

**Chaudhry v Vital Holding Co. of N.Y., Inc.**

2007 NY Slip Op 33057(U)

September 26, 2007

Supreme Court, Nassau County

Docket Number: 4858-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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FAROOQ CHAUDHRY,

Plaintiff,

TRIAL/IAS, PART 6  
NASSAU COUNTY

INDEX No. 004858/07

MOTION DATE: July 23, 2007  
Motion Sequence # 002

-against-

VITAL HOLDING COMPANY OF NY, INC.  
and BERJ HAROUTUNIAN,

Defendants.

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The following papers read on this motion:

- Order to Show Cause..... X
- Affidavit..... X
- Reply Affirmation ..... X
- Memorandum of Law in Opposition..... X

This motion, by the plaintiff, brought on by order to show cause, for an order, pursuant to BCL §§ 619 and 706 and CPLR § 6311, allowing the plaintiff, as his right, to act as a member of the board of directors of the corporate defendant and for his immediate reinstatement as such a member, and for such other and further order as to the Court may seem proper, is determined as hereinafter set forth.

**CHAUDHRY****Index no. 004858/07****FACTS**

The plaintiff, Farooq Chaudhry ("Chaudhry"), is a shareholder of Vital Holding and a driver for Vital Transportation, Inc. ("VTI"). The plaintiff was also once a director of Vital Holding. The defendant, Vital Holding ("Vital"), was incorporated in the State of New York and has a business address in Long Island City, New York. Vital is the owner of subsidiary VTI, which is a car transportation company. The drivers for VTI are also the shareholders of Vital. Berj Haroutunian, a defendant, is the president of Vital's board of directors.

During April and June of 2006, several incidents occurred involving the plaintiff. These incidents led to the issuance of a security slip and a subsequent hearing before corporate defendant's security committee. The committee found Chaudhry guilty of violating Vital's Security Rule #3 (Inappropriate Conduct) and fined him \$6,000. Due to a provision of Vital's by-laws, the security violation resulted in his alleged constructive resignation from Vital's board of directors. This action was brought to recover damages from the defendant for the improper removal of the plaintiff from the board of directors of Vital. The plaintiff further seeks a judgment to restrain the defendants from depriving him of his right to act as a member of, and reinstatement to, the board of directors.

**PLAINTIFF'S CONTENTIONS**

The plaintiff asserts that his removal as a director of Vital was in violation of Vital's corporate by-laws in that his removal occurred in the absence of a special meeting and affirmative vote of the holders of a majority of all the shares of stock outstanding. He also argues that the security violation, which, according to the defendants resulted in his deemed resignation, was merely a scheme designed for the sole purpose of removing the plaintiff from the Board of Directors. Therefore, he contends, the defendants should be restrained from depriving him of his right to act as a member of corporate defendant's board of directors and that he should be immediately reinstated as such.

**DEFENDANTS' CONTENTIONS**

The defendants argue that the plaintiff fails to meet the standard for a proceeding pursuant to BCL § 619 because the action was brought in the wrong Judicial District, the motion seeks redress for alleged misconduct not covered by the statute, and that the plaintiff has failed to provide notice to all necessary parties. Furthermore, the defendants

CHAUDHRY

Index no. 004858/07

argue, the plaintiff fails to meet any of the criteria for the granting of a preliminary injunction. Lastly the defendants assert that the plaintiff has no chance of success on the merits.

### PLAINTIFF'S REPLY

The plaintiff argues that the defendants have not properly opposed his motion for reinstatement. Furthermore, he asserts that the defendant is grossly misrepresenting the provisions of the by-laws as they relate to his resignation from the board of directors. Specifically, that the by-laws do not provide that the plaintiff may not seek to be reinstated to the board of directors, and that Section 3 of Article III has no application to the facts at issue. Finally, the plaintiff argues that BCL § 619 does not indicate that the improper choice of venue raises an issue as to jurisdiction.

### DECISION

BCL § 619 provides that the supreme court may, upon petition by an aggrieved shareholder, hold a proceeding in order to review a corporate election. The plaintiff argues that he was improperly removed from the corporate defendant's board of directors. On the other hand, the defendants argue that the plaintiff was deemed to have resigned from the board of directors due to his being found guilty of a security violation. The plain language of BCL § 619 limits review to that of "an election." The removal of a director is not cognizable under section 619 of the Business Corporation Law. (**Springut v. Don and Bob Restaurants of Am, Inc.**, 57 A.D.2d 302, 305, 394 N.Y.S.2d 971, 973, 4th Dept., 1977). Despite the broad language of the statute's final clause ("or take such other action as justice may require"), the statute's reach has been confined to the review of elections, (**Goldfield Corp. v. General Host Corp.**, 29 N.Y.2d 264, 267, 327 N.Y.S.2d 330, 333, 1971), and "matters which would necessarily pertain to or effect an election's outcome, such as voting rights and stock ownership." (**In re Schmidt**, 97 A.D.2d 244, 252, 468 N.Y.S.2d 663, 668, 2d Dept., 1983). In the instant case, there was no election. Therefore, whether the plaintiff was removed or whether he resigned, the relief he seeks is not of the kind addressed by BCL § 619 and thus the petition for a BCL § 619 proceeding must be denied, and **dismissed**.

As a shareholder of Vital and pursuant to the share certificate issued, the plaintiff is subject to, and bound by, VTI's proprietary license and Vital's by-laws. Paragraph 30 of VTI's proprietary license provides that the "sole and exclusive" remedy in the event of

CHAUDHRY

Index no. 004858/07

“any claim or controversy” arising out of “any monetary fine assessed against a Licensee” shall be 1) submission of such claim or controversy to a committee for review; and 2) submission of the same to binding arbitration. Parties to a contract may agree that any and all controversies growing out of it in any way shall be submitted to arbitration. (**Marchant v. Mead-Morrison Mfg. Co.**, 252 N.Y. 284, 298, 169 N.E. 386, 391, 1929). If they do, the courts of New York will give effect to their intention. *Id.* The proprietary license also provides that, in order to exercise the above options, the Licensee must submit a written request for review to the review committee within 60 days after the date the claim or controversy arose, and submit a request for arbitration within 180 days after the date the review committee renders its final determination on the claim or controversy.

The plaintiff alleges that his “so called security violation” which, according to the defendants resulted in his deemed resignation, “was merely a scheme designed for the sole purpose of removing the plaintiff from the Board of Directors.” Despite his claim of impropriety by the defendants, the plaintiff failed to exercise his right to a review of the security violation. In **Plummer v. Klepak**, (48 N.Y.2d 486, 489-90, 423 N.Y.S.2d 866, 867, 1979) the petitioner, who was deemed to have resigned from his employment following a period of unexplained absence, was denied CPLR Article 78 relief because he failed to avail himself of the grievance procedure set forth in the collective bargaining agreement by which he was bound. There, the court stated: “the parties having agreed to a procedure for the resolution of disputes involving this provision, petitioner should not now be heard to complain, having failed to avail himself of the administrative remedies outlined in the collective bargaining agreement.” *Id.* In the instant case, the plaintiff likewise failed to avail himself of the available remedies provided for in Vital’s by-laws. Although this case does not involve a petition for Article 78 relief, the principle articulated in **Plummer** provides guidance and strongly supports denial of the plaintiff’s demand for reinstatement.

It is the plaintiff’s contention that the defendants’ by-laws in no way provide that he may not seek to be reinstated to the board of directors if he can prove that his removal and/or resignation is based upon fraudulent and contrived security violations. In support of this assertion he cites **Ellis v. Broder**, (11 Misc.3d 534, 812 N.Y.S.2d 851, Sup. Ct. N.Y. Co. 2006) and **Brevettie v. Tzougros**, (42 Misc.2d 171, 247 N.Y.S.2d 295, (Sup. Ct. Queens Co., 1964). In each of those cases, the plaintiffs, having been removed from their positions on the board of directors, were reinstated because the courts found that the

**CHAUDHRY**

**Index no. 004858/07**

defendant failed to provide him with any notice and opportunity to defend himself.

Here, although the Court does not determine whether the plaintiff was in fact “removed,” the uncontroverted facts show that he was given both notice of the charge against him and an opportunity to defend himself before the security committee. Thus, while the plaintiff may in fact be entitled to reinstatement, such a determination cannot be made on the ground that he was not given notice and an opportunity to defend himself.

The plaintiff’s argument, that Section 3 of Article III of Vital’s by-laws has no application to the facts at issue, is a mischaracterization. Section 3 deals with eligibility to become a member of the board of directors. According to the plaintiff, since he was already elected to the board of directors and Section 3 deals with eligibility to become a member of the board of directors, this section is not relevant. This interpretation, however, only presents part of the story. Section 3 states: “Each director...shall not have been found guilty of any security violations under the rules and regulations of the Corporation...during the one (1) year period prior to the nomination and *thereafter at any time during his term as a director*” (emphasis supplied). Thus, Section 3 targets behavior both prior to, and following, a director’s election. This section of the by-laws is, therefore, relevant to the facts at issue.

Significantly, Section 4 of Article III of the by-laws, provides, in pertinent part, “A director. . .[who] otherwise ceases to be qualified as a director pursuant to Section 3 of Article III of these By-Laws shall be deemed to have resigned as a director of the corporation”. These Sections, hereinbefore quoted, must necessarily be read together, and Chaudhry’s failure to contest and seek review of his security violation effectively and practically forecloses his right to his former position as a director.

To the extent that the plaintiff seeks a preliminary injunction restraining the defendants from interfering with his asserted right to serve as a member of the corporate defendant’s board of directors, this too must be denied. In order to obtain a preliminary injunction, the moving party must demonstrate (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that the equities are balanced in his favor. (Gerstner v Katz, 38 AD3d 835, 835 NYS2d 203, 2<sup>nd</sup> Dept., 2007).

First, the plaintiff must demonstrate the likelihood of ultimate success on the merits. In order to sustain his burden, Chaudhry must demonstrate a clear right to relief which is plain from the undisputed facts. (Dental Health Assocs. v. Zangeneh, 267

A.D.2d 421, 421, 701 N.Y.S.2d 106, 107, 2d Dept., 1999). Chaudhry argues that because there was never a shareholders vote to remove him from the board of directors, the defendants violated Section 5 of Article III of the corporate defendant's by-laws, therefore he was improperly removed in violation of BCL § 706 and Section 5 of Article III. The defendants counter that Chaudhry, having been found guilty of a security violation, ceased to be qualified as a director and was deemed to have resigned, and thus neither BCL § 706 nor Section 5 of Article III apply. In his reply affirmation, the plaintiff alleges that his "so called security violation," which, according to the defendants resulted in his deemed resignation, "was merely a scheme designed for the sole purpose of removing the plaintiff from the Board of Directors." In essence, he claims, the defendants conspired to falsely charge him with a security violation as pretense for his removal and thus avoided the removal procedure outlined in the corporate by-laws. Where the facts are in sharp dispute, a temporary injunction will not be granted. *Id.* Here, the undisputed facts do not demonstrate a clear right to relief and the facts are sharply in dispute. Accordingly, the plaintiff has failed to demonstrate the likelihood of ultimate success on the merits.

The plaintiff has also failed to demonstrate that he will suffer irreparable injury absent the granting of the preliminary injunction. Chaudhry's only attempt to satisfy his burden is the claim, in his affidavit in support of the order to show cause, that in the absence of an equitable remedy he will suffer irreparable injury and loss. When attempting to demonstrate irreparable injury, "the plaintiff's bare conclusory allegations [are] insufficient to satisfy that element." (*Neos v. Lacey*, 291 A.D.2d 434, 435, 737 N.Y.S.2d 394, 395, 2d Dept., 2002). Furthermore, "the irreparable harm must be shown by the moving party to be imminent, not remote or speculative." (*Golden v. Steam Heat*, 216 A.D.2d 440, 442, 628 N.Y.S.2d 375, 377, 2d Dept., 1995). Here, the plaintiff's claim is a bald allegation providing no indication that he will suffer imminent harm.

Finally, the plaintiff has failed to demonstrate that the equities are balanced in his favor. In order to satisfy this element, the moving party must show "that the irreparable injury to be sustained is more burdensome [to the plaintiff] than the harm caused to the defendant[s] through imposition of the injunction. (*McLaughlin, Piven, Vogel, Inc. v. W. J. Nolan & Co.*, 114 A.D.2d 165, 174, 498 N.Y.S.2d 146, 152, 2d Dept., 1986). Since Chaudhry has failed to demonstrate irreparable injury it follows that he cannot demonstrate that the equities are balanced in his favor.

Therefore, for the foregoing reasons, the plaintiff's motion for preliminary injunction and reinstatement is ~~denied~~

Dated SEP 26 2007

**ENTERED**  
 SEP 28 2007  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE

*Stephen A. Savaris*  
 J.S.C.