

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

	x	
THE BOARD OF TRUSTEES OF THE MAHA LAKSHMI MANDIR, INC., in the right of and on behalf of THE MAHA LAKSHMI MANDIR, INC.,		Index Number <u>5485</u> 2006
		Motion Date <u>January 24,</u> 2007
Plaintiff,		Motion Cal. Number <u>33</u>
-against-		
SWASTI DUBEY,		
Defendant.		
	x	

The following papers numbered 1 to 14 read on this motion by plaintiff Board of Trustees of the Maha Lakshmi Mandir, Inc. in the right and on behalf of the Maha Lakshmi Mandir, Incorporated to disaffirm the Referee's report dated October 19, 2006; and this cross motion by defendant Swasti Dubey to confirm the Referee's report and for judgment in the favor of defendant.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-5
Notice of Cross Motion - Affidavits - Exhibits ...	6-9
Answering Affidavits - Exhibits	10-12
Reply Affidavits	13-14

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This action was commenced by Latchmin Kellawan and other alleged members of the Board of Trustees, the governing body of Maha Lakshmi Mandir, Inc. (Mandir), a domestic not-for-profit corporation, established to promote Hindu religious and cultural purposes. Plaintiff alleged that in March 2003, defendant Swasti Dubey was appointed to serve temporarily as the acting president of the Mandir until the holding of an election of various

officers, including president. Plaintiff further alleged that an election was held by the Board of Trustees on November 6, 2005, at which time various persons were elected as officers of the Mandir, including Latchmin Kellawan, as president. Defendant Dubey allegedly refused to recognize the authority of the newly-elected officers, including that of Ms. Kellawan, and to relinquish his position as president. Plaintiff alleged that defendant Dubey engaged in wrongful acts to prevent those newly-elected officers from performing their duties. In addition, plaintiff alleged that defendant Dubey gained control over the organization and management of the Mandir, without any legal right or authority to do so, fraudulently misrepresented the financial state of the Mandir to others, and misappropriated its funds.

By so-ordered stipulation dated April 9, 2006, the Referee was appointed to conduct an election of officers of the Mandir, and the Referee's fee was directed to be paid by the Mandir.

Prior to the election, the Referee met with counsel for the parties and by notice dated May 2, 2006, gave them various directions regarding the holding of the election. In addition, he directed that those monies maintained by plaintiff in a separate bank account had to be turned over unconditionally to the Mandir by May 10, 2006. Then, pursuant to the so-ordered stipulation, the Referee conducted an election at the Mandir Ashram, located at 121-15 101st Avenue, Richmond Hill, New York, on May 21, 2006 from 12:00 p.m. to 7:00 p.m. According to the Referee's report dated October 19, 2006, there were two separate slates of candidates for positions of officers, committee members and trustees of the Mandir, i.e., one slate proposed by Ms. Kellawan and the other slate proposed by defendant Dubey, and that the Referee provided voters with two different-colored ballots to distinguish the slates. The Referee further stated that he found that each voter had produced satisfactory photographic identification and a receipt for the payment of \$51.00, which sum is the amount of annual dues charged by the Mandir. Following the completion of voting, the Referee secured the ballots.

Each party challenged the eligibility of certain voters to cast ballots. When those challenges were taken together, they comprised a challenge to 322 ballots of the total 354 ballots cast. The challenges related to the parties' dispute as to which voters were actual members of the Mandir. The Referee stated that the parties each relied upon their own list of alleged members of the Mandir to support their challenges to the eligibility of certain voters who cast the contested ballots.

The Referee determined a hearing was necessary to conclude whether or not, with respect to the contested ballots, the voter casting the ballots were members of the Mandir (and hence eligible voters). He directed the parties to produce authenticated membership records of the Mandir, which had been maintained pursuant to section 621(a) of the Not-For-Profit Corporation Law. The Referee concluded that the Not-For-Profit Corporation Law, rather than the Religious Corporation Law, should govern the legal issues involved, because the Mandir had been incorporated as a domestic not-for-profit corporation, pursuant to the Not-For-Profit Corporation Law. The Referee conducted a hearing on June 15, 2006, June 28, 2006 and September 15, 2006.

At the hearing, plaintiff called Latchmin Kellawan and Latchmin Budhai, as witnesses to testify regarding the collection of membership dues. It sought to demonstrate that the voters listed on its membership list had paid dues, and thus were qualified to vote as members of the Mandir. Plaintiff also sought to have Ms. Kellawan serve as a sponsoring witness to authenticate certain receipt records.

Ms. Kellawan testified that she had been a founding member of the Mandir, and that she is a member of the Board of Trustees and is involved in fund-raising activities for the Mandir. She also testified that in 2005, she collected dues from members of the Mandir, which she kept in her safe located in her home, and that she deposited cash and checks into an account for the Mandir at the Independence Savings Bank, which account was opened by plaintiff in February 2006. Ms. Kellawan further testified that one of the checks deposited into the account, in the amount of \$1,400.00, was a check drawn on her personal bank account. Ms. Kellawan identified the receipt books as containing copies of the receipts that she gave to those persons from whom she collected membership dues. She also identified the two signatures at the bottom of each receipt as her signature and the signature of Marjorie Misir, another member of the Mandir, who had been elected secretary of the Mandir on November 6, 2005. Ms. Kellawan further testified that she (Ms. Kellawan) created the receipt records and kept them in her home, and that only she had access to them.

Mr. Bundai testified that he had been the president of the Mandir from 1994 to 2004, and that he is a member of the Board of Trustees. Mr. Bundai testified he was not involved in collecting dues, and had not purchased the receipt books, or the stamps used to stamp the name "Mandir" on the receipts.

Plaintiff offered the dues receipts records into evidence. The Referee refused to admit the receipt books, finding they

constituted hearsay, and were inadmissible under the business records exception to the hearsay rule. The Referee indicated that plaintiff had failed to establish a proper foundation for admitting the records, and that the records had not been maintained at the Mandir in accordance with the Not-For-Profit Corporation Law. The Referee further indicated that the by-laws of the Mandir required a member to pay annual dues on or before March 31, 2006 in order to be entitled to vote in a 2006 election. He found that plaintiff failed to establish when the money was collected, and that the money was not deposited into a "Mandir" account until May 2006.

Plaintiff rested its case, and then the Referee directed defendant Dubey to call his witness. Defendant Dubey called Diante Persaud as a witness to establish the validity of his membership roster, and thus, to establish the eligibility of the voters who cast the ballots (contested) for his slate of candidates, and the ineligibility of the voters who cast the ballots (contested) for plaintiff's slate of candidates. Ms. Persaud testified that she had been a member of the Mandir since 1992, and served as its treasurer of the Mandir since July 1, 2005. She testified that she had been elected the assistant treasurer of the Mandir on February 15, 2004. She further testified that following the resignation, in June 2005, of Dhanook Chinilal, the Mandir's treasurer, she was appointed treasurer. Ms. Persaud stated that she compiled a list of members based upon receipt books she maintained for the temple, and that on the last page of the list, she set forth those names of those persons who are "lifetime" members of the Mandir based upon information given to her by "the president." Ms. Persaud testified she kept the list in the ordinary course of business of the Mandir. Defendant Dubey offered such membership list into evidence. Plaintiff objected to the offer, asserting that defendant Dubey had failed to authenticate the document and demonstrate Ms. Persaud's authority to maintain it.

Defendant Dubey responded by submitting an unsigned copy of the minutes of a meeting held by the Board of Trustees on September 8, 2005 to show Ms. Persaud was properly appointed to the position of treasurer following the resignation of Mr. Chinilal. The Referee admitted the copy into evidence subject to defendant Dubey's production of a signed original copy of such minutes,¹ and

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A copy of the signed copy of the minutes was substituted at the conclusion of the hearing. The signatures on the copy appear on the lines above the names of defendant Dubey, as president, and Ms. Persaud, as recording secretary.

directed that defendant Dubey provide to plaintiff a copy of any notes of such meeting kept by Ms. Persaud. Ms. Persaud further testified that she prepared the membership list beginning in early 2000, as part of a membership drive. She admitted that the copy of the list offered into evidence was a printout from her own computer. The Referee admitted the document into evidence.

Ms. Persaud testified that the receipt books, which she maintains, were kept in the ordinary course of business of the Mandir, and it was the business of the Mandir to keep such receipt books. Defendant Dubey offered the receipt books into evidence. Plaintiff's counsel objected only to the admission of those receipt books marked for identification as defendant's Exhibits "D2," "D3" and "D4." Plaintiff contended that to the extent the books contained receipts, the signatures on the receipts were made by persons lacking authority to issue them. The Referee overruled the objection, and accepted into evidence all the receipt books offered by defendant Dubey.

At the conclusion of the last day of the hearing, the Referee made findings as to whether the names of the respective voters, casting the contested ballots, appeared on the membership list produced by defendant Dubey, and in the event, they were not, concluded the voter was ineligible to vote. In addition, the Referee marked various exhibits as referee's exhibits, including a letter from counsel for plaintiff and an envelope containing a check dated May 11, 2006 drawn on the Independence account, made out to the Mandir in the amount of \$17,136.00. The Referee also stated that he was going to turn over the check to the Mandir. The Referee thereafter issued his report, making various findings and conclusions of law, and setting forth various recommendations.

In his report, the Referee determined that Ms. Kellawan was a founding member of the Mandir, who performed fund-raising work for the temple, and in 2005, served as a member of the Board of Trustees, but not as an officer. The Referee found plaintiff failed to establish by a fair preponderance of credible evidence that Ms. Kellawan was acting on behalf of the Mandir when she collected dues money in cash, kept the funds in her home, and spent funds on legal fees. The Referee also found that the check in the amount of \$17,136.00 represented funds collected by Ms. Kellawan, and stated that the check had been turned over to Diante Persaud, as the treasurer of the Mandir. The Referee found that the \$17,136.00 check had been drawn on an account opened in April 2006 at the Independence Community Bank, and that the bulk of the funds in that account had been deposited in that bank in May 2006. The Referee characterized the source of such funds as "personal" funds of plaintiff, including a \$1,400.00 personal check of Ms. Kellawan.

The Referee found that Ms. Kellawan and her associates were not acting in accordance with the law when they collected and maintained charitable contributions in cash, and recommended a full accounting of these cash transactions be presented to the court.

The Referee reported that of the uncontested ballots, 17 ballots were cast for the slate of candidates proposed by defendant Dubey, and 15 ballots were cast for the slate of candidates proposed by Ms. Kellawan. The Referee upheld the challenges made by defendant Dubey to 230 of the contested ballots which had been cast in favor of the slate proposed by Ms. Kellawan. The Referee concluded that a total of 99 ballots were validly cast in favor of the slate of candidates proposed by defendant Dubey, and a total of 25 ballots were validly cast for the slate of candidates proposed by Ms. Kellawan. The Referee recommended, therefore, that the candidates listed on the slate proposed by defendant Dubey be certified as the elected officers of the Mandir. The Referee further recommended that the membership records of the Mandir be updated so to avoid challenges regarding the qualification of voters, from arising at the next annual election scheduled for April 2007. The Referee also recommended that a full accounting of the cash transactions made by Ms. Kellawan and her associates be presented to the court.

Plaintiff moves to disaffirm the Referee's report, asserting that a total of 255 votes had been cast for its slate of candidates and that the Referee improperly refused to consider such votes, when concluding the Dubey slate of candidates be certified. Plaintiff asserts that the Referee improperly refused to admit its receipt books into evidence, and improperly admitted defendant Dubey's list of membership and receipt records.

Defendant Dubey opposes plaintiff's motion and cross-moves to confirm the Referee's report.

The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility (see CPLR 4311; Slater v Links at North Hills, 262 AD2d 299 [1999]; Frater v Lavine, 229 AD2d 564 [1996]). The Referee adopted a methodology of using membership records and membership dues receipts as a means of determining which voters, among those persons casting contested ballots, were eligible to vote. Such methodology comported with the by-laws of the Mandir. The Referee also clearly defined the issues relative to the admissibility of the membership records and dues receipts records and properly resolved matters of credibility when ruling that plaintiff's offerings of a membership list and receipt records were

inadmissible as hearsay, and defendant Dubey's offerings were admissible as business records of the Mandir.

To the extent the Referee made recommendations regarding the need for an accounting, an updating of membership lists, and certification of compliance with record keeping requirements and financial controls under state and federal law, such relief was not sought by the parties and he was not charged with such account, updating and certification. However, nothing in this order should be construed as precluding the parties from following such recommendations.

Under such circumstances, the cross motion by defendant Dubey to confirm the Referee's report is granted to the extent of confirming that portion of the report certifying the candidates listed on the slate proposed by defendant Dubey as the elected officers, committee members and trustees of the Mandir (CPLR 4403), and the motion by plaintiff to disaffirm the Referee's report is granted only to the extent of disaffirming that portion of the report recommending an accounting, updating of membership lists of the Mandir, and certification of records.

Dated: March 21, 2007

J.S.C.