioner's request pursuant to Business Corporation Law § 624 is otherwise overly broad.

Accordingly, the petition/complaint is granted to the following extent: The petitioner is granted summary judgment on its fourth cause of action. The respondents are prohibited from undertaking new financing on behalf of the cooperative until a new election for members of the Board of Directors is held. The petitioner is granted judgment on the fifth cause of action in the petition/complaint to the extent that the respondents shall make available for the petitioner's inspection at a mutually agreeable date, time, and place, a list of shareholders, including their addresses. The petition/complaint is otherwise dismissed. The motion for provisional relief is denied as moot.

Short form order signed herewith.

J.S.C.