

**Academy Twins Condominium by the Bd. of Mgrs. v
Elcordy**

2010 NY Slip Op 32072(U)

July 29, 2010

Supreme Court, New York County

Docket Number: 105931/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

IA PART 16
PART 16

Academy Invoirs Condominium (INDEX NO. 105931/10)

- v -

Shaniff Elcandy

MOTION DATE _____

MOTION SEQ. NO. 001

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~~ petition is denied insofar as it seeks sanctions against Veritas, and respondents' cross-motion to dismiss is granted and this proceeding is dismissed in accordance with the accompanying memorandum decision.

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 310).

JUL 29 2010

Dated: July 29, 2010.

Alice Schlesinger
ALICE SCHLESINGER, 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: IAS PART 16

-----X
ACADEMY TWINS CONDOMINIUM BY THE BOARD
OF MANAGERS, DAVID SHARGANI,
ALEXANDER PANKOV, NICHOLAS FERNANDEZ
ALISON STAMAS AND LILLIAN RAMOS,

Petitioners,

Index No. 105931/10
Mot. Seq. No. 001

-against-

SHARIFF ELCORDY, INES HERNANDEZ, DANNY
LEONARDO AND AKIBEDES ESPINOSA, and
VERITAS PROPERTY MANAGEMENT, (141B).

Respondents.

-----X
SCHLESINGER, J.:

An unhappy situation exists among the owners of the condominium units at Academy Twins Condominium ("Academy"), located at 571-579 and 581-589 Academy Street. The source of hostility is unclear, but certainly one focus is who will be its managing agent. Through the end of 2009, that entity was Veritas Property Management LLC ("Veritas"). It has been named a respondent, along with several individual unit owners, in this special proceeding brought by other unit owners in the name of "Academy Twins Condominium By the Board of Managers" ("Board").

The named petitioners, David Shargani, Alexander Pankov, Nicholas Fernandez, Alison Stamas and Lillian Ramos, claim that they constitute a majority of duly elected members of the Board and thereby had the authority to commence this proceeding and to replace Veritas with their chosen managing agent, A.N. Shell.

Specifically what the petition seeks is a declaration by this Court that the Board consists of the five individual petitioners, together with Shariff Elcordy, Ines Hernandez, Danny Leonardo and Akibedes Espinosa. It is significant to note that the last four named

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unit owners, allegedly the sixth through ninth members of the Board, are also named respondents in this proceeding. The petition also asks the Court to find that Veritas has engaged in frivolous conduct and to sanction it to the extent of compelling it to pay petitioners' legal fees and costs, among other unnamed penalties.

The petition is sworn to by David Shargani, who identifies himself as the owner of Unit 2F at 571 Academy Street and a Board Member. He recounts the recent history of elections and other related matters. First he notes that on December 10, 2009, an annual meeting was held to elect nine members of the Board of Managers. Respondents agree that this occurred and that the following individuals were elected: Shariff Elcordy, Ines Hernandez, Danny Leonardo, Alexander Pankov, Alison Stamas, Ana Torres, Akibedes Espinosa, Lillian Ramos and Kim Shiraishi. Both sides also agree that the first meeting of the new Board was held on January 18, 2010. But that is where the agreement ends.

According to Mr. Shargani, because in the interim time there were two resignations from the Board, Kim Shiraishi and Ana Torres, there were two replacements for them, he and Nicholas Fernandez. But pursuant to an affidavit by Shariff Elcordy, submitted as part of the opposition and in support of respondents' cross-motion to dismiss, there were in fact three resignations, the two mentioned by Shargani plus another, petitioner Alexander Pankov, who resigned in an e-mail sent by him on December 22 stating "I am resigning from the Board..." The "Subject" line of that e-mail is "Re: letter to be sent".¹

¹It is unclear whether Pankov ever followed up with such a letter. Probably he did not since he did continue to attend meetings and vote on January 18, 2010, and on January 26, 2010, as well as via e-mail voting. In reply, counsel for petitioners state that the Pankov e-mail was never sent to the Board or to its counsel; rather, it was sent to another shareholder. It is pointed out that the subject of the e-mail is blacked out. But these statements are not made by anyone with personal knowledge. Most notably, there is no enlightening affidavit by Pankov.

Also mentioned by Elcordy, but not by Shargani, is a vote for officers that took place on January 18, 2010 where he, Elcordy, was elected Treasurer. The other officers elected were Ines Hernandez as President, David Shargani as Vice President, and Alison Stamas as Secretary.

The "draft minutes" of this meeting are included in both sets of papers and are identical. It is unclear if they were ever actually adopted. In any event, two other votes bear mentioning. The first dealt with "E-mail Voting," the second "Removal of Veritas Management". Both of these issues have become central to the dispute. Regarding "E-mail Voting", the vote shows that "Ana, Alex, Alison and Danny voted Yes" and that "Shariff and Ines voted No." That would seem to suggest that it passed 4 to 2. That is what Shargani says happened. But Elcordy states, pursuant to what he says his counsel told him, that the vote was invalid as Pankov, who had allegedly resigned, participated in it, and also because, vote or no vote, e-mail voting was simply not authorized by the By-Laws.²

The other vote taken on January 18 dealt with the removal of Veritas. Pursuant to the Draft Minutes, that ended in a tie of 3-3, with Alex (Pankov) Ana and Alison voting "Yes" and Shariff, Ines and Danny voting "No". It is interesting to note one further thing about this meeting, though neither side comments on it, and that is that petitioner David Shargani was not present, even though he had been elected not only to replace Ana Torres who was present and "stepped down", but as Vice President as well. His non-attendance seems clear. He is neither mentioned in the list of "Board of Members Present"

²In petitioners' reply, counsel points out that e-mail voting was not some new, nefarious device seized upon by the recently elected Board. He says it was used before. The example he gives is an e-mail vote taken in December 2008 on the subject "Vote for Tomas' Holiday Bonus". (It is not clear by the incomplete voting submitted whether or not Tomas received the same \$600 bonus he received the previous year.)

(he was not as yet a member, although Alexander Pankov is mentioned), and he is not shown voting on any of the issues.

The petition then refers to a meeting held on January 26, 2010. Even though Elcordy is listed as being present, in his affidavit he makes no mention of this meeting. Pankov was also listed as being present, as was Shargani. Another vote was held regarding the removal of Veritas and this time, it seems to have passed with Alex (Pankov), Alison and David voting "Yes" and Shariff and Ines voting "No".

Pursuant to the vote (only 5 of the 9 Board Members were present) it was decided that Veritas would be given 60 days' notice, ending its contract on March 31, 2010. Other matters were discussed, but no other votes were taken. Shargani related that Nicholas Fernandez was stepping down but no replacement was made.

This was the last actual meeting held by the Board. What happened next was a series of e-mail votes, described in the petition, to appoint another managing agent A.N. Shell to replace Veritas. This vote was allegedly held on February 5, 2010. Other e-mail voting concerned the termination of the law firm of Hankin & Mazel and a replacement by attorney Michael Carlin. This vote allegedly occurred on February 16, 2010.

But Elcordy never acknowledges the e-mail votes or their outcome. Oddly, what is not mentioned in the petition is what appears to be still another e-mail vote. This one involved another election of Officers to the Board. One wonders about this since the By-Laws establish one-year terms for the Board members and as previously noted, there was an election or designation of the officers made at the January 18 meeting. But in a February 15, 2010 e-mail with the subject line: "Re: We need some order" (Exhibit I to the petition), it seems new officers were elected. Those elected appear to be President, "David

Shaigaini (sic)", Vice President, "Lillian Ramos", Treasurer, "Yanni Stamas" and Secretary, "Alexander Pankov".

Though I have used the word "odd" here, perhaps it is not so strange in light of what was going on at the Condominium during this time. We get a preview of the turmoil in the petition, when Shargani complains about the actions of Hankin & Mazel refusing to be terminated and their instructions to Veritas to hold on. Thus, two managing agents were in place, both seeking money from the unit owners. "At this stage, the condominium is a complete mess and close to financial ruin" (§ 24). "The building is in chaos and total disarray" (§ 25). These are statements made by Shargani in his plea to this Court to recognize his Board and get rid of Veritas.

Elcordy fills in the gaps as to what helped to create the chaos. He ignores all the February e-mail votes. Rather, he describes a February 12, 2010 resolution "adopted by a majority of the unit owners in a signed Petition (wherein) petitioner David Shargani and other so called alleged Board Members were removed from their position and the vacancies were filled by other unit owners." (§ 11 of his affidavit). This Resolution, included in the opposition/cross-motion, informed the Unit Owners that it was "Pursuant to Article 3, Section 12 of the Condominium By Laws" which states the following:

Section 12 Action without Meeting. Any action required or permitted to be taken by unit owners may be taken without a meeting if the number of unit owners required by the Declaration, these By-Laws or applicable law consent in writing to the adoption of a resolution authorizing such action and the writing or writings are filed with the records of the condominium. (END)

But it should be noted, and counsel in Reply does, that Section 5 of Article II of the By-Laws entitled "Removal of Members of the Board of Managers" does speak to removal: at a "regular of (sic) special meeting of unit owners ... any one or more of the members of the Board of Managers ... may be removed with or without cause by a majority of the unit owners ... and "Any member of the Board of Managers whose removal has been proposed by the unit owners shall be given an opportunity to be heard at the meeting." This provision suggests some kind of meeting where the beleaguered member "shall be given an opportunity to be heard."

The resolution was allegedly passed and pursuant to it, the newly Elected Board of Managers advised Veritas in a notice dated February 19, 2010, to retain all records. And the chaos continued.

Frankly, when all the smoke has cleared, only one party or entity here appears professional and credible, respondent Veritas. Also, it was the first to be heard from in response to the petition, in the form of an affirmation from counsel and an affidavit from James Maistre, its Chief Operating Officer.

Mr. Maistre explains the dilemma Veritas finds itself in. He says that at all times Veritas was prepared to turn over its files and control of accounts to a successor (this is corroborated in the papers), presumably A.N. Shell. However, just as they were prepared to do that, he received a letter from the former attorneys for the Board, Hankin & Mazel (now the attorneys for respondents), threatening to sue them if they turned over any files before the dispute was resolved.

Based on the above events, Maistre states that he is prepared to turn over the files "once there is a resolution as to the legality of the Board, and there is either an Order of

the Court ratifying the current Board, or directing some other means to determine the makeup of the Board" (§ 6). Finally, he opines that Veritas has, at all times, acted reasonably. I agree. It certainly appears that this entity was willing to end its contract and do what was necessary with regard to a successor. But then its hands were tied through no fault of its own. Therefore, that part of the petition and/or its supporting papers which asks me to find that Veritas Property Management, LLC has engaged in frivolous conduct deserving of sanctions is denied.

In the cross-motion submitted by respondents, an application is made to dismiss the petition for two reasons. First, pursuant to CPLR §3211(a)(3), respondents argue that the petitioners here lack the capacity to sue. The second reason, pursuant to CPLR §3211(a)(7), is that there is a failure to state a claim for which relief can be granted.

With regard to capacity to sue, counsel cites to §12 of the General Associations Law, which says that any action on behalf of an unincorporated association, such as Academy, can only be brought by its President or Treasurer. Further, he refers to the affidavit of Shariff Elcordy indicating he was elected Treasurer at the January 18 meeting at the same time Ines Hernandez was elected President. It is clear that, as respondents in the lawsuit, neither of them brought the petition. Also, counsel argues that there never was a meeting in which a vote was taken to institute a suit of any kind.

With regard to the termination of Veritas as Managing Agent, counsel then argues that a valid vote to this effect was never taken. He bases this argument on two things: first, Pankov's alleged improper participation in the January 26, 2010 vote to terminate Veritas, because of his earlier resignation on December 22, 2009; and second, his contention that despite the January 18th vote to allow e-mail voting, the By-Laws, specifically Article II,

Section II, preclude such a procedure. The relevant language here is the following:

Quorum of Board of Managers. At all meetings of the Board of Managers, a majority of the members of the Board shall constitute a quorum for the transaction of business, and the votes of a majority of the members of the Board of Managers present at a meeting at which a quorum is present shall constitute the decision of the Board of Managers...

Counsel for petitioners responds that in fact "a meeting was held by the Board of Managers" on February 15, 2010. However, what he really means is that certain e-mails were exchanged, not all of which seem to have been attached, wherein a new vote was taken and David Shargani was selected as President, thus having the authority to commence this proceeding. Counsel also says that, at the very least, the January 26th vote to terminate Veritas was legal and it was respondents' refusal to recognize that vote which created all the confusion.

I am prepared to decide the issues currently before me. However, it is clear that such a decision will neither clear up the confusion, bring order to the chaos, nor achieve harmony between these neighbors. I find that the e-mail election of new officers allegedly held on February 15, 2010 violated the By-Laws. There was no meeting, certainly in the normal sense of the word, and one wonders how a quorum can be reached among e-mailers. The fact that e-mail voting had been held in the past does not alter this finding. First, it was never challenged, and second, at least as to the one e-mail included in the papers, it concerned a relatively minor issue, Tomas' end of the year bonus. Here, the issue was the election of officers for the Board. The Board members' election, pursuant to the By-Laws, is to occur at an annual meeting of unit owners. I find that an election of

officers to the Condominium's governing Board is not the type of issue that can be decided by an exchange of e-mails, particularly since the By-Laws do not specifically allow for this procedure. A vote constituting a bare majority of Board Members does not override the By-Laws.

The above finding leads to the granting of the cross-motion to dismiss, since it follows that the petitioners lacked the capacity to bring this lawsuit. None of the petitioners alone or with the others had such authority. Nor did the unit owners as a group or the Board itself ever vote to initiate such a proceeding or any proceeding.

So what happens now? I take no position on whether Pankov, a member of the Board elected at the annual meeting on December 10, 2009, is still a member, though he probably is. I say this because there was never any official recognition of his "resignation," and he was recognized as a member by the other members and allowed to vote on January 18 and 26, 2010. Following from this, expressed as pure *dicta*, the vote to terminate Veritas was probably legal. Finally, the resolution to unseat the Board Members duly elected on December 10, 2009 (and in some cases replaced) is probably invalid as inconsistent with the By-Laws, with regard to the right to notice and an opportunity to be heard. But again, this finding is *dicta*.

I wish all the unit owners good luck. I truly hope that they understand that they have more in common than not, and that by using their energies productively to obtain goals common to all, such as a safe and clean environment, so much more can be achieved than by a precipitous and unauthorized rush to the courthouse. Litigation has its purposes, but certainly its limitations as well. Living peacefully together cannot be mandated by a Court. Alas, all of this is *dicta* too.

Accordingly, it is hereby

ADJUDGED that the petition is denied insofar as it seeks sanctions against respondent Veritas Property Management, LLC; and it is further

ORDERED that the cross-motion to dismiss this proceeding pursuant to CPLR §3211(a)(3) for lack of capacity to sue is granted, and the proceeding is dismissed.

This decision constitutes the judgment and order of the Court.

Dated: July 29, 2010

JUL 29 2010



J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT

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