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

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice PART 11

Index Number : 101607/2008
HONG, DONALD
VS
384 GRAND STREET
Sequence Number : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
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 is decided in accordance with the annexed decision and order.

FILED
FEB 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: February 17, 2009

J.S.C.

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

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 11

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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 SI, 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 ("NPCL"), respondents move for an order pursuant to CPLR 2221(d) granting leave to reargue the order and judgment of this court dated May 19, 2008, which granted the petition and invalidated the election of the directors of 384 Grand Street Housing Development Fund Company, Inc. ("384 Grand") and directed a new election of directions.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979). Reargument is not intended "to serve as a vehicle to permit the unsuccessful party to

argue once again the very questions previously decided . . . [or] to provide a party an opportunity to advance arguments different from those tendered on the original application." Id at 567-568.

Applying this standard, reargument is not warranted, as respondents fail to establish that the court overlooked or misapprehended the facts, or misapplied the law.

In seeking reargument, respondents contend that the court overlooked the following facts: 1) a quorum was present at the December 17, 2007 meeting; 2) the timely commencement of the December 17, 2007 meeting at 6:00 p.m. was not "unusual or unanticipated"; 3) the meeting "was not held before the petitioners arrived at the premises as they were congregated immediately outside the meeting room"; and 4) the short duration of the meeting was due to the fact that it was an annual membership meeting of only 384 Grand, as opposed to a "joint meeting" of "three companies, 384 Grand, Hong Ning and the Chinese-American Planning Council, Inc." Respondents further contend that the court misapplied the law, in that respondent Thomas Tam was not properly re-served with the notice of petition and petition, and that the court improperly determined pursuant to Not-For-Profit Corporation law section 681, that reasonable grounds existed for concluding that the election was not conducted in a fair, proper or regular manner. These contentions are without merit.

First, as to the re-service of the petition and notice of petition on respondent Tam, petitioners satisfied the due diligence requirement of CPLR 308(4). Respondents incorrectly assert that the process server made only two attempts to personally serve Tam at his residence. The affidavit of service clearly shows that the process server made three such attempts on February 25, 2007 at 5:20 p.m., February 26, 2007 at 7:00 a.m. and February 27, 2007 at 10:20 p.m. Respondents neglect to include the third attempt at personal service on February 27, 2007,

immediately after which the process server affixed the papers to the door of Tam's residence.

Second, even though a quorum was present when the meeting commenced at 6:00 p.m., respondents were the only members in the meeting room at that time, and petitioners, who arrived four minutes later, did not have an opportunity to participate in the election.

Third, even assuming that the commencement of the meeting at 6:00 p.m. sharp was neither unusual nor unanticipated, the court's determination as to the irregularities in the election was not based solely on a comparison of that time to the start times of three prior meeting conducted in December 2004, June 2007 and September 2007. While the court noted that petitioners had submitted the minutes from other annual member and board meeting to show that the meetings usually did not start "on time," the court focused on the incredulous fact that "the nominations were taken, and the election was conducted 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 appointed Jenny Lo as secretary for the meeting." The court also relied on the parties' admissions that petitioners and respondents represented two separate factions of the corporation in sharp disagreement about its future, in concluding that it was no "accident" that respondents were in the conference room electing the board of directors, while petitioners remained in the waiting area, unaware that the meeting had started without them.

Fourth, respondents' assertion that meeting was not held before petitioners' "arrival" because they were "congregated immediately outside the meeting room," is at best disingenuous, in light of the uncontroverted record recited in the court's prior decision, as to the events of December 17, 2007. Those events were described as follows:

> On December 17, 2007, from 5:50 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 respondents 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. . . .
>
> 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. . . . 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

Based on the foregoing, it is clear, as the court previously determined, that "it was an not 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."

Fifth, while respondents assert that the short duration of the meeting was due to the fact that it was an annual membership meeting of only 384 Grand, as opposed to a "joint meeting" of "three companies, 384 Grand, Hong Ning and the Chinese-American Planning Council, Inc," that fact alone, even if true, is insufficient to alter the court's prior conclusion.

Finally, respondents contend that the court misapplied the law governing an application challenging an election, pursuant to section 681 of the Not-For-Profit Corporation law. Specifically, respondents argue that the fact that prior meetings started later or lasted longer,

"does not supply reasonable grounds" for the court's conclusion that the election of December 17, 2007 was not conducted in a fair, proper or regular manner. This argument is not persuasive, as it is based on a misguided assumption that the sole basis for the court's conclusion was an allegedly "flawed comparison" as to the start time and duration time of the meeting. As determined above, the court has already rejected respondents' arguments that the court overlooked facts regarding the start time and duration time of the meeting. Moreover, the court did not base its conclusion solely on evidence comparing the start times and duration times of the instant meeting with three earlier meetings. Rather, in concluding that the meeting was not conducted in fair or regular manner, the court emphasized that respondents intentionally started the meeting without petitioners and intentionally insured that the election was expeditiously completed within four minutes, before petitioners arrived, for the purpose of securing control of 384 Grand.

Accordingly, it is hereby

ORDERED that respondents' motion for leave to reargue is denied.

DATED: February 17, 2009

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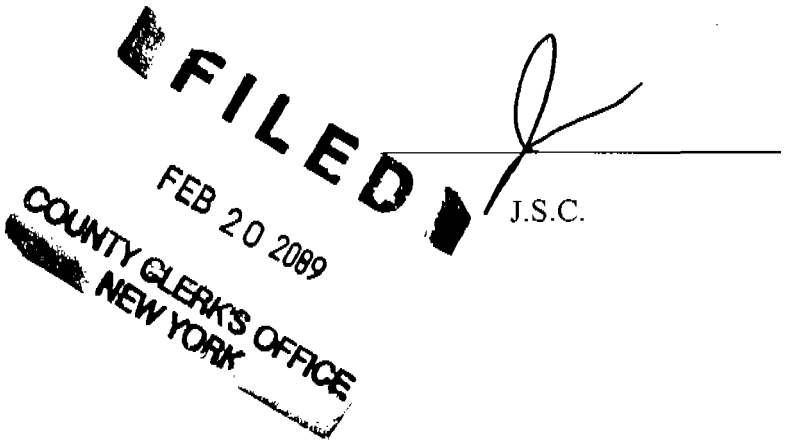

J.S.C.