[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 31

Index Number : 104530/2012
O. ALDON JAMES, JR.
vs.
NATIONAL ARTS CLUB
SEQUENCE NUMBER : 002
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

This motion is decided under Motion Sequence 001.

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).

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

Dated: 4/5/13

HON. CAROL EDMEAD, J.S.C

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

In the Matter of the Application of
O. ALDON JAMES, JR., JOHN JAMES and STEVEN U. LEITNER,

Petitioners,

Index No. 104530/2012
Motion # 001

-against-

THE NATIONAL ARTS CLUB; THE BOARD OF GOVERNORS OF THE NATIONAL ARTS CLUB; DIANNE BERNHARD, as President of the National Arts Club; JOHN MORISANO, as First Vice President of the National Arts Club; and TARA CORTES, STEPHEN HEDBERG, MILBRY POLK, ALEX ROSENBERG and ROSS ZNAVOR, as Governors of the National Arts Club and as hearing officers,

Respondents.

----------X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioners Steven Leitner ("Leitner"), O. Aldon James, Jr. ("James") and John James ("John") (collectively "petitioners") seek an order annulling and setting aside the decision of the National Arts Club ("NAC" or the "Club") dated February 17, 2012 (the "February 17th decision"), and voiding the NAC's termination of petitioners' memberships imposed as a consequence thereof.[1]

In response, respondents move to dismiss the petition.

Factual Background

In the spring of 2011, the Attorney General, along with the New York County District Attorney's Office, commenced an investigation into the Club's operations (allegedly instigated

[1] Respondents' decision was made on February 16, 2012, but memorialized in a letter dated February 17, 2012.

by the respondents) and subpoened the Club's records.

Thereafter, the NAC's Board of Governors (the "Board") hired counsel to conduct an internal investigation, and on July 11, 2011, initiated internal disciplinary charges against petitioners by serving upon them a "Statement of Charges" containing numerous allegations of misconduct, and noticing them for a hearing on August 30, 2011.[2] On August 29, 2011, the day before the hearing, petitioners commenced an action seeking an injunction staying the hearing and a declaration that the Statement of Charges were void (the "First Lawsuit"). Petitioners then moved to disqualify the Board from presiding over the hearing on the ground that the Board was biased, which the Court granted, on November 18, 2011, to the extent of disqualifying only certain Board members.

Defendants then moved for leave to assert counterclaims against petitioners (almost mirroring the Statement of Charges), which was granted by the Court in January 2012. The filing of the counterclaims prompted petitioners to renew their application to disqualify the entire Board on the ground of bias and seek a stay of the impending hearing on January 23, 2012. The Court denied the stay, but reserved decision on the renewal application, and as such, the hearing proceeded on January 23, 2012 before a subcommittee of the Board. The subcommittee consisted of five Board members: Tara Cortes, Stephen Hedburg, Milbry Polk, Alex Rosenberg, and Ross Znavor.

The following 10 witnesses testified at the hearing: Diane Bernhard (the current NAC

---

[2] Roland Riopelle of Sercarz & Riopelle LLP was hired as counsel to investigate the Club's management during James's tenure as President. Counsel issued a Memorandum, dated June 15, 2011, containing a "Summary of Internal Investigation," which served as a basis for the Statement of Charges. The report warned that if the NAC did not implement the suggested changes in the day-to-day management of the Club, and management of its assets and real estate, the Attorney General might seek the appointment of a Receiver and removal of the Board. The report also warned of the possibility that the Board members could be sued or prosecuted criminally.

President), Mary Farias (the accounts receivable clerk), Andrew Ziemba (who worked in the Club's accounting office), Joan Raffaele (responsible for accounts payable in the accounting office), Steven Acosta (the Club's bartender and superintendent), Cinnamon Booth (Club member residing in apartment 5D), Freddie Diaz (worker in the Club dining room and bar), Cherry Provost (a Board member), Andy Fisher (a landlord-tenant lawyer hired by the NAC during James and Bernhard's presidencies), and Marguerite Yaghijian (a Board member).

Petitioners did not appear at the hearing, but instead, submitted a written summation with 202 documentary exhibits. In their summation, petitioners mainly argued that the witnesses were biased, and inherently favorable toward to the NAC because as employees, their livelihood was dependent upon the NAC. Ms. Provost and Ms. Yaghjian were recently appointed to chairmanships, and thus, would testify in favor of those who appointed them. Petitioners also pointed out that Mr. Acosta had been singled out for special treatment in that Ms. Bernhard paid his bail related to a pending warrant for his arrest and purchased a $700 expensive cell phone for him, and his obscene and hateful statements demonstrated the unreliability of his testimony.

After the conclusion of the hearing, the Board found that James committed conduct extremely prejudicial to the NAC and violated the rules and policies of the NAC, and expelled James, John, and Leitner from the membership of the NAC (see, the February 17th decision).

Thereafter, by order dated March 22, 2012, this Court granted petitioners' renewal motion, vacated the NAC's February 17th decision, and directed a new hearing before a neutral arbiter. However, on appeal, the First Department reversed this Court's order, stating:

> . . . the motion court improperly disqualified the NAC Board from adjudicating the statement of charges against plaintiffs. The court should not have decided this issue by way of motion in this plenary action for declaratory and injunctive relief. Rather, the

> appropriate venue for plaintiffs, as members of a private club, to challenge their expulsion would be in an Article 78 proceeding after the NAC's internal proceedings were completed, and upon a full record. . . . In this regard, we note that the court reached its conclusion without even reviewing the full record of the hearing.
>
> Even if we were to address the merits, we would find that the court, in this ruling, overstepped its authority by interfering with internal, private, club proceedings. . . . Here, there is no showing that the disciplinary process was not conducted in accord with the NAC bylaws.
>
> Nor have plaintiffs demonstrated bias on the part of the Board warranting its disqualification. . . . The proffered reason for the disqualification of the Board - the filing of the counterclaims - is not evidence of bias sufficient to warrant the Board's removal. Nor, on this record, was there any showing that the decision to expel plaintiffs from the NAC flowed from any such alleged bias.
>
> (Internal citations omitted)
>
> (October 11, 2012 Appellate Divison, First Department Order, pp. 4-5).

Thus, petitioners move to annul the NAC's February 17th decision based on the full hearing record. Petitioners initially claim that the petition was timely filed. The February 17th decision was vacated on March 22, 2012, but was not reinstated until October 11, 2012 by the First Department. Thus, the statute of limitations was tolled from March 22 through and including October 11, as the NAC decision was vacated during that time period.

According to petitioners, as a result of respondents' failure to apply the clear and convincing standard, failure to consider the witnesses' biases, and failure to consider the documentary evidence petitioners submitted, they failed to perform a duty imposed upon it by law (CPLR 7803(1)), violated lawful procedure (CPLR 7803(3), and the decision is arbitrary, capricious, an abuse of discretion, and unsupported by substantial evidence (CPLR 7803(4)).

The Statement of Charges were issued at a time when Bernhard was chair of the NAC Management Committee, and her husband was chair of the NAC's Oversight Committee, and both committees controlled the operation of the NAC and were implicated in counsel's Memorandum. Respondents trumped up charges to evict petitioners in order to increase the

Club's rental revenue.

Petitioners contend that there was no basis to terminate Leitner's membership in the Club, which was done out of spite and vindictiveness to get back at James. Leitner has not been a member of the Board or officer of the Club since 2002, and therefore, had no responsibility for the leases, rent rolls, or other financial aspects of the Club's apartments. Leitner had an office on Broadway, and therefore, did not have a need to rent the office, which lacked a fax machine or telephone, at the Club. Therefore, Leitner's membership in the Club should be reinstated.

Petitioners argue that the panel was tainted with apparent and/or actual bias against them. The Board, which took the affirmative position as to petitioners' guilt, lacked the necessary neutrality to arbitrate the Statement of Charges. The panel consisted of Board members who authorized the filing of the counterclaims which sought significant monetary damages based on the same allegations found in the Statement of Charges. One of the panel members was biased because he/she had an interest in one of the apartments leased by petitioners. Mr. Rosenberg was biased because of his animus toward James for his refusal to rent to Rosenberg and his wife. Ms. Cortes was appointed to the Board by the new President and wanted to remain in her position. Hedberg wanted to keep his position on the Board. And, Ms. Polk wanted to make sure that her daughter did not lose the apartment she was renting at the NAC. Yet, the panel took no notice of these biases.

As to the witnesses, Farias, Ziemba, Raffaele, Acosta, Diaz, and Fisher were either present or former employees and had an inherent financial incentive to testify favorably toward the NAC. And, for the reasons stated in petitioners' summation, Acosta, Bernhard, Provost, and Yaghjian were biased. The panel members also acted in bad faith because they failed to prevent

the spoliation of evidence critical to petitioners' defense. Therefore, based on the full record, the Court should again find that bias permeated the hearing deliberations, and vacate the Board's decision.

Furthermore, although the by-laws are silent on the level of proof needed, there is no indication that the panel deliberated under the "clear and convincing" standard (as opposed to the lesser "preponderance of the evidence") standard, which is the applicable standard in light of the gravity of the charges.

The NAC does not mention whether the documents submitted by petitioners were considered, except to note that they were received (but, presumably disregarded) since petitioners did not call any witnesses to identify the evidence or explain its relevance. In any event, the documentary evidence submitted by the petitioners showed that James leased apartment 2C, Leitner leased apartment 2D, and John leased apartment 3A/B pursuant to written lease agreements approved by the NAC's Board with full knowledge that the rent was below market. Petitioners paid rent commensurate with the rent stabilization laws, and the Board ignored the fact that Bernhard, and vice-president, John Morisano, both have large apartments in the NAC's building for which they pay rent that is far less than comparable, unstabilized apartments in the area. Further, the NAC was originally subject to the rent stabilization laws, but in the sound business judgment of the Board, obtained an exemption to rent stabilization with tenant approval conditioned upon the Board's agreement to maintain the rent charged for NAC apartments consistent with the rent stabilization laws (see April 1, 1986 Board resolution, reaffirmed on October 19, 1989). The Board also ignored the fact that petitioners were forced to move to apartments on the upper floors of the NAC's building because their apartments on the lower

floors (for which they continued to pay rent) became uninhabitable due to water leaks, mold and general disrepair. As shown in the January 2011 memorandum from Dan Schiffman, the NAC elected not to make the required repairs in order to repair the building's façade.

As to the other apartments and rooms which were supposedly occupied by petitioners without paying any rent, the evidence which was destroyed by new management would have shown that they were used for storage of NAC property and were not usurped for personal use or occupancy.

The Board also failed to recognize that James incurred legitimate business expenses that were charged to the NAC. All meals, livery services, and other expenditures incurred by him were for legitimate NAC purposes, such as developing relationships with donors and potential members. The Board knew and approved these expenditures while James was president. All items purchased at flea markets, thrift shops, and auction houses for James's personal use were paid for by him with his personal money. Bernhard sometimes accompanied James to flea markets and therefore knew that his purchases there were for works of decorative art that were displayed at the Club. No records were produced at the hearing showing that James made personal purchases with the NAC funds. Thus, her testimony that she never authorized James to use NAC funds to make purchases at the flea market and thrift shops is highly suspect. NAC money was used to purchase items when the items were bought for the use of the NAC or for display at the NAC. Any coffee or food charged at local coffee shops or restaurants by James was because he was entertaining potential donors to the NAC and was engaged in promotional activities for the NAC. James retained records of the foregoing in the form of a "day file" in which he recorded all of his daily activities and kept all receipts. However, the new management

of the NAC destroyed or discarded these records without his knowledge or consent.

Moreover, to the extent that evidence was introduced of checks signed by James, or debit card entries made by James, there was no proof that those checks were in the nature of self-dealing, as opposed to NAC business and/or legitimate reimbursements. And, records establishing James's defense were destroyed by management. In March of 2011, and without petitioners' consent as President of NAC, Morisano locked all NAC storage rooms and offices containing extensive records of the prior three decades, including material belonging to James in connection with his NAC duties, which prevented petitioners from viewing, inventorying, or photographing the materials in question. Petitioners were never again given access to these records or rooms, and the records were later destroyed by respondents. The material contained James's day planners and financial records, which would clarify how monies were apportioned between NAC purposes and personal purchases. As a result of respondents' intentional spoliation of evidence, petitioners were unable to mount a defense to the Statement of Charges. Many of the rooms where material was confiscated and destroyed contained decorations used for many NAC functions that occur each year that James saved and reused after NAC functions. James's many awards for his contributions to the NAC and the community, which refute the claims of mismanagement, and daily folders containing receipts, billing slips, and correspondence, to explain various expenses, including meals and car services, were destroyed. Such evidence was material and necessary to establishing that the results of the investigation were unfounded, and that the Statement of Charges was baseless.

In opposition and in support of dismissal of the petition, respondents argue that the petition is time-barred pursuant to CPLR § 217 and should be dismissed pursuant to CPLR §

3211(a)(5). Petitioners received notice of the February 17th decision on that day, and the petition was not filed until December 28, 2012, months after the 120-day period within which to bring an Article 78 petition. There was no toll of the statute of limitations since the Court did not expressly state that there was a toll. And, the interim stay granted by the Appellate Divison on April 11, 2012 nullified any toll, and petitioners were on notice since that time that this Court's March 22 order vacating the NAC's decision was no longer in effect.

Further, the claim in counts one and two of the petition that the petition must be reviewed pursuant to the "substantial evidence" standard, is improper, since the hearing was not a "hearing held ... pursuant to direction by law" and accordingly the "substantial evidence" standard found in CPLR § 7803(4) does not apply. Instead, the Court's review is limited to establishing whether the determination was arbitrary or capricious. Even assuming the "substantial evidence" standard applies, dismissal on other grounds is warranted, making transfer to the Appellate Division unwarranted, and the same standard of rationality applies. And, CPLR § 7803(1) does not apply as this action does not seek a mandamus to compel any action.

As to the merits, the documentary record of the Club's hearing proceedings, which included 10 witnesses and documentary exhibits, demonstrate that petitioners violated the Club's by-Laws and were properly expelled as members. Thus, the Club's actions were neither "arbitrary and capricious" nor an "abuse of discretion" as a matter of law. Therefore, the petition must be dismissed also pursuant to CPLR § 3211(a)(1) because respondents have a defense "founded upon documentary evidence" which demonstrates that petitioners' claims "fail to state a cause of action."

And, petitioners' argument that the Board's decision to expel them was infected by bias

has already been decided against them by the Appellate Division, and it is now the "law of the case." The Appellate Division held that the filing of the counterclaims was not evidence of bias sufficient to warrant the Board's removal. Furthermore, the Appellate Division ruled, that the record failed to show that the Board's decision to expel plaintiffs flowed from any such alleged bias." Thus, petitioners' "bias" claim based on the Board's authorization of counterclaims, has been foreclosed by the Appellate Division, and the petition cannot be sustained as a matter of law on the basis of that claim, and should be dismissed pursuant to CPLR §§ 3211(a)(1) and (7).

Furthermore, respondents argue, petitioners' arguments regarding the quantum of proof, the credibility of the witnesses, the alleged failure to consider their documents, and the substantial evidence standard are all meritless. The Board considered hundreds of pages of sworn testimony and dozens of documentary exhibits, and made a reasoned decision based on that evidence. The Board followed the Club's By-Laws and this Court's directives with respect to taking the evidence and thus, did not violate "lawful procedure."

Finally, petitioners never argued to the Board that respondents destroyed evidence that would exonerate them, even though this argument was known to them months earlier, when James filed his derivative lawsuit on October 24, 2011. Petitioners's failure to raise this argument to the Board is fatal, since a petitioner may not raise new issues for the first time in an Article 78 petition. As the Court cannot consider the issue of spoliation because it was never argued to the Board in connection with the hearing, the branch of the petition founded on such argument fails to state a cause of action and must be dismissed.

In reply, petitioners argue that the Court's March 22, 2012 Court decision nullifying the NAC's February 17th decision, rendered the petitioners as the prevailing party, and thus tolled the

statute of limitations until October 11, 2012 when the Appellate Division reinstated the NAC's decision. Until the Appellate Division reinstated the NAC's decision, there was no adverse ruling against petitioners for which petitioners could seek Article 78 relief. And, there is no requirement that the Court expressly stated in advance that the statute of limitations has been tolled in order for a toll to take place. Nor did the Appellate Division's interim stay on April 11, 2012 end the tolling period; it only delayed the scheduling of a new hearing and did not effect this Court's invalidation of the NAC decision. The interim stay did not reinstate the NAC decision. Any Article 78 proceeding before the Appellate Division's reinstatement on October 11th would not have been ripe because the NAC's decision had been vacated on March 22nd and there was nothing to challenge during that period.

In any event, this Article 78 proceeding is a mere continuation of the Underlying Action. This Court's November 9, 2011 decision (disqualifying some members from the hearing panel) ruled that the Underlying Action would be treated as an Article 78 proceeding. Thus, this Court should *sua sponte*, and in its discretion under CPLR 103(c), consolidate the instant proceeding and the Underlying Action, and convert the underlying injunctive and declaratory judgment claim into an Article 78 proceeding.

And, the issue of bias was not decided by the Appellate Division. The Appellate Divison specifically indicated that the appropriate venue to challenge the NAC's decision would be after a hearing and upon a full record. The Appellate Division's statement, *in dicta*, was limited to the record before.

Further, this Court may consider the issue of spoliation, as this issue was raised during the hearing. The documentary evidence provided *via* CD included the summons and complaint

in James's derivative action against Bernhard, and such complaint expressly alleges that respondents destroyed the evidence petitioners' needed to exonerate them from the Statement of Charges.

Discussion

As a procedural matter, the Court finds that the petition is not barred by the applicable statute of limitations.

CPLR § 217 provides that an Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner ..." (*Yarbough v Franco*, 95 NY2d 342 [2000]; CPLR § 217[1]; *Vadell v City of New York Health and Hospitals Corp.*, 233 AD2d 224, 649 NYS2d 714 [1st Dept 1996]). "Finality" requires that the petitioner be aggrieved by the determination (*Vadell*, 233 AD2d at 225), and the decision is not final and binding within the contemplation of CPLR §217 until it "has its impact" upon the petitioner (*Bludson v Popolizio*, 166 AD2d 346, 347 [1st Dept 1990], *citing Matter of Edmead v McGuire*, 67 NY2d 714 [1986]). And, although not at issue herein, the statute of limitations does not begin to run until the petitioner receives notice of the determination *(Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). "To determine if agency action is final ... consideration must be given to the completeness of the administrative action and a pragmatic evaluation [must be made] of whether the decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (*LaSonde v Seabrook*, 89 AD3d 132, 933 NYS2d 195 [1st Dept 2011] *citing Matter of Essex County v Zagata*, 91 NY2d 447, 453, 672 NYS2d 281, 695 NE2d 232 [1998]).

Here, the four-month period within which to challenge NAC's February 17th decision, by

which petitioners were aggrieved, accrued on February 17th when petitioners undisputedly received this decision. Based on this date, any Article 78 petition would have to be filed by June 18, 2012.[3] *However*, petitioners were no longer "aggrieved" by NAC's February 17th decision when this Court vacated it on March 22, 2012. Until this Court's decision, only 34 days (or one month and five days) elapsed, when petitioners were still within their rights to seek Article 78 relief.[4] However, their right to commence an Article 78 proceeding was effectively extinguished when this Court vacated the NAC's decision in petitioners' favor. Notably, but for *respondents'* appeal to the Appellate Division, First Department, Article 78 relief was unavailable to petitioners.

It was not until the Appellate Division, First Department's reversal of this Court's order on October 11, 2012, that petitioners were again "aggrieved" by the NAC's decision, and petitioners' pre-existing right was resuscitated. And, Appellate Divison's April 11, 2012 interim stay of this Court's vacatur of the NAC's decision did not nullify the toll; the interim stay did not reinstate the NAC's decision, and thus, petitioners were not yet "aggrieved" by the decision until after the NAC's decision was expressly reinstated on October 11th. Therefore, applying a pragmatic approach, the filing of the petitioner on December 28, 2012, before the expiration of the four-month period on or about January 7, 2013, was timely.

As to the merits, CPLR § 7803 states, in relevant part, that "The only questions that may be raised in a proceeding under this article are (3) "whether a determination was made in

---

[3] The four-month period expired on *Sunday,* June 17, 2012.

[4] As of the date of this Court's March 22, 2012 decision, petitioners had two months and 27 days remaining in the four-month period.

violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed . . . ."

At the outset, CPLR § 7803 (1), providing for review of "whether the body or officer failed to perform a duty enjoined upon it by law" does not apply. CPLR § 7803 (1) pertains to requests "to compel acts that officials are duty-bound to perform," *i.e.*, mandamus relief, and petitioners seek no such relief herein (*see Matter of Altamore v Barrios-Paoli*, 90 NY2d 378, 660 NYS2d 834 [1997] (where Nassau County residents sought an order directing the Director of the New York City Department of Personnel to extend the duration of the eligibility appointment list beyond its scheduled expiration date and to use that list for further firefighter appointments, was deemed as seeking a mandamus to compel pursuant to CPLR 7803 (1)).

Further, although CPLR § 7803 (4) also provides for review of the issue of "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence," contrary to petitioners' contention, the substantial evidence standard is inapplicable in this proceeding (*Matter of Rensselaer Socy. of Engrs. v Rensselaer Polytechnic Inst.*, 260 AD2d 992, 689 N.Y.S.2d 292 [3d Dept 1999] ("As the hearing held by the Greek Judicial Board was not required by law, the standard of review is whether the challenged determination is arbitrary or capricious")).[5]

"It is well established that where the constitution and by-laws of a voluntary association reasonably set forth grounds for expulsion and provide for a hearing upon notice to the member,

[5] CPLR 7803 (2) was not asserted in the petition.

judicial review of such proceedings is unavailable, unless the reason for expulsion is not a violation of the constitution or by-laws or is so trivial as to suggest that the action of the association was capricious or corrupt, or unless the association failed to administer its own rules fairly" (*James v National Arts Club*, 99 AD3d 523, 952 N.Y.S.2d 158 [1st Dept 2012] *citing Bloch v Veterans Corps. of Artillery*, 61 AD2d 772, 773, 402 N.Y.S.2d 200 [1st Dept 1978]).

As the First Department pointed out above, Court intervention in matters concerning not-for-profit associations is anathema.

Here, petitioners failed to establish that the disciplinary process was not conducted in accordance with the NAC bylaws. Petitioners were given ample opportunity to prepare for the hearing, submit evidence and arguments in their defense, and to appear at the hearing to give testimony. In fact, petitioners submitted voluminous documents, and a written summation (though meager in comparison), but failed to not only appear and give testimony in their defense, but also, failed to adequately explain in their summation the relevance of any particular document to the specific claims alleged against them.

As to whether the decision was biased, contrary to respondents' contention, the Appellate Division, First Departments statement that the counterclaims filed by respondents was insufficient evidence of bias constituted *dicta* (*Bobrow v Bobrow*, 181 AD2d 556, 581 NYS2d 54 [1st Dept 1992] (rejecting "any suggestion that dictum contained in a prior order granting [plaintiff's] motion . . . constituted law of the case with respect to his claim for partnership distributions, since the prior order was not a judicial determination of the merits of his claim"]). The portion of said decision addressing bias was preceded by the following phrase "Even if we were to address the merits . . . ." thereby indicating that it was merely advisory, especially since

in the Appellate Division's opinion, this court should not have decided the disqualification issue "by way of motion in this plenary action", in the absence of a "full record."

Notwithstanding that the Appellate Division's opinion was *dicta*, the Court, with consideration of the full record, makes a similar independent finding that the counterclaims do not constitute sufficient evidence of bias on the part of the panel members to warrant vacatur of the February 17 decision. Partiality may take two forms, actual bias, which must be proven by clear and convincing evidence and the appearance of bias from which a conflict of interest may be inferred *(New York Restaurants Exchange, Inc. v Chase Manhattan Bank, N.A.*, 226 AD2d 312, 642 NYS2d 626 [1st Dept 1996]; *Zrake v New York City Dept of Educ.*, 41 AD3d 118, 838 NYS2d 31 [1st Dept 2007] (arguments in support of application to vacate an arbitration ruling on the grounds of actual bias and misconduct on the part of the arbitrator were unsupported by clear and convincing evidence); *Application of Kessler Motor Cars, Inc.*, 245 AD2d 211, 666 NYS2d 613 [1st Dept 1997] ("record herein does not come near to satisfying the 'clear and convincing proof' standard governing an allegation of an arbitrator's actual bias")). Here, the mere allegation of bias premised on a members' desire to maintain his or her benefits of club membership (*i.e.*, a position on a board, or access to rental apartments) does not suffice to set aside the Club's decision. There must be a factual demonstration to support the allegation of bias and proof that the outcome flowed from it (*see, Matter of Warder v Board of Regents*, 53 NY2d 186, 197, *cert denied* 454 US 1125), and these purported motives of the alleged biased panel members is unsubstantiated by anything other than petitioners' conjecture.

Instead, an example of the extent to which the hearing strove to be impartial and fair is the statement by Mr. Rosenberg at the very outset of the proceedings:

> We find ourselves in the sad and unsought position of having to judge three men, all well known to us; and in my case, one of whom I've considered to be my friend for many years.
>
> It is only my high regard for the history, tradition and cultural values of the National Arts Club, in my eyes a unique and irreplaceable institution of New York, that has caused me to accept this uncomfortable duty.
>
> I wish to assure everyone involved that we will only consider testimony given here, we will only act on what we believe to be facts, not hearsay, not rumor; it's not proof. We will listen to hearsay, but only consider it if it is backed up by testimony or evidence.

Therefore, petitioners failed to establish that bias and impartiality so permeated the proceedings or deliberations.

Further, it is noted that petitioners offer no legal basis for its position that the *hearing panel, as opposed to the Court*, was required to assess the evidence before it under a "clear and convincing standard." Indeed, this Court's review of whether the panel was biased involves application of this standard, but no such standard applies to internal proceedings of a voluntary association such as the NAC. Instead, caselaw appears to hold that the lesser, preponderance of the evidence standard applies to internal disciplinary proceedings such as the one at issue herein (*Matter of Capoccia*, 59 NY2d 549 [1983])). And the cases cited by petitioners in this regard are inapposite, and they did not involve internal proceedings of an association.

Here, the charges against petitioners coupled with the testimonial and documentary evidence, were not so trivial "as to suggest that the Club's decision was arbitrary and capricious" (*see Caposella v Pinto*, 265 AD2d 362, 696 NYS2d 493 [2d Dept 1999] (upholding expulsion of petitioner who was charged with criminal mischief in a dispute with a truck driver who parked in front of his business)). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." (*Matter of Pell*

v Board of Education, 34 NY2d 222, 231 [1974]). The court's function is completed on finding that a rational basis supports the determination (*see Howard v Wyman*, 28 NY2d 434 [1971]).

The documentary evidence and testimony of the witnesses amply supported the finding made by the respondents, and it cannot be said that their decision lacked a rational basis (*Murphy v New York Athletic Club in City of New York, Inc.*, 249 AD2d 106, 671 NYS2d 475 [1st Dept 1998] (since there was plainly a rational basis for the challenged determination of respondent, a private, voluntary membership corporation, there exists no ground upon which we might set it set it aside)). The transcript of the proceedings, documents, and photographs before the panel sufficiently support the contention that petitioners engaged in physical and verbal abuse toward other NAC members, and that James, with the assistance of John and Leitner, mishandled the finances, assets, and realty entrusted to the NAC, at great loss and expense to the NAC. It is worth noting that petitioners did not attend and cross examine the witnesses.

Therefore, all of the arguments concerning the credibility of the witnesses based on documentation that purportedly belied their testimonies, is not subject to this Court's review.[6]

Here, the panel's determination involved a factual evaluation within an area of the its expertise and is amply supported by the record, and as such, its determination must be accorded great weight and judicial deference (*see Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 [1987]). And, "[w]here evidence conflicts, issues of credibility

---

[6] For example, the appropriate time and place for petitioner to assert the arguments that:

* Bernhard's animosity toward James began when he spurned sexual advances made by her in Paris when they were traveling together;
* Bernhard trumped up charges against James to escape scrutiny from her own conduct; and
* stocked the Board with members who would make her President and intimidated those Board members who favored James

would have been at the hearing, which he chose not to attend.

are the province of [the] hearing officer, since 'the decisions by [the Hearing Officer] to credit the testimony of a given witness is largely unreviewable by the courts" (*Wooten v Finkle*, 285 AD2D 407, 408 [1st Dept 2001] *quoting Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). And the courts may not weigh the evidence or reject the conclusion of the hearing officer where the evidence is conflicting and room for choice exists (*Berenhaus*, 70 NY2d at 444, 522 NYS2d 478, 517 NE2d 193; *Matter of Stork Rest. vBoland*, 282 NY 256, 267, 26 NE2d 247 [1940]; *Matter of Acosta v Wollett*, 55 NY2d 761, 447 NYS2d 241, 431 N.E.2d 966 [1981]; Matter of *Verdell v. Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390, 813 NYS.2d 68 [2006]).

There is no basis to find that the panel members failed to consider the evidence put before it. And, the spoliation argument, raised for the first time in this proceeding, is insufficient to warrant the annulment petitioners seek (*see Brown v New York City Housing Auth.*, 40 AD3d 511, 837 NYS2d 73 [1st Dept 2007] (finding that an argument not included in the record pertaining to the administrative disciplinary hearing, "is not properly before this Court in this article 78 proceeding")). Merely inserting a pleading into the record as an exhibit among hundreds of other documents, without more, is inadequate to properly raise an issue to be considered. Moreover, even if such submission was suffice, witnesses testifying about the removal of the alleged exculpatory materials stated that such materials were not found or seen during the clean-up process, or did not exist.

In light of the above, dismissal pursuant to CPLR §§ 3211(a)(1)[7] and (a)(7)[8] for failure to state a cause of action, and on the ground that the defense is founded upon documentary evidence, is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by respondents to dismiss the petition is granted on the ground that the petition fails to state a cause of action (CPLR 3211(a)(7)) and the defense is based on documentary evidence (CPLR 3211(a)(1); and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondents shall serve a copy of this order with notice of entry upon petitioners within 20 days of entry.

This constitutes the decision, order and judgement of the Court.

Dated: April 5, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

---

[7] Pursuant to CPLR 3211 (a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence" and such documentary evidence must utterly refute the complaint's factual allegations, "conclusively establishing a defense as a matter of law"(*DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

[8] In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). Where the parties have submitted evidentiary material, or where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence" the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).