

**Cheary v Board of Directors of E. Riv. Hous. Corp.**

2007 NY Slip Op 33750(U)

November 14, 2007

Supreme Court, New York County

Docket Number: 0113993/2007

Judge: Judith J. Gische

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

PRESENT: GISCHE  
Justice

PART 10

JOHN CHERRY

INDEX NO. 113993/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

EST RIVER HOUSING CORP MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

NOV 21 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: Nov 14 2007

[Signature]  
HON. JUDITH J. GISCHE J.S.C.

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: Part 10**

John Cheary, et al.

Plaintiffs,

**Decision/Order**

-against-

Index#113993/07  
Mot. Seq. # 001

The Board of Directors of East  
River Housing Corp and  
East River Housing Corporation,

Defendants.

Present:  
Hon. Judith J. Gische  
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
OSC, affidavits.....	1
Exhibits.....	2
RV affidavit, exhibits.....	3
ENG affidavit, exhibits.....	4
SSA affirmation, exhibit.....	5
Oral Argument [Stenographic record dated November 1, 2007].....	6

Hon. Gische, J.:

*Upon the foregoing papers, the decision and order of the court is as follows:*

Plaintiffs are 18 tenant shareholders of defendant East River Housing Corporation ("East River"). East River is a cooperative corporation that owns four multifamily residential buildings with approximately 1700 apartments, located on the lower east side of Manhattan. Although it was originally built as a limited equity corporation under the Private Housing Finance Law, in 1996 it was converted to private ownership. It is run by defendant Board of Directors ("Board"), who have , three of a total number of eleven (11) Board members are to be elected.

By this Order to Show Cause plaintiffs seek an immediate court order directing

the Board to follow certain procedures in connection with the upcoming annual meeting. The underlying complaint is styled as one for declaratory judgment and a permanent injunction. It is also for the identical relief sought on this motion. In particular, plaintiffs seek an order directing the Board to: [1] accept any form of proxy that is otherwise permitted under BCL § 609; [2] provide them with a shareholder list with full information; [3] hold its annual meeting in a wheelchair accessible site, and [4] not interfere with the distribution of written materials by candidates. The plaintiffs believe that the procedures now being put in place by defendants deprive insurgent candidates of an opportunity to challenge the incumbent Board members running for reelection.

In opposition, the Board denies that it has or will act unfairly or contrary to law in connection with the upcoming meeting. The Board denies that insurgent candidates for the Board have been “frozen” out of the process in any past elections. In any event, the Board claims that, on its own, it is trying to address some of the issues raised by plaintiffs in this action.<sup>1</sup> It does not believe, however, that it should be subject to any court order to undertake such measures, and that plaintiffs’ proof that it will act contrary to law is speculative and premature. It further argues that it has fully complied with any legal obligation it has to provide shareholder lists and addresses to plaintiffs.

The nature of the relief being sought by plaintiffs is a mandatory, permanent injunction. BCL § 619 gives the court equitable powers to set aside a corporate

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<sup>1</sup>Although the parties dispute whether recent Board actions taken with respect to the upcoming elections are in response to plaintiffs’ complaints or not, the resolution of this issue not important to the dispute before the court. Regardless of the Board’s motivation, it is the procedures that they are intending to put in place which must be considered in connection with the relief requested.

election and order a new one if justice requires. Relying on Goldfield Corp. v. General Hospital Corp., 36 AD2d 125 (1<sup>st</sup> dept. 1971) *affd* 29 NY2d 264 (1971), plaintiffs argue that the court may, in advance of an election, order procedures to be followed to ensure that it is fair. Whether or not the court has the power to intervene in the corporate process in advance of an election, it is a remedy that should be exercised sparingly. This is because a permanent mandatory injunction is still considered an extraordinary remedy (Jackson v. Bunnell, 113 NY 216 [1889]) and further, the courts should not interfere with the internal affairs of a corporation. In order to get the relief requested, plaintiffs need to show that court assistance is needed to allow them to vote and/or solicit proxies. Goldfield Corp. v. General Hospital Corp., *supra*.

#### 1. The Proxies

Based upon prior history, plaintiffs argue that the Board will limit use of proxies only to forms that are board approved. The two proxy forms that have been used by defendants in the past are a general proxy form and a directed proxy form. Copies of the proxies distributed by the board in 2006 have been provided to the court and there is no factual dispute about them. The general proxy form allows the shareholder to designate any person it wants to serve as his or her proxy and to vote in whatever manner the shareholder has directed him or her to do. The directed proxy form designates defendants' counsel as a proxy to vote for a slate designated by the shareholder. The slate is chosen from a list of all candidates that are listed in alphabetical order on the proxy form.

There are no by-laws in this case that limit the use of proxies to particular forms. BCL § 609 generally governs proxy use in New York. It provides in pertinent part:

“(a) Every shareholder entitled to vote at a meeting of shareholders or to express consent or dissent without a meeting may authorize another person or persons to act for him by proxy.

\*\*\*\*

(i) Without limiting the manner in which a shareholder may authorize another person or persons to act for him as proxy pursuant to paragraph (a) of this section, the following shall constitute a valid means by which a shareholder may grant such authority.

(1) A shareholder may execute a writing authorizing another person or persons to act from him as proxy. Execution may be accomplished by the shareholder or the shareholder's authorized officer, director, employee or agent signing such writing or causing his or her signature to be affixed to such writing by any reasonable means including, but not limited to, by facsimile signature.

(2) A shareholder may authorize another person or persons to act for the shareholder as proxy by transmitting or authorizing the transmission of a telegram, cablegram or other means of electronic transmission to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person who will be the holder of the proxy to receive such transmission, provided that any such telegram, cablegram or other means of electronic transmission must either set forth or be submitted with information from which it can be reasonably determined that the telegram, cablegram or other electronic transmission was authorized by the shareholder. If it is determined that such telegrams, cablegrams or other electronic transmissions are valid, the inspectors or, if there are no inspectors, such other persons making that determination shall specify the nature of the information upon which they relied.

(j) Any copy, facsimile telecommunication or other reliable reproduction of the writing or transmission created pursuant to paragraph (i) of this section may be substituted or used in lieu of the original writing or transmission for any and all purposes for which the original writing or transmission could be used, provided that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original writing or transmission.”

Defendants argue that although they send shareholders two forms of proxies, they have historically accepted, and will continue to accept, any proxy that complies

with BCL § 609. They further argue that the cover letter sent with the 2006 proxies is instructive and does not intimidate shareholders from using a proxy and/or voting for any candidate that is on the ballot.

Plaintiffs have not shown that defendants' intended actions with respect to proxies for the upcoming annual elections will violate BCL § 609. Any shareholder may use a form of proxy that otherwise complies with BCL § 609 to vote for any candidate of his or her choice. Further, even were a shareholder to use one of the two forms of proxies prepared and circulated by the Board, such proxies allow for that shareholder to vote for any candidate of its choosing, including any insurgent slate. Plaintiffs are not entitled to injunctive relief in advance of the upcoming election regarding proxy use.

## 2. Site of the Shareholder Meeting

Plaintiffs argue that because the site of the annual meeting is not handicapped accessible, the defendants should be ordered to find another site. There is no dispute that there is no particular statute requires a handicapped accessible venue for the upcoming meeting. Plaintiff argues that fundamental principles of fairness require such a venue.

The annual meeting has traditionally been held on the second floor of a private auditorium located in a community building at East River. The second floor is admittedly not handicapped accessible. Plaintiffs argue that in the past this prevented handicapped shareholders from participating in, or voting at, the annual meetings. Therefore, they want defendants to be ordered to hold the meeting in a handicapped accessible location.

\* 7 ] .

Plaintiffs have not suggested an alternative location and defendants have given a history of how they have in the past sought alternative locations, which were problematic in themselves. The Board claims that because of the tremendous number of shareholders, finding a suitable venue has been extremely difficult. The auditorium is geographically convenient, it seats 900 people and it is air conditioned and heated. The defendants claim that in the past, to ameliorate any problems with the selected venue, they placed two tables on the first floor so shareholders could register their votes. Porters were then used to run the ballots up to the second floor where the actual meeting took place. Defendants represent and contend that they will continue this practice. Plaintiffs factually dispute whether this procedure has been in place and its effectiveness. Nonetheless, defendants also indicate that it is their intention this year to hook the first floor to the second floor *via* video conferencing. They have solicited at least one bid from a contractor, and although they may not use that particular contractor, they are committed to the procedure. Plaintiffs indicated during oral argument that, in principle, video conferencing as a means of including shareholders physically located on the first floor would be acceptable.

Consequently, there is no basis for injunctive relief as to the site of the annual meeting in advance of the meeting.

### 3. Written Campaign Materials

The Board previously adopted written election procedures which prohibit all candidates for office from electioneering in the form of written communications. The only permitted written information submitted by candidates was a "biography" and a

[\* 8 ]  
“photograph.” Plaintiffs argue that this rule prevents them from providing election materials to persuade shareholders to vote for an insurgent slate of candidates.

Defendants claim that on October 10, 2007 the Board changed the rule to permit written electioneering materials and to hold a candidates night at which all candidates for office can address the shareholders. While the details remain to be worked out, defendants have indicated that all candidates, whether incumbent or insurgent, will have the same rights to distribute campaign materials.

Consequently, there is no need for an injunction with respect to the distribution of election materials prior to election.

#### 4. Shareholder lists

BCL § 624 provides in pertinent part:

“(a) Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders, board and executive committee, if any, and shall keep at the office of the corporation in this state or at the office of its transfer agent or registrar in this state, a record containing the names and addresses of all shareholders, the number and class of shares held by each and the dates when they respectively became the owners of record thereof. Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into written form within a reasonable time.

(b) Any person who shall have been a shareholder of record of a corporation upon at least five days' written demand shall have the right to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom for any purpose reasonably related to such person's interest as a shareholder. .... A corporation requested to provide information pursuant to this paragraph shall make available such information in written form and in any other format in which such information is maintained by the corporation and shall not be

[\* 9 ] .

required to provide such information in any other format. If a request made pursuant to this paragraph includes a request to furnish information regarding beneficial owners, the corporation shall make available such information in its possession regarding beneficial owners as is provided to the corporation by a registered broker or dealer or a bank, association or other entity that exercises fiduciary powers in connection with the forwarding of information to such owners. The corporation shall not be required to obtain information about beneficial owners not in its possession.

(c) An inspection authorized by paragraph (b) may be denied to such shareholder or other person upon his refusal to furnish to the corporation, its transfer agent or registrar an affidavit that such inspection is not desired for a purpose which is in the interest of a business or object other than the business of the corporation and that he has not within five years sold or offered for sale any list of shareholders of any corporation of any type or kind, whether or not formed under the laws of this state, or aided or abetted any person in procuring any such record of shareholders for any such purpose."

It is undisputed that Jennifer Feraday is a shareholder entitled to inspect East Rivers records. She requested a list of the names and addresses of shareholders and provided an affidavit of proper purpose, etc. otherwise required by BCL § 624 (c) . In response, she received a list that contained all the names of the shareholders with addresses only at the apartments located within East River. Plaintiffs claim that they are entitled to the addresses of those shareholders whom own apartments in East River, but live elsewhere. Defendants claim that this category of non-resident shareholders is only a small percentage of the total number of shareholders. They further claim that they are not required to provide information about alternate addresses.

In general terms, BCL § 624 requires a corporation to make available all of its books and record to a qualified shareholder. Thus, as long as the defendants maintain as part of their books and records alternative addresses for certain shareholders, that

information must be provided.

In the event a corporation fails to provide the requested information, BCL § 624(d) provides for a summary proceeding to be brought in this court in which an order directing that the material be provided for inspection could issue. In this case, plaintiff Feraday is entitled to an order against defendants directing that they make available for her inspection and copying the names and alternate addresses, if there be any, of shareholders of East River. Given the impending election and annual meeting, the court orders that defendants provide such information for inspection on November 20, 2007.

### **Conclusion**

To the extent plaintiffs seek relief directing certain procedures be followed in connection with the upcoming annual meeting and election of new Board members, it is denied. The Board has expressed an intention and implemented plans that should result in a fair election that complies with existing laws. While no one can predict the future, plaintiffs have not made an adequate showing that warrants court intervention at this point. In the event there are problems with the actual election, plaintiffs still have rights to proceed under BCL § 619.

Plaintiff Feraday has established the right to information maintained on the books and records of the corporation, including the right to alternate addresses. This decision is made in accordance with the summary procedure set forth in BCL § 624.

Since there are no factual disputes that bear upon the resolution of the issues before the court and further because the relief sought in the underlying complaint is the

\* 11 ]  
same as that sought on this motion, the court makes this determination with the need for any testimonial hearing and renders it as a final determination of the matters raised in this action.

In accordance herewith it is hereby:

ORDERED that plaintiffs' petition is granted only to the extent that defendants shall make available for inspection and copying to plaintiff Jennifer Feraday the names and addresses for all shareholders of East River, including any alternate addresses other than those for the buildings that are part of the East River Cooperative Housing Corporation, and it further

ORDERED that the motion for a permanent mandatory injunction is otherwise denied and the underlying proceeding for pre-election relief is dismissed without prejudice to seeking post election relief under BCL §619 if appropriate, and it is further

ORDERED that any requested relief not expressly addressed herein is denied and this constitutes the decision and order of the court.

Dated: New York, New York  
November 14, 2007

**FILED**  
NOV 21 2007  
SO ORDERED:  
NEW YORK  
COUNTY CLERK'S OFFICE  
\_\_\_\_\_  
J.G. J.S.C.