

Mittasch v Long Is. Greyhound Transfer, Inc.

2008 NY Slip Op 31414(U)

May 6, 2008

Supreme Court, Nassau County

Docket Number: 6604-08/

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
ROBIN MITTASCH and PAULINE WEISSMAN,

TRIAL TERM PART: 48

Petitioner,

INDEX NO.: 006604/08

-against-

MOTION DATE: 4-28-08

SUBMIT DATE: 4-28-08

SEQ. NUMBER - 001

**LONG ISLAND GREYHOUND TRANSFER, INC.,
(L.I.G.H.T.) A 501(c)(3) charitable not for profit
corporation, together with its officers and board
members Albert J. Bruns, Joel Graff, Ellen Graff,
Aimee Botsch, Pat Barney, Dave Efron and Shiela
Daiell, both individually and in their official
capacities,**

Respondents.

-----x

The following papers have been read on this motion:

- Order to Show Cause, dated 4-10-08.....1**
- Affirmation in Opposition, dated 4-21-08.....2**
- Affirmation in Reply, dated 4-25-08.....3**

This is a petition pursuant to CPLR § Article 78 and N-PCL §601 and 621.

Petitioners are respectively a nonmember (Mittasch) and a member (Weissman) of Long Island Greyhound Transfer, Inc. (LIGHT), a New York, Type B, not-for-profit corporation, an organization whose objective, according to its Certificate of Incorporation,

is to find homes for racing greyhound dogs whose racing days are over and to educate the public about greyhounds. Petitioner Mittasch is a member of a group known as Greyhound Angels Adoption, an organization involved in the adoption of Greyhound racing dogs.

The principal bases of the petition are that (i) Mittasch has been denied membership in LIGHT, a fact not denied by respondents and (ii) respondent Joel Graff, the owner of the building which houses LIGHT's offices and equipment is improperly profiting from an arrangement with a dog groomer located at the same premises; an allegation vehemently denied by Graff and the other respondents.

Petitioners thus seek a directive to issue membership to Mittasch and to permit, without limitation, inspection by the petitioners of the membership rolls, books and records of LIGHT.

Petitioners are also seeking to suspend the Board of Directors and officers, appoint a receiver, enjoin the use of funds for the defense of this proceeding, hold new elections and disqualify present officers and directors from running for or holding office. These additional demands are not supported by any facts, but rather are based on conclusory statements or opinions, rumor, and hearsay and are thus denied.

As to election of directors, N-PCL §703 provides that directors may be elected, appointed or a combination of both, there must be at least three and the term shall not exceed five years. The statute is nonspecific and to a large extent unrestrictive. Ultimately the Certification of Incorporation or by laws control. Directors may be removed for cause by a vote of members or by a majority vote of other directors or without cause if the certificate permits. However, a court action such as this, to remove a director for cause may only be

brought by the attorney general or by ten percent of the members N-PCL §706.

Since the Certificate of Incorporation is silent as to number of directors and no by laws have been submitted, the Court cannot determine on these submission if the directors were properly elected. Petitioners have failed to satisfy their burden of demonstrating that the directors were improperly selected and have not disputed the method of selection contained in the responsive submission. Thus, that portion of the petition which challenges selection of directors is dismissed. To the extent petitioners seek removal of the directors, the petition also fails because petitioners do not constitute 10% of the members. That portion of the petition which challenges election of directors or removal is dismissed.

By way of example and not in limitation of the foregoing, the claim that LIGHT has not made certain filings with the State of New York is not supported by any evidence and is without dispute or contradiction, belied by a record of filing submitted by respondents. Claims that the respondents have not effectively carried out the purposes of LIGHT are similarly based upon opinion, conclusory statements and hearsay which are internal to the functioning of LIGHT and thus for the members to resolve.

In reply, petitioners invoke N-PCL §720 as a basis for this proceeding by Weissman. This section provides that a derivative action may be brought against directors or officers to sanction them for or to prevent misconduct as to corporate management, finances or business such as is sought here. However, the statute limits the class of persons who may institute such an action and in this case, petitioners have failed to allege, as required, that they represent five (5%) percent of the members or otherwise qualify. N-PCL §§623(a) and

720(b). Wyckoff, Practice Commentaries, McKinney's Cons Laws of NY, Book 37, Not For Profit Corporation Law, p. 476-477 (2005). *See also People v. Cypress Hills Cemetery*, 23 AD3d 536 (2d Dept. 2005) *Lve to App. Dismissed* 7 NY 3d 844 (2006); *Hoffert v. Dank*, 55 AD2d 518 (1st Dept. 1976).

In any event, the petition fails to state a cause of action under N-PCL §720 in that it is lacking in sufficient facts to support the conclusions reached. *Cirrinzione v. Polizzi*, 14 AD2d 281 (4th Dept. 1961).

As to payment of legal fees for this proceeding, N-PCL §720-a, 721 and 722 set out authorizations for the indemnification of directors and officers in derivative and direct actions and also authorize a corporation to expand upon such rights. Ultimately, the Certificate of Incorporation or by laws control. Here, the petition fails to set forth sufficient reasons why these sections are not applicable or should not be applied, thus those claims for relief are dismissed. *See Martin v. Columbia Greene Humane Soc. Inc.*, 17 AD3d 839 (3rd Dept. 2005).

Although the statute permits indemnification of respondents, N-PCL §§ 721, 722 et seq, the Certificate of Incorporation is silent on the subject and neither the by laws nor any resolutions have been presented by either side. Moreover, the submissions do not address whether respondents should be entitled to indemnification for legal fees and expenses. Given the expansive nature of the N-PCL on this subject and considering the lack of any evidence proffered on the part of petitioners relating to the issue, the Court concludes that petitioners have not met their burden for an extension of the stay in regards to indemnification.

The parties are cautioned however that vacatur of the stay with respect to payment of legal expenses does not constitute a determination that the respondents are entitled to same. It merely constitutes a determination that petitioners have not met their burden of showing grounds for a continuance of the stay.

Pending further order of this Court, the stay contained in the Order to Show Cause shall remain in full force and effect except for the words “to pay for the defense the Board of Directors and Officers herein” which are deleted.

N-PCL §621 provides, insofar as is applicable here, that a not-for-profit corporation shall keep correct and complete books and records of virtually every aspect of its existence and that a person who has been a member for at least six (6) months preceding demand therefor may examine the corporation’s minutes and list of members. Thus, by virtue of N-PCL §621 (a) and (b) petitioner Weissman may examine the minutes, list of members and make copies thereof provided she complies with the affidavit requirements of N-PCL §621(c).

In addition N-PCL §621(e) permits petitioner Weissman the right to obtain a balance sheet and profit and loss statement for the preceding year and finally, N-PCL §621(f) leaves to the Court’s discretion whether to compel production for examination of the other books and records of LIGHT.

The burden lies with the respondent to raise a substantial question of fact as to Weissman’s good faith and motives in making her request. *Matter of Smith v. Calvary Baptist Church*, 35 AD3d 749 (2d Dept. 2006); *Watson v. Christie*, 288 AD2d 29 (1st Dept.

2001). But even where as here, it is obvious from the submissions that there is substantial personal rancor among the various parties merely having ill feelings or a desire to change management and policies does not render a request for information to be improper. *Matter of Mayer v. National Arts Club*, 192 AD2d 863 (3rd Dept. 1993).

Here, the dual circumstances of there being a dog groomer working with or at the LIGHT offices in a building owned by or through respondent Joel Graff or an entity controlled by him coupled with the incident of the greyhound Rocky escaping from his adoptive home and being killed by a railroad train is sufficient basis for inquiry by a member of LIGHT and the Court finds that bad faith is not demonstrated based on these facts. Such inquiry includes the right to investigate management conduct and to communicate with fellow members. *Matter of Wells v. League of American Theatres & Producers, Inc.*, 183 Misc. 2d 915 (Sup. Ct. 2000).

Based on the foregoing, respondent shall, provided compliance with N-PCL §621(c) is made (submission of an affidavit), permit Weissman inspection of the minutes and membership list of LIGHT, the balance sheet and profit and loss statement of LIGHT for the preceding fiscal year and in addition, pursuant to this Court's discretionary authority, shall permit inspection and copying of all records and financial transactions between LIGHT and Joel Graff, Greyhound Plaza, Ltd and the person or persons who conduct dog grooming at the location of LIGHT's offices, 20 W. Old Country Road, Hicksville, NY. All of the foregoing, inspections shall take place no later than 30 days from the date of this decision and order at the principle office of LIGHT on a weekday between the hours of 8:00 a.m. and 6:00

p.m. on at least 48 hours prior written or oral notice from petitioners' attorney to respondent's attorney. Cost of copying shall be paid by petitioner Weissman, who maybe accompanied by one attorney from the office of petitioners' attorney and one certified public accountant.

The issue of membership for Mittasch cannot be determined on the basis of the submissions.

The petition alleges that she filled out a membership form, sent in a check, and was denied membership by telephone by respondent Joel Graff. Although the Certificate of Incorporation attached to the petition is silent on membership eligibility, petitioner asserts that the by laws, that have not been submitted, contain minimal requirements for membership.

N-PCL §601 is essentially silent on membership requirements. Thus, eligibility for membership is to be determined by the constitution, by laws and other organic documents of governance. *See Harris v. Lyke*, 217 AD2d 982 (4th Dept. 1995); *Barazini v. Brighton & Manhattan Beach Chamber of Commerce & Civic Assn.*, 20 Misc. 2d 844 (Sup. Ct. 1959).

A trial is necessary in order to determine the requirements for membership in LIGHT, whether petitioner Mittasch meets the eligibility requisites and whether her application was considered and processed in accordance with the constitution, by laws and other rules of LIGHT.

Petitioners are directed to file a Note of Issue, together with the required fee, at the office of the County Clerk of Nassau County forthwith upon receipt of a copy of this order.

[* 8]
Thereafter, the proceeding shall be added the CCP calendar for **June 10, 2008**, at 9:30 a.m.

A copy of this order shall be served on the Calendar Clerk and accompany the Note of Issue when filed. The failure to file a Note of Issue or to appear as directed may be deemed an abandonment of the claim giving rise to the hearing.

This directive with respect to a hearing is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer or a Court Attorney Referee as he or she deems appropriate.

With respect to the claims of improper management and direction of the corporate objectives, absent some specific violation of law, the business judgment rule insulates the respondents from scrutiny by this Court. That rule bars inquiry by the courts into actions of directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. *Consumers Union of U.S. Inc., v. New York State*, 5 NY 3d 327, 360 (2005). The Court takes no position and makes no findings with respect to claims relating failures of placement for adoption, locating wayward greyhounds, relationships with race tracks and the like.

Since Mittasch is not a member of LIGHT, she lacks standing as to all of the foregoing except her claim of entitlement to membership. Hence, all of her claims are dismissed except the claim of entitlement to join LIGHT and that claim shall be determined at trial, *Harris v. Lyke, supra*.

The trial shall determine the qualifications for membership in LIGHT as to Mittasch, whether there was compliance with such requirements and such other issues as the trial court shall determine are necessary and proper.

This shall constitute the Decision and Order of this Court.

Petitioners shall submit a partial judgment in accordance with this order.

ENTER

DATED: May 6, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: Richard Bruce Rosenthal and Associates, P.C.
Attorney for Petitioners
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**Ferro, Kuba, Mangano, Sklyar
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ENTERED

MAY 08 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**