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

EMILY JANE GOODMAN

PART 17

Justice

Index Number : 401278/2009

EAST MIDTOWN PLAZA HOUSING COMPANY

VS.

CUOMO, ANDREW M.

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 401278-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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 Petition and cross motion

Upon the foregoing papers, it is ordered that this ~~motion~~ are decided

in accord with the attached

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

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: 3/9/10

EMILY JANE GOODMAN J.S.C.

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 : I.A.S. PART 17

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EAST MIDTOWN PLAZA HOUSING COMPANY, INC.,

Petitioner,

Index No. 401278/09

-against-

ANDREW M. CUOMO, AS ATTORNEY GENERAL Of The State Of New York and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

DECISION

Respondents.

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EMILY JANE GOODMAN, J.S.C.

East Midtown Plaza Housing Company, Inc. (EMP/Petitioner), a limited-profit housing company organized under the Private Housing Finance Law, commences this proceeding under CPLR Article 78 seeking to compel the City of New York Department of Housing Preservation and Development (HPD/City) to approve its plan to privatize a Mitchell-Lama development of 746 apartments plus two for staff, on Manhattan's east side, and to compel Andrew Cuomo, Attorney General of the State of New York (AG), to accept for filing, its Second Amendment To Cooperative Offering Plan (Second Amendment). The central issue in this proceeding is whether Petitioner obtained the necessary votes to exit the Mitchell-Lama project, and Petitioner seeks a declaration in this regard.

Two motions to intervene were previously granted: East Midtown Plaza Tenant-Cooperator Association (pro-dissolution intervenor) and certain members/officers, which

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support Petitioner, and East Midtown Plaza Mitchell-Lama Organization which opposes withdrawal from the Mitchell-Lama umbrella. A third motion brought pro se by an individual seeking to intervene or appear as amicus curiae was previously denied as it would be too cumbersome to allow additional submissions from potentially thousands of residents and other interested persons.

BACKGROUND

Mitchell-Lama housing, which bears the names of the original sponsoring state legislators, was created in 1955 with the goal of providing affordable housing for low and middle income New Yorkers. Some developments are rentals while others, such as Petitioner, are cooperatives. A provision was included that after 35 years Mitchell-Lama residents could privatize and change the development's status; the period of time was later reduced to 20 years, for loans made after May 1, 1959, which Petitioner relies on and which is not disputed here (see Private Housing. Finance Law § 35 [2]).[1]

In seeking to dissolve and reconstitute, the goal of Petitioner is to privatize the development, pay off existing public and other debts, and create, inter alia, the right of shareholders to sell their units at market prices, notwithstanding that they have had the benefits of the original discounting of purchase price, preferential mortgages, taxes and

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[1]Project mortgages that are financed by New York City are supervised by HPD (see Private Housing Finance Law § 2[15]), while those financed by New York State are supervised by Division of Housing and Community Renewal. Pursuant to Private Housing Finance Law § 23 the supervising agency (here HPD) has exclusive power to promulgate rules and regulations. The rules promulgated by HPD are contained within Chapter 3 of Title 28 of the Rules of the City of New York.

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maintenance accorded by public financing.

Petitioner moves on multiple grounds, including asking this court to order, by mandamus, HPD's approval and issuance of a letter of "No Objection." Petitioner also moves for this court to order the AG to accept its Second Amendment, while arguing, in the alternative, that the AG does not have jurisdiction over this matter.

Both Respondents oppose the Petition and the AG cross moves to dismiss it.

In late November 2005, following a December 2004 shareholder election, and a vote in favor of dissolution and privatization based on two-thirds of the outstanding shares, HPD accepted the results (HPD now states that this approval was in error). The AG, however, rejected Petitioner's Cooperative Offering Plan, citing an exhaustive list of deficiencies, along with an improper filing sequence, i.e., a vote must be held after filing an offering plan, not in the reverse order, which was the method followed. Accordingly, in 2006, HPD notified Petitioner that a new shareholder vote must be taken for approval of the privatization plan after the AG has accepted the plan. Further, HPD notified Petitioner that under 28 RCNY 3-14(i) (7), the vote must be by units, i.e., one-unit-one-vote, regardless of the number of shares allocated to a given unit (more "desirable" apartments having more shares).[2] That is, Petitioner must carry two-thirds of the votes

[2]28 RCNY 3-14 (i) (7) provides that "Dissolution and/or reconstitution of the mutual housing company requires approval of two-thirds (2/3) of the outstanding shares of the corporation as mandated by the Business Corporation law." HPD is in the process of amending this rule to clarify that the dissolution/reconstitution approval must be based on two-thirds of the "dwelling units in such mutual housing company" as opposed to two-thirds of "the outstanding shares of the corporation as mandated by the Business Corporation Law."

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counted by apartment to prevail in its quest to privatize. Despite HPD's acceptance of an earlier election based on two-thirds of the total outstanding shares, Petitioner would now have to win two-thirds of votes in a one-apartment-one-vote election and not two-thirds of the shares issued.

The 2009 vote, supervised by the Honest Ballot Association, as had been the earlier vote, reached the same result in favor of dissolution when, as before, the vote was calculated by two-thirds of shares. But since the City and the AG maintain that the dissolution of the existing corporate structure and the nature and culture of the complex actually require a vote of two-thirds of the units, and not the two-thirds of the shares that Petitioner relies on, the election has led to a perceived election victory which is invalid and ineffective. The calculation of votes cast would, according to Honest Ballot Association, lead to the opposite result if units were counted - - one-apartment-one-vote - - rather than being based on the number of shares assigned to a given unit. That is, when units and shareholders are treated equally, those opposed to privatization would prevail. Absent a vote in which two-thirds of existing units, rather than two-thirds of outstanding shares, choose privatizing, HPD will not issue the "No Objection" letter.[3] Without HPD's letter, the AG will not accept the plan as effective especially since the AG had additional reasons to reject the plan.

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[3]HPD also states that it will not issue a Letter of No Objection because Petitioner failed to comply with the waiting list notification requirement under 28 RCNY 3-14(i) (9) as well as the requirements under 28 RCNY 3-14 (i)(10) regarding the repayment of indebtedness, which Petitioner presumably intends to repay.

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Discussion

A. The Attorney General

Petitioner maintains that the AG, having accepted the Offering Plan for filing,[4] should be directed to perform the "non-discretionary, ministerial acts" of filing the Second Amendment (which declared the 2009 vote effective, based on a per share vote). However, the act is not ministerial. A judicial finding, for example, that the requisite number of votes was not obtained, would mean that act is not ministerial. Further, the Second Amendment was rejected for filing by the AG, by letter dated April 30, 2009, not only on the basis that the votes were not properly counted, but also on the basis that Petitioner represented to its shareholders that HPD and the AG required a per apartment vote. The First Amendment noted on page 10, that HPD and the AG required a vote based on a per apartment-not a per share basis. Thus, even if Petitioner is correct, and received the requisite votes, the Second Amendment was properly rejected. Proper disclosure regarding the method of voting must be made prior to the actual vote.[5] The

[4]The Offering Plan was ultimately accepted by letter dated February 12, 2008 after more than 97 deficiencies were cured. However, the AG's letter itself provides that "[a]ll advertising and solicitation material must be consistent with the contents of the filed offering literature. Any material change of facts or circumstances affecting the property or the offering requires an immediate amendment. Any misstatement or concealment of material fact in the literature filed renders this filing void ab initio."

[5]Petitioner is aware of the fact that a vote is taken only after proper disclosure as its 2002 Notice of Special Shareholder's Meeting indicates that a vote would be taken only after the AG accepted the Offering Plan.

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cases cited by Petitioner (88 Assoc. v Abrams, 159 AD2d 412 [1990] and Matter of 44 W. 96th St. Assoc. v Abrams, 85 AD2d 563 [1st Dept 1981]) lend no support to its position.

Further, the alternative argument that the AG is without jurisdiction, lacks any support whatsoever. The Offering Plan, amendments, and surrounding correspondence, are replete with references to mandatory submission to the AG, and Petitioner's Offering Plan put residents on notice that each aspect of the project required AG approval. Petitioner's initial allegation, that it was forced to "yield" to the AG's demands (until now), and its glib reference in its reply memorandum, to "EMP's voluntary compliance with the Attorney General's regulations" which "should be rewarded" is meritless. Petitioner has clearly changed its position of "voluntary compliance," notwithstanding its continuous reference in its submissions, over the years, to the jurisdiction of the AG.

The gist of Petitioner's conclusory position is that the AG derives its authority through Article 23-A of the General Business Law, commonly known as the Martin Act, a "blue sky" law intended to provide public protection in the sale of investment instruments, but that those protections are not applicable here. While acknowledging that the Martin Act, and its protections applies to new residential cooperative developments and cooperative conversions, Petitioner contends that the AG has no jurisdiction here because Petitioner is not conducting a "public offering or sale...of securities constituted of participation interests or investments in real estate" (General Business Law § 352-e).

Apparently, EMP reaches this conclusion because although its Plan of Reconstitution contemplated the exchange of shares in Petitioner, for shares in the new corporation, page 11-12 of its Offering Plan (which was not changed by the First or Second Amendments) provides, in relevant part, that:

THIS PLAN...SUPERCEDES THE INITIAL PLAN OF RECONSTITUTION AND THIS PLAN NO LONGER CONTEMPLATES TRANSFERRING THE PROPERTY OR EXCHANGING THE SHARES OF THE SPONSOR AS A CONDITION OF WITHDRAWING FROM THE MITCHELL-LAMA PROGRAM.

The Offering Plan also provides at page 15 that "[t]he number of shares of the Apartment Corporation allocated to each apartment will not be changed or reallocated by reason of the privatization contemplated by this Plan."

The purpose of the Martin Act is to protect the public from fraudulent practices with respect to the offer and sale of securities (see People v Federated Radio Corp., 244 NY 33, 37 [1926]). This goal is implemented by requiring full disclosure of all material aspects of an offer of securities, including ownership interests in cooperatives and condominiums, so that a prospective purchaser has all the relevant information necessary to make a decision regarding whether to purchase (see State of New York v Rachmani, 71 NY2d 718, 726-27 [1988]). Pursuant to General Business Law § 352-e every offer of sale of a cooperative must be submitted in an offering plan to the AG for approval and, the AG must verify that all necessary disclosure has been made. Petitioner does not dispute that since 1986 (a year after the first Mitchell-Lama cooperative sought to convert

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to a private cooperative), the AG has exercised oversight regarding dissolution and reconstitution of limited-profit housing companies formed under Article 2 of the Private Housing Finance Law.

What constitutes a public offering is not defined in the statute, although General Business Law § 352-g permits the AG to exempt from filing any offer of securities governed by General Business Law § 352-e, which is made to less than forty people. Petitioner does not argue that the contemplated exit is not an offering (presumably, because it is a firm offer), but appears to argue that the transaction is not made to the public. Although the number of people involved are sufficiently numerous, Petitioner argues that shares will no longer be exchanged. Regardless of the fact that the transaction is now structured differently and does not contemplate the exchange of shares, Petitioner is nevertheless conducting a "public offering...of securities constituted of participation interests or investments in real estate." The statute is remedial and does not require that shares are physically "exchanged." The reality is that current shareholders are being offered interests in a new private entity, which has different rights and liabilities from Petitioner. It is unimportant that shares as not being exchanged because new interests are being created, whether they are documented by new shares or not. Further, any shares not purchased by current shareholders, will be offered to members of the public under the terms of the Offering Plan. Moreover, although General Business Law § 352-eeee excludes "an offering statement or prospectus for such conversion pursuant to article two...of the private housing finance law" from the protections of that section, General Business Law § 352-e (1) (a)-(c) does not provide for such an exclusion. Accordingly, the Court finds not only that the AG has jurisdiction, but finds that the attack on jurisdiction is baseless.

B. HPD's Rule [28 RCNY 3-14 (i) (7)]

Petitioner claims that HPD cannot change its rules, and further makes the unsupported argument that what may appear in the Certificate of Incorporation or in the Business Corporations Law is irrelevant. Petitioner argues that the City's rule by which it earlier accepted a vote of two-thirds of the outstanding shares, carries the authority and binding nature of a statute and does not lend itself to the change. The argument is that because New York City's Administrative Code is a body of laws that govern New York City, the City's 2005 acceptance of the vote under its rules cannot be changed. But HPD contends that (1) it has not changed its rule, and (2) as a city agency, it sets rules that are not created by the local legislature (City Council), which are not statutes that might bind the City to the 2005 approval. It is not necessary to determine whether HPD is merely clarifying its rule, or, is in fact, changing its rule. While it is true that the Administrative Code is composed of city laws, that does not change agency rules into laws. Therefore, rules promulgated by New York City agencies, including HPD, remain rules; they are not enacted by the Council, they are not stand-alone statutes, and they can be and were amended internally in order to comply with, or clarify, the law. Thus, the only issue is whether the rule is in compliance with law.

C. What Counts is How the Votes Are Counted

The 1968 Certificate of Incorporation, Petitioner's own creation, specifically and unambiguously starts with the proposition that votes are counted per unit reflecting an intent to broaden the equities and equal standing of the residents by giving each resident the same voting rights. Still, the Certificate of Incorporation, which was not amended, may not provide for such a count where a statute provides otherwise. It provides, in relevant part:

> Each holder of shares of capital stock entitled to vote shall be entitled to one vote at any and all meetings of stockholders for any and all purposes regardless of the number of shares held by such holder, <u>except as otherwise provided by statute</u> (emphasis added). Certificate of Incorporation Paragraph IV

Petitioner and the pro-dissolution intervenor also note that Article XVI of the Certificate of Incorporation states that Petitioner has certain enumerated powers, subject to the "limitations contained in the Business Corporations Law" and that Private Housing Finance Law §17 provides that companies organized under it are "subject to the limitations contained in the business corporation law." They further argue that Business Corporation Law § 612 and § 1001 are the statutes which provide "otherwise"-- that a dissolution vote is not by apartment, but rather, by share. Respondents agree that these provisions apply, but maintain that they dictate the contrary--that the vote must be by apartment, not by share.[6]

Business Corporation Law § 612 provides, in relevant part, that:

Qualification of Voters: (a) Every shareholder of record shall be entitled at every meeting of shareholders to one vote for every share outstanding in his name on the record of shareholders, unless otherwise provided in the certificate of incorporation (emphasis added).

Business Corporation Law § 612 does not support the contention that the vote must be counted by one vote per share. The argument is circular, yielding no conclusion. The statute applies "unless otherwise provided in the certification of incorporation," and the Certification of Incorporation applies "except as otherwise provided by statute." This provision, however, is relevant to the extent that it evidences the legislative intent that the Certificate of Incorporation can provide for a scheme other than one vote per share.

Under Business Corporation Law § 1001:

(a) A corporation may be dissolved under this article. Such dissolution shall be authorized at a meeting of shareholders by (i) for corporations the certificate of incorporation of which expressly provides such or corporations incorporated after the effective date of paragraph (b) of this section, a majority of the votes of all outstanding shares entitled to vote thereon, except, in either case, as otherwise provided under section 1002 (Dissolution under provision in certificate of incorporation).

(b) Any corporation may adopt amendment of the certificate of incorporation providing that such dissolution be authorized at a meeting of shareholders by a specified proportion of votes of all outstanding shares entitled to vote thereon, provided that such proportion may not be less than a majority (emphasis added).

HPD and the AG both argue that the language entitled to vote thereon, refers to

[6] Private Housing Finance Law § 35 (2) provides for the "Voluntary dissolution" of a limited-profit housing company. No party has explained why HPD has also referred to the dissolution voting procedures of the Business Corporation Law, in 28 RCNY 3-14 (i) (7).

the first share allocated to each apartment. Pro-dissolution intervenor maintains that such an argument would create two different classes of stock (voting and non-voting) which is not permitted under the Certificate of Incorporation (which provides that only one class of stock shall be issued and outstanding at any time). Further, pro-dissolution intervenor cites Business Corporation Law § 501 (c) mandating that "each share shall be equal to every other share of the same class." It further maintains that HPD's and the AG's reading may result in loss to the tenants of the right to deduct a portion of their maintenance under Internal Revenue Code 28 USC § 216 (b) (1) (A), which allows for a deduction if there is one class of stock. Accordingly, Petitioner and pro-dissolution intervenor maintain that the language <u>entitled to vote thereon</u> refers quantitatively to all of the outstanding shares of Petitioner, because all shares are entitled to vote.

It is apparent from the language of Business Corporation Law §1001, that the intent of that provision was to regulate the <u>proportion</u> of votes needed to dissolve (e.g., whether dissolution is by majority or by a super-majority), as opposed to regulate which shares are entitled to vote thereon. The provision only begs the question: "which shares are entitled to vote?"

In answering this question, the Court must start with the Certificate of Incorporation which provides that "[e]ach holder of shares of capital stock entitled to vote shall be entitled to one vote at any and all meetings of stockholders for any and all purposes regardless of the number of shares held by such holder," unless a statute

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provides otherwise. Business Corporation Law § 1001 was in effect when the Certificate of Incorporation was executed.[7] If Petitioner is correct, and Business Corporation Law § 1001 mandates that a dissolution vote be counted based on two-thirds of the total outstanding shares, notwithstanding the language of the Certificate of Incorporation regarding a per apartment vote, then the Certificate of Incorporation's language dictating a per apartment vote would be rendered meaningless.[8]

Petitioner has cited no authority for the proposition that the Business Corporation Law prohibits voting by apartment, under the circumstances here.[9] While it is true that the Certificate of Incorporation allows for only one class of stock, and Petitioner maintains that HPD's and the AG's argument effectively creates two classes of stock, the issue here is whether there can be a limitation on the voting power <u>within</u> one class of stock. In this regard, the court finds Business Corporation Law § 501 (c) instructive.

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[7]The 1997 amendments to Business Corporation Law § 1001 (a) reduced the shareholder vote needed to dissolve a corporation from two-thirds to a majority, for any corporation incorporated after February 22, 1998. As Petitioner was incorporated before February 22, 1998, the two-thirds requirement remained the same.

[8]Petitioner cannot argue that the Certificate of Incorporation's language regarding a per apartment vote refers to all votes, except dissolution votes, because the language applies to "any and all meetings of stockholders" and "for any and all purposes" which includes the dissolution attempted here.

[9]The single case relied on by Petitioner, <u>Yu v Linton</u> (68 AD2d 856 [1st Dept 1979]) is inapposite. There, shareholders were deprived of the right to vote where they failed to pay maintenance charges. This case has no bearing here, even though Petitioner's one vote per share interpretation does narrow the rights of residents who maintain "lesser" housing accommodations.

Business Corporation Law § 501 (c) (which describes what type of shares may be authorized) was added by the legislature in response to Fe Bland v Two Trees Mgt. Co. (66 NY2d 556 [1985]), to permit variations in transfer fees or charges (e.g., a "flip" tax) payable to a corporation (see New York Condominium and Cooperative Law (2d ed) §10:5 at 511-515). Although it addresses variations in fees and not dissolution, it supports HPD's and the AG's position. Business Corporation Law § 501 (c) specifically provides that shares of the same class shall not be considered unequal, because of variations in fees and charges payable to the cooperation, provided certain elements are satisfied, including that "voting rights are substantially equal per share or the certificate of incorporation provides that the shareholders holding the shares allocated to each apartment or dwelling unit owned by the corporation shall be entitled to one vote in the aggregate regardless of the number of shares allocated to the apartment or dwelling unit." Although Business Corporation Law § 501 (c) requires that equal rights and preferences are extended to all shares of stock of the same class, the fact that the legislature included the above language, implies that shares in the same class are not treated unequally because a Certificate of Incorporation provides for voting rights that are per apartment, not per share.[10] Accordingly, HPD's and the AG's interpretation of Business Corporation Law § 1001 is correct. No matter how many shares an individual apartment owner holds,

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[10]Whether or not a per apartment vote results in the Internal Revenue Service concluding that Petitioner effectively has two classes of stock, for purposes of the maintenance deduction, is not the issue before the Court.

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the number of shares entitled to vote thereon is one. This is the only construction that effectuates the intent of the Certificate of Incorporation, the only document created by Petitioner, as well as the Business Corporation Law.

It is hereby

ORDERED that the cross motion to dismiss is denied as moot, and it is further

ADJUDGED the Petition is denied and the proceeding is dismissed.

This constitutes the Decision, Order and Judgment of the Court.

Dated: March 9, 2010

ENTER:

J.S.C.

EMILY JANE GOODMAN

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).