

**Weldon v 210 East 73rd Owners Corp.**

2006 NY Slip Op 30723(U)

June 30, 2006

Supreme Court, New York County

Docket Number: 107301/06

Judge: Faviola A. Soto

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 7

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JAMES WELDON and DIANE WELDON,

Plaintiffs,

Index No.: 107301/06

- against -

210 EAST 73<sup>RD</sup> OWNERS CORP.,

Defendant.

**FILED**

JUL 12 2006

DECISION AND ORDER

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HONORABLE FAVIOLA A. SOTO, J.:

X NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff James Weldon, along with his wife Diane Weldon, move by order to show cause for a preliminary injunction to restrain implementation and enforcement of an amendment to the Cooperative's by-laws and to restrain the election of directors. This motion and action were randomly reassigned to this IAS Part pursuant to the June 1, 2006 order of Justice Marilyn G. Diamond.

Defendant 210 East 73 Owners Corp. opposes.

Plaintiffs are shareholders in defendant Cooperative which seek to restrain the current Board of Directors from enforcing an amendment to the Co-op by-laws which they claim specifically targeted them and prevents them from being eligible to run for the Board in the June Annual meeting. The Court has issued a temporary restraining order pending the determination.

Plaintiffs accuse the defendant of acting in bad faith by enacting an amendment on April 20, 2006 to Article III, Section 2, which states as follows:

No person shall be eligible to serve as a Director of this Corporation if he/she, or his/her spouse, domestic partner, parent, child or sibling shall have served as

a Director of this Corporation for four or more consecutive one-year terms; any person who has served, or whose spouse, domestic partner, parent, child or sibling has served, as a Director of this Corporation for four or more consecutive one-year terms shall not be eligible to serve again as a Director of this Corporation until not less than four years have elapsed. The foregoing restrictions shall not apply with regard to a person who has served as Director by virtue of his/her having been appointed, designated or elected by the Holder of Unsold Shares.

Plaintiff James Weldon, a current Board member, has served for more than four years and the amendment makes him and his spouse ineligible to run in the June meeting. They seek a declaration in their complaint that this amendment is null and void.

James Weldon was the Co-op's president from 1988 to December 2005. Diane Weldon has served as assistant treasurer but has never held office as a director. Plaintiffs were accused of misconduct in December 2005 and then again in March 2006. According to plaintiffs, there has been no corroboration or determination of the charges, which they vigorously deny.

In April 2006 plaintiffs claim the Board adopted the aforementioned amendment specifically to prevent them from continuing to serve on the Board.

Plaintiffs also claim defective notice for the Special meeting during while the amendment was enacted. The parties at oral argument do not dispute that this can be cured.

James Weldon claims that he is the only Board director affected by the amendment and Diane the only spouse affected.

Defendant asserts that William Saporito, who has been a Board member since June 2002, as well as his wife, also are barred from being elected pursuant to the amended by-laws. They further assert that the plaintiffs were given notice of the special meeting, were afforded the opportunity to vote against the amendment, six of the seven members of the Board voted in favor of the amendment, plaintiffs' argument that they were unlawfully discriminated is without merit, and

plaintiffs' argument that the allegations of wrongdoing against them were baseless in fact is not true, as they were provided with specific facts which corroborate the misconduct.

Plaintiffs argue that it is well-settled that "a prima facie case of unequal stockholder treatment is made out where there is a departure from precisely uniform treatment of the stockholders and a resulting violation of their [the board of directors] fiduciary obligation to treat stockholders fairly and evenly. Aronson v. Crane, 145 A.D.2d 455,456 ( 1988) (breach of fiduciary duty stated where board of directors assisted prospective purchasers in getting out of a purchase agreement); Ackerman v. 305 East 40<sup>th</sup> Owners Corp., 189 A.D.2d 665 (1993); See also DeCastro v. Bhokari, 201 A.D.2d 382, 383 (1994) ("[U] equal treatment of shareholders is sufficient to overcome the directors' insulation from liability under the business judgment rule").

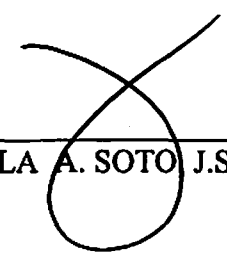
Plaintiffs argue that they have a likelihood of success on the merits as defendant violated the law by treating them unequally, and rely on Feld v. 710 Park Avenue Corp., 2002 WL 32063115 (NY Sup. Ct N.Y. Co.). In Feld, Justice Kapnick concluded that the preliminary injunction was warranted as the amendments in that case were squarely targeted to thwart the plaintiff's candidacy.

Defendant argues, however, that plaintiffs have failed to make the requisite showing and the motion must be denied. They argue that: plaintiffs' reliance on Feld is misplaced and that case is distinguishable on the facts; the promulgation of the by-law amendment is immune from judicial scrutiny by reason of the business judgment rule; BCL §602 does not provide a basis for the granting of the preliminary injunction.

This Court finds that the Feld holding does not apply based on the facts herein. Here, plaintiffs have not shown a likelihood of success and the Court denies the motion for a preliminary injunction.

Accordingly, it is  
ORDERED that the temporary restraining order is vacated; and it is  
ORDERED that the motion for a preliminary injunction is denied; and it is  
ORDERED that defendant shall serve and file its answer by July 31, 2006 and a preliminary  
conference is scheduled for September 7, 2006, 9:30 a.m., at 111 Centre Street, Room 949, New  
York, N.Y.

Dated: New York, New York  
June 30, 2006

  
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FAVIOLA A. SOTO J.S.C.

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