

De La Force v Khiterer

2013 NY Slip Op 31439(U)

July 2, 2013

Supreme Court, New York County

Docket Number: 102309/12

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Moulton Justice

PART 40B

Index Number : 102309/2012
DE LA FORCE, MICHAEL
vs.
KHITERER, INNA
SEQUENCE NUMBER : 002
OTHER RELIEFS

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

*decided in accordance with
the written decision of Justice
Moulton in motion sequence No. 1*

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

UNFILED JUDGMENT
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HON. PETER H. MOULTON
SUPREME COURT JUSTICE

Dated: 7/2/13

[Signature], 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: New York County
Part 40B

RECEIVED
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-----X
In the Matter of the Application of

MICHAEL DE LA FORCE,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

-against-

Index No. 102309/12

INNA KHITERER, EURICE MAYFIELD,
MITCHELL ST. CLAIRE,

Respondents.

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appear in person at the Judgment Clerk's Desk (Room
141B).

-----X
Peter H. Moulton, Justice

In this Article 78 proceeding petitioner seeks to annul the
purported election of respondents, at a Special Meeting convened on
November 29, 2011, to the board of the residential cooperative 440
West 164th Street HDFC. Petitioner also seeks a declaration that
he was not properly removed from the board at the Special Meeting.
Finally, petitioner moves for discovery and to stay a
landlord/tenant proceeding in Housing Court brought against him in
the name of the corporation.

BACKGROUND

The cooperative owns the building located at 440 West 164th
Street in Manhattan. The cooperative is a low income Housing

Development Finance Corporation ("HDFC") cooperative. HDFCs often are started in buildings taken over by the City when landlords default on real estate taxes. After a period of ownership by the City, in which the City rehabilitates the building and trains the existing tenants on management and ownership, they are turned over to the existing tenants who become shareholders upon payment of a nominal purchase price.

Petitioner contends that the cooperative has 20 units, and the governing documents appear to support that proposition. Respondents contend that the building has 19 units. This disagreement over a simple verifiable fact typifies the parties' pattern of disagreement concerning nearly all matters concerning the governance of the cooperative.

Petitioner avers that he purchased his apartment in 2007 and that he has resided there continuously until the present day. He alleges that none of the respondents live in the building. Respondents Mayfield and St. Claire admit that they are unable to produce their share certificates. Petitioner alleges that respondent Khiterer illegally purchased her apartment from the estate of a deceased shareholder. He also states that Khiterer, and her husband, nonparty Andreas Kroll, rented out their apartments on a weekly or daily basis to tourists through a company called Community Homes LLC. Khiterer admits that she does not reside at the building. She asserts that her purchase was valid

and that she was given permission by the board to sublet the apartment. She contends that she stopped advertising the apartment for short term rentals in October 2011.

DISCUSSION

As a threshold matter, respondents argue that petitioner failed to name the corporation as a party respondent and that the corporation is an indispensable party. This argument fails. Petitioner has not brought this proceeding pursuant to BCL § 619, and he does not seek to confirm an election, or hold a new election. Rather he seeks, pursuant to CPLR 7803(3) to determine whether a decision by a corporate body was "made in violation of lawful procedure" or affected by an error of law. (Compare Matter of Schapira v Grunberg, 11 Misc3d 1063[A] with Lindkvist v Honest Ballot Association, 31 Misc3d 1234[A].) Given the nature of the relief sought herein, the corporation is not an indispensable party. Accordingly, the court now reaches the merits of the petition.

The cooperative's governing documents specify that the board shall consist of three shareholders. Article III section 8 of the by-laws provide that in order to serve on the board, and to vote in a board election, a shareholder must not be more than two months delinquent in payments due the corporation.

Petitioner Michael De La Force and respondent Inna Khiterer

were elected to the Board of Directors in an election held on June 22, 2011. A third alleged shareholder, nonparty Gregory Washington, was either elected to the board the same day, as alleged by petitioner, or appointed to the board by De La Force on September 10, 2011, as alleged by Khiterer. Washington apparently resigned from the board sometime in October 2011.

On November 1, 2011, Khiterer, Kroll, St. Claire and alleged shareholder Carl Jeremy noticed a special meeting to be held on November 29, 2011. The notice stated that the business at the meeting would be "[e]lecting a new Board of Directors." No other business was stated. The parties dispute whether this notice was properly served on the shareholders pursuant to the dictates of the cooperative's by-laws. Petitioner alleges that these four individuals are not shareholders holding 10% of shares, which is the requisite amount of shares for shareholders to call a Special Meeting in the absence of board action.

In a letter dated November 2, 2011, petitioner informed Khiterer that she was excluded from the board pursuant to the by-laws because she had failed to pay maintenance to the cooperative for two months. For her part Khiterer avers that she resigned from the board on November 11, 2011 because of De La Force's abusive behavior and ultra vires actions.

A meeting went forward on November 29, 2011. The parties dispute whether a sufficient number of eligible shareholders voted

their shares, and the proxies of other eligible shareholders, to constitute a quorum. Khiterer avers that five shareholders attended, and five proxies were voted. De La Force asserts that this number, on its face, does not constitute a quorum under the by-laws. He also questions the eligibility of the shareholders who allegedly voted.

In all events, respondents Khiterer, Mayfield, and St. Claire allege that they were elected to the board at the November 29 Special Meeting. They allege that shareholder eligibility to vote was determined by a ledger reflecting payments through June 2011. They also claim that this ledger demonstrated that De La Force was two months in arrears and therefore ineligible to continue as a director under Article III section 8 of the by-laws. De La Force points out that he was elected at the June 22, 2011 meeting in the face of this ledger. He avers that officials from HPD present at the June 22 election found that the ledger was not accurate, and that they certified his election to the board finding that he was not in arrears at the time of the June 22, 2011 election. Respondents do not respond in their sur-reply to these allegations.

In any event, it is clear that the June ledger could not serve as a means to determine shareholder eligibility to participate in the purported election held on November 29, 2011. As noted above the by laws require that, in order to vote or serve on the board, a shareholder must not be more than two months in arrears.

Accordingly, the November 29, 2011, election was invalid on that basis alone. Voter and candidate eligibility was determined by a document that could not speak to eligibility.

Additionally, the notice of the Special Meeting stated that the business of the meeting would be "[e]lecting a new Board of Directors." It said nothing about the dismissal of an existing director. Under Article III, section 3 of the by-laws, the only business that may be undertaken at a Special Meeting is the business listed on the notice. As there was no notice that De La Force was to be deposed (on the basis of a discredited and out of date ledger) the business of De La Force's removal could not be performed at the meeting.

De La Force allege that at least nine other provisions of the cooperative's governing documents were violated in the notice and conduct of the November 29 Special Meeting. It is not necessary to reach those grounds in light of the two fatal violations discussed above.

De La Force was not properly removed as a director, and the respondents were not properly installed as directors, at the Special Meeting convened on November 29, 2011.

Based on this court's invalidation of the actions taken at the November 29, 2011 Special Meeting, there is no need for the discovery sought by petitioner's motion. Additionally, now that the matters at issue in this Article 78 proceeding has been

resolved, the stay of the parties' landlord tenant action is lifted.

It is clear that this cooperative is not functioning properly due to deep divisions among the shareholders. The court urges the parties, as it has urged them throughout the pendency of this lawsuit, to bury their differences and join together in the proper governance of the building. Justice Ling Cohan made similar entreaties in deciding an earlier lawsuit. It may be that the parties' best path forward is to have an independently-run election, where a neutral party determines who may run for, and vote for, the board of directors. However that relief is beyond what is sought in the petition.

CONCLUSION

For the reasons stated, it is hereby ADJUDGED AND DECLARED:

That the purported election of respondents to the board of directors of the 440 W. 164th Street HDFC on November 29, 2011 was invalid; and it is further

ADJUDGED that respondents are enjoined from action as directors as a result of the November 29, 2011 election; and it is further

ADJUDGED AND DECLARED that petitioner was not properly dismissed from the board of directors at the Special Meeting held

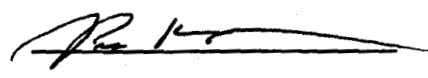
on November 29, 2011, for any delinquency in payment to the cooperative.

The motion for discovery by petitioner is denied.

All stays are lifted.

This constitutes the decision and judgment of the court.

DATE: July 2, 2013



A.J.S.C.

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