SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

RICHARD CARABALLO

-v-

THE ART STUDENTS LEAGUE OF NEW YORK, et al

INDEX NO. 650522/14

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this cross motion to/for Summary Judgment

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 cross motion by defendants for summary judgment is GRANTED per the attached Decision and Order.

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

Dated: July 23, 2014

MELVIN L. SCHWEITZER

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 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 the cross-motion for summary judgment of defendants The Art Students League of New York (the League), its Board of Control (the Board), Broadway Trio LLC (Trio), and Extell Development Company's (Extell) (collectively, Defendants) in a derivative action brought by 249 members of the League (Plaintiffs) to enjoin or set aside the conveyance of certain development rights by the League to Trio (the Cantilever Transaction).

Background

In its Order dated April 14, 2014 (Decision & Order), that followed a two-day hearing during which the parties submitted documentary evidence and oral testimony from several witnesses, the court denied Plaintiffs' motion for a preliminary injunction. The court did not rule on Defendants' cross-motion to dismiss pursuant to CPLR 3211. Instead, in its Supplemental Order dated April 30, 2014, the court stated that it would treat Defendants' cross-motion as a motion for summary judgment.

Discussion

To prevail on a motion for summary judgment pursuant to CPLR 3212, the moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, the party opposing the motion must "demonstrate by admissible evidence the existence of a factual issue requiring a trial." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Moreover, the court must view the evidence in the light most favorable to the party opposing the motion, granting it the benefit of every favorable inference. *See Myers v Fir Cab Corp.*, 64 NY2d 805 (1985).

Defendants argue that summary judgment in their favor is appropriate because Plaintiffs failed to produce any new evidence to rebut what Defendants already have established on the preliminary injunction motion – that in conducting the vote on the Cantilever Transaction (February 12 Vote), the Board at all times acted in good faith and in furtherance of the League's best interests.

Plaintiffs' efforts to enjoin the Cantilever Transaction are essentially two-fold, and the court will address each claim in turn.

1. The Vote

Plaintiffs' first claim is that the Cantilever Transaction did not pass because the Board improperly interpreted Amendment 31 to the League's By-Laws as requiring approval by a majority of the League's active members. Instead, they contend, a majority of all the League's members was needed to pass the resolution, and this did not occur.

The court remains unpersuaded by Plaintiffs' argument. Offering no new evidence on this point, Plaintiffs argue that the court should interpret the By-Laws according to the "plain meaning of the language," and should consider the extrinsic evidence only if "ambiguity is determined within the four corners of the document." Defendants' Memorandum at 15 (citing *Brad H. v City of New York*, 17 NY3d 180 [2011]). This is precisely what the court already did when it found that Plaintiffs' interpretation of the By-Laws "is contrary to the plain meaning of Amendment 30(1)(b)." Decision and Order at 10. To the extent there was any ambiguity as to who is entitled to vote pursuant to Amendment 31, the matter has been conclusively resolved in favor of Defendants' interpretation. Namely, the court credited the testimony of Defendants' witnesses who described the origins of Amendments 30 and 31, the drafters' intent, and the methodology used by the League during the 2005 Vote, which was the only other time the League voted pursuant to these provisions. In contrast, Plaintiffs offered no evidence of their own. Therefore, since the court remains of the view that Plaintiffs' interpretation of the By-Laws is entirely incorrect, there are no questions of fact on this issue.

2. Alleged Misrepresentations and Omissions

Plaintiffs' alternative claim is that the Cantilever Transaction should be enjoined due to several misrepresentations and omissions made by the Board in the campaign materials. During the preliminary injunction hearing, Plaintiffs argued that the Board's communications to the League's members that "not voting equals voting no" was intended to, and did, deceive the League's members into thinking that they could vote "no" simply by remaining at home. They similarly argued that the Board's decision to classify the February 12 Vote as an "all or nothing decision," and to rely on the Haims Appraisal, also were grounds for enjoining the Cantilever Transaction.

In its April 14 Order, however, the court found that Defendants successfully established that the Board at all times acted in good faith and with a reasonable exercise of its business judgment while preparing for and conducting the February 12 Vote. Therefore, the court finds that Defendants have met their burden to make a prima facie showing of entitlement to summary judgment, and the burden now shifts to Plaintiffs to present evidence sufficient to establish that a genuine triable issue of fact exists. *Zuckerman*, 49 NY2d at 560.

To that end, Plaintiffs submit 25 sworn affidavits (the Affidavits) from the League's members who stated the following:

> "I did not vote in the February 12, 2014 ballot. . . . My understanding was that by not voting, my abstention would be counted as a vote against the [Cantilever] Transaction. I came to this understanding based upon numerous statements issued to The League's members regarding the February 12, 2014 ballot." Plaintiffs' Memorandum at 7.

Plaintiffs further submit a survey of the League's members that Mr. Caraballo conducted via email on April 26, 2014 (the Survey). The Survey asked the members whether the following statement was true:

> "In my case, I did not vote on the [Cantilever] Transaction because my understanding was that not voting is equal to a 'No' vote." Caraballo Affidavit, Ex. A.

The results of the Survey were as follows: 2004 members were sent the email, 831 opened it, 120 responded, 60 responded "true," and 60 responded "false." Plaintiffs' Memorandum at 8-9. Based on these results, Plaintiffs argue that "one can extrapulate the results of the [S]urvey to conclude that 50% of the non-voting members intended and understood their abstention to represent votes against the [Cantilever] Transaction, which is 1,189 members." Therefore, they argue, but for the Board's misleading communications, the Cantilever Transaction would not have passed. *Id.*

In support of their argument that these alleged misrepresentations present triable issues of fact, Plaintiffs cite Section 14(a) of the Securities and Exchange Act of 1934 and Rule 14a-9. To prevail under these provisions, a plaintiff must establish that the proxy statement contained a material misrepresentation, that the defendant was at least negligent, and that the proxy statement was an essential link in the completion of the transaction at issue.

Defendants respond that Plaintiffs' Survey and Affidavits are severely flawed, that their proposed application of the securities law materiality standard to the statements made by a volunteer board of a non-profit organization is misguided and without any precedent, and that the Board's allegedly misleading communications are protected by the business judgment rule.

Defendants also submit a letter sent by the Board to the League's inactive members in August 2013 (August 2013 Letter),[1] which states:

> "We are contacting you because League records indicate that you have not voted in more than two years. This means that you are currently considered "inactive" for the purposes of voting and do not receive mailed ballots from the League." Kagedan Affirmation, Ex. A.

The letter further invited the recipients to reactivate their status by returning the enclosed reply card or by visiting the League's website. *Id.* Defendants contend that since the League's inactive members were on constructive notice that they were "inactive" for the purposes of "voting," they could not have reasonably interpreted the "not voting equals voting no" message just a few months later as applicable to them. Defendants' Memorandum, 8, 15.

The court agrees with Defendants. Contrary to Plaintiffs' contention, the Board had a legitimate business interest in rallying the League's members to vote on an extraordinary opportunity for the League. The Board's allegedly misleading communications to the League's

[1] The court finds that Plaintiffs' objections concerning the admissibility of the August 13 Letter are moot given that Defendants have resubmitted the letter with an affidavit by a witness with personal knowledge of the facts contained therein. *See* Goldberg Affidavit, Ex. A.

members were made solely in furtherance of that effort. The court is of the opinion that the Board's communications pertaining to the February 12 Vote thus fall within the purview of the business judgment rule. The same reasoning holds true with respect to the Board's decision to characterize the vote on the Cantilever Transaction as an "all or nothing decision," and the Board's reliance on the Haims Appraisal and the Appraisal Review. While it is true that the business judgment rule does not protect a board that "fails to act within the scope of its authority and in good faith[,]" (*Board of Mgrs. of 229 Condominium v JPS Reality Co.*, 308 AD2d 314 [1st Dept. 2003]), Plaintiffs here have failed to present any evidence to that effect.

The court further believes that Mr. Caraballo's Survey is severely flawed, and that the conclusions Plaintiffs draw from its results are untenable. For example, the Survey does not limit its query to inactive members, even though it is undisputed that the "not voting equals voting no" message is entirely correct with respect to active members. Indeed, the only members of the League who could even theoretically assert that they were misled by the "not voting equals voting no" message are inactive members. The same flaw is also present in the Affidavits. Indeed, Defendants contend that only 2 out of 25 Affidavits came from inactive members. Goldberg Affidavit, ¶ 4.

Further, the court notes that out of 2004 recipients of Mr. Caraballo's Survey email, 1173 members did not open it. Out of 831 members who did open it, and presumably read it, 711 still ignored Mr. Caraballo's cause. Given that over thirteen hundred people voted in favor of the Cantilever Transaction, the court finds that the Survey has little probative value as to the materiality of the allegedly misleading statements made by the Board. If anything, the Survey supports the court's conclusion that the League's members were overwhelmingly in favor of the Cantilever Transaction. Thus, even if the court were to import the strict materiality standard

from the federal securities law concerning proxy statements, and apply it to the present case,[2] it is questionable at best that Plaintiffs would be able to raise a triable issue of fact. This is especially true given that the August 13 Letter specifically and unequivocally informed the League's inactive members that they were ineligible to vote unless they first reactivated their status.[3]

In summary, though it is well-established that where there is any doubt as to the existence of triable issues of fact, the motion for summary judgment must be denied (*See Rotube Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), Plaintiffs here have failed to submit any evidence to rebut what Defendants have established through both documentary evidence and testimony – that the Board at all times acted "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of" the League's best interests. *Auerbach v Bennett*, 47 NY2d 619, 629 (1979).

The court has considered Plaintiffs' remaining arguments and finds them unpersuasive.

Accordingly, it is

ORDERED that Defendants' motion for a summary judgment is granted.

Dated: July 23, 2014

ENTER:

J.S.C.
MELVIN L. SCHWEITZER

[2] The federal statute in question states that it applies to proxy statements "in respect of any security . . . registered pursuant to section 781 of this title." 15 USC 78n(a)(1). Plaintiffs cite no precedent for the proposition that the securities law materiality standard is applicable to the Board's statements here.

[3] Indeed, the Supreme Court has ruled that "[a]n omitted fact is material if there is a substantial likelihood that a *reasonable* shareholder would consider it important in deciding how to vote." *TSC Industries, Inc. v Northway, Inc.*, 426 US 438, 449 (1976) (emphasis added).