

Alwini v Ali
2013 NY Slip Op 33172(U)
December 6, 2013
Supreme Court, Queens County
Docket Number: 13949/13
Judge: James J. Golia
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable **JAMES J. GOLIA**
Justice

IAS TERM, PART 33

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EMMA ALWINI, JOERGE ILYAS, ERNI M. NUR,
HANDRA SURYA, and ARTITA ZAIDAN

Index No: 13949/13

Motion Date: 10/01/13

Peititioner(S),

Cal. No: 5

-- against --

Seq. No:1

M. SYAMSI ALI, FITRI CHOWDHURY, ADE
HADIZ, PRIJONO HADJOWIROGO, HUSNI
HUSAIN, FENNY F. IGIRISA, and
AMIRUDDIN SUMAILA,

Respondent (s) .

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The following papers numbered 1 to 18 read on this motion by petitioners/plaintiffs for an order annulling the June 14, 2013 election of the Board of Trustees of the Indonesian Muslim Community Inc., (IMC) pursuant to Not-For-Profit Corporation Law §618; enjoining the Board-elect respondents from representing, identifying and posturing themselves out as the Board of Trustees; declaring that the previously established Interim Board as the primary authority responsible for managing all of the IMC, and compelling the re-established Interim Board to select a fifth interim board member. Respondents/defendants cross move for an order consolidating this action with an action entitled *Indonesian Muslim Community Inc. v Aridjo*, (Index No. 29801/10); dismissing the within action on the grounds of res judicata and collateral estoppel; and awarding attorney's fees and costs.

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Memorandum of Law.....	

Upon the foregoing papers the motion and cross motion are determined as follows:

The IMC, a not-for-profit corporation , operates a religious community center and mosque known as Al-Hikmah Masjid.

In the action entitled *Indonesian Muslim Community Inc. v Aridjo*, (Index No. 29801/10), the parties entered into a so-ordered stipulation and settlement, executed by the Hon. Charles J. Markey and dated November 19, 2012, whereby the parties agreed to dissolve the present board of directors of the IMC, except as to those functions requiring emergent and immediate board attention and provided that no such board action shall be taken by any of the dissolved board members without the approval of the plaintiffs therein; that effective immediately an interim committee of temporary board members shall be constituted within 15 days of said order; that the temporary board shall consist of two appointees by the plaintiff and two by defendants, and that the committee shall submit to a referendum within 20 days to be voted upon by 2/3 of the general members of the community on the issue of amending the bylaws, and holding elections upon the completion of the amended bylaws. The parties further agreed to arbitrate certain issues and that said issues must be arbitrated and adjudicated before any election to be held by the interim committee.

Pursuant to the terms of said stipulation, the parties therein appeared before the late Hon. Joseph Risi, J.H.O. on March 13, 2013, who stated on the record that the election for the referendum on the bylaws was to take place on May 31, 2013; that after the bylaws were approved the election of officers would take place on June 14, 2013; and that the arbitration referred to in the stipulation would take place within 30 days of the election. The plaintiffs therein agreed to the appointment of Utjok Ziden, Danny Purba as interim board members and the defendants agreed to the appointment of Amir Salar Udin and Sultmia Ade Hadiz as interim directors, who would run the day to day operations and to pay the expenses of the mosque. As to the fifth person, counsel for the parties agreed to provide the name of a fifth person within two days, and in the event that a fifth person could not be agreed upon J.H.O. Risi would designate a fifth interim board member. There is no evidence that a fifth member of the interim board was ever named or designated.

On May 25, 2013 the interim board members entered into an agreement whereby persons who had previously been excluded from the congregational list established by the court order of March 19, 2013, should be added to the congregational list, and submitted to the court lists of persons added to the congregational list for all purposes including voting and running as candidates for office. Said agreement was incorporated into a so-ordered stipulation on June 14, 2013, executed by the Hon. Rudolph Greco, Jr., in the action commenced under Index No. 29801/10.

The proposed bylaws, dated March 9, 2013, were voted on and adopted by the congregants at a meeting held on May 31, 2013.

Prior to entering into the June 14, 2013 so-ordered stipulation, the four members of the interim board held a meeting on June 8, 2013 to discuss matters pertaining to the June 14, 2013 election. The meeting continued on June 9, 2013, at which time a fifth person, Prijono Hadjowirogo attended the meeting. The board's agenda reads as follows:

- “ THE PLAINTIFFS DEMAND ONE CONGREGANT ONE VOTE”
- “ THE DEFENDANTS MAINTAIN ONE CONGREGANT 5 VOTES”
- “ PLAINTIFFS PROPOSED FOR 5 CANDIDATES MAXIMUM”

“DEFENDANTS PROPOSED FOR 7 CANDIDATES MAXIMUM”

“HERE[sic] ARE NO RESOLUTION REACHED ON THIS MEETING”

The signatures of interim board members Ade Hadiz, Amiruddin Sumaila, Utjok A. Zaidan and Danny Purba. appear below the above quoted statement.

Prijono Hadjowirogo apparently was selected to act as the chairman of the election committee and was present at the June 9, 2013 meeting.

Interim board member Utjok A. Zaidan and Muhammad Husni, in a letter dated June 12, 2013 requested that Mr. Hadjowirogo remove all “plaintiff” candidates names from the ballot and not hold an election until a resolution was reached as to the voting rules, and the rules and regulation of the election. Mr. Zaidan and Mr. Husni set forth their proposals for such rules and regulations in said letter.

Although the interim board members had not reached an agreement with respect to voting and the number seats on the board, the election was held on June 14, 2013, at which time M. Syamsi Ali, Fitri Chowdhury, Prijono Hardjowirogo, Husni Husain, Fenny H. Igrisa and Amiruddin Sumaila were elected to the IMC’s Board of Directors. The court notes that although the complaint alleges that these individuals were elected to the Board of Trustees, the IMC’s bylaws provide that it is governed by a Board of Directors, and not by a Board of Trustees.

Plaintiffs now seek to set aside the June 14, 2013 election on the grounds that it was held despite the fact that the interim board members had failed to resolve and implement electoral mechanisms and procedures prior to said election meeting.

At the outset, the proper method to test the validity of an election is not within the context of an action but rather a special proceeding pursuant to Not-for-Profit Corporation Law § 618. “Generally, where an action or proceeding is brought in the wrong form or under an inappropriate statute, the court, in its discretion, may deem it brought in a proper fashion, thus avoiding a dismissal” (*Matter of Schmidt [Magnetic Head Corp.]*, 97 AD2d 244, 250, [2d Dept 1983]; see CPLR 103 [c]; see also *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 653 [1976]; *Matter of Schroeder*, 70 AD3d 583, 584[1st Dept 2010]; *Esformes v Brinn*, 52 AD3d 459, 462 [2d Dept 2008]). Here, in their first five causes of action plaintiffs seek to challenge the validity of the June 14, 2013 elections, in the sixth cause of action plaintiffs seek to recover damages for breach of fiduciary duty, and the seventh cause of action is for injunctive relief. therefore, the within action shall be considered a hybrid special proceeding and action.

That branch of respondents’ cross motion which seeks an order consolidating this action with an action entitled *Indonesian Muslim Community Inc. v Aridjo*, (Index No. 29801/10), is denied. The action commenced under Index No. 29801/2010 was settled pursuant to a so-ordered stipulation dated November 19, 2012, and there are no pending issues in that action, as the parties therein agreed to arbitrate the issues of the

misappropriation of the mosque's funds and breach of fiduciary duty.

Res judicata, or claim preclusion, bars relitigation of claims “where a judgment on the merits exists from a prior action between the same parties involving the same subject matter” (*Matter of Hunter*, 4 NY3d 260, 269[2005]). “[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy’ ” (*Xiao Yang Chen v Fischer*, 6 NY3d 94 [2005], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Res judicata precludes re-litigation of all claims which were raised, or could have been raised, in the prior action (see *Xiao Yang Chen v Fischer*, 6 NY3d at 100; *Cypress Hills Cemetery v City of New York*, 67 AD3d 853, 854 [2009], leave to appeal denied 14 NY3d 712[2010]).

Collateral estoppel, or issue preclusion, “precludes a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action . . . and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]; see also *Buechel v Bain*, 97 NY2d 295, 303 [2001], cert denied 535 US 1096 [2002]; *Kedik v Kedik*, 86 AD3d 766, 767[2011]; *Matter of Frontier Ins. Co.*, 73 AD3d 36, 41 [2010]). Moreover, as a general rule, future litigation between parties arising from the same transaction is precluded following a valid final judgment in previous actions, even if a new action is based upon different theories or seeks a different remedy (see *Matter of Josey v Goord*, 9 NY3d 386, 389-390 [2007]; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Collateral estoppel requires that the party to be precluded from relitigating the issue “had a full and fair opportunity to contest the prior issue” (*Ryan, supra*, 62 NY2d at 501). The doctrine of law of the case only applies to prior determinations made in the same action, and has no application to separate and distinct actions.

Here, the fact that Justice Greco declined to sign two orders to show cause with respect to a request for a preliminary injunction in the action commenced under Index No. 29801/2010 does not provide a basis for the application of the doctrine of res judicata or collateral estoppel. The granting of an order to show cause is a discretionary matter, and Justice Greco's declination to sign said orders to show cause does not constitute a final determination on the merits, or a determination of an issue raised by a party in a prior action. Therefore that branch of the cross motion which seeks to dismiss the within special proceeding/action on the grounds of res judicata and collateral estoppel, is denied. The branch of the cross motion which seeks an award of attorney's fees and costs is also denied.

This court has the authority to set aside a corporate election if it is not conducted in accordance with the corporate by-laws, or statutory requirements, or other legalities (see

Trustees of Gallilee Pentecostal Church, Inc. v. Williams, 65 AD3d 1221 [2nd Dept. 2009]; *Application of Kaminsky*, 251 App Div 132 [4th Dept. 1937], *affirmed*, 277 NY 524, [1938]; *Matter of Singh v 74th Street Merchants Ass'n, Inc.*, 25 Misc 3d 1224[A] [Sup Ct Queens County 2009]; *Azzi v Ryan*, 120 Misc 2d 121[Sup Ct Queens County 1983]).

Petitioners/plaintiffs assert that at the June 14, 2013 election, each congregant was permitted five Board of Trustee votes in accordance with the proposals made by defendants Ade Hadiz, and Amiruddin Sumaila at the June 8, 2013 meeting. Plaintiffs assert that this, in effect, diluted the votes of any opposition faction and inflated the votes of the defendants' supporters. Ms. Hadiz asserts in her affidavit that "[t]he election committee, an independent body, neither comprised of plaintiffs nor defendants, ultimately decided the manner of election", and that "[a]s per the long tradition of the IMC and pursuant to the By-Laws which allow congregants one vote per slate of candidates, an election was held on June 14, 2013 pursuant to this Court's order.

The IMC's bylaws were adopted by the congregation pursuant to a referendum held on May 31, 2013. Article III, Section 4 of the bylaws provide that each regular member shall have one vote. The bylaws are silent as to whether the candidates for the Board of Director are elected individually or as part of a slate of candidates. However, contrary to petitioners'/plaintiffs' assertions, there is no evidence that any of the congregant members cast "five Board of Trustee votes". Notably, plaintiffs have not submitted any evidence with respect to the actual votes cast at the June 14, 2013 election meeting and the method used to tally the votes.

Contrary to Ms. Hadiz' assertion, the election committee was not empowered to decide the manner of the election. Rather, Article IV, Section 4 of the bylaws provide that the election committee shall follow the election procedures set by the Board of Directors, and that if the Board did not establish written election procedures, the election committee would prepare the procedures for the Board's approval. In addition, Article V, Section 1 of the bylaws provides, in pertinent part, that the Board of Directors shall be composed of at least 3 members but no more than 9 members. It is undisputed that prior to the June 14, 2013 election, the interim Board was unable to agree on the number of directors to be elected at the June 14, 2013 election, and that it did not approve any written election procedures. Therefore, as the June 14, 2013 election was not conducted pursuant to the IMC's bylaws, it must be set aside.

Accordingly, that branch of the petitioners'/plaintiffs' motion which seeks to set aside the June 14, 2013 election of the Board of Directors, is granted.

That branch of the motion which seeks to enjoin respondents/defendants who were

purportedly elected on June 14, 2013 from representing, identifying and holding themselves out as the Board of Directors is denied, as there is no evidence that these individuals will act in any manner contrary to this court's judgment and order.

That branch of the motion which seeks a declaration to the effect that the interim board has primary authority to manage all of the affairs of the IMC, is granted to the extent that it is the declaration of the court that the interim board consisting of Utjok Ziden, Danny Purba, Amir Salar Udin, and Sultmia Ade Hadiz shall manage the corporation's day to day affairs and pay the expenses of the mosque, until such time as written election procedures are approved by the interim board, and a new election is held.

That branch of the motion which seeks to compel the interim board to select a fifth board member, is granted to the extent that the parties are directed to select a fifth member of the board of directors, within 20 days from the date of service of this judgment/order, together with notice of entry.

Respondents/defendants' cross motion is denied in its entirety.

This constitutes the judgment and order of the court.

Dated: December 6, 2013

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JAMES J. GOLIA, J.S.C.