

Masud v Biswas

2016 NY Slip Op 30527(U)

March 21, 2016

Supreme Court, Queens County

Docket Number: 16291/14

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART_2_

MOLLAH MA MASUD and ELIER RAHMAN,

Index Number: 16291/14

Plaintiff,

Motion Date: 12/1/15

-against-

Motion Seq. No. 3

RAMA KANTA BISWAS, BM ZAKIR HOSSAIN,
MATIER RAHMAN FULU, Z.H. ARZU,
WASIER RAHMAN as Chief Election
Commissioner, and GOPALGONJ DISTRICT
ASSOCIATION AMERICA, INC.

Defendants.

The following papers read on this motion by plaintiffs for an order vacating their default in failing to oppose the defendants' prior cross motion to dismiss the complaint, and permitting them to file papers in opposition to said cross motion, and granting leave to reargue the prior motion and cross motion which resulted in the order of September 2, 2015, dismissing the complaint.

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Upon the foregoing papers this motions is decided as follows:

On November 7, 2014, Plaintiffs Mollah Ma Masud and Elier Rahman commenced this action for declaratory judgment and seek a declaration to the effect that on September 15, 2014, Mollah Ma Masud was elected President and Elier Rahman was elected General Secretary of the Gopalgonj District Association of America, Inc. (Association), for the period of 2014-2016, and that defendants Matier Rahman Fulu is not the President or President

Elect and Rama Kanta Biswas is not the General Secretary or General Secretary Elect of said Association. Plaintiffs also seek to recover attorney's fees.

Plaintiffs, pursuant to an order to show cause dated November 7, 2014, sought to enjoin the November 9, 2014, inauguration and oath of office ceremony of defendants Matier Rahman Fulu and Rama Kanta Biswas, as President and General Secretary, respectively, of the Association. Said motion had an original return date of November 25, 2014, and was adjourned to January 20, 2015.

Defendants Rama Kanta Biswas, BM Zakir Hussain, Matier Rahman (Fulu), Z.H. Arzu, and the Association, in a pre-answer cross motion, moved to dismiss the complaint on the grounds of lack of personal jurisdiction, failure to state a cause of action, and lack of capacity, standing or authority to maintain the within special proceeding; sought an award of sanctions; and in the alternative sought leave to serve an answer. Said cross motion was noticed for January 20, 2015, and served on the plaintiffs's then counsel Hector M. Roman, by overnight express mail on January 14, 2015.

The plaintiffs' motion and the defendants' cross motion were adjourned from January 20, 2015 to March 10, 2015, at which time they were marked fully submitted. Plaintiffs did not oppose the cross motion. Defendant Wasier Rahman did not appear, serve an answer to complaint, or otherwise move.

On March 16, 2015, Mr. Roman served a motion to be relieved as counsel for plaintiffs, which was submitted without opposition on April 7, 2015. This court in an order dated April 16, 2015 granted Mr. Roman's motion, and stayed all proceedings for a period of 30 days from the date of service of said order together with notice of entry upon all parties by regular mail and upon the plaintiffs by both regular mail and certified mail, return receipt requested. Mr. Roman, the outgoing attorney was directed to file proof of service of said order and the CPLR 321(c) notice, within 10 days after service had been effectuated.

This court, in an order dated April 21, 2015, held the plaintiffs' motion and the defendants' cross motion in abeyance pending the expiration of the stay imposed in the order of April 16, 2015 relieving plaintiffs' counsel. Said order was filed with the court on April 23, 2015.

It is undisputed that Mr. Roman failed to serve the April 16, 2015 order, and there is not evidence that he otherwise notified his former clients that he had been relieved as counsel. The court's records reveal that the order of April 16, 2015 was filed with the court on May 18, 2015 and again on May 21, 2015, and on July 6, 2015, counsel for the cross moving defendants served a copy of said order on Mr. Roman, Waisur Rahman, and the

plaintiffs by ordinary mail, and also served the plaintiffs by certified mail, return receipt requested. Copies of the return receipts (postal green cards), however, were not filed with the court.

This court, in an order dated September 2, 2015, determined that the stay imposed by the court in its order of April 16, 2015, had expired by its terms; directed the clerk to remove the stay; determined the motion and cross motion on the merits. Defendants' BM Zakir Hossain, and Matier Rahman Fuli's request to dismiss the complaint on the grounds of lack of personal jurisdiction was denied. This court granted that branch of the cross motion which sought to dismiss the complaint as the defendants had "established that Waisur Rahman did not have the authority to conduct elections and to declare any person as having been elected" and plaintiffs did not submit any opposition to rebut the defendants' evidence. The remainder of the cross motion was denied, and plaintiffs' motion for a preliminary injunction was denied.

Plaintiffs now move to vacate their default in opposing the defendants' cross motion to dismiss their complaint, and seek leave to serve and file papers in opposition to said cross motion and for leave to reargue their prior motion and the cross motion.¹

A party can move to vacate a default if it is excusable and there is a meritorious claim or defense (*see* CPLR 5015(a)(1); *Gray v B.R. Trucking Co.*, 59 NY2d 649 [1983]). The court may consider law office failure as an excuse (*see* CPLR 2005). Here, plaintiffs' prior counsel, Hector M. Roman, failed to oppose the defendants' cross motion at a time when he still represented the plaintiffs, and moved to be relieved within days of the submission of the prior motion and cross motion. In view of the fact that plaintiffs did not intend to abandon their action and had a good faith belief that Mr. Roman would oppose the cross motion, his failure to do so is akin to law office failure. Plaintiffs' default in opposing the defendants' prior cross motion to dismiss the action, therefore, is excusable.

Plaintiffs have also demonstrated that they have a meritorious claim and that they have the standing to maintain this action or special proceeding. Defendant Wasiur Rahman, sued herein as Wasier Rahman, has submitted an affidavit dated March 10, 2015, stating that the Association properly appointed the Election Commission, and that the Commissioners compiled the list of eligible voters by September 8, 2014, at which time the final list was published; that after the list of voters had been finalized, nomination for candidates were complied, and lists of voters and candidates had been published, Kari Irbil Ahmed resigned from the Commission on September 9, 2014; that the final list of candidates was published

¹Although defendants request reargument, in fact they seek to have the court rehear the prior motion and cross motion.

on September 10, 2014, and there was only one candidate for each office; that the defendants Matier Rahman and Rama Kanta Biswas did not submit nomination papers and were not candidates for any office at the September 15, 2014 election and did not participate in any oath taking ceremony; that only that the plaintiffs and the candidates for other offices were elected on September 15, 2014, and were administered their respective oath of office on November 2, 2014.

Plaintiffs further assert that the Chief Election Commissioner was duly appointed by the Executive Committee of the Association and that all three members of the Election Commission were properly selected in accordance with the Association's bylaws; that a new member could not be appointed to the Election Commission upon the resignation of Kari Irbil Ahmed due to a lack of time; that the Election Commission compiled the voters list and received and reviewed the nomination papers of candidates for election; that the election was held on September 15, 2014, at which time plaintiff Mollah Ma Masud was elected President and plaintiff Elair Rahman was elected General Secretary, and that they and all other elected officers were administered their respective oath of office on November 2, 2014. It is asserted that defendant Wasier Rahman, the Chief Election Commissioner, properly carried out his duties and that the defendants failed to submit any evidence in support of their claim of misconduct on his part.

Plaintiffs also assert that defendants Matier Rahman and Rama Kanta Biswas were not candidates for election and that they were not elected to any office of the Association; that an announcement was published in a Bengali language newspaper stating that on November 9, 2014, Matier Rahman would be sworn in as the President and that Rama Kanta Biswas would be sworn in as General Secretary of the Association, and that these defendants plan to set up an entity using the same name as the Association in order to deceive the public and benefit personally.

In view of the foregoing, that branch of plaintiffs' motion which seeks to vacate their default in responding to the defendants' cross motion is granted, and the plaintiffs' opposition papers are deemed served. This court's order of September 2, 2015 is hereby vacated and the plaintiffs' motion for a preliminary injunction and defendants' pre-answer cross motion to dismiss the complaint are determined as follows:

Although plaintiffs' former counsel failed to serve his clients with a copy of the April 16, 2015 order as directed by the court, it is undisputed that the plaintiffs are now aware of said order and have retained new counsel. The stay set forth in the order of April 16, 2015 therefore, is hereby lifted.

At the outset, the court notes that the within action for declaratory judgment, pursuant

to Not-For-Profit Corporation Law §618, should have been brought as a special proceeding. This defect, however, is not fatal and the within action is hereby converted to a special proceeding, the complaint shall be referred to as the petition, and the parties shall be referred to as petitioners and respondents (*see* CPLR 2001).

That branch of the cross motion which seeks to dismiss the petition against respondents BM Zakir Hussain and Z.H. Arzu on the grounds of lack of personal jurisdiction is denied. “A process server’s affidavit of service constitutes prima facie evidence of proper service” (*E*Trade Bank v Vasquez*, 126 ADd3d 933,934 [2015]). These respondents’ bare and unsubstantiated denial of service is insufficient to rebut the presumption of proper service (*see U.S. Bank N.A. v Tate*, 102 AD3d 859 [2013]; *Bank of N.Y. v Espejo*, 92 AD3d 707.708 [2012]).

That branch of the cross motion which seeks to dismiss the complaint on the grounds of failure to state a cause of action, is granted as solely as to respondents BM Zakir Hussain and Z.H. Arzu. Although these individuals are named as respondents, the complaint does not contain any substantive allegations against them and does not seek any relief against them. This court, however, finds that the Association is a proper party to this action and the petition states a claim against respondents Rama Kanta Biswas and Matier Rahman Fulu.

It is settled law that a CPLR 3211 dismissal may be granted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Held v Kaufman*, 91 NY2d 425, 430-431[1998], *quoting Leon v Martinez*, 84 NY2d 83, 88 [1994]). With respect to respondents Rama Kanta Biswas and Matier Rahman Fulu, it is noted that these individuals have not refuted the petitioners’ claim that they were not elected to any office of the Association. The documentary evidence submitted by the respondents in support of their claim that the Chief Election Commissioner was released from his responsibilities on September 7, 2014, is inadmissible and insufficient to establish that the plaintiffs lack standing to commence and maintain this special proceeding. Said document is an English translation of a document written in a foreign language, and is not accompanied by an affidavit of translation, as required by CPLR 2101(b). Furthermore, said document does not identify by name the Chief Election Commissioner and there is no evidence that it was delivered or transmitted to anyone. Therefore, that branch of the cross motion which seeks to dismiss the within proceeding against Rama Kanta Biswas and Matier Rahman Fulu and the Association, is denied.

Turning now to petitioners’ motion, in order to obtain a preliminary injunction, the movant must clearly demonstrate (1) a likelihood of success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant’s favor (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005];

Aetna Ins. Co. v Capasso, 75 NY2d 860[1990]; *Doe v Axelrod*, 73 NY2d 748[1988] ; *Ruiz v Meloney*, 26 AD3d 485 [2d Dept 2006]; *Stockley v Gorelik*, 24 AD3d 535 [2d Dept 2005]; *Matos v City of New York*, 21 AD3d 936 [2d Dept 2005]).

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual (*Ruiz v Meloney*, 26 AD3d 485, *supra*; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, [2d Dept 2006]; *Weinreb Management, LLC v KBD Management, Inc.*, 22 AD3d 571[2d Dept 2005]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*Doe v Axelrod, supra*, at 750; *Ruiz v Meloney, supra*; *Weinreb Management, LLC v KBD Management, supra*). “[A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment” (*SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727, 728 [2d Dept 2005]; *see Board of Mgrs. of Wharfside Condominium v Nehrlich*, 73 AD3d 822, 824[2d Dept 2010]; *Matter of Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2d Dept 2009]; *Village of Westhampton Beach v Cayea*, 38 AD3d 760, 762 [2d Dept 2007]; *St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347 [2003]).

Here, petitioners seek to enjoin the defendants, and any of its representatives or agents from performing an inauguration and oath ceremony swearing in Matier Rahman Fulu as President and Rama Kanta Biswas as General Secretary of the Association scheduled to take place on November 9, 2014. Petitioners’ request is based upon their assertion that an advertisement to that effect appeared in a Bengali language newspaper. The documentary evidence submitted herein, however, is not supported by a proper affidavit of translation of the alleged notice of the inauguration and oath ceremony complained of (*see CPLR 2101[b]*). Moreover, as the event sought to be enjoined has long since passed, plaintiffs’ motion for a status quo injunction, is denied.

The within proceeding is hereby restored and respondents are directed to serve an answer within 20 days of the service of this order together with notice of entry.

Dated: March 21, 2016

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J.S.C.