

Das v Dutta
2014 NY Slip Op 33326(U)
December 9, 2014
Supreme Court, Queens County
Docket Number: 5668/14
Judge: Allan B. Weiss
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

Application of SADHAN DAS,
RAMESH C. NATH, NRIPENDRA NATH DHAR,
BHOLA NATH GHOSH, CHANDRA GHOSH AND
NRIPATI RAY, individually and on behalf
of BANGLEDESH MANDIR, INC.,

Index No.: 5668/14

Motion Date: 7/16/14

Motion Seq. No.: 2

Petitioners,

For Orders and Judgment Pursuant to
Article 78 of the CPLR and the
Not-For-Profit Corporation Law,

-against-

DEBABRATA DUTTA, M.D. a/k/a
DEBABRATA DATTAM M.D.,
SALIL BURMAN, DDS, a/k/a SALIL
BARMAN, DDS, MOHUA DUTTA, ALOK
BHOWMIK AND "JOHN AND JANE DOES
1 THROUGH 20," the last twenty
names of individuals or entities
being unknown to Petitioners,

Respondents.

x

The following papers numbered 1 to 22 read on this Order to Show cause by petitioners for an order that within sixty days a special meeting of the Bangladesh Hindu Mandir Inc. (BHM) be called for the election of new directors and/or trustees and that such meeting be called upon proper notice to all BHM member in accordance with the By-Laws of BHM or otherwise directed by the Court; reinstating one or more officers, director and/or trustees who were removed from their positions by respondents or others at their direction without proper cause; pursuant to Sections 623 and 720 of the N-PCL compelling the respondents to account for their official conduct on behalf of petitioner BHM, including but not limited to their activities with the management of BHM and the disposition of corporate assets; pursuant to N-PCL § 114 directing respondents to permit petitioners and/or their attorneys to inspect all books and records of BHM including but not limited to its financial records of the calendar years beginning January 1, 2007 to the present; pursuant to N-PCL § 621 permitting petitioners and/or their

attorneys or other designated agents to inspect the minutes of and records pertaining to all meetings or other proceedings of BHM, and an official list or record of BHM members or prospective members; pursuant to N-PCL § 621(c) directing respondents to provide petitioners with quarterly, semi-annual and/or annual balance sheets, and profit and loss statements for the calendar years beginning January 1, 2007 to the present; pursuant to N-PCL § 718 directing respondents to provide petitioners with a list of BHM's officers and directors for each year beginning January 1, 2007 to the present; directing respondents to open up membership to all personal eligible to become members of BHM upon payment s of all due and/or fees required under the by-laws; directing respondents to refund all annual membership paid by current BHM members that exceeded the \$25 in annual dues for new member or \$20 for continuing members in contravention of the by-laws; directing that after an election of new directors and/or trustees a special meeting of BHM members be called for the purpose of adopting new or amended by-laws of BHM that are in full compliance with New York Law; directing that within thirty days following such election a Board meeting be held for the purpose of electing or appointing new officers and that such meeting be with due and proper notice to all members of BHM; directing that the duly and properly elected directors and trustees of BHM undertake all efforts necessary to bring BHM into full compliance with the New York Non-Profit Revitalization Act; precluding respondents from taking any other nonessential actions on behalf of BHM.

Papers
Numbered

Order to Show Cause - Affidavits - Exhibits.....	1-8
Answering Affidavits - Exhibits.....	9-15
Reply Affidavits.....	16-22

Upon the foregoing papers it is ordered that this order to show cause is determined as follows:

Petitioners are members of the Bangladesh Hindu Mandir Inc. (BHM) a corporation formed in 1996 under the New York Not-For-Profit-Corporation Law for the purpose of establishing a temple and fulfilling the spiritual, cultural, and social needs of people of the Hindu faith residing in the tri-state area of New York, New Jersey and Connecticut. The BHM temple is located at 94-39 44th Avenue, Elmhurst, New York. The respondents are members, directors and officers of BHM, including the president of BHM, the respondent Dutta. The petitioners allege that when BHM was formed no by-laws

were ever properly adopted. They allege that BHM is being run without regard to the purported by-laws or the N-PCL. They allege that no fair and proper elections have been held and the respondents have run BHM to ensure that they remain in power. The most recent elections for directors was held in November 2012. The petitioners allege that this election was not held in accordance with the by-laws or the N-PCL.

The petitioners have brought this special proceeding pursuant to Not For Profit Corporation Law and purportedly under Article 78. The petitioners seek to void the election held in November 2012. The petition further seeks the removal of the president of BHM, the respondent Dutta, as well as other respondents.

To the extent that in this special proceeding the petitioners are challenging the results of the election from November 2012, such a challenge is barred by the statute of limitations (CPLR 217; *see Matter of Uranian Phalanstery 1st N.Y. Gnostic Lyceum Temple* [1st Dept 1989]). The petitioners contend that they are not actually challenging the results of the election, but arguing that the election never took place and therefore the statute of limitations does not apply. This argument is without merit. However, phrased by the petitioners, they are in effect seeking to void the results of that election and therefore the statute of limitations is applicable. Furthermore, the petitioners did not serve every person declared elected at the contested election as required by N-PCL § 618.

Additionally, the underlying argument that the by-laws were never adopted and the further contention by the petitioners that for years meetings were not properly noticed or not properly held have been waived by the petitioners. The petitioners have been active members of BHM for over 15 years, including serving as board members, but have never raised the objection concerning the By-laws nor did they object to the running of BHM prior to this application. By failing to object to whether the by-laws were properly adopted and whether such by-laws were properly followed and by their active participation in the Corporation the petitioners have waived their right to such an objection (*Matter of Baba Makhan Shah Lobana Sikh Ctr. Inc. v Singh*, 115 AD3d 948 [2d Dept 2014]; *Union Hosp. Assn. of the Bronx ex rel. Shumofsky v Carty*, 185 AD2d 787 [1st Dept 1992]).

The relief sought under N-PCL § 621 is denied as the petitioners have not established that they properly made a demand for the information they requested. Therefore, the relief sought under N-PCL § 621 is denied without prejudice to make a further application for this relief upon proper showing that a demand has

been made or the petitioners may seek such information through the discovery process that will proceed in this case. The petitioners also did not establish their entitlement to relief under N-PCL § 118. The relief that was requested under N-PCL § 118 was not appropriate under that section and should have been brought under N-PCL § 621. Additionally the allegations contained within the petition did not adequately allege that the respondents misappropriate corporate assets. Therefore the petitioners are not entitled to relief under N-PCL § 118, but may seek such information through the discovery process or upon a further application under N-PCL § 621.

As to the remaining relief sought in the petition, including the removal fo the respondent Debabrata Dutta and other relief sought under N-PCL, such relief is only cognizable in an action at law (N-PCL §§ 623, 706 714 & 720; see *Baba Makhan*, 115 AD3d at 948; *Matter of Southern Queens Park Assn. v Capitol Ins. Co.*, 107 AD3d 1006 [2d Dept 2013]). This proceeding is therefore, converted into an action (CPLR 103[c]). The petition is deemed the complaint and the answer to the petition is deemed an answer to the complaint. The caption is amended to reflect the change in the styling of the parties from petitioner and respondent to plaintiff and defendant and to remove the reference to Article 78 and shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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SADHAN DAS, RAMESH C. NATH, NRIPENDRA
NATH DHAR, BHOLA NATH GHOSH, CHANDRA
GHOSH and NRIPATI RAY, individually and
on behalf of BANGLADESH HINDU MANDIR,
INC.

INDEX NO. 5668/2014

Plaintiffs,

-against-

DEBARATA DUTTA, M.D. a/k/a DEBABRATA
DATTA, M.D., SALIL BURMAN D.D.S.
a/k/a SALIL BARMAN D.D.S, MOHUA DUTTA,
ALOK BHOWMIK, and "JOHN AND JANE DOES
1 THROUGH 20,"

Defendants.

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Accordingly, the Order to Show cause is denied. This special proceeding is converted into an action and the caption is amended as directed above.

This action is set down for a preliminary conference to be held on Monday, February 2, 2015 at 9:30 a.m. in the Preliminary Conference Part, room 3003.

Dated: December 9, 2014
D#50

J.S.C.