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

PRESENT: STONE Justice

PART 50S

HON. LEWIS BART STONE

KUKSTCER, DAVID

-v-

NORMANDY OWNERS CORP, ET AL.

INDEX NO. 102289/07

MOTION DATE

MOTION SEQ. NO. 01

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 is dismissed in accordance with the annexed Decision and Order

RECEIVED
APR 20 2007
IAS MOTION SUPPORT OFFICE

FILED
MAY 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/19/07

HON. LEWIS BART STONE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50S

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In the Matter of the Application of the Petition to Set Aside the Election of Directors of Normandy Owners Corp. Held on the 23rd day of October, 2006, DAVID KUNSTLER,

Petitioner,

- against -

NORMANDY OWNERS CORP., JANE BOOTH, JACK POLISH and ROBIN WAGGIE,

Respondents.

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DECISION AND ORDER

INDEX NUMBER 102288/07

Hon. Lewis Bart Stone:

This proceeding was commenced by Order to Show Cause, issued on February 26, 2006, by David Kunstler ("Kunstler") pursuant to New York Business Corporation Law ("BCL") §619 to set aside an election of three directors of Normandy Owners Corp. ("Corporation"), a New York Corporation which had occurred at the annual meeting of the Corporation on October 23, 2006.

Corporation owns the residential cooperative building at 140 Riverside Drive in Manhattan. Kunstler is one of the seven member Board of Directors (the "Board"). At the 2006 Annual Meeting, three directors were to be elected from four candidates, one of whom was supported by Kunstler, and the other three by the other board members. Proxies were solicited by both sides, and at the meeting, inspectors of

election who were employees of the Corporation's managing agent, were appointed for the election, and all proxies were submitted to them prior to the meeting.

After reviewing the proxies, the inspectors announced that a quorum was present. Thereafter, but prior to the vote, the President of the Board announced that "to simplify procedure, the Board had determined to permit proxy forms to be used as ballots, without the necessity of executing a separate form ballot." Kunstler, who was present, made neither objection nor comment and the meeting proceeded to the vote on such basis. After votes were counted by the inspectors of election, the three candidates of the Board were declared winners. During the ballot counting, Kunstler elected to exercise his right as a director to physically oversee the counting of the ballots by the inspectors of election and expressed no objection to any proxy, the count, or to any particular vote of any particular shareholder.

The first time Kunstler raised any objection to any aspect of the election was after the adjournment of the meeting long after the announcement of the vote.

Kunstler now raises a series of objections to the validity of the election based on the use of the proxies as ballots and various claimed irregularities and seeks to set the election aside, calling for a new election. The Corporation opposes Kunstler's views.

PROXIES AS BALLOTS

Kunstler asserts that the use of the proxies as ballots was improper and that BCL §609 requires this Court to set aside the election for such reason.

BCL Article 6 sets forth voting rules for New York corporations. BCL §609 expressly authorizes shareholders to vote by proxy. While the BCL imposes certain rules applicable to proxies, the BCL does not require any particular form for a valid proxy. Prince v. Albin, 23 Misc.2d 194 (Sup. Ct. NY Co. 1969) (construing New York General Corporation Law §19, the predecessor of similar provisions of the BCL).

The only mention of ballots in BCL Article 6 is found in BCL §611 which addresses the duties of inspectors of election, who are *inter alia*, charged therein to receive ballots, determine their validity and set the time of the opening and closing of the polls for the receipt of ballots. Section §611(c) further provides that no ballots may be received in any event after a meeting is over, unless the Supreme Court decides to the contrary.

While BCL §611 expressly discusses ballots, §611(d) makes it clear that BCL §611(a) and (c) do not apply to corporations which are not publicly traded on an exchange or a registered over-the-counter market. BCL §610(b) also expressly limits the requirement that there be inspectors of election to similar corporations. As the

Corporation was established for the cooperative ownership of a residential building, its shares are not such as would be traded. BCL §610(b) also authorizes New York corporations such as the Corporation to adopt through its by-laws a requirement to appoint inspectors of election for elections as provided in BCL §610(a). BCL §611(d) also authorizes New York corporations such as the Corporation to adopt the provisions of §611 relating the duties of inspectors of election in its certificate of incorporation or by-laws. Both sections also expressly allow corporations such as the Corporation, at their option, from time to time, to take actions equivalent to those set forth in §610 and §611 for inspectors of elections and ballots.

Thus, the BCL imposes no obligation on the Corporation to conduct its voting by ballot or to have inspectors of election. Accordingly, Kunstler's objection that the use of proxies as a ballot violated the BCL is without merit.

As Kunstler, as petitioner, has not submitted the Corporation's articles of incorporation, he cannot maintain any claim that the Certificate required ballots to be independent of proxies. Kunstler did submit, however, a copy of the by-laws of the Corporation ("By-Laws"). Article II, §6 of the By-Laws makes the election authorized by BCL §610 to make §610 applicable to the Corporation so as to require inspectors of elections for shareholder votes, but only when requested by a shareholder or in the case of contested elections. However, the By-laws do not "opt

in" to BCL §611.

The By-Laws, as submitted by Kunstler, do themselves, refer to the use of ballots in Article II, §5, in two provisions, viz:

> "Voting by shareholders shall be viva [sic] vote unless any shareholder present at the meeting, in person or by proxy, demands a vote by written ballot, in which case the voting shall be by ballot, and each ballot shall state the name of the shareholder voting and the numbers of shares owned by him and in addition, the name of the proxy of such ballot if cast by a proxy."
>
> "In all contested elections, the amendment provides that a written ballot for election of directors at annual meetings must be given."

Although the second paragraph above may not be actual By-law language, its effect is the same, a ballot was required by the By-Laws for this election. However, the By-Laws do not proscribe form of proxy or ballot or foreclose using a document meeting the minimal By-Law provisions for the content of a ballot and the minimal BCL provisions for the content of a proxy for both purposes. Thus, Kunstler cannot challenge the election on the ground that there has been a violation of the By-Laws of the Corporation.

The Corporation has asserted that Timmerman v. Board of Managers, 212 AD2d 523 (2nd Dept. 1995) is dispositive of the proxy-as-ballot issue. Timmerman upheld an election of three members of the nine member board of managers of the

Anchorage Condominium. The applicants' argument that the proxy agents had to fill out ballots, in addition to handing in the completed proxy forms of the absent homeowners, is without merit, and no reasoning or other citation is given for this statement.

Timmerman, however, involved an election to the board of managers of a condominium where the standards and procedures for such elections are governed by the declaration and by-laws of the condominium. While New York Real Property Law §339-V requires the by-laws of a condominium to address the nomination and election of members, the call of meetings and quorums, there are few proscriptions as to how such is to be done. While such section permits condominium boards to be incorporated, few are. See McKinney's Real Property Law Practice Commentaries to Art. 9-B, Part 1, Section V, §F. Thus, Timmerman does not control the issues here.

Kunstler has also asserted that the decision in Brodsky v. Board of Managers of Dag Hamarskjold Tower Condominium, 111 Misc.3d 591 (Sup. Ct. NY Co. 2003) supports his contentions on this issue. Besides not addressing such issue, Brodsky also relates to a condominium and specific aspects of its by-law procedures and not a corporation and BCL provisions. Such case is equally not controlling.

This Court, however, finds that there being no proscription in the BCL or in any corporate document submitted as part of the record, there is no basis for this

Court to set aside the election by reason that the proxies were also deemed ballots for the election. There was a ruling by the President at the meeting that such would be done and there was no objection from any shareholder, including Kunstler. Absent some compelling violation of law, this Court may not find that the ruling of the President as chair of the meeting should be set aside.

Kunstler, who participated in the election, raised no objection to the use of proxies as ballots and himself had his proxies counted by the inspectors of election and personally oversaw their counting. As the proxy holders were undoubtedly present at the meeting, had he made a timely demand that ballots be used, separate ballots could have been prepared and would undoubtedly have led to the same result. Thus, even to the extent this Court found improprieties in the use of a proxy as a ballot (which the Court does not), it would be against the equitable principles of laches and estoppel for this Court to accord Kunstler relief at this time on such basis under the circumstances.

COUNTING IRREGULARITIES

Kunstler next seeks to have the election set aside on the grounds that irregularities should have precluded enough of the votes to have been counted for the Board's candidates so as to require a new election.

Although Kunstler did not challenge the determinations made by the inspectors of election to count such votes before the announcement of the election results, or before the subsequent adjournment of the meeting, he now raises a series of objections. These objections are:

- - certain proxies were undated.

- - certain proxies were executed in blank and did not originally name the specific proxy holders.

- - one shareholder issued two contradictory proxies dated the same day.

It is not the province of this Court, sitting as a court of equity, to impose its views as to whether the elections process of the Corporation could be better. The fact that only one shareholder, and not one who "lost" the election, complained is ample evidence of the substantial acceptance of the election by the Corporation's electorate. The fact that the "loser" would not consider a re-run if the Court ordered a new election also shows acquiescence in the result by the person most affected by the election. Further, as with the proxy-as-ballot issue, Kunstler participated in the election and raised none of these objections prior to the counting of votes, announcement of the results or adjournment of the meeting. Thus, as was also true as to the use of proxies as ballots, it would be against equitable principles of laches and estoppel for this Court to award Kunstler the relief he seeks, even is his alleged

improprieties indeed constituted improprieties.

In any event, this Court does not find that the three alleged defects constitute improprieties which would require this Court to set aside or stop the election even if these "defects" were challenged at an appropriate time.

Kunstler, attacks certain proxies for being undated. Yet neither BCL §609 nor the By-laws require that a proxy be dated; the BCL only requires that a proxy may not be valid for more than a year, except in certain circumstances. As proxies normally given for a cooperative election are of a shorter duration, it is unlikely that any proxy used was in fact over a year old. Here, Kunstler does not allege or set forth any competent evidence that the challenged undated proxies were over a year old, and thus, has not met his burden to establish an impropriety on this ground.

Kunstler's next challenge is to certain proxies for being signed in blank without naming the person who could exercise the voting rights of the shares as proxy holder. Kunstler's objection is that such proxies are invalid for such reason. Although he himself has said it, Kunstler offers no authority why a shareholder may not give someone a proxy in blank, effectively authorizing the holder to supply the persons to act as proxy. Kunstler's sole support for his ipse dixit is: "my attorneys told me."

Blank payee checks, blank note or check endorsements and blank powers of assignment of stock or notes may under certain circumstances be unwise, but they are

common in commerce and neither illegal nor void. When knowingly given, they grant a presumptive power of attorney to the holder to fill in the blanks. There is nothing in the BCL, the By-laws or any precedent cited to this Court why the same does not prevail with respect to the proxies here. No grantor of any of these blank proxies has alleged that the person exercising the proxy was unauthorized to do so. The record further does not show that the person exercising the proxy had not completed the proxy before voting. Accordingly, Kunstler has therefore not established any basis for this Court to set aside the counting of these proxies at the election.

Kunstler's third objection is that one shareholder executed two proxies on the same day, without indicating which was subsequent. While it is clear that a subsequent proxy revokes an earlier proxy, unless the proxy is coupled with an interest, Kunstler proffered no evidence that the proxy counted voted was the earlier proxy, as he could have easily done through an affidavit of the shareholder who signed such proxy. Further, the shareholder in question had 122 shares, and thus 366 votes on a cumulative basis. Such votes were recorded as cast one-third each for the board slate. Even if there had been an error in counting the wrong proxy, it would have made no difference in the outcome as the losing candidate had 1841 less votes than the candidate of the board slate with the fewest votes.

INSPECTORS OF ELECTION

Kunstler also inferentially objects to the choice of the inspectors by challenging their impartiality and seeks to have some "independent" inspection appointed for the re-vote he seeks from the Court. To the extent such objection is before this Court, this Court, in exercising its equitable powers under BCL §619, rejects this inferential objection.

Kunstler has presented no evidence of any bias in the actions of the inspectors of election other than that, in retrospect, Kunstler believes they should have decided certain matters differently than he - even though at the time, Kunstler, although present and aware of the facts, made no objections to their appointment or decisions. Cooperative building's managing agent's employees are commonly appointed to serve as inspectors of election for cooperative board elections. They generally do so as a portion of their services under their management contracts without extra charges. The Board may, of course, appoint others to such a post. Here there is no evidence of any request being made by Kunstler or anyone else prior or at the time of appointment to appoint anyone else as an inspector. Accordingly, as no request was made and as no evidence of bias has been proffered, and it was, under the circumstances, perfectly reasonable for a board to save an additional expense by appointing the managing agent's employees as inspectors, this Court would find no

grounds to challenge the election on this basis. The petition is dismissed, and all prior restraining orders are dissolved.

This is the Decision and Order of the Court.

DATED: APRIL 12, 2007
NEW YORK, NEW YORK

Hon. Lewis Bart Stone
Justice of the Supreme Court