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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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CHRISELLE ANDREWS f/k/a CHRISELLE SHARP-SELDON,

Plaintiff,

- against -

MIDDLE COUNTY RESOURCES MANAGEMENT, INC., DAN HESTER, Individually and in his Official capacity as Chairman of the Board of Directors and President of MIDDLE COUNTY RESOURCES MANAGEMENT, INC., JOSEPH COOPER, Individually and in his Official capacity as a director and Vice-President and agent of MIDDLE COUNTY RESOURCES MANAGEMENT, INC., BETTIE CROSS, JEFFREY ROWE and ANDERSON GOOSBY Individually and in their Official capacities as Directors and agents of MIDDLE COUNTY RESOURCES MANAGEMENT, INC., and "JOHN DOE No. 1" through "JOHN DOE No. 10" inclusive, the names of the last 10 defendants being fictitious, the true names of said defendants being unknown to plaintiff, it being intended to be the employee(s) and agents of MIDDLE COUNTY RESOURCES MANAGEMENT, INC. described in the complaint herein,

Defendants.

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TRIAL/IAS PART: 25
NASSAU COUNTY

Index No: 016979-09
Motion Seq. No: 1
Submission Date: 9/15/09

The following papers having been read on this Order to Show Cause

Order to Show Cause, Affidavit in Support and Exhibits (Summons and Verified Complaint with Exhibits).....x
Emergency Affirmation.....x
Plaintiff's Memorandum of Law in Support.....x
Affirmation in Opposition with Attachment.....x
Affidavit of J. Morrison.....x
Defendants' Answer.....x

This matter is before the Court for decision on the Order to Show Cause by Plaintiff Chriselle Andrews f/k/a Chriselle Sharp-Seldon, filed on August 21, 2009 and submitted on September 15, 2009 seeking certain injunctive relief. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause in its entirety.

BACKGROUND

A. Relief Sought

Plaintiff Chriselle Andrews f/k/a/ Chriselle Sharp-Seldon ("Plaintiff") seeks an Order 1) immediately reinstating Plaintiff to the Board of Directors ("Board") of Defendant Corporation Middle County Resources Management, Inc. ("Corporation"); 2) directing an accounting to Plaintiff of all funds of the Corporation paid to or on behalf of the directors of the Corporation ("Directors") for the period September of 1997 to the present; and 3) directing Defendants to provide Plaintiff with copies of the following documents for the period September of 1997 to the present: a) all House and Urban Development ("HUD") certifications, documentation and agreements, b) all financial statements prepared for HUD, c) all reports made to HUD, d) all bank statements, e) all records of all bills paid for the Corporation, f) all tax returns for the Corporation, g) authorizations for tax returns for the Corporation, and h) authorizations for all records of the Corporation in the possession of accounts for the Corporation.

The Corporation opposes Plaintiff's applications.

B. The Parties' History

In her Affidavit in Support, Plaintiff affirms as follows:

Plaintiff is a Permanent Director of the Board of the Corporation, a domestic not-for-profit corporation with an office at 260 Clinton Street, Hempstead, New York 11550 ("Premises"). Defendant Dan Hester ("Hester") is the President and Chairman of the Board of the Corporation, and maintains an office at the Premises. Defendant Joseph Cooper ("Cooper") is Vice-President and a Director of the Board of the Corporation. Defendants Bettie Cross ("Cross"), Jeffrey Rowe ("Rowe") and Anderson Goosby ("Goosby") are Directors of the Board of the Corporation. Defendants Corporation, Hester, Cooper, Cross, Rowe and Goosby are collectively referred to as "Defendants."

In the portion of the verified complaint ("Complaint") titled "Background," Plaintiff alleges, *inter alia*, that Permanent Directors are appointed for life and can only be removed by a unanimous vote of the other members of the Board, at a special meeting called for that purpose.

In the first cause of action in the Complaint, Plaintiff alleges that 1) on or about March of 2000, Defendants ceased communications with Plaintiff, failed to advise Plaintiff of future meetings of the Board and refused to permit Plaintiff to attend any further Board meetings; 2) no meeting was held to remove Plaintiff from the Board; and 3) Defendants' purported removal of Plaintiff from the Board, and refusal to permit Plaintiff to continue to serve as Permanent Director, violated the Corporation's By-Laws, and § 706(a) of the Not For Profit Law ("NFPL").

Article III, Section 4 of the Corporation's By-Laws (Ex. C to the Compl.) provides, in pertinent part, as follows, "Permanent directors of the Board may only be removed, with or without cause, at any time by a unanimous vote of the other members of the Board at a special meeting of the Board called for that purpose."

In the second cause of action in the Complaint, Plaintiff reaffirms the allegations in the first cause of action, and further alleges that 1) Permanent Directors of the Corporation receive periodic compensation for serving on the Board; and 2) Defendants have withheld and refused to pay Plaintiff her compensation, in violation of the By-Laws.

With respect to the first cause of Action in the Complaint, Plaintiff submits, in her Affidavit in Support, that Defendants' removal of Plaintiff from the Board, and refusal to permit Plaintiff to continue to serve as Permanent Director of the Corporation, was illegal. Plaintiff asks the Court to declare that removal a nullity, and direct that Plaintiff is entitled to immediate

reinstatement to the Board.

With respect to the second cause of action in the Complaint, Plaintiff contends, in her Affidavit in Support, that Defendants' actions in withholding and refusing to pay Plaintiff her compensation is illegal. Plaintiff seeks the entry of judgment against Defendants, in an amount to be determined at trial, for her damages, as well as expenses, counsel fees, costs, disbursements and interest.

In their Answer, Defendants deny every allegation in the Complaint. They also assert five (5) affirmative defenses: [1] 1) the Complaint fails to state a cause of action against the Defendants; 2) the Complaint is barred by the applicable statute of limitations; 3) the Complaint is barred in whole or in part by the doctrine of laches; 4) the Complaint is barred based on Plaintiff's failure to serve all necessary parties; and 5) the Complaint is barred by the conflict of interest of Plaintiff's attorney. Defendants seek 1) dismissal of the Complaint with prejudice, as well as an award of reasonable expenses, counsel fees, disbursements and interest, and 2) the imposition of sanctions against Plaintiff and her attorney.

In his Affirmation in Opposition, counsel for Defendants affirms as follows:

Defendants' counsel submits that Plaintiff's counsel, W. Charles Robinson, Esq. ("Plaintiff's Counsel"), has a conflict of interest by virtue of 1) his having been the individual who incorporated the Corporation in 1997, created the Corporation's by-laws and served as the Corporation's initial legal counsel, and 2) his membership on the Corporation's Board of Directors until his removal on December 13, 2004.

In support thereof, Defendants' counsel provides a copy of the Corporation's Meeting Minutes dated December 13, 2004 ("Minutes"). Defendants also provide an Affidavit of Jamie Morrison ("Morrison") dated September 1, 2009 with respect to those Minutes. In the Affidavit, Morrison affirms that 1) s/he is the Executive Director of the Village of Hempstead Housing Authority ("HHA"); 2) the Corporation is a not-for profit corporation created by the HHA; 3) HHA is the custodian of the business records of the Corporation; 4) Morrison personally searched the Corporation's records, on file with HHA, and located the minutes of a special Board

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[1] Defendants apparently misnumbered their fifth affirmative defense as their sixth affirmative defense. The Answer contains only five (5) affirmative defenses.

meeting held on December 13, 2004 ("Removal Meeting"); and 5) the copy of the Minutes attached to the Affirmation of Defendants' attorney is a true, complete and exact copy of the original Minutes on file with the HHA.

The section of the Minutes titled " Item # 1" reflects, *inter alia*, that on motion by Hester that was seconded by Cooper and unanimously passed, 1) Plaintiff was removed as a member of the Board because of her "Non involvement;" and 2) Plaintiff's Counsel was removed as a member of the Board. The Minutes contain the word "Attorney" next to the name of Plaintiff's Counsel, but do not state the reason for his removal. The Minutes also reflect that Plaintiff's Counsel was absent from the December 13, 2004 meeting.

C. The Parties' Positions

Plaintiff argues that 1) the Removal Meeting was unlawful and void because neither the Minutes nor Defendants' submissions reflect that Plaintiff received notice of the Removal Meeting; 2) disqualification of Plaintiff's counsel is inappropriate in light of Plaintiff's limited involvement with the Board of filing the Corporation's incorporation papers and serving as one of the initial Directors of the Corporation; 3) Plaintiff's action is governed by a six year limitation period and, therefore, is not precluded by either the statute of limitations or laches; 4) Plaintiff was not required to request reinstatement or compensation prior to filing this action; and 5) Plaintiff is permitted to file an amended Complaint to add any necessary parties.

Defendants' counsel submits that the Board properly removed Plaintiff, in accordance with the Corporation's by-laws. Defendants' counsel contends, further, that Plaintiff is not entitled to compensation because she stopped attending Board meetings in 2000 and Board Members did not begin receiving compensation until December 2004, after Plaintiff's removal.

Defendants' counsel also submits that Plaintiff has improperly sought identical relief in the Complaint and the instant Order to Show Cause, and that the Court should limit Plaintiff to one avenue of relief.

Defendants' counsel submits, further, that Plaintiff's applications are precluded by the Statute of Limitations. Plaintiff affirms that Defendants' improper conduct occurred on or about March of 2000. Thus, pursuant to either CPLR § 213 or 217, Plaintiff's action is untimely.

Defendants' counsel further affirms that, upon information and belief, Plaintiff never,

prior to instituting this lawsuit, requested reinstatement to the Board, or compensation from the Corporation. Thus, he submits, Plaintiff's application is barred by the doctrine of laches. In addition, Plaintiff has failed to obtain jurisdiction of all necessary parties by virtue of her failure to serve all past and present members of the Board.

Defendants submit that the Court should deny Plaintiff's Order to Show Cause. Defendants also seek an award of expenses, counsel fees and interest, as well as the imposition of sanctions, on the grounds that Plaintiff's lawsuit is frivolous.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Preliminarily, the Court will assume, without deciding, that the applicable statute of limitations period for some if not all of Plaintiff's causes of action is six (6) years and that Plaintiff's application is not barred by the statute of limitations. Plaintiff may be entitled to the six year statute of limitation pursuant to CPLR §§ 213(1) and/or (7) which provide for a six year statute of limitation for 1) an action for which no limitation is specifically prescribed by law, and b) in pertinent part, an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting.

B. Plaintiff has not Demonstrated that the Removal Meeting was Void

Plaintiff cites the case of *Rapoport v. Schneider*, 29 N.Y.2d 396 (1972) in support of her claim that the Removal Meeting was void because Defendants have failed to allege that Plaintiff received notice of that meeting. It is true that the Court of Appeals in *Rapoport* held that, because the action in question took place at a special meeting, notice to directors was required, citing Business Corporation Law ("BCL") § 711(a). *Id.* at 401. The Court of Appeals, however, also held that notice may be waived, citing BCL § 711(c). *Id.* BCL § 711(c) provides as follows:

> Notice of a meeting need not be given to any director who submits a signed waiver of notice whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to him.

In the matter *sub judice*, the Minutes lists the "Attendees" and those that were "Absent," and Plaintiff's name does not appear on either line. Thus, the Court cannot conclude, based solely on the Minutes, whether Plaintiff attended that meeting and/or waived her right to notice, and the disputed factual allegations raise issues regarding notice.

The Court notes, further, that the Court of Appeals in *Rapoport* addressed the sufficiency of the complaint, not an application for injunctive relief. The court in *Rapaport* held that the plaintiff's first cause of action, alleging that a resolution of the board of directors was void, was sustainable "if for no other reason than on the basis of the alleged lack of notice." 29 N.Y.2d at 402. In so holding, however, the Court of Appeals stated that "Although it may eventuate upon a trial that notice may have been adequate under the by-laws of [the corporation], or, perhaps, by the statutory mailing presumption ([BCL], § 108 subd. [c]), the unqualified allegation that one director did not receive any notice of the meeting should be sufficient to put the adequacy of notice in issue (CPLR 3013)."

Under the circumstances, the Court cannot conclude that Plaintiff has demonstrated a likelihood of success on the merits warranting injunctive relief, based on her alleged lack of notice of the Removal Meeting.

C. Laches May Apply to Plaintiff's Claim for Equitable Relief

Plaintiff cites the case of *Blinds To Go v. Times Plaza*, 45 A.D.3d 714 (2d Dept. 2007) in support of her argument that her claims are not precluded by the doctrine of laches. In *Blinds to Go, supra*, the Second Department held that "[t]he doctrine of laches, 'which bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered recovery inequitable, has no application in actions at law [citations omitted].'" *Id.* at 715. Thus, the Second Department concluded that the lower court had erred in granting defendant's motion to dismiss the amended complaint, in which plaintiff sought to recover damages for breach of a commercial lease, on that ground. *Id.*

The *Blinds to Go* case is inapposite to the instant Order to Show Cause, however, because Plaintiff is seeking equitable relief in the form of injunctive relief. Thus, the Court may, and does, consider Plaintiff's years of inaction in determining whether Plaintiff has met her burden of establishing that injunctive relief is appropriate, and determines that Plaintiff's delay militates against the granting of injunctive relief.

D. The Minutes Support Defendants' Claim that Plaintiff's Removal was Proper

The Minutes of the Removal Meeting support Defendants' assertion that the Board followed the appropriate procedure in removing Plaintiff from the Board. Those Minutes reflect that Plaintiff was removed on a motion by Hester that was seconded by Cooper and unanimously passed by the Board, in compliance with the Corporation's By-Laws.

E. Conclusion

In light of the foregoing, the Court concludes that Plaintiff has not demonstrated a likelihood of success on the merits that would warrant injunctive relief. The Court also concludes, in part because of Plaintiff's substantial delay in filing this action, that Plaintiff has not established a danger of irreparable harm unless the injunction is granted, or a balance of the equities in her favor. Accordingly, the Court denies Plaintiff's Order to Show Cause in its entirety.

The Court also denies Defendants' application for an Order awarding expenses and counsel fees, and/or imposing sanctions against Plaintiff and her counsel, for allegedly filing a frivolous lawsuit.

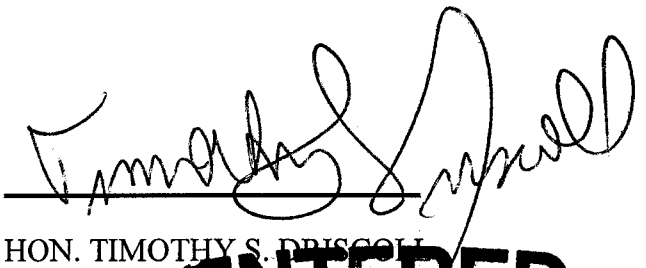
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court on December 1, 2009 at 9:30 a.m., at which time the Court will conduct a Preliminary Conference.

ENTER

DATED: Mineola, NY
November 12, 2009



HON. TIMOTHY S. DRISCOLL
J.S.C.