Hughes v Newport Apts., Inc.
2015 NY Slip Op 31328(U)
May 7, 2015
Supreme Court, Queens County
Docket Number: 18379/12
Judge: Carmen R. Velasquez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order and Judgment
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

----------x

LAWRENCE HUGHES,

Index No: 18379/12

Plaintiff,

Motion
Dated: December 1, 2014

-against-

M# 4

NEWPORT APARTMENTS, INC., et al.,

Defendants.

----------x

The following papers numbered 1 - 10 read on this motion by petitioner for leave to renew its petition.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 4
Affirmation in Opposition - Exhibits.....	5 - 7
Replying Affidavit.....	8 - 10
Petitioner's Memorandum of Law	
Respondents' Memorandum of Law	
Petitioner's Reply Memorandum of Law	

Upon the foregoing papers it is ordered and adjudged that this motion by petitioner is decided as follows:

At the outset, the court notes that this matter was reassigned to this Part following the retirement of the Honorable Augustus C. Agate, which was effective on January 1, 2015.

Petitioner Lawrence F. Hughes brought this special proceeding for, *inter alia*, a judgment confirming the election of certain individuals as directors of Newport Apartments, Inc. In a previous decision and order dated May 3, 2013 holding a determination on the merits in abeyance until after the conclusion of discovery, Justice Agate summarized the allegations of the parties as follows:

"Petitioner Lawrence F. Hughes alleges the following: Newport Apartments, Inc. is a cooperative housing corporation which owns an apartment building located at 42-65 Kissena Boulevard, Flushing, New York. The cooperative is managed by a Board of Directors consisting of seven individuals elected by the

shareholders. The individual respondents are seven individuals who claim that the shareholders elected them to serve as directors on May 15, 2012. Petitioner Hughes served as a director from 2000 until he was purportedly defeated in the election held on May 15, 2012. At the shareholders meeting held on that date, Marianne Dimino, the President of the cooperative and herself a board member, appointed two inspectors of election pursuant to Article I, section 6, of the Bylaws who were required to sign an oath and then to file the oath along with a certificate of the result of the vote with the corporate secretary. The inspectors did not file the oath and the certificate with the corporate secretary. Nevertheless, Lawrence Properties, Inc., the managing agent for the cooperative, has turned over to the new board the control of the cooperative, including its finances. Moreover, amendments to the corporate bylaws require that directors be both shareholders of the cooperative and residents in its building, although the petitioner has been unable to locate these amendments to the bylaws which should be in the cooperative's possession. The petitioner served a demand upon the managing agent that he be permitted to examine corporate minutes and bylaws for the purpose of locating the residency requirement and other corporate documents relevant to the election, but the demand was not honored. 'This proceeding to confirm the election has largely been driven by the refusal to permit examination.'"

Petitioner argues that he still holds office because (1) the inspectors did not file their oath, (2) the inspectors did not certify the election results, and (3) the purported new directors have not been shown to be qualified in regard to the residency requirement. The petitioner relies on BCL § 703, which provides in relevant part: "(b) Each director shall hold office until the expiration of the term for which he is elected, and until his successor has been elected and qualified."

Respondent Kenneth Chew alleges the following: He was newly elected to the Board on May 15, 2012. Lawrence Properties, Inc., the managing agent, and Marcie Waterman Murray, the cooperative's attorney who had been hired by the incumbent Board, ran the election, and she also announced the election results. No one then objected to the conduct of the election or its results. After the election, Hughes met with Chew, and the former proposed that three of the newly elected directors resign so that three of the ousted directors could take their place. Hughes also wanted the right to select the vice-president and the treasurer. Chew rejected his proposal. The new Board has reviewed some of the books and records of the cooperative and has not discovered an amendment to the bylaws requiring residency in the building as

one of the qualifications for serving as a director. While respondent Wen Hong Ding does not reside in the building, all of the other newly elected directors are residents.

The petitioner, an attorney representing himself, is the only apartment owner in a cooperative having two hundred ten (210) apartments and hundreds of shareholders who has contested the validity of the 2012 election. The other shareholders have incurred the expense of defending this proceeding which is presumably considerable.

The parties have completed discovery. During the nearly two years that have elapsed since the May 3, 2013 decision and order rendered by Justice Agate, the cooperative has conducted two more annual elections for the Board, the first in May, 2013 and the second in May, 2014. Petitioner Hughes chose not to run in these two annual elections. The cooperative intends to hold a third annual election for the Board in May, 2015.

This petition has been mooted by the annual elections conducted in May, 2013 and May, 2014. Business Corporation Law § 619, "Powers of supreme court respecting elections," provides in relevant part: "Upon the petition of any shareholder aggrieved by an election, ... the supreme court ... shall forthwith hear the proofs and allegations of the parties, and confirm the election, *order a new election*, or take such other action as justice may require." (Emphasis added.) (*see Ronnen v Ajax Elec. Motor Corp.*, 88 NY2d 582 [1996]; *Matter of Gearing v Kelly*, 11 NY2d 201 [1962].) Since the commencement of this special proceeding in or about September, 2012, there have been two annual elections to the Board and a third one is imminent. The respondents correctly contend that there is no longer any need to order a new election, if there ever was a need in the first place.

The petitioner makes four weak arguments against mootness. First, he argues that "since the individual respondents were never elected and qualified as directors of Newport, they do not have the authority to execute the powers of directors or officers, including the power to call an election ..." (Memorandum of Law dated November 25, 2014, p. 9.) However, the respondents, at minimum, comprised the de facto board obligated to conduct the affairs of the cooperative, and the petitioner made no showing that the board's mere scheduling of the election influenced the vote of the shareholders. Moreover, the petitioner did not bring any proceeding to challenge the validity of the elections held in 2013 and 2014. Second, the petitioner argues that a determination of this court is needed to resolve the issue of which of the two competing boards that allegedly

existed in 2012 had the authority to issue resolutions. However, the petitioner did not show that any specific problem with competing resolutions exists, and this appears to be merely a feigned difficulty. Third, the petitioner argues that the respondents unfairly gained the advantages of incumbency in the elections held in 2013 and 2014. This argument rests on speculation concerning the advantages of incumbency in this case, and, moreover, the petitioner did not bring a special proceeding to challenge the results of the elections held in 2013 and 2014. Fourth, the petitioner argues that the respondents engaged in delaying tactics, which if the court countenances, then "the flood gates would be opened wide to all future respondents to delay such proceedings and hold new 'elections' during that delay." (Memorandum of Law dated November 25, 2014, pp 11-12.) However, the court finds that the petitioner himself caused much of the delay in this case by prolonging discovery.

The petitioner would not prevail in this case even if the matter has not been mooted. "Section 619 of the Business Corporation Law endows the Court with broad equitable powers to direct a new election of directors where the election under review is 'so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require the court to order a new, clear and adequate expression of the security holders' will.'" (*Carter v Muscat* 21 AD2d 543, 546 [1st Dept 1964] quoting *Wyatt v Armstrong*, 186 Misc 216, 220 [Sup Ct, New York County 1945; *see Matter of Vallone v First Women's Bank*, 92 AD2d 799, 800 [1st Dept 1983].)

In the case at bar, although no documents have been discovered showing that the 2012 election results were formally certified and showing that the respondents were formally declared qualified new directors, such alleged irregularities do not so taint the election results that the 2012 election must be set aside. The ousted board sent the proper notices to all shareholders and conducted the annual meeting and election. A quorum was reached, ballots were counted, and proxies were counted. The election inspectors (Edward Eng and Keith Chow) had been appointed, swore their oath, and observed the election, and the attorney for the ousted Board announced the election results. The petitioner produced no affidavit from the inspectors, the attorney, or anyone else sufficient to establish that the election was tainted by unfairness. The petitioner also failed to demonstrate the existence of any by-law supporting his claim that all directors must be residents of the building. The petitioner has at most, if anything at all, shown minor irregularities in the conduct of the election. "[A]n election result should not be overturned based upon irregularities where

the same result would have occurred despite the irregularities." (*Webster v Kings Village Corp.*, 2015 WL 298634; *see Matter of Schmidt [Magnetic Head Corp.]*, 97 AD2d 244, 250 [2d Dept 1983]; *Matter of R. Hoe & Co.*, 14 Misc 2d 500, 505 [Sup Ct, Bronx County 1954], affd 285 App Div 927 [1st Dept 1955], affd 309 NY 917 [1955].)

Accordingly, the petition is denied.

The court notes that the notice of motion is not addressed to the counterclaim.

Dated: May 7, 2015

CARMEN R. VELASQUEZ, J.S.C.