

**Wolfus v Board of Mgrs. of Cent. Park  
Place Condominium**

2007 NY Slip Op 33922(U)

November 30, 2007

Supreme Court, New York County

Docket Number: 0104580/2007

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB  
Justice

PART 15

Daniel Wolfus

INDEX NO.

104580/07

MOTION DATE

Central Park Place  
Condominiums Etc

MOTION SEQ. NO.

2

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

**FILED**

DEC 04 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 11/30/07

WALTER B. TOLUB S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check one if appropriate:

DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
DANIEL WOLFUS, individually and derivatively  
on behalf of the Unit Owners of Central Park  
Place Condominium

**Index No.** 104580/07  
**Mtn. Seq.** 002

Petitioner

-against-

Board of Managers of the Central Park Place  
Condominium, Gabriella Garzoni, Walter  
Goldstein, Kosaku Horiwaki, Jens Winther  
(A/k/a Jorgenson), Hooman Mehran,  
Chandranath Sen, Monya Singh

Respondents  
-----x

**WALTER TOLUB, J.:**

By this motion Petitioner seeks: (1) leave to renew and reargue the dismissal of the Petition or, in the alternative; (2) relief from this court's dismissal of the Petition based on excusable default; or (3) leave to reserve the Petition upon Respondents.

Facts

The facts, as stated in this court's July 30, 2007 memorandum decision, are as follows: Petitioner owns a residential unit in the Central Park Place Condominium ("Condominium"), located at 301 West 57<sup>th</sup> Street in Manhattan. The underlying action was filed to vacate the results of an election of the Board of Managers held on December 11, 2006 and to compel the Board of Managers to hold a new election. The underlying Petition sought an order pursuant to CPLR 6301 and

6313 prohibiting Respondents, individually and/or collectively, from performing any duties as board members of The Board of Manager of the Central Park Place Condominium other than (1) ensuring the collection of common charges; (2) paying the regularly recurring bills of the Condominium and (3) addressing any emergency situations which pose an immediate threat to the property. Respondents cross-moved for an order (1) dismissing the Petition pursuant to CPLR 3211 for both lack of jurisdiction and failure to state a cause of action; (2) dismissing the Petition as to the individually named members of the Board; (3) disqualifying the firm of Braverman Associates as counsel for Petitioner; and (4) dismissing Petitioner's claim for attorneys' fees.

In November, 2006 Halstead Property Management ("Halstead"), the managing agent for the Condominium, mailed and delivered a notice of the 2006 Annual Meeting (the "notice"). The notice announced that the annual meeting of the residential unit owners of the Condominium and election of members of the Board of Managers would take place on December 11, 2006. The Notice of the Annual Meeting advised the unit owners to attend in person, but provided a proxy printed on gold-colored paper (the "gold proxy") to be completed and returned in the event that an owner could not attend.

On November 8, 2006, a Condominium unit owner, Rosemary Bodner, advised Halstead in writing that she was seeking election to the Board of Managers with six other candidates, Sean Fitch, Walter Goldstein, Deborah Hoffman, Kosaku Horiwaki, Norman Steele and Daniel Wolfus (the "Green Slate"). The Green Slate of candidates printed its proxies on green-colored paper (the "green proxy", giving voting power to Ms. Bodner and directing her to vote solely for the Green Slate candidates. The Gold Slate candidates was comprised of Board Manager incumbents Jens Wither (a/k/a Jens Jorgenson), Hooman Mehran, Geoffrey Schwartz, Chandranath Sen, and Monya Singh, as well as non-incumbents Moti Bashan and Gabriella Garzoni (the "Gold Slate Candidates").

On December 11, 2006, the Board held its Annual Meeting and Election. On December 13, 2006, the ballots and proxies were reviewed and counted. Petitioner claimed that challenges were raised as to the validity of certain Election documents. These documents were separated from the rest of the documents and the objections were noted by the Condominium's accountants. Petitioner further claimed that the challenged Election documents and objections were to have been reviewed by the Condominium's attorney, David Fingerhut, prior to certification of the election results. Petitioner claimed that the election results were certified without Mr. Fingerhut's review of the challenged

documents and objections. The new Board of Managers was announced on December 15, 2006.

Petitioner, by Order to Show Cause dated April 3, 2007, commenced the instant proceeding claiming that the December election was tainted by; (1) improper intervention and involvement by Halstead at the cost of the Condominium unit owners; (2) lack of controls during the election to ensure a fair and accurate voting result; (3) the counting of fraudulent proxies which Petitioner argues would have changed the result of the election.

By Order dated July 30, 2007, this court held that there was nothing in the Order to Show Cause indicating that Petitioner was seeking leave to commence an Article 78 proceeding in lieu of service of a Notice of Petition. Therefore, in order to commence the Article 78 proceeding, this court held that Petitioner was required to file and serve the Notice of Petition and Petition in "the same manner as a summons in the action" (CPLR 403 [c]).

Petitioner never independently served Respondents with the Notice of Petition and Petition prior to service of the Order to Show Cause. Rather, Respondents were first presented with the Notice of Petition and Petition with the service of the Order to Show Cause. Petitioner argued then, as it does now, that service of the Order to Show Cause was made in accordance with this

court's directive<sup>1</sup> and therefore is valid and sufficient service. However, this court held that while service of the Order to Show Cause was made in accordance with this court's directive, it did not obviate the service requirement for commencement of a Special Proceeding under Article 4 and Article 3 of the CPLR (citing Barr, Altman, Lipshie and Gerstman, New York Civil Practice Before Trial, §42:82 [James Publishing 2007]). This court held that service of the Notice of Petition and Petition was defective as to all of the Respondents and that therefore, this court lacked jurisdiction over the parties and dismissed the matter. The court did not address the balance of the issues raised in either the application or the Petition.

#### Discussion

Pursuant to CPLR 2221(d), a motion to reargue shall be granted, at the courts discretion, when the court has overlooked or misapprehended law in determining the prior motion. (CPLR

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<sup>1</sup>The Order to Show Cause for this application, in pertinent part, reads as follows:

ORDERED that the service that [sic] a copy of this Order and the papers upon which it is based, together with service of the Notice of Petition and Petition be made on or before the 9<sup>th</sup> day of April, 2007 by: (i) hand delivering them to the offices of Richman & Fingerhut, General Counsel to the Central Park Place Condominium; and (ii) with respect to the individual respondents in addition to the hand delivery upon Richman & Fingerhut, by overnight mail to their last known addresses, and that said service be deemed sufficient.

[\* 7]

2221; Foley v. Roche, 68 AD2d 558 [1<sup>st</sup> Dept 1979]). Pursuant to CPLR 2221(e), in a motion to renew, the moving party must demonstrate the existence of new facts not known at the time the motion was submitted, a reasonable justification for the failure to present such facts and must show that said facts would change the outcome of the prior motion. (American Auto Service Bureau Inc. v. AT&T Corp., 33 AD3d 473 [1<sup>st</sup> Dept 2006]). Even where a moving party is able to demonstrate new facts, the motion must be denied where these new facts would not change the outcome of the action. (Clemons v. Glicksman, 25 AD3d 468 [1<sup>st</sup> Dept 2006]).

Here, the court did not overlook facts or misapprehend the law. This court dismissed the Petition specifically noting that no application was made by Petitioner to file and serve an Order to Show Cause in lieu of a Notice of Petition. As the Court noted in Harlem River Consumers Cooperative, Inc., v. New York State Tax Commission, 44 AD2d 738 [3d Dept 1975] aff'd 37 NY2d 877 [1975];

A proceeding under Article 78 is a special proceeding 9CPLR 7804, subd. (a) which is commenced and in which jurisdiction is acquired by service of a notice of petition or order to show cause (CPLR 304). Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party (CPLR 7804, subd. [c]). A notice of petition shall be served in the same manner as a summons in an action (CPLR 403, subd. [C]).

In the absence of an order authorizing service in a manner other than that provided for by CPLR 403 (subd. [c]), service of the notice of petition and petition by mail upon the State Tax Commission was insufficient to confer jurisdiction over that body (citations omitted). Since service upon the commission was jurisdictionally defective and requires dismissal of the petition, it is unnecessary to decide whether the failure to serve the Attorney General pursuant to CPLR 7804 (subd. [c]) would be fatal in any event. . . .

(Harlem River Consumers Cooperative, Inc., v. New York State Tax Commission, 44 AD2d 738 [3d Dept 1975] aff'd 37 NY2d 877 [1975]).

Additionally, the cases cited by Petitioner do not hold that service of an Order to Show Cause eliminates the statutory requirement of proper service insofar as the commencement of a special proceeding. In Osorio v. Leventhal, 80 NY2d 898 [1992], the Court specifically stated that the holding was limited to the specific facts and circumstances of that case. In Osorio v. Leventhal, there was no issue as to personal jurisdiction in the commencement of a proceeding, there was no question that Petitioner sought and obtained an order authorizing service of the Order to Show Cause in lieu of the Notice of Petition or an alternative method of service for acquiring jurisdiction. It follows that this motion to reargue is denied.<sup>2</sup>

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<sup>2</sup>The court notes that there will be a new election and shareholders meeting in November/December of this year.

Petitioner argues that renewal is appropriate since the court overlooked facts, namely that Respondents Mr. Goldstein and Mr. Horiwaki acknowledged service and consented to the relief sought in the Petition and the Order to Show Cause. However, renewal is improper since there is no new evidence which was unavailable at the hearing date. The affidavits of Mr. Goldstein and Mr. Horiwaki add no new evidence as to service, or any other evidence to indicate that the Petition should be granted.

The remainder of Petitioner's motion is also denied. Accordingly, it is

ORDERED that Petitioner's motion is denied in its entirety.

This memorandum opinion constitutes the decision and order of the Court.

DATED: 11/20/07

**FILED**  
DEC 04 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

W

WALTER B. TOLUB J.S.C.