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

PRESENT: HON. RICHARD B. LOWE III Lowe Justice

PART 56m

Ard Associates Inc.

INDEX NO. 600318/06

MOTION DATE 2/9/06

- v -

MOTION SEQ. NO. 001

Mitchell Ray

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 23 2006
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 3/21/06

HON. RICHARD B. LOWE, III
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

AID ASSOCIATES INC. D/B/A PLAZA ASSOCIATES AND TEDDY MATTE

Index No. 600318/06

Plaintiffs,

-against-

MITCHELL KAY and JERRY MARTIN

----------X

Hon. Richard B. Lowe, III:

Plaintiff Aid Associates Inc. d/b/a Plaza Associates ("Plaza") and Teddy Matte ("Matte") move for an order granting a preliminary injunction which would reinstate him as President of Plaza and would declare null and void his termination which was voted upon at a Board of Director's meeting.

BACKGROUND

Plaza is a New York corporation in the business of debt collection. Matte, defendant Mitchell Kay ("Kay"), and defendant Jerry Martin ("Martin") are equal shareholders of Plaza. They are also the sole members of the board of directors of the company. Matte has served as President of the corporation, Martin as Vice President, and Kay as general counsel.

On January 30, 2006, Kay and Martin voted Matte out as President and elected Kay in his place. This was done during a meeting among the three men held in the offices of Plaza. The plaintiff and the defendants dispute whether notice of the board meeting was given to Matte.

Plaintiff brings this action alleging the vote was improper and seeks to be reinstated as President. He alleges the vote was improper and in violation of the Shareholder's Agreement

between the parties. The Defendant's argue the vote was proper by the terms of the by-laws of the corporation.

The plaintiff now asks this court for a preliminary injunction which would, among other things, allow him to resume his duties in his capacity as President of Plaza.

DISCUSSION

In order to obtain a preliminary injunction, a party must show (1) likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) balancing of the equities (*W.T. Grant Co. v Srogi,* 52 NY2d 496, 517 [1981]). Granting a preliminary injunction is a drastic remedy and should be done so sparingly (*Uniformed Firefighters Ass'n of Greater New York v City of New York*, 79 NY2d 236 [1992]).

Likelihood of Success on the Merits

Plaintiff argues that the vote which was taken was invalid in that proper notice was not given for the board meeting. In support of this argument, plaintiff relies upon the by-laws of the corporation which read:

> Special meetings of the board shall be held upon notice to the directors and may be called by the president upon three days notice to each director either personally or by mail or by wire; special meetings shall be called by the president **or by the secretary in like manner** on written request of two directors. Notice of a meeting need not be given to any director . . . who attends the meeting without protesting prior thereto or at its commencement, the lack of notice to him. (Art III, ¶ 11(a))(empahsis added)

In this matter, Martin, Plaza's secretary, called the meeting in which Matte was voted out as President. According to the by-laws, this is appropriate. Furthermore, nowhere in Matte's affidavit, does he assert that he objected to the notice which was given for the meeting.

Therefore, pursuant to the by-laws, such objection was waived. Lastly, New York law holds:

> [I]t is beyond dispute that when all directors and shareholders of a close corporation are present, the ritual of notice to themselves is not required and the principal owners can make management decisions by majority vote. To hold otherwise would hold form over substance.

(*Mardikos v Arger*, 457 NYS2d 371, 373 [Sup. Ct. 1982]).

Accordingly, the vote is not deemed invalid for improper notice.

Matte also argues that his removal as President is a violation of the Shareholders Agreement between the parties. Specifically, Matte references Paragraph 7 of the agreement which reads:

> Control. Each shareholder has been elected to serve as a member of the Board of Directors of the Corporation and may not be removed from such position, for any reason, without his consent. The Shareholders, below named, shall be elected to the office set forth opposite his respective name below:
>
> | | |
> |---|---|
> | TEDDY MATTE | President |
> | JERRY M. MARTIN | Secretary/Treasurer |
>
> Each member of the Board shall have one (1) vote for each share of stock which he may own, beneficially or otherwise, and all routine matters pertaining to the policy and operation of the Corporation shall be passed by a majority vote of the Board of Directors. All matters which might significantly affect the Corporation's finances or the value of the stock of any Shareholder shall be passed by a unanimous vote.

In opposition, the defendants argue that the by-laws of the corporation allow for the removal. Under the express terms of Plaza's by-laws, "[a]ny officer elected or appointed by the board may be removed by the board with or without cause" (Art IV ¶ 2(a)). Further, "[u]nless

otherwise required by law, the vote of majority of the directors present at the time of the vote . . .shall be the act of the board" (Art. III, ¶ 8). The majority vote would be two of the three shareholders.

Whether a director can be removed before the end of his term of office is a question governed by the certificate of incorporation, bylaws, applicable shareholder agreements and the Business Corporation Law (*Springut v Don and Bob Restaurants of America*, 57 AD2d 302 [4th Dept 1977]). The by-laws of a corporation may legally provide for the removal of a director with or without cause by the stockholders (*In the Matter of the Petition of Singer*, 189 Misc 150 [Special Term, NY 1974]). Notwithstanding that a shareholders' agreement requires maintenance in office of a particular director designated by a stockholder, a director may be removed for cause since implicit in any agreement to maintain a particular director in office is a director's duty to fulfill faithfully the requirements of his office (*Springut*, 57 AD2d at 302).

Defendants Martin and Kay both provide affidavits whereby the affirm that Matte was terminated for cause. They affirm he has run Plaza in an autocratic style and without regard for other board members of shareholders. They overall affirm as to various reasons why Matte was not acting in the best interest of Plaza and therefore was terminated for cause.

A court may not second guess corporate decisions so long as they are made in good faith. The business judgment rule is a "presumption which bars 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 (*Merrill Lynch, Pierce, Fenner & Smith Inc. v Arcturus Builders, Inc.* 159 AD2d 283, 284 [1 st Dept 1990]). Therefore, where the individual directors allege the removal of Matte was for cause, it is not within this Court's purview to

review that decision absent a showing of bad faith, misconduct, or self interest.

Irreparable Harm

Matte's assertion that a breach of a shareholders agreement per se constitutes irreparable harm is unsupported. Matte still owns his one-third shares, still has a vote on the board, and is still a director of Plaza, albeit no longer President. Matte fails to establish the harm to him or Plaza by his removal as President.

Balancing of the Equities

Matte fails to articulate why the equities weigh in his favor rather than the defendants. He argues he has always run the company in the past, and Kay has never run the company. This is insufficient to show that the equities mandate he be reinstated as President.

CONCLUSION

Accordingly, based on the foregoing, the motion for a preliminary injunction is denied.

DATED: March 21, 2006

ENTER:

HON. RICHARD B. LOWE, J.S.C.