

**Hong v 384 Grand St. Hous. Dev.
Fund Co., Inc.**

2008 NY Slip Op 31456(U)

May 19, 2008

Supreme Court, New York County

Docket Number: 0101607/2008

Judge: Joan Madden

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

PRESENT: HON. JOAN A. MADDEN
J.S.C.

PART 11

Donald Hong, Et Al.
384 Grand Street
Housing, Et Al.

INDEX NO. 101607108
MOTION DATE 3-6-08
MOTION SEQ. NO. 1
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~~ proceeding is determined in accordance with the annexed decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: May 19, 2008

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
In the Matter of the Petition to Set side the Election of
Directors and Officers of 384 Grand Street Housing
Development Fund Company, Inc. Held on the 16th day
of December, 2007

INDEX NO. 101607/08

DONALD HONG, MICHAEL LEE, KIN LEE,
JOHN CHANG, FLORENCE CHAN, ECHO WONG,
TONY WONG and NORMA CHU,

Petitioners,

-against-

384 GRAND STREET HOUSING DEVELOPMENT
FUND COMPANY, INC., EDDIE MO, FLORA
HERBERT KEE, THOMAS TAM, ALLEN COHEN,
JENNY LOW and JAN HE.,

Respondents.

-----X

JOAN A MADDEN, J.:

In this proceeding pursuant to section 618 of the Not-for-Profit Corporation Law (“N-PCL”) petitioners seek an order setting aside the election of directors held on December 17, 2007 and directing that a new election be held. Respondents are cross-moving to dismiss the petition, and in the alternative submit an answer opposing the relief sought in the petition.

At the outset, the court finds that the issues raised in this proceeding can be determined without a formal hearing, as the undisputed facts are contained in the verified petition, the parties’ affidavits and supporting documents, and neither side has suggested that oral testimony is necessary. See Nyitray v. New York Athletic Club of City of New York, Inc., 195 AD2d 291 (1st Dept 1993).

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1473).

The following facts are not disputed. Respondent 384 Grand Street Housing Development Fund Company, Inc. (hereinafter "384 Grand") is a not-for-profit corporation organized under the New York State Not-for-Profit Corporation Law. Pursuant to its certificate of incorporation, 384 Grand is organized for the purpose of owning and operating, on a non-profit basis, a housing project for low income elderly and handicapped persons, at the premises known as 384 Grand Street, which has 26 apartments. 384 Grand is comprised of fifteen members: petitioners Donald Hong, Michael Lee, Kin Lee, John Chang, Florence Chan, Echo Wong, Tony Wong and Norma Chu; and respondents Eddie Mo, Flora Si, Herbert Kee, Thomas Tam, Allen Cohen, Jenny Low and Jan He. Prior to the December 17, 2007 election, the following members served on the board of directors: respondent Eddie Mo, President; petitioner John Chang, Vice President; petitioner Michael Lee, Secretary; petitioner Donald Hong; and respondent Thomas Tam.

By letter dated November 15, 2007, President Eddie Mo, noticed an annual membership meeting for Monday, December 17, 2007 at 6:00 p.m., at 50 Norfolk Street. The letter listed four agenda items in the following order: \$10,000 legal bills; management company report; membership election; and board of directors election.

On December 17, 2007, from 5:50 p.m. to 6:03 or 6:04 p.m., petitioners Donald Hong, Norma Chu, Tony Wong, Michael Lee and Echo Wong were sitting in the waiting area near the entrance of 50 Norfolk Street. During that time, they did not see any of the respondent members arrive for the meeting and for that reason, believed the meeting had not yet commenced. Petitioners assert, and respondents do not dispute, that the respondent members arrived at the

building earlier, prior to 5:50 p.m., and were already assembled in the conference room when petitioners arrived.

Meanwhile, at 6:00 p.m. sharp, the respondent members present in the conference room began the meeting, with none of the petitioner members present; one additional respondent member appeared by proxy, Thomas Tam. As reflected in the minutes, the "meeting was called to order at 6 :00 p.m. verified by clock on cell phones (via satellite)," and as the first order of business, Eddie Mo appointed "Jenny Low to be secretary for this meeting to record the minutes because Michael Lee was not present when the meeting started at 6 p.m." The minutes describe the election which followed:

Addressing one of the items on the agenda, Eddie [President, Eddie Mo] called for the election of board of directors. Jenny nominated the following slate of candidates: John Chang, Thomas Tam, Eddie Mo, Herbert Kee, and Flora Si. Allen moved to accept the slate nominated by Jenny. Jan seconded the nomination. A vote was taken. The motion passed by unanimous vote. 6 votes in favor. (5 votes and 1 proxy vote.) Eddie as chair of the meeting did not cast a vote.

At 6:03 or 6:04 p.m., petitioners Norma Chu and Tony Wong entered the conference room and discovered the meeting in progress; respondent Herbert Kee announced that they were four minutes late. Tony Wong immediately called for the remaining members in the waiting room to join the meeting, and they arrived at approximately 6:04 p.m.¹ Thereafter, the building manager gave the management report and a \$10,000 legal bill was discussed. According to the minutes, the meeting was adjourned at 6:13 p.m.

¹The minutes state that "[a]t 6:04 PM, the following arrived: Norma Chu, Tony Wong, Michael Lee, Echo Wong, Dong Hong, Wayne Wong, and David Chen."

Petitioner Donald Hong submits an uncontroverted affidavit, explaining that before the meeting was adjourned, he objected that the election had not yet taken place. Eddie Mo stated the election was held before Hong and the other petitioners arrived. Donald Hong objected that he and the other petitioner members had not participated in the election and, as a result, the election had not been conducted. Petitioner Kin Lee then arrived at the meeting, and Hong said that there was a sixth vote to keep the meeting going. The meeting was adjourned over petitioners' objections.

Petitioners sent a letter dated December 18, 2007 to President Eddie Mo, disputing the election and declaring that "[a]ll new action[s] of your board are improper and of no effect. The current board shall continue to govern until a proper election is conducted." On January 28, 2008, petitioners secured an order to show cause and commenced the instant proceeding seeking an order pursuant to section 618 of the Not-For-Profit Corporation Law setting aside the December 17, 2007 election and directing a new election. Respondents have cross-moved to dismiss the petition, and in the alternative, submit an answer opposing the relief sought in the petition

Under section 618 of the Not-For-Profit Corporation law, where an aggrieved member of a not-for-profit corporation challenges the results of an election, the court is authorized to "hear the proofs and allegations of the parties" and either "confirm the election, order a new election, or take such other action as justice may require." N-PCL §681; Jackson v. First District Dental Society, 240 AD2d 265 (1st Dept 1997).² A court reviewing an election pursuant to section 618,

²N-PCL §618 provides as follows:

Upon the petition of any member aggrieved by an election and upon notice

sits as a court of equity, and “should not interfere in the internal affairs of a corporation . . . unless a clear showing is made to warrant such action.” Nyitrary v. New York Athletic Club of City of New York, Inc., *supra* at 291 (quoting Matter of Scipioni v. Young Women’s Christian Assoc., 105 AD2d 113 [4th Dept 1984]; Matter of F.I.G.H.T., Inc., 79 Misc2d 655, 659 [Sup Ct, Monroe Co 1974]). Nevertheless, the court “has broad equitable powers and may direct a new election where the election under review is ‘so clouded with doubt and tainted with questionable circumstances that the standards of fair dealing require the court to order a new, clear and adequate expression.’” Matter of F.I.G.H.T., Inc., *supra* at 659 (quoting Wyatt v. Armstrong, 186 Misc 216, 220 [Sup Ct, NY Co 1945]); accord Matter of Davidson v. James, 172 AD2d 323, 324 (1st Dept 1991); Matter of Scipioni v. Young Women’s Christian Assoc., *supra*; Faraldo v. Standardbred Owners Ass’n, Inc., 63 AD2d 1010 (2nd Dept 1978). In other words, “if reasonable grounds exist to indicate that the election under review has not been conducted in a proper, regular, or fair manner,” and “the result is not free from suspicion, or is clouded in doubt . . . right justice and fair play require a new election.” Matter of Kaminsky, 251 App Div 132, 139-140 (4th Dept 1937).

First, as to the cross-motion to dismiss the petition, respondents assert that respondent Thomas Tam was not properly served and the failure to serve him is fatal to this proceeding. Although the court agrees that N-PCL §618 requires service upon each of the “persons declared

to the persons declared elected thereat, the corporation and such other persons as the court may direct, the supreme court at a special term held within the judicial district where the office of the corporation is located shall forthwith hear the proofs and allegations of the parties, and confirm the election, order a new election, or take such other action as justice may require.

elected” at the contested election, see Uranian Phalanstery 1st New York Gnostic Lyceum Temple v. Reab, 155 AD2d 302 (1st Dept 1989), petitioners’ reservice of the order to show cause and the petition at Tam’s residence effectively obviated respondents’ objections to service. See IBJ Schroder Bank & Trust Co. v. Zaitz, 170 AD2d 579 (2nd Dept 1991); Helfand v. Cohen, 110 AD2d 751 (2nd Dept 1985); Heusinger v. Russo, 96 AD2d 883 (2nd Dept 1983). Thus, respondents’ cross-motion to dismiss the petition is denied.

Turning to the petition, petitioners assert that the December 17, 2007 election “was conducted by respondent-president, Eddie Mo, with a minority of members present as part of a scheme to wrestle control of the Board from the majority by denying the petitioners in person or through proxy a full and fair opportunity to vote.” The court agrees that the undisputed record reveals an organized and intentional effort on the part of respondents to hold the election before petitioners arrived at the meeting, so that respondents could conduct their own election without petitioners’ participation and succeed in gaining control of the corporation.

It appears unusual and unexpected that the meeting commenced exactly at 6:00 p.m. and lasted only 13 minutes. Petitioners submit the minutes from other annual member and board meetings, which indicate that a December 2, 2004 annual meeting was “called to order at 6:10 p.m.” and was adjourned at 7:20 p.m.; a June 28, 2007 board meeting “started at 8:35 p.m.” and ended at 9:40 p.m.; and a September 11, 2007 board meeting “opened” at 6:38 p.m. and was adjourned at 8:25 p.m. Moreover, it strains credulity that the nominations were taken, and the election was conducted and concluded in the four minute interval between 6:00 and 6:04 p.m, before any of the petitioners arrived, especially since the minutes state that Eddie Mo began the meeting by appointing Jenny Lo as secretary for the meeting.

Significantly, the parties admit that the petitioner members and the respondent members represent two separate factions of the corporation which are in sharp disagreement about its future and whether it should continue to operate as a non-profit venture.³ Clearly, it was no accident that Eddie Mo and his supporters were in the conference room conducting the election, while the members of the opposing faction were still in the waiting area, unaware that the meeting had started without them. For that reason, respondents were successful in gaining control of the board, as two petitioners who had been on the board, Donald Hong and Michael Lee, were neither nominated nor reelected, and were replaced by respondents Herbert Kce and Flor Si. Eddie Mo submits an affidavit, essentially admitting as much in attempting to justify the election:

In view of the concern of myself and a number of the other members that Hong's actions were not serving the best interests of 384 Grand, that he was threatening to move 384 Grand away from its original mission and that he would mount additional attempts to seize control of 384 Grand, I noticed an annual membership meeting for December 17, 2007. . . . On the evening of December 17, 2007, there was quorum for the purposes of the annual membership meeting when the proceeding began at 6:00 p.m. as there were more than one-third of the members present. . . . Once there was a quorum the meeting properly began at 6:00 p.m., the appointed time for the meeting. An election of Board members took place. Myself, John Chang and Thomas Tam were reelected to the Board of Directors. Hong and Michael Lee were not reelected. . . . 384 Grand [was formed] to help pursue its purpose of providing housing to low and moderate income residents of Chinatown. In recent years it became abundantly clear that Hong had other ideas for the building and adjacent lot at 384 Grand Street. . . . [I]n order to protect the building and to further the purpose for which the not-for-profit corporation was originally formed, a meeting was duly noticed and a majority of the members acted.

³According to Eddie Mo, "[s]ince 384 Grand Street opted out of its HPD low income housing status, the property can potentially be redeveloped and run as a building for profit sometime in the future."

While the concerns that 384 Grand continue to pursue its purpose of providing housing for low and moderate income residents as articulated by Eddie Mo, are commendable, the determination of the issue regarding the fairness and regularity of the election does not turn on the viewpoint of either faction. Under these circumstances, where respondents intentionally held the election expeditiously before petitioners arrived at the meeting, for the purpose of securing control of 384 Grand, reasonable grounds exist for concluding that the election was not conducted in a fair, proper or regular manner, and fair play and justice require a new election. See Matter of Kaminsky, supra; Azzi v. Ryan, 120 Misc2d 121 (Queens Co Sup Ct, 1983); Matter of Kirschner v. Drake Supply Corp., 81 NYS2d 435 (Queens Co Sup Ct, 1948).

In light of this determination, the court need not reach the additional grounds raised in the petition.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted, and the December 17, 2007 election of 384 Grand Street Housing Development Fund Company, Inc. is invalid and a new election shall be held.

This constitutes the decision, order and judgment of the court.

DATED: May 19, 2008

ENTER:

J.S.C.

UNFILED JUDGMENT

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