

**52 E. End Ave. Comm. for
Change v Stanton**

2007 NY Slip Op 30981(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0113837/2006

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

Application of 52 East End Avenue Committee
for Change, et al.

INDEX NO. 113837/06

MOTION DATE 4/19/07

- v -

MOTION SEQ. NO. 001

Frank Stanton, et al.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered in person at the Judgment Clerk's Desk (Room 141B), 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 petition is granted as follows:

Petitioner The Committee for Change is a group of unit owners of a condominium located at 52 East End Avenue in Manhattan. The individual petitioners are unit owners and the individual respondents are unit owners. Respondent Stanton is the President of the Board of Managers and respondent Abel is the Secretary of the Board.

The petition seeks a writ of mandamus compelling respondents to call and hold the 2006 annual meeting of unit owners pursuant to the by-laws which provide that the annual meeting shall be held on or about the last Tuesday in September of each year. When petitioners requested in August 2006 that the Board hold the annual meeting on September 26, 2006, the Board responded through its counsel by letter dated August 25, 2006 that

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

the annual meeting had already been held on March 3, 2006 at which time five managers were elected and that there is no requirement in the by-laws for a second annual meeting to be held within seven months after the first. The Board's counsel also stated that the relevant provision of the Business Corporation Law, which is used to interpret the by-laws, is that the annual meeting is required to be held within thirteen months of the last annual meeting. Petitioners maintain that the meeting held in April 2006 (not March 3, 2006 as stated by respondents' counsel in their August 25, 2006 letter) was the 2005 annual meeting.

In opposition to this petition, respondents have asserted, among other things, that the court should not even consider this application because the First Department stated in Brasseur v. Speranza (21 AD3d 297 [2005]) that condominiums "are not amenable to Article 78 proceedings in the nature of mandamus for claims of bylaw breach (citations omitted)." However, this statement was dicta because Brasseur was not an Article 78 proceeding. Furthermore, in Y & O Holdings (NY), Inc. v. Board of Managers of Executive Plaza Condominium (278 AD2d 173 [2000]), issued five years prior to Brasseur, the First Department affirmed an order that had denied a motion to dismiss an Article 78 proceeding against individual Board members that alleged a violation of the by-laws. In any event, as has been noted by the Court of Appeals, "[u]nder CPLR 103 (subd. (c)), the courts are empowered and indeed directed to convert a judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution." (First National City Bank v. City of New York Finance Administration, 36 NY2d 87, 94 [1975]). Thus, even assuming for the sake of argument that an Article 78 proceeding is not the proper form for this application, dismissal is not warranted.

Regarding whether the 2006 annual meeting was held on March 3, 2006 as stated by respondents' counsel in their August 25, 2006 letter,

petitioners assert that historically, annual meetings have been held in December. According to petitioner Del Mastro, the 2000 meeting was held on Wednesday, December 6, 2000, and the 2001, 2002 and 2003 annual meetings were each held in December of their respective calendar years, but the 2004 annual meeting was held in March 2005 and the 2005 annual meeting was not held until April 2006. Petitioners have submitted a copy of a Reminder Notice to the unit owners issued by the condominium management company. That Notice " Re: The 2000 Annual Meeting", states that the annual meeting shall be held on Wednesday December 6, 2000.

In opposition to the petition, respondents have submitted the affidavit of Harvey Siegel, former President of the Board. He states that he served as President for 17 years, and according to his affidavit, the 2000 annual meeting was held on December 8, 1999¹; the 2001 meeting held on December 6, 2000; the 2002 meeting held on December 13, 2001; the 2003 meeting held on December 16, 2002; the 2004 meeting held on December 8, 2003; the 2005 meeting held on March 10, 2005 and the 2006 meeting held on April 6, 2006².

Thus, the parties do not agree on whether the 2006 meeting has been held. While petitioners have submitted a copy of a notice that supports their contention regarding the scheduling of the annual meetings, respondents have only submitted the affidavit of their former President. When counsel appeared for argument of this motion and requested an adjournment, this court expressly stated to them that upon the adjourned date, the court was expecting respondents to submit proof that the 2006 annual meeting had been held. Upon the adjourned date,

¹As noted, the reminder notice from the management company pertaining to the 2000 meeting stated it was to be held on December 6, 2000.

²This contradicts the statement by respondents' counsel in their August 25, 2006 letter to petitioners that the 2006 meeting had been held on March 3, 2006.

respondents submitted no such proof. Not even minutes of the annual meetings, which presumably would reflect the year of the annual meeting, were submitted. Thus, petitioners have come forth with some documentary evidence supporting their contention regarding the scheduling of the annual meetings, and respondents have not countered that proof.

The court was informed that a meeting is currently scheduled for April 25, 2007 at 7 PM. While respondents have taken the position that this is the 2007 annual meeting, in light of the foregoing, it shall be deemed the 2006 annual meeting.

ADJUDGED that the petition is granted to the extent that the 2006 annual meeting is to be held on April 25, 2007 at 7 PM.

A preliminary conference on respondents' counterclaim for damages³ is scheduled for June 21, 2007, at 9:30 A.M.

UNFILED JUDGMENT

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Dated: April 20, 2007

SA-S

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

³While the papers on this motion include a Verified Reply to Counterclaim, they do not include the Counterclaim itself.