

**Green v Guardians Assoc. of the New York City  
Police Dept., Inc.**

2012 NY Slip Op 32206(U)

August 15, 2012

Supreme Court, New York County

Docket Number: 100099/12

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
*Justice*

PART \_\_\_\_\_

Index Number : 100099/2012  
GREEN, GREGORY  
vs.  
GUARDIANS ASSOC., N.Y.P.D.  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**

**AUG 22 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Dated: AUG 15 2012

*Alice Schlesinger*, J.S.C.  
**ALICE SCHLESINGER**

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  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

-----X  
GREGORY GREEN AND MARK ELLIS AS MEMBERS  
AND TRUSTEES FOR THE BOARD OF THE  
GUARDIANS ASSOCIATION OF THE NEW YORK  
CITY POLICE DEPARTMENT, INC.,

Plaintiffs,

Index No. 100099/12  
Motion Seq. No. 001

-against-

THE GUARDIANS ASSOCIATION OF THE NEW  
YORK CITY POLICE DEPARTMENT, INC.,  
VICTOR SWINTON INDIVIDUALLY AND AS  
PRESIDENT OF THE GUARDIANS ASSOCIATION  
OF THE NEW YORK CITY POLICE DEPARTMENT  
INC., YUSUFF HAMM INDIVIDUALLY AND AS FIRST  
VICE PRESIDENT OF THE GUARDIANS  
ASSOCIATION OF THE NEW YORK CITY POLICE  
DEPARTMENT, INC., CHERMAINE PORTER  
INDIVIDUALLY AND AS SECOND VICE PRESIDENT  
OF THE GUARDIANS ASSOCIATION OF THE NEW  
YORK CITY POLICE DEPARTMENT, INC.,  
GWENDOLYN PLUMMER INDIVIDUALLY AND AS  
TREASURER OR THE GUARDIANS ASSOCIATION  
OF THE NEW YORK CITY POLICE DEPARTMENT  
INC., WADE WILLIAMS INDIVIDUALLY AND AS  
FINANCIAL SECRETARY OF THE GUARDIANS  
ASSOCIATION OF THE NEW YORK CITY POLICE  
DEPARTMENT, INC., AND FELICIA RICHARDS  
INDIVIDUALLY AND AS RECORDING SECRETARY  
OF THE GUARDIANS ASSOCIATION OF THE  
NEW YORK CITY POLICE DEPARTMENT, INC.,

**FILED**

**AUG 22 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Defendants.

-----X  
SCHLESINGER, J.:

Before the Court is a dispute between insurgent members of the Guardians  
Association of the New York City Police Department, Inc., Gregory Green and Mark Ellis

and the leadership of that association. This matter probably should have been brought as a Special Proceeding, specifically an Article 78 petition, because it asks the Court to take special action vis-a-vis an election of officers that occurred on November 15, 2011. Instead, Messrs. Green and Ellis brought an action wherein they are appearing as plaintiffs. Be that as it may, the defendants have responded by serving a pre-answer motion to dismiss pursuant to §3211(a)(7) of the CPLR.<sup>1</sup>

The Complaint is composed of fifteen pages of explanatory background before the two causes of action are set down. Those Causes of Action, in a more succinct fashion largely repeat the background material before stating the specific relief requested. The First Cause of Action, which appears in ¶83 reads as follows:

Plaintiffs request that pursuant to General Corporation Law §25 the court vacate and set aside the results of the November 15, 2011 Guardians Association general election and order a new one.

The Second Cause of Action virtually asks for the same relief with several differences. This appears in ¶95 and ¶96. In the first of these, counsel asserts a basis for the second. Paragraph 95 contains counsel's belief that he has shown clearly that "an egregious situation exists to warrant judicial intervention." Paragraph 96 reads as follows:

Plaintiffs request that pursuant to N-PCL§618 the Court exercise its equitable powers to intervene with the internal affairs of the Guardians Association, vacate the November 15, 2011 general election and order a new one permitting Plaintiffs to be placed on the ballot.

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<sup>1</sup>It would appear that the motion could also have been brought pursuant to §3211(a)(1), "a defense founded upon documentary evidence" since counsel is relying in large part on the Constitution and By-Laws of the Association.

Therefore the relief sought in the Second Cause of Action differs from the first in that it relies on a different law and it includes a request for the "Plaintiffs to be placed on the ballot".

The Complaint contains nine exhibits "A" through "I". These are then followed by sworn verifications signed by Mr. Green and Mr. Ellis. The exhibits help to explain what is in the Complaint. Exhibit "A" is referred to in ¶12 which says, that the Association was formed in 1949 as a fraternal organization with certain stated objectives outlined in Article II of the Constitution. After those are enumerated, a direction is given to ("see Exhibit "A" Guardians Association Constitution"). But in fact, only selected Articles are provided.

Exhibit "B" is a reproduced flyer for "The Green Team" which not only gives its name and the members of the team with pictures, but also contains the recommendation to vote for these members for various offices in "November 2011". Plaintiff Gregory Green was said to be running for President and Plaintiff Mark Ellis was said to be running for First Vice President. This flyer was probably disseminated in the Fall of 2010 because according to ¶24 of the Complaint, October 2010 was when the Plaintiffs publicly announced their intent to campaign for the November 15, 2011 general election.

Exhibit "C" is composed of two pages from an announcement of the Associations 37<sup>th</sup> Annual dinner dance with an advertisement by the Green Team, its flyer. In ¶30 of the Complaint (there are two paragraphs numbered 30, this is the second), the statement is made that by "acceptance" of this "advertisement", "defendants acknowledged, consented and approved of Plaintiff's eligibility and right to campaign." This characterization is not accepted by the defendants in their motion.

Exhibit "D" is referenced in ¶38, wherein Plaintiffs assert that they satisfied the requisite requirements for the positions they were running for "outlined in Article IV, Section 3a" of the Constitution by obtaining signatures of "members in good standing who support their candidacy". It consists of two "memos", one from each plaintiff. They are addressed, "To Nomination Committee, Guardians Association". They are dated August 16, 2011. Each one contains 15 signatures. Each one is signed by a plaintiff. Interestingly, the part of the document where certifications by the Financial and Recording Secretary are left blank.

Exhibit "E" is the official ballot which did not contain the plaintiffs' names. Rather, only one slate is shown, many of whom are named defendants listed in the caption of this action. This exhibit which is referenced in ¶49 follows the factual heart of the complaint and is the culmination of plaintiffs' failed efforts to be on the ballot.

But first there is a statement in ¶40 that the "electoral process was inherently flawed and improper at the outset". This accusation has something to do with an alleged impropriety in setting up the Nominating Committee. But it is difficult to understand.

Then, beginning in ¶41 and through ¶48, plaintiffs explain that they were told on September 21, 2011 by defendant, "President Swinton that they were not being placed on the ballot as candidates for President and First Vice President because the Financial Secretary claimed that no proof existed for payment of Plaintiffs 2009 membership dues" (¶41).

What follows is a lengthy explanation as to why this communication from President Swinton "was another ill advised concocted plan to wrongfully preclude Plaintiffs from being placed on the ballot". There is then a statement that "Defendants rationale belies

conclusive facts that disprove their claims.” (¶42) What is then set out is an account of how Green and Ellis became members of the Board of Directors as the Brooklyn, North and South Trustees. They say they submitted requests for these positions in the form of a UF49, that those were approved by the Board and that in early 2010, they were sworn in. Then they say that pursuant to the Constitution “a member has to be in good standing to become an elected member to the Board”. Therefore, since they were approved, this “presupposed the fact that Plaintiffs had to be in good standing and current on their dues for the year 2009 otherwise such positions would not be obtainable” (¶43). While they acknowledge that the Constitution requires members to be “financial continuously” two years before the election (up to date on dues), they dismiss the Financial Secretary’s record showing that they failed to pay their 2009 dues “because the Board’s own approval of Plaintiff’s positions as Trustees...establishes such” (¶44).

But no where, in their lengthy complaint and in their opposition to the defendant’s motion, which in large part is based on their alleged failure to be “financial for two years,” do they say that in fact they paid those dues. Nor do they ever attempt to prove that they did with canceled checks, receipts or other documentation. Their dismissal of the defendants’ “proof” of their 2009 dues failure, via an affidavit from Wade Williams, Financial Secretary of the Association from 1998 through December 31, 2011 which says that his search of the records show that neither plaintiff paid their 2009 dues (this appears in the defense motion) is continually that this proof is insufficient and that their role as Trustees prove otherwise. In other words that those positions prove that they did pay. But again, they never explicitly say that.

Exhibit "F" are the minutes of the Association from the general meeting held on October 18, 2011. In ¶¶50 and ¶¶51, plaintiff refers to questions asked by them. One of these concerned identities of the election committee members. Wade Williams referred this inquiry to such committee. But as plaintiffs point out in ¶¶52, no such election committee ever existed.

Exhibit "G" is an affidavit by Vernon Young, sworn to on December 29, 2011. His statement discusses what occurred at the November 15 general election meeting, from his perspective. He says he and several other members were at the meeting and that it was there that he learned of the reasons that Green and Ellis were not allowed on the ballot. He says:

The general consensus of those members at this meeting, including myself, was that Sergeant Gregory Green and Mark Ellis should have been allowed to be on the ballot. This consensus was shared by the overwhelming majority of both members and non-members in attendance at the general election meeting.

He then adds that attempts were made to delay the election results until all the members could be apprised of the situation but that "the motion was summarily denied by President Swinton". He ends by saying that the "results of the election were announced under protest".

Exhibit "H" is an affidavit by Detective Stephon Garland, sworn to on December 15, 2011. His statement ends with a plea to the Court to intervene and allow the plaintiffs to be placed on the ballots in a new election. Preceding this is his own description of the November 15 meeting. He discusses the disarray of the membership records. He discovered this when he reviewed them and attempted unsuccessfully to locate seventy

applications which the plaintiffs had submitted from individuals wishing to join (Green and Ellis in ¶¶34-37 also discuss these applications). He also gives examples of what he believes to be President Swinton's failure to adhere to the governing by-laws. Exhibits "G" and "H" are discussed in the Complaint in ¶¶ 55-60.

Finally, Exhibit "I" appears to be the Financial Secretary's Monthly Report for May 2011 - August 2011. This is referred to in ¶75 where plaintiffs point out that supporters of theirs joined the Association.

The last part of the Complaint deals with the exhaustion of all internal remedies before commencing the action. The plaintiffs claim that there really is no method set out in the Constitution or By-Laws for adjusting difficulties and settling conflicting demands. Nor is there such a policy or procedure implemented by the Association to resolve them. However, they point to the members' demands to have them placed on the ballot on November 15, which demands were refused. The plaintiffs conclude this part by saying in ¶64:

However, defendants defied and summarily ignored the express will of the majority membership, and unilaterally ratified the results of the general election. The Defendants autocratic action is emblematic of their despotic leadership that renders impossible any objective and fair review to address and settle conflicting membership demands.

The Motion to Dismiss is supported by affidavits from Victor Swinton (Exhibit A) and Wade Williams, (Exhibit E). Both are named defendants in this action as well as specific individuals mentioned in the body of the Complaint. In the motion's factual recital, counsel reviews the claims and demands of the plaintiffs. It is when she gets to ¶10 of the Motion

and the parts that follow that its essence is revealed. That essence is something “acknowledged” by the plaintiffs, that for their complaint to have any merit, “they would have had to have been eligible for these positions”. The defendants emphatically assert, with support from the Association’s Constitution and by the aforementioned affidavits, that these plaintiffs were not so eligible.

Primarily, they were not eligible because they were not paid up dues paying members continuously for the two years immediately prior to the November 15, 2011 election. This refers to 2009 dues. Here counsel first refers to the authority for this. It is found in 3.a of Article IV of the Constitution (A “Financial member” is defined as “one who paid his/her dues for the current calendar year”, ¶7 of the By-Laws of the Constitution).

It is in this paragraph that the offices of President and First Vice President are distinguished from all other positions. Two requirements are clearly spelled out and these “must be certified by the Recording Secretary and the Financial Secretary”. They are first, that the candidate must have served as an “elected officer for any two (2) years”<sup>2</sup> and second, that the candidate has been “financial continuously two (2) years immediately prior to the date of the election.”

Counsel then discusses the requirement that the two year “financial” requirement must be certified by both the Recording Secretary and the Financial Secretary. Here, she points to Mr. Williams’ affidavit where he says in ¶9 that his records show that plaintiffs Gregory Green and Mark Ellis, had not paid their dues for the two continuous years prior to the November 15, 2011 election. Specifically to 2009, neither plaintiff paid his dues (¶10).

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<sup>2</sup>This is the second reason counsel discusses in her Motion for why these plaintiffs were not eligible candidates.

In fact, the records indicate that the dues for 2010 were paid in the early months of that year (¶11). Williams then goes on to say that these failures resulted in his not being able to certify that either plaintiff had met that requirement. He states he presented these findings on September 20, 2011. Further, in the motion itself, counsel points out what this Court has already alluded to, the fact that plaintiffs themselves do not even make a statement that they did, in fact pay their 2009 dues.

The next reason for their ineligibility to be candidates for these leadership offices was their failure to serve as "elected officers" of the Association prior to the November 15, 2011 election. The Constitutional requirement for this, as already stated was 3.a of Article IV.

Victor Swinton, President of the Association from 2004 until December 31, 2011, recounts in his affidavit how the plaintiffs came to be Borough Trustees. He says that in January and February 2010, Green and Ellis submitted written requests to be appointed to fill the vacant Board of Directors positions of Borough Trustee, "since they had not paid their membership dues for the year 2009, the Board of Directors insisted that plaintiffs pay their 2010 dues before the Board would consider appointing them to the Board of Directors as Borough Trustees" (¶14). They did then pay their 2010 dues.

He then points out that Article IV of the Constitution lists the officers of the Guardian Association. They are President, First Vice President, Second Vice President, Financial Secretary, Recording Secretary, Treasurer and Sergeant-at-arms. There is no Article IV position as a Borough Trustee, which only confers membership on the Board of Directors. President Swinton then says in ¶20 "During my membership in the Guardians Association from 1984 to the present, the plaintiffs have never previously served as "elected" officers

of the Guardians Association".<sup>3</sup>

Finally, President Swinton makes it clear that the plaintiffs were not even "elected" to the Board by members from their Borough. Both were appointed as Borough Trustees by the Board of Directors on January 16, 2010 and February 2, 2010 to fill vacancies there. Pursuant to ¶7 of Article IV of the Constitution, a Borough Trustee is only elected in a membership meeting election in November of alternate years. Wade Williams, in the last few paragraphs of his affidavit, makes the same point, that the plaintiffs never previously served as elected officers of the Association.

Counsel for the defendants then disputes plaintiffs' assertion that they have exhausted the internal appeals process. She says they have not pursued the appeal's process provided for in the Constitution and By-Laws. It is Article VII, ¶5 that deals with questions that arise concerning interpretations of the governing documents. The appeals procedure is spelled out there. But counsel insists the plaintiffs have not utilized this. Although she adds that she thinks it is unlikely that the two requirements which plaintiff have not met to qualify them to be candidates would have been waived if such a request had been made. Perhaps that is why they have not tried to do that. But because an action may be ultimately futile does not mean it can be avoided.

Finally, counsel argues and cites convincingly to cases that hold, that NYN-PCL§618 frowns on the courts' interference in the internal affairs of a corporation, unless a clear showing is made to warrant such drastic action. *Nyitray v. New York Athletic Club of City*

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<sup>3</sup>He also alludes to a document dated March 15, 2011, which Green gave to him. It was a request that the Constitution and By-Laws be amended to add board member position of Borough Trustee as an elected office. This was added to show that Green's request indicated he was "fully aware" of this requirement. This document is Exhibit "D".

of N.Y., 195 AD2d 291 (1<sup>st</sup> Dep't 1993).

When the Court read plaintiffs' affirmation in opposition to the motion to dismiss, it did not impress. There, counsel asserts that the claim by defendants that Green and Ellis were not current in their dues for two successive years immediately prior to the November 15, 2011 election "is false and bereft of any evidence to support such a claim" (p.2). First he says that it is of great significance "that although Williams keeps referring to his records, he never produces them". But in counsel for defendants' Reply, he does, for the years 2008-2012, his written copies. Also, defense counsel points out in Williams' second affidavit is his explanation as to why he did not attach the computer records of dues paying members the first time. That was because the names and addresses of the other members were shown there. Here, in his written record they are not. He also includes his September 20, 2011 memo to the Board of Directors wherein he states he was unable to certify Green because he was not "financial" for 2009. He also attaches the computer records giving that information.

Returning to the plaintiffs' opposition to the motion, one (here the Court) would think that finally this was the time to, at the very least, provide affidavits from Green and Ellis that they did pay 2009 dues. This might then create an issue of fact on this eligibility requirement. But again they do not. Therefore, I am compelled to find that no issue has been created as to whether the plaintiffs paid 2009 dues. That item is resolved in favor of the defendants' position, that they did not.<sup>4</sup>

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<sup>4</sup>Plaintiffs' argument in both their complaint and opposition, that to be Board Members they had to have paid their dues, carries no weight. Counsel wants to presuppose the fact that, to be in good standing, they had to be current. I can not do that in the face of the documents and affidavits that say the contrary. Moreover, I can

Further, with regard to the argument by the defense that the plaintiffs were also not eligible because they had not served previously as elected officers, despite counsel for plaintiffs characterizing this defense as "without merit", I find otherwise. The plaintiffs urge that there is no documentary support for the distinction between appointed and elected officers. However, Article IV, 3.a of the Constitution does support this. It says specifically that candidates for President or First Vice President must have served as elected officers for any two years and ¶1 of Article IV lists the elected officers. Borough Trustee is not included on that list. Further as explained, these two plaintiffs were appointed, not elected, to the Board.

The motion to dismiss the complaint is granted. While it is normally presumed that the allegations in a complaint are true, when the allegations are so obviously not true, as is the situation here, such presumption can not be honored. (*Kantrowitz & Goldhamer, P.C.*, 265AD2d 529, (2<sup>nd</sup> Dep't 1999) and *Meyer v. Guinta*, 262 AD2d 463 (2<sup>nd</sup> Dep't 1999). The affidavits by the defendants which were in all ways corroborated by documents, the Constitution and By-Laws and records of dues payment; leaves no doubt that plaintiffs were not eligible to be candidates for the offices they sought in the 2011 election. Therefore, even if this Court believed it should interfere here (which I do not), there is no basis to disturb that election because Green and Ellis were not eligible to run as opposition candidates.

ORDERED that the motion of defendants The Guardians Association of the New York City Police Department, Inc. to dismiss the complaint herein is granted and the

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not do that, in the face of the failure by the plaintiffs to submit affidavits that they did pay these dues.

complaint is dismissed in its entirety as against said defendants, without costs and disbursements, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: August 15, 2012

**AUG 15 2012**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

**FILED**

**AUG 22 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**