

Matter of Webster v Kings Vil. Corp.

2015 NY Slip Op 30074(U)

January 15, 2015

Supreme Court, Kings County

Docket Number: 505670/13

Judge: David I. Schmidt

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, 47-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of January 2015

P R E S E N T:

HON. DAVID I. SCHMIDT,
Justice.

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In the matter of the Application of
NATALIE WEBSTER,

Petitioner,

- against -

Index No. 505670/13

KINGS VILLAGE CORP., DAVID SPIRA,
GLORIA PINSKER, HUGH BRUSTER,
LOIS FOSTER, CAROLYN HARVEY, ANDREW
ZAFIR and NANA AGYEKUM,

Respondents.
-----X

The following papers numbered 1 to 10 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-4_____
Opposing Affidavits (Affirmations)_____	5-8_____
Reply Affidavits (Affirmations)_____	9, 10_____
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, Natalie Webster (petitioner) moves (mot. seq. 4), pursuant to Business Corporation Law (BCL) § 619, for an order deeming the election of the Kings Village Corp. Board of Directors held on January 29, 2014 invalid and directing a new

election. Additionally, petitioner requests an order granting her legal fees incurred in bringing this petition (mot. seq. 5). Kings Village Corp., David Spira, Gloria Pinsker, Hugh Bruster, Lois Foster, Carolyn Harvey, Andrew Zafir and Nan Agyekum (respondents) cross-move pursuant to CPLR 3211 (a) (1), (a) (3) and (a) (7) and 3212 for an order dismissing the petition (mot. seq. 6).¹

Background And Procedural History

Petitioner applied on September 19, 2013, pursuant to BCL § 619, for an order directing respondents to schedule an annual meeting of the Kings Village Corp. shareholders to elect a new board. In addition, petitioner requested that either Honest Ballet Association (HBA) or Election-America be hired to supervise the election. The parties stipulated on November 18, 2013 to hold a meeting and election on January 8, 2014 with HBA overseeing the election. Respondents, due to alleged scheduling conflicts, moved the meeting and election to January 29, 2013. Petitioner, by order to show cause, moved to stay the meeting and election. This court declined to grant the stay and ordered the meeting and election to proceed on January 29, 2013 (*see* Decision and Order dated January 14, 2014). Petitioner was not elected, but this court allowed petitioner to examine the ballots (*see* Decision and Order dated February 5, 2014). Petitioner filed this motion to set aside the election and require Kings Village Corp. to administer a new election, and respondents cross-moved to dismiss the petition.

¹Respondents' "cross-motion," in essence, like an answer in this special proceeding, challenges the merits of the petition and therefore is treated accordingly.

Discussion

The court, pursuant to BCL § 619, has the power to confirm an election or order a new election. Here, petitioner asks that the results of the election be overturned, and respondents request that the petition be dismissed. Petitioner presents three grounds to nullify the election: (1) there were no election inspectors as required by the corporation's bylaws and BCL § 610; (2) the vote tabulation was not done pursuant to the corporation's bylaws; and (3) two ballots containing incorrect nominees were issued before the election.

The argument that no monitors oversaw the election lacks merit. HBA provided four overseers for the election. Neither party has presented evidence that HBA's inspectors were appointed strictly pursuant to the corporation's bylaws, but no allegation was made that there were any improprieties in collecting the votes. Furthermore, petitioner requested that HBA be hired to oversee the election and petitioner cannot now complain about procedures undertaken at her own request.

Petitioner's claim that the voting was improper because the total number of shares voted exceeded the total number of shares permitted to vote equally fails. Each shareholder, according to the bylaws, is apportioned one vote per share owned. Petitioner states in her affidavit that HBA's tally of the shares for each candidate combined equals 729,477 while the total number of shares is only 50,021.² However, petitioner's petition fails to accept that

²Petitioner's tally of the total shares permitted to vote appears incorrect. The actual number of shares is 251,470 (*see* Exhibit E to the affidavit of Linda Gibbs, HBA's President, annexed, in turn, to Cathleen Kelly Rebar's affirmation, all submitted in support of respondents' cross motion).

the manner in tallying the votes allows each shareholder to vote all of that shareholder's shares *separately* for each of six candidates. Nothing in the bylaws prevents each shareholder from being able to vote all of that shareholder's shares separately for each of six candidates on the ballot. Moreover, petitioner has provided no evidence that this manner of voting differed from the customary manner in which such elections have been held (*cf. Matter of Garrett*, 132 NYS2d 373, 375 [Sup Ct Queens County 1954]).

Finally, an election result should not be overturned based upon irregularities where the same result would have occurred despite the irregularities (*see Matter of Schmidt [Magnetic Head Corp.]*, 97 AD2d 244, 250 [1983]; *Matter of R. Hoe & Co.*, 14 Misc 2d 500, 505 [1954], *affd.* 285 App Div 927 [1955], *affd* 309 NY 917 [1955], *rearg denied* 309 NY 802 [1955]). No evidence shows that the two ballots distributed in error were sufficient to alter the results of the election. First, the allegedly accidental omission of Glenda Seaborn as a candidate on the memorandum and ballot proxy sent to the shareholders on January 13, 2014 was quickly rectified, and a new memorandum and revised proxy including Ms. Seaborn as a candidate was sent the next day. Secondly, including Andrew Zafir as a candidate was appropriate until Mr. Zafir's appointment to the board of directors pursuant to the bylaws. Thereafter, the ballots distributed in person at the meeting removed Mr. Zafir's name as a candidate. Both respondents and HBA state that petitioner would still fall short of the number of votes required for election even if all the votes for Mr. Zafir were allotted to petitioner. Therefore, "the result would have been the same" despite these

irregularities (*Matter of Laufer [Columbus W. 82 Apts. Corp.]*, 221 AD2d 342, 342 [1995]).

Consequently, petitioner's application for relief warrants denial as does the concomitant motion for legal fees, and the petition should therefore be dismissed. Accordingly, it is

ORDERED that petitioner's application for a judgment overturning the election and directing a new election (mot. Seq. 4) is denied and the petition is dismissed, and it is further

ORDERED that petitioner's application for legal fees incurred in bringing this petition (mot. seq. 5) is denied, and it is further

ORDERED that respondents' purported cross motion (mot. seq. 6) is denied as moot.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. DAVID L. SCHMIDT

Written with the assistance of Keith Dewar, Esq.