SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

RICHARD CARABALLO, et al.,	:	
Plaintiffs,	:	Index No. 650522/14
-against-	:	DECISION AND ORDER
THE ART STUDENTS LEAGUE OF NEW YORK, et al.,	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

This is the court's decision with respect to a derivative action brought by 249 members of The Art Students League of New York (plaintiffs) for a preliminary injunction seeking to prevent defendants The Art Students League of New York (the League), its Board of Control (the Board), Broadway Trio LLC (Trio), and Extell Development Company (Extell) (together, defendants) from closing a proposed sale of certain air and development rights by the League to Trio.

Parties

The League is a not-for-profit corporation organized under the laws of New York. It was founded in 1878, and it currently has 3,947 members. Amended Complaint, ¶¶ 2-3. The League's operations are governed by rules and procedures set forth in its constitution (Constitution), by-laws (By-Laws) and amendments to By-Laws (Amendments). The Constitution provides that "[t]he officers of the League shall be a President, two Vice-Presidents, a Treasurer, and eight others, all of whom shall be members of the Board of Control." The Board functions as the League's board of directors, and its members are elected and appointed each December. Amended Complaint, ¶ 5.

Defendant Salvatore Barbieri is the League's current president, and defendants Susan Matz and Thomas E. Harvey are the League's vice-presidents. Amended Complaint, ¶ 6.

Defendant Trio is a Delaware limited liability company authorized to do business in New York, and a wholly owned affiliate of defendant Extell Development Company (together with Trio, Extell), which is a Delaware corporation authorized to do business in New York. Amended Complaint, ¶¶ 8-9.

Plaintiffs 249 League members together constitute more than 5% of the League's total membership. Amended Complaint, ¶ 4.

Background

The League owns the American Fine Arts Building located at 215 West 57th Street, New York, New York. Amended Complaint, ¶ 11. In 2005, Extell purchased air rights from the League (2005 Transaction) to construct an 88-story building on the lot adjacent to the League's building, located at 225 West 57th Street. Amended Complaint, ¶ 13.

In 2013, Extell made plans to construct a residential tower on its lot, a portion of which would cantilever over the League's building. The tower's lower stories would be occupied by Nordstrom, Inc. (Nordstrom), a retail department store, which already bought that portion of air space within the tower. Tr., Part 1, 104: 24. The proposed cantilever portion of the residential Extell tower would start at the 30th floor, and would rise to 1440 feet in height. Accordingly, Extell approached the League with the intent of acquiring an additional 6,000 square feet of the League's development rights, and the right to build a cantilever over a portion of the League's building (the Cantilever Transaction). Memorandum in Opposition, 2.

Amendment No. 31 to the By-Laws (Amendment 31) provides that the Board "shall take no action to sell, lease, mortgage or dispose of the Building or any interest therein (including development or other rights associated with the ownership of the Building) unless and until:"

> (a) the proposed action has been approved by two successive Boards of Control (that is, by the Board as constituted at the time of the first such approval and by the Board as reconstituted after the next annual election of the Board); and
>
> (b) the Board has thereafter submitted the proposed transaction to the Members, and a majority of the members entitled to vote (or such greater percentage of Members whose affirmative vote may be required by law from time to time) have approved the proposed transaction.

Memorandum in Opposition, Exhibit A.

The Board that was in office when Extell first approached the League in 2013 (the First Board) began negotiations with Extell. The League was represented by Peter S. Britell, a real estate attorney with 38 years experience. Tr., Part 1. 117: 6-16. The League retained the services of Jerome Haims Realty, Inc. (Haims) to appraise the value of the rights that Extell was seeking to purchase. Memorandum in Opposition, 2. Haims appraised the value of the cantilever rights at $28 million, and the value of the additional air rights at $2.8 million, for a total value of $30.8 million. Memorandum in Opposition, 3.

In the fall 2013, Extell made an offer to the First Board in the amount of $25.8 million for the cantilever and development rights. The First Board approved the Cantilever Transaction, and a purchase and sale agreement was drafted to that effect (the Agreement). The Agreement states that it is conditioned upon, and subject to, the approval by the Board and the League's members. The Agreement further states that "[i]f, for any reason or no reason, such approval is not obtained on or before January 30, 2014, Seller and Purchaser shall each have the right to terminate this Agreement." Defendants' Exhibit C, Section 16.

In December 2013, the League elected its current Board. Prior to its approval of the Cantilever Transaction, the Board advised Extell that, given the Haims appraisal, the League's members might have difficulty approving the sale for a price less than $30.8 million. As a result, Extell executed an amendment to the Agreement. The amendment increased the purchase price to $31.8 million, added more indemnification provisions in favor of the League, and extended the approval deadline to February 14, 2013. Defendants' Exhibit D. Satisfied, the Board approved the Cantilever Transaction on December 18, 2013. Memorandum in Opposition, 3-4.

The Board then proceeded to make arrangements for a members' vote. Since the fall 2013, the Board held a series of fifteen meetings where League members were offered an opportunity to provide input regarding the proposed Cantilever Transaction. Memorandum in Opposition, 3. In early January 2014, the Board distributed to the League's voting members a 48-page packet containing a ballot, voting instructions and materials relating to the Cantilever Transaction (the Ballot Package). The Board also took steps to make available upon request the Agreement and other due diligence materials, and many members took advantage of this opportunity. The vote on the Cantilever Transaction was scheduled for February 12, 2014 (February 12 Meeting). Memorandum in Opposition, 5.

Some League members opposed the Cantilever Transaction, and circulated their own materials to the other members. In response to the opposition's concerns, the Board retained the services of Appraisers & Planners, Inc. (Appraisers & Planners) to review the Haims appraisal. In its report, Appraisers & Planners stated that the methodology and conclusions of the Haims appraisal were "appropriate and credible"(the Appraisal Review). Memorandum in Opposition, Exhibit D. In addition, the Board contacted Extell to inquire if it would be willing to renegotiate

the purchase price, or at least extend the approval deadline beyond February 14, 2014. Extell responded with an "emphatic NO" to both of these questions, and stated that it would consider any attempts to change the terms of the Agreement as bad faith (the Extell Letter). Memorandum in Opposition, Exhibit E.

On January 15, 2014, a group of twenty League members who opposed the Cantilever Transaction made a request that the Board organize a meeting of members on February 11, 2014, to vote on a resolution to cancel the February 12 Meeting. Memorandum in Opposition, 7. In addition, plaintiff Richard Caraballo, an active member of the League, sent a letter to the Board on February 11, 2014 (Caraballo Letter), requesting that the Board commence an action "to obtain an order enjoining officers and members of the League from proceeding with the February 12 Meeting." Amended Complaint, Exhibit D. The Board granted the request for a members' meeting on February 11 to consider whether to cancel the February 12 Meeting. The February 11 meeting was held, and League members voted to proceed with the February 12 Meeting. Memorandum in Opposition, 7.

On February 12, 2014, the League's active members voted on the Cantilever Transaction (the February 12 Vote). Amended Complaint, ¶ 16. Out of the total of 1,569 members who voted, 1,342 were in favor, and 227 were opposed. Amended Complaint, ¶ 17.

In order to stop the Cantilever Transaction, plaintiffs brought this derivative action to enjoin the proposed conveyance transfer pursuant to N.Y. N.-P.C.L. § 720 (a) (3), or in the alternative, if the proposed conveyance pursuant to the Cantilever Transaction has already been made, to set aside the proposed conveyance pursuant to N.Y. N.-P.C.L. § 720 (a) (2), and enjoin all defendants from taking any actions in reliance upon or in furtherance of the Cantilever Transaction. Amended Complaint, ¶¶ 1, 73-79.

The court conducted a hearing on March 24, 2014 and April 4, 2014, during which the parties had an opportunity to submit testimony and oral arguments on plaintiffs' motion to preliminarily enjoin the closing of the Cantilever Transaction.

Discussion

1. Standing

Though defendants initially objected to plaintiffs' standing on the grounds that they did not represent "five percent or more of any class of members" of the League, as is required by Section 623 of New York's Not-for-Profit Corporation Law (Section 623), plaintiffs were afforded an opportunity to gather sufficient support, which they did, and the parties have stipulated to that effect. Defendants maintain that plaintiffs nevertheless lack standing because they failed to satisfy subdivision (c) of Section 623, which requires that the complaint "set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the board [or] the reason for not making such effort." N.Y. N-P.C.L. § 623(c). According to defendants, the only action demanded of the Board in the Caraballo Letter was to cancel the February 12 Meeting, whereas the stated purpose of the present action is to enjoin the Cantilever Transaction.

The court disagrees. The February 11 Meeting was called for the specific purpose of voting on the Cantilever Transaction. *See* Plaintiffs' Exhibit 5. The one and only purpose of the Caraballo Letter was to stop the Cantilever Transaction. The letter makes this abundantly clear, and it cites the same legal grounds found in the Amended Complaint. *See* Amended Complaint, Exhibit D. The letter is also unambiguous with respect to "who made the demands, when they were made, which Board members they were made to, and the content of the demands." *Tomczak v Trepel*, 283 AD2d 229, 229-30 (1st Dept 2001); *see* Amended Complaint, Exhibit D.

In addition, the Amended Complaint also states that no further demands were made because "the individual defendants comprise the entire Board of Control and are all of the officers of the defendant." and an effort to do so would have been "futile and useless." Amended Complaint, ¶ 23. Accordingly, the court finds that plaintiffs have sufficient standing to assert the present derivative action against the League.

2. Preliminary Injunction

To prevail on a motion for preliminary injunction, plaintiffs have to show a likelihood of success on the merits, danger of irreparable harm absent the injunction, and a balance of the equities in their favor. *Aetna v Capasso*, 75 NYS2d 860, 862 (1990).

Plaintiffs argue that the conveyance of the air and cantilever rights pursuant to the Cantilever Transaction is unlawful because the vote that occurred during the February 12 Meeting was invalid for several reasons. Amended Complaint, ¶ 24. Namely, plaintiffs assert (a) that the vote count conducted during the February 12 Meeting is defective because of the Board's erroneous interpretation of the League's Amendments, and (b) that the Board made materially misleading misrepresentations and omissions when it presented the Cantilever Transaction to its members. The court will address each of these contentions in turn.

a. The Vote Count

According to defendants, as of the February 12 Meeting, the League had 2,102 active members. Therefore, the 1,342 votes cast in favor of the Cantilever Transaction represent a clear majority of the voting membership (63.8%).

During the course of the hearing, plaintiffs made an argument that both active and inactive members of the League are entitled to vote so long as they pay their membership dues. Accordingly, they believe that all 3,946 members were entitled to vote, which means that 1,974

votes were required to approve the Cantilever Transaction. Tr., Part 1. 52: 22-25. Based on this interpretation of the By-Laws, the resolution put forth at the February 12 Meeting did not pass.

With respect to which members are entitled to vote, Amendment No. 30 to the By-Laws (Amendment 30) provides:

> 1. The Corporation shall have two categories of Members: (a) "Active Members," who shall have the right to vote on all matters for which a Member of the Corporation is *entitled to vote* under these By-laws; and (b) "Inactive Members," who shall be Members of the Corporation for all other purposes but shall not have the right to vote on any other matter for which a Member of the Corporation is entitled to vote under these By-laws.
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> . . .
>
> 3. Any Inactive member may reinstate his or her status as an Active Member either: (a) by voting at any meeting of Members; or (b) by submitting a written request for reinstatement to the Board at least 30 days before a meeting of members in which such member desires to vote.

Memorandum in Opposition, Exhibit A (emphasis added).

Plaintiffs interpret these provisions to mean that inactive members are entitled to vote because Amendment 30 (3) (a) states that an inactive member can reinstate his or her status by "voting at any meeting of Members."

Defendants counter that there is a qualitative difference between the voting rights of an active and inactive member under the By-Laws. An inactive member can vote only after reinstating his or her status as an active member, i.e. voting in person. Indeed, 86 inactive members did this at the February 12 Meeting, thereby changing their status to active. Amendment 30 (1) (b) makes it clear that an inactive member who fails to do so is not entitled to vote. This is in contrast to an active member who is "entitled to vote" at all times and by absentee ballot.

In support of their position, defendants offered testimony from the following witnesses: John A. Varriano, who served as a Board member in 1991, 1994 and 2001 (Tr., Part 2. 9: 6-7), and also as a President of the Board in 2005 and 2006 (Tr., Part 2. 9: 18-19, 23); Ira Goldberg, who has been the League's Executive Director since 2001 (Tr., Part 2. 37: 2-7); and Yair Listokin, a tenured professor at Yale Law School and an expert on corporate voting (Defendants' Exhibit F).

Mr. Varriano's testimony addressed the origins of Amendments 30 and 31, which were added in 2001. Namely, he testified that Amendment 31 was added to make sure that both the Board and the League's members had a say in the disposition of the League's real estate assets. Another concern was the League's ability to pass *anything* given its "sprawling membership base[,]" with many members not being "connected with the League any longer," including "people in the books who possibly had even passed away . . . ." Tr., Part 2. 17: 3-6, 9-10. As a solution, the drafters of the Amendments decided to confine the number of members from which to calculate a manageable absolute majority, and thus allow the League to take action when necessary. Therefore, Amendment 30 was added to exclude inactive members from the calculation of an absolute majority by denying them an "entitlement" to vote on the disposition of the League's real estate assets unless they reactivated their membership by showing up in person to vote. *Id.*

Messrs. Varriano and Goldberg testified that the above methodology was used to conduct and count the League's vote during the only two instances the League voted pursuant to these Amendments – the 2005 Transaction and the Cantilever Transaction (Tr., Part 2. 41: 6). Both in 2005 and 2013, only the League's active members received packages with ballots (Tr., Part 2.

47). The 2005 Transaction passed by a 1,282 to 69 vote (Defendants' Exhibit G). At the time, the League had approximately 4,000 active and inactive members (Tr., Part 2. 21-22).

Prof. Listokin, who testified as an expert witness, explained that the business judgment rule applies whenever a board interprets "unclear matters" in by-laws. Tr., Part 1. 160: 25. In addition, he testified that his interpretation of Amendments 30 and 31 is that "entitled to vote" means active members, including inactive members who have activated their membership by voting. Tr., Part 1. 161: 15-26. Any other interpretation would render the "entitled to vote" restriction meaningless. Tr., Part 1. 163: 3-12.

The court agrees with Prof. Listokin that the League's By-Laws are less than clear, and that the Board's interpretation of the By-Laws is reasonable. The same interpretation was used when the League voted on the 2005 Transaction. According to Messrs. Britell, Varriano and Goldberg, throughout the 2013 process, and ever since the Amendments were passed in 2001, it was always assumed that only active members were absolutely entitled to vote. Tr., Part 1. 139: 4; Tr., Part 2. 41: 22. Indeed, plaintiffs themselves apparently thought so, because in the Amended Complaint they stated that "a majority of members entitled to vote . . . means a majority of all active members." Amended Complaint, ¶ 17. Plaintiffs' interpretation would require the court to classify all inactive members who did not vote as "no" votes, which is contrary to the plain meaning of Amendment 30 (1) (b). Therefore, the court does not find that the Board acted outside the scope of its authority or in bad faith in interpreting the League's By-Laws.

b. Alleged Misrepresentations and Omissions

Plaintiffs claim that the Board has not submitted an accurate description of the Cantilever Transaction to the members because there were several materially misleading misrepresentations

and omissions made in the campaign materials. Tr., Part 1. 56: 7-12. For instance, in the Ballot Package, the Board made the following statement:

> As a Voting Member you should consider the following: 1) If the members do not approve this transaction, Extell will proceed with the construction of the Extell Building [without the cantilever]. 2) If the sale of the development rights and the airspace parcel is not approved now, under Amendment 31 any new deal with Extell could not (at the earliest) be presented again to the members until after election of the next Board in December, 2014 with a vote by the members early in 2015. Extell's construction schedule does not permit the kind of delay that would result from this schedule. 3) Most importantly, you are making an all or nothing decision. If you do not approve the $31.8 million sale price, you should assume that the League will get nothing.

Memorandum in Opposition, Exhibit C.

The Board reaffirmed its view in the numerous emails it sent to League members from November 1, 2013 through February 9, 2014. The Board warned them that, "for approval, a majority of all members eligible to vote must favor the transaction. That means not voting is the equivalent of voting no." Plaintiffs' Exhibits 6-15.

Plaintiffs' argument is that these materials were intended to and did deceive the League's members who were opposed to the Cantilever Transaction. According to plaintiffs, the Board's strategy, and the materials' effect, was to lull these members into a false sense of security that, if they stayed at home, their vote would be registered as a "no" vote.

The court does not credit plaintiffs' convoluted theory. Rather, the court views the Board's action as a legitimate message to the League's voting members regarding the consequences of a failure to have their vote registered. The Board's purpose appears to have been a straight-forward effort to mobilize League members to vote on an extremely important opportunity for the League, not to mislead them.

Plaintiffs also claim that the Board's characterization of the February 12 Meeting vote as an "all-or-nothing decision" was inaccurate as well. They argue that if the League's members voted against the Cantilever Transaction, there would have been no need to wait for a new Board to be elected in December 2014, as defendants contend, because two consecutive Boards already had approved the transaction. Instead, the Board could renegotiate with Extell, obtain a better deal, and submit it for the members' approval before the end of its term. Amended Complaint, ¶¶ 27-30.

Defendants disagree. They argue that if the majority of active members voted to reject the Cantilever Transaction, this would have completed the approval process cycle under Amendment 31, and any new deals with Extell would have to go through the whole process anew. Therefore, the earliest that any new deal could be approved by the membership would be in January 2015, which, according to Extell, was unacceptable for its construction schedule. Again, in the court's view, the Board's exercise of its business judgment was a reasonable one in light of Extell's stated position and what it meant, i.e. the February 12 Meeting vote was an "all-or-nothing decision." Memorandum in Opposition, 15-16. This is especially the case in light of the fact that the Board relied on the legal advice of its counsel regarding the approval process cycle. Affidavit of Salvatore Barbieri, ¶ 21.

The Board had sufficient cause to believe that the cantilever opportunity had an expiration date to it. The Agreement states that if membership approval is not obtained by February 14, 2014, Extell can terminate the Agreement. Moreover, when the Board tried to ask for more time, Extell absolutely refused to grant it. While the Extell Letter was received after the Board already distributed most of its materials, it reinforced the Board's view that the League needed to act quickly, or else risk losing this opportunity. Indeed, Mr. Barnett testified

that his company already started excavations, that Extell's alternative plans had already been approved by the Department of Buildings, and that he "will not renegotiate the terms of [the Agreement]." Affirmation of Garry Barnett, ¶¶ 5-6.

In light of these circumstances, were the Board members to have perceived Mr. Barnett as "bluffing," and decided to call the ostensible "bluff" and then lose this unique $31 million opportunity, their business judgment may very well have been called into question. The League's voting members obviously concurred with the Board even though plaintiffs raised many of these same issues during the fifteen meetings the League held on this matter. They overwhelmingly voted in favor of the Cantilever Transaction. Therefore, based on the admitted evidence and testimony, the court finds that the Board acted within the scope of its authority and in good faith. The record, as it stands, does not allow for an inference to the contrary.

The same reasoning holds true with respect to the Appraisal and the Appraisal Review. Plaintiffs claim that the Appraisal was grossly erroneous because it used a comparison structure that is substantially different than the alternative structure Extell plans to build if it is denied the cantilever. Moreover, they believe that Haims' previous work with Extell in 2008 should have been disclosed to the League's members. Amended Complaint, ¶¶ 41-43.

In response, defendants contend that the comparison structure plaintiffs refer to is only one of a number of designs that Extell may build as of right, and that the number of square feet of residential floor area would not at all be diminished. Mr. Barnett testified that the 45,000 square foot lot allows his company to build the intended square footage without the cantilever, though his architects might have to adjust the building's core. He further testified that these adjustments would not significantly upset Nordstrom's retail space. Moreover, since Nordstrom secured its retail space long before the cantilever idea surfaced, and since it is equally

eager for the building to start going up, Mr. Barnett is expecting that Nordstrom would consent to his alternative plans. Tr., Part 1. 92: 5.

The court is persuaded that the Board acted in reasonable exercise of its business judgment when relying on the Appraisal and the Appraisal Review. *Auerbach v Bennett*, 47 NY2d 619, 629 (1979) (The business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment" even when "the results show that what they did was unwise or inexpedient."). In addition, the business judgment rule also protects the Board's decision not to publish the fact that Mr. Haims, an expert appraiser, did work for Extell in 2008. There is nothing in the record that points to any ongoing Extell-Haims relationship, and the fact that the Board did not consider events that happened five years earlier to be of sufficient import to disclose is well within the Board's prerogative, and of no moment. As far as the Board was concerned, the Appraisal Review removed any doubts one might have concerning Mr. Haims' competence and impartiality. The Board was entitled to rely on these expert opinions. N.Y. B.C.L. § 717 (a) (2) ("In performing his duties, a director shall be entitled to rely on information, opinions, reports or statements . . . prepared or presented by . . . counsel, public accountants or other persons as to matters which the director believes to be within such person's professional or expert competence[.]")

In summary, the court finds that the Board acted "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Auerbach*, 47 NY2d 629. The court has considered plaintiffs' remaining arguments pertaining to the Cantilever Transaction vote, and finds them unpersuasive. Because plaintiffs have failed to establish a likelihood of success on the merits, the court need not address the irreparable injury and the balance of equities elements.

3. CPLR § 4401 Motion

At the beginning of the hearing held on April 4, 2014, defendants made a motion for a judgment pursuant to CPLR § 4401, which provides that any party may move for judgment as a matter of law "[(1)] after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or [(2)] at any time on the basis of admissions." With respect to the first ground, "the timing of a motion prescribed by CPLR 4401 must be strictly enforced[,]" even if "the ultimate success of the opposing party in the action is improbable." *Griffin v Clinton Green South, LLC.*, 98 AD3d 41, 46 (1st Dept 2012). With respect to the second ground, the admission made by the non-moving party must be such that "there is no rational basis by which a finder of fact could find for the non-movant." *Shandell v Katz*, 159 AD2d 389, 390 (1st Dept 1990).

The record is not clear as to defendants' basis for making a "motion for judgment during trial"(CPLR § 4401), especially since the court conducted a preliminary injunction hearing, and not a trial. The record is even less clear on whether plaintiffs intend to introduce additional evidence. Namely, during the course of the hearing, plaintiffs' counsel stated that he will present additional witnesses at trial (Tr., Part 2. 105: 24-26), will engage in more thorough cross-examination of defendants' witnesses (*See* Tr., Part 1. 116), and will also subpoena Mr. Haims (Tr., Part 2. 119: 5-6). On the other hand, while making his irreparable harm argument, plaintiffs' counsel also stated that, "without [a] preliminary injunction, the trial of this case could be futile . . . ." Tr., Part 1, 74-75. The fact that plaintiffs also appear to have made a CPLR 4401 motion at the close of the hearing "does not waive the[ir] right . . . to present further evidence." CPLR § 4401. Nevertheless, the record remains unclear as to plaintiffs' intentions.

Therefore, the court will reserve its decision on the CPLR 4401 issue until the record is clarified, and the parties are directed to contact Chambers to schedule a status conference for this purpose.

Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that the parties are to contact Chambers to schedule a status conference as discussed above.

Dated: April 14, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER